

he might desist and seek the annualrent of his money.—THE LORDS did sustain the pursuit for the principal sum and annualrent in time coming, the pursuer denuding himself of the right of wadset in favour of the defender, who was only cautioner. But as to the years that he had suffered Philorth to possess, the defender was assoilzied, seeing he had never used an order of redemption, but had possessed by the pursuer's tolerance or right.

*Fol. Dic. v. 1. p. 226. Gosford, MS. p. 120.*

No 37.  
without any intimation made to the cautioner. The cautioner was found liable for annualrent in time coming, from the date of the process, but not for bygonnes.

1717. January 25.

HUGH WALLACE of Inglistoun *against* The LORD ELIBANK.

THE LORD ELIBANK being charged as cautioner for John Auchmouttie, he suspended on this reason, That Murray of Spot was also bound for the same debt, and the charger having denounced him, did afterwards consent to his relaxation; and the gift of Spot's escheat being taken upon several hornings, whereof the charger's was one, the charger did insist for payment of the debt in the horning, out of the escheat goods, and was excluded in that pursuit by the consent he had given to the rebel's relaxation; whereby my Lord Elibank was prejudged of the relief that was competent to him against Spot; for, if the charger had not consented to the relaxation, the half of the debt would have been paid by Spot's escheat goods, and the suspender has paid the other half, and therefore the letters ought to be suspended.

It was *answered*; The creditor takes cautioners one or more for his own security, and he may do diligence, or forbear it, or discharge it, when it is done, at his pleasure, which a co-cautioner cannot quarrel.

It was *replied*; If the creditor have more cautioners, and should discharge one of them, the co-cautioner would be liberated from that share, to which the co-cautioner discharged, would be liable to relieve the other cautioners; because a cautioner paying has the *beneficium cedendarum actionum*. And if the principal have done any deed to make the relief ineffectual, either by discharging a co-cautioner, or, which is the same thing, by passing from any diligence which would have operated his payment, and the other co-cautioner's relief, he is obliged to make up the damage to the co-cautioner; and in this case, Spot's escheat would effectually have operated the charger's payment.

'THE LORDS found the charger liable to make up the damage sustained by the suspender, by consenting to relax Spot the co-cautioner.'

*Nota*, That Spot was not bound in the original bond, but only in a corroboration; in which they varied from what was found in a like case, Clerkson *contra* Edgar, *voce* SOLIDUM ET PRO RATA.; and 14th February 1705, Brock

No 38.  
A cautioner cannot arbitrarily discharge his diligence done against one *co-reus debendi*, to the hurt of the rest, who have a right to claim assignation.

No 38. *contra* the Lord Bargainy, *IBID.* ; but there were decisions on the other side also condescended on ; so that there is no fixed rule in this point.

*Fol. Dic. v. I. p. 226. Dalrymple, No 167. p. 231.*

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1729. *January 21.* M'MILLAN *against* HAMILTON of Oliverstob.

No 39.

A CREDITOR having apprehended the principal debtor upon a caption, and kept him some days in the messenger's hands, and thereafter set him at liberty ; this was not found sufficient to liberate the cautioner. It was yielded that a creditor can pass from no consummate diligence or security to disappoint the cautioner's relief, but he may begin, without being obliged to finish any diligence : Thus, though he may take out a horning, he is not bound to charge or denounce, or take out a caption, or put that caption in execution ; and if there were not a discretionary power left to the creditor, it would be the occasion of most unmerciful distress ; neither is there any thing more usual than for the creditor to stop when the messenger has touched the party, and to take a bond of presentation, or such other security as he can obtain. *See APPENDIX.*

*Fol. Dic. v. I. p. 226.*

\* \* The like was decided in a case, *Grahams against Little*, 16th July 1730.

*See APPENDIX.*

No 40.

A cautioner can reap no benefit from a separate security unless conveyed to him.

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1735. *February.* GARDEN of Troup *against* DR GREGORY.

A CREDITOR of a tenant's having arrested corns belonging to his debtor in a third party's hand, a cautioner in the tack, who had been forced to pay the tack-duty to the setter's creditors, appeared in the furthcoming, and *pleaded* preference upon the right of hypothec.—*Answered*, The right of hypothec was extinct by payment of the rent, the cautioner having demanded no assignation of the same from the setter.—*Replied*, What a party is bound to do, the law holds as done. Here the tack-duty was drawn out of the cautioner's hands by the setter's creditors ; so that there was no opportunity to demand assignation from the master ; the law supplies this, and the cautioner pleads upon his legal assignation.—THE LORDS preferred the arrester, in respect the cautioner had not an actual assignation from the setter to the tack-duty and hypothec. *See APPENDIX.*

*Fol. Dic. v. I. p. 227.*