SECT. II.

In what cases a Cautioner may remain Bound, where the Principal gets Free.

No 4.

1612. *December.* —— *against* CRIGHTON.

A BOND was found simply null, because not subscribed by the principal, although subscribed by the cautioner.

Fol. Dic. v. 1. p. 124. Haddington, MS.

*** *See* This case *voce* WRIT.

1623. *November* 28. SHAW *against* MAXWELL.

No 5.
A cautioner was bound, although the principal was not, the debt being an account subscribed by a married woman, without her husband. The cautioner could have no relief from the husband.

IN an action betwixt Shaw and Maxwell, for payment of a sum contained in an account of merchant furnishing, which was subscribed by the woman to whom the furnishings were made, and by a cautioner for her:——THE LORDS sustained this action against the cautioner, albeit the woman, who was the principal, had an husband at the time of the furnishing, and at the time of subscribing of the account by her, who had not subscribed the same; and the cautioner was found to stand effectually obliged, albeit the principal was not so bound, the account not being subscribed by her husband; and albeit the cautioner could not pursue the principal for his relief, for the same reason. *See* HUSBAND and WIFE.

Act. ——. Alt. *Belshes.* Clerk, *Gibson.*

Fol. Dic. v. 1. p. 124. Durie, p. 83.

1627. *November* 20. ROLLOCK, FINLAY'S Relict *against* CORSBIES.

No 6.
A cautioner was found liable, who had bound himself in an act of curatory, though the act of curatory was informal; but the party meant to be curator had intromitted.

IN an action moved by Jean Rollock, as executrix to umquhile Patrick Finlay, her husband, against Corsbies, as executors to umquhile Corsbie their father, who was cautioner for Walter Finlay, curator to the said umquhile Patrick, *de fideli administratione*, for payment to her of 400 merks received by the said Walter, curator foresaid, for his said pupil: The LORDS sustained this process and action against the executors of the cautioner, albeit it was *alleged*, that in this case of cautionry for curators, the LORDS are not in use to sustain process against the cautioner, until the curators' selves be fully discust, both in their persons, goods, and lands, and till that be fully done, the cautioner cannot be convened; which allegeance was repelled, and the process sustained against the cautioner's executors; but the LORDS declared, that they would give

no execution against the cautioner's executors, until the said curator was fully discussed. This seems contrary to the LORDS practique, 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'Gill.* Alt. ——. Clerk, *Hay.*
Fol. Dic. v. 1. *p.* 124. *Durie, p.* 314. & 317.

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

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.*

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