

Restitution of the principal Debtor is an Event which the Creditor did foresee and guard against by securing his Debt with the additional Obligation of a Surety, who on his Part could not be ignorant of the consequence of his Engagement. But where the Principal Obligation is quite null in it self, being granted by a Fool, or not subscribed by the principal Debtor, ~~the~~ *the* Stat. Lib. 1. Tit. 17. §. 11. or procured by Force or Violence, *Cui labes realis intervi* in January 1695 L. Kallon contra E. Abberbeck. The where a Bond is granted by one as Principal and another as Cautioner, the Cautioner subscribing free, if the Principal ~~under~~ *under* be not yet a Bond of Cautioner in a Suspension obliging both Principal ^{and Cautioner} to pay what shall be decreed, but only the Cautioner perform and the Principal to relieve him, was sustained to oblige the Cautioner tho' not signed by the Principal 6 January 1681 Kime contra Kime. And in his proper Cautioner is not become obliged with the Principal, but for the Principal, that he shall pay what shall be decreed one may become liable for another either in Civil or Criminal Matters, but none can bail Criminal except to a Civil Effect in *Judicio sisti*, that they shall appear under a *mandatum* l. 6. §. 5. l. 7. §. ult. *pro Fidejuss.* For seeing none can demand *immoratorium* l. 13. pr. ff. de L. April. One Man cannot give security for another *Peccata sua tenent auctores* l. 22. *de Penis.* But there are some lawful Engagements in which it would not be decent to give security, thus it would be contrary to good Manners for an Empire to give security that he will pronounce Sentence in the Matter referred to him, or any uprightly; or for a Partner to give security to his Partner, that he will not quit him *Las Lias Civiles* l. 7. ff. de *Off. p.* We may give security not only a present Obligation or for one that is already contracted, but also for one yet to be contracted: As if he who hereafter a Business for which he may be in need of Money, gives before hand the Security of a Surety to the Debtor who is to lend him the Money, the said Surety obliging himself before hand for the Money that is to be lent l. 6. §. ult. l. 50. ff. de *Fidejuss.* and this might happen for Example, he who is to be Surety should have Affairs to call him away before the Money is actually paid to the Borrower, or in other Cases and for such Cases as the Warrant of a Sale or some other Engagement.

One may become Surety without an Order from the Person for whom he binds himself, and even without his Knowledge l. 30 ff. de *Fidejuss.* l. 20. §. 1. ff. *mandati.* For on the Part of the Creditor it is just, that he be at Liberty to take his Security independently of the Will of his Debtor: And as to the Surety himself, he may do this good Office to his absent Friend, in the same Manner as one may take Care of the Affairs of an absent Person. In *Quisquis* before the Admiral Court or others against Strangers, Seafaring Men or the like, who might by going out of the Country do great ill Effect of any Sentence; the Defendants are summarily attached, till they find ~~the~~ Bail sometimes *judicio sisti* for their Appearance at the Diets of Process; sometimes *judicatum solvi*, to pay the Condemnation or satisfy what shall be decreed and sometimes both *judicio sisti* and *judicatum solvi*, to which Caution to answer as Law will (anciently termed a Bargh upon a Weir of Law *Stat. 16. Car. 2. c. 11.*) is equivalent, in that the Parties shall do all that Law requires in the present Case *16. Car. 2. c. 11.*

Novemb. 1636 Stewart contra geds *Stat. Lib. 1. Tit. 17. §. 10.* The Intendment of such Cautioner is not to make the Defender and his Cautioner liable to answer in their proper Jurisdiction, but both subject them to the Jurisdiction of the Court where the Surety is given 28 January 1633 Stevingen contra Law a Bond of Caution *judicio sisti et judicatum solvi* obliges the grantor only to pay what shall be decreed against the Principal himself, ~~and not to pay what might be decreed against the Principal's Representatives, where he dies before Sentence and the Action is transferred against them~~ 20 January 1681 Hodge contra May. With as the finding of Caution *judicio sisti et judicatum solvi* is only customary before Superior Judges, whose Sentence would be unprofitable as not able to receive Execution within their own Jurisdiction without such Caution, especially where the Debtor was neither Lord nor peer there *Stat. 16. Car. 2. c. 11.* Cautioner or Cautioner enacting himself *judicio sisti et judicatum solvi* in the Court of Territoriality, is not bound to be tried by the Jurisdiction of his Cause upon any other ground, than that of Jurisdiction of the Judge. But a Cautioner only *judicio sisti* might be ~~tried~~ *tried* by a Jurisdiction upon any ground *16. Car. 2. c. 11.* Stewart contra Geds. Cautioner or Law is bound by putting the Principal *Stat. 16. Car. 2. c. 11.* in Prison, and proceeding there upon to be free, tho' he is not present himself. A Cautioner obliges to present the Debtor at all the Diets of Process and to pay what shall be decreed against him, if he did not within *Stat. 16. Car. 2. c. 11.* within the Terms of Law *Stat. 16. Car. 2. c. 11.* was free by producing him personally, and taking his *Stat. 16. Car. 2. c. 11.* thereupon, albeit at the same time he is only presented in Jurisdiction and was not incarcerated: Seeing the Judge might have committed him to Prison tho' he gave new Surety, notwithstanding the Detention *Stat. 16. Car. 2. c. 11.* sitting Process, as had he been incarcerated it might for not finding Bail, the Detention would not have liberated him 28 Feb. 1666 *contra* *Stat. 16. Car. 2. c. 11.*

A Cautioner with or without Security take either a Clause in the Bond obliging the Principal Party to relieve him if, it cost *Stat. 16. Car. 2. c. 11.* more Expence he should happen to sustain thro' his becoming Cautioner; or yet from the Principal a Bond of Relief or Indemnity apart. But a Cautioner taking a Bond from the Principal for a Sum of Money as a premium or Reward for his becoming Cautioner, is contra *Stat. 16. Car. 2. c. 11.* *bonos mores*, and such a Bond is null 24 January 1711 Ring contra Rex. Because Suretyship is not the Subject of Commerce, but a friendly Office which Law hath taken Care of by Relief in the Event of Distress, and to ask more is plain Extortion.

This far of the Nature of the Obligation of Sureties, and the Manner in which it is contracted; I shall in the next Place explain the Several Engagements of the Surety to the Creditor, of the Debtor towards his Surety, and of the Surety towards him; and the Engagement of Sureties to one another. The Sureties for Officers and other Persons employed in the Receipt of the publick Money, are answerable for what they run short in