

ordinary action for payment of the sums charged for, which is called in the statute a special decret.

No. 43.

Answered : This is not a charge upon general letters, but is founded upon a special decret of modification, &c. whereby a particular sum is allocated upon particular lands, and the heritors, &c. are decerned to pay the sum so allocated ; and if this charge could be suspended without consignation, it is easy to see how Ministers might be distracted by pleas before they got payment of their stipend. Ministers have now only alimentary provisions out of the teinds, and the law has provided, in their favour, that suspensions of their stipends should not so easily pass as in other cases, that they may not be withdrawn from their charges by unnecessary law-suits for recovering their stipends. It is frivolous to pretend, that by special decreets, in the act of Parliament, are meant decreets taken upon an ordinary action against particular persons for payment of particular sums ; for, though such decreets may be necessary, where the Minister has nothing to found upon but use of payment, yet where he obtains a decret of locality, that is a special decret, upon which he can, without necessity of an ordinary action, charge the possessors of the ground ; and if it were otherwise, he could have little benefit from the act, by a decret of locality, in case he were obliged to convene the tenants upon every occasion in an ordinary action.

The Lords passed the bill upon consignation only.

*C. Home, No. 153. p. 261.*

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1794. December 13. ALEXANDER GOVAN *against* JOHN GRAY

John Gray having presented a bill of suspension against a decree of an inferior judge, in favour of Alexander Govan, it was passed on caution.

The cautioner, after the suspension had come into Court, having become insolvent, the charger craved, that the Lord Ordinary would assign a term for the suspender's finding new caution, under certification, that the letters would be found orderly proceeded against him.

The Lord Ordinary took the point to report on minutes, and the Court afterwards ordered memorials. For the charger, it was

Pleaded : The same expediency which has made caution the condition of obtaining a suspension, seems to require its renewal on the bankruptcy of the cautioner, during its pendency, especially as the choice of the original cautioner lies not with the charger himself, but with the clerk of the bills ; Bankton, vol. i. p. 458. § 26.

Although the charger cannot quote any case directly in point, his plea is strongly supported by analogy. In the case of judicial sales, the creditors are entitled, on the failure of a cautioner, to insist for new caution ; 8th March, 1769, Stark and Clark against Johnston, (Not reported.) The Lord Lyon exacts new caution from messengers, as often as he finds it expedient. Notaries, if required, are oblig-

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When a cautioner in a suspension becomes bankrupt during its dependence, the charger cannot insist for new security.

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ed to renew their bonds of caution, on the death or insolvency of their cautioner ; and of old, when the practice in improbations was regulated by 1557, C. 62. new caution was found by the pursuer, when his former cautioner died *pendent lite* ; Balfour, Tit. Improbation ; see also Voet, Lib. 2. Tit. 8. § 3. ; Lib. 46. T. 1. § 2. ; Corvinus, Lib. 46. T. 5. ; Huber, De stipulationibus prætoriiis, § 2. ; Marsilius. De fidejussoribus, § 74. ; Zoesius, Tit. Qui satis dare cogantur ; Heringius, De fidejussoribus, Cap. 13.

Answered : As soon as Caution is received by the clerk of the bills, the process is removed from his office to that of the clerks of Session, and a certificate afterwards from him, bearing, that the cautioner had become bankrupt, would be inept. Were it therefore necessary, that new caution should be found, the business of receiving it would be entrusted to the depute-clerks or some other officers of court ; and there being none to whom it belongs, shows that the demand is ill founded. Indeed, the charger admits, that it is altogether unprecedented, although similar cases must frequently have occurred, and, if granted, it would occasion constant disputes respecting the sufficiency of the original caution, and produce much delay in the determination of causes.

The cases mentioned by the charger bear no analogy to the present. In the articles of judicial sales, sufficient caution for the price is always expressly stipulated. The Lord Lyon is ordained by special statutes, (1587, C. 46. 1592. C. 125.) to take caution from messengers ; and from the public nature of their office, it is consistent with reason, that on the death or insolvency of one cautioner, they shall be obliged to find another. And notaries are obliged to renew their caution in consequence of a special obligation in the bond, granted by them on their admission.

Observe on the Bench : Practice has very properly established that the suspender must in most cases find caution *judicatum solvi*, before his cause can be removed from the inferior court, although this Court may dispense with his doing so, if they see cause. But after a cause is brought into Court, the parties are entitled to be heard, and the proceedings are not to be overturned, because the cautioner has become insolvent. The suspender is not to blame for the bankruptcy of his cautioner, and it would be unreasonable to make him lose his suit, whether right or wrong, merely on that account.

The Court, with one dissenting voice, “ repelled the demand of new caution, and remitted to the Lord Ordinary to hear parties on the merits of the cause.” See CAUTIONER, Sect. 8.

Lord Ordinary, *Abercromby*.

Alt. *Arch. Campbell, Fletcher*.

For the Chargers, *Tait, R. H. Cay*.

Clerk, *Sinclair*.

R. D.

*Fol. Dic. v. 4. p. 320. Fac. Coll. No. 147. p. 337.*