

no execution against the cautioner's executors, until the said curator was fully discussed. This seems contrary to the LORDS practise, as it is marked Dec. 9. 1623, at the *Nota*, anent cautioners. See Henderson's Bairns against Debtors, Durie, p. 88. *voce* FOREIGN.

No 6.

*December 5. 1627.*—IN an action betwixt Rollock and Corsbies, whereof mention is made 20th November 1627; the defenders *alleging*, that they nor their father could not be convened as cautioners for the curator by this act produced; because, before this act of curatory, there was another act of curatory whereby the minor had chosen curators, who had accepted and given curators to him; which act standing, there could no new curators thereafter be lawfully chosen, until the first had been removed, or that act lawfully taken away, as is statute 35th act, 6 Parl. Q. Mary anno 1555.; and therefore, the second act was null, and consequently the cautioner for the curator in the second act could not be convened: This exception, albeit verified *instanter*, was repelled, and the action sustained against the cautioner in the second act, which the LORDS found could not be impugned by the cautioner, being his own deed, and that he nor his executors could not oppone against the same. But the LORDS reserved action to reduce upon that ground *prout de jure*. It is always to be remembered, that the cautioner was convened here, for payment of a particular sum intromitted with by that second chosen curator, whereof reason craved, that he should make payment to the minor, being his intromission; and the cautioner was not convened for the curators omission; in which case, the matter would have been more considerable.

Act. M<sup>r</sup>Gill.

Alt. ———.

Clerk, Hay.

*Fol. Dic. v. 1. p. 124. Durie, p. 314. & 317.*

1672. February 6. The EARL of KINGHORN *against* ROBERT CLELAND.

ROBERT CLELAND having attested a cautioner in a suspension raised against the Earl of Kinghorn, in these words; 'that the raiser of the suspension was worth the sum charged for, for which he did oblige himself;' the suspension being discussed in favours of the Earl; and the cautioner, who was one William Sinclair, having reduced his bond upon minority and lesion, the Earl did pursue Cleland as attestor in the terms foresaid. It was *alleged* for the defender, That the attestation could import no more but that the cautioner had an estate worth the sum charged for; but could not bind him, in case, upon minority, he should free himself of that bond. It was *replied*, That the clerk of the bills having warrant to receive cautioners, where they are attested by responsal men, whatever damage the creditors suffer by the attestation, whether as to the insufficiency of the estate of the cautioner, or the inability of his person to bind himself, the attestor ought to be liable. The LORDS ordained Cleland to give his oath if he

No 7.

A cautioner in a suspension being minor, but attested to be sufficient, the attestor was found liable for the debt, he knowing that the cautioner was minor, and would be freed *ex capite minorennitatis*.

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 excrescing 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