

obtained decree against the debtor for repayment of the sums paid out, with annual rent thereof during the not payment.

No 116.

*Fol. Dic. v. 1. p. 373. Durie.*

\* \* See this case No 19. p. 3199.

\* \* Auchinleck reports the same case :

ALTHOUGH a bond be heritable, yet if it be paid by the cautioner in his own time, his bond of relief is found, and must pertain to executors.

*Auchinleck, MS. p. 15.*

1629. July 10.

WARDLAW against WARDLAW.

No 117.

THE LAIRD of Torrie, for the relief of the sums of money for which he became cautioner for Mr David Wardlaw, was infeft in the said Mr David's lands of Cullarnie. Before Torrie's decease, he paid the sums for which he was cautioner. The LAIRD of Torrie's Heir pursues Mr David for the sums as due to him, by reason his father was infeft in his lands for his relief; likewise the LAIRD of Torrie's Executors pursue Mr David for the same sums, as due to them, alleging the bond of relief to be moveable, and consequently due to the executors.—THE LORDS found the sums due to the heir, and he who only could renounce the infeftments.

*Fol. Dic. v. 1. p. 373. Auchinleck, MS. p. 3.*

\* \* This case is reported by Durie :

WHILE Wardlaw of Torry being cautioner for Mr David Wardlaw in a sum by an heritable bond, and for his relief, beside the clause of relief contained in the bond, having taken infeftment in his principal lands, the cautioner having paid the sum, being distressed therefor; and after his decease the cautioner's heir, and also his other bairns, as executors to him, either of them claiming this relief to be due to them, and pursuing by two distinct pursuits, the principal party for payment of that sum, the one as due to the executor, and the other as due to the heir, in respect that he *alleged*, that the bond being heritable, the relief ought to be of that same nature; likeas the infeftment given to the defunct for his relief proved that the same pertained to his heir and not to his executor; it was found, nevertheless, that the said relief so sought against the principal party, by personal pursuit, was due to the executor, and not to the heir; seeing the heir sought not the benefit of his infeftment, as he might against the land, if he had been distress, but only pursued personal action for payment; and that infeftment would not have prejudged the defunct in his own time, to have miskenned the relief, which he took by infeftment, *ad*

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 infestment is due to the heir ; for if the heir sought it off the land, wherein the defunct was infest, 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 infestment 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 infestment 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.*