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to the best of his knowledge, they were able to pay the debt.

it turned out that the latter were unable to pay the debt, and had been so when the caution was accepted. The chargers then brought an action for the debt against Sir Robert Anstruther and Thomas Smith, the Principal Clerks to the Bills, and

Pleaded, It is the duty of the Clerks to the Bills, where appearance is made for the charger, either to intimate to his agent, the caution found, or take attesters in terms of the act of sederunt, 27th December 1709, especially in cases like the present, where the chargers consented that the bill should be passed on caution. If the pursuers had received such notice, or if the Depute-clerk had delayed, for a short time, accepting the caution, they would have established, which they still offer to do, that the cautioners were not, as required by the act of sederunt, 18th February 1680, reputed sufficient for the sum charged for when their bond was accepted. See Stair, 2d December 1680, Alstoun against Riddel, *voce* REPARATION; 23d February 1785, Sibbald against Inglis, No 49. p. 13139.

Answered, The Clerks to the Bills are bound to accept, as cautioners, any persons reputed solvent at the time; and, as it is impossible for them to know the circumstances of every person offered to them, they must act upon the best information they can obtain. The information received in this case was so respectable, that it would have been their duty to have accepted the cautioners, although the chargers had appeared and objected, 1st March 1769, Stanners against Inglis, No 41. p. 13131. It is not the practice, in any case, to give intimation to the charger; and doing so does not free the clerks from their usual responsibility.

THE LORD ORDINARY assoilzied the defenders.

Upon advising a petition, with answers, the LORDS "adhered."

Lord Ordinary, *Glenlee*. Act. *Tait*. Alt. *Inglis*. Clerk, *Sinclair*.

D. D.

Fac. Col. No 49. p. 114.

1799. March 9.

ELIZABETH WILKINS, and her ATTORNEY, *against* WILLIAM CAMPBELL.

No 52.

A Sheriff-clerk subjected in payment of a debt, for which a warrant had been granted against the debtor, as in *meditatione fuge*, because he had accepted insuf-

EDMUND KELLY, a native of Ireland, after residing for a considerable time in England, came to Ayr in August 1795. He remained there till June 1796, when he was followed by Elibabeth Wilkins, a creditor for L. 1900, borrowed by him during his residence in England. She immediately presented a petition to the Sheriff, stating the amount of the debt due to her, the documents of which she produced; that Mr Kelly had clandestinely withdrawn from England, in order to avoid payment of it; and that she believed he would leave Scotland on hearing of her arrival.

The Sheriff ordered her to appear in Court, and give oath to the truth of the facts stated in her petition.

She did so accordingly, and the Sheriff granted warrant for imprisoning Mr Kelly, till he should find caution "to remain in this country for the space of six months from the date of the bail-bond to be granted to that effect, and abide the effect of any action that may be brought against him, for the payment of the debts mentioned in the petition."

He was immediately apprehended, but liberated without imprisonment, in consequence of the creditor's accepting a bond of presentation for his appearance, which was renewed till the 15th August.

Before this time a suspension of the Sheriff's warrant, by Kelly, had been refused, and it was understood that the warrant was then to be enforced.

On the 4th August, William Campbell, Sheriff-clerk of the county of Ayr, who happened to be in Dublin, there accepted a bond of caution in the Scots form, from two Irishmen, who obliged themselves that Mr Kelly should "abide in Scotland for the space of six months from this date, and abide the effect of any action that might be brought against him before any competent Court, at the instance of Elizabeth Wilkins."

The bond was subscribed only on the last page; and the testing clause of it was in the following terms: "In witness whereof, we have subscribed these presents, wrote on this and the preceding pages, by Michael Clark, attorney, as follows, this 4th August 96,—Six.

DONAT. O'CALLAGHAN.
W. P. IRVINE.

Present, Michael Clark.
Matthew Considence."

The bond contained an obligation on Mr Kelly to relieve the cautioners; and the following clause was afterwards added to it: "And these presents are subscribed by the said Edmond Kelly, for the said Donatus O'Callaghan's relief, at Ayr, the 12th day of August, seventeen hundred and ninety-six, before these witnesses, George Charles, surgeon in Ayr, and William Eaton, Sheriff-clerk depute of Ayrshire, the last place, date, witnesses names, and designations being inserted, and filled up by the said William Eaton, and the subscription of the said Donatus O'Callaghan and William P. Irvine, being filled up by the said William P. Irvine, and subscribed in presence of Michael Clark, attorney, and Matthew Considence, Esq. of Dublin.

