1736. *February* 6.

JEAN and ELIZABETH HALYBURTONS *against* GRAHAM of Mossknow.

No 218.
When a party who was cautioner was expressly bound himself to pay certain debts of another, the septennial found to apply.

THE deceased Irvine of Bonshaw granted two bonds to Captain Blair, in the 1683, and 1684, for L. 300 Sterling; in which he assigned the Captain, for his payment, to the rents of Bonshaw in Mossknow's hands, to whom he had disponed his estate, who, in consideration thereof, undertook the payment of Bonshaw's debts. And, in the year 1687, Mossknow granted an obligation to Captain Blair, whereby 'he bound himself to pay all debts owing by Bonshaw 'to him, according to the instructions of the same to be given to him by the 'Captain, and to apply the rents of Bonshaw's estate, for crop 1686 and down-'wards, for payment of the debts due by Bonshaw to Captain Blair.' Upon which obligation inhibition and horning were used in the 1692.

These deeds having come, by progress, into the persons of the saids Jean and Elizabeth Halyburton, they brought an action, in the year 1730, against Mossknow, for payment of the L. 300 Sterling, founded on his own obligation.

For the defender it was *pleaded*, 1*mo*, That he was only cautioner for Bonshaw; and, as his debts were extinguished by prescription, consequently the accessory fell with it. 2*do*, That the cautionry obligation was not for any specific sum, but, in general, for all debts that should be instructed to be due by the principal debtor. And, 3*tio*, That, by the quality of the obligation, instructions of the debts behoved to be given by the obligant, which could not now be complied with, as they were prescribed.

Answered for the pursuers; It signifieth nothing, that the years of prescription were run from the date of the bonds due by Bonshaw; seeing the defender was expressly bound, by his own obligation, to pay the debts, owing by Bonshaw to Captain Blair, at the date thereof; therefore, as his obligation was not prescribed, he must be liable for every debt due by Bonshaw, at the time he entered into that obligation; it being an established rule, That he who becomes bound *constituendo*, remains so, if the debt existed at the time of his obligation, though, before he be sued, it should be prescribed; as appears from the L. 18. De pecunia const. § 1. And it is a mistake to consider Mossknow's obligation as an accessory, that must fall when the principal is prescribed; seeing he was really a *correus debendi*, who came in place of the original debtor; neither is there any foundation for distinguishing betwixt an obligation that relates to debts in general, or to a particular sum; seeing the defender is as much bound to pay all the debts which, at the date thereof, were owing by Bonshaw, as if it had related to a specific sum; because the effect of the diligence done upon the defender's obligation must be to maintain it in the same force it had the day it was entered into; consequently, as it was then a valid obligation for the whole debts, though not named, it must be so now, no prescription having run from the time of the diligence; which is likewise established by the

No 218. L. 14. De pecunia const.; where it is laid down as a rule, That qui constituit se soluturum, tenetur, sive adjecit certam quantitatem, sive non; which doctrine is likewise agreeable to our practice; as it had been found, that a general acknowledgment of debt owing, without relating to any particular one, saved the running of prescription with respect to the *modus probandi* of a debt, not probable by witnesses after three years, 20th February 1708, Elliot against Veitch, Div. 15. *h.t.*; which proceeds upon this principle, that the acknowledgment of debts in general puts a stop to the prescription of every one owing at that period, and makes them considered as of the date of such obligation; therefore bonds, though now prescribed, may be used to prove that they existed at the time of the obligation. Besides, the pursuer desires to know, what possibly could be done more than charging the defender in terms of his own deed? he could not be charged for payment of particular debts, as it behoved to proceed conform to the terms of the obligation; all which arguments apply with greater force, when it is considered, that the defender got the original debtor's estate, in consequence whereof he undertook the payment of his debts; so that here was a plain delegation. Besides, the obligation was granted after Bonshaw's death; which shows, that the defender was not interposing as a cautioner, but was binding for himself, as having a right to the debtor's estate.

The defender *replied*; Supposing the obligation had been special, it would not have saved the bonds from prescription, unless they had been innovate by his becoming a principal; which was not the case here; but, whatever would have been the effect of its being special, as it relates only to debts in general, there is no difference betwixt the present question and that of a common cautioner; as the two bonds were not extinguished, but only an obligation granted to pay the debts that should be instructed; which necessarily supposes them to be existing when they were demanded. To illustrate this, the case was put, That Captain Blair had received payment from Bonshaw between the date of the obligation and the production of the instructions, Surely he could not have recovered it a second time; as it could not thereafter have been instructed to be a debt of Bonshaw's when the demand was made, although it was so at the date of the obligation; it is therefore begging the question, to say, that, if Mossknow was bound *ab initio*, he remained so until his own obligation prescribed, seeing he was only bound to pay what Bonshaw could have been obliged to; therefore, if he would have had a good exception against payment, so must the defender; as the obligement is not to pay any particular sum, but only debts in general, which implies a power to object against the instructions when offered; and, if they are actually extinguished when demanded, eventually he is free. Besides, as this deed is an obligation to pay the debts due by another, How is it possible the defender can operate his relief (if he should be found liable) upon bonds that are prescribed, which *præsumptione juris et de*

jure, are declared to be no debts, in so much that they could not be founded on by way of compensation? [No 218.

As to the quotations from the civil law, they are of no force; for the doctrine of *constituta pecunia* has, at present, no place in the practice of nations; but, supposing it had, the *L.* 14. says only, that a definite sum needs not be contained expressly in the paction, which received the name of *constitutum*. But still, in order to make it effectual, it must have been certain, either by the agreement itself, or by relation to somewhat which rendered it so; which is not the case here; as the obligation founded on supposes an uncertainty, to be determined by instructions afterwards to be produced. Further, the law seems to relate to a person's entering into a *constitutum* for his own debt, and not for another's; in such a case, if he who had the benefit of a temporal exception brings himself under a fresh obligation, he is supposed to renounce the benefit of the exception competent against the first. Neither is the decision in point, as the acknowledgment there was made by the debtor himself; and, though the debt was not mentioned, yet it would appear to have been under the party's view at the time; but that can afford no argument in this dispute, where a third party intervenes, and grants an obligation which relates to no particular debt.

As to the question, What could be done in order to save the bonds from prescription, other than charging the defender in terms of his obligation? it was *answered*, That Captain Blair should have produced the instructions of his debts, until which there could not regularly be a charge on this obligation; and, as that was not done, such a general charge, which was entirly uncertain in itself, and was not made certain by relation to any other document, could never interrupt the prescription running against that to which it had no relation.

With respect to the alleged specialty arising from the defender's getting Bonshaw's estate, that cannot vary the argument; as there is no evidence produced that he was discharged; and innovation is never presumed; nor does it make any difference, that the obligation was granted after the original debtor's death; seeing one may become cautioner in a bond as well after as before the principal's decease.

THE LORDS repelled the defence of prescription.

But, upon a reclaiming bill and answers, "They sustained the defence."

C. Home, No 10. *p.* 29.

1741. *July* 22. SIR ROBERT MONRO *against* BAIN. No 219.

A BOND of presentation granted in 1724 by Dingwall of Cambuscurry as principal, and Bain of Tulloch as cautioner, whereby they bound themselves,