

the state of the process raised against his heir. The cautioner compears, and ALLEGES he ought to be freed, because his obligation was personal, and died with the principal party. And the meaning of his accessory obligation is only this, If you had obtained sentence against him in his lifetime, then I was to be liable for it. And where one is cautioner in a suspension, if the decret be turned into a libel, then the cautioner is free. Stair, *tit.* 10.

Though this allegiance seemed unreasonable to some, yet, it being reported, on the 20th January 1680, the Lords found a cautioner *judicio sisti et judicatum solvi*, liberated, in respect the principal debtor died *pendente lite*, though after litiscontestation; and though the cautioner had delayed its coming to a sentence by advocating the cause.

This seems agreeable to the Roman law, *De Fidejussore judicio sisti et judicatum solvi*; see *Bartholus* and *Broderodii de Repertor. item Accurs. Glossar. Vol. I. Page 73.*

1680. January 8. ANDREW CADDEL *against* ALEXANDER RIE [OF REATH.]

ALEXANDER Rie marrying Andrew Caddel the vintner's daughter; in the contract of marriage Alexander's father is obliged to lay 3000 merks to her tocher, and to provide it to the married couple in liferent and conjunct fee, and to the bairns of the marriage in fee. Within half a year thereafter, the father impleads a discharge of this 3000 merks from his son. Which discharge being quarrelled by the wife and the son's creditors, Lord Saline found the discharge null and fraudulent, *et contra fidem tabularum nuptialium*, unless Alexander Rie, the father, would either prove the numeration of the money, or the giving his son assignation to sufficient bonds or merchant ware; or, *2do*, will prove that the said sum was reemployed for the wife and bairns' use, conform to the destination of the contract of marriage. *Vide supra, 19th November 1679, Wemyss: and 8th January 1679, Lady Knox.* The father not resting satisfied with Salin's interlocutor, he, on the 21st of January, reported it to the hail Lords; and they found the son's discharge to the father might prejudice himself, but not the obligation for the wife's liferent, nor the son's creditors, though they became only creditors after the discharge was granted; they proving that it was comuned betwixt the father and the son, that he should give the father this discharge, (which they referred to the father's oath,) or proving any other collusion betwixt them, which may render the discharge fraudulent; in which case the Lords would not regard it as *contra fidem pactorum dotalium*.

If a man or a woman do any deed betwixt the contract and marriage, derogating from and altering the solemn stipulations contained in the contract matrimonial, the Lords distinguish thus:—Either he or she are free persons, whose parents are dead, and have the disposal of their means in their own hands, and are majors, and have contracted for themselves; or they are minors, and *sub potestate parentum*, and their portion or tocher is *peculium profectitium* from the father or other friend who contracts in the *tabulæ nuptiales*. In this last case, any second latent paction betwixt the contract and marriage, innovating the conditions of the contract, without the consent of the whole other parties contractors and friends, the Lords will incline to find them null; but in the first

case they will sustain them, being done by them who are *sui juris*. *Vide Ann Robertum Rer. Judicat. lib. 1, c. 2, et lib. 4, c. 1.* Durie, 29th November 1626, Scot. *Vol. I. Page 73.*

I HEAR that in 1678 the following case was decided :—A father, in his son's contract of marriage, disposes the fee of lands to him, with the burden of 4000 merks ; but, during the ceremony and treating of the marriage, he takes a bond privately from his son, to pay him 6000 merks towards the provision of his younger children. This bond being thereafter quarrelled as *contra pactum dotalitium*, the Lords reduced and annulled the said bond *quoad excessum* of the 2000 merks. *Vol. I. Page 74.*

1680. *January 8.*

IT was debated in a case, where a woman grants a bond betwixt her contract and her marriage ; it is clear the bond does not oblige her husband ; but *quæritur* if she become a free woman afterwards, if she will be liable for the sum therein contained, as being granted by her *ante matrimonium consummatum* ; or if the bond will be simply null, as if it were granted by her *stante matrimonio*. This is a very dubious case. *Vol. I. Page 74.*

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1677, 1679, and 1680. JAMES DOUGLAS, Master of Mordington, *against* JAMES CURRY.

1677. *June 26.*—IN a competition between a tack and a wadset of the lands of Nether-Mordington and Edrington, betwixt James Curry, late Provost of Edinburgh, and Charles Oliphant, one of the under-clerks of Session, this case fell to be debated :—Where a minor grants a deed to his lesion, and the creditor, to secure himself against revocation, causes him, either in the bond or otherwise, swear solemnly he shall never come in the contrary of that deed ; *quæritur* whether he should be reponed, and get leave to revoke, notwithstanding of his oath. The canon law is for observing the oath,—*Omne juramentum est servandum quod non tendit in dispendium animæ* ; and the religion of it is so great, that none can dispense with it but God, especially *in materia licita*, as here. On the other hand, if the oath be sustained as binding, then adieu to the privilege of minority : *actum est* with all poor minors : they are exposed to the rapacity of every crafty cheat, who has no more to do but to cause his bubble, upon oath, renounce the fence the law has put about him, which he for the present advantage will not fail to do ; *eadem enim facilitate juratur qua contrahitur*. And thus, in the most of all the sovereign courts of justice abroad, the oath is relaxed, and the poor minor protected. Yet the priest-ridden Emperor, Fridericus, in the Authentic *Sacramenta Puberum, C. Si adversus Venditionem* (for it is no part of the Roman law, but one of his extravagants,) commands the oath to be kept ; and conform to this Authentic have our Lords decided. See Dury, 15th January 1634, *Hepburne and Seton* ; last of February 1637.