

No. 34. have deducted the half of his proportion. 4 .Mountquhany cannot found his preference for the accumulations upon Douglas's adjudication in implement ; for that adjudication doth not accumulate, being only led for implement of, and to complete the disposition ; and as a distressed co-cautioner he can only accumulate the sum truly paid, upon which he must depone.

The Lords restricted Mountquhany's adjudication to the half, and cut off his accumulations ; and ordained him to assign Lillie, upon payment of the said half, to a proportionable relief out of Bonhard the principal debtor's estate.

Fol. Dic. v. 2. p. 380. Forbes, p. 37.

1763. *January 11.*

JAMES HAY, Tenant in Garbet, *against* The Honourable CHARLES ELPHINSTON, and JOHN GRAY of Condorrat.

No. 35.

The passing at the bar, at the moving of a reclaiming petition, from one of three defenders, who were made liable conjunctly and severally by a former interlocutor, found not to relieve the other two of any part of the sum decreed.

JAMES HAY brought an action against the said Charles Elphinston and John Gray, and also against James Hamilton of Hutchison, concluding for damages and expenses, on account of their having wrongfully adjudged him to serve as a soldier during the subsistence of the press acts in the year 1757 and 1758.

The Court, by interlocutor of the 6th of August, 1762, found the whole defenders conjunctly and severally liable in £. 200 of damage and expenses.

The defenders having reclaimed by a joint petition, which came to be moved upon the last day of the session, it was refused as to Mr. Elphinston and Mr. Gray ; but, as some of the Judges seemed to be of opinion, that Mr. Hamilton was not equally guilty, the pursuer, in order to be free of any further litigation, agreed at the bar to pass from that gentleman ; upon which he was assoilzied.

The pursuer having extracted the decret, and charged Mr. Elphinston and Mr. Gray with horning, a bill of suspension was offered in their name ; in which, besides repeating the arguments pleaded for them in the original cause, they further insisted, That, in respect of the pursuer's passing from the other defender Mr. Hamilton, they could only be liable in two thirds of the sum charged for.

This bill of suspension having come to be advised in the vacation by three Ordinaries, they refused it as to two thirds of the sums charged for ; but made avisandum to the Lords as to the other third, and ordered both parties to give in memorials.

Pleaded by the complainers : As, by the interlocutor of the 6th of August, all the three defenders were condemned, conjunctly and severally, to pay both the damages and expenses, and as Mr. Hamilton was thereafter assoilzied upon the charger's consent, it must have the same effect as if the charger had granted him a discharge ; in which case he could not have exacted more than two thirds of the sum decerned for from the other defenders.

Answered for the charger : He had it in his power to insist either against any one, or against all of the defenders ; and as the complainers were found liable

singuli in solidum, they are in no worse situation than if Mr. Hamilton had never been made a party; besides, he had it also in his choice, after obtaining decret, to force payment of the whole from any one; and, as at the time of his passing from Mr. Hamilton, he had not got payment of a sixpence of what was found due to him, it is ridiculous to consider his passing from that gentleman, in order to avoid further litigation, as importing a discharge of any part of the sum; especially, as the defenders, in their joint reclaiming petition, endeavoured to shew, that Mr. Hamilton was less guilty than any of the other two.

“The Lords refused the bill of suspension, reserving to the defenders action of relief against James Hamilton of Hutchison, together with the defences against the same, as accords.”

Act. *Montgomery, Walter Stewart, and Wright.*
Reporter, *Barjarg.*

Alt. *Lockhart and Burnet.*
Clerk, *Home.*

A. W.

Fol. Dic. v. 4. p. 296. Fac. Coll. No. 220. p. 241.

No. 35.

SECT. VIII.

Relief Competent to a Cautioner against the Principal Debtors.

1622. November 13.

MUCHAL against FORBES.

No. 36.

RELIEF of cautionry by two principals found to be *in solidum*, albeit they were not obliged conjunctly and severally, but only in these terms, “obliges us and our foresaids.”

Fol. Dic. v. 2. p. 380. Kerse MS. fol. 52.

* * Durie reports this case :

Two Forbeses, viz. the father and the son, as principals, and with them the Laird of Muchal and some others as cautioners for them, being all obliged, conjunctly and severally, in sums of money to a creditor; and the same two principals, by the same obligation, being bound for relief of the cautioners, by the which clause of relief, the said two principals were not obliged conjunctly and severally, as the cautioners were all obliged to the creditor, but only after this manner; viz. the said ——— Forbes, and ——— Forbes, his son, obliged them to relieve their said cautioners; the Lords found, that this clause resolved not in a conjunct obligation, by the which every one of the said two principals should be allenarly