

*Duplicated* for the pursuer, The words of the act, declaring the diligence good for what fell due within the seven years, must comprehend annualrents in all time thereafter, as accessory to the principal sum that fell due within that time, seeing *dies cessat* as to these *licet nondum venerat*. 2do, The defender's argument *a contrario sensu* (which is the weakest of all arguments) is never admitted in application of a new correctory law.

No 236.

THE LORDS found, that the diligence executed against the cautioner within seven years, stands good only for what fell due in that time. 24th February, thereafter, the pursuer *alleged*, That the act of Parliament 1695 in favours of cautioners, did exempt the defender from annualrent, in virtue of the bond falling due, after elapsing of the seven years; yet he being denounced to the horn before, must be liable from the denunciation in all time coming, not only for annualrent of the principal sum, but also for annualrent of those annualrents that fell due within the seven years, by the act 20th, Parl. 23d Ja. VI.; and a decision 11th February 1673, Smith *contra* Waugh; No 24. p. 491. Which allegiance the LORDS found relevant.

*Forbes, MS. p. 22.*

1728. January 9.

HUNTER against ADAIR.

No 237.

FOUND, That arrestment used against the cautioner, is sufficient to preserve to the creditor all manner of diligence competent against the cautioner for what fell due within the seven years, though it was *pleaded*, upon the express words of the act, That any diligence raised within the seven years must be followed forth after the seven years, but no diligence could be insisted in; it being *answered*, That the statute intended an *ipso jure* liberation to the cautioner for what should fall due after the seven years; but as to what falls due within that space, a proper prescription is introduced to be interrupted by any thing that interrupts another prescription. See APPENDIX.

\* \* \* THE same had been found thrice before, *anno* 1717, Hunter *contra* Muir; December 1720, M'Cornock *contra* Coltran; and, February 1726, Fairholm *contra* Cuninghame. See APPENDIX.

*Fol. Dic. v. 2. p. 117.*

1738. June 13.

ANDREW ROWAND against WILLIAM LANG.

No 238.

THOMAS MITCHELL as principal, and the said Lang as cautioner, granted a bond to John Rowand for 100 merks, of date the 29th of January 1714, in the town-court books of Glasgow, and, that same day, both principal and cautioner

A charge given to a cautioner by a town-officer.

No 238.  
within the  
seven years,  
found suffi-  
cient to inter-  
rupt the pre-  
scription.

were charged: as also, by another execution, it appeared they were likewise charged the year thereafter. Andrew Rowand being assigned to this bond, charged the cautioner, *anno* 1736, with horning; who *suspended* upon this ground, That, by the act 1695, anent cautioners, the same was prescribed, there being no diligence executed within the seven years that could have any effect after the expiry thereof, the only thing done being a charge given by a town-officer two days before expiry of the first seven years, which could have no effect at all, because two days thereafter the seven years expired; and so neither poinding nor caption could follow thereon against the suspender, until after the time was elapsed. And, as to the other charge, it was good for nothing, being many months after the expiry of the first seven years. But, *2do*, Granting the first charge were to be considered as an interruption of the prescription, (although the defence that arises from the act has scarcely any thing in common therewith;) yet the utmost length it could operate was to preserve the cautionary obligation from being cut off by the lapse of the first seven years; but, even on this supposition, it still preserved it a cautionary obligation, subject to the statute, and, therefore, as it lay over afterwards for more than seven years, without any diligence done, it became, of new, cut off by the septennial act.

*Answered* for the charger: The import of the statute is not only to save diligence done against the cautioner, within the seven years, for the principal sum and annualrents that fell due within that time, but it likewise declares, That such diligence shall have its course and effect. Now, one of the chief effects thereof is, to serve as an interruption to prevent the cautioner's obligation from prescribing, as to what it is declared to subsist for, in case of diligence within the seven years: and, if the gloss put upon the act by the suspender should hold, it were hardly possible that a cautioner's obligation could signify any thing, unless it attained its full effect, by poinding or adjudication, &c. in the lifetime of the cautioner, whereby the *salvo*, in favours of the creditor, would be of no avail; therefore the law must be understood to save, to the creditor, the principal sum and annualrents falling due within the seven years, by any diligence, in that period, sufficient to make interruption. And, with respect to the second point, it is a jest to pretend, That, after running the first seven years, a new prescription commences, as the act says no such thing, but, on the contrary, speaks of seven years from the date of the bond; so that, if any diligence was used for interruption within that time, the bond must subsist thereafter against the cautioner, for what fell due within that period, during the course of the long prescription.

THE LORDS repelled the reason of suspension, and found the letters orderly proceeded for the principal sum and penalty, and what annualrents fell due within the seven years.