

No 16. chief, shown by one or more overt acts, may be put under caution not to commit such wrongs in time coming. But to oblige an innocent person to find caution to abstain from doing mischief of any kind, is hard and unjust. It is punishing a man who has done no fault. *2do*, The statutes enjoining caution to be taken from messengers, go all of them upon that plan. The act 46, parl. 1587, enjoins caution to be taken from messengers, 'for the damage and interest of parties grieved by the falsehood, negligence, or informality of any officer.' Here are three delicts condescended on, which regard the pursuer only, viz. falsehood, *i. e.* returning a false execution; the second, negligence; and the third, informality, *i. e.* giving an informal execution. The act 73, of the same parliament, is in the same strain, only more explicit, 'That the soverty shall be answerable for the damage and interest of his falsehood, sloth, or informal doing, in his Highness' service, or other parties; *i. e.* in the service of his Highness, or in the service of other parties. *3tio*, The bond of cautionry in question, being of the same tenor with all other bonds of the kind, is in every article conformable to the foregoing statutes. The three delicts are the same with what are condescended on in the statutes; and the obligation is confined to those who employ the messenger, because no other person is bound to pay him reasonable expenses. *Lastly*, Another remedy is provided by law, where messengers, under pretext of executing their office, oppress any of the lieges, and that is by the act 84, parl. 1587, declaring this crime to be capital.

Fol. Dic. v. 3. p. 117. Sel. Dec. No 150. p. 205.

SECT. IV.

Cautioner, how far Liable.

1593. *May 25.* GUTHRIE *against* WADDEL.

No 17. AN executor's cautioner was found only bound for what was contained in the inventory, not for concealments.

Fol. Dic. v. 1. p. 125. Haddington, MS.

* * * See This case *voce* EXECUTOR.

1628. *July 2.* NASMITH *against* MENZIES.

No 18.
A cautioner
in a contract
of marriage,
bound to em-

IN a suspension, Nasmith *contra* Menzies, the relict, upon her contract of marriage, having charged the cautioner for employment of 1000 merks upon annualrent to her use in her lifetime; and the party exhibiting the money at the

bar, to be delivered to her for her employment foresaid, she finding caution to make the principal sum forthcoming after her decease, to the heir: And the relict *alleging*, That she was not holden to receive the money, which she could not get employed, and that she was not obliged to receive the same, nor find caution, which, she alleged, was not in her power to find; and that she sought payment only yearly of that annualrent for her lifetime:—THE LORDS found, That this offer of delivery of the money to the relict, as said is, (which sum also was exhibited in presence of the Lords) freed not the cautioner; and that the relict was not holden to accept the same, but if she pleased; and that the cautioner remained subject to employ the money for the use of the relict, that she might get the annualrent thereof so long as she lived.

Act. *Aiton.*

Alt. ———.

Clerk, *Hay.*Fol. Dic. v. i. p. 125. *Durie*, p. 380.

1628. July 4. HAMILTON against BISHOP of GALLOWAY'S RELICT.

In a suspension, Hamilton of Kinblathmonth against the Relict of Gawin, Bishop of Galloway, who had charged the suspender, as he who was cautioner for her husband in the contract of marriage with him, for infesting her in life-rent of a tenement pertaining to her said unquhile husband, and also in some annualrents, which he had out of certain lands, redeemable, conform to the said contract; wherein it was provided, that how oft the lands should be redeemed, as oft the monies should be employed again to her use for her lifetime:—THE LORDS found, That there being an infestment once given to her of the said tenement by her husband, albeit she alleged that the land was thereafter sold by her husband, and so thereby she alleged the same was not profitable to her, yet that the cautioner was freed thereby of that part of the said contract; for if she had consented to the alienation, it was her own fault, for the which the cautioner was not bound; and if she had not consented thereto, then she might claim and use the right of her infestment: And sicklike they found the cautioner obliged to give her, her life-rent of the annualrents contained in the contract, notwithstanding that he alleged that she was once infest therein by her husband, whereby he alleged, that he was not further obliged; seeing, albeit the annualrents were redeemed, and the monies paid to her husband, yet seeing she consented to the renunciation made by her husband, that being her own deed, she could not come to seek the cautioner, who was not obliged for that which was done by herself, nor for any thing wherein she had voluntarily prejudged herself:—For he *alleged*, That howsoever he was obliged as cautioner, that how oft the annualrents should be lawfully redeemed, in that case to employ them again to her use; yet he was not obliged to employ, where they voluntarily received the money, and gave voluntary renunciations, on redemption being orderly used; in which case of order of redemption, and not voluntary renunciation, he alle-

No 18.

ploy a sum for the Lady's life-rent, was found not entitled to consign the sum, or otherwise get quit of the duty.

No 19.

Found in conformity with the above.