

No 84.

plurality. Attesters of cautioners in suspensions may be in a different case, for they are mainly taken to secure the clerk of the bills in case he take insufficient caution; and it is of them my Lord Stair speaks in the forecited place, that habit and repute is sufficient, unless anterior incumbrances be instructed; but this may alter from conventional attestations such as Tulloch's is.

Fountainball, v. 2. p. 26.

1710. July 19.

JAMES RAMSAY, and DANIEL REID his Assignee, *against* DAVID SPALDING of Ashintully.

No 85.

A person who, before the act of sederunt rendering attesters of cautioners in suspensions liable for the sufficiency of such cautioners, had attested the sufficiency of a cautioner, and obliged himself for the same, was not found liable for the sufficiency, but only for the reputed solvency of the cautioner at the time of attestation.

JOHN STEWART of Clockfoldich having enacted himself cautioner for Joseph Watson, in the suspension of a charge against him at the instance of James Ramsay; and the charger having obtained a decret finding the letters orderly proceeded, and discussed the cautioner; he pursued David Spalding, who had (before the late act of sederunt concerning attesters) attested his sufficiency, and obliged him, his heirs and executors, for the same.

Alleged for the defender: He ought to be assoilzied, because the cautioner was habit and repute solvent at the time of his attestation, which imported no more; and did not oblige the attesters for the cautioner's future and eventual insolvency; seeing attesters are taken for the security of the clerks of the bills, when doubtful of the sufficiency of offered cautioners, that they, if found liable in subsidiary actions, may recur against the attesters for relief. And as it would be a good defence for these clerks, that the cautioner was held and reputed solvent when they received him; so the attester can be no farther liable, December 17. 1667, Paterson *contra* Homes, No 83. p. 2159.

Replied for the pursuer: The Lords repelled such a defence made for an attester, December 16. 1698, Sir Donald Bayne *contra* Sir John Dempster, No 84. p. 2160.; but whatever a simple attestation, which is the case of the decision 1667, might be understood to import, yet the defender's attesting the sufficiency of Clockfoldich, and obliging him and his for the same, must be understood *cum effectu*, to make him liable *subsidiarie* for the cautioner's real, and not putative solvency, in the same manner as the cautioner was liable for the principal debtor.

Duplied for the defender: These words in the attestation, 'and I oblige me for the same,' are only exegetic of the former part of the sentence, viz. That the cautioner was sufficient at the time. And the late act of sederunt providing, that attesters in time coming should be liable as cautioners, implies, that these were not liable in that manner before.

THE LORDS found the defender's attestation doth not oblige him for the sufficiency of the cautioner simply, but only for his sufficiency at the time of the attestation.

Fol. Dic. v. 1. p. 130. Forbes, p. 424.

* * * Fountainhall reports the same case :

No 85.

July 20.—JOSEPH WATSON being debtor to Ramsay in L. 4000 Scots or there-by, and being charged, he suspends and finds one Stuart of Clochfoldish cautioner; but the clerks suspecting him, required an attester, whereon Spalding of Auchintully attested him. The principal debtor being imprisoned, and failing, Stuart the cautioner is discussed by horning, caption and adjudication, so there is a subsidiary action raised by Ramsay against Auchintully, the attester, for payment; for whom it was *alleged*, the import of his attestation was only that the cautioner was habite and repute solvent at the time of his cautionry, which he offers to prove; and as this would liberate the clerk of the bills, if pursued, it must likewise assoilzie him, as was found 17th December 1687, Paterson *contra* Homes, No 83. p. 2159.; and he can never be answerable for future and eventual insolvency; and, if this had not been our law, what was the need of making the act of sederunt 28th December 1709, that attesters shall be equally liable with cautioners in suspensions *in suo ordine*, which infallibly proves attesters were *minus in obligatione* before that act? *Answered*, If the attestation had said no more but that he attested the cautioner's solvency and responsibility, there might have been some pretence for this allegeance; but the style here went farther, viz. 'and I oblige me and my heirs and executors for the same;' which certainly imports an effectual obligation, that he should pay what could not be recovered of the cautioner after diligence. Next, the LORDS have found holden and repute not sufficient, but burdened them to prove he was actually solvent the time of the attestation, as was decided 16th December 1698, Sir Donald Bayne *against* Dempster, No 84. p. 2160. *Replied*, These words 'and I oblige myself for the same,' are only an exegetic extension of the preceding clause, whereby he attested the cautioner to be sufficient, and can go no farther; and otherwise there had been no use for making the act of sederunt. THE LORDS by plurality found Auchintully the attester, no farther liable, than to prove that the cautioner was holden and repute solvent at the time of his attestation.

Fountainhall, v. 2. p. 589.

1747. June 26.

GILLESPIE *against* MAIN.

JOHN GILLESPIE drover in Abington, having obtained decret before the Sheriff of Edinburgh, against John Croll flesher there; it was suspended, and George Lesly indweller in Edinburgh became cautioner, who was attested by Andrew Main taylor there, in these words, being the ordinary style of attestations, 'I do hereby not only attest the sufficiency of the within designed cautioner, but likewise bind and oblige me, my heirs, and executors, as cautioners for

No 86.

An attester of a cautioner in a suspension may be summarily charged with horning upon his obligation.