Upon advising a reclaiming petition, with answers, the Lords adhered to the judgment of the Lord Ordinary. No 80.

Lord Ordinary, *Braxfield.* Act. *Maclaurin.* Alt. *Cullen.* Clerk, *Menzies.*
Craigie. *Fol. Dic. v.* 3. *p.* 121. *Fac. Col. No* 186. *p.* 291.

1786. *February* 7.

SIR MICHAEL STEWART, Bart. *against* WILLIAM MITCHELL.

No 81.
The cautioner in a suspension is at liberty to resile before his security has been accepted of by the charger.

WILLIAM MITCHELL signed a bond, as cautioner in a suspension offered by a tenant of Sir Michael Stewart's; but his security not being thought sufficient, the bond was, in common form, delivered to the suspender's agent, for the purpose of getting it attested.

Two different attestations were successively offered, but not accepted; and, in the mean time, the suspender became notoriously insolvent. Sir Michael Stewart, the charger, then insisted for delivery of the bond; and

Pleaded: The security offered, though not judged fully adequate, was not, however, finally rejected. Neither can it be reasonably imagined, because the charger was desirous of the collateral warranty of an attester, that he had it in view, if that could not be had, to renounce altogether the right he had already acquired. A contrary doctrine, indeed, would be full of injustice; for if, instead of allowing the suspender to procure additional security, the cautioner had been peremptorily refused, a certificate of caution not being found, might have been obtained; and, by means of immediate diligence, the charger might have had an opportunity of recovering payment, which is now altogether precluded.

Answered: The interposition of a cautioner in supensions, is viewed, in practice, merely as an *offer*, from which, at any time before its being accepted by the clerk of the bills, the party *offering* is at full liberty to recede. Hence, when his sufficiency is doubted, the bond signed by him is invariably returned, without any receipt, to the person by whom it is presented. Nor has the charger any reason to complain of this; because it is in his power, at any time after the day assigned by the Lord Ordinary, to extract the certificate, and so to proceed to the execution of his diligence.

THE LORDS found, that the cautioner was not bound.

Lord Ordinary, *Rockville.* Act. *Maclaurin.* Alt. *Cullen.*
Craigie. *Fol. Dic. v.* 3. *p.* 121. *Fac. Col. No* 257. *p.* 393.

1793. *June* 12.

JOHN HERBERTSON and Company *against* JAMES RATTRAY and Others.

No 82.
The cautioner in a suspension found not liberated

ROBERT RATTRAY was cautioner for James Rattray in a suspension of a decree of a Sheriff, pronounced in absence against him. James objected to the decree,

No 82.
by the circumstance of the decree under suspension being turned into a libel.

that it was pronounced when he was in England, and when he had neither domicil nor property in this country.

The Lord Ordinary turned the decree into a libel; and, in a reclaiming petition, it was

Pleaded, 1*mo*, for James Rattray: A decree can be turned into a libel, only where it is defective in point of form, and not where (as in the present case) it is fundamentally null.

2*do*, It was *pleaded* for the cautioner: A pursuer, by executing a citation at a place where the defender has no residence, may easily obtain a decree in absence against him. The relief against it only lies by letters of suspension, and these he can only obtain by finding caution to fulfil the decree, in case the letters shall be found orderly proceeded. All that the cautioner interposing in these circumstances can be held to undertake, is, that the decree is incompetent, but not that the claim itself is groundless. The pursuer otherwise would be rewarded for the irregularity of his procedure, and the defender punished, to whom no fault can be imputed.

Answered, 1*mo*, The object of turning a decree into a libel, is to save the trouble and expense of bringing a new action, the defective charge being held equivalent to a citation. The defender, therefore, never can be a loser by that means. Decrees liable to objections equally strong with the present have been turned into libels; Bruce, p. 178. 30th July 1715, Macready against Crawford, *voce* Process; 8th November 1692, Shaw *contra* Kennedy, No 72. p. 2146.

2*do*, The law presumes that every decree is just and formal; and as the creditor, who has *parata executio*, may be altogether disappointed by the delay occasioned by a suspension, before it is obtained, he is entitled to security for payment of his debt, and future expenses. The debtor who takes advantage of a point of form to evade payment of a just debt, is guilty of a wrong; and the cautioner, before undertaking the obligation, ought to examine the nature of the debt. By the act of sederunt 29th January 1650, the cautioner in a suspension is declared to be equally liable with the principal debtor; and, by common style, he is taken bound to pay the debt, 'if it shall be ultimately found due.' That he is not liberated when the decree is turned into a libel, was found; Forbes, 30th November 1709, Dunbar *contra* Muirhead, No 75. p. 2149. and confirmed by an express act of sederunt, 27th December 1709.

Observed on the Bench: No distinction can be made between one decree and another. The act of sederunt last mentioned is in force, and is decisive against the cautioner.

The Court unanimously adhered.

Ordinary, *Lord Monboddo*. For the Suspender, *Dickson*. Alt. *Laing*. Clerk, *Home*.
D. Douglas. *Fol. Dic. v. 3. p. 121. Fac. Col. No 59. p. 129.*

See Forbes against Strachan, 17th June 1714, Forbes, MS. *voce* Legal Diligence.

See Appendix.