

1717. November 21. BESSIE BENNET and her Husband, Supplicants.

JAMES SCLANDERS having charged certain tenants for payment of their rents, in victual and money, they suspended upon caution.

At discussing, Bessie Bennet and her husband compear for their interest; and being preferred to the charger, the tenants are decerned to pay their rents to Bessie Bennet and her husband; who present a petition to the Lords, shewing that the bond of cautionry, in the suspension, as conceived, is in favour of the charger, in so far as the Lords shall decern at discussing; whereby the petitioner, who is preferred to the sums charged for, has not direct access against the cautioner, without a special warrant, which they crave.

'THE LORDS, considering that the design of the bond of caution is, that the sum charged on should be secure, in the event that the same were found due; and that albeit, according to the conception of the bond, the same could not be registrated, and horning granted upon it in favour of a third party preferred; yet the cautioner being bound for the debt, the LORDS, by deliverance, granted warrant for letters of horning against the cautioner, for payment of the sums decerned, and made an act of sederunt, that in time coming there should be an addition to the style of bonds of cautionry, and that the cautioner should be bound to pay or perform to the charger, or any other person found to have best right, in so far as the suspender should be found liable.'

*Fol. Dic. v. 1. p. 129. Dalrymple, No 174. p. 240.*

1743. December. AGNES DICKIE against THOMSON, &c.

THE act of sederunt 1650 finds and declares, 'That all cautioners in suspensions hereafter shall be obliged and liable, as validly and effectually as the suspenders are, notwithstanding the charger or suspender shall decease before the discussing of the suspension. And for this effect the Lords ordain, That all bonds and acts of caution, to be taken and received in suspensions hereafter, shall bear this clause, obliging the cautioner, his heirs and executors, for payment of the sums or doing of the deeds to the charger, as validly and in the same manner, as the suspender, his heirs and executors, are obliged themselves.' The form of the bond of cautionry appointed by this act came to be neglected; and of late years bonds of cautionry in suspensions have been conceived in the following terms: 'That the cautioner shall pay to the charger the sum contained in the decret, in case it be found, after discussing of the suspension, that the suspender ought to pay the same.' Alexander Hall, who had suspended a decree for L. 63 Sterling, recovered against him by Agnes Dickie in the inferior court, having died during the dependence of the suspension, his cautioners Thomson and Lang insisted, that they were free; since, by the terms of their

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No 77.

The cautioner in a suspension, found bound to pay to the party preferred at discussing the suspension, whether the charger or another.

No 78.

The cautioner in a suspension is not liberated by the death of the suspender during the dependence.

No 78. bond of cautionry, they are only liable to pay what shall be decerned against Alexander Hall personally, and that now, after his death, there can be no such decerniture against him.

' THE COURT notwithstanding found them liable in terms of the act of sederunt.'

*Fol. Dic. v. 3. p. 121. Rem. Dec. v. 2. No 48. p. 76.*

1781. February 14. ROBERT M'KINLAY *against* WILLIAM EWING.

No 79.  
The act 1695,  
introducing  
the septennial  
prescription  
of cautionary  
obligations,  
does not ap-  
ply to cau-  
tionary obli-  
gations in sus-  
pensions.  
See No 76. p.  
2152.

IN a process of suspension, of a charge, at the instance of Ewing against James Macadam, John Macadam was offered as cautioner to the clerks of the bills, who consented to receive him, upon having put into their hands the following letter, addressed by M'Kinlay to the suspender's agent: ' 8th August 1771. I understand John Macadam, tenant in Stockrodgeart, has become cautioner for James Macadam, tenant in Bellock, in the suspension at his instance, against Robert Ewing of Lochend, and that he is refused at the Bill Chamber; I therefore hereby attest, that the said John Macadam is a sufficient cautioner in said suspension, and is able to pay the sums charged for.'

This missive was subscribed by M'Kinlay; but was not holograph; nor was the subscription attested by witnesses. The subscription, however, was judicially acknowledged.

In 1779, Ewing having previously discussed both the suspender and cautioner, raised an action against M'Kinlay, as attester of the sufficiency of the latter.

*Pleaded* by the defender: In the *first* place, the letter founded on by the pursuer contains nothing farther than a declaration, that the cautioner was sufficient at the time. It by no means imports any obligation upon the defender to become liable, *subsidiarie*, in the event of his future insufficiency. In order to produce this obligation, the form prescribed by act of sederunt, 27th December 1709, would have been requisite, by which ' attesters of cautioners are to be taken bound as fully as the cautioners themselves.' *Secondly*, The missive is defective in the statutory solemnities. And, *thirdly*, Though it were valid, both in substance and form, it would fall under the septennial prescription of cautionary engagements, introduced by act 1695, cap. 5. which, from its spirit and design, should be interpreted to extend equally to all cautioners, whether judicial or extrajudicial. Nay, if even the strict letter of the statute be adopted, the former, as well as the latter, may be said ' to be bound and engaged in bonds or contracts for sums.'

*Answered* by the pursuer, to the *first* defence: The nature of the obligation incurred by the defender appears from the circumstances of the case, from the whole strain of the letter, and especially from the words, ' I hereby attest, &c.'

To the *second*: The judicial acknowledgement of subscription saves from any legal nullity supposed to arise even from the statute 1681, Fountainhall, v. 1. p. 692. 26th December 1695; Beatie *contra* Lambie, *voce* WRIT; but especially