21, 1792, Hume's Decisions, 781; *Whitelaw* v. *Fulton*, November 1, 1871, 10 Macph. 27. In article 3, a breach of the tenant's obligation in this respect, and damage resulting therefrom, were relevantly averred. It was not admitted on record by the pursuer that Clappertons were joint agents. They were only his agents for the purpose of securing a new tenant, and in so far as they were his agents had nothing to do with the supervision of the house so long as the defender's lease was still running.

Argued for the defender—The pursuer's averments in article 3 were irrelevant. There was no averment that the pursuer, although he knew that the defender had left the house empty, made any remonstrance or objection, and he must be held to have acquiesced. Indeed, it was admitted that he consented to the house being sublet. It was not averred that if the defender had been in occupation of the house less damage would have resulted from the bursting of the pipe. The breaking of the windows was not due to any fault on the part of the defender. At least it was too remote and consequential a result of his conduct to found any claim against him. There was no relevant averment of damage. The tenant of an ordinary dwelling-house was not responsible for damage caused owing to his temporary absence, and he was especially not responsible when the origin of the damage was an accident for which he was in no way to blame. The damage occurred while the Clappertons were acting as joint factors for the parties.

LORD YOUNG—I do not think it is necessary to call for any further argument. There is no objection to the relevancy of articles 1 and 2 and articles 4 to 8 of the pursuer's condescendence, the pursuer does not insist in articles 9 and 10, and therefore the only question is as to the relevancy of article 3. I am of opinion that article 3 is relevant, and that the interlocutor of the Sheriff which refuses proof of article 3 must be recalled. The result is that the Sheriff's interlocutor will be affirmed except in so far as it refuses proof of article 3.

LORD TRAYNER and LORD MONCREIFF concurred.

The LORD JUSTICE-CLERK was absent.

The Court pronounced the following interlocutor:—

"Recal the interlocutors of 11th March, 17th and 25th May, 1897: Remit to the Sheriff to allow the pursuer a proof of articles 1 to 8, both inclusive, of his condescendence, and the defender a conjunct probation: Find the expenses in this Court to be expenses in the cause as the same may be determined by the Sheriff."

Counsel for the Pursuer — Rankine — M'Lennan. Agent — Daniel Turner, S.L.

Counsel for the Defender — Hunter. Agents—Boyd, Jameson, & Kelly, W.S.

Thursday, July 15.

SECOND DIVISION.

[Lord Low, Ordinary.

STEWART *v.* FORBES.

Cautioner—Process—Caution for Expenses—Liability of Cautioner for Suspender Found Liable for Expenses "as Trustee"—Bond of Caution.

A trustee and executrix was sisted at her own request as a suspender in a suspension which had been raised by her author, and caution was found, the cautioner becoming bound, in terms of the bond of caution, that the suspender should "as trustee" pay to the respondents the sum due under the bill, upon which the charge sought to be suspended proceeded, in the event of its being found that she ought so to do. As regards expenses, the bond provided "that payment shall be made of whatever sum" might be modified "in name of damages and expenses in case of wrongous suspending." The suspender was ultimately found liable in expenses "as trustee." *Held* (*aff.* judgment of Lord Low, *diss.* Lord Young) that whatever might be the liability of the trustee, the cautioner was liable for the whole amount of the expenses found due.

This was an action at the instance of Duncan Stewart, shipmaster, Leith, with consent of Wallace & Pennell, Writers to the Signet, Leith, and the individual partners of that firm, against Roderick Forbes, solicitor, Edinburgh, and Janet Cairns Welsh or Daily, widow of John Cameron Daily, shipmaster, Leith, and John Lawson, 188 Dalkeith Road, Edinburgh.

The pursuer sought decree against the defender Forbes for the sum of £64, 14s. 8d., being the amount of expenses decerned for in a suspension in which Forbes was cautioner for the suspender.

