

S E C T. III.

A Creditor receiving payment from a Cautioner, must assign every separate security for the debt. By passing from his separate security he liberates the Cautioner.

No 35.

1628. *July 4.* HAMILTON *against* BISHOP of GALLOWAY'S RELICT.

A CAUTIONER in a contract of marriage, being pursued by the relict, her claim was found compensated and extinguished by the sums and goods she had confirmed in her husband's testament; and that although diverse of them were evicted from her by sentences at the instance of his creditors; in regard she was entitled to have pleaded a preference to the creditors upon her contract of marriage, and neglected to do it.

Fol. Dic. v. 1. p. 226. Durie.

* * See This case, No 19. p. 2087.

No 36.

1665. *January 10.* LESLIE *against* GRAY.

A creditor getting payment from a cautioner, was not only obliged to assign him for his relief against the principal, but likewise was decerned to convey to him a separate security which he had obtained *ex post facto* for the same debt.

Fol. Dic. v. 1. p. 227. Stair.

* * See This case, No 37. p. 2111.

No 37.

1677. *June 24.* MR WILLIAM ROBERTSON *against* CAMPBELL of Kilpount.

There was a clause in a wadset, that if the wadsetter should take possession, both principal and cautioner should be free of annualrent during his possession. The wadsetter, after being several years in possession, voluntarily quitted it,

MR Archibald Campbell being pursued at Robertson's instance, as cautioner in a contract of wadset for the Master of Gray for 50,000 merks, in case of requisition; in which wadset there was a clause, That if he should continue in possession of the lands, that the principal and cautioner should be free of annualrent;—the said Mr William having desisted to possess, and suffered the Laird of Philorth to enter to the possession, who had required a right of reversion, did pursue for the principal sum due by the requisition, and for five years annualrent that he had been out of possession.—It was *alleged*, That the pursuer having continued in possession after the requisition, and thereafter desisted without any decret gotten against him at Philorth's instance, he could not pursue for payment.—It was *replied*, That by the foresaid clause of wadset, it was in the pursuer's option to possess or not possess as he pleased, so that

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.