Answered for the suspender: Seeing the fact to be performed is the retiring of the bond, which in other words is nothing else but paying the debt, it can make no alteration, because it is not *factum individuum*, consisting only *in faciendo*: And undoubtedly in all reliefs whatever, the retiring of the obligment, for which the relief is granted, is ever implied: So that in truth the obligation here is to pay, and the performance could only be made by payment; and the clause obliging to retire the bond, is a clause of style, and makes no manner of alteration. No. 11.

Replied, That this is not barely a clause of style, but has its effects; and it appears certain from it, though William Erskine and Mr. Strachan had actually paid the money to Dr. Eizat, they still failed in performance of this obligement to Mr. Grant, till they delivered him the retired bond itself, or a discharge; and there was good reason for the clause, because till one or other of these was performed, Mr. Grant lay still open to a pursuit.

"The Lords found the suspender liable to relieve the charger *in solidum*."

Fol. Dic. v. 2. *p.* 378. *Rem. Dec. v.* 1. *No.* 26. *p.* 57.

SECT. IV.

If an Obligant bound conjunctly only, should become insolvent.

1668. *February* 22. CAPTAIN STRACHAN *against* MORISON.

No. 12.
Three persons wrongously intermeddled with a ship. One of them found liable *in solidum*, the others being insolvent.

CAPTAIN STRACHAN pursues the heirs of umquhile George Morison, before the Admiral, for a ship and goods meddled with wrongously, by George and others, *in anno* 1638. They raise reduction, on this reason, that there was no probation, but one witness, and Captain Strachan's oath taken in supplement.

The Lords, having considered the probation, in relation to the ship, found it sufficiently proved, that Captain Strachan was an owner of an eight part of the ship; but found, that the value thereof was not proved; and seeing Morison and the other partners sold the ship, after they had long made use of her, without Strachan's consent, they found, that Strachan's oath *in litem* ought to be taken as to the value, and would not put him to prove the same, after so long time; and, for the profits thereof, ordained him annual-rent since he was dispossessed. This question arose to the Lords, whether, there being three partners beside Captain Strachan, who all meddled, whether Morison should be liable *in solidum*, or only for his third part? in which the Lords found the ship being *corpus indivisible*, and all the partners in a society, and that Captain Strachan being absent, in the King's

No. 12. service, from the time of their meddling, to the King's return, and the other parties in the mean time becoming insolvent,

The Lords found George Morison liable *in solidum* for the eighth part of the ship; but as to the wines and others that were in the ship, whereanent there was no copartnership proved, and but one witness of George Morison's intromission, and Captain Strachan's own oath in supplement, the Lords found the same not sufficient; and yet allowed Captain Strachan, in fortification of the decreet, to adduce further probation.

Fol. Dic. v. 2. p. 378. Stair, v. 1. p. 531.

1710. *December* 16. MUSHET *against* HARVEY.

No. 13.
Two persons bought a wood, without adjecting in the contract conjunctly and severally. One having become insolvent, the other was found liable *in solidum* for the price.

In 1703 Mushet of Calliquhat sells his wood to Stewart of Craigton, and Harvey of Blackhouse, for £.1060 Scots. Stewart being dead and broke, Mushet pursues Harvey for the price. He contends, That, by the conception of the contract betwixt them, he was only liable to the one half, because they were only simply bound, without adjection of the clause, "conjunctly and severally," which must be interpreted to have been *de industria* omitted, and that they would not condescend thereto; *et verba sunt contra proferentem sumenda, qui potuit apertius dicere;* and if a bond run in that stile, wanting these words, the obligants will not be liable *in solidum*, but only *pro rata*, and even so in a contract of victual. Answered, It is so in ordinary cases; but here is a plain copartnery and society, which, by the nature of the contract, binds each of them *in solidum*, that he may not be put to seek in his price by parcels; neither would he have trusted Stewart without him; and as he makes one party-contracter in the writ, so they two make the other *pro indiviso*; and in selling of woods, they are always understood liable *in solidum*. Replied, There be many sorts of communion in law which do not amount to a society, such as heirs-portioners *pro indiviso*, yet each is only liable for their own part; where a house, or other *corpus*, is legated to two several persons, there is a *communio*, but no copartnery; and even take the case in hand. Two buy the same thing. L. 31. D. *Pro socio*, lays it down for a rule, *non sufficere rem esse communem nisi et societas intercedat;* and was so found by the Lords in 1707 betwixt Graham, Pyper, and Chiesly (not reported.) And Stair, Lib. 1. Tit. 16. tells, there may be a communion by accident without society; as among legatars, heirs, and acquirers of the same thing *pro indiviso sine affectione societatis*. The Lords found, by the nature of this contract, Harvey was bound *in solidum* for the whole price. Then Mushet insisted to have his damage liquidated for the wrong cutting of his birks even over, whereby a hole being left in the middle of the trunk, the water stood there, and sinking into the root, made them to rot and decay, that it never springs out again; but, in regard the witnesses had neither been special in the number nor value of the skaith, they could put no estimate thereon without a farther probation.

Fol. Dic. v. 2. p. 378. Fountainhall, v. 2. p. 609.