

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.*