The late Mr Daily, having been charged to make payment of the sum of £100 and interest due under a bill drawn by the pursuer and accepted by Daily, brought a suspension of the charge. The Lord Ordinary passed the note on caution. Thereafter, Mr Daily having died on 27th July 1895, the defender Mrs Daily, who had been nominated with others as trustee and executrix to her husband by his trust-disposition and settlement, craved leave to be sisted as a suspender in her character of one of his representatives, and the Lord Ordinary, by interlocutor dated 6th September 1895, sisted Mrs Daily "as trustee of the deceased John Cameron Daily, her husband," and appointed her to find caution as trustee foresaid.

In compliance with this interlocutor the defender Forbes became cautioner for Mrs Daily as trustee.

The bond of caution, dated 21st September 1895, was in the following terms:—"I, Roderick Forbes, solicitor, 22 Castle Street, Edinburgh, bind and oblige myself and

my heirs, executors, and successors, as cautioners and surety acted in the books of Council and Session for Mrs Janet Cairns Welsh or Daily, residing in Gladstone Place, Leith, widow of John Cameron Daily, sometime of No. 24 Bernard Street, Leith, now deceased, trustee acting under the trust-disposition and settlement of the said John Cameron Daily, that she shall, as trustee foresaid, pay to Duncan Stewart, designed in the note of suspension after mentioned as shipmaster, Gladstone Place, Leith, but presently resident abroad, and Messieurs Wallace and Pennell, Writers to the Signet, Leith, his agents, for any interest they may have—respondents, or to any other person to whom she shall be ordained to make payment, of the sum of £100 sterling, and the legal interest thereof since due and till paid, contained in and due by a bill dated the 9th day of January 1895 years, drawn by the said Duncan Stewart upon and accepted by the said John Cameron Daily, and payable four months after date, in full in the event of there being a sufficiency of trust-funds, or rateably along with the other creditors of the said John Cameron Daily in the event of the estate proving insufficient to pay his creditors in full; but declaring that this limitation of the obligation shall be without prejudice to any preference which the respondents may have already secured in a note of suspension between the said parties presented on the 4th day of July 1895 years, and that in case it shall be found by the Lords of Council and Session that she ought so to do, after discussing the passed note of suspension, and also that payment shall be made of whatever sum the said Lords shall modify in name of damages and expenses in case of wrongous suspending.—Consenting to the registration hereof in the books of Council and Session, that letters of horning and all other execution may pass upon a decreet to be interponed hereto in common form," &c.

On 26th November 1895 the Lord Ordinary (Low) pronounced the following interlocutor, which was not reclaimed against—"Repels the reasons of suspension: Finds the letters and charge orderly proceeded, and decerns: Finds the complainer Mrs Janet Cairns Welsh or Daily, as trustee of John Cameron Daily her husband, the original complainer, liable to the respondents in expenses: Allows an account," &c.

On 7th January 1896 the Lord Ordinary pronounced the following interlocutor—"Approves of the Auditor's report on the respondent's account of expenses, and decerns against the complainer for £64, 14s. 8d. sterling, the taxed amount thereof."

On 6th April 1896 the pursuer brought the present action, in which he set forth the facts above narrated, and averred that payment of the expenses decerned for in the suspension had repeatedly been demanded from Mrs Daily and Roderick Forbes, but that payment had been refused or delayed.

The defenders averred — "(Answer 5) Reference is made to the decree in the said suspension, which, both as regards the principal sum and the expenses, was against Mrs Daily in her capacity of trustee only, and explained that there has been no decerniture against her personally. The sisting of herself in the suspension as trustee of her deceased husband was done in *bona fide*, and her doing so formed no ground for subjecting her in personal liability for expenses. Explained further, that when she was so sisted as a suspender, Mrs Daily was in possession, as trustee foresaid, of a portion of the deceased's estate, consisting of his household furniture, valued at £75, and his stock, plant, and machinery, valued at £500. The estates of the deceased were sequestrated by the Lord Ordinary on the bills on 3rd December 1895 upon the pursuer's petition, and the trustee in the sequestration, Mr D. H. Huie, C.A., has taken possession of the stock, plant, and machinery, which were in possession of Mrs Daily as trustee at the date of the said sequestration. He also claims the deceased's household furniture, and has presented a petition to the Sheriff of the Lothians and Peebles at Edinburgh against the defender Mrs Daily for delivery of the deceased's household furniture in her possession. She is willing and has offered to deliver over the said furniture, or to pay the value thereof, on being relieved of the claim sued for in the present action, and of the deceased's funeral expenses, or other payments made or obligations undertaken by her as trustee foresaid, but her offer has been declined." . . .

