

S E C T. IX.

Attester of a Cautioner in Suspension.

1667. December 17. JAMES PATERSON *against* HOMES.

JAMES PATERSON having charged the Earl of Home, in *anno* 1662, for payment of a sum due by his bond, the Earl suspended, and found one Bruntfield cautioner; and, at the foot of the bond of caution, Home of White-rig attested the cautioner, in these terms, viz. I attest the cautioner to be sufficient; and subscribes the same, which is registrate, with the bond itself, and the extract produced bearing the same. The suspension being discust against the Earl of Home, and the cautioner charged with horning, Paterson pursues the attester subsidiary for payment of the debt. It was *alleged* for the defender absolvitor, because he having but attested the sufficiency of the cautioner, can be holden no further than a witness, and so can only be found liable if his testimony were found false, or that *ex dolo* he had attested a person to be sufficient, not according to his judgment, but either contrary to his knowledge, or without knowledge of his condition, at least his attesting can only oblige him to prove that the cautioner (when he attested him) was holden and repute a person sufficient for the sum, and that he had a visible estate in land, bond, or moveables. The pursuer *answered*, That the attester behoved to be liable to him, because *ejus facto* by the attestation, the suspension was obtained, and the principal being dead, without any to represent him, and the cautioner *insolvendo*, the attester is obliged *de jure* to make up the damage falling out by his deed.

THE LORDS found the allegiance for the attester relevant, viz. that the cautioner was holden and repute sufficient for such a sum at the time of the attest, to be proven, *prout de jure*.

Fol. Dic. v. 1. p. 129. Stair, v. 1. p. 495.

* * * Dirleton reports the same case :

It was found, that the attester of the sufficiency of a cautioner being pursued for the debt, the cautioner being distrest and discust, and not solvent, and the attester having *alleged* that he offered to prove that the cautioner was then, the time he became cautioner, *habitus et reputatus* responsal & *idoneus* as to the debt, the allegiance was relevant, and the attester no further liable.

Dirleton, No 121. p. 50.

No 83.

All the attester was presumed to undertake was, that the cautioner was holden and reputed sufficient; so that if the cautioner thereafter became bankrupt, the attester was not liable.