

A Creditor who consents to the Alienation of the Thing given him in
his Mortgage if he does not expressly refer to it l. 158 ff. de reg. jur. l. 2
S. 1. l. 7. ff. Quib. mod. pign. vel hyp. solv.

Tit. 3.
Of Cautionry or Suretyship.

Cautionry or Suretyship, is an Obligation to pay a Sum or perform
a Deed for another bound jointly for the same, whose Obligation at no time
suffices. The Person so oblig'd is in the Civil Law termed Fidejussor. A pro-
-missor, Sponsor, and with us is called a Cautioner Bail or Surety. Because the
Creditor following his Faith, doth contract with the Person bindstaker for who is
called the principal Debtor. A Cautioner differs from Expressor, in that the
former stands bound together with the principal Debtor for the Creditor's
greater Security. Whereas the latter discharges the first Debtor and takes the
whole Burden upon himself. Persons oblig'd themselves for others either
to pay a Sum of Money or for other Causes as to perform a Deed or to present a
-drisoner at a Day and Place certainly assign'd who is set at Liberty or put
-in Prison. But the securing bound or Suretyship for one's Appearance or
-coming at a Day assign'd is properly termed Bail. In Latin Bailium
from the French Bailleur to deliver or Mainprise (in Latin Manuipor
from the French Paire the Hand, and pris taken; Because by the Law
the Party restrain'd is deliver'd or taken into the Hands of those that take
themselves for his Appearance, called his Bail, or Mainperners (manuipor
-res). The Law of England makes this Difference betwixt Bail and Ma-
-perners, that the former are Sureties taken by a Person authoriz'd, that
-an Offender who is under Arrest or imprisonment, shall appear at a Day, and
-answer and be justified by Law; Whereas the latter are only Sureties, that in
-Case a Comynal (whether he was arrested or imprisoned or not) does not ap-
-pear, doth forfeit their Recognizances. None being bailed but such as are arrested
-or in Prison; he who is let to Bail is accountable by the Law to be for the Time
-in the Ward & Custody of the Justice for his Faith-coming: Who may there-
-fore seize him if they suspect he will fly, and carry him before a Justice to pre-
-sent him to the Justice, or to be committed in Discharge of the Bail. But a Person
-mainperned, is supposed to go at large and to be at his own Liberty, until
-the Day of his Appearance, under no Possibility of being confin'd by his Ma-
-perners or Justices. So that Mainprise is more large than Bail, every Bail
-being Mainprise, but every Mainprise not being Bail. But the in a proper
-Legal Sense Bail and Mainprise differ; yet they are often us'd promiscuously for the same thing.
When a private Person receives Security, he accepts or rejects as he
thinks good, those who are offer'd to him as Sureties, and he settles his Secur-
-ity in such Manner as he and his Debtor can agree. But when Caution or
-Security is taken in a Court of Justice, it is the Office of the Judge to

accept or reject it according as the Person who offers the Security can shew
that it is sufficient. Which depends on three Qualities, that are to be consider'd
in Justice, according to the Engagements for which they are to be answerable,
the Solvency of the Person, the Faithfulness, and the Valua-
-bility of their Engagement. Les Loix Civiles cc. Tomus 2. l. 1. l. 3. tit. 4.
-sect. 1. Art. 13. These regularly may be surties for others, who can effectually
-oblige themselves l. 2. l. 10. s. 2. ff. de Fidejuss. The Civil Law admits of
-several Exceptions from this Rule: 1st of Women, because of the Frailty
-and Capriciousness of their Sex l. 2. s. 2. ff. de Sententia Confess. Ulla. Solutio,
-that they may not be released from the Wars l. 35. C. de her. in Clergymen,
-because they should not be mix'd in temporal Business Nov. 23 Cap. 6. pp.
-In Italian and England, Soldiers, excepted as an immovable Women are
-allowed to be Justices, but Women cannot oblige themselves for others.
Cautionry may be accessory to any Obligation, but is not altogether null,
-even to that of Justice themselves; For we may take Security for a Surety
-l. 1. l. 2. s. 2. ff. de Fidejuss. taken with us an Allusion to infra Cap. 1022.
The Surety is not effectual against the principal Debtor, except of some Pri-
-vilege by Statute or Custom upon the Account of Minority, or of the being
-clothed with a Habit 20. November 1628 Scham contra Maxam, or by what
-is called l. 2. s. 2. ff. de Fidejuss. the Obligation of a Surety may be less or more so than
-that of the principal Debtor, as he may oblige himself only
-for a part of the Debt, or of some other Engagement l. 9. ff. de Fidejuss. or
-may oblige himself upon some Condition, altho' the Debt be pure and
-simple, or may take a longer Term than that of the principal Obliga-
-tion l. 5. ff. de Fidejuss. out of what Nature must the principal Obligation be
-the Engagement of the Surety can never be greater than that of the prin-
-cipal Debtor. For his Obligation is only an accessory to the other, and if he should
-oblige himself to any Thing more or more considerable than are more Indemnity,
-he would be Surety only for what is contained in the principal Obligation l.
-2. s. 7. l. 10. s. 2. ff. de Fidejuss. And the Obligation for the Surety will not
-be reckoned a part of his Suretyship, but the Cautioner's own propriety,
-if by the Circumstances the Obligation for the Surety ought to succeed
-Les Loix Civiles Tit. Art. 2. But then altho' a Cautioner cannot be bound in
-majus than the principal he may be bound magis. Thus a Cautioner bound
-with the principal as a full Debtor jointly and severally in a Bond for 100 Pounds,
-was found liable for the whole Sum, tho' the principal Party who could not
-write, having subscribed only by one Solary, would be liable for 100 Pounds only,
-and the Cautioner could get no more Relief (Because both were oblig'd for the
-same Sum, tho' their Obligations were not of equal Efficacy 8 July 1680 Johns-
--town contra S. Romane. A creditor having, upon a Discharge of a Debtor
-from the principal Debtor, promis'd never to trouble his Person or Goods for
-what he wanted of his Debt, with express Reservation of Power to distress
-the Cautioner for that Overplus. The Cautioner was found not free thereby, tho'
-the Creditor could not assign to him the Debt for his Relief 10 July 1680
-Leitch contra Parvish. He who has bound himself Surety for a Minor or a
-Prodigal who is interdicted, is not discharged from his Suretyship, by the Restitution
-of the principal Debtor l. 1. l. 2. C. de Fidejuss. minor. Because the