The pursuer pleaded—"(1) The defender Roderick Forbes being bound in terms of his bond of caution to make payment to the pursuer of the sum sued for, decree should be pronounced therefor, with expenses. (2) The averments of the defender are irrelevant."

The defenders pleaded—"(2) The decerniture for expenses being against the defender Mrs Daily in her capacity of trustee only, the pursuer is not entitled to a personal decree, either against her or her cautioner. (4) The defender Mrs Daily having ceded, and being willing to cede, possession of the trust-estate intact as she entered upon it, the defenders are entitled to absolvitor, with expenses."

On 19th March 1897 the Lord Ordinary (Low) pronounced the following interlocutor:—"Repels the defences, and decerns against the defenders conform to the conclusions of the summons: Finds the pursuer entitled to expenses; allows an account," &c.

Opinion.—"The interlocutor in the suspension finds Mrs Daily, as trustee of John Cameron Daily, 'her husband, the original complainer, liable to the respondent in expenses.' I am inclined to think that the words which I have quoted are only descriptive and explanatory of how Mrs Daily became liable in expenses in a suspension which was brought by her husband John Cameron Daily.

"Assuming, however, that the rule laid down in the case of *Craig* v. *Hogg* (24 R. p. 6) applies, and that the words in the

interlocutor, 'as trustee,' limit Mrs Daily's liability to the extent of the trust-estate, I do not think that it forms a good defence to the cautioner.

"In the bond of caution there is a distinction between the obligation to pay the principal sum contained in the bill which was under suspension, and interest thereon, and the obligation undertaken for the expenses and damages in case of wrongous suspending. The obligation in regard to the principal sum is that Mrs Daily shall, as trustee foresaid, pay to Duncan Stewart, designed in the note of suspension as "shipmaster, Gladstone Place, Leith, but presently resident abroad," the sum of £100 sterling, and the legal interest thereof since due and till paid. . . . . in full in the event of there being a sufficiency of trust-funds, or rateably along with the other creditors of the said John Cameron Daily in the event of his estate proving insufficient to pay his creditors in full.' The obligation as regards the principal sum, therefore, is simply that the estate shall be forthcoming.

"But as regards expenses and damages it is different. The cautioner binds himself 'that payment shall be made of whatever sum the said Lords shall modify in name of damages and expenses in case of wrongous suspending.'

"There is no limitation of liability there. The cautioner binds himself to see the sum which shall be modified as expenses paid. That sum is the amount of the account as taxed. I shall therefore give decree in terms of the conclusion of the summons."

The defenders reclaimed, and argued—The cautioner was only bound for Mrs Daily "as trustee." Mrs Daily was only found liable in expenses "as trustee." When a judicial factor or trustee was found liable in expenses as judicial factor or trustee he was not personally liable—*Craig* v. *Hogg*, October 17, 1896, 24 R. 6. A cautioner was not liable for more than his principal—Ersk. Inst. iii. 3, 64; *Jackson* v. *M'Iver*, July 6, 1875, 2 R. 882. If this cautioner paid these expenses, and demanded an assignation, he could only get an assignation against his principal as trustee. The cautioner was therefore only liable in the event of his principal improperly failing to make the trust-estate forthcoming to meet the expenses.

