

minor had now acknowledged and homologated the debt, by giving a bond of corroboration after his majority.—*Answered*, Whatever this ratification may operate against Monreith younger, the principal debtor, yet it can never bind the cautioner in the suspension, because I became bound on the faith of a reason of suspension, which I knew both to be relevant and true, viz. that he was minor, and lesed when he gave that bond; and this being proven, any emergent reply arising upon the minor's giving a new bond of corroboration after majority, which was not *in rerum natura*, when I engaged for him, can never bind me. See Spottiswood's Practicks, p. 325, *voce* SUSPENSION, where a cautioner in a suspension was freed on this head, No 68. p. 2142.—*Alleged*, That a cautioner for a minor stands bound, though the principal escape free; and his bond of cautionry obliges him to fulfil whatever the Lords shall find the suspender bound to perform, and not as it stood at the time of the suspension; and though he was minor and lesed at the time, yet that cannot be reputed a good defence, because it is now elided by as relevant a reply, that he has ratified the debt; and Dynus, *ad l. 60. de reg. juris canonice*, tells us, *illa sola est justa exceptio quæ ope replicationis nequit elidi*.—*Replied*, If a suspended decret be turned into a libel, the cautioner in the suspension is undoubtedly freed, *et multo magis* here, when a relevant reason of suspension is only elided by a supervenient reply; and Sande, *decis. Frisce lib. 3. tit. 10. def. 3.* gives us their decision, that *fidejussor pro judicato solvendo datus liberatur, si principalis ob actionem male propositam sit absolutus, licet postea mutata actionis genere, idem reus in alia instantia fuerit accusatus et condemnatus*.—THE LORDS found the cautioner in the suspension free, seeing the principal was overtaken by his own deed of ratification subsequent to the suspension, which could not prejudice the cautioner, who was *in bona fide* to engage for him. Then M'Dougal the charger alleged the cautioner must still be liable, because the reason of suspension was not proven, viz. his lesion, in so far as it was alleged, that he was furnished *aliunde*; and Sir Robert Blackwood's account produced did indeed prove his furnishing to Sir William Maxwell elder, and his family; but few or none of these articles concerned this suspender; in respect whereof, the LORDS found the cautioner still liable, seeing their reason of suspension founded on lesion was not proven.

Fol. Dic. v. 1. p. 128. Fountainball, v. 2. p. 341.

1709. November 30. DUNBAR against MUIRHEAD.

ALEXANDER JACK, one of the Queen's life-guard, being debtor to Alexander Dunbar, taylor in the Canongate, in L. 101 Scots, for cloaths and furnishings, he pursues him before the Bailies of Edinburgh, where he compeared, and objected against the account as exorbitant; and tradesmen being named to cognosce and report, the Bailies modified the account to L. 95 Scots; which decret being suspended by Jack, he found Robert Muirhead merchant in Edinburgh

No 75.

A suspended decree being turned into a libel, and a day assigned to the suspender to depone upon the verity

No 75.
of the debt,
and upon his
failing to
depone, the
letters being
found
orderly pro-
ceeded; the
cautioner in
the suspen-
sion was
found liable
to pay the
debt.

In this case,
the cautioner
not having
been express-
ly bound in
the bond of
caution for
expenses,
was found
not liable
for them;
but an act
of sederunt
was made
to regulate
that matter in
future.

cautioner in the suspension; and their being a decret, finding the letters order-ly proceeded against Jack, the principal Muirhead is charged on his bond of cautionry, who suspends on this reason, That the cause having come in before the late Lord Register, he had turned the Bailies decret into a libel, which, by frequent decisions, liberates the cautioner, who is only bound to answer for the validity of the decret charged on; and if that be found null, then he is free: And *esto* the letters were orderly proceeded afterwards by Jack's collusion, or negligence, Muirhead the cautioner was not bound to notice what passed afterwards; for the first interlocutor turning the decret into a libel sufficiently secured him, as not only appears by Lord Stair's Institut. b. 1. tit. 17. § 7. bearing, where a decret suspended is turned into a libel, it imports liberation to the cautioner; but has been so decided in foreign supreme judicatories, and particularly in Friesland, Sande decis. b. 3. tit. 10. def. 3.—*Answered*, It is not a single interlocutor that liberates a cautioner in a suspension, but he must wait the last finishing act of the process; which, if it be a split new decret, without regard to the former, the cautioner may plead some exemption, (though that be more a subtilty than solid reason) yet if the superstructure be on the former decret, and the letters be found orderly proceeded, then *posteriora derogant prioribus*, and the cautioner stands unquestionably bound; and though he pleads a *ius quaesitum* by the first interlocutor, yet in Lucan's words *nil credas actum dum quid et restat agendum*, so the last consummates all, and to that he must stand.—THE LORDS found the cautioner in the suspension still bound and liable, and repelled the reasons.

