

## S E C T. III.

## Nature of the Cautioner's Obligation.

1738. July 20. BANNERMANS *against* BANNERMAN of Elsick.

No 14.

A CAUTIONER in a contract of marriage for the husband, that he shall employ such a sum for the wife in liferent and the children in fee, is bound that the sum shall be employed, re-employed, &c. but not that so much shall be effectual to them against the husband's onerous creditors.

*Fol. Dic. v. 3. p. 117. Kilkerran, (CAUTIONER.) No 1. p. 116.*

1749. Dec. 6.—1750. Feb. 6.

MAGDALEN SCOTT, and her HUSBAND, *against* DAME ELISABETH CARNEGIE, widow of Sir James Nicolson of that ilk.

No 15.

The cautioner in a testament, confirmed in name of an infant by his father as administrator, was found to be bound for the father, to the infant.

SIR JOHN LAUDER, Lord Fountainhall, in the year 1719, left a sum of money to Magdalen Scott his infant grand-child, daughter to Thomas Scott of Milleny; and Sir John dying in 1722, while his said grand-child was still an infant, Thomas Scott her father confirmed her executrix *qua* creditrix to her grandfather; and as usual he, as upgiver, was authorised to intromit with, receive and dispose upon the subject, grant discharges thereof, and if need be, to pursue, &c.

As this confirmation could not be expedite without caution, Sir James Nicolson enacted himself as cautioner, whereby he became bound and obliged that the sum should be made free and furthcoming to all parties having interest thereto as law will.

In the action pursued by the said Magdalen Scott and her husband, before the Commissaries of Edinburgh, against the Lady Nicolson, as representing her husband Sir James, the cautioner in the confirmed testament, for payment of the money wherewith her father had intromitted; it was for her *alleged*, that as the pursuer herself was the executrix confirmed, Sir James Nicolson was cautioner for her and her administrator in law, to all other persons interested in the defunct's estate confirmed; but that he was not cautioner to the pursuer for her father and administrator; in so much, that if Sir James the cautioner had been distressed on account of this cautionary at the instance of any third party having interest in the subject confirmed, action of relief would have been competent to him against the said Magdalen the executrix.

This defence the Commissaries sustained, and assoilzied the defender, whereof the pursuer complained by bill of advocation, and referred to a passage from Sir Thomas Hope, in his Minor Practiques, fol. 30. § 97. where his words are, 'Albeit, commonly the confirmation bear, that the caution is found by the executor, yet if the executor be pupil or minor, and gives not up, nor makes faith upon the inventory himself, but the inventory is given up by the mother or tutor, or nearest of kin, &c. in this case the caution is understood to be found by those who give up the inventory, and not by the minors, and the minors may pursue those that gave up the inventory, and intromitted with the goods and gear confirmed; and obtain sentence against them; and if they shall not be found *solvendo*, after discussing them, they may pursue the cautioner in the confirmed testament: And it will be no relevant defence to the cautioner to allege, that he is cautioner for the executor, and that therefore he can have no action against him, but ought to relieve him, in respect the caution is holden to be found, not by the minor, but by the ingiver, as said is.'

Conformably whereto, the Lords, on the 6th December 1749, found, 'That Sir James Nicolson was cautioner in the confirmation for Scott of Milleny, the the administrator-in-law, and therefore found the defender, as representing her husband, liable in payment of the sums pursued for;' and, upon the 6th February 1750, 'adhered.' Notwithstanding that Sir Thomas Hope's opinion was, for the defender, said to be singular, confirmed by the opinion of no other author, nor supported by antecedent practice, nor by any decision since; the LORDS having considered it to be the just and rational construction of the caution when found, as by the form of the Commissary-court, it must be, even by the father, who otherways is not bound to find caution *rem pupilli salvam fore*.

*Fol. Dic. v. 3. p. 117. Kilkerran, (CAUTIONER.) No 3. p. 118.*

1758. July 8. GRANT against FORBES and HENDERSON.

JOHN GRANT became cautioner for John Henderson, a messenger, to the Lord Lion, in the following words: 'I John Grant, the younger of Rothmaise, by the tenor hereof, bind and oblige me, my heirs, executors, and successors, as cautioner and surety for John Henderson in Giach, to the Honourable Alexander Brodie of Brodie, Esq; Lion King of Arms, that the said John Henderson, where he shall dwell and remain, shall leally, truly, and honestly, use and exerce the office of a messenger, to all and sundry our Sovereign Lord's lieges, upon their reasonable expenses: And if he does in the contrary, what damages, skaith, or expenses, any of them shall happen to sustain through the negligent, fraudulent, and informal execution of the said messenger in the said office, we bind and oblige us, conjunctly and severally, both cautioner and messenger, to pay the same to the party interested and wronged.'

The commission from the Lord Lion to Henderson was clogged, as all commissions to messengers are, with the following clause: 'And I (*i. e.* the Lord

No 16.

The cautioner for a messenger is liable for malversations done to those against whom, as well as for whom, the messenger is employed.