

In the suspension, for the *suspender*, compear Mr. George M'Kenzie and Mr. William Strachan; the *charger*, Sir George Lochart, Mr. Robert Burnet; for Auchmedden, Sir Jo. Baird and Pat. Fraser. In the transferring, for the *pursuer*, Mr. David Falconer. *Alt.* Mr. Arthur Gordon, Thomas Baird, and George Nicolsone.

*Signet MS. No. 49, folio 56.*

1665. *February 7.* JAMES CUNNINGHAM *against* HARRY DENNISTON.

JAMES CUNNINGHAM, merchant in Edinburgh, charges Harry Denniston, merchant there, for payment of L.214, contained in a decret obtained before the Bailies. He suspends because the charger is obliged to relief for cautionary whereunto he stands engaged for the said charger, as tutor to William Wilson his bairns, now in the sum of L.60,000; till which relief be granted him, the suspender, in all law and equity, must have retention of the sums charged for.

To this its ANSWERED,—That its noways relevant, unless the suspender were distressed for the said cautionry contained in the said act of curatory; which is not instructed.

Whereunto it was REPLIED for the suspender,—That the reason of suspension stands yet relevant, notwithstanding the answer made thereto; because the suspender cannot yet be distressed by the said children, they being minors, till their majority. *2do*, There is process depending at the said children's friends, their instance, against the charger, for count and reckoning, and payment-making to them, of the goods and gear left to them by their father; and when they have discussed the charger, they will then recur upon the suspender who is cautioner: and urged the case of a cautioner for a tutor *qui vergit in pauperiem*. Its duplied, that notwithstanding of the reply, the letters must be found orderly proceeded, because the ground of this charge is a clear bond for merchant ware received by the suspender, from the charger, long after his becoming cautioner for him in the said act of curatory; and if the suspender pleases, for his relief, he may raise inhibition against this charger upon the said act of curatory: Yea more, the charger offers to find him caution for relieving him.

Notwithstanding of thir reasons of suspension, with what was alleged in fortification of them, the Lords found the letters orderly proceeded for the sum charged for; reserving always to the suspender, or to the nearest of kin of the bairns of the said William Wilson, action against the charger, for removing of him from his intromissions with the minor's gear, as being suspect; or to find new and better caution as accords of the law.

*Suspender*, Sir Thomas Wallace. *Alt.* Sir Robert Sinclair.

*Signet MS. No. 51, folio 57.*