

No 68.

A suspension was brought because the charger had not implemented his part of a contract. At discussing, he did implement, and the letters consequently were found orderly proceeded. Yet the cautioner was not liable.

1633. December 5.

WEIR *against* BAILLIE.

JOHN WEIR having charged John Symington of that ilk, for payment of 600 merks, conform to his bond ; he suspended, and found James Bailie, brother to the Laird of Lamington, cautioner in the suspension. The reason was this, that the bond was given for a renunciation of a wadset, which should have been given by the charger to the suspender for it ; but so it was, that he had never received the said renunciation. For purging of the reason, the charger produced the renunciation, and therefore craved the letters might be found orderly proceeded, which was done against the suspender. After this, the cautioner in the suspension *alleged*, That howsoever the charger did now produce his renunciation, that should not burden him, but he ought to be free of his cautionry, since the suspender had reason to suspend, the charger not having performed his part the time of the raising of the suspension ; and the renunciation being now produced, the suspender can only be burdened with it, but not the cautioner. *Answered*, The cautioner must be liable to all that the suspender is, seeing he became caution for that effect, to fulfil whatever the LORDS should think the suspender bound to perform, and not that the reason was true and relevant. THE LORDS did suspend the letters *simpliciter* against the cautioner, and found that he ought not to be burdened with the debt, for the reason foresaid.

Fol. Dic. v. 1. p. 128. Spottiswood, p. 325.

1681. January 6.

HUME *against* HUME.

No 69.

A bond of caution found good against the cautioner, altho' it contained an obligation on the principal, and he had not subscribed it.

The cautioner in a suspension is bound *for* the principal, not *with* him.

GEORGE HUME pursues Mr Patrick Hume upon this ground, that umquhile Hume of Rentoun having granted bond to one Willet in London, whereunto George Hume is assignee, and charged Rentoun thereupon, he did suspend, and found an insufficient cautioner, but Mr Patrick his son, attested him to be sufficient. The pursuer having discussed the suspension against Sir Alexander Hume, now of Rentoun, he insists against Mr Patrick, as attester, for payment of the sum, who *alleged*, *imo*, That the bond of caution was null, containing an obligation for Rentoun to relieve the cautioner, which Rentoun subscribed not ; so that this bond being in effect a mutual contract, cannot oblige the cautioner, unless the principal had subscribed. It was *answered*, That whatever may be pretended as to bonds, where one party is principal and another cautioner, when the cautioner subscribes and the principal subscribes not, yet there is no ground to quarrel cautioners in suspensions who do not become obliged with the principal, but for the principal, that he shall pay what shall be decreed ; and though the bond contain a clause of relief, though the insolvent cautioner did not see to the signing of that clause, it imports not. ' THE LORDS sustained the bond of caution, though the bond of relief was not signed.' The defender further *alleged*, That he did only attest the cautioner in the second

suspension, and therefore was not convenable till the cautioner in the first suspension was discussed. 'THE LORDS repelled the defence, but ordained the pursuer to assign Mr Patrick to the first bond of caution, upon payment.' The defender further *alleged*, That neither cautioner nor principal could be distressed for the sum, because he offered to prove, by the charger's oath, that the bond was granted to John Hume of Kello, or to his behoof, who was forfault, and so it fell to the King; likeas, Rentoun obtained discharge of it from the King. It was *answered*, That the donatar to the forfaulture concurs with the charger, whose gift was anterior to the King's discharge, and which gift required no declarator, being a forfaulture in Parliament. 'THE LORDS repelled the defence, in respect of the answer' The defender further *alleged*, That he produced a letter from the King to his Commissioner, recorded in Parliament in favours of Rentoun, bearing, 'That the King knew that Rentoun was damned by suffering for his father, in obedience of his Royal commands in L.8000 Sterling, and that he had promised to see him satisfied,' and that this King conceived himself obliged to see his father's promise made effectual in the way he promised, to wit, to cause the Parliament take an effectual course to satisfy Rentoun; and therefore the King did recommend it to his Commissioner, that course might be taken in the Parliament for Rentoun's satisfaction, which letter is before the King's gift of forfaulture, whereby the King acknowledged himself debtor in a liquid sum to Rentoun, which therefore founds a compensation against the donatar, who is the King's assignee. It was *answered*, That the letter doth neither instruct that the King's father, nor himself, were personally debtors to Rentoun, obliging themselves to pay; but only to interpose that the Parliament might take course.

THE LORDS found, that the letter did not make the King personally debtor, and therefore repelled the compensation.

Stair, v. 2. p. 827.

1683. *January 2.*

SOMERVELL *against* COLT.

MR ROBERT COLT advocate, having intented a declarator against Mr William Somervell, to hear and see it found and declared, that he being an attester of a cautioner in a suspension, raised at the instance of one Menzies, against Mr William, of a charge of horning for payment making of 2000 merks, due by the said Menzies to the said Mr William, that he ought to be free, in regard the reasons of suspension were relevant and true, and particularly that reason, that the charge was at Mr William's instance, after he was sentenced by a sentence of the Justice Court to die, and that the sum being made moveable, fell under escheat, albeit *ex post facto*, he had gotten a remission. THE LORDS found, that the charge was null, being at the instance of a condemned person, and the reason of suspension (exclusive of the charger's title, the same falling under es-

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A charge having been liable to an objection when given, although it afterwards came to be valid, the cautioner, and consequently his attester, against whom an action was brought, were found not liable.