

No 209. 1726. *July.* STEWART *against* CAMPBELL.

A CAUTIONER in a contract of marriage, (where the husband was bound to have a certain sum in readiness, and to lay it out on good security for his wife's liferent use, and to the heirs of the marriage in fee), claiming the benefit of the act 1695, cap. 5 ; the LORDS found, that the cautioner here being bound *ad factum præstandum*, and not to pay a certain sum of money, his case did not fall within the description of the act. See APPENDIX.

Fol. Dic. v. 2. p. 115.

No 210. 1736. *December 3.* ROBERTSON *against* M^CINLAY.

M^CINLAY having become bound as cautioner, in a bond of presentation, to present the person of Archibald Hamilton against a day certain, otherwise to pay the debt ;

THE LORDS found he was not entitled to the benefit of the prescription introduced by the act 1695.

G. Home, No 39. p. 72.

S E C T. II.

Who entitled to the benefit of the act 1695.—Can the benefit of it be renounced.

No 211. 1708. *January 21.*
JOHN BALLANTINE, Merchant and late Provost of Ayr *against*
ROBERT MUIR, present Provost thereof.

IN the cause at the instance of John Ballantine against Robert Muir, for payment of 2000 merks, in a bond granted to John Ballantine by the said Robert Muir and other three persons as co-principals bound conjunctly and severally, and obliged to relieve each other *pro rata* ; Robert Muir was found liable for the whole sum, though no diligence had been done upon the bond within seven years of the date ; in respect he was not a cautioner in the terms of the act of Parliament 1695 ; which correctory law extends not to bonds bearing clauses of

mutual relief, which is implied, though not expressed; but only to bonds where one of more *correi* is obliged to relieve the rest of the whole debt.

No 211.

Fol. Dic. v. 2. p. 116. Forbes, p. 225.

. Fountainhall reports this case :

1708. *January 22.*—ROBERT MUIR, provost of Ayr, and three others, having granted bond for 2000 merks to John Ballantyne, factor for Alderman Smith, and being charged thereon, he suspends on this ground, that the bond bore a clause of mutual relief, and so fell under the 5th act 1695, declaring all cautioners free after seven years, if not insisted against; and *ita est*, this bond is dated in 1699, and so prescribed *quoad* three parts, and he is willing to pay his fourth share, some of the other obligants being dead and broke. *Answered*, This case fell noways under the act of Parliament; for that was where one was principal and the rest cautioners, or where one was obliged to relieve his co-obligant of a greater share than what he would be tied to by law; but here all the four were bound as co-principals, and only a clause to relieve one another *pro rata*, which is implied though it had not been expressed; and so being no more but what they were bound to perform without it, it noways falls under the case of that act. THE LORDS found, the act being correctory, non est recedendum a jure quod prius obtinuit, except where the case was in the precise letter or meaning of the law; and that this clause inerat de jure, et ex natura rei, though it had been omitted; and therefore repelled the reason of suspension, and found this bond fell not under that act; but in respect of the clause, arising from a new law, they assoilzied from the penalty, he always paying the principal and annualrent within the days of the charge.

Fountainhall, v. 2. p. 422.

1710. *February 16.*

GILBERT MORE, Writer in Edinburgh, *against* SIR SAMUEL FORBES of Foveran.

SIR SAMUEL FORBES, to stop diligence at the instance of Gilbert More against Robert Keith of Fedderate, *alias* Lentush, and Mr Alexander Johnston merchant in Edinburgh, for 600 merks contained in their bond, having by his letter August 5th 1697 to Mr More, obliged himself to procure security to him, or to pay the debt betwixt and Martinmas then next; it was *alleged* for Sir Samuel, when pursued for payment, That he being only a cautioner by his letter, was free, in respect no diligence was done thereon within seven years of the date, in the terms of the act of Parliament 1695. And he must be understood a cautioner, in so far as the letter was accessory and relative to, and corroborative of an antecedent principal obligation, and implied that he was to be relieved by the granters thereof.

No 212.

A person who obliges himself by letter to procure security to the creditor, in bond granted by others, or to pay the debt himself, is not a cautioner in terms of the act 1695, and not entitled