

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