

No 34.

the Executors ; which reply the Lords respected not, seeing the cautioner could not be prejudged by that decret against the Executors, wherein he was neither party called nor convened, and he could not by that sentence *inter alios* be prejudged of his lawful defences, specially seeing he instantly verified the same without delay, which was found sufficient to absolve the cautioner ; for the payment made, conform to the sentence, was a fulfilling of that whereto the cautioner was bound, and being once done and performed, he could not do it over again, and so thereby was freed of his cautionry, and which was competent to him to allege, albeit the executor should omit the same. This decision seems contrary to the decision made betwixt Wood of Craig, and the Executors of Carre, and their cautioner, whereof mention is made 4th March 1623, No 32. p. 14049.; and 5th December 1623, Rocheid, No 28. p. 2190 ; except that in that decret against the Executors in that process, the Executors compeared, and proponed that exception, and succumbed therein, which was not here alleged by the executors.

Act. Nicolson.

Alt. Belshes.

Clerk, Gibson.

Fol. Dic. v. 2. p. 351. Durie, p. 71.

1623. December 11. EARL OF WIGTON against PARISHIONERS of STOBO.

No 35.
In a spuilzie of tiends, it was found, that the principal tack having been reduced, when the sub-tacksman was not called as a party, the sub-tack, notwithstanding, could not defend him, altho' there were years to run of both tacks.

IN an action of spuilzie, at the instance of the Earl of Wigton against the Parishioners of Stobo, the LORDS found, that a sub-tack, set by a principal tacksman, there being years to run both of the principal tack and sub-tack, the years to run of the sub-tack could not defend the sub-tacksman being defender, in this process of spuilzie, where the principal tack was reduced before ; albeit that the defender *alleged*, That he was not called to the reduction of the tack, as he contended that he ought to have been, being, at the time of the reduction, of before, and sinesine, in real possession of the teinds libelled, and not being called, the sub-tack behoved to liberate him from the spuilzie, he being *bona fide* possessor ; notwithstanding whereof the allegiance was repelled, in respect of the reply, founded upon the reduction of the principal tack, to the reduction whereof the LORDS found no necessity to call the sub-tacksman, and that he could not be *in bona fide*, in respect of the inhibition libelled, which interrupted his possession.

Act. Hope.

Alt. Cunninghame.

Clerk, Gibson.

Fol. Dic. v. 2. p. 351. Durie, p. 91.

* * * Haddington reports this case :

A PRINCIPAL tack, containing a clause irritant, being sought to be reduced *super eo capite*, he who has a sub-tack is not necessary to be called, unless he

allege that his interest was known to the pursuer of the reduction, by intimation, or some other legal mean. He who excepted upon an infeftment of lands, *cum decimis inclusis*, and many years possession by virtue thereof, cannot be elided by a reply, that the pursuer, and his predecessors and authors, have been many years in possession of the teinds controverted, by uplifting a great part of the teinds *ipsa corpora*, and receiving of payment of an yearly duty for the rest from the defender, unless he offer to prove the reply by writ or oath of party, because the Lords will not take away a valid right, clad with possession, by probation of witnesses.

In that same cause the LORDS would not admit an irrelevant allegiance, albeit the contrary party made no answer to it.

Haddington, MS. No 2955.

No 35.

1626. December 13. EARL GALLOWAY against M'CULLOCH.

A PRINCIPAL tack being reduced, the sub-tack was not found to fall in consequence, being consented to by the pursuer, who ought therefore to have called the sub-tacksman in the reduction of the principal tack.

Fol. Dic. v. 2. p. 351.

* * This case is No 62. p. 7833. JUS TERTII.

No 36.

1629. January 22. FAIRBAIRN against KELLO.

HENRY FAIRBAIRN being warded in the tolbooth of the Canongate for not payment of a sum owing to Bartholomew Kello, contained in his bond, and escaping out of ward, and sentence recovered against the Bailie thereupon for payment of the debt; thereafter the bond is desired to be reduced by Fairbairn, upon a reason of his minority; and the creditor having summoned the pursuer, he being out of the country, to give his oath *de calumnia* upon the reason, with certification; and this reduction being desired to be transferred in the cautioner for the jailor, who was decerned to relieve the Bailies; it was found that it ought to be transferred, and that the cautioner might insist thereon, even as a cautioner might transfer a suspension, though the principal would not insist thereon, who raised the same, or as a singular successor might seek transferring of that which was competent to his predecessor; and albeit the raiser of the reduction were holden as confessed, upon his oath *de calumnia*, as would grant

No 37.

A debtor who had raised reduction of his bond on minority and lesion, was held as confessed; *de calumnia*. This found not to bar his cautioner from insisting in the action.