No 220. character under which the party became bound, at the time of contracting the debt. And this is not left to arguments and conjectures; as two certain and visible signs are fixed upon, one or other of which must necessarily be adhibited, otherways the remedy cannot have effect. It is a correctory law, and therefore not to be extended, by analogy, to similar cases. And as to the argument, That Bannerman received the money, and Middleton bound with him in the payment, and therefore free by lapse of time; it was *answered*, That this was separating one part of the act from the rest; which is plainly one proposition, whereof the *first part* is governed by the *second*, provided, &c. Nay the defender cannot even subsume, in the terms of his own explication; for, according to his doctrine, the party pretending to be a cautioner only must be bound for and with another; and the strength lies in the first of these; as it is only being bound for another, that can make a cautioner; and yet this word, which is assumed in the argument, is not to be found in the bond. Surely being bound with another, is, of itself, no mark of a cautioner. And, if the question were betwixt the parties themselves, who are bound in the bond, the manner in which it is conceived would not, by itself, be sufficient to entitle the one to a total relief against the other; for the fact might have been, that Bannerman got the money to be employed for the use of the other; or, if he had intended to make him a present of it (which may be presumed, as there is no clause of relief) in either of these cases, the bond for the creditor's security, would have been properly conceived in the terms as it now stands; yet no relief would have been competent to the one against the other; see 8th February 1715, Rutherford, No 213. p. 11012.; 14th February 1727, Bell, No 234. p. 11039.

The Lords repelled the defence founded on the septennial prescription.

Fol. Dic. v. 4. *p.* 100. *C. Home, No* 101. *p.* 334.

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A having granted bond to B for L. 50, C gave a holograph obligation in these words: "Whereas B did, at my desire, lend to A L. 50, conform to his bond, I hereby oblige me and mine, that A shall repay the said sum and annualrents; or else

1742. *December* 4. Katharine, &c. Caves *against* David Spence.

Anno 1710, Robert Bannerman granted bond to James Clark for L. 50; and, in the 1712, Mr Spence granted an holograph obligation to Clark, in the following terms: "Whereas James Clark did, at my desire, lend to Robert Bannerman L. 50 Sterling, conform to his bond given thereupon; therefore I hereby oblige me and mine, that the said Robert Bannerman shall truly repay the said sum and annualrents; or else to content and pay the same myself, upon demand, to the said James Clark, he giving me an assignation to the said bond."

The Caves having a right to this obligation, brought an action for payment against Spence. The defence was the septennial prescription upon the act 1695.

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to content and pay the same myself to B. he giving me an assignation to said bond." The Lords found C. could not have the benefit of the act 1695.

A cautioner who accedes *ex post facto*, and not when the money is originally borrowed, has no benefit of the act.

Answered; It was the defender's faith which Clark followed in lending the money, consequently he must be considered as the party principally bound. The receipt of the money is not the determining circumstance to denote who is principal and who is cautioner, he, in all cases, is always understood the principal party upon whose account the money is advanced, and whose faith is principally followed; letters of credit are a strong example of this, and the present case comes to be precisely the same. The defender's obligation, acknowledging that the money was advanced at his desire, is, in effect, a letter of credit. 2*dly*, There is no clause in the statute 1695, comprehending the case in question; for the cautioners in view of the act are those who are bound "for, and with another, conjunctly and severally," and who may be attacked without necessity of discussing the principal parties; and it contains this further limitation, that the cautioner be bound in the same bond with the principal, which, though it may appear whimsical, there is ground for it in the act. See 16th February 1710, More, No 212. p. 11011.; and 8th February 1715, Rutherford, No 213. p. 11012.

Replied for the defender, to the *first*, That it was only said *narrative* in the obligation, that it was at the defender's desire the money was lent to Bannerman; for the question still recurred, what is the nature and import of the obligation itself? And that it is really a cautionary one in all the senses of the word, is obvious. How then can it be maintained to be of the nature of a letter of credit, which always is, and ought to be interposed and given before the advance of the money, whereas here it was not till two years after? See the *Dictionaire de Commerce*.

To the *second* argument, it was *answered*, That it was not a conclusive way of arguing, that, because in one of the clauses of the act, the most favourable case for the creditor is set down, as an instance where the cautioner shall not be bound after seven years; that is, though he be bound "for, and with another, conjunctly and severally, in any bond or contract for sums of money;" that therefore other cautioners are not. And whether the characteristics of cautioners specified in the statute appears in the original obligation, or supervene by an accessory one, *per inde est*; it is the prejudice arising from cautionry obligations the law intended to prevent, by reason of the facility whereby men are induced to engage therein; and therefore, whether this arises from one, or from separate writings, makes no difference, because, truly, there is none in the nature of the thing.

THE LORDS found the defender could not have the benefit of the act 1695.

Fol. Dic. v. 4. *p.* 100. *C. Home, No* 212. *p.* 353.

