

1629. December 4.

L. COCKPUL *against* JOHNSTON.

THE principal is found obliged to pay his cautioner, who was distrest, and paid for him the principal sum, and all the annualrents since the term of his payment, albeit the bond bore only (the same being only moveable), 'That the principal bound him to relieve his cautioner of the premisses in the bond,' which was only principal sum and penalty, and that it did not relieve him of all cost, skaith, damage, and expenses, which the cautioner might incur by his becoming cautioner.

Act. *Hope et Nicolson.*Alt. *Stuart.*Clerk, *Hay.**Fol. Dic. v. 1 p. 127. Durie, p. 473.*

No 43.

A principal is bound to relieve his cautioner of all consequences of his obligation, though not expressed in the obligation of relief.

1630. March 19.

LAIRD OF LUNDIE *against* EARL OF ARGYLE.

ALTHOUGH the bond of relief imports that the cautioner should be relieved of all cost, skaith, and damage, that he shall sustain through such caution, yet the Lords' statute interprets that the same clause should not infer but payment of the principal sum and annualrent; so, although a cautioner be denounced to the horn, and his escheat fall by horning, or his lands be appraised for the debt, yet the principal will be no farther obliged but for payment of the principal sum and annualrent; and yet, in the action pursued by the Laird of Lundie, cautioner to Robert Arnot for the Earl of Argyle, for which Robert Arnot comprises the Laird of Lundie's lands for the principal sum, penalty, and annualrent, and sheriff-fee, when Lundie seeks his relief of all that Robert Arnot had given his discharges upon, the LORDS found the Earl of Argyle should refund to him, all that he had justly debursed to Robert Arnot on his own oath.

Fol. Dic. v. 1. p. 127. Auchinleck, MS. p. 25.

No 44.

A cautioner, who was denounced for the debt of his principal, and whose escheat consequently fell, was not found entitled to relief of this, although the obligation of relief was expressed in the most ample terms.

1632. December 19.

MAXWEL OF GRUBTON *against* E. NITHSDALE.

THE deceast Lord Herreis being bound as cautioner for umquhile Lo. Maxwell in anno 1587, that he should depart out of the country, and not to return without the King's license, under the pain of 5000 merks; the said Lord Herreis is convened before the King, being then present, and before the Lords of Secret Council, to hear him decerned to pay the sum, because the principal had contravened, by returning without license; whereupon decret being given, and he charged to pay, thereafter he made payment, and reported the thesaurer's discharge; and the donatar to the Lo. Herreis escheat, after declarator thereon, assigning and disposing his right of relief against the Lo. Maxwell, and also the

No 45.

A cautioner, against whom sentence had past, and who had thereupon paid, was found to have no relief against the principal, because the principal, who had a good plea, was not called, nor the distress intimated to him.