No. 70.

but not as to the interest of third parties or cautioners. Neither could the apprentice, by renouncing the objection competent to him, create an obligation on the cautioner, which did not before subsist. And, *2tio*, The suspender is bound expressly as cautioner: He signs the indenture as cautioner, and he is charged as such to satisfy the obligations contained in the indenture: His obligation, therefore, is merely accessory, and must fall with the principal; and supposing he had contracted as a principal, yet in mutual contracts all parties must be bound, or else all are free.

Observed on the Bench, Objections on the heads of force or fraud may be properly taken off by acts of homologation; but where deeds labour under a legal nullity, it is contrary to the practice of all other nations, to sustain payments as acts of homologation sufficient to support such deeds.

2do, If a deed or obligation for upwards of £100 Scots is restricted in its effect to that sum, it may be so far sustained, though signed only by one notary.

"The Lords remitted the cause to the Lord Ordinary, to modify damages to the master, not exceeding £100 Scots.

Act. *Macintosh*. Alt. *Sir Dav. Dalrymple*.

D. R. *Fac. Coll. No.* 113. *p.* 202.

1760. *June* 25.

JAMES and MARGARET FARMERS, *against* AGNES MYLES and AGNES ANNAN.

No. 71.
Objection sustained to a testament signed by notaries, That the witnesses did not hear the defunct give orders for signing, nor saw her touch the pen.

Agnes Farmer, the sister of James and Margaret Farmers, executed a testament in favour of Agnes Myles and Agnes Annan, who were her grandnieces. This testament was signed by two notaries for the defunct, and was executed recently before her death.

It was objected against this testament by the heirs *ab intestato*, That the instrumentary witnesses did not hear the defunct give warrant to notaries, to sign, nor did they see her touch the pen: That the subjects conveyed by the testament amounted to so considerable a sum, as to make this a deed of importance, and to subject it to the regulations of the act 1579, which, as to such deeds, requires two notaries and four witnesses to attest the execution: That the execution of this testament was inconsistent with the express words of the act 5. 1681, by which it is declared, "That no witness shall subscribe as witness to any party's subscription, unless he then knew that party, and saw him subscribe, or saw or heard him give warrant to a notary or notaries to subscribe for him, and, in evidence thereof, touch the notary's pen, or that the party did at the time acknowledge his subscription; otherwise the said witnesses shall be reputed, and punished, as accessory to forgery."

It was proved, That one of the notaries read over the disposition, and then turned about to the bed-side where Agnes Farmer was lying, and was heard by the wit-

No. 71. nesses either to say to her, I know you cannot write; or to ask her, If she could write? But one of the instrumentary witnesses deposed, " That he did not hear her make an answer, or declare to them, that she could not write; nor did he hear any orders given to the notary to subscribe for her; nor did he see her touch the pen; nor did he hear her speak a single word that day; and she might have been asleep or awake for him: That he saw the two notaries sign the disposition, which he believed they were signing in her name; but whether by her order, he knows not; and he thought there was nothing incumbent on him but to put his name to the paper. Depones, He did not see a pen in the hand of either of the notaries when they went to the bed-side; nor did he see either of them have a pen, till they were signing at the table."

Another instrumentary witness deponed, " That he heard no answer given, nor did he observe a pen in the notary's hand: That he did not hear the defunct declare to the notaries, that she could not write, or give them any orders to subscribe for her, or touch the pen."

A third instrumentary witness deponed, " That he did not hear her make any answer, or declare she could not write, or give him any orders to sign for her; and that he imagined there was no more incumbent on him, than to put his name to the paper."

Answered: The deed in this case was extremely rational; and it is proved, that the defunct expressed her intention of settling her affairs in this manner some time before her death. The deed was read over in her presence; and she is proved to have had at that time, though weak, her memory and judgment entire. The two notaries have deposed, " That after reading over the deed to her with an audible voice, they asked her, the one after the other, also with an audible voice, so as the witnesses might hear, If the deed was written according to her mind? and, If she was pleased with it? To which she answered, Yes, yes: That they then asked her, If she could write her name? To which she answered, No: That they then said to her audibly, so as the witnesses might hear, You give us then commission, before these witnesses, to sign for you? and having a pen, reached it over to her; when she put her hand forth from under the cloaths, and took hold of it."——And the fourth instrumentary witness deposed, That he heard the question put to her by the notary, If he should sign for her? and saw her take the pen from the one notary, and deliver it to the other; though, being at a distance from the bed, he did not hear her answer."

Another witness also, who had been sent for to be an instrumentary witness, but did not arrive till after the deed had been read, and one of the notaries had obtained his authority, deposed expressly, to his having heard the other notary ask authority to sign for her, and that she answered, Yea, yea, or Yes, yes. And even the three instrumentary witnesses referred to by the pursuer have deposed, That they heard the disposition read over, and heard the notaries ask the defunct, Whether or not she could write? It is impossible, therefore, to doubt, that her answer to this question was agreeable to what the notaries have deposed. And it

is further proved, That the defunct, some days after the testament was executed, delivered it to the father of Agnes Myles, and recommended it to him to take care of it. No. 71.

In point of law, the evidence of the instrumentary witnesses, improbatory of the deed, may certainly be redargued by contrary evidence. For if, upon any occasion, the instrumentary witnesses should upon oath deny their having seen the party subscribe a deed, or heard him acknowledge his subscription, the verity of the deed might still be astructed by collateral proofs; as was found in a late case, Isabel Rolland against John Rolland maltster in Culross, though that case never came to a final decision.

Observed on the Bench: That in this case *non deficit jus sed probatio.*—In the case of notaries, the greatest strictness ought to be oberved, and they ought not to be allowed to dispense with any part of the strict forms.

"The Lords found, That the testament was not regularly executed; and therefore reduced the same; and decerned."

Act. *Johnstone, Ferguson.* Alt. *Lockhart.*

J. C. *Fac. Coll. No. 222. p. 409.*

1765. *June* 21. GORDON *against* MURRAY.

No. 72.

Objected to the conveyance of a ground of debt in an adjudication, that though it was subscribed by two notaries, there were only three subscribing witnesses. The Lords sustained the objection in so far as the debt conveyed exceeded the sum of £100 Scots.

Fac. Coll.

*** This case is No. 28. p. 16817.

1767. *July* 1.

ELIZABETH and MARTHA ROLLANDS *against* RICHARD ROLLAND.

No. 73.
A deed signed by two notaries, but at different places, and before different witnesses, found not valid, nor supportable by a proof of homologation.

George Rolland having purchased some heritable subjects, took the disposition thereof "to himself and his wife in conjunct fee and life-rent, and to the heirs lawfully procreated, or to be procreated, betwixt them, in fee." After his death, Richard Rolland, his eldest son, obtained a charter of confirmation of the disposition, and a precept of *clare* from the superior, and was infeft, and died in possession of the heritage in the year 1760.

Richard Rolland, his son, succeeded to him, and, in right of his apparency, continued the possession, and uplifted the rents until the year 1764, when the tenants having refused to make any further payments, he brought an action against them.