there were only three subscribing witnesses. Answered,—This was no nullity before the third Act of Parliament 1681; because, there were four witnesses inserted in the body of the writ, which was all then required by our law; subscription being only introduced for fixing the witnesses' memory, as appears by comparing 80th Act 1579 with third Act 1681. They had other two allegeances, but there was no need of determining them.

The *first* was, That the three witnesses were at least good for £100 Scots; but it was urged, the Lords had refused to restrict, in a late case in 1691, between Sir Robert Colt and Aikman.

The *second* was,—The cautioner subscribed for himself; so two witnesses were enough for him. To which it was answered,—If the principal obligation be null, the fidejussory must fall in consequence as an accessory. Replied,—Cautioners are all principals, *et correi debendi*, by our law; and so the cautioner's obligation may subsist without the other; as was lately found in *John Callender's pursuit* against *George Alexander*, brewer in Edinburgh. But, determining the first superseded the need of considering thir two last points.

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1695. *January* 18. Mr Rory Mackenzie of Prestonhall and Macleod of Appin *against* John Drummond and George Watson, Merchants.

Croceric reported Mr Rory Mackenzie of Prestonhall, and Macleod of Appin, against John Drummond and George Watson, merchants, for £900 Scots of salvage, given by a written contract, for saving some shipwrecked goods from the country-people's plunder, and wherein the Admiral had decerned: Against whose decreet this iniquity was objected, That he had made them answer summarily on a petition. Answered,—1*mo*. It is usual to table processes before the Admiral by way of complaint; 2*do*. They passed from this declinator, by proponing other defences, and taking out a commission for trying the quality of the goods delivered, and if they were conform to the inventory. Replied,—That the defending before a court is no homologation, or passing from a prior defence; being *actus necessarius*, and involuntary.

The Lords repelled the strangers and their factors. *Vol. I. Page* 660.

1695. *January* 18. The Earl of Tweeddale, Chancellor, *against* Dury of Craiglascar.

Mersington reported the Earl of Tweeddale, Chancellor, against Dury of Craiglascar. The question was,—He, being a vassal of the regality of Dumfermline, if he was liable in the sheriff-fiars as the price of his teinds, or in the regality fiars, which are much dearer. The Chancellor founded on a decreet he had obtained against Fotheringham of Halhill. Answered,—This vassal, Craiglascar, is in another case; because he has a decreet of the Commission for

Plantations finding him only liable in the Exchequer prices. ALLEGED,—This was before Dumfermline got the tack.

The Lords resolved to hear this farther. *Vol. I. Page* 661.

1678, 1682, 1683, 1684, 1688, *and* 1695. WILLIAM HAMILTON of WISHAW *against* ANDREW LUNDY and LORD MELVILL.

[See 30th November 1677, Oliphant against Hamilton.]

1678. *November* 20.—IN the count and reckoning betwixt William Hamilton of Wishaw and Andrew Lundy, and my Lord Melvill, his assignee, Pitmedden being auditor, he found a tutor, *ante redditas rationes,* could not legally and validly assign any debt owing to him by the minor's father; because, *ex eventu* of his intromission with the minor's estate, and after counting, he may be found *intus habere,* and to be paid, and that debt to be discounted. See 8*th December* 1671, *Scot; item,* 25*th January* 1677; and 12*th January* 1678. This wants not difficulty; for though, in the R. law, *l.* 20, *C. de Adm. Tut.* pupils and minors had a hypothec in their tutors' and curators' goods, which affected them so as to hinder transmission, yet our law has given them no such privilege by hypothec or pledge. See 25*th July* 1679, *Cleland.*

In the same cause the two following points were reported to the Lords:—1*st.* Wishaw, having produced a bond, under Andrew Lundy's hand, bearing, That he had received a bond of Culfargie's, to Sir John Brown of Fordel, for 4000 merks, and that he should either restore it or pay the same; and Wishaw, craving compensation thereon, conform to the alternative, Lundy ALLEGED the ticket was null, because it wanted both writer's name and witnesses. Wishaw offered to condescend upon the writer, and to prove, by extraneous witnesses, that it was Lundy's subscription, and that Lundy had Culfargie's ticket; all which were sufficient to adminiculate the defect and want of the witnesses. The Lords found the condescendence upon Robert Carmichael, in Sanquhar, as the writer of it, sufficient; but found the presumption, that the said ticket was once in Lundy's hand, not sufficient to supply the want of the other witnesses, unless Wishaw will offer to prove that Lundy pursued Culfargie on the said bond. I hear of a practick, in 1675, between *Vans* and *Malloch,* allowing a null bond to be adminiculated; which is contrary to this, and also to what was decided 19*th July* 1678, between *Tillicoultry* and *Rollo.* Then Wishaw craved Lundy's oath of calumny on the truth of his subscription.

The *second* controverted point was, Wishaw contended Lundy behoved to defalcate the sum of ——— of his comprising; because, being executor *qua creditor* confirmed to Sir John Brown of Fordell, he had suffered John Hamilton to recover, as another creditor of Fordell's, a decreet against him as executor; which was collusive; and he would not have done unless he had obtained satisfaction for his own sum first; he, *quoad* the superplus, being countable to co-creditors as any other executor is. The Lords found the presumption, founded on the decreet recovered by Hamilton against him, not relevant to infer collusion; and therefore rejected that article, except Wishaw would prove