

being none given by either of the cautioners to others; nor was obliged to relieve the other cautioners by an express clause, which is ever insert, when mutual relief is intended; and that this is clear law, it appears from the title of the civil law *de Fidejussoribus ff. lib. 46. tit. 1. leg. 39. Et leg. 36. ibid. Et leg. 11. cod. eod. tit.*

THE LORDS decided, as said is, in respect of a practique produced betwixt  
in anno relating to a  
former practique in anno

*Dirleton, No 212. 228. p. 90. 108.*

No 7.

1676. November 7.

THOMAS RIG *against* the CAUTIONERS for the LAIRD of BROOMHALL.

THERE being a suspension raised by the Laird of Broomhall of a charge upon a bond for borrowed money, against Mr Thomas Rig, who was assigned by Alexander Lockhart to the principal bond whereupon the suspension was raised, and Captain Crawford found cautioner in the suspension; which Cautioner being charged, he gave in a bill of suspension, upon the reason, That he being Cautioner, and being willing to pay the debt, he craved, that he might have an assignation for his relief, not only of the principal, but of the whole Cautioners contained in the principal bond; whereupon they being ordained to be heard before the Ordinary upon the bills, and he to make report;—it was *alleged* for the Cautioners, That no assignation would be granted against them to the Cautioner in a suspension, but only to militate against the principal for whom he was cautioner. It was *answered*, That albeit the principal, Broomhall, was only charged, yet it was not only suspended to his benefit, but to the benefit of the whole Cautioners, who were bound to the creditor; and that by payment he did free both principal and Cautioners, and therefore ought to be assigned to the whole obligations. THE LORDS did consider this as a general case, and found that the creditor, or his assignee, if they had discharged any of the Cautioners, they could not be of new distrest, and so were not obliged to assign the cautioner in the suspension, or the principal debtor, who were only charged; and so ordained that the creditor and his assignee should give their oath, if, by writ or promise, they were bound to any of the Cautioners in the bond, never to distrest them; in which case, any of the Cautioners to whom they were bound were to be free, and no assignation to be granted against them; otherwise they found that the assignee should be obliged to assign the cautioner in the suspension, who was to make payment of the bond, that for his relief he might not only discuss the principal, but all those Cautioners, who were not secured by a discharge or promise not to be distrest.

*Fol. Dic. v. 1. p. 221. Gosford, MS. No 898. p. 577.*

No 8.

A cautioner in a suspension being distressed upon a decree, may crave an assignation, not only against the principal, for whom he was cautioner, but against the whole cautioners in the original bond.