clerk, for a sight of his store-books, which would have discovered his condition, without the necessity of any formal stated account between his master and him; which they neglecting to do, *sibi imputent.*——THE LORDS considered only the last defence, and found that clause of compting quarterly was not merely a clause of relief between the clerk and his cautioners, but that Sir James was likewise obliged thereby, and was introduced in favours of the cautioners, who having engaged for the clerk's fidelity and honesty, they could not know the same without fitting quarterly accounts; which method not being observed, the LORDS found the cautioners liberate, except for the first three months allenarly. No 23.

Fountainhall, v. 1. *p.* 798.

1706. *June* 18.

SIR GEORGE HAMILTON and FLEMING of Farm, his Son-in-law and Assignee, *against* SIR JAMES CALDER of Muirton.

No 24.
A cautioner for a public collector's cashier, being bound that the cashier should account 'monthly, 'quarterly, 'and yearly,' was found liable for the whole arrears, although the cashier had not been called to account in terms of the contract, and had become bankrupt.

SIR GEORGE and MUIRTON being tacksmen of the King's customs from 1686 to 1688, John Murray was their cash-keeper, and Sir James Calder his cautioner. Murray falling short in his counting, and dying in 1693, Sir George pursues his heirs; and after a tedious count and reckoning, extracts a decreet against them for L. 9000 or L. 10,000 Scots of balance he was owing them; and on this decreet, he registrated Muirton's bond of caution to pay him that sum; who suspends on these reasons, That the bond of cautionry was never a delivered evident, but in Murray's custody the time of his decease.—*Answered*, 1*mo*, Oppones the bond now in my own hands; and *esto* it had been lying beside Murray, he was Sir George's trustee and factor.——THE LORDS repelled the first defence.—2*do*, *Alleged*, he had arrested effects of Murray's, and so cannot recur on the cautioner.—*Answered*, A creditor may use all legal diligence till he be paid, and the one does not exclude the other, and on payment he shall be assigned.—— This was also repelled.—3*tio*, *Alleged*, by John Murray's count-books, the tacksmen are debtors to him in a balance of L. 3000.—*Answered*, If Sir George were using his books *in modum probationis*, this might be obtruded, otherwise his own books can never prove for him.——THE LORDS found his books not probative in this case.—4*to*, *Alleged*, Sir James, as cautioner, cannot be bound, considering the terms of his obligement, to wit, that they should fit accounts with the said Murray the cash-keeper monthly, quarterly, and yearly; and Sir George having neglected this, his fault cannot be profitable to him, nor prejudicial to the cautioner, *nam socius tenetur socio etiam ob culpam levem;* likewise, he was solvent if diligence had been done against him before his death; and if you have suffered my relief to perish by your delay, that must not be imputed to me; which was so decided on the 30th November 1697, Sir James Dick against one who became cautioner for the clerk to his brewerie, and was assoilzied, because he was obliged to count every three months with him, (*limitata fideijussio limitatem pro-*

