

bar, to be delivered to her for her employment foresaid, she finding caution to make the principal sum forthcoming after her decease, to the heir: And the relict *alleging*, That she was not holden to receive the money, which she could not get employed, and that she was not obliged to receive the same, nor find caution, which, she alleged, was not in her power to find; and that she sought payment only yearly of that annualrent for her lifetime:—THE LORDS found, That this offer of delivery of the money to the relict, as said is, (which sum also was exhibited in presence of the Lords) freed not the cautioner; and that the relict was not holden to accept the same, but if she pleased; and that the cautioner remained subject to employ the money for the use of the relict, that she might get the annualrent thereof so long as she lived.

Act. *Aiton.*

Alt. ———.

Clerk, *Hay.*Fol. Dic. v. i. p. 125. *Durie*, p. 380.

1628. July 4. HAMILTON against BISHOP of GALLOWAY'S RELICT.

In a suspension, Hamilton of Kinblathmonth against the Relict of Gawin, Bishop of Galloway, who had charged the suspender, as he who was cautioner for her husband in the contract of marriage with him, for infesting her in life-rent of a tenement pertaining to her said unquhile husband, and also in some annualrents, which he had out of certain lands, redeemable, conform to the said contract; wherein it was provided, that how oft the lands should be redeemed, as oft the monies should be employed again to her use for her lifetime:—THE LORDS found, That there being an infestment once given to her of the said tenement by her husband, albeit she alleged that the land was thereafter sold by her husband, and so thereby she alleged the same was not profitable to her, yet that the cautioner was freed thereby of that part of the said contract; for if she had consented to the alienation, it was her own fault, for the which the cautioner was not bound; and if she had not consented thereto, then she might claim and use the right of her infestment: And sicklike they found the cautioner obliged to give her, her life-rent of the annualrents contained in the contract, notwithstanding that he alleged that she was once infest therein by her husband, whereby he alleged, that he was not further obliged; seeing, albeit the annualrents were redeemed, and the monies paid to her husband, yet seeing she consented to the renunciation made by her husband, that being her own deed, she could not come to seek the cautioner, who was not obliged for that which was done by herself, nor for any thing wherein she had voluntarily prejudged herself:—For he *alleged*, That howsoever he was obliged as cautioner, that how oft the annualrents should be lawfully redeemed, in that case to employ them again to her use; yet he was not obliged to employ, where they voluntarily received the money, and gave voluntary renunciations, on redemption being orderly used; in which case of order of redemption, and not voluntary renunciation, he alle-

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ploy a sum for the Lady's life-rent, was found not entitled to consign the sum, or otherwise get quit of the duty.

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Found in conformity with the above.

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ged he could only become cautioner, and the words of his obligation could not be extended. This allegiance was repelled, and the cautioner was found obliged to employ again to the relict, in liferent, the sums uplifted, notwithstanding of her renunciation, and albeit there was no order of redemption used; for the annualrents contained in the contract being redeemable, the voluntary renunciation was found of that same force, to astrict the cautioner to re-employment; seeing there was a preceding reversion which was as necessary a cause, as an order and decret of redemption: And because it was thereafter *alleged* by the cautioner, That the relict had given up and confirmed her husband's testament, wherein she confirmed the money beside him to a special quantity, and the utensils of the house to a special sum, which was given up by herself, she then being in his house, and retaining the possession of the house; likeas she became obliged in the testament, to relieve the cautioner therein, who was obliged to make the goods furthcoming; therefore the LORDS allowed the sums to the relict, to meet the sums *pro tanto*, which she desired to be employed to her use by the said suspender; and found, that she ought to fulfil that to herself, she being fulhanded therewith; and found, that the testament given up by herself, as said is, and her own obligation therein, to relieve the cautioner for the goods confirmed, was a sufficient probation of her intromission, and that there was no necessity to prove any otherwise her intromission, but that the same was sufficiently proven by the said testament, as said is; and consequently the LORDS found the said suspender could not be charged by her *pro tanto*, seeing she might, by her own intromission, employ the same to her own use; and albeit she alleged, that divers of these sums was evicted from her by her husband's creditors, by sentences recovered by them upon lawful grounds of just debt; yet that was repelled, seeing they found that she might have alleged that she was a prior creditor by her contract of marriage, and so more favourable, and therein she would have been preferred to them; and this being omitted by her, and so suffering other creditors to be preferred in that which would have been first subject to herself, and whereby the suspender was also frustrated of the means of his relief: This allegiance was therefore repelled also.

Act. Aiton.

Alt. Stewart &amp; Cunningham.

Clerk, Gibson.

*Fol. Dic. v. I. p. 125. Durie, p. 382.*

No 20.

A cautioner for an apprentice was found liable in damages for the apprentice's desertion of his service,

1663. June 17. JAMES ALLAN *against* JAMES PATERSON.

JAMES ALLAN charges James Paterson, as cautioner in an indenture for an apprentice, set to the charger for five years, and insists upon that article, of paying two day's wages for ilk day's absence; and subsumes that the apprentice left his service after the first two years, and was absent three years. The said James Paterson suspends on this reason, That it must be presumed collusion betwixt