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the principals, though they compare not at pronouncing; because such cautioners do in effect subject themselves to the performance of the decreets to be pronounced. But the defender is in a different case from these, and cannot be concluded by *res judicata* against the principal, *Voet. ad Tit. de Re Judicata*, § 32. *Huber ad eundem Tit.* § 51, 52.

THE LORDS found, That the decret against the representatives of the principal debtor is not *res judicata*, either as to relevancy or probation, in so far as concerns the cautioner; but that any thing done in the said decret is only to be considered as practicks or interlocutors, which the pursuer may found on, and repeat here, without prejudice to the defender to object, both against the relevancy and import of the probation. *See RES JUDICATA.*

*Forbes, p. 87, 125, & 382.*

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1707. February 20.

HUGH WALLACE of Inglishton, and JOHN BAILLIE, Chirurgeon, against Mrs MARGARET and ELIZABETH LAUDERS, and Mr JOHN FAIRHOLM of Babertoun, Advocate, and JOHN CUNNINGHAME of Woodhall, their Husbands.

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Found in conformity with the above.

HUGH WALLACE and JOHN BAILLIE, assignees by the late tacksmen and managers of the customs, to a bond granted to them by Kenneth Urquhart, late collector of Aitoun as principal, Archibald Murray of Spot, and Sir George Lauder of Idingtoun as cautioners; that the said Kenneth should make just count, reckoning, and payment to them of his intromissions with the customs, excise, and bullion, and do all exact diligence for bringing in thereof monthly, quarterly, or oftner as he should be required; pursued Mrs Margaret and Elizabeth Lauders, and their husbands for their interests, as representing the said Sir George Lauder, for payment of the equal half of 3301 pound Scots, and annual-rents thereof, wherein the said collector fell short in his accounts.

*Alleged* for the defenders: That the tacksmen not having done monthly or quarterly diligence against Kenneth Urquhart the principal in the terms of the obligation, the cautioners were free: As was decided betwixt Sir James Dick and the cautioners for the clerk of his brewery, No 23. p. 2090. For the defenders having engaged for the fidelity of a person in office, are like *fidejussores indemnitate*, free if the creditor permit the principal debtor to become insolvent by his neglect. So the cautioners for a factor at Campvere were not found liable for effects sent to him, after he was known to be insolvent. *See p. 2092.*

*Replied* for the pursuers: The obligation by Kenneth Urquhart and his cautioners conjunctly and severally, was in favour of the tacksmen, whereby they might have compelled him and his cautioners to count and pay monthly, quarterly, and oftner if required; but did not oblige the tacksmen to that diligence, or free the cautioners for omission thereof; more than cautioners are free after the term of payment. There is no parity betwixt this, and Sir James Dick's case; for his clerk was precisely obliged to count to him quarterly, and he was

obliged to take the clerk's accounts quarterly off his hand ; which the cautioner required Sir James to do, and protested to be free for his not counting.

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THE LORDS repelled the defence, in respect of the reply.

*Fol. Dic. v. 1. p. 125. Forbes, p. 134.*

1708. February 28.

SIR PETER FRASER of Dooris *against* ALEXANDER ABERCROMBIE, his Factor, and ABERCROMBIE of Glassoch, his Cautioner.

SIR PETER FRASER of Dooris pursues Alexander Abercrombie, his factor, and Abercrombie of Glassoch, his cautioner, for count, reckoning, and payment of the rents of his estate. *Alleged* for Glassoch, the cautioner, absolvitor from any intromission had by the factor after the third act of Parl. 1700, declaring papists incapable of any public office, and particularly of being factors or chamberlains, because of the influence they might have to pervert tenants ; and Mr Abercrombie being a Roman catholic, his commission *ipso facto* expired by that act, and consequently my cautionry obligation ceased therewith. *Answered*, Though *ignorantia juris non excusat*, yet I was out of the kingdom at the time of making the act, and for a long time after, so it came not to my knowledge so soon ; yet the cautioner must stand bound (the factor being now broke) for all his intromissions and administrations, not only from the date of the act, and forty days thereafter, but for the last of the forty days after the publication and promulgation of the said act at the cross of Edinburgh ; seeing, both by the Roman law and our acts of Parliament, laws do not bind till then ; and the LORDS found it behoved to be so counted. Then Sir Peter craved, that the cautioner might assign him to his bond of relief he had from the principal, which the Lords refused.

*Fol. Dic. v. 1. p. 126. Fountainhall, v. 2. p. 439.*

1711. January 23.

THE CREDITORS of HAY of Park *against* ALEXANDER FALCONER of Blackhill.

IN the count and reckoning at the instance of Park Hay's Creditors, against Alexander Falconer, as cautioner for Sir Hugh Campbell of Calder their factor ; THE LORDS found the factor and his cautioner liable for the victual only, either according to the fiars, or according to the prices received by the factor, deducting all losses, in the option of the pursuers ; and found the cautioner liable for the annualrent of Sir Hugh's intromissions, as factors are liable by the act of sederunt, 31st July 1690. Albeit it was *alleged* for the defender, That the bond of cautionry bore no annualrent, and a cautioner in a suspension was

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A cautioner for a factor who was a papist, was free with regard to all the factor's intromissions posterior to the act 3d Parl. 1700, declaring all papists incapable of any public office.

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The cautioner for a factor upon a sequestrated estate, found liable for annualrent of the factor's intromissions, according to the act of sederunt 1690, although the