EDMD. KELLY.

George Charles, witness.
Will. Eaton, witness."

On the 12th August Mr Campbell took from the cautioners a penal bond for L. 2000, in the Irish form, which bore, "that he had agreed to liberate the said Edmond Kelly, upon being indemnified, by these presents." And the condition of it was declared to be, to indemnify Mr Campbell from any loss he might sustain, by reason of the said Edmond Kelly not abiding in the kingdom of Scotland, for the space of six months from the date hereof."

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ficient caution *judicio sisti*, and the debtor was not presented in proper time.

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Mr Campbell remitted the bond first mentioned to Mr Kelly at Ayr, and it was accepted by the Depute-sheriff clerk on the 12th August, although the attorney for Elizabeth Wilkins protested against his doing so, both because the cautioners were unknown to him, and the bond was informal.

Mr Kelly left Ayr that day, and, as afterwards discovered, went to reside at York.

Elizabeth Wilkins soon after raised a process of constitution against Kelly before the Sheriff of Ayr. Defences, chiefly dilatory, were proponed; and it was understood, that decree against him was to be reported in Court by the Sheriff, on the 17th January 1797.

The day before, the pursuer's attorney intimated to Mr Campbell's deputy, (he himself being absent,) under a protest, narrating the objections to the bond, that if Mr Kelly was not next day produced in Court, Mr Campbell should be liable, as if he had been cautioner in a proper bond.

A similar protest was repeated in Court next day, when the decree was about to be reported by the Sheriff.

On the 1st of February, Mr Campbell made his deputy write to Mr Jones, a friend of the creditor, in Dublin, by whose advice he afterwards alleged he had acted, in accepting the caution,* that the cautioners had forfeited their bond, and that he would not hold himself answerable for the debt, till they were first discussed in Ireland.

On the 4th of February, the last day of the six months from the date of the bond of caution, the pursuer's attorney again protested, that Mr Campbell should be liable for the debt.

The decree against Kelly was then extracted.

On the 27th February Mr Campbell, and an attorney sent over by one of the cautioners, prevailed on Mr Kelly to come from York, where, it rather appeared, they had only lately discovered his residence, and presented him at Ayr, under a protest from Mr Campbell, that he should now be free from all claim at the instance of Elizabeth Wilkins.

Her attorney refused to accept of this presentment, but offered to assign her grounds of debt to Mr Campbell, whom he now held liable for the debt.

An action was afterwards brought against him, in which the pursuer *contended*, That the defender had subjected himself in payment of the debt, by accepting a bond of caution, completely nugatory, from its wanting the solemnities required by the law of Scotland, and from the cautioners being foreigners, and because he had failed to present the debtor in proper time; that the defender had interfered in this matter, out of regard to the debtor, with whom he was in habits of intimacy, and that he was all along aware of the risk he was running, as was evident from his taking the bond of indemnity from the cautioners; his letter to Mr Jones; and his obtaining from Mr Kelly a mortgage on his lands in Ireland. †

* This was afterwards denied by Jones. Miss Wilkins likewise denied his having any authority from her; and a parole proof, offered by Mr Campbell, was refused.

† The fact, as to this mortgage, was not explicitly stated in the papers.

Various defences were stated ; particularly,

1mo, The solemnities of the law of Scotland were not requisite in a bond executed in Ireland. Besides, the supposed defects in the testing clause were afterwards supplied.

The pursuer, herself of England, and claiming on a debt contracted there, had no right to insist on having cautioners resident in Scotland. It would be extremely hard on a person in Mr Kelly's situation, possessed of a great landed estate in his own country, and here only *in transitu* to it, (though his stay had been protracted by various accidents,) if cautioners from his own country were not to be accepted.

2do, At any rate, the defender cannot be in a worse situation than if he had himself become cautioner *judicio sisti*, and the pursuer did not take the proper steps to subject him in that character. He ought, according to the usual practice*, before decree was pronounced, to have applied to the Judge to name a day for the cautioners and the defender (if she considered him virtually in their place) presenting the debtor, in which case a reasonable time would have been allowed by the Judge ; whereas, the pursuer contented herself with giving the defender's deputy an extrajudicial intimation of twenty-four hours, within which it was impossible to comply with her requisition.

