

Upon advising a reclaiming petition, with answers, the Lords adhered to the judgment of the Lord Ordinary.

No 80.

Lord Ordinary, *Braxfield*. Act. *Maclaurin*. Alt. *Cullen*. Clerk, *Menzies*.
Craigie. *Fol. Dic. v. 3. p. 121. Fac. Col. No 186. p. 291.*

1786. February 7.

SIR MICHAEL STEWART, Barr. *against* WILLIAM MITCHELL.

WILLIAM MITCHELL signed a bond, as cautioner in a suspension offered by a tenant of Sir Michael Stewart's; but his security not being thought sufficient, the bond was, in common form, delivered to the suspender's agent, for the purpose of getting it attested.

Two different attestations were successively offered, but not accepted; and, in the mean time, the suspender became notoriously insolvent. Sir-Michael Stewart, the charger, then insisted for delivery of the bond; and

Pleaded: The security offered, though not judged fully adequate, was not, however, finally rejected. Neither can it be reasonably imagined, because the charger was desirous of the collateral warranty of an attester, that he had it in view, if that could not be had, to renounce altogether the right he had already acquired. A contrary doctrine, indeed, would be full of injustice; for if, instead of allowing the suspender to procure additional security, the cautioner had been peremptorily refused, a certificate of caution not being found, might have been obtained; and, by means of immediate diligence, the charger might have had an opportunity of recovering payment, which is now altogether precluded.

Answered: The interposition of a cautioner in suspensions, is viewed, in practice, merely as an offer, from which, at any time before its being accepted by the clerk of the bills, the party offering is at full liberty to recede. Hence, when his sufficiency is doubted, the bond signed by him is invariably returned, without any receipt, to the person by whom it is presented. Nor has the charger any reason to complain of this; because it is in his power, at any time after the day assigned by the Lord Ordinary, to extract the certificate, and so to proceed to the execution of his diligence.

THE LORDS found, that the cautioner was not bound.

Lord Ordinary, *Rockville*. Act. *Maclaurin*. Alt. *Cullen*.
Craigie. *Fol. Dic. v. 3. p. 121. Fac. Col. No 257. p. 393.*

1793. June 12.

JOHN HERBERTSON and Company *against* JAMES RATTRAY and Others.

ROBERT RATTRAY was cautioner for James Rattray in a suspension of a decree of a Sheriff, pronounced in absence against him. James objected to the decree,

No 81.

The cautioner in a suspension is at liberty to reside before his security has been accepted of by the charger.

No 82.

The cautioner in a suspension found not liberated