

No 117. *majorem securitatem*, and to have sought the same by personal pursuit from his principal, and so it pertained to him, as he pleased ; and was found competent to his executors, seeing the relief by the infeftment is due to the heir ; for if the heir sought it off the land, wherein the defunct was infeft, he could not be prejudged thereof, and so there is a great scruple here.

Clerk, *Gibson*.

Durie, p. 459.

1630. *March 18.*

HART *against* HART.

No 118.

Found in conformity with
Cant against
Edgar, No
116. P. 5565.

UMQUHILE Mr John Hart, as cautioner for Patrick Hart his son, who was principal, being obliged in 1000 merks, for which he being distrest by the creditor, he borrows the sum from Eupham Wilson, and pays the debt, and gives redeemable infeftment of his lands to her for her security. Thereafter the said Mr John, who paid the debt as cautioner, in his testament makes his son Patrick, who was principal debtor foresaid, his executor, who is confirmed executor to him. Thereafter the heir of umquhile Mr John, whose lands were engaged for the debt, as said is, pursues Patrick, the principal, to relieve him and his lands of the foresaid distress ; in which process, the defender clothing himself with the said executry, the LORDS found, that the heir of the cautioner had no action for relief against the principal ; for albeit his father, the cautioner, to whom he was heir, had paid the debt, and that the payment was made by that money for which he gave heritable infeftment out of his lands, yet thereby the heir had not the right of that relief competent to him, albeit his lands were burdened therewith ; but they found, that the right of that relief pertained to the executors of the cautioner, and who had the only interest to seek the same ; and consequently they found, that the said principal being nominated executor, and confirmed to the defunct, who, as cautioner, paid the debt, the said relief was confounded, he having right to seek the relief, as being executor, and being the same person who should make the relief, being the principal, and so obliged to relieve his cautioner, and so he was both creditor and debtor ; but as to this relief, albeit the heir was excluded from the right thereof, yet the creditors of the defunct will have right thereto against the said executor, or may be sought by the executor-dative *ad omissa*, if it be not confirmed in the principal testament.

Act. ———.

Alt. *Stuart*.

Clerk, *Hay*.

Fol. Dic. v. 1. p. 373. Durie, p. 509.