

No. 21. as principal, and William Gordon, as cautioner, Ker paid the debt, upon distress and assignation from the creditor, and pursued William Gordon for the half.

Alleged for the defender: That the pursuer ought to relieve him, who, as cautioner in the bond of corroboration, was, in effect, cautioner for Ker, the cautioner in the first bond; and though Ker be cautioner, in respect of relief from Riddel, he must be considered as principal, in respect of the defender, as well as of the creditor; *2dly*, By a clause in the bond of corroboration, it was to be null and void, upon payment of the debt, by virtue of the obligation in the first bond.

Answered for the pursuer: That cautioners in corroborations, and cautioners in suspension of the debt, are looked upon as co-cautioners with those in the principal bond, and ought to relieve one another *pro rata*.

The Lords found the defender liable for the half; and found, That the first clause in the bond of corroboration was only a provision against double payment.

Fol. Dic. v. 2. p. 379. Harcarse, (CAUTIONERS) No. 243. p. 58.

1685. February 27.

HUGH WALLACE, Merchant in Edinburgh, *against* FLEMING and CUNNINGHAM of Barns.

No. 22.

A bond being suspended by the principal and cautioner, the cautioner in the suspension was found entitled to a total relief.

HUGH WALLACE is pursued by Fleming and Cunningham, as he who had become cautioner for Mr. John Wilky, in a second suspension. He alleged, The principal suspender, and the cautioner in the first suspension, were bound to relieve him, "et quem de evictione tenet actio eundem agentem repellit exceptio." Answered, He could recur against the cautioner in the first suspension only *quoad* the half, they being, in the construction of law, as co-cautioners, and cited a decision in Stair, Arnold *contra* Gordon, No. 19. p. 14641. where it was so found. Replied, The first cautioner is a principal to the second, and, in contemplation thereof, the second engaged; L. 27. § 4. and L. 43. D. De fidejuss. "The Lords, on Kemnay's report, found the first cautioner bound to relieve Hugh Wallace, the second, *in solidum*; and therefore assoilzied him."

Fol. Dic. v. 2. p. 379. Fountainhall, v. 1. p. 344.

* * Harcarse's report of this case is No. 4. p. 9450. *voce* PACTUM DE NON PETENDO.