upon a Writ, which the principal had formerly proponed, and succumbed in the probing; the same not having been intimated to the Cautioner, nor he called in the process. 11 December 1673 E. Kinghorn contra E. Wintoun.

The principal Debtor is obliged to save his surety harmless, either by getting him discharged from his suretyship, or by acquitting the Debt. And tho' there should be no express Engagement indemnify him, yet it is enough that it does appear, that the surety is obliged for the Debtor that Quality: For it implies the Engagement to save him harmless L. 4. ff. de Neg. Gest. l. 20 ff. Mandat. principal Debtors who with a Cautioner granted a Bond for a sum jointly and severally, bind obliged themselves therein to relieve one another pro rata, and to relieve the Cautioner in general, without mentioning either pro rata, or jointly and severally; more found liable in full to relieve the Cautioner, who paid the Debt upon distress and got assignation from the Creditor for his Relief. 19 June 1713 Buchanan contra French. In regard the Co-principals being bound to the Creditor jointly and severally, were also under the same Engagement to the Cautioner, who interposed jointly and severally for and with them: seeing the Cautioner's Relief should be equal to his obligation. Cautioners have Action of Relief competent to them not only against the principal Debtor, but also against his Heirs and Executors who are liable to implement what he stood bound for. The Lords once found the only Child of a Marriage after the Father's death obliged to relieve the Father's Cautioner in the Contract for fulfilling the provision therein contained, in favour of Heirs of that Marriage; the being no other Heir of Line to discuss. 22 November 1677 Cranstoun contra Hennay. But that Decision seems very hard. Because tho' the Cautioner be creditor to the Father for Relief; it were strange, that he should work his Relief against the Heir Child to whom he is cautioner; and who hath Right to his provision as a Creditor: At which rate all provisions in Contracts of Marriage would be illusory, and ineffectual. Therefore on the and Bar of provision was afterwards found not obliged to relieve the Cautioner for payment of the provision. 18 December 1707 Dickson of Harlaw contra Mill of Cauldon.

By the Civil Law, if the principal Debtor fails to pay the Creditor at the Term, the cautioner may sue him after the Term is expired, to oblige him to acquit the Debt, altho' the Creditor demand nothing: If the Indemnity of the Cautioner were in Hazard, as when the Debtor squanders away his Estate, or his Goods are attached by his Creditors L. 18 §. 1. ff. Mandati. But the Law of Scotland doth ordinarily afford no Relief to Cautioners against the principal Debtor, till he be distressed, i. e. called upon by the Creditor to pay. A Cautioner having a Bond of Relief may, after Registration of the principal Bond, charge for Relief upon his Bond; And if he pay the Debt may claim Repayment from the principal Debtor. 24 January 1627 E. Wauchton contra E. Innerwick. Spotswood p. 211. Tit. Registration. But so long as he does not pay the Debt, the principal should be no further liable than to find him good Security, for Assurance of his Relief. Howard Answers to Dalton Doubts, Tit. Bond of Relief.

By the Civil Law, if a Cautioner simmoned to pay, acquits the Debt fairly and honestly, in order to prevent an Execution or Attachment of his Goods, and being ignorant of the that the Debtor had a Compensation to make, or had paid the Debt, or had other Grounds of Defence against the Creditor; he will nevertheless have his Relief against the Debtor: For that the Debtor ought to blame himself, that he did not give Notice to the Surety not to pay the Debt. L. 29 pr. & §. 1. ff. Mandati. By our Law, if a Cautioner pay upon distress, without notifying the Creditor's demand to the principal Debtor in due Time before Litis contestation, it is upon his peril: Seeing the principal, if he had a relevant defence against the Debt, would not be obliged to reimburse the Cautioner for paying. 19 December 1632 Maxwell of Gribton contra E. Nithsdale.