Fol. Dic. v. 1. p. 129. Fountainhall, v. 2. p. 531.

* * * The same case is reported by Forbes :

ROBERT MUIRHEAD being cautioner in a suspension of a decret obtained by Alexander Dunbar before the Bailies of Edinburgh, against Alexander Jack, one of the gentlemen of the horse-guards, for a taylor-account, which was turned into a libel, and a day allowed to Jack to depone upon the verity of the account; and the LORDS having not only found the letters orderly proceeded for the sums charged for, but also modified L. 60 Scots of expenses upon his failing to depone, Alexander Dunbar extracted the decret of suspension, and the bond of cautionry, and thereupon charged Robert Muirhead the cautioner for the sums contained in the Bailies' decret. He suspended upon this reason, That he being only bound for Jack, in case the letters were found orderly proceeded on the Bailies decret, and that decret being turned into a libel, which was admitted to probation, he, the cautioner, was *ipso facto* sufficiently liberated, and not bound to notice what might afterwards follow, perhaps through collusion betwixt the charger and suspender.

Answered for the charger: By the style of bonds of cautionry in suspensions, the cautioner is bound to pay, in case it shall be found by the Lords, that the

principal ought so to do ; consequently, though the ground of a charge be turned into a libel, the cautioner is liable for the sum in the charge, if the suspender be decerned to pay the same.

THE LORDS repelled the reasons of suspension, and found the letters orderly proceeded.

Thereafter, 17th December 1700, Alexander Dunbar having charged Robert Muirhead, for the sum of L. 60 of expenses modified in the decret of suspension obtained against Alexander Jack, he suspended upon this ground, That the charge was unwarrantable, in so far as he by his bond of cautionry was only bound to pay the sum in the Bailies decret, in case it were found by the Lords that Jack ought to do the same, and therefore was not liable for the expenses modified at discussing the suspension ; and bonds of cautionry being *stricti juris*, can never be extended beyond what the natural import of the words will bear, l. 68. § 1. *ff. de Fidejuss. l. 99. ff. de Verb. Signif.* Therefore the LORDS, by an act of sederunt in November 1613, (observed by Spottiswood, tit. SUSPENSIONS,) ordained cautioners in suspensions, to enact themselves not only for the sum in the charge, but also for re-funding the charger such expenses as should be modified at discussing the suspension : Whence it is clear, that they thought a cautioner, obliging himself only for the sum charged for, not liable for any subsequent modification of expenses.

Answered for the charger : Seeing *accessorium sequitur naturam sui principalis*, the damages arising to the creditor by the deed of the principal debtor oblige the cautioner, l. 58. § 1. *ff. de Fidejuss. l. 24. § 1. ff. de Usuris.* The laws cited for the suspender concern only voluntary stipulations betwixt the creditor and cautioner : And there is a great difference betwixt a cautioner in a conventional obligation, and a cautioner in a suspension, who doth not formally contract with the creditor, but by authority of the Lords enacts himself as cautioner, and *ex natura negotii*, is understood to be bound for whatever shall be decerned against the principal debtor : So that it is not arbitrary to the clerks of the bills, or to cautioners, to limit the extent of such bonds, but they must be understood in the terms of law, without respect the style ; as law and custom, without respect to mere style, do regulate the import of inhibitions, interdictions, and gifts of Exchequer.

THE LORDS sustained the reason of suspension as to the expenses, and assoilzied the suspender from payment thereof, in respect he was not expressly bound for the same by his bond, and found the charge unwarrantable : But recommended to the Committee of the LORDS appointed for regulating abuses, to draw a *formula* of a bond of cautionry in suspension, according to the act of Sederunt 1613, (observed by Spottiswood, *vocce* SUSPENSION) to be the rule in time coming.

Forbes, p. 359.