

CAUTIONER.

SECT. I.

When understood Cautioner, when *Expromissor*.

No 1. 1661. *June*. HUME *against* LOCKHART of Lee.

A PERSON who wrote a letter to another's creditor, desiring him to delay Mr Douglas for the price of the horse till Whitsunday next, and he would see to his paying of it to the creditor, found liable as cautioner, and not as *expromissor*; because Douglas was not liberate, and the letter was *personaliter* conceived; but found liable only *subsidiarie*, after discussing of the principal party by horning and caption.

Fol. Dic. v. 1. p. 123. Harcarse, (CAUTIONER.) No 234. p. 56.

1693. *January 20*.

JOHN DOWALL, as Assignee by LAUHLAN LESSLY, *against* SIR JOHN HOME of Blackader.

No 2.
An obligation granted by a third party to a creditor, to cause the debtor pay, or else to pay the debt himself, was found to be fidejussory only; and that any exception competent to the debtor, was competent to him as cautioner.

THE LORDS found, *imo*, That the tenor of Blackader's bond, to cause the tenant pay, or else he should pay it himself, being *fidejussoria et ad factum præstandum*, he was only *expromissor* and cautioner, and that any exception that was competent to the tenant, who was here in place of the principal, was also competent to Blackader: But, *2do*, found that this bond was special as to the rent of the year 1666, extending to L. 2200, and was liquidate by the subsequent year 1667; and so, though the tenant had the benefit of the prescription of five years, introduced by the act of Parl. 1669; yet Blackader could not cloath himself with that defence; because, his bond being special *quoad* that year, he fell within the exception of the said act, and had not the benefit of the prescription; but found as to the rests due before the 1666, he was not liable, because they were general and indefinite: And as to the year 1667, he could not be liable, though it was special, because the term of payment of that year's rent was

not then due when Blackader gave the bond, and so was but equivalent as if he had been cautioner in the tenant's tack, which obligation in writ would not hinder the prescription, if not pursued for within five years after the tenant's removing out of the ground : And found the tenant needed not be cited and first discussed here by John Dowall ; but allowed a diligence to Blackader, to call the tenants here *incidenter*, if he had any other defence to elide the debt.

Fol. Dic. v. I. p. 123. Fountainball, v. I. p. 548.

No 2.

1735. July 12. HALYBURTONS *against* GRAHAM of Mosknow.

GRAHAM of Mosknow, in the year 1687, ' became bound to pay to Captain Blair, all debts or sums of money, and accounts resting by Irvine of Bonshaw, ' deceased, to the said Captain Blair, according to instructions of the same to ' be given in by him.' Within the years [of prescription of this obligation, Captain Blair's representatives insisted in a process against Graham of Mosknow for payment of two bonds due by Irvine of Bonshaw to Captain Blair. The defence was, that these bonds were prescribed.—*Answered, imo*, That the prescription was interrupted by the aforesaid obligation : *2do*, Supposing the prescription to be run, *quoad* Irvine of Bonshaw, Mosknow must be liable upon his own obligation, which was not prescribed.—*Replied to the first*, Taking an additional security from a third party will be no interruption *quoad* the principal debtor, unless done with his concurrence ; far less will a general obligation make an interruption, which is not taking a document upon any particular debt.—*Replied to the second*, The defender is not an *expromissor*, who takes a debt absolutely and ultimately upon himself ; he is only *adpromissor*, liable indeed directly to the creditor, but virtually cautioner and entitled to relief. Hence every exception competent to the principal debtor must be competent to him, and if he should pay he can have no relief : And the creditor has himself to blame, who allowed the debt to prescribe against the principal, which must operate in favour of the cautioner, equally as if he had granted a discharge ; and it is *triti juris* that every security past from, *quoad* the principal, is *eo ipso* a liberation *quoad* the cautioner.—THE LORDS sustained the allegiance of prescription. See PRESCRIPTION.

No 3.
One person bound himself generally to pay all debts due by another to a third party. A debt prescribed *quoad* the principal, found not to be exigible against him.

Fol. Dic. v. I. p. 123,

* * * See No 136. p. 1560.