

1698. December 16.

SIR JOHN DEMPSTER of Pitliver *against* SIR DONALD BAYN of Tulloch.

No 84.

An attester of a cautioner in a bond of presentation found not liable *subsidiarie* for the cautioner.

SIR JOHN DEMPSTER having taken the Countess of Seaforth with caption, and being unwilling to put her in prison, he accepted of a bond of presentation by Mr John M'Kenzie of Assint her son ; and Sir Donald Bayn did attest the cautioner in these words :

' I Sir Donald Bayn do hereby attest the sufficiency of the above writtē Mr John M'Kenzie of Assint as cautioner above specified, and oblige me therefor, as witnesseth my hand,' &c.

The cautioner having failed to present the Countess, Pitliver charges and denounces him, and adjudges his estate.

Pitliver recovering no payment by that diligence, pursues Sir Donald Bayn the attester, and concludes that he is liable *subsidiarie* for the debt.

The defender *alleged* : That an attester is only liable to prove that the cautioner was habit and repute solvent, as was found 17th December 1667, Paterson *contra* Homes, No 83. p. 2159. And, at most, he could only be liable to prove that the cautioner was truly solvent, which can be made appear in this case ; for an attester is generally interposed, in passing of suspensions, for satisfying the scruple that the clerk of the bills may have, as not knowing the condition of the cautioners offered ; therefore a known sufficient person is interposed to attest that the cautioner is held and repute sufficient. And the pursuer having accepted an attester of a cautioner residing at a distance, he can crave no more than the common effect of such an attestation, and rather less : because he might have required an obligation in what terms he thought fit, and imprisoned the Countess, if he could not obtain it.

It was *answered* : The defender is liable *subsidiarie* as cautioner for the cautioner ; because he not only attests his sufficiency, but obliges him therefor : and now that the cautioner is discussed, and proves utterly insufficient by suffering denunciation and adjudication, the defender is liable for him.

And as to the case of Paterson *contra* Homes, the obligation there was not so strict ; for there was only a simple attestation ; but the words, ' and obliges him therefor,' are not adjected. And, since that time, these obligatory words have been commonly adjected, that the obligation may be the more effectual ; and the cautioner being now absolutely insolvent by suffering such diligences to pass against him, the defender is liable.

It was *replied* : An attestation of a cautioner's sufficiency implies an obligation, and the obligatory words import no more ; and it were of dangerous consequence, if such a decision should pass, as might render all attesters of cautioners in suspensions liable *subsidiarie*, contrary to the common apprehension of all lawyers, and of parties who grant such obligations, without any other design, than to testify, that the cautioner is, or is reputed to be, sufficient. And what-

ever diligence may afterwards happen against the cautioner, that alters not the case; because the matter must be considered as circumstances were at the time of the attestation.

THE LORDS found, 'That the attester was not liable *subsidiarie* for the cautioner, but only that he was reputed, and really was solvent at the time of the attestation.

Fol. Dic. v. 1. p. 129. Dalrymple, No 7. p. 10.

* * * Fountainhall reports the same case :

December 16.