No 24. *ducit effectum*) and Sir James did it not; and that there was a *jus quæsitum* to the cautioner by that clause, No 23. p. 2090.; and it cannot be presumed that Muirton would run the risk of a general indefinite intromission, which might exceed his estate; but relied on the short monthly countings, in which there could be little hazard.—*Answered*, The bond of cautionry is opponed, that it obliges him to pay whatever Murray shall fall short in, and that at any time when required; and the clause of quarterly, &c. relates to exercising his office; and such a short period for counting was impracticable, for the articles of his charge behoved to come from all the corners of the nation, which could not be done on a sudden; and Sir James Calder understood it so; for, in a discharge he gave to Murray's Representatives in 1700, he expressly excepts Sir George Hamilton's claim, and his own recourse of warrandice in case Sir George prevailed; and in a letter he desires Sir George to prosecute these counts, that he may be free of his cautionry; and there was a great specialty in Sir James Dick's case; for there he was required by way of instrument, to count with his clerk by his cautioner, and he having omitted to do it, the cautioner was very justly liberate: But Muirton never interpelled Sir George Hamilton to count with Murray till after his death.——The Lords also repelled this fourth defence.—Then it was *alleged* in the 5*th* place, That there is a great difference betwixt a cautioner for the prestation of a fact, and one's fidelity in their administration, whom the law calls *fideijussor indemnitatis*, and a cautioner for a debt, or a special sum of money; for cautioners for factors, executors, and curators, are only liable to make up what is wanting of the principals; and if you send goods to a factor at Campvere, when you know him to be a bankrupt, you have no access against his cautioner, 4th March 1630, Ritchie *contra* Paterson, Durie, p. 499. (*voce* Proof;) and Heringius *de fidejuss.* c. 20. is positive, that the creditor has no recourse against the cautioner, if he let the principal debtor turn insolvent; and Carpsovius, *definit. forens. par.* 2. *conclus.* 19. *num.* 10. says, *talis creditor cessans convenire principalem donec solvendo esse desinit, non potest debitum a fidejussore exigere*, and founds on *l.* 41. *D. de fidejuss.*—*Answered*, The cases stated by these two lawyers, are where the creditor was premonished, and required by the cautioner, to look to the principal, and did it not, which cannot be pretended in this case.——The Lords found, (five against nine) Calder still liable as cautioner, but allowed him to propone any thing, that might diminish the debt owing by Murray, the principal; for though it was constituted against his representatives by a decree *in foro*, yet Muirton the cautioner, not being compearing there, it was entire for him to propone any thing he could yet say against the debt.

1707. *December* 20.—Sir George Hamilton of Tullyallan, being tacksman of the customs, he made John Murray, merchant in Edinburgh, his cash-keeper, on Sir James Calder of Muirton's becoming cautioner, that he should make up

whatever Murray should fall short in his accounts. After the expiration of the tack, Sir George pursues Murray, first before the Commissaries of Edinburgh, and then by a decreet of suspension *in foro* constitutes Murray's Representatives debtors in a balance of 20,000 merks, and upwards; and then he charges Sir James Calder of Muirton on his bond of cautionry to pay that sum; who suspended on this reason, That his bond was never a delivered evident, but found beside Murray after his decease, and delivered up by his widow, and he never looked upon himself as debtor; and at most it only imports his fidelity, *et de indemnitate servanda*, and he should have been called to the discussing of the principal debtor, that all proper and competent defences might have been proponed, and not have been carried on against Murray, without ever acquainting him. *Answered*, He opponed the bond of cautionry, now lying in his hands, which cannot be taken from him but by his own oath; and no law obliged him to call him to the process, discussing the principal debtor; seeing, by your engaging, you undertook that hazard, and you was so far from being ignorant or forgetful, that, by letters produced, you acknowledged your being cautioner, and desired the accounts might be fitted and cleared; and, in a discharge you gave Murray, you expressly reserved and excepted your relief and recourse against him for your cautionry. THE LORDS found Muirton liable; but then he *contended*, he must be heard against the accounts as if he were *in libello*, seeing the two decreets against Murray were *res inter alios acta* as to him; and he must be allowed to object against the relevancy and probation of each article, as if there were no such decreets, but the affair still entire, seeing their collusion could not seclude him from all his objections and defences. *Answered*, The affair was managed with all the contention possible, so far was it from any collusion; but if there were any defences either arising *ex facto vel jure*, omitted by Murray, Sir George Hamilton was willing to receive the same; but to lay open his decreets, and begin *de novo* to instruct every article, was both unjust and impossible, as has been refused, both to cautioners for executors, and in arrestments, 4th March 1623, Wood *contra* The Executors of Ker, Durie, p. 54. (*voce* RES INTER ALIOS.;) 24th June 1665, Irvin *contra* Strachan, (IBIDEM.;) where a decreet of liquidation against the principal, upon probation by witnesses, was sustained against the cautioner, and he found concluded thereby, though he was not called. THE LORDS found it was competent to Sir James, the cautioner, to found on any thing, either in law or fact, that was omitted; and for that end the whole count-books and instructions ought to be made patent and open to his perusal; but refused to repone him as to any articles already determined, either *quoad* relevancy or probation, else there should be no *finis litium*, and there might be a clashing and interfering betwixt the interlocutors already pronounced in the decreet, and those that might happen to be given in reviewing it again. *See* RES INTER ALIOS.—RES JUDICATA.

