

1751. July 26. JAMES GIBB *against* WALKER and SIMPSON.

No. 19

ONE's becoming bound as cautioner in a bargain of lambs was found proveable by witnesses, agreeably to a former judgment in a case of a bargain of sheep bought at the house in the muir, which I have either neglected to mark, or cannot find it; and we altered both the Sheriff of Edinburgh's interlocutor, and Shewalton's, who refused a bill of advocacy on iniquity; for we thought all bargains for the sale of moveables proveable by witnesses. (See PROOF.)

1751. November 29.

MAGDALEN SCOTT, Daughter to SCOTT of Milleny, *against* DAME ELIZABETH NICHOLSON.

No. 20.

A FATHER, as administrator in law to his daughter, having confirmed her executrix and found caution, wherein he in common form obliged him and his daughter to relieve the cautioner, and the Commissaries gave him as upgiver power to intromit; he accordingly uplifted the debt confirmed; and after his death the daughter sued the cautioner to account for the money; and his defence was, that he was not bound to her for her father, but was bound for both father and daughter to all others having interest, and she was bound to relieve him; but upon the authority of Hope's minor practices in point, and also upon the reason of the thing, we repelled the defence unanimously. Afterwards adhered. Thereafter the defender alleged that the daughter had accepted of a bond of provision of 2500 merks in full of portion natural, and of all that she could claim of him any manner of way. Answered, That he was no more than an heir of a strict entail exercising a faculty given him by the entail, and it could not be meant in satisfaction of this claim, which was truly of more value. *2dly*, The general words could only be intended of claims of the same nature with the portion natural; but the Court unanimously sustained the defence and assoilzied. Other new defences were also proponed, but as they seemed attended with some difficulty, the Court did not decide them. (See DICT. No. 15. p. 2080.)

Cautioner in a confirmed testament.