But tho' a Cautioner having a defence peculiar to himself, which is not common to the Debtor, as if he was a Minor, and for that Reason might get himself relieved from his obligation or have other personal Exception; pays the Debt voluntarily, without taking Advantage of the said Exception; he will nevertheless have his Action of Relief against the Debtor: For by having

nabed his own Right he has done no Wrong to the Debtor, and only acquitted him of what he owed. L. 29 §. 6. ff. Mandat. Again, if a surety fund by the Creditor does not use the Means for obtaining a Delay, which he might make use of, as the neglecting to allege in his Defence some Nullities in the proceedings in the Cause, which would not be sufficient to discharge the Debtor; and after having acquainted the Debtor with the Creditors Demand pays the Debt: The Debtor cannot blame him for not having taken the Advantage of such Defences. De bona fide omni agitur, cui non conglutinatur de apicibus Juris disputare, sed de hoc tantum debitor fuerit nec ne? d. l. 29 §. 4. ff. Mand. If a Cautioner having paid the Debt without acquainting the Debtor where he might have done it, the Debtor pays it a second Time; the Cautioner will have no Relief against him: For he was in the Fault for having suffered the Debtor to be in Danger of paying d. l. 29 §. 3. But otherwise a Cautioner may bring Action of Relief against the principal Debtor and his Heirs, not only for the principal sum and Annualrent paid to the Creditor, but also for Annualrent of the said principal and Annualrent. L. 29 §. 7. ff. Mand. L. 1. C. eod. L. 18 C. de Nag. Gest. For with Regard to him all the Money which he has paid on the Debtors Account is a Capital, of which he ought to be reimbursed, with much more Reason than a Factor or Agent who does the Business of an absent person; seeing in all Bonds, they advance them of their own Accord, and it is by constraint that a surety makes payment: Thus a distressed Cautioner was found to have Right to Annualrent of Annualrents paid by him for the principal Debtor from the Time he paid them. 27 June 1706 Mc Micker contra Kennedy of Glenoulter. He may also claim all other Damage, Costs and Expences incurred thro' the Cautioner's without his Fault, as if the Creditor sues him, or attaches his Goods, he will be reimbursed of the Expences he hath been put to and Damages sustained thereby, and also of the Charges he has been in suing for Reimbursement against the Debtor. Such Relief was found competent to a Cautioner in a Bond albeit it bore only, that the principal bound himself to relieve the Cautioner of the principal Sum and penalty; and did not mention to relieve of all Cost, Skaith, Damage and Expences, which the Cautioner might incur thro' his Cautionery. 4 December 1629 E. Corkpoil contra Johnston. But if a Cautioner be denounced at the Horn for his Cautionery, the principal Debtor is not bound to relieve him of the Loss of his Birthright. That Damage not happening directly by his being cautioner, but the his own Fault in not satisfying his obligation by payment, which the principal would have been obliged to relieve him of. Stair's Answers to Dalton. D. Tit. Cautioner & Relief. 22 July 1675 Menzies contra Kennedy. But if the principal Debtor obtain a Gift of the Cautioner's Birthright fallen upon the Debt for which he was cautioner; it would be a relevant personal objection against the principal Debtor, that he could not make use of the Gift either in his own Name or in the Name of another to his Behoof against the Cautioner whom he was obliged to relieve. 22 July 1675 Menzies contra Kennedy. A Cautioner for a Minor has his Action of Relief against him to save him harmless, if the obligation has been profitable to the Minor. But if it has not been advantageous to him, and he on that Account has been relieved from it, he may likewise be relieved from his obligation to indemnify his surety. L. 1. C. de Fidej. Min. Les Loix Civiles &c. Tom. 1. part 1. Tit. 4. Sect. 1. art. 11.

If one of several sureties pay the whole debt, he may obtain Relief thereof from the rest deducting his own part; Carpzov. Jurisp. Forens. part 2. Const. 17. def. 18. whether there be an express obligation of mutual Relief among them. 8 July 1664 Nisbet contra Lessidor or not; for Relief is implied ex natura rei. 27 January 1675 Montsith contra Rodger. The obligation of mutual Relief takes place among cautioners, tho' not bound at the same Time, or by the same Deed. Thus a Cautioner in the suspension of a Bond whereon there were four Cautioners, having paid upon distress was considered as a fifth Cautioner, and allowed Access of Relief against the first four Cautioners, deducting his own fifth part. 23 February