No 30.
expenses due by a forfeited person; yet the cautioner for such a person was found liable to the creditor for expense of diligence.

The estate of Balmerino was afterwards forfeited to the Crown.

Hugh M'Leod entered a claim in terms of the vesting act; which was sustained to the extent of the principal sum and annualrents only, in regard no expenses were considered as due by the Crown in terms of that act.

Hugh M'Leod brought an action against Henry Allan, for the expense he had laid out in the Court of Session for ascertaining his claim, and afterwards in Exchequer, at receiving payment, amounting to L. 16 : 6s.

Henry Allan objected to this claim, and *argued*, That he was only cautioner for Lord Balmerino, as was proved by a bond of relief; that the expenses claimed are cut off by act of Parliament, and therefore cannot be effectual against him; for if he should be decerned to pay them to the pursuer, he would have relief against the Crown, having duly entered his claim for securing that relief; and therefore the judgment of the Court, upon Hugh M'Leod's claim, finding him not entitled to expenses from the Crown, must be considered as a judgment, finding also that he can have no claim against the cautioner.

Answered, Although expenses were refused upon M'Leod's claim, it does not follow that they will be refused to Allan, when he claims upon his relief; for that in a former case, of a debt paid by Allan to Ross of Culrossie, it was found, That Allan was entitled to relief in terms of his claim, so far as he had already paid, or should afterwards, upon distress, as cautioner, be obliged to pay. At any rate, it was optional for the pursuer to have at first demanded his debt from Allan instead of the Crown; in which case, the expense now claimed must have been laid out by Allan, in order to recover his relief out of the forfeited estate; and it cannot vary the case, that, out of favour to the defender, he first endeavoured to recover the debt from the Crown, as in place of the principal debtor.

'THE LORDS found Henry Allan liable for the sum claimed. *See* FORFEITURE.

Act. *Swinton.* Alt. *Rae.*

W. Johnston. *Fol. Dic. v.* 3. *p.* 116. *Fac. Col. No* 17. *p.* 28.

No 31.
A bond granted by two cautioners having been given up and cancelled, upon an erroneous idea that the obligation of the debtor had been fully implemented,

1788. *November* 16.

PATRICK RIGG and Others, *against* GEORGE PATERSON and CHARLES BELL.

RIGG, and the other heritors in the parish of Cupar of Fife, having employed a person to rebuild the parish church, Paterson and Bell granted a bond, obliging themselves, as cautioners, that the work should be properly executed.

When the building was finished, it was examined by two tradesmen appointed by the heritors, and they having declared their opinion that the builder had fulfilled the conditions of his bargain; the heritors, after making payment to

No 31.
it was found that the cautioners were nevertheless liable.

to him of a small balance then due, gave up the bond to the cautioners, by whom it was cancelled.

It soon appeared, however, that the report of the two tradesmen was exceedingly erroneous, the walls of the church, from an improper construction of the roof, being in imminent danger of falling asunder. The builder himself having become insolvent, Rigg, and the other heritors, brought an action against the cautioners, who, in defence,

Pleaded: A cautionary engagement in the law of Scotland is merely *literarum obligatio*, which derives its whole efficacy from the subscription of the cautioner. If, therefore, he has not subscribed at all, or if his subscription has not been accompanied with all the statutable forms, this circumstance, though originating in mere inattention, will be fatal to the obligation. In the same manner, if a cautionary bond, however regularly executed, has been cancelled with the deliberate consent of the creditor, it cannot be made the foundation of any effectual action; and this, agreeably to the rule, *Quod unumquodque eodem modo dissolvitur quo colligatum est.* It is expedient, that cautionary obligations should be confined within the narrowest bounds, otherwise they would be attended with such danger, as would altogether preclude their use. Hence a cautioner having subscribed a bond of corroboration, which, owing to the inaccuracy of the writer, contained no obligation for re-payment of the sum lent, was found to be free. And, in a later case, where the manager of a banking company had been induced, in consequence of an erroneous statement of accounts, to give up a bond signed by two persons as cautioners in a cash-credit, it was solemnly decided, that although it was still competent to sue the principal debtor, no action could be sustained against the cautioners; 2d June 1749, Colt *contra* Angus, Kilkerran, p. 612. *voce* WRIT; January 1784, George Home *contra* Archibald Malcolm and Thomas Stodhart, (not reported.)