Argued for the pursuer and respondent—Mrs Daily was liable personally for the expenses found due in the suspension. This case was distinguished from *Craig* v. *Hogg, cit.* That was a case with regard to a judicial factor. A judicial factor was in a different position from a trustee and executor, for he was an officer of court, whereas a trustee and executor was not. In that case the judicial factor was brought into Court as defender, and he was sued "as judicial factor." Litiscontestation therefore took place upon the condition that he should be liable only as such. It was conceded in *Craig* v. *Hogg, cit.*, that trustees, whether testamentary or for creditors, were liable personally for expenses. See report, p. 9. In the present case the deceased having raised a suspension, his trustee and executrix was sisted at her own request. (2) Apart from this, however, and whether Mrs Daily was personally liable or not, the cautioner was liable for the whole expenses. A cautioner might be liable for more than his principal, as, *e.g.*, the case of cautioners for minors acting without their curators, or for married women, or the case of natural obligations—Stair's Inst. i. 17, 10; Erskine's Inst. iii. 3, 64. The position of a cautioner in a suspension was different from that of a cautioner in an obligation. He was not introduced at the instance of the charger but of the Court, and the general rules as to a cautioner's obligations did not apply, as for example, with regard to the right of discussion—Ersk. Inst. iii. 3, 72. See also *Simpson* v. *Fleming*, February 3, 1860, 22 D. 679. The law and the Court demanded a cautioner as a condition of execution being sisted, so that there might be an assurance of the expenses being paid "in case of wrongous suspension." The whole object of having such a cautioner would be defeated unless he were bound absolutely to pay the expenses found due, whatever the position of his principal might be. (3) On the terms of the bond the cautioner was bound for the whole expenses whatever might be the principal's liability. He bound himself *simpliciter* that payment of the expenses should be made, and he was not now asked to do more than discharge that obligation.

LORD JUSTICE-CLERK — This action is raised for the purpose of obtaining decree for the amount of the expenses found due in a suspension in which the defender was the cautioner. The suspension was originally raised by one John Cameron Daily, now deceased, and the note was passed on caution. He had not found caution at the time of his death, and his widow, who was by his trust-disposition and settlement appointed a trustee and executrix on his estate, sisted herself, and the defender was accepted as her cautioner. By the bond of caution the obligation as regards the principal sum is that Mrs Daily shall, "as trustee foresaid," pay to the respondents the sum contained in and due by the bill, and then there is a declaration saving any preference which the respondents may have secured. As regards the expenses, the obligation is "that payment shall be made of whatever sum the said Lords shall modify in name of damages and expenses."

In a suspension the complainer undertakes to find caution if the Court think it right not to allow the suspension to be proceeded with unless caution be found—that is, caution that the intending charger shall not be in a worse position than he is at the time of the finding of the caution by not being able at once to charge upon his decree. Here the complainer, who was sisted, was in the position of executor, and therefore as regards the principal, not liable except in so far as there might be funds available in the executry estate to meet the claim. This is accordingly duly set forth in the passage I have read. It simply binds the

cautioner to make the amount of the existing estate forthcoming if the decree under which it is claimed is successfully maintained against the suspension.

But the conditions as regards expenses in the suspension seem to me to be different. The cautioner does not merely undertake that if there was estate in the hands of the suspender to meet both principal and expenses, the expenses shall be paid, but his undertaking is expressed in language absolute and unrestricted. He undertakes that "payment shall be made" of these expenses as modified by the Court in case of wrongous suspending. That he should undertake to make good these expenses is a condition of the suspension being allowed to proceed. And unless that means that he shall pay them if decerned for, so that the respondent in the suspension shall not be a loser by its being allowed to proceed, the language is certainly very badly chosen to express any other idea. If a respondent is to be kept from suffering by a wrongous suspension by caution taken for his protection, I think that can only be done by two things being guarded against by caution, (1) the diminution of that estate on which he has a right to charge pending the suspension proceedings, and (2) security given to him that he shall be paid the expenses he is put to by the suspension. These are truly the conditions in which the person for whom he is cautioner is allowed to proceed with the suspension. Therefore I am of opinion that whatever may be the liability of the principal here, who was found liable in expenses *qua* trustee, the cautioner who signed this obligation that payment should be made of the expenses which the Court should modify, is bound when called upon to make the payment. The respondent in the suspension is not required to discuss the principal first. He is entitled to sue the cautioner, leaving him to find relief if he can from his principal. It may be that the cautioner may not be able to obtain full relief against the principal. As to that I express no opinion: whether the words "as trustee" mean that the suspender is liable, and has relief against the estate, or whether it means that she is only liable to the extent of the estate in her hands for the expenses. Even if it be so, I still would hold that the cautioner, having offered his obligation that the modified expenses would be paid, must be decerned to pay them. The respondent in the suspension is not interested in the question who shall ultimately suffer the loss of these expenses. He holds his obligation binding this defender to pay them, and is entitled to a decree against him in terms of the obligation. In decerning against him we are only decerning that he shall do that which he undertook to do, and on which undertaking alone the person for whom he intervened was allowed to proceed with the suspension which has been unsuccessful. I am therefore in favour of affirming the Lord Ordinary's interlocutor.

