

tioner) during the not payment of the said principal sum; yet one of the cautioners being distrest, and the other cautioners being obliged to relieve him *pro rata* of all cost, skaith, and damage, they are liable to the cautioner who was distrest, for payment of annualrent since his distrest and payment; and also found, that the cautioner being assignee, may seek payment of the hail sum, except his own proportion; just as the principal creditor might do, though the cautioners be obliged to relieve others *pro rata* only. See *SOLIDUM et PRO RATA*.

Gilmour, No 124. p. 91.

No 48.

1668. July 7.

PATON against PATON.

JAMES PATON, fiar of Ballilisk, being engaged for his father John in several bonds as cautioner, besides the obligations of relief contained in the bonds, did receive a bond apart, wherein his father was obliged to satisfy the several debts before the terms of payment contained in the saids bonds, and to relieve his son; whereupon being charged, the father did suspend, upon this reason, that there was no distrest produced, without which he could not be charged for relief; notwithstanding whereof the letters were found orderly proceeded, in respect of the conception of the bond to pay at a certain term.

Fol. Dic. v. 1. p. 127. Gasford, MS. No 23. p. 9.

No 49.

A bond of relief was found to be the ground of a charge, tho' no distrest was produced, it bearing an obligation to pay at a certain term.

1676. December 13.

MR JOHN INGLIS of Nether Crammond, DOCTOR HENDERSON, and OTHERS,
against The Creditors of EASTBARNES, and DAVID OSWALD.

In a double poinding raised by the tenants of Eastbarnes against the foresaid parties, that it might be found who had best right, it was *alleged* for Mr John Inglis, that he ought to be preferred, because he stood infest by Mr Patrick Inglis in the lands of Eastbarnes, before any comprising led against him at the instance of any creditor who was now in competition. It was *answered* and *alleged* for the creditors-comprizers, that any prior infestment granted to the said Mr John was only base and never confirmed, whereas the comprizers were infest and confirmed by the said Mr John himself as Bailie for the superior; likeas the said Mr John's infestment was only for relief in case of distrest for cautionry, before the comprizer's public infestment, he can never crave preference. It was further *alleged* for the comprizers, that they ought to be preferred before all the comprizers who had comprized the saids lands from Mr Patrick Inglis, as being infest by his father Mr Cornelius; because Mr Patrick's right and disposition of the lands were affected with their debts, in so far as by his disposition he became obliged to pay all his father's debts, conform to a list, wherein their names were particularly set down, and therefore the creditors of

No 50.

An infestment in relief, in the event of distrest for cautionary obligations, was received as a competent right in competition with other real rights.

No 50.

the son could not comprize, but *cum onere* of all debts due by the father, none of their names being insert in the list. It was *answered* for David Oswald, and the rest of the comprizers, that Mr Patrick Inglis having the full right of the lands settled in his person, and undertaking his father's debts, conform to a list, for which he was only personally liable, there being no inhibition served against him, it was lawful for any person to acquire a right from him to the lands, or to his own creditors to acquire a right from him by comprizing; and they having led comprizings within year and day of the comprizings led by the father's creditors, they ought to come in *pari passu*.—THE LORDS, as to the first debate, preferred Mr John Inglis of Nether Crammond, upon that ground, that not only he had a real right to the estate, but likewise that it was clad with possession, in so far as he instructed that Mr Cornelius had made payment of the rents to the creditors, and had obtained discharges to the said Mr John as having paid the same, before any comprizing led against him, and so albeit his infestment was base, it was clad with possession before any of their rights. As to the *second* point, anent the preference betwixt the comprizers against the father and against the son, they did consider the right and disposition made to the son, and finding that neither in the dispositive part, procuratory of resignation, nor precept of sasine, it was really affected with these debts; so that in the narrative it did only bear, that he had become personally liable to pay these creditors whereupon no inhibition was served, they found that all the comprizings being within year and day, they ought to come in *pari passu*, without any regard who was within the list or out of the list. See COMPETITION.

Gosford, MS. No 917. 918. p. 594.

No 51.

1678. *January 31.* MATHIESON *against* FISHER.

No cautioner can legally claim expenses given out by him after a decree is recovered against him, because they were needless and wilful, so that being once decerned, he ought to have paid the debt.

Fol. Dic. v. 1. p. 127. Fountainball, MS.

* * See This case *voce* EXPENSES.

No 52.

A cautioner, although he had not paid, was preferred, as executor-creditor, to the relict, he producing a

1681. *February 4.*

M'KENZIE of Suddy *against* The COUNTESS of SEAFORTH.

A CAUTIONER being distressed, and confirming as executor creditor to the principal debtor, and the relict as a posterior executrix creditrix competing, and *alleging* he had no right till he paid, and he *answering* that he was willing with