Fol. Dic. v. 1. *p.* 125. *Fountainhall, v.* 2. *p.* 334. & 406.

No 24.

*** The same case is reported by Forbes:

No 24. 1706. *January* 25.—ARCHIBALD FLEMING of Farm, as assignee by Sir George Hamilton, having charged Sir James Calder of Muirton, upon his bond, as cautioner to the tacksman of the customs and foreign excise for John Murray their general receiver and cashkeeper, for payment of the sum of L. 13,068 10s. 6d. as the balance of Murray's intromissions not counted for by him: Sir James suspended upon this ground, That he could not be liable upon the bond, in respect it was never delivered to the tacksmen, but was only put in Murray's own hand to have been delivered, in case they should not otherways trust him to be their cash-keeper, and so it is that they did trust him without regard to any such bond; which Sir James offered to prove was found among his papers after his death, and but lately recovered *viis et modis* out of the hands of his children.

Answered for the charger: The bond being out of the charger's hand, is understood to be the tacksman's evident wherever lodged, albeit permitted by them to lie in their cash-keeper's hands with the rest of their papers, whereof he had the trust, and the not delivery can only be proved *scripto vel juramento*. 2*do*, It can never be quarrelled by the suspender as an undelivered evident; because, it was not only posterior to an act of sederunt of the tacksmen admitting Murray to be their receiver, he finding caution, and so presumed to have been granted conform to the said act, since *facile præsumitur quod fieri debet*; but also Sir James, by his missive letter, and by the exception in a general discharge, to Murray's relict and children, as to all action might be intented upon his bond of cautionry, acknowledged himself liable as cautioner for Murray.

Replied for the suspender: 1*mo*, *Præsumptio cedit veritati*, and he offers to prove the indirect way how the charger's cedent came by the bond of cautionry long after Murray's decease. And the Lords sustain such an allegeance relevant to be proved by witnesses, March 21. 1628 *, February 13. 1679, Cathcart of Carleton †. Because the so seeing of the writ is a sensible fact, necessarily inferring an exclusion thereof, and the proper subject of probation by witnesses, as well as fraud or force. Besides, there are instances in law, of writs found null upon proving of facts importing the creditor's coming by them in an undue way, January 11. 1676 ‡. 2*do*, The letter and exception of the discharge amount only to infer a suspicion in Sir James, that his bond of cautionry might have been delivered by Murray the principal, which has not been done. 3*tio*, John Murray the principal in the bond of cautionry being free through the not delivery thereof in his lifetime, Sir James's owning himself liable as cautioner could not bind him; because, the cautionry was but an accessory obligation which *sequitur conditionem principalis*.

* Scot against Creditors of Dishington, Durie, p. 366. *voce* PROOF.

† Cathcart against Laird of Corsclays, Stair, v. 2. p. 694. *voce* PROOF.

‡ Bruce against Alexander, Stair, v. 2. p. 396. *voce* PROOF.

THE LORDS sustained the bond charged on, and repelled the defence against the not delivery thereof; in respect of the answers and writs produced. No 24.

July 18.—Sir George Hamilton, assignee by the rest of the tacksmen of the foreign customs and excise, having obtained a decreet against the Representatives of John Murray (who had been their cash-keeper and general receiver) for a matter of twenty thousand merks of balance due by the defunct; and having charged Sir James Calder of Muirton his cautioner, for payment of the said sum, he suspended upon this ground, That the said decreet of liquidation was altogether in absence *quoad* him, who was never cited to the obtaining thereof. And the Lords for that reason turned the decreet into a libel; and found that the charger behoved to prove his libel, as if the suspender were only newly cited.

1709. *December* 28.—In the action at the instance of Sir George Hamilton, and his assignee, against Sir James Calder, as cautioner for the deceased Sir John Murray, who has been cash-keeper to the tacksmen of the customs, the Lords, July 18. 1706, having found that Sir George behoved to proceed against the defender by discussing and adducing probation as in a libel, notwithstanding of an extracted decreet against the Representatives of John Murray; and, upon a reclaiming bill given in by Sir George, the decreet being sustained against the cautioner as to the points of relevancy and probation therein determined, reserving to him to be heard on all competent defences, albeit omitted to be proponed by the defenders in the said decreet; Sir James reclaimed upon this ground, That, notwithstanding the said decreet wherein he was not called, he ought to be heard upon the relevancy and probation; seeing it cannot have the effect of *res judicata* against him.