Besides, as the debtor was presented on the 27th February, (to which day, if the usual application had been made to the Judge, the day of his appearance would, in all probability, have been prorogated), without any change of circumstances, she cannot qualify damage from the delay in presenting him, which is essential in a claim against cautioners *judicio sisti*, 24th January 1786, Gordon against Mellis, No 79. p. 11756. ; 16th November 1792, Brown against Magistrates of Lanark, No 85. p. 11763. See Thomson against Magistrates of Stirling, 8th December 1756, No 70. p. 11747.

Answered, 1mo, The object of caution *judicio sisti*, is to secure the presence of the debtor, when required by the creditor, during the progress of the action, and particularly when the final decree is to be pronounced against him. The pursuer is then entitled to have the security renewed, or the debtor imprisoned, till diligence can be enforced on the decree. The caution accepted, therefore, must be actionable by the law of Scotland, and the obligants in it subject to the jurisdictions of its Courts, 6th February 1759, Collins against Lord Boyd, No 10. p. 4648. ; 21st June 1763, Ray against Bellamy, No 13. p. 2051. Nor has a debtor in Mr Kelly's situation any just cause to complain of a hardship in this, as, if he had remained in England, an arrestment of his person, till payment, would have been the first step of diligence against him.

2do, It is not necessary for the creditor to apply to the Judge to appoint a day for the cautioners' producing the debtor ; and, at any rate, the defender had made this nugatory in the present case ; the Judge had no jurisdiction.

* Certificates of practice to this effect in the Sheriff-Courts of Edinburgh, Glasgow and Dumfries, were produced.

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over the cautioners, and no direct claim, on the bond, lay against the defender himself. If he had been appointed to produce the debtor, the present litigation would have ensued before decree of constitution could have been obtained against him. The pursuer, therefore, did every thing which the circumstances of the case admitted of. If the defender had thought the intimation given him to produce Kelly too short, he ought to have applied to the Judge for delay.

The pursuer is not bound to qualify loss, in consequence of the defender's conduct, 7th December 1780, Gray against Magistrates of Dumfries, No 76. p. 11754. ; 13th June 1781, Bell against Magistrates of Lochmaben, No 78. p. 11756. ; 8th June 1790, Shortreid against Magistrates of Annan, No 83. p. 11760. At the same time, if the defender had not interfered, Mr Kelly would have been imprisoned on the 15th of August, and decree of constitution would have been sooner obtained, as he would then have had no interest to state dilatory defences against it. And to take the strictest view of the case, the pursuer had lost the presumed benefit derived from imprisonment of the debtor, on caption, for several weeks before he was presented.

The Lord Ordinary reported the cause on informations.

All the Judges seemed to be of opinion, that, in the whole circumstances, the defender, by accepting the bond in question, had put himself in the same situation as if he had himself become cautioner; but some thought the pursuer had lost her claim against him, by neglecting to obtain a judicial appointment for production of the debtor before decree.

THE LORDS (5th July 1798) repelled the defences; and, upon advising a petition, with answers, &c. they adhered.

Lord Ordinary, *Stonefield.*

Act. Solicitor-General Blair, D. Cathcart.

Alt. Lord Advocate Dundas, G. Fergusson, H. Erskine, Hay.

Clerk, Colquhoun.

D. D.

Fac. Col. No 121. p. 275.

1802. November 19.

ABERCROMBY against The CORPORATION of GOLDSMITHS of Edinburgh.

No 53.

A Corporation has no power to name an assistant to their clerk, without his consent, after having appointed him for life.

ALEXANDER ABERCROMBY, writer to the signet, was elected clerk of the Corporation of Goldsmiths of Edinburgh, in the year 1793; but, being frequently prevented by indisposition from attending their meetings, his partner, William Walker, writer to the signet, was in use to attend in his place, and was chosen to officiate as clerk at each sederunt.

At a meeting of the corporation, 11th August 1801, it was moved, "That as the state of health in which Mr Alexander Abercromby, our present clerk, had been for some considerable time past, has prevented him from attending the meetings of the Corporation, and it being uncertain, whether it may be in his power to give a punctual attendance in future, some person shall be appointed to officiate as clerk, at those times when it may be inconvenient or impossible