1629. *December* 4. L. COCKPUIL *against* JOHNSTON.

No 43.
A principal is bound to relieve his cautioner of all consequences of his obligation, though not expressed in the obligation of relief.

THE principal is found obliged to pay his cautioner, who was distrest, and paid for him the principal sum, and all the annualrents since the term of his payment, albeit the bond bore only (the same being only moveable), 'That the 'principal bound him to relieve his cautioner of the premisses in the bond,' which was only principal sum and penalty, and that it did not relieve him of all cost, skaith, damage, and expenses, which the cautioner might incur by his becoming cautioner.

Act. *Hope et Nicolson.* Alt. *Stuart.* Clerk, *Hay.*

Fol. Dic. v. 1 *p.* 127. *Durie, p.* 473.

1630. *March* 19. LAIRD of LUNDIE *against* EARL of ARGYLE.

No 44.
A cautioner, who was denounced for the debt of his principal, and whose escheat consequently fell, was not found entitled to relief of this, although the obligation of relief was expressed in the most ample terms.

ALTHOUGH the bond of relief imports that the cautioner should be relieved of all cost, skaith, and damage, that he shall sustain through such caution, yet the Lords' statute interprets that the same clause should not infer but payment of the principal sum and annualrent; so, although a cautioner be denounced to the horn, and his escheat fall by horning, or his lands be apprised for the debt, yet the principal will be no farther obliged but for payment of the principal sum and annualrent; and yet, in the action pursued by the Laird of Lundie, cautioner to Robert Arnot for the Earl of Argyle, for which Robert Arnot comprises the Laird of Lundie's lands for the principal sum, penalty, and annualrent, and sheriff-fee, when Lundie seeks his relief of all that Robert Arnot had given his discharges upon, the LORDS found the Earl of Argyle should refund to him, all that he had justly debursed to Robert Arnot on his own oath.

Fol. Dic. v. 1. *p.* 127. *Auchinleck, MS. p.* 25.

No 45.
A cautioner, against whom sentence had past, and who had thereupon paid, was found to have no relief against the principal, because the principal, who had a good plea, was not called, nor the distress intimated to him.

1632. *December* 19. MAXWEL of GRUBTON *against* E. NITHSDALE.

THE deceast Lord Herreis being bound as cautioner for umquhile Lo. Maxwel in *anno* 1587, that he should depart out of the country, and not to return without the King's license, under the pain of 5000 merks; the said Lord Herreis is convened before the King, being then present, and before the Lords of Secret Council, to hear him decerned to pay the sum, because the principal had contravened, by returning without license; whereupon decreet being given, and he charged to pay, thereafter he made payment, and reported the thesaurer's discharge; and the donatar to the Lo. Herreis escheat, after declarator thereon, assigning and disponing his right of relief against the Lo. Maxwel, and also the

No 45.

