

books of that jurisdiction and shire, wherein by the bond they were designed then to dwell, where the creditor knew not of their changing their domicile; or if that must always follow them wherever they remove. But the LORDS thought, though the designation in the writ was a presumption they still continued in that place; yet if the contrary was proven, the new domicile was the place where they could only be convened; *nam actor sequitur forum rei, id est, ubi habitat.* See JURISDICTION.

*Fol. Dic. v. 1. p. 129. Fountainball, v. 1. p. 516.*

1704. February 4.

SIR THOMAS KENNEDY against SIR GILBERT ELLIOT of Stobs.

RANKELOR reported Sir Thomas Kennedy *contra* Sir Gilbert Elliot of Stobs.—Sir Thomas being one of the partners with Sir John Cochran, of the poll laid on in 1693, he transacts with Sir Charles Murray of Hadden, who buys his share, and Sir Thomas takes a back-bond from Hadden to relieve him of the tack-duty, and of all cost, skaith, and damage he could incur thereby. There coming to be loss by that tack, Sir Thomas charges Hadden to relieve him in the terms of his back-bond. He suspends, and finds his son William Murray cautioner; but the clerk to the bills refusing him, Sir William Elliot of Stobs, Hadden's son-in-law, attests him; whereupon the suspension being expedite, it was determined against Hadden; and William the cautioner being likewise discussed, he insisted last of all against Sir Gilbert Elliot of Stobs, as heir to his father the attester; who *alleged, imo*, His father's attestation subjoined to the bond of cautionry was null, as wanting writer's name and witnesses:—*2do*, That the attester of a cautioner in a suspension, is no farther bound but to prove that the cautioner was holden and repute solvent at the time, which William Murray the cautioner then was.—THE LORDS, before answer, allowed a conjunct probation, as to the custom of subscribing attestations in the bill-chamber, and the pursuer to prove the cautioner's insolvency at that time, and the defender to prove he was holden and repute solvent. And the LORDS having advised the probation, found it proven to be the general custom, to receive attestations without either writer's name or witnesses; and also proven, that William Murray, the cautioner, was then solvent: Whereupon decret went forth against Stobs, which he suspended; and, at calling, *insisted* on this reason, That he was minor the time of obtaining that decret against him, and he was lesed by his procurators omitting this relevant defence for him; that Sir Thomas's charge against Hadden, the principal suspender, was null and unwarrantable, being on a general bond of relief, without any previous distress either alleged or produced; and that such an obligent to relieve cannot be the ground of a charge till distress precede; and therefore, the charge being unjust, the suspension must necessarily be just; and if it be relevant, the cautioner is liberate, and conse-

No 72.

No 73.

A charge on a bond of relief, though before distress, was found noways unwarrantable nor unjust. Therefore, tho' the principal suspended such a charge, the cautioner, and his attester were found to remain still bound to the charger.

No 73.

quently the arrester: And Stair, b. 1. tit. 17, lays it down as a principal, That if the decret suspended be turned into a libel, and the reasons of suspension be relevant and proven, though elided by a reply, the cautioner is free, and cites for it a decision in Spottiswood, Weir *contra* Bailie, No 68. p. 2142.; and the like was found, 26th March 1628, Vaus *contra* Law, No 42. p. 2114.; 2d January 1683, Sir Robert Colt against William Somervell, No 70. p. 2143.; and 27th November 1685, More *contra* Finnison, No 71. p. 2145. Even so cautioners, as law will, *et judicio sisti*, are liberate on incompetency; and so it was decided in the Supreme Court of Friesland, *teste Joanne a Sande, lib. 3. tit. 10. definit. 3.* Now, to apply this to the present case, Sir Thomas Kennedy was never charged for the tack-duty which Hadden was bound to relieve him of, nor was the debt constituted or liquidated, so as he could know what to relieve him of; and therefore, the charge being general and unwarrantable, the suspension was just, necessary and warrantable, which is sufficient to liberate the cautioner, and he falling, so must his attester.—*Answered* for Sir Thomas, That the rule is quite mistaken; for a charge on a bond of relief is both legal, just, and ordinary, even before distress, its style being to free, relieve, and skaitless keep, which is not that he shall pull me out of the mire when I am cast in, but that he shall prevent my being tumbled therein; and it is more reasonable to free me before distress than after. And Stair, in the place above cited, says, Though cautioners have not ordinarily action against the principal debtor till they be distressed, where the cautioner has only a clause of relief in the bond, yet it is otherwise where the bond of relief runs in these terms, to free, relieve, and skaitless keep; and *esto* he were minor, yet the reason insisted on was nowise relevant to assoizie him.—THE LORDS found a charge on a bond of relief, though before distress, was nowise unwarrantable nor unjust; and therefore the cautioner and his attester stood still bound to Sir Thomas, and decerned against Stobs, in the terms of the bond of relief.

*Fol. Dic. v. 1. p. 128. Fountainhall, v. 2. p. 219.*

No 74.

A minor suspended on the head of minority. Before discussion, he became major, and granted a bond of corroboration. The cautioner was not affected by this, but was liberated.

1706. July 5.

UCHTRED M'DOUGAL, Merchant, *against* MAXWELL, Younger of Monreith.

THIS Monreith having taken off sundry suits of apparel, and other furniture, from M'Dougal, and given bond for it, he raises a reduction and suspension thereof on minority and lesion.—*Answered*, No lesion, because furnished to you for necessaries, and so *in rem et utilitatem tuam conversum*.—*Replied*, Offers to prove, that his father caused furnish him sufficiently, with cloaths, by Bailie Blackwood, another merchant; so the account on which M'Dougal's bond is founded was not *in rem versum*, but most exorbitant; and after a few days wearing, he gave them away to his comrades. A probation being allowed of these points before answer, at advising the charger craved decret, in regard the