No. 18. 1749, June 2. BARBARA ANGUS *against* DR COULT.

A BOND of cautionry, wherein by oversight, in the obligatory clause, the sum was neglected to be inserted, though mentioned in the preamble,—yet we found the cautioner bound. Altered 2d June, and the cautioner found not bound. 2d July adhered.

No. 19. 1751, July 26. JAMES GIBB *against* WALKER and SIMPSON.

GIBB, in bargaining for the sale of some lambs to Walker, refused to sell without caution for the price, and Walker said that Simpson was to be concerned with him in the bargain, and would be his paymaster; and Gibb having applied to Simpson, he answered, if John Walker buy your lambs, give them to him, and I will see you paid for them,—and thereupon Gibb sold and delivered the lambs to Walker. Gibb sued both in the Sheriff-Court for the price, and proved the above communing with Simpson by witnesses, before Simpson appeared in the cause;—and then he compeared and objected that such a proof of a cautionry obligation was not competent by witnesses,—and the Sheriff found it not proveable by witnesses. Gibb presented an advocation, which Shewalton refused. But upon a reclaiming bill, we all differed from him, (agreeably to a former decision we gave in the sale of sheep at the house in the muir to a principal and cautioner, but I have forgot the parties and year, though I think I have it marked,) and thought that as this was part of a bargain for moveables, it was proveable by witnesses, and therefore without any answer remitted it back to him to pass the bill.

No. 20. 1751, Nov. 29. MAGDALEN SCOTT *against* ELIZ. NICHOLSON.

MILLENY, administrator to his daughter, confirmed her and himself administrator in a bond of 2000 merks, and found Sir James Nicholson cautioner, and Milleny uplifted the money,—and now Magdalen Scott sues Sir James's relict and executrix as representing him the cautioner, to pay the money. The defence was, that Sir James was cautioner for the pursuer as executrix, and the father only as her administrator, and that the executrix the pursuer, is herself bound to relieve him. Answered, He was cautioner indeed for the pursuer to all strangers, as far as she should intromit, and she was bound to relieve him; but he was also cautioner to her for her father, whereof he was bound alone to relieve him, and quoted Hope's Minor Practics, and so we unanimously found. 6th February 1750 The Lords adhered.—*Renit.* Justice-Clerk.—(6th December 1749.)

Lady Nicholson pleaded some other defences against the bond mentioned of the above date; 1st, That though her husband is bound cautioner for the father to his infant daughter, as well as for her to all others having interest, yet if the money was uplifted by her only with his consent, the cautioner is not liable to her, and therefore the pursuer must prove that it was uplifted by the father during her pupillarity, which lasted but a few months after confirmation. Answered, The upgiver of the testament, and his cautioner, must either produce the bond, or prove it paid to her. A second defence, That the daughter in 1728 had accepted a bond of provision by her father of 2500 merks, in full of all portion natural, and of all she could claim of him in any manner of way. Answered, That could not be meant in payment of this debt, because it was truly less than the

debt; 2dly, By an heir of a strict entail pursuant to a faculty to give bairns provisions to a limited extent; 3dly, The general clause can only mean claims of the same kind with those mentioned, viz. portion natural, &c. Third defence, Supposing the father liable as tutor of law, yet the action against him prescribed in ten years after the daughter's majority. Answered, That prescription only competent to such tutors as are bound to make inventories. 2dly, The father liable *super alio modo* as upgiver of the testament. The Lords thought there was some difficulty in the first and third defences, and therefore did not decide thereon, but unanimously sustained the second and assoilzied.—(29th November 1751.)

No. 21. 1752, Jan. 7. COPLAND *against* IRVINE.

IN the competition of the creditors of John Rae, an adjudication against him on a bond, wherein he was bound only as cautioner, though led 20 years after the date of the bond, was sustained for all that fell due in seven years after the date of the bond, in respect of a horning executed against him within the seven years, though never denounced or otherwise followed out, and Kilkerran's interlocutor adhered to *nem. con.*

No. 22. 1752, June 4. CAMPBELL *against* M'LACHLAN.

CAMPBELL threatening to detain the stocking and effects of one of his tenants that was removing, for arrears of rent and other debts, M'Lauchlan, a friend of the tenant's wrote to Campbell, and engaged himself for the tenant for whatever they should agree, and thereupon Campbell let the tenant's goods go. In a process against M'Lauchlan, wherein a proof before answer was brought by witnesses, that he subscribed the letter, because it was not holograph and he denied that that was the letter he subscribed, though he owned the signing a letter written by the same person engaging for the arrears of rent, but not for the other debts,—we found that mean of proof competent, because we considered it as a bargain for moveables which is proveable by witnesses.—*Sed renit.* Kilkerran, Kames, *et aliis*;—and we repelled the objection that the tenant had come to no agreement with his creditor, for that we considered as only meaning the settling of what was justly due, which was *pars judicis*; but in this the President alone was against the interlocutor.

No. 23. 1753, Jan. 17. ELIZABETH M'KENZIE *against* M'KENZIE.

MARTIN and Blackhill were debtors in a bond of L.100 sterling, and sometime after a bond of corroboration was granted by them two and Sir George M'Kenzie of Granville, and he got the debt to pay, and took assignation;—and now his relict, in his right, sues relief against Blackhill, who produced a bond of relief by Martin of the original bond, and insisted on being liable in relief only *pro rata* agreeably to the decisions of Maxwell of Orchardton and Murray of Broughton, and George Lockhart against Lord Semple. Answered, In these cases the new obligant acceded plainly on the faith of the principal debtor. In the first case, Sir Godfrey M'Culloch alone was bound with Murray of Broughton in the corroboration; and in the other Mr Lockhart was alone bound in the