

No 332. lands above 8000 merks; in respect of all these circumstances, (which were not found in the practick produced) the LORDS assoilzied the defender, albeit the authority of a Judge was not interponed to the foresaid disposition, and that it was express against the civil law.

Spottiswood, p. 160.

1636. July 16.

HACKSTOUN *against* RUTHERFORD.

No 333.
A cautioner
for the adhe-
rence of hus-
band and wife
during life,
not liberated
by a tempora-
ry adherence.

MR DAVID KINLOCH being cautioner for David Hackstoun, that he should adhere to Rutherford his spouse, and after that caution, they adhering together, and bairns thereafter procreated betwixt them, thereafter they diverted. The wife, after the death of the cautioner, desired the bond to be transferred in the cautioner's heirs, and he *alleging* that the bond of cautionry was expired, seeing thereafter they had cohabited, and children since gotten betwixt them, whereby the effect of the bond was fulfilled, and the cautioner and his heirs were freed of the bond; and it being opponed that the tenor of the bond bore, that they should adhere during their lifetime; and now seeing he had diverted, she had reason to seek the bond to be transferred, the LORDS, in respect of the tenor of the bond, which bore, that the cautioner was bound that they should adhere during their lifetime, found, that the cautioner and his heirs were obliged for the husband's adherence during that time. And it being *alleged*, that he was content to adhere, and for that effect had a process before the Commissaries against her for adherence, and she *answering*, that the Commissaries had assoilzied her from that pursuit, because the husband would not find caution for her indemnity and entertainment, so that except the caution already found should be obliged to that, she could not adhere; the LORDS found, that the caution foresaid, found for the husband for his adherence, was only obliged that he should adhere, and was not obliged for her indemnity and entertainment, that clause not being expressed in the act of caution; and the husband being but a poor man, indigent of means, and a servant, who could not get such a particular cautioner for these particulars desired by the wife, they found, that they could not astrict the cautioner to such things as he had not bound himself to.

Durie, p. 816.

1662. November 20.

CHILDREN OF WOOLMET *against* DOUGLAS.

No 334. THOUGH a mutual contract betwixt a husband and wife is not revocable, yet, if it be very unequal, and the excess considerable, it will be presumed to have been intended as a cover for a donation, and therefore revocable.

Fol. Dic. v. 1. p. 410. Stair.

* * * See this case, No 12. p. 1730.