LORD YOUNG—I am of opinion that this case is ruled by the decision of seven Judges in the case of *Craig* v. *Hogg*, October 17, 1896, 24 R. 6. In that case it was decided by a majority of five Judges to two that where a judicial factor or trustee is found liable in expenses as judicial factor or trustee, that signifies that he is only liable as judicial factor or trustee to do his duty as such in administering the factorial or trust-estate. That that was decided is, I think, clear from a reference to the opinions.

The Judges were all of opinion, and expressed their opinion, that there was no difference between the case of a judicial factor and the case of a trustee.

I stated my opinion very distinctly in that case, that a judicial factor or trustee ought not to be found liable personally in expenses unless there is something in the conduct of the judicial factor or trustee to warrant such a finding—some failure to do his duty as judicial factor or trustee. Some of the Judges expressed an opinion that the general rule was for personal liability. My opinion to the contrary was concurred in by Lord Adam and Lord Kinnear. But all the Judges who were in the majority in that case were of opinion, and expressed themselves clearly to the effect, that whether the general rule is for personal liability or not, the question of liability in that particular case should be determined in favour of the judicial factor, and that when a judicial factor or trustee is found liable as judicial factor or trustee, such a finding negatived personal liability and inferred liability only as judicial factor or trustee.

That case was of importance, not only on the general question of liability in such cases, but also as regards the proper mode of expressing an interlocutor with reference to the question of the personal liability of a judicial factor or trustee for expenses, and it was decided that where the intention is to find a trustee or judicial factor personally liable in expenses, the proper course is to find him in terms personally liable in expenses, and where the intention is to limit his liability to the extent of merely making the factorial or trust-estate forthcoming, the proper course is to find him liable as judicial factor or trustee, and that when he is so found liable, personal liability is negatived.

The grounds of my opinion will be found on page 18 of the report, where I am reported to have said—"I stated in the outset of these observations that the qualifying and limiting words 'as judicial factor' in the decree against the complainer are, in my opinion, inconsistent with the personal liability which the respondent contends for, and this opinion, if sound, is enough for the decision of the case."

Lord Adam concurred in my opinion in terms, and so did Lord Kinnear. Lord M'Laren thought that the general rule was for personal liability, but that there was no personal liability where the finding was for liability as judicial factor or trustee. He says—"The view which I take on the second question would (if I were sitting alone) make it unnecessary to consider the first. I think that the question whether a

trustee or judicial factor is to be made liable in expenses individually or only in his representative capacity, is a question that ought always to be decided in the original action. If the decree is simply against the 'pursuer' or the 'defender,' I should understand this as meaning that the individual decerned against must pay the expenses, reserving his claim to be indemnified out of the trust-estate, a claim which of course cannot be determined one way or the other in an action to which beneficiaries are not parties. In the present action, the interlocutor in the original action, which is the warrant of the decree, ordains Mr Craig, 'as judicial factor of Archibald Rodan Hogg,' to make payment to the pursuer of £159, 6s. 8d. with interest, and also finds the defender, 'as judicial factor foresaid,' liable in expenses to the pursuer. It is not disputed that the decerniture for principal and interest due under the account sued for is a decerniture against Mr Craig in his representative capacity; and it follows, in my opinion, that an award of expenses, qualified in identical terms, must be read subject to the same limitation. In so reading the decree we are not, as I conceive, laying down new law. So long ago as 1842 the meaning of an obligation undertaken by obligants 'as trustees' was determined by the House of Lords. I refer to the case of *Gordon* v. *Campbell*, 1 Bell's App. 428."

