

1758. June 21. THOMAS SIBBALD *against* ANDREW FLETCHER.

No 7.

The surviving cautioner of an apprentice who has inlisted, found liable, *in solidum*, for the damages; but in no expenses.

IN 1750, Walter Fletcher was bound apprentice by indenture to Thomas Sibbald locksmith, for six years and two months, without any apprentice-fee. His brothers Andrew and William Fletchers became bound as cautioners for him, under the penalty of L. 15 Sterling.

In 1755, sixteen months before the elapse of the term, Walter Fletcher voluntarily inlisted himself in the regiment of artillery, and went immediately on board a ship ready to sail for London.

Thomas Sibbald charged the two cautioners with horning upon the indenture, for the penalty of L. 15; soon after which William Fletcher, one of the cautioners, died.

*Pleaded* in defence by Andrew Fletcher, the other cautioner, *1mo*, That the indenture was null: For though it was wrote upon paper duly stamped, yet it had not been stamped in terms of the act *8vo Annæ c. 8.* upon payment of the duty imposed upon apprentice-fees. *2do*, That he can only be liable for one half of the damages incurred by the loss of the apprentice, as being one of two cautioners, and not bound *conjunctly and severally*. *3tio*, It was the duty of Thomas Sibbald to have claimed back his apprentice, notwithstanding his having inlisted; in which case he must have been restored to him. *4to*, The master cannot, in this case, be entitled to costs of suit, because he gave a charge for the whole penalty of L. 15, contained in the indenture, which was higher than his real loss; whereas he ought to have brought an action by summons, and claimed no more than the true amount of his damage, as it should be ascertained by proof.

*Answered 1mo*, The act *8vo Annæ, c. 8.* does not require that indentures should be stamped when no apprentice-fee is paid: For the purpose of the act was, to secure the duty payable upon apprentice-fees, of 6d. per pound on every sum under L. 50, and 1s. per pound for every sum above L. 50; but where no duty is payable, no stamp is required: And it is the practice at the stamp-office, to refuse to stamp indentures which contain no apprentice fee. *2do*, Cautioners, though bound simply, and without the words *conjunctly and severally*, are notwithstanding ultimately liable *in solidum*. They have indeed the benefit of division, if the other cautioners are also solvent; but if, at the time of the action, as in the present case, the others are insolvent, any one cautioner must make good the whole, Lord Stair, b. 1. tit. 17. § 12. Besides, in this case, the two cautioners became bound for the performance of an indivisible fact, and must therefore be liable *in solidum*; 14th June 1672, Sutherland, (Stair; v. 2. p. 84. *voce Solidum et pro rata*.); 6th July 1721, Patrick Grant, (Rem. Dec. v. 2. p. 57. *voce Solidum et pro rata*.) *3tio*, The master is not bound to demand his apprentice back when he deserts his service, and voluntarily inlists, and is not impressed or carried off by force. Besides, in this case, by his going on board a ship ready to sail, the master had no opportunity to make a demand. *4to*, The master was entitled to give

a charge upon the indenture for the penalty, otherwise the clause of registration would be inept; but in this, as in all cases of penalties, the sum charged for is to be understood as subject to the modifications of the Court.

No 7.

THE LORDS found the defender liable in damages; which they modified to L. 8 Sterling; but refused expences.

A&C. Johnstone.

Alt. P. Murray.

Fac. Col. No 110. p. 196.

W. Johnstone.

1760. November 19.

CHRISTIAN SHEPHARD, Relict of William Mowat, against ALEXANDER INNES.

No 8.

CHRISTIAN SHEPHARD, whose son, James Mowat, had, by indentures executed in May 1750, entered an apprentice to Alexander Innes, commissary-clerk and advocate in Aberdeen, for a term of three years, but deceased in October following, brought a reduction, in 1755, of three bills, of 100 merks each, accepted by her on the 2d August 1750, payable to Innes, as her son's apprentice-fee.

No ground for reducing bills granted for an apprentice-fee, That the sum was not inserted in the indenture, nor the principal indenture stamped; the master having subjoined the sum to an extract of the indenture, and got the extract stamped, on payment of the duty; though this was done after the death of the apprentice. The whole apprentice-fee is exigible, although the apprentice should die before expiration of the indenture. Sufficient to support bills signed by initials, that the party acknowledges they were truly adhibited.

Innes produced an extract of the indenture, stamped, with a notandum subjoined, in these words: 'Notwithstanding that there is no apprentice-fee contained in the foregoing indentures, there was 300 merks really and truly secured to me, the foregoing Alexander Innes.' (Signed) 'ALEXANDER INNES.' As also a receipt wrote upon the back by the defender's brother, then clerk to the collector of the stamp-duties, of this tenor: 'Stamp-office, Edinburgh, 25th June 1755. Received 8s. 4d. for the duties of 6d. per pound, according to the statute.'

THE LORD ORDINARY 'repelled the first reason of reduction, That the bills libelled were not duly signed, in respect it was acknowledged, that the initials subjoined to the bills were truly adhibited by the pursuer: Repelled also the second and third reasons of reduction, That the sum given in name of apprentice-fee, was not filled up in the indenture, and that the indenture was not stamped in due time; in respect of the several acts of Parliament indemnifying such omissions, and that the indenture was now stamped, and the sum given in name of apprentice-fee subjoined to the indenture: And also repelled the fourth and last reason of reduction, founded upon the death of the apprentice before the expiration of the indenture, in respect the non-performance of the contract was not occasioned by any fault on the part of the defender, the master; and affoizied from the reduction, and decerned.'

Pleaded in a reclaiming petition for Shepherd, the pursuer, *imo*, The reason why a subscription by initials has been sustained, is, that it is a party's ordinary subscription that makes a writ effectual. Accordingly, in the case Earl of Traquair *contra* Gibson, 9th February 1723, (*voce* WRIT) the Lords would not sustain a subscription by initials, without a previous proof, that such was the party's