

No 46.

was lawful for her to do ; neither could the exception be sustained upon that disposition made to him for his relief, to give him power at his own hand, without authority of any Judge or Magistrate, to meddle with the same goods, specially seeing the same was made for his relief, and before his distress, he could never have intromitted ; likeas he was never distress, nor yet is distress therefor, nor able to show any distress, and of law *qui rem, quamvis suam, non jure occupat, punitur ut invasor, et cadit a jure, quod in re habet* ; and the pursuer having sundry gentlemens' sons in boarding, by this malicious meddling with her whole gear, and plenishing of her house, and leaving nothing therein for her use, they had deserted her, she having nothing left but the bare walls, which has redacted her to great misery ; which reply was rejected, and the exception sustained, albeit there was no distress alleged.

*Durie, p. 686. & 695.*

1636. *March 2.*LIBRACK *against* VAUS.

No 47.

A cautioner, distressed, granted a bond of corroboration, in which he found new caution for himself. The original debtor found bound to relieve this second cautioner.

DAVID VAUS, brother to the Laird of Blaws, as principal, and the Laird of Barnbarroch as cautioner for him, were obliged in a certain sum to David Aitkenhead, Provost of Edinburgh. The cautioner being put at by the creditor, gives a bond of corroboration to him, wherein Barnbarroch as principal, and his brother Lybrack was bound as cautioner for the same sum. Lybrack, after this, was forced to pay it ; whereupon he convened David Vaus (who was principal in the first bond) to relieve him of the said sum that he had paid for Barnbarroch, who was only obliged as cautioner for the said David Vaus, in respect that the said David was principal debtor, and so of all equity should relieve the pursuer. *Alleged*, The pursuer could have no action against the defender, because he had never employed him to be cautioner for him, but he should seek his relief off his brother Barnbarroch.—THE LORDS sustained the action as being very competent against the defender ; because, by his occasion, the pursuer had been distressed with payment foresaid. But declared that what this defender could allege against Barnbarroch, if he were seeking his relief off him, was receivable here against this pursuer Lybrack, in favours of this defender David Vaus.

*Spottiswood, p. 34.*

1665. *February 7.*KINCAID *against* LECKIE.

No 48.

Found in conformity with No 43. p. 2115.

IN an action pursued at the instance of ——— Kincaid against the Lairds of Leckie and Boquchan, it was found, that where, in a bond bearing annualrent, the principal debtor was only obliged to pay the annualrent (and not the cau-

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.