

No 73.

quently the arrester: And Stair, b. 1. tit. 17, lays it down as a principal, That if the decret suspended be turned into a libel, and the reasons of suspension be relevant and proven, though elided by a reply, the cautioner is free, and cites for it a decision in Spottiswood, Weir *contra* Bailie, No 68. p. 2142.; and the like was found, 26th March 1628, Vaus *contra* Law, No 42. p. 2114.; 2d January 1683, Sir Robert Colt against William Somervell, No 70. p. 2143.; and 27th November 1685, More *contra* Finnison, No 71. p. 2145. Even so cautioners, as law will, *et judicio sisti*, are liberate on incompetency; and so it was decided in the Supreme Court of Friesland, *teste Joanne a Sande, lib. 3. tit. 10. definit. 3.* Now, to apply this to the present case, Sir Thomas Kennedy was never charged for the tack-duty which Hadden was bound to relieve him of, nor was the debt constituted or liquidated, so as he could know what to relieve him of; and therefore, the charge being general and unwarrantable, the suspension was just, necessary and warrantable, which is sufficient to liberate the cautioner, and he falling, so must his attester.—*Answered* for Sir Thomas, That the rule is quite mistaken; for a charge on a bond of relief is both legal, just, and ordinary, even before distress, its style being to free, relieve, and skaithless keep, which is not that he shall pull me out of the mire when I am cast in, but that he shall prevent my being tumbled therein; and it is more reasonable to free me before distress than after. And Stair, in the place above cited, says, Though cautioners have not ordinarily action against the principal debtor till they be distressed, where the cautioner has only a clause of relief in the bond, yet it is otherwise where the bond of relief runs in these terms, to free, relieve, and skaithless keep; and *esto* he were minor, yet the reason insisted on was nowise relevant to assoizie him.—THE LORDS found a charge on a bond of relief, though before distress, was nowise unwarrantable nor unjust; and therefore the cautioner and his attester stood still bound to Sir Thomas, and decerned against Stobs, in the terms of the bond of relief.

*Fol. Dic. v. 1. p. 128. Fountainhall, v. 2. p. 219.*

No 74.

A minor suspended on the head of minority. Before discussion, he became major, and granted a bond of corroboration. The cautioner was not affected by this, but was liberated.

1706. July 5.

UCHTRED M'DOUGAL, Merchant, *against* MAXWELL, Younger of Monreith.

THIS Monreith having taken off sundry suits of apparel, and other furniture, from M'Dougal, and given bond for it, he raises a reduction and suspension thereof on minority and lesion.—*Answered*, No lesion, because furnished to you for necessaries, and so *in rem et utilitatem tuam conversum*.—*Replied*, Offers to prove, that his father caused furnish him sufficiently, with cloaths, by Bailie Blackwood, another merchant; so the account on which M'Dougal's bond is founded was not *in rem versum*, but most exorbitant; and after a few days wearing, he gave them away to his comrades. A probation being allowed of these points before answer, at advising the charger craved decret, in regard the

minor had now acknowledged and homologated the debt, by giving a bond of corroboration after his majority.—*Answered*, Whatever this ratification may operate against Monreith younger, the principal debtor, yet it can never bind the cautioner in the suspension, because I became bound on the faith of a reason of suspension, which I knew both to be relevant and true, viz. that he was minor, and lesed when he gave that bond; and this being proven, any emergent reply arising upon the minor's giving a new bond of corroboration after majority, which was not *in rerum natura*, when I engaged for him, can never bind me. See Spottiswood's Practicks, p. 325, *voce* SUSPENSION, where a cautioner in a suspension was freed on this head, No 68. p. 2142.—*Alleged*, That a cautioner for a minor stands bound, though the principal escape free; and his bond of cautionry obliges him to fulfil whatever the Lords shall find the suspender bound to perform, and not as it stood at the time of the suspension; and though he was minor and lesed at the time, yet that cannot be reputed a good defence, because it is now elided by as relevant a reply, that he has ratified the debt; and Dynus, *ad l. 60. de reg. juris canonice*, tells us, *illa sola est justa exceptio quæ ope replicationis nequit elidi*.—*Replied*, If a suspended decret be turned into a libel, the cautioner in the suspension is undoubtedly freed, *et multo magis* here, when a relevant reason of suspension is only elided by a supervenient reply; and Sande, *decis. Frisce lib. 3. tit. 10. def. 3.* gives us their decision, that *fidejussor pro judicato solvendo datus liberatur, si principalis ob actionem male propositam sit absolutus, licet postea mutata actionis genere, idem reus in alia instantia fuerit accusatus et condemnatus*.—THE LORDS found the cautioner in the suspension free, seeing the principal was overtaken by his own deed of ratification subsequent to the suspension, which could not prejudice the cautioner, who was *in bona fide* to engage for him. Then M'Dougal the charger alleged the cautioner must still be liable, because the reason of suspension was not proven, viz. his lesion, in so far as it was alleged, that he was furnished *aliunde*; and Sir Robert Blackwood's account produced did indeed prove his furnishing to Sir William Maxwell elder, and his family; but few or none of these articles concerned this suspender; in respect whereof, the LORDS found the cautioner still liable, seeing their reason of suspension founded on lesion was not proven.

*Fol. Dic. v. 1. p. 128. Fountainball, v. 2. p. 341.*

1709. November 30. DUNBAR against MUIRHEAD.

ALEXANDER JACK, one of the Queen's life-guard, being debtor to Alexander Dunbar, taylor in the Canongate, in L. 101 Scots, for cloaths and furnishings, he pursues him before the Bailies of Edinburgh, where he compeared, and objected against the account as exorbitant; and tradesmen being named to cognosce and report, the Bailies modified the account to L. 95 Scots; which decret being suspended by Jack, he found Robert Muirhead merchant in Edinburgh

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A suspended decree being turned into a libel, and a day assigned to the suspender to depone upon the verity