

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 intromissions. See WRIT.

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

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

No 12.

No 13.