

No 68.

A suspension was brought because the charger had not implemented his part of a contract. At discussing, he did implement, and the letters consequently were found orderly proceeded. Yet the cautioner was not liable.

1633. *December 5.**WEIR against BAILLIE.*

JOHN WEIR having charged John Symington of that ilk, for payment of 600 merks, conform to his bond ; he suspended, and found James Bailie, brother to the Laird of Lamington, cautioner in the suspension. The reason was this, that the bond was given for a renunciation of a wadset, which should have been given by the charger to the suspender for it ; but so it was, that he had never received the said renunciation. For purging of the reason, the charger produced the renunciation, and therefore craved the letters might be found orderly proceeded, which was done against the suspender. After this, the cautioner in the suspension *alleged*, That howsoever the charger did now produce his renunciation, that should not burden him, but he ought to be free of his cautionry, since the suspender had reason to suspend, the charger not having performed his part the time of the raising of the suspension ; and the renunciation being now produced, the suspender can only be burdened with it, but not the cautioner. *Answered*, The cautioner must be liable to all that the suspender is, seeing he became caution for that effect, to fulfil whatever the LORDS should think the suspender bound to perform, and not that the reason was true and relevant. THE LORDS did suspend the letters *simpliciter* against the cautioner, and found that he ought not to be burdened with the debt, for the reason foresaid.

Fol. Dic. v. 1. p. 128. Spottiswood, p. 325.

1681. *January 6.**HUME against HUME.*

No 69.

A bond of caution found good against the cautioner, altho' it contained an obligation on the principal, and he had not subscribed it.

The cautioner in a suspension is bound *for* the principal, not *with* him.

GEORGE HUME pursues Mr Patrick Hume upon this ground, that umquhile Hume of Rentoun having granted bond to one Willet in London, whereunto George Hume is assignee, and charged Rentoun thereupon, he did suspend, and found an insufficient cautioner, but Mr Patrick his son, attested him to be sufficient. The pursuer having discussed the suspension against Sir Alexander Hume, now of Rentoun, he insists against Mr Patrick, as attester, for payment of the sum, who *alleged*, *imo*, That the bond of caution was null, containing an obligation for Rentoun to relieve the cautioner, which Rentoun subscribed not ; so that this bond being in effect a mutual contract, cannot oblige the cautioner, unless the principal had subscribed. It was *answered*, That whatever may be pretended as to bonds, where one party is principal and another cautioner, when the cautioner subscribes and the principal subscribes not, yet there is no ground to quarrel cautioners in suspensions who do not become obliged with the principal, but for the principal, that he shall pay what shall be decreed ; and though the bond contain a clause of relief, though the insolvent cautioner did not see to the signing of that clause, it imports not. ' THE LORDS sustained the bond of caution, though the bond of relief was not signed.' The defender further *alleged*, That he did only attest the cautioner in the second