

## No 6.

In order to free the cautioner, he must present the debtor in terms of the bond, and take instruments.

1695. *November 22.* ALEXANDER PITBLADO *against* ISOBEL MAYNE.

ON a petition given in by Alexander Pitblado writer, against Isobel Mayne in Dumfermline, it fell to be argued, where a prisoner in the messenger's hands grants a bond of presentation, with a cautioner, to sist himself such a day, or else pay the debt; if it be sufficient to exoner the cautioner, to allege that none for the creditor or messenger appeared at the diet prefixed, to accept or require the prisoner, and to take instruments on his absence or not compearance; or if it be incumbent on the debtor to attend at the time limited in the bond of presentation, and to enter his protest on his readiness to deliver himself to the messenger and his employers, and take instruments in their absence, and so protest that the cautioner must be free of his bond—THE LORDS found, though the messenger did not attend, yet that did not excuse the other party's absence; but the cautioner, for his liberation, ought to present him at the place and time appointed, and take instruments if there be none to receive him; even as it would be no excuse to say in an order of redemption, I needed not come and offer the money, because I can prove you, nor none for you, were present to have received it, though I had come; for it was your duty to have attended, and you could not divine whether the other party would come or not.

*Fol Dic. v. 1. p. 114. Fountainhall, v. 1. p. 680.*

## No 7.

The debtor being said to be sick on the day fixed for presenting; the cautioner was found liable, not having offered to produce him when recovered.

1704. *February 12.* CALLANDER *against* BRUCE.

BRUCE of Newton being debtor to Callender of Craigforth, in the sum of 600 merks, by bond; and, being apprehended by caption, he, to relieve himself out of the messenger's hand, grants a bond of presentation, wherein Alexander Bruce, his son, is cautioner with him; whereby they oblige themselves either to pay, or present him at Craigforth's house, without a suspension, at a precise day therein-mentioned; at which day Alexander compears, and intimates to Callender, by a notary, that his father was fallen sick, and it was impossible for him to travel, but offered to produce him within some few weeks after when he should grow better; which Callender refused, because it was Alexander's single assertion, and no testificate produced. Callender having charged Alexander, on the bond of presentation, both for the penalty, and the original debt in his father's bond, he suspended, on this reason, that he was neither *in mora* nor *culpa*, for not presenting his father on the precise day, because he was then sick; and it were against humanity, *et contra bonos mores*, to oblige them to what is naturally or morally impossible; *et nemo tenetur ad impossibile, vel præstare casus fortuitos*.—*Alleged*, Though his sickness (providing it was real and not simulate) did excuse at that time; yet this did not extinguish the obligation of presenting; but how soon he reconvalesced, and was able to come abroad, he was