

No 7. knew that the cautioner was minor the time of the attestation; and that, notwithstanding, he might free himself upon minority, yet did attest him sufficient; *quo casu*, the attestor being *in passimo dolo* they found him liable.

Fol. Dic. v. 1. p. 124. Gosford, MS. p. 240.

1700. February 2.

JOHN NIMMO *against* SIR GEORGE BROWN.

No 8.

A cautioner was found liable, altho' the bond fell under the statutable nullity of being subscribed by but one witness.

DOCTOR HEPBURN having granted bond to John Nimmo for a sum of money, and Sir George Brown of Colston being cautioner therein; the Doctor retiring to England, Sir George is charged for the debt; who suspends on this reason, that the principal's obligation was null, being only subscribed by one witness, and consequently the cautioner must be liberate, *quia sublato principali fundamento corrui accessorium*, and he can have no recourse nor relief against the principal. *Answered*, The nullity objected was only statutory by the act of Parliament 1681, before which the inserting of witnesses names was sufficient, without subscription; and wherever a natural obligation takes place, there a cautioner stands bound, whereof the law gives several instances; as where one engages cautioner for a wife, though it be null *quoad* her, yet the cautioner stands bound, 28th November 1623, Shaw *contra* Maxwell, No 5: p. 2074.; or if one binds with a minor, he has not the minor's privilege of restitution; or where one notar signs a bond for a sum above L. 100, though it be null as to the principal *quoad* the excrecing sum, yet the cautioner will be liable in the whole, as was found 8th July 1680, Sophia Johnston *contra* the Laird of Romano, No 9. *infra*; and the reason is, *quia subest debitum naturale cui fidejussor accedere potest*; especially seeing Colston cannot, on his oath of calumny, deny in this case, but he saw the principal subscribe, at least that it is his hand-writ. The LORDS repelled the reason of suspension, and found the cautioner liable.

Fol. Dic. v. 1. p. 124. Fountainball, v. 2: p. 86.

. In the Fol. Dic. this case is called Hepburn against Nimmo.

No 9.

A cautioner, bound as full debtor with the principal, found liable for the whole sum, though the principal was freed by a legal exception, one notary only having subscribed for him.

1680. July 8.

JOHNSTOUN *against* The LAIRD of ROMANO.

SOPHIA JOHNSTOUN, as executrix to her father, pursues Romano, as representing his father, who was cautioner in a bond of L. 130 for Adam Smith, in September *anno* 1638. The defender *alleged*, That the principal party had subscribed only by one notary, and therefore the bond would only be effectual against him for L. 100, and so could not be further extended against the cautioner, who could get no more relief, and specially in so favourable a case against a cautioner, upon an old debt, within a few days of prescription. It was *answered*, That here the cautioner is bound as full debtor conjunctly and severally, and both he and the principal are bound for the same sum, although different solemnities are required in their subscriptions, the cautioner having subscribed

with his own hand, and the principal requiring notaries, so that the cautioner is not bound *in majus*, but is bound *magis*, as cautioners for wives, pupils, and minors, who are bound as full debtors, though the principal will be free; and the favourableness of the case doth not alter the point of right.

THE LORDS repelled the defence, and found the cautioner liable for the whole.

Fol. Dic. v. 1. p. 124. Stair, v. 2. p. 784.

No 9.

1680. July 10.

LEITCH *against* HADERWICK.

LEITCH of Mousie pursues Mr Andrew Haderwick for repetition of a sum paid by him to. — his cautioner, upon the clause of relief, albeit Mr Andrew had promised never to trouble the principal party; which ought to liberate the cautioner, seeing the principal party thereby was free; which being referred to Mr Andrew's oath, he deponed, that the pursuer having disposed to him his moveables, he promised never to trouble him for his debt, by any distress, real or personal, but with express reservation, 'that he might distress the cautioner for what he wanted by the disposition of the moveables.'

THE LORDS found, that the promise not being simply, but with that reservation, 'that he might distress the cautioner,' it could not exclude him from distressing the cautioner; yet that he could not assign to him the debt, but leave him to seek his relief by the clause of relief.

Fol. Dic. v. 1. p. 124. Stair, v. 2. p. 784.

No 10.
A *pactum de non petendo* made to the principal, frees not the cautioner.

1695. December 19.

JOHN DOULL, and Other Creditors of Lauchlan Leslie, *against* SIR JOHN HOME of Blackader.

IN the action pursued by John Doull, and other creditors of Lauchlan Leslie, against Sir John Home of Blackader, for payment of a tack-duty of some lands in East-Nisbet, in the Merse, for which Sir John's father became cautioner to the said Lauchlan, as Chamberlain to that estate: The defence was on the quinquennial prescription, introduced by the act of Parliament 1669. *Answered*, He was in the exception of that act, his obligation being a special writ *quoad* the crop 1666, and proceedings, whereof the terms of payment were past, the time he became cautioner; and the Lords having found so, and the act being extracted accordingly, he could not be heard now to reclaim against the same. Yet the Lords remembering they had often reconsidered interlocutors though extracted; and in the case of Gray of Balgony against Irvine of Cairnfield*, the last winter session, the Lords were clear, if it had been only an act, they would have reviewed the grounds of that protutory; but being found a decret, the review was precluded: So here the Lords finding this to be allenar-

No 11.
A cautioner was liberated, the principal, a tenant, for rent, being free by the quinquennial prescription.

* Fount. v. 1. p. 530. *voce* MINOR. See PROCESS.