*** Lord Kames reports this case:

IN the 1710, David Spence, secretary to the Bank of Scotland, applied to James Clark, engraver to the mint, for the loan of L. 50 Sterling to Banner-

No 221. man, a friend of his. Clark agreed to advance the money, upon Spence's promise to be his paymaster. The bond is in Spence's hand-writing; he is also a subscribing witness thereto; and it does not appear that Clark had any communing with Bannerman upon the subject. This bond is dated November 1710; and, in October 1712, Clark becoming uneasy about his money, Spence agreed to convert his promise into a written obligation; and accordingly, 23d October 1712, gave him a holograph note, in the following terms: "Whereas James Clark engraver to the mint did, at my desire, lend to Mr Bannerman L. 50 Sterling, conform to his bond given thereupon the 22d November 1710; therefore I hereby oblige me and mine, that Mr Bannerman shall truly and faithfully pay the said sum and annualrents, or that I shall content and pay the same myself at demand, upon the said James Clark his giving me an assignation to the said bond."

The bond and accessory holograph note came, by progress, to Katharine, Mary, and Christian Caves; and, Bannerman being bankrupt, they insisted for their payment against David Spence, whose defence was, That, *ex facie* of his holograph note, he was a cautioner; and therefore was free by the septennial prescription.

Several answers were made to this defence. One only shall be mentioned, being that upon which the judgment proceeded. It was to this effect, that the statute 1695 is not calculated to give relief in every sort of cautionary obligements, but only where the cautioner becomes bound in the original obligation, and at the time of lending the money; and the following reasoning was employed to support this proposition. In the *first* place, cautioners in suspensions, cautioners in contracts of marriage, cautioners in loosing arrestments, cautioners in annual prestations, and, in general, cautioners *ad facta præstanda*, are none of them entitled to the privilege of the statute. The statute relates only to cautioners in bonds for borrowed money; and the question is, whether it comprehend all cautioners of this sort, or only a certain species of them? This question is pretty nice; but it will be cleared by enquiring into the motives which introduced this statute, and by considering the words of the statute itself.

One thing must be obvious at first view, that the prejudice to families by the cautionary obligements first named, was not respected as sufficient to entitle the cautioners to any privilege. A different thing was in the view of the Legislature. Money has all along been a scarce commodity in this country; and it is too well known by experience, that when a man is pinched for want of money, he will submit to any conditions, however hard, to come at it. This has occasioned many laws to restrain rigorous creditors, and to protect persons who want money, from the hardships that will be imposed upon them by those who have money to lend. Is it not a rational conjecture, that the same motive introduced the act 1695? When people are pinched for want of money, it is extremely difficult for friends and relations to avoid giving their credit. This is

the facility that is spoken of and guarded against in the statute. After the money is borrowed, the call is not so urgent for friends to interpose, where the purpose is only to save the debtor from execution. Tenderness frequently, and shame almost always, are sufficient to protect a debtor from being thrown into jail, except upon the most urgent occasion. And as for other executions, they are not extremely tremenduous to most people. The difference betwixt these two is so well ascertained in common life, that, for one man who interposes to save his friend from being destroyed by execution, fifty interpose to procure money to their friends. No 221.

That this was the sense of the Legislature, may be put beyond dispute, from this consideration, that, if it had been intended to communicate the privilege to cautioners binding *ex post facto*, it is impossible to give any rational account why the law should stop short, and not extend the privilege to all cautioners whatever. For instance, is there not a strong call upon a man to interpose his credit in the loosing of an arrestment, which bars his friend from touching his own money, by the want of which he is extremely pinched? This case approaches very near to that of the statute. Another instance is a cautioner in a suspension; if the statute intended to guard against the facility of interposing for a friend, to save him from execution, a cautioner in a suspension ought not to be excluded. What shall be said with regard to a cautioner in a bond of presentation? Is not the call here for a friendly interposition, more urgent than to become cautioner in a bond of corroboration; perhaps before execution is commenced.

It is no answer to say, that the cautionary obligations now mentioned, are *ad facta præstanda*. For the plain question is, what degree of facility the law had in view to guard against? Had the Legislature reckoned upon the terror of execution as an overpowering motive, to force men unwillingly to interpose their credit, it would not have failed to provide a remedy in that case, as well as where men interpose to relieve their friends when they want money. But it was known by experience, that the one situation is not so ready to work upon the facility of men as the other. Therefore it was proper to provide a remedy in that case where the danger is the greatest, without providing a remedy in the other case, where the danger is less, and cautionary engagements less frequent. And to shew the difference betwixt these two cases in still a clearer light, let it be considered, that few are of so extensive credit as to command, without a cautioner, all the sums they may have use for. This makes the interposition of cautioners, when money is borrowed, extremely frequent. But as it is reckoned a disgrace for a man not to be able to pay what he borrows, it is but with a bad grace that one seeks his friend's credit to save him from execution; and accordingly, partly for this reason, and partly for that formerly mentioned, the interposing *ex post facto* is much less frequent than of interposing at the loan of the money.

