

obliged to take the clerk's accounts quarterly off his hand ; which the cautioner required Sir James to do, and protested to be free for his not counting.

No 25.

THE LORDS repelled the defence, in respect of the reply.

Fol. Dic. v. 1. p. 125. Forbes, p. 134.

1708. February 28.

SIR PETER FRASER of Dooris *against* ALEXANDER ABERCROMBIE, his Factor, and ABERCROMBIE of Glassoch, his Cautioner.

SIR PETER FRASER of Dooris pursues Alexander Abercrombie, his factor, and Abercrombie of Glassoch, his cautioner, for count, reckoning, and payment of the rents of his estate. *Alleged* for Glassoch, the cautioner, absolvitor from any intromission had by the factor after the third act of Parl. 1700, declaring papists incapable of any public office, and particularly of being factors or chamberlains, because of the influence they might have to pervert tenants ; and Mr Abercrombie being a Roman catholic, his commission *ipso facto* expired by that act, and consequently my cautionry obligation ceased therewith. *Answered*, Though *ignorantia juris non excusat*, yet I was out of the kingdom at the time of making the act, and for a long time after, so it came not to my knowledge so soon ; yet the cautioner must stand bound (the factor being now broke) for all his intromissions and administrations, not only from the date of the act, and forty days thereafter, but for the last of the forty days after the publication and promulgation of the said act at the cross of Edinburgh ; seeing, both by the Roman law and our acts of Parliament, laws do not bind till then ; and the LORDS found it behoved to be so counted. Then Sir Peter craved, that the cautioner might assign him to his bond of relief he had from the principal, which the Lords refused.

Fol. Dic. v. 1. p. 126. Fountainhall, v. 2. p. 439.

1711. January 23.

THE CREDITORS of HAY of Park *against* ALEXANDER FALCONER of Blackhill.

IN the count and reckoning at the instance of Park Hay's Creditors, against Alexander Falconer, as cautioner for Sir Hugh Campbell of Calder their factor ; THE LORDS found the factor and his cautioner liable for the victual only, either according to the fiars, or according to the prices received by the factor, deducting all losses, in the option of the pursuers ; and found the cautioner liable for the annualrent of Sir Hugh's intromissions, as factors are liable by the act of sederunt, 31st July 1690. Albeit it was *alleged* for the defender, That the bond of cautionry bore no annualrent, and a cautioner in a suspension was

No 26.

A cautioner for a factor who was a papist, was free with regard to all the factor's intromissions posterior to the act 3d Parl. 1700, declaring all papists incapable of any public office.

No 27.

The cautioner for a factor upon a sequestrated estate, found liable for annualrent of the factor's intromissions, according to the act of sederunt 1690, although the

No 27.
bond of cautionry did not bear annual-rent.

assoilzied from the expences modified by the decreet, finding the letters orderly proceeded, in regard he was not expressly bound therefor by his bond; notwithstanding of a prior act of sederunt, ordaining cautioners to enact themselves, both for the sums charged for, and also for what expenses should be modified, 17th December 1709, Dumbar *contra* Muirhead, *infra* Sect. 7.

Fol. Dic. v. 1. p. 125. Forbes, p. 484.

1715. February 22.

WILLIAM BOWLES, Solicitor in Exchequer, *against* SIR JOHN JOHNSTON of Caskieben.

No 28.
A cautioner having paid the debt; in a competition betwixt him and the donatar of the principal debtor's bastardy, the penalty of the bond was restricted to the sum really paid out by the cautioner to the creditor.

SIR JOHN JOHNSTON being cautioner to the town of Aberdeen for one Douglas, baxter there; and having a bond of relief in the ordinary terms; upon Douglas's death William Bowles obtained a gift of bastardy; and Sir John insisted for payment against the donatar, libelling upon his bond of relief, and also for another sum of L. 55 Scots, due to him by the bastard. In this process Sir John acknowledged, upon oath, payment of L. 36 Scots; and at the advising his oath, gave in a bill for expenses, which was refused, and so the decreet went out, as to the bond of relief, in the terms of the libel, decerning the donatar either to free, relieve, &c. or make payment of the said sums, &c. after the form and tenor of the said bond of relief in all points. In a suspension of this decreet, the point in question being, 'Whether the penalty of the first bond by Douglas to the Town of Aberdeen, is due to the cautioner?' the donatar *contended*, it was not,

Because, *1mo*, The charger having insisted upon the alternative of payment, to which no penalty is taxed in the great decernitor, could not therefore now charge upon the first member of the alternatives, to relieve him of the bond and penalty therein contained: *2do*, That there was no penalty adjected to the bond of relief, but only in that granted to the town of Aberdeen; to which, although Sir John obtained assignation upon payment, yet the town did not exact the full penalty: *3tio*, That the donatar is in the case of an executor, who must have a decreet for his warrant, and therefore liable in no penalty nor expenses: *4to*, No penalty or expenses here, because of the *pluris petitio*, Sir John having received L. 36 as said is.

Answered for the charger, That here there was only a penalty craved, and the Lords do often refuse expenses where persons have been litigious, and yet sustain the penalties in bonds for reimbursing the damages the creditors may sustain on account of the expenses debursed; and the decreet, though it assoilzies from the L. 36, yet decerns for the rest of the libel; now the penalty was expressly libelled on: *2do*, That though there be no penalty in the bond of relief, yet it obliges Douglas to relieve Sir John of the penalty contained in