Answered: In the constitution of a cautionary obligation, it seems to be established in practice, that nothing less than a written instrument, deliberately and formally executed, can be admitted. But after it is once properly constituted, this agreement must undoubtedly subsist, like every other, until it has been fulfilled by specific performance, or until it has been done away by another agreement, to which no objection, arising from the fraud or error of one or other of the contracting parties, can be stated. If a bond granted by a cautioner has been by any accident destroyed, it will not be said, that it may not be restored in an ordinary action for proving the tenor. And in the present case, as the cautioners could not have been allowed to avail themselves of their own fraud, in getting up their bond before the work was properly executed, no reason can be given, why they should be permitted, for the same purpose, to avail themselves of the fraud or fault of another. The decisions quoted do not support a contrary doctrine. In that of Colt *contra* Angus, there was an essential defect in the original agreement; and in the other, which has not been collected, some peculiarity must have occurred, which made room for an exception from the ge-

No 31.

neral rule; 5th February 1703, Gordon *contra* The Heirs of Johnston of Polton; Fountainhall, v. 2. p. 178. *voce* Presumption.

It was further *contended* for the defenders, That, at least to the extent of the sums paid to the builder, after the erroneous report of the tradesmen appointed by the heritors, the claim should be disallowed. This circumstance, however, had no weight with the Court, no precaution of this sort having been stipulated in the bond granted by the cautioners.

'The Lords found the cautioners liable.'

Reporter, *Lord Dreghorn.* Act. *Blair.* Alt. *Wight.* Clerk, *Gordon.*

Craigie. *Fol. Dic. v. 3. p. 119. Fac. Col. No 44. p. 74.*

1790. *November* 18.

No 32.
A cautionary obligation must be limited strictly to the terms in which it was expressed, though the meaning of the parties may appear to extend further.

The University of Glasgow, *against* The Earl of Selkirk, and Others.

The University of Glasgow, in 1745, appointed a factor over the estates belonging to it; and, on this occasion, a contract was executed between the University and the factor, to which, in the character of cautioners for him, the Earl of Selkirk, William Miller, and Alexander Stirling were parties.

In this contract, the subjects of the factory were specially enumerated and described, and particularly the following: 'All and sundry the fruits, rents, 'teind-duties, casualties, and emoluments, real or casual, belonging to the 'Archbishoprick of Glasgow, which the said University has been in use to re-'ceive formerly, and has right to uplift and receive, *by virtue of a lease granted* '*by the Crown, to endure for nineteen years after Whitsunday* 1736:' Which rents and emoluments the factor was empowered to levy 'for the crop and year of 'God 1745, and in time coming thereafter, *ay and until these presents be recalled,* 'by a writ under the hands of the principal and professors of the University.'

On the expiration of this lease in 1755, a new one was obtained; and for many years afterwards the factor continued in the management.

At length, upon his resignation, and a final settlement of his accounts, it appearing, that during the period posterior to the expiration of the above-mentioned lease, there was a considerable deficiency as to those rents in particular, the University raised an action against Lord Selkirk and the heirs of the other cautioners, for payment of that sum; in defence against which, they

Pleaded: A particular tack having been referred to in the contract, the cautioners were not liable for intromissions subsequent to its expiration; since obligations of that sort ought to be strictly limited by the terms in which they are conceived.

Although of deeds of settlement *mortis causa*, or of *bonæ fidei* contracts where mutual value is given, a latitude of interpretation may be allowed, conformable to the will of the granter, when clearly discovered, though not fully