

1746. December 24. MRS MARGARET BALFOUR of Burleigh *against* LAZINI.

MRS MARGARET BALFOUR being charged at the instance of Jean Lazini and her husband, to make payment of L. 320 Sterling contained in an heritable bond granted by her to the chargers, suspended on this ground, That she was cautioner for the charger Jean Lazini in the confirmation of her brother Andrew Lazini's testament, as his nearest of kin, and that she had right to retain the sum charged for till she was relieved of her cautionry.

At discussing, the Ordinary ordained ' the suspender to depone *de calumnia*, Whether she had reason to allege that there are any debts owing by the defunct Andrew Lazini, which may yet emerge?' And upon her refusing to depone in these terms, *That there are debts*, and contending that it was enough for her to say, that such debts might be, ' found the letters orderly proceeded.'

The suspender reclaimed, and specially set forth this fact, that the money had originally belonged to the deceast Mrs Violante, and was by her conveyed to her son Andrew Lazini, and by his death fell to his sister Jean Lazini the charger; that they being all foreigners and persons of circumstances unknown, Jean Lazini could find no person who would be cautioner for her in the confirmation of her brother's testament, till the suspender, who had occasion to borrow the like sum, agreed to become her cautioner, upon condition that the money should be lent to her, and for which she granted the heritable bond charged on.

THE LORDS were of opinion, That if it should appear that the suspender had become cautioner on that condition that the money should be lent to her, she could not be obliged to pay till she were relieved of her cautionry; and ' remitted to the Ordinary to enquire what evidence she could give that she had become cautioner in the view of borrowing the money.' And the Ordinary having, upon examining the agents concerned for either party, reported the fact to be as set forth for the suspender, the LORDS found, ' she had right to retain the sum ay and while caution were found to relieve her.'

On this occasion it occurred to be taken notice of, that it was a hardship that there was no method by which an exoneration could be obtained by an executor, *qua* nearest of kin, whereby his cautioner might be relieved.

*Fol. Dic. v. 3. p. 143. Kilkerran, (COMPENSATION.) No 1. p. 135.*

1774. November 29.

WILLIAM MACKIE *against* JOHN M'DOWAL, and Others.

MACKIE, as factor appointed by the Court upon the sequestrated estate of Ebenezer M'Culloch and Company, brought an action against John M'Dowal

No 35.

A person who became cautioner in a confirmation, upon condition of receiving the fund in loan, found entitled to retain till relieved.

No 36.

In an action for payment of copartners-