right of a sum of other 5000 merks, falling under the same escheat, which was conditioned to be paid to that same Lord Herreis, by the Lord Maxwel, in name of tocher to ——— Maxwel of Grubton, who pursues this Earl as heir to the person obliged to the Lord Herreis's rebel, both for the penalty paid, and whereof the Lo. Maxwel was obliged to relieve him, and also for the tocher-good: The parties compearing and defending, the LORDS found, that the pursuer, as having right by progress *ut supra*, nor the Lo. Herries himself, if he were pursuing, and living, could not seek this relief, notwithstanding of the sentence foresaid by the King and Secret Council, and albeit he had paid conform to the sentence, and albeit he had been charged before he had paid, because the principal party, viz. the Lo. Maxwell, who was alleged to have contravened and come against his bond, and thereby to have incurred the penalty, was not called to that sentence of the Secret Council, but the cautioner only, against whom that fact of contravening ought most properly to have been tried; neither did the cautioner, who was convened, decerned, and distressed, ever intimate to the principal that pursuit, or sentence, or charge given to him, at any time before his alleged payment of the sum, as he ought to have done, and which, if he had done, the principal now proponed a defence, which was then competent before the payment made by his cautioner, which would have relieved both principal and cautioner, viz. Compensation of a greater debt owing by the King's Majesty, and which was confessed by the King, in presence of the Lords of Secret Council also, and there acknowledged to be true, and done before the alleged payment made by the Lo. Herries as cautioner; in respect whereof the Lords assoilzied from the pursuit, and found the cautioner, for omitting the intimation of the said distress before his payment, could not seek relief against his principal, who was not cited to that pursuit, and who had the foresaid defence to liberate himself and his cautioner, if that had been notified to him; and as for the other part of the summons, anent the tocher-good, the Lords found this exception relevant, viz. That it was subscribed by the Lo. Maxwel, being then minor, and having curators, without their consents; neither was it respected what the pursuer *replied*, that albeit he was minor, yet the obligement was good, being done in a contract of marriage with his sister, and upon that condition of tocher the marriage followed, and was perfected, and bairns procreate betwixt them now living, and the sister renounced all bairns part of gear competent to her therefor; so that, after 40 or 45 years since the contract, it was not time now to allege this nullity, the sister having discharged more than she received, and which could not now be conveniently tried, all the parties being dead, so that the probation of that which was due for her bairns part of gear discharged by her is now perished; notwithstanding whereof the nullity was sustained; for *frater non tenetur dotare sororem L. (Cum plures)* 12. § *(Cum Tutor.)* 3 *ff. De administrat. & periculo Tutorum. tit.* 7. *lib.* 26. *et ibi Glossa, sed Bartolus contra;* the rather this was done, because the parties were married

a year or more before the contract, and the Lords reponed also the sister to that discharge, given of her bairns part of gear contained in the contract done, in respect of the condition of the tocher, which was found null, as said is. *See* MINOR. No 45.

Act. *Stuart et Dunlop.* Alt. *Nicolson et Cunninghame.* Clerk, *Scot.*
Fol. Dic. v. 1. *p.* 127. *Durie, p.* 660.

1633. *July* 19. KIRKWOOD *against* FERGUSON.

No 46.
A cautioner who had received from the principal debtor a right to intromit at his own hand for his relief, afterwards pursued for spuilzie, was assoilzied.

MARGARET KIRKWOOD pursues Robert Ferguson for spuilzie of goods out of her house, committed in February; and the defender excepting upon a disposition preceding, made by the pursuer to him of these goods, for relief of his cautionry, wherein he was bound for the pursuer, in which disposition she gave him power to intromit with the goods at his own hands, and renounced all action of spulzie, and all other action competent to her therefor; by virtue whereof he intromitted, and so alleged he ought to be free of spuilzie; the exception was repelled, and the action sustained; because the sum wherefore he was cautioner for the pursuer was not payable till Whitsunday, and the spuilzie was committed in February before that time, so that neither the term being come, nor he distrest any ways therefor by the creditor, that disposition could not sustain his intromission had at that time foresaid; but the LORDS reserved the modification to themselves after probation.

December 14.—ONE Kirkwood pursuing Ferguson in Galloway for spuilzie of her goods out of her house in Glasgow; the defender excepting that he was cautioner for the pursuer in a sum owing by her to her creditors, for his relief whereof the pursuer had disponed to him these goods; in which disposition she gave him power, for his relief, to intromit with these goods libelled at his own hand, without all danger of spulzie, or any action to follow thereon against him, which she renounced; according whereto, fearing his relief to be uncertain, and seeing that the pursuer disponed some of the said goods, (whereby his relief might be frustrate,) he intromitted, and he was content being relieved to restore all again with which he intromitted; this exception was found relevant by the LORDS, to liberate the defender from all action of spuilzie, and to assoilzie him therefrom simpliciter, notwithstanding of the reply, that the pursuer offered to prove, that any alleged disposition that she had made of any of the goods, whereupon the defender excepted, was only of a brewing caldron which she had only set out to one for hyre, viz. of so much money to be weekly paid therefor, and upon bond to deliver the same again to the pursuer, after the time of hyring convened upon; by the which deed the excipient's case, and the disposition made to him, was no ways prejudged, and he could not allege, nor condescend upon any other of the goods libelled, to have been disponed by her, and this