

S E C T. VII.

Relief of Cautioners.

1625. July 28. TENANTS of HAYNING *against* SCOT.

IN a double poinding, at the instance of some tenants of the lands of Hayning, against Laurence Scot, advocate, and Sutie; wherein Sutie being cautioner for Scot of Hayning, and being charged to pay to the creditor, to whom he was cautioner; and for his relief having recovered sentence against these suspenders, for payment of the duties of the lands possessed by them, as addebted by them to Scot of Hayning, for whom the said Sutie was cautioner; and, on the other part, Laurence Scot claiming the same duties, as pertaining to him, who was infest in the same lands, by comprising from Hayning, and upon this comprising publicly infest by the superior, before the term of payment of that year, which was controverted; whereby he *alleged*, the tenants were his tenants, and so should only be astricted in payment to him:—THE LORDS found the charge given to Sutie by Hayning's creditors, to whom Sutie was cautioner for Hayning, as said is, was a sufficient distress, whereupon Sutie might, for his relief, seek payment, and recover sentence against the suspenders, Hayning's tenants; albeit the time of that sentence he had not paid off the sums for the which he was bound; for it was found sufficient to obtain relief, and seek this payment for his relief, and so recover sentence therefor, that he was charged, before the sentence obtained against the suspenders, albeit he had not paid the sum for which he was cautioner, since that sentence obtained by him; and that there was no necessity that payment should have preceded the sentence: Likeas the Lords preferred Sutie to Laurence Scot, notwithstanding of his public infestment, in respect of the sentence foresaid, recovered against the tenants.

J. C. Fide-jussor potest agere contra principalem antequam solvat, si condemnatus fuerit ad solvendum, & Bald. & hæc dicitur interpretativa solutio, Vid. Bartol. Concil 159.

Act. ———.

Alt. Laurence Scot per se.

Clerk, Hay.

*Fol. Dic. v. 1. p. 127. Durie, p. 182.*1627. January 19. THOMSON *against* HERRIOT.

ADAM THOMSON being bound as cautioner at the confirmation of the testament of Lewis Muir and Margaret Herriot, relict of the said Lewis, and her

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No 40.

A charge of horning was found sufficient distress, for a cautioner to seek his relief, altho' nothing further was done thereupon; nor had the cautioner paid the debt.

No 41.

A cautioner in a confirma-

No 41.
tion, demand-
ed from the
executors se-
curity in re-
lief, because
they were
vergentes.
Before an-
swer the exe-
cutors were
appointed to
account.

brother being then obliged for his relief; the said Adam pursues them to warrant him of his said cautionry, and to that effect to find caution, because *vergebant ad inopiam*, and they had wasted the goods confirmed, to be decerned to find caution to him for his better security. The defenders *alleged*, That this pursuit was a novelty, to seek warrandice where the pursuer was not able to show any distress; and the desire of finding caution was a greater novelty, whereto they could not be restricted of the law.—THE LORDS, albeit they inclined to sustain this pursuit, as just and equitable, yet they ordained the parties first to count and reckon upon the goods contained in the testament, whereby it might be first known what became thereof, if they were extant, or to what good or necessary use the samen were employed; and thereafter they would consider of the answer to be given anent the sustaining of this pursuit.

Clerk, *Hay*.

Fol. Dic. v. 1. p. 126. Durie, p. 259.

No 42.

Registration
of a bond was
found suffi-
cient distress,
upon which a
cautioner
might seek
his relief a-
gainst a prin-
cipal suspect-
ed to be *ver-
gens*.

1628. *March 26.*

VAUS against LAW.

IN an action of relief Vaus *contra* Law, for relieving of the said Vaus, who was cautioner for Law, to pay a sum of money to the creditor; the LORDS sustained the action and charge of relief at the cautioner's instance, against his principal, for whom he was obliged, and who was bound to relieve him; where the principal bond was registrate against the cautioner, and the term of payment was by-past before the seeking of the said relief; albeit the principal *alleged*, that the cautioner could not seek relief but where he was distrest, either by charge of horning, or by making payment to the creditor, neither whereof he could allege. Likeas he instructed, that the creditor had superseded the payment of the sum while a term yet to come, whereby he could not be distrest: Which allegiance was repelled, and the charge for relieving of the cautioner sustained, seeing the bond was registrate, and the term by-past, as said is; and also the condition of the principal was feared and suspected, as likely to become *non solvendo*, viz. Mr James Law's father.

Act. *Gibson*.

Alt. *Nairn*.

Clerk, *Gibson*.

Fol. Dic. v. 1. p. 127. Durie, p. 372.

* * * The same case observed by Auchinleck.

May 16.—THE registration of a bond is sufficient distress, whereupon a cautioner may seek his relief against the principal.

Auchinleck, MS. p. 25.

* * * The like, Stevenson against Fraser, Colvil, MS. *voce* REGISTRATION.