I REPORTED Sir John Dempster of Pitliver against Sir Donald Bayne of Tulloch. Pitliver having apprehended the Countess Dowager of Seaforth at Inverness, on a decret of Parliament, Mr John M'Kenzie of Assint, her son, became cautioner to present her against such a day; and, under this bond of presentation, Tulloch attested the sufficiency of the cautioner. Assint having failed to produce the Lady, Pitliver registrates his bond, denounces, and takes out caption, whereon he retires to the isle of Lewis. Then he adjudges his lands, and raises a process against Tulloch as *subsidiarie* liable on his attestation, after he had thus discussed the cautioner. *Alleged* for Tulloch, My obligation is not, that failing the cautioner I shall pay the debt, but only I attest his sufficiency; which imports no more in law but that I am bound to instruct he was holden and reputed sufficient for that debt at the time of my subscription, which he is willing to prove; and thus it was found, Paterson *contra* Homes, No 83. p. 2159.; and Stair shews this to be the common opinion, book IV. tit. 52. *Answered*, That since the decision 1667, the Lords were so sensible of the danger of the preparative, that there was an addition made to the stile of these attestations, which run before in the naked assertory terms of his sufficiency; but now these words are added, 'and oblige myself for the same,' which words must operate something; for *verba non debent esse otiosa*, and can import no less, but after I have discussed the cautioner, you must be liable, like a cautioner *judicio sisti et judicatum solvi*. THE LORDS, by their first vote in this case, found these obligatory words imported more than his being habit and reputed sufficient at the time of the attestation, (which was all the former decision required,) but also burdened the attester to prove he was actually and really solvent at the time, which is more than being so holden and reputed. But then the question arose, if his being immediately discussed by denouncing and adjudging, and yet no payment following, if that did not make the attester *subsidiarie* liable, though he were proven solvent at the time, seeing he was *difficilis conventionis*, and could not be easily reached. THE LORDS found the attester not liable in that case, he proving the cautioner's solvency at the time he gave the attestation. Some of the Lords urged, that solvency must be understood *cum effectu*, and such as upon diligence would produce payment; but it carried in the contrary by the

An attester is bound, by the words, 'and oblige myself for the same,' to prove not only that the cautioner was habit and reputed solvent, but that he was actually and really solvent at the time.

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plurality. Attesters of cautioners in suspensions may be in a different case, for they are mainly taken to secure the clerk of the bills in case he take insufficient caution; and it is of them my Lord Stair speaks in the forecited place, that habit and repute is sufficient, unless anterior incumbrances be instructed; but this may alter from conventional attestations such as Tulloch's is.

Fountainball, v. 2. p. 26.

1710. July 19.

JAMES RAMSAY, and DANIEL REID his Assignee, *against* DAVID SPALDING of Ashintully.

No 85.

A person who, before the act of sederunt rendering attesters of cautioners in suspensions liable for the sufficiency of such cautioners, had attested the sufficiency of a cautioner, and obliged himself for the same, was not found liable for the sufficiency, but only for the reputed solvency of the cautioner at the time of attestation.

JOHN STEWART of Clockfoldich having enacted himself cautioner for Joseph Watson, in the suspension of a charge against him at the instance of James Ramsay; and the charger having obtained a decret finding the letters orderly proceeded, and discussed the cautioner; he pursued David Spalding, who had (before the late act of sederunt concerning attesters) attested his sufficiency, and obliged him, his heirs and executors, for the same.

Alleged for the defender: He ought to be assoilzied, because the cautioner was habit and repute solvent at the time of his attestation, which imported no more; and did not oblige the attesters for the cautioner's future and eventual insolvency; seeing attesters are taken for the security of the clerks of the bills, when doubtful of the sufficiency of offered cautioners, that they, if found liable in subsidiary actions, may recur against the attesters for relief. And as it would be a good defence for these clerks, that the cautioner was held and reputed solvent when they received him; so the attester can be no farther liable, December 17. 1667, Paterson *contra* Homes, No 83. p. 2159.

Replied for the pursuer: The Lords repelled such a defence made for an attester, December 16. 1698, Sir Donald Bayne *contra* Sir John Dempster, No 84. p. 2160.; but whatever a simple attestation, which is the case of the decision 1667, might be understood to import, yet the defender's attesting the sufficiency of Clockfoldich, and obliging him and his for the same, must be understood *cum effectu*, to make him liable *subsidiarie* for the cautioner's real, and not putative solvency, in the same manner as the cautioner was liable for the principal debtor.

Duplied for the defender: These words in the attestation, 'and I oblige me for the same,' are only exegetic of the former part of the sentence, viz. That the cautioner was sufficient at the time. And the late act of sederunt providing, that attesters in time coming should be liable as cautioners, implies, that these were not liable in that manner before.

THE LORDS found the defender's attestation doth not oblige him for the sufficiency of the cautioner simply, but only for his sufficiency at the time of the attestation.

Fol. Dic. v. 1. p. 130. Forbes, p. 424.