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The act of Parliament, attentively considered, will be found to give relief to no cautioners, but to those who are bound in the original bond. There are only two clauses in the statute of importance in the present question; the one statutory, the other explanatory. The statutory clause is in the following words: "Statutes and ordains, That no man binding and engaging for hereafter, for and with another conjunctly and severally, in any bond or contracts for sums of money, shall be bound for the said sums, for longer than seven years after the date of the bond; but that, from and after the said seven years, the said cautioner shall, *eo ipso*, be free of his caution." As this is the only statutory clause in the act, it must regulate the whole; and, it is extremely clear, that it regards only cautioners who become bound at the borrowing of the money. The next clause referred to, is no more but explanatory of a doubt that might arise upon the statutory clause now recited; no cautioners are entitled to the privilege but those who are bound in the original obligation; but then, with regard to the creditor, it might be extremely uncertain which of the obligants was to be considered by him as principal, and which as cautioner. To ascertain this point, the following clause is added: "And that, whoever is bound for another, either as express cautioner, or as principal, or as co-principal, shall be understood to be a cautioner, to have the benefit of the act; providing that he have either clause of relief in the bond, or a bond of relief apart, intimate personally to the creditor, at his receiving the bond." This clause, intended for no other purpose but to distinguish the cautioner from the principal, cannot, by any just interpretation, be supposed to comprehend any case but what is expressed in the statutory clause. And so the sense of the whole comes clearly out thus: "Where two or more join in borrowing a sum of money, and grant their bond conjunctly and severally, the person who is declared to be cautioner in the bond, or has a bond of relief apart intimate to the creditor, shall be understood a cautioner in the sense of the statute, so as to have the privilege of the septennial prescription."

Further, there is evidence sufficient from the latter clause itself, that the Legislature had no cautioner in view but him upon whose credit the money is borrowed. "It talks of a clause of relief in the bond, or a bond of relief intimated to the creditor at his receiving the bond." These expressions evidently refer to an original contraction, and do by no means agree to a cautioner acceding *ex post facto*. The bond of relief must be intimated personally to the creditor when he lends his money and receives his bond; or there must be a clause of relief in the bond when delivered to the creditor. Here, plainly, there is nothing in view, but what is in the statutory clause; no new fact, nor any provision for such.

"The Court, without entering into any one of the specialties which had been suggested by the pursuers, repelled the defence of prescription for the following reason singly: That no cautioner has the benefit of the statute, but

he who is bound along with the principal in the original bond; and not he who accedes *ex post facto*. No 221.

Rem. Dec. v. 2. No 35. p. 54.

*** This case is also reported by Kilkerran:

1743. *January* 3.—An obligation having been granted by David Spence secretary to the Bank of Scotland, in the following terms: "Whereas James Clark, engraver in the mint, did, at my desire, 22d November 1710, lend to Robert Bannerman L. 50 Sterling, conform to his bond given thereupon; therefore, I hereby oblige me and mine, that the said Robert Bannerman shall truly and faithfully repay the said sum and annualrents, or else to content and pay the same myself upon demand, upon the said James Clark his giving me an assignation to the said bond;" it was found, That the granter had not the benefit of the act 1695 anent principals and cautioners.

The second clause in the act of Parliament, providing, &c. was so far thought explanatory of the first, that from no implication could one plead the benefit of cautioner, nor indeed from any words, other than that of being bound expressly as cautioner, having a clause of relief in the bond, or a bond of relief intimated.

Kilkerran, (PRESCRIPTION.) *No 10. p. 420.*

1747. *January* 20. BLAIR *against* DEMPSTER.

No 222.

FOUND, that the statute, relative to the septennial prescription of cautionry obligations, must be strictly interpreted.—*See* APPENDIX.

Fol. Dic. v. 4. p. 101.

1748. *November* 16. Lady HENRIETTA GORDON *against* TYRIE.

No 223.
A cautioner granting a bond of corroboration cannot plead the septennial prescription.

IN the year 1700, George Gordon at Mill of Ruthven as principal, and John Ross of Wardhouse as cautioner, became bound in a bond to the Duke of Gordon for L. 195 Scots. In 1705, John Ross the cautioner, and with him David Tyrie, on the narrative of the said bond, in which the said Ross was cautioner, became bound in corroboration thereof to the Duke for L. 192, as all that was then resting of the original bond.

In a process at Lady Henrietta Gordon's instance, as executrix to the Duke her father, against Tyrie for payment, he pleaded the septennial prescription, on the act anent cautioners, on this ground, that Ross was by the original bond only cautioner, nor did he cease to be cautioner by granting the bond of corroboration; and as the defender, by the bond of corroboration, only became