

S E C T. III.

Nature of the Cautioner's Obligation.

1738. July 20. BANNERMANS *against* BANNERMAN of Elsick.

No 14.

A CAUTIONER in a contract of marriage for the husband, that he shall employ such a sum for the wife in liferent and the children in fee, is bound that the sum shall be employed, re-employed, &c. but not that so much shall be effectual to them against the husband's onerous creditors.

Fol. Dic. v. 3. p. 117. Kilkerran, (CAUTIONER.) No 1. p. 116.

1749. Dec. 6.—1750. Feb. 6.

MAGDALEN SCOTT, and her HUSBAND, *against* DAME ELISABETH CARNEGIE, widow of Sir James Nicolson of that ilk.

No 15.

The cautioner in a testament, confirmed in name of an infant by his father as administrator, was found to be bound for the father, to the infant.

SIR JOHN LAUDER, Lord Fountainhall, in the year 1719, left a sum of money to Magdalen Scott his infant grand-child, daughter to Thomas Scott of Milleny; and Sir John dying in 1722, while his said grand-child was still an infant, Thomas Scott her father confirmed her executrix *qua* creditrix to her grandfather; and as usual he, as upgiver, was authorised to intromit with, receive and dispose upon the subject, grant discharges thereof, and if need be, to pursue, &c.

As this confirmation could not be expedite without caution, Sir James Nicolson enacted himself as cautioner, whereby he became bound and obliged that the sum should be made free and furthcoming to all parties having interest thereto as law will.

In the action pursued by the said Magdalen Scott and her husband, before the Commissaries of Edinburgh, against the Lady Nicolson, as representing her husband Sir James, the cautioner in the confirmed testament, for payment of the money wherewith her father had intromitted; it was for her *alleged*, that as the pursuer herself was the executrix confirmed, Sir James Nicolson was cautioner for her and her administrator in law, to all other persons interested in the defunct's estate confirmed; but that he was not cautioner to the pursuer for her father and administrator; in so much, that if Sir James the cautioner had been distressed on account of this cautionary at the instance of any third party having interest in the subject confirmed, action of relief would have been competent to him against the said Magdalen the executrix.