

No 11. ly an interlocutor, they reponed Blackader against the same ; and, by a second vote, sustained this defence as sufficient to assoilzie him, that his bond was only an accessory additional and cautionary obligation to cause the tenant pay *tanquam expromissor*, and so any exception defending the tenant was competent to him ; but if the principal tenant were pursued, or his representatives, they would have this unanswerable defence, that they were not convened within five years after removal from the land, and so payment is presumed, unless ye offer to prove resting owing by my oath ; and therefore assoilzied Blackader.

Fol. Dic. v. 1. p. 124. Fountainhall, v. 1. p. 689.

1699. November 9.

JOHN HERDMAN *against* ELIZABETH BORTHWICK.

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Not relevant to be proven by a cautioner's oath, that he heard the principal debtor de- cease acknowledge the debt. This would not bind the principal's representatives. So the cautioner could not be liable in consequence of an oath *affirmative*, for he would have no relief.

JOHN HERDMAN being cautioner for Alexander Barnet, drawer to Alexander Borthwick vintner, that the drawer should make just count, reckoning, and payment of all liquors he should receive from his master, from Whitsunday 1686, to Whitsunday 1687 ; the drawer continued in the service till he was married about Martinmas 1686, and then he removed.

The drawer dying, his master pretended, that he had not counted, and pursued a cognition against his nearest of kin, in which he produced an instrument, bearing, that the drawer did acknowledge, that he was debtor to his master in the sum of L. 27 Sterling, and the notar and witnesses of the instrument depone conform.

Borthwick having obtained a decret on that probation, pursues Herdman the cautioner upon the said decret of cognition, and obtains a decret against him for the said sum.

Herdman suspends, and raises reduction on these reasons : *1mo*, The decret of cognition was in absence as to him, and yet was sustained as *probatio probata* against him, without production of the instrument, or examining of the witnesses. *2do*, It was null, in as far as it proceeded on a probation by witnesses, after prescription, the defunct being more than three years out of his service, before intending of the process.

It was *answered* for the representatives of Borthwick : That the nearest of kin of the drawer were called in the cognition, which was sufficient to constitute the debt against them, and Herdman being cautioner, was liable for them. *2do*, The probation was sufficient, being upon the defunct's acknowledgement of the debt, which was probation enough against him *quandocunque* : and, in fortification of the instrument and testimonies, it is offered to be proven by Herdman's oath, that he himself was present, and heard the defunct's acknowledgement of the debt, and did also take instruments upon it ; so that he can never call the debt in question. *3tio*, If need were, it could also be proven by witnesses, that much more money was furnished than the defunct did acknowledge.

It was *replied* by Herdman : *imo*, The instrument or witnesses cannot be sustained to prove the acknowledgment of a debt, being the emission of words, which is not probable by witnesses ; neither is it competent, after the years of prescription, to prove furnishing by witnesses : *2do*, Though Herdman should acknowledge he was present, and likewise that he took instruments, that cannot oblige him : for, *imo*, The instrument he took was only, that the defunct's means might not be conveyed in prejudice of his relief, and he may, and does pass from that instrument : *2do*, Whatever his presence, when the defunct acknowledged the debt, might operate, if he did represent the defunct as being *eadem persona* with him, yet being a cautioner, his presence signifies nothing ; because the representatives of the defunct, who are principals, are free by prescription, and no pretended acknowledgement of the debt, in presence of notary, witnesses, and cautioner, will establish the debt against the heirs of the principal ; and consequently the cautioner, who can have no relief, is free.

' THE LORDS found the defunct's acknowledgement of the debt not probable by witnesses, and that the probation could not be fortified or supplied by Herdman the cautioner's oath, that he was present when the debt was acknowledged, in respect he was a cautioner, and could have no relief against the heirs of the principal, if he should acknowledge.'

Fol. Dic. v. 1. p. 125. Dalrymple, No 17. p. 20.

1728. February 8. SIR HARRY INNES *against* COMMISSIONERS OF SUPPLY.

ONE being chosen collector of supply, gave bond with his cautioner to the commissioners, obliging them to make just count, reckoning, &c. ; the principal becoming bankrupt, the cautioner insisted in a reduction of the bond, upon this head, that it was null as to the principal debtor, there being no witnesses designed to his subscription, and therefore not binding as to him the cautioner, which the LORDS sustained ; notwithstanding that the principal having acted as collector, and uplifted, was truly bound to account for his intrusions. See WRIT.

Fol. Dic. v. 1. p. 124.

* * See Campbell *against* Campbell, Gilmour, p. 87. *voce* WRIT.

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