No 27.
bond of cautionry did not bear annual-rent.

assoilzied from the expences modified by the decreet, finding the letters orderly proceeded, in regard he was not expressly bound therefor by his bond; notwithstanding of a prior act of sederunt, ordaining cautioners to enact themselves, both for the sums charged for, and also for what expenses should be modified, 17th December 1709, Dumbar *contra* Muirhead, *infra* Sect. 7.

Fol. Dic. v. 1. p. 125. Forbes, p. 484.

1715. *February* 22.

WILLIAM BOWLES, Solicitor in Exchequer, *against* SIR JOHN JOHNSTON of Caskieben.

No 28.
A cautioner having paid the debt; in a competition betwixt him and the donatar of the principal debtor's bastardy, the penalty of the bond was restricted to the sum really paid out by the cautioner to the creditor.

SIR JOHN JOHNSTON being cautioner to the town of Aberdeen for one Douglas, baxter there; and having a bond of relief in the ordinary terms; upon Douglas's death William Bowles obtained a gift of bastardy; and Sir John insisted for payment against the donatar, libelling upon his bond of relief, and also for another sum of L. 55 Scots, due to him by the bastard. In this process Sir John acknowledged, upon oath, payment of L. 36 Scots; and at the advising his oath, gave in a bill for expenses, which was refused, and so the decreet went out, as to the bond of relief, in the terms of the libel, decerning the donatar either to free, relieve, &c. or make payment of the said sums, &c. after the form and tenor of the said bond of relief in all points. In a suspension of this decreet, the point in question being, 'Whether the penalty of the first bond by Douglas to 'the Town of Aberdeen, is due to the cautioner?' the donatar *contended*, it was not,

Because, 1*mo*, The charger having insisted upon the alternative of payment, to which no penalty is taxed in the great decernitor, could not therefore now charge upon the first member of the alternatives, to relieve him of the bond and penalty therein contained: 2*do*, That there was no penalty adjected to the bond of relief, but only in that granted to the town of Aberdeen; to which, although Sir John obtained assignation upon payment, yet the town did not exact the full penalty: 3*tio*, That the donatar is in the case of an executor, who must have a decreet for his warrant, and therefore liable in no penalty nor expenses: 4*to*, No penalty or expenses here, because of the *pluris petitio*, Sir John having received L. 36 as said is.

Answered for the charger, That here there was only a penalty craved, and the Lords do often refuse expenses where persons have been litigious, and yet sustain the penalties in bonds for reimbursing the damages the creditors may sustain on account of the expenses debursed; and the decreet, though it assoilzies from the L. 36, yet decerns for the rest of the libel; now the penalty was expressly libelled on: 2*do*, That though there be no penalty in the bond of relief, yet it obliges Douglas to relieve Sir John of the penalty contained in

the first bond, or pay it to him; and therefore he having failed in the first, it was just to decern him in the second: 3*tio*, Though the donatar must have a decreet, yet that can never excuse his extraordinary litigiousness: 4*to*, That there was no *pluris petitio*; for, at commencement of Sir John's process, the full L. 55 was due; but it having depended long, Sir John in the interim recovered L. 36 by a furthcoming, and fairly in his oath acknowledged and allowed the same. No 28.

THE LORDS restricted the penalty of the bond granted to the treasurer of Aberdeen; wherein the charger was bound with Douglas the bastard, to the sums paid by the charger to the creditor.

Act. *Graham.* Alt. *Horn.* Clerk, *Justice.*

Bruce, No 85. *p.* 102.

1740. *December* 19.

LORD NAPIER, *&c. against* MR THOMAS MENZIES of Lethem, and his Cautioners.

No 29.
The cautioners for an executor, must have credit for debts paid by the executor before confirmation, although he should be also heir.

LORD NAPIER, and other creditors of Sir William Menzies of Gladstanes, brought a process against Mr Thomas Menzies, eldest son and heir to Sir William, and who was also confirmed executor *qua* nearest of kin to him, and against Mr Thomas's cautioners in the several eiks made to the principal confirmed testament.

The defence offered for the cautioners was, That Mr Thomas had paid many moveable debts due by his father, partly before the several confirmations and eiks, and partly after; to some whereof he took assignations, and as to others discharges; by which the sums in the eiks were exhausted.

Answered for the pursuers, That by the act 76th, Parl. 6th, James IV. the heir has the benefit of discussion against the executor for year and day; and after that, he is entitled to demand caution from the executor, to relieve him of moveable debts, to the extent of the free moveables; that this is the sole foundation in law for the heir's claim of relief of moveable debts against the executor: That the heir, by making payment of moveable debts due by the defunct, does not become creditor to the defunct, being *eadem persona* with him, and thereby liable to his debts of whatever kind; and by payment, he discharges a debt due by himself; but as he does not contract with the defunct, nor becomes his creditor, so neither is he a proper creditor upon the defunct's moveable estate; and from hence it is, that he has not the privilege competent to the other creditors of the defunct; *e. g.* a creditor of the defunct may pursue a vicious intromitter, and he will be liable *in solidum* for payment of his debt, though far exceeding the extent of the intromission; yet an heir who has paid his predecessors moveable debts, will have only action *in valorem* of the intromission.