

* * * Fountainhall reports the same case :

No 85.

July 20.—JOSEPH WATSON being debtor to Ramsay in L. 4000 Scots or there-by, and being charged, he suspends and finds one Stuart of Clochfoldish cautioner; but the clerks suspecting him, required an attester, whereon Spalding of Auchintully attested him. The principal debtor being imprisoned, and failing, Stuart the cautioner is discussed by horning, caption and adjudication, so there is a subsidiary action raised by Ramsay against Auchintully, the attester, for payment; for whom it was *alleged*, the import of his attestation was only that the cautioner was habite and repute solvent at the time of his cautionry, which he offers to prove; and as this would liberate the clerk of the bills, if pursued, it must likewise assoilzie him, as was found 17th December 1687, Paterson *contra* Homes, No 83. p. 2159.; and he can never be answerable for future and eventual insolvency; and, if this had not been our law, what was the need of making the act of sederunt 28th December 1709, that attesters shall be equally liable with cautioners in suspensions *in suo ordine*, which infallibly proves attesters were *minus in obligatione* before that act? *Answered*, If the attestation had said no more but that he attested the cautioner's solvency and responsibility, there might have been some pretence for this allegeance; but the style here went farther, viz. 'and I oblige me and my heirs and executors for the same;' which certainly imports an effectual obligation, that he should pay what could not be recovered of the cautioner after diligence. Next, the LORDS have found holden and repute not sufficient, but burdened them to prove he was actually solvent the time of the attestation, as was decided 16th December 1698, Sir Donald Bayne *against* Dempster, No 84. p. 2160. *Replied*, These words 'and I oblige myself for the same,' are only an exegetic extension of the preceding clause, whereby he attested the cautioner to be sufficient, and can go no farther; and otherwise there had been no use for making the act of sederunt. THE LORDS by plurality found Auchintully the attester, no farther liable, than to prove that the cautioner was holden and repute solvent at the time of his attestation.

Fountainhall, v. 2. p. 589.

1747. June 26.

GILLESPIE *against* MAIN.

JOHN GILLESPIE drover in Abington, having obtained decret before the Sheriff of Edinburgh, against John Croll flesher there; it was suspended, and George Lesly indweller in Edinburgh became cautioner, who was attested by Andrew Main taylor there, in these words, being the ordinary style of attestations, 'I do hereby not only attest the sufficiency of the within designed cautioner, but likewise bind and oblige me, my heirs, and executors, as cautioners for

No 86.

An attester of a cautioner in a suspension may be summarily charged with horning upon his obligation.

No 86.

‘ him, and for payment of the within sums of money, as fully in all respects
 ‘ as the cautioner himself, except as to the order of discussing; and consent
 ‘ thir presents be registrate with the within bond, that all execution pass thereon
subsidiarie accordingly.’

A bill of horning was presented against the attester, upon production of a
 registrate horning and denunciation against the suspender and cautioner; and
 the matter being reported, because the writers to the signet doubted whether
 an attester could be summarily charged with horning, they thinking that he
 was only liable to a process.

THE LORDS directed the LORD ORDINARY to pass the bill.

Fol. Dic. v. 3. p. 122. D. Falconer, v. 1. No 194. p. 259.

See Brodie against Keith; Stair, v. 2. p. III. *voce* DEBTOR and CREDITOR.

M’Michan against Kennedy, *voce* ANNUALRENT, p. 524.

Bailie against Nisbet, *voce* ANNUALRENT, p. 518.

Kincaid against Leckie; Gilmour, p. 91. *voce* SOLIDUM ET PRO RATA.

Collins against Boyd, 6th February 1759; Fac. Col. No 161. p. 288. *voce* FOREIGN.

Smith against —; Durie, p. 211. *voce* FACTOR.

Creditors of Brough against Selby, p. 1159.

Castlesomerville against Lookup; *voce* ADJUDICATION, p. 113.

Menzies against Cashogil, Durie, p. 611. *voce* HERITABLE and MOVEABLE.

No 11. p. 1406.

Hackstoun against Rutherford; Durie, p. 816. *voce* HUSBAND and WIFE.

Cautioners in what proportions liable—proportion of relief, *voce* SOLIDUM et
 PRO RATA.

Communication of eases—mutual relief—bound to assign, *voce* DEBTOR and
 CREDITOR.

Creditor bound to assign upon payment—bound to communicate separate secu-
 rity—cannot liberate the principal debtor after imprisonment, *voce* DEBTOR
 and CREDITOR.

Benefit of Discussion, *voce* DISCUSSION.

Strangers pursued here must find caution *judicio sisti*, *voce* FOREIGN.

Sentence against the principal, effect against the cautioner, See RES INTER ALIOS,
 RES JUDICATA.

Diligence against a Cautioner, See HERITABLE and MOVEABLE.

Annualrent due by Cautioners, *voce* ANNUALRENT.

BANKRUPT.

PRESCRIPTION, Septennial.

MESSENGER.

See APPENDIX.