

with his own hand, and the principal requiring notaries, so that the cautioner is not bound *in majus*, but is bound *magis*, as cautioners for wives, pupils, and minors, who are bound as full debtors, though the principal will be free; and the favourableness of the case doth not alter the point of right.

No 9.

THE LORDS repelled the defence, and found the cautioner liable for the whole.

Fol. Dic. v. 1. p. 124. Stair, v. 2. p. 784.

1680. July 10.

LEITCH *against* HADERWICK.

LEITCH of Mousie pursues Mr Andrew Haderwick for repetition of a sum paid by him to. — his cautioner, upon the clause of relief, albeit Mr Andrew had promised never to trouble the principal party; which ought to liberate the cautioner, seeing the principal party thereby was free; which being referred to Mr Andrew's oath, he deponed, that the pursuer having disposed to him his moveables, he promised never to trouble him for his debt, by any distress, real or personal, but with express reservation, 'that he might distress the cautioner for what he wanted by the disposition of the moveables.'

No 10.
A *pactum de non petendo* made to the principal, frees not the cautioner.

THE LORDS found, that the promise not being simply, but with that reservation, 'that he might distress the cautioner,' it could not exclude him from distressing the cautioner; yet that he could not assign to him the debt, but leave him to seek his relief by the clause of relief.

Fol. Dic. v. 1. p. 124. Stair, v. 2. p. 784.

1695. December 19.

JOHN DOULL, and Other Creditors of Lauchlan Leslie, *against* SIR JOHN HOME of Blackader.

IN the action pursued by John Doull, and other creditors of Lauchlan Leslie, against Sir John Home of Blackader, for payment of a tack-duty of some lands in East-Nisbet, in the Merse, for which Sir John's father became cautioner to the said Lauchlan, as Chamberlain to that estate: The defence was on the quinquennial prescription, introduced by the act of Parliament 1669. *Answered*, He was in the exception of that act, his obligation being a special writ *quoad* the crop 1666, and proceedings, whereof the terms of payment were past, the time he became cautioner; and the Lords having found so, and the act being extracted accordingly, he could not be heard now to reclaim against the same. Yet the Lords remembering they had often reconsidered interlocutors though extracted; and in the case of Gray of Balgony against Irvine of Cairnfield*, the last winter session, the Lords were clear, if it had been only an act, they would have reviewed the grounds of that protutory; but being found a decret, the review was precluded: So here the Lords finding this to be allenar-

No 11.
A cautioner was liberated, the principal, a tenant, for rent, being free by the quinquennial prescription.

* Fount. v. 1. p. 530. *voce* MINOR. See PROCESS.