Answered for Sir George Hamilton: The decreet against the representatives of the principal is justly sustained against the cautioner; not as the effect of *res judicata*, but as the consequence of an accessory obligement, which hath the same relevancy and probation as the principal. For as a cautioner follows the faith of the principal; so his oath doth militate against the cautioner. And the cautioner of an executor was not suffered to propone exhausted, after the principal had made that defence, and failed in proving, March 4. 1623, Wood *contra* Ker, Durie, p. 54. (*voce* RES INTER ALIOS.;) albeit the cautioner was neither called nor compearing in the decreet against the executor. Again, a decreet of liquidation against the principal debtor upon probation by witnesses, was sustained against the cautioner, who was not called therein, June 24. 1665, Irving *contra* Strachan, Stair v. 1. p. 287. (IBIDEM.) And it is clear from *Voet. Tit. de Fidejussoribus*, § 8., that accounts cleared and determined against the heirs of the principal debtor, conclude the cautioner.

Replied for Sir James Calder: It is true that cautioners in suspension of decreets, or cautioners *judicatum solvi*, are effectually bound by decreets against

No 24. the principals, though they compear not at pronouncing; because such cautioners do in effect subject themselves to the performance of the decreets to be pronounced. But the defender is in a different case from these, and cannot be concluded by *res judicata* against the principal, *Voet. ad Tit. de Re Judicata*, § 32. *Huber ad eundem Tit.* § 51, 52.

THE LORDS found, That the decreet against the representatives of the principal debtor is not *res judicata*, either as to relevancy or probation, in so far as concerns the cautioner; but that any thing done in the said decreet is only to be considered as practicks or interlocutors, which the pursuer may found on, and repeat here, without prejudice to the defender to object, both against the relevancy and import of the probation. *See* RES JUDICATA.

Forbes, p. 87, 125, & 382.

1707. *February* 20.

HUGH WALLACE of Inglistoun, and JOHN BAILLIE, Chirurgeon, *against* Mrs MARGARET and ELIZABETH LAUDERS, and Mr JOHN FAIRHOLM of Babertoun, Advocate, and JOHN CUNNINGHAME of Woodhall, their Husbands.

No 25.
Found in conformity with the above.

HUGH WALLACE and JOHN BAILLIE, assignees by the late tacksmen and managers of the customs, to a bond granted to them by Kenneth Urquhart, late collector of Aitoun as principal, Archibald Murray of Spot, and Sir George Lauder of Idingtoun as cautioners; that the said Kenneth should make just count, reckoning, and payment to them of his intromissions with the customs, excise, and bullion, and do all exact diligence for bringing in thereof monthly, quarterly, or oftner as he should be required; pursued Mrs Margaret and Elizabeth Lauders, and their husbands for their interests, as representing the said Sir George Lauder, for payment of the equal half of 3301 pound Scots, and annualrents thereof, wherein the said collector fell short in his accounts.

Alleged for the defenders: That the tacksmen not having done monthly or quarterly diligence against Kenneth Urquhart the principal in the terms of the obligement, the cautioners were free: As was decided betwixt Sir James Dick and the cautioners for the clerk of his brewery, No 23. p. 2090. For the defenders having engaged for the fidelity of a person in office, are like *fidejussores indemnitatis*, free if the creditor permit the principal debtor to become insolvent by his neglect. So the cautioners for a factor at Campvere were not found liable for effects sent to him, after he was known to be insolvent. *See* p. 2092.

Replied for the pursuers: The obligement by Kenneth Urquhart and his cautioners conjunctly and severally, was in favour of the tacksmen, whereby they might have compelled him and his cautioners to count and pay monthly, quarterly, and oftener if required; but did not oblige the tacksmen to that diligence, or free the cautioners for omission thereof; more than cautioners are free after the term of payment. There is no parity betwixt this, and Sir James Dick's case; for his clerk was precisely obliged to count to him quarterly, and he was