Lord Moncreiff expressed himself to the same effect. He says—"I agree with those of your Lordships who hold that it does not" (*i.e.*, that the decree in that case, according to its terms, did not) "impose personal liability, because the complainer was found liable in expenses as judicial factor and not as an individual. These are limiting words; their natural and legal signification and effect is to restrict the decree to one against the party in a representative capacity."

Therefore I infer that the five Judges who constituted the majority in *Craig* v. *Hogg* were of opinion that where you have these limiting and qualifying words you have no personal liability.

I must therefore express some surprise at the first sentences of the Lord Ordinary's opinion. He says—"The interlocutor in the suspension finds Mrs Daily, as trustee of John Cameron Daily, her husband, the original complainer, liable to the respondent in expenses. I am inclined to think that the words which I have quoted are only descriptive and explanatory of how Mrs Daily became liable in expenses in a suspension which was brought by her husband John Cameron Daily. Assuming, however, that the rule laid down in the case of *Craig* v. *Hogg*, 24 R. 6, applies, and that the words in the interlocutor 'as trustee,' limit Mrs Daily's liability to the extent of the trust-estate," and so on, I cannot think it doubtful that the judgment applies, and the Lord Ordinary suggests nothing to the contrary which was not overruled in the case of *Craig* v. *Hogg*. The decree against Mrs Daily finds her, "as trustee of the said John Cameron Daily, her husband, the original suspender, liable to the respondent in expenses." That may, no doubt, be a serious liability. She must do her duty in recovering payment of these expenses out of the trust-estate. Now, Mrs Daily has a cautioner, and this action is against him for payment of the expenses so decerned for as her cautioner. The pursuer's first plea-in-law is as follows:—"The defender Roderick Forbes being bound in terms of his bond of caution to make payment to the pursuer of the sum sued for, decree should be pronounced therefor with expenses." It is not contended that he is liable except as her cautioner, and in terms of his bond of caution. The question is whether this imposes a liability on him which is not upon his principal and never was. She was not found liable in expenses. She was found liable in expenses "as trustee." And it is her liability which he as cautioner is bound to discharge. I am bound to say I differ entirely from your Lordships and the Lord Ordinary. There is no liability upon the defender, except as cautioner for Mrs Daily. The bond of caution begins as follows:—"I, Roderick Forbes, solicitor, 22 Castle Street, Edinburgh, bind and oblige myself, and my heirs, executors, and successors, as cautioners and surety, acted in the Books of Council and Session, for Mrs Janet Cairns Welsh or Daily, residing in Gladstone Place, Leith, widow of John Cameron Daily, sometime of No. 24 Bernard Street, Leith, now deceased, trustee acting under the trust-disposition and settlement of the said John Cameron Daily, that she shall as trustee foresaid pay," and so on. That is the introduction to the bond of caution, and these are the only words of obligation in the bond. These words are the ordinary words of style. He also binds himself that payment shall be made of whatever sum the said Lords shall modify in name of damages and expenses in case of wrongous suspending, but this expression must be read along with the introductory words, which, as I have said, are the only words of obligation in the bond by which the cautioner is only bound as cautioner for Mrs Daily "as trustee."

I know of no case in which a cautioner is liable for more than his principal except upon some special ground. We were referred very properly to statements from Erskine's Institutes, iii. 3, 64, and Stair's Institutions, i. 17, 10, to the effect that cautioners for minors acting without their curators, and for married women, may be found personally liable although they have no relief against their principals. These are on the statement of them emphatically exceptional cases. The cautioner in such cases is found liable for his gross indiscretion and indeed impropriety of conduct in becoming liable for a minor acting without his curators, or for a married woman. This case is entirely different.

