

No 19.

ged he could only become cautioner, and the words of his obligation could not be extended. This allegiance was repelled, and the cautioner was found obliged to employ again to the relict, in liferent, the sums uplifted, notwithstanding of her renunciation, and albeit there was no order of redemption used; for the annualrents contained in the contract being redeemable, the voluntary renunciation was found of that same force, to astrict the cautioner to re-employment; seeing there was a preceding reversion which was as necessary a cause, as an order and decret of redemption: And because it was thereafter *alleged* by the cautioner, That the relict had given up and confirmed her husband's testament, wherein she confirmed the money beside him to a special quantity, and the utensils of the house to a special sum, which was given up by herself, she then being in his house, and retaining the possession of the house; likeas she became obliged in the testament, to relieve the cautioner therein, who was obliged to make the goods furthcoming; therefore the LORDS allowed the sums to the relict, to meet the sums *pro tanto*, which she desired to be employed to her use by the said suspender; and found, that she ought to fulfil that to herself, she being fulhanded therewith; and found, that the testament given up by herself, as said is, and her own obligation therein, to relieve the cautioner for the goods confirmed, was a sufficient probation of her intromission, and that there was no necessity to prove any otherwise her intromission, but that the same was sufficiently proven by the said testament, as said is; and consequently the LORDS found the said suspender could not be charged by her *pro tanto*, seeing she might, by her own intromission, employ the same to her own use; and albeit she alleged, that divers of these sums was evicted from her by her husband's creditors, by sentences recovered by them upon lawful grounds of just debt; yet that was repelled, seeing they found that she might have alleged that she was a prior creditor by her contract of marriage, and so more favourable, and therein she would have been preferred to them; and this being omitted by her, and so suffering other creditors to be preferred in that which would have been first subject to herself, and whereby the suspender was also frustrated of the means of his relief: This allegiance was therefore repelled also.

Act. Aiton.

Alt. Stewart &amp; Cunningham.

Clerk, Gibson.

*Fol. Dic. v. I. p. 125. Durie, p. 382.*

No 20.

A cautioner for an apprentice was found liable in damages for the apprentice's desertion of his service,

1663. June 17. JAMES ALLAN *against* JAMES PATERSON.

JAMES ALLAN charges James Paterson, as cautioner in an indenture for an apprentice, set to the charger for five years, and insists upon that article, of paying two day's wages for ilk day's absence; and subsumes that the apprentice left his service after the first two years, and was absent three years. The said James Paterson suspends on this reason, That it must be presumed collusion betwixt

the charger and his apprentice, that having gotten the apprentice fee, and not learned him the trade, he had suffered him to escape, never making intimation to the suspender, that he might have brought him back to his service, while now that he is out of the country, and not knowing where.—The charger *answered*, That there was nothing to oblige him to make such intimation, neither could a sufficient presumption of collusion be sustained.

THE LORDS found the letters orderly proceeded, either while the cautioner caused the apprentice re-enter, and serve out his time, or otherways paid L. 50 for damage and interest, to which they modified the charge.

*Stair, v. 1. p. 191.*

1671. December 6. ALEXANDER *against* GORDON of Tillichoudie.

THERE being a wadset of certain lands granted by one Seaton, to William Gray in Aberdeen, and a bond of corroboration by Mr James Chein; there was another bond granted by Gordon of Tillichoudie, whereby he obliges him to pay the principal sum and annualrent, if three terms of the annualrent run together unpaid, with this provision, that Gray dispoise to him the right of wadset, and assign him to Chein's bond. The Earl of Haddington being donatar to the bastardy, and *ultimus hæres* of Gray, assigns to ——— Alexander all these bonds, who thereupon pursues Tillichoudie, as representing his father, for payment, who alleged absolutor, because the bond was conditional; and the condition could not now be fulfilled *cum effectu*, in respect that Gray, the wadsetter, by the space of 18 or 19 years, did never intimate the want of his annualrent, neither did he declare the clause irritant in the wadset, but by his fraud or supine negligence, was neither infest himself holden of the superior, as he might, by the procuratory of resignation of the wadset, neither yet took possession; so that the wadset lands are carried away by apprising, and Mr James Chein, who granted the bond of corroboration, is bankrupt.—It was *answered*, That the wadsetter was not obliged to do any diligence, nor yet to intimate the same to Tillichoudie, whose part it was to try the condition of the affair in which he was obliged; neither is the condition of the bond, that the wadsetter should make intimation, much less declare the irritancy; nor is there any thing singular in this case, more than if a cautioner, after a long time, were pursued to pay, should allege, that *medio tempore* the principal debtor were become insolvent; and that if the creditor had either pursued him in time, he might have recovered his debt, or if he had pursued the cautioner in time, he would have recovered relief, which case hath frequently occurred, but was never sustained.

THE LORDS found, That the wadsetter was obliged to do no diligence, nor to make intimation or declare the irritancy; and that his negligence could not exclude him, or the pursuer, unless he had colluded by fraud to prefer other creditors.

No 19.  
though the master suffered the apprentice to go out of the country without informing the cautioner.

No 21.  
A cautioner in a bond of corroboration, being bound to pay a sum contained in a wadset, if three terms annualrent should run together unpaid, was found not liberated, although the creditor did no diligence to recover payment for many years, by which time the principal debtor had become insolvent.