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which, by the original agreement, was to be paid immediately, was in the fame predicament. But with regard to that for L. 9000, it was

Pleaded: By the minute of fale, Sir James Campbell became bound to convey the lands, upon receiving L. 3000, an heritable bond for L. 15,000, and a perfonal bond for the remainder; and although the minute contained no procuratory, nor precept, by which the purchafer could be inftated in the feudal right, yet Sir James Campbell could have been compelled by action at law, or by adjudication, to implement the precife terms of his agreement. The after tranfaction, therefore, by which the whole price is made a burden on the lands, as alfo the heritable bond for L. 9000, being a deed entirely voluntary on the part of the debtor, muft be affected by the inhibition.

Answered: Even after the minute of fale, Sir James Campbell continued in the property of the lands. The infolvency of the purchafer, and his cautioners, entitled him to reprobate their perfonal fecurity; nor could he have been obliged, either by the purchafer or his creditors, to diveft himfelf before receipt of the price. The condition, therefore, under which this fale was carried into execution, created a real burden on the eftate, from which the creditors of the purchafer affecting it, for their payment, cannot fhake themfelves loofe.

As to the *first* point, 'THE LORDS, in refpect Mr Garbet was only a cautioner, found, That Mansfield, Ramfay, and Company were not obliged to affign the fecurity granted by him, upon the ftock of the Carron Company, in farther fecurity of L. 9000, contained in the bond granted by Charles Gafcoigne.'

As to the *second*—THE LORDS 'found, That the inhibition at the inftance of Ludovick Grant did not affect either of the bonds in queftion, fo as to make them reducible at his inftance.' *See* INHIBITION.

Lord Ordinary, *Elliock.* Act. *Ilay Campbell.* Alt. *Maclaurin.*
Craigie. *Fol. Dic. v.* 3. *p.* 72. *Fac. Col. No* 94. *p.* 180.

1780. *January* 14. JAMES ERSKINE *against* GEORGE MANDERSON.

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A co-debtor found entitled to receive affignation of diligence from the creditor, that he might the more fpeedily operate his relief.

MANDERSON and HAY were joint acceptors of a bill payable to Erfkine, who fued both of them for payment; and, as Hay pleaded no defence, immediately obtained decreet againft him.

Manderfon, however, being ftill fued for the whole debt, made offer of payment, on condition of receiving an affignation to the decreet againft Hay, the *correus debendi;* which being refufed, he, in a procefs of fufpenfion, brought on that ground,

Pleaded: 'A creditor cannot arbitrarily difcharge his diligence done againft one *correus debendi* to the hurt of the reft, who have a right to claim affignation;' Dalrymple's Decifions, No 167.* When a debt is difcharged by a *correus,* it is

* Page 231. Wallace againft Elibank, 25th January 1717, *voce* DEBTOR and CREDITOR.

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certainly juſt that the creditor thus ſatisfied, ſhould communicate to him a right, which he himſelf can no longer exerciſe.

In the preſent caſe, the aſſignation may be of important uſe; as without the circuit of a proceſs of conſtitution, it will entitle to immediate execution againſt Hay; by which means alone, perhaps, ſuch danger as that ariſing from his ſuddenly converting his effects into caſh, and leaving the kingdom, could be prevented. The creditor, therefore, ſhould not be permitted to withhold that conveyance, notwithſtanding the oppoſite tendency of a deciſion reported by Lord Stair in 1666,* and of a later one by Lord Fountainhall,* which indeed is leſs connected with the preſent queſtion, or of the opinion of Mr Erſkine,* founded on the authority of thoſe judgments. It is, however, to be remarked, that Lord Fountainhall has ſubjoined to the laſt-mentioned deciſion, this acknowledgement, 'that with reſpect to the *beneficium cedendarum actionum*, our practice is not yet 'arrived at a full conſiſtency.'

Answered for the creditor:—By the Roman law, the *beneficium cedendarum actionum* was indeed allowed to cautioners; but the reaſon of it was, that there were no other means by which they could operate their relief. In ours, ſuch a claim is rejected, becauſe they may obtain relief without that extraordinary remedy; though perhaps it might enable them to execute diligence more ſpeedily. Nor is it neceſſary to add, that the caſe of no co-obligant is ſo favourable as that of a cautioner, which the ſuſpender is, being joint acceptor of a bill for behoof of another. That the above is the doctrine of our law, is evident from Erſkine, p. 474.;* Stair, July 10. 1666, Hume *contra* Crawford;* and from Fountainhall, v. 1. p. 687. Dec. 12. 1695, Wood *contra* Gordon, *voce* DEBTOR and CREDITOR.

THE LORDS found, 'That the creditor was bound to grant the aſſignation demanded by the ſuſpender.'

Lord Ordinary, *Alva*. Act. *R. Sinclair*. Alt. *Buchan-Hepburn*. Clerk, *Campbell*.

Fol. Dic. v. 3. *p.* 72. *Fac. Col. No* 98. *p.* 189.

* The caſe reported by Lord Stair, above alluded to, is Hume againſt Crawford, v. 1. p. 393. 10th July 1666. *voce* DEBTOR and CREDITOR: That by Lord Fountainhall, is Wood againſt Gordon, v. 1. p. 687. 12th December 1695, *voce* DEBTOR and CREDITOR: The opinion of Mr Erſkine mentioned, is in b. 3. tit. 3. § 68.

See DEBTOR and CREDITOR.

See CAUTIONER.