Now, by this decree which your Lordships propose to pronounce we either make Mrs Daily liable, by making the cautioner liable with relief against her, according to the ordinary rule of law, and so impose upon her a liability which the Lord Ordin-

ary in his original decree declined to impose —when I say declined I am assuming of course that the words "as trustee" have the limiting and qualifying effect which the majority of the Court in the case of *Craig* v. *Hogg* were of opinion that they had—or we have an example of a case, which has never to my knowledge occurred before, of a cautioner being found liable for more than his principal, without any relief against his principal, and without any fault or indiscretion on his part, as in the case of the cautioner for a minor acting without his curator, or for a married woman. I cannot assent to that. I think that the cautioner is liable only in so far as his principal is liable. I think therefore that the cautioner here is bound to implement the decree only in so far as Mrs Daily is bound.

There are some exceptional words introduced into the bond with a view to protecting any preference which the respondents might have already secured. They were introduced for no other purpose. All the rest is in the ordinary words of style.

I am therefore of opinion that the opinion of the Lord Ordinary is wrong and that his interlocutor ought to be reversed. I regard this case as of importance because it arises on the case of *Craig* v. *Hogg*.

LORD TRAYNER — In the interlocutor under review the Lord Ordinary assumes the rule laid down by the majority of the Court in the case of *Craig* v. *Hogg*, but thinks it does not form a good defence to the present defender. I agree with the Lord Ordinary. I leave aside the considerations which arise from the differences between a cautioner in a suspension and an ordinary cautioner who intervenes at the request of a creditor to guarantee the debtor's debt. These considerations are by no means immaterial in themselves, but in my view do not need to be taken into account here. I think the cautioner's obligation here is to see paid whatever expenses shall be found due "in case of wrongous suspending." The reasons of suspension were repelled, and therefore there was "wrongous suspending" in the sense of the bond of caution.

I cannot take the view that the cautioner's obligation before us is limited to the extent of the suspender's liability for expenses. His liability for the principal sum is so limited. He undertakes as cautioner that the suspender shall, "as trustee foresaid," make a certain payment which the bond of caution defines. But the bond does not bind the cautioner merely to pay the expenses which the suspender "as trustee foresaid" shall be decerned to pay. He guarantees substantially that "payment shall be made" of the expenses found due in respect of wrongous suspending. He is not asked now to do more.

To limit the cautioner's obligation as he contends for would make the caution not a benefit but an injury to the charging creditor. For if the executrix makes payment of the expenses out of the estate under her charge (which she must do if she has estate enough to do it) she just diminishes the fund out of which the charging creditor is to operate payment of the principal sum due to him. In a word, it would be giving the charger decree for expenses against his opponent, and allowing the opponent to pay them out of the charger's money.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuer—W. Campbell —Abel. Agents—Wallace & Pennell, W.S.

Counsel for the Defenders—F. T. Cooper —Welsh. Agents—Welsh & Forbes, S.S.C.

Friday, July 16.

FIRST DIVISION.

[Lord Low, Ordinary.

MACFIE *v.* THE CALLANDER AND OBAN RAILWAY COMPANY.

Railway—Superfluous Lands—"Purposes of the Undertaking"—Bar—Effect of the Company Entertaining Proposals for Sale of Lands Claimed

An action was brought against a railway company by an adjoining proprietor under sec. 120 of the Lands Clauses Act 1845, concluding for declarator that the plots of land A and B, which had been acquired by the company from him compulsorily for the purposes of their undertaking, had become superfluous lands, and had become the property of the pursuer. The two plots together amounted to a little over half an acre. They were adjacent to the company's station in the middle of a town. The land, of which part consisted of the plots in question, when acquired by the company was rough ground partially covered by the sea at high water, and was made up by the company and used in part for their station, and in part for the approaches to it. Plot A was directly contiguous to the station buildings, and B was separated from it by the roadway forming the access to the station. Both plots were laid out in ornamental grounds, and through A access was furnished to part of the station buildings. It was proved that there was a reasonable probability of the ground being required for the extension of the station With regard to A, the directors of the company, after the expiry of the statutory period of ten years, within which it was lawful for them to sell off superfluous lands, entered into negotiations with the Post Office with a view to selling part of it, and directed their secretary to take the necessary steps for doing so, but on their learning that the sale was illegal it was not carried out. With regard to B, during the ten years they considered various proposals for the purchase of parts of it, but declined them on the ground of the pro-