

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.

No 11. ly an interlocutor, they reponed Blackader against the same ; and, by a second vote, sustained this defence as sufficient to assoilzie him, that his bond was only an accessory additional and cautionary obligation to cause the tenant pay *tanquam expromissor*, and so any exception defending the tenant was competent to him ; but if the principal tenant were pursued, or his representatives, they would have this unanswerable defence, that they were not convened within five years after removal from the land, and so payment is presumed, unless ye offer to prove resting owing by my oath ; and therefore assoilzied Blackader.

Fol. Dic. v. 1. p. 124. Fountainhall, v. 1. p. 689.

1699. November 9.

JOHN HERDMAN *against* ELIZABETH BORTHWICK.

No 12.

Not relevant to be proven by a cautioner's oath, that he heard the principal debtor de- cease acknowledge the debt. This would not bind the principal's representatives. So the cautioner could not be liable in consequence of an oath *affirmative*, for he would have no relief.

JOHN HERDMAN being cautioner for Alexander Barnet, drawer to Alexander Borthwick vintner, that the drawer should make just count, reckoning, and payment of all liquors he should receive from his master, from Whitsunday 1686, to Whitsunday 1687 ; the drawer continued in the service till he was married about Martinmas 1686, and then he removed.

The drawer dying, his master pretended, that he had not counted, and pursued a cognition against his nearest of kin, in which he produced an instrument, bearing, that the drawer did acknowledge, that he was debtor to his master in the sum of L. 27 Sterling, and the notar and witnesses of the instrument depone conform.

Borthwick having obtained a decret on that probation, pursues Herdman the cautioner upon the said decret of cognition, and obtains a decret against him for the said sum.

Herdman suspends, and raises reduction on these reasons : *1mo*, The decret of cognition was in absence as to him, and yet was sustained as *probatio probata* against him, without production of the instrument, or examining of the witnesses. *2do*, It was null, in as far as it proceeded on a probation by witnesses, after prescription, the defunct being more than three years out of his service, before intending of the process.

It was *answered* for the representatives of Borthwick : That the nearest of kin of the drawer were called in the cognition, which was sufficient to constitute the debt against them, and Herdman being cautioner, was liable for them. *2do*, The probation was sufficient, being upon the defunct's acknowledgement of the debt, which was probation enough against him *quandocunque* : and, in fortification of the instrument and testimonies, it is offered to be proven by Herdman's oath, that he himself was present, and heard the defunct's acknowledgement of the debt, and did also take instruments upon it ; so that he can never call the debt in question. *3tio*, If need were, it could also be proven by witnesses, that much more money was furnished than the defunct did acknowledge.