

1762. February 19.

MILLERS *against* SHORT.

By minute of agreement, John Miller became bound to assign certain sums, mentioned in a list, to Thomas Johnson, who, on the other hand, became bound to grant a bond for three-fourths of the sums conveyed. This agreement was executed, and Thomas Johnson granted a bond accordingly for L. 450 Sterling, with James Short, as cautioner and full debtor. The bond bears date 30th November 1751, and the term of payment is at Martinmas 1759. The cautioner's defence, in a process for payment, was the act 1695, introducing the septennial prescription. *Answered*, That act relates only to bonds for borrowed money; and, at any rate, can never apply to a bond, the term of payment of which is more than seven years after the date. The Court accordingly repelled the defence.

*Fol. Dic. v. 4. p. 101. Sel. Dec. No 189. p. 253.*

1762. July 29.

JAMES EWART of Mulloch, and ROBERT CUTLER, Merchant in Dumfries,  
*against* RICHARD LOTHIAN of Staffold.

In 1747, John Graham, Robert Ferguson, James Ewart, and Robert Cutler, entered into a co-partnery for carrying on a wine-trade. Each partner advanced L. 150; but, in the course of their trade, they had occasion to contract debts, and borrow money to a considerable extent.

In 1754, the other partners agreed to convey their several shares of the co-partnery to John Graham, upon his paying to each of them L. 150 Sterling, the original stock put in by them, with interest, at the rate of 8 *per cent.* from the time of the advance, and relieving them of all the company debts.

Graham accordingly granted bills to the other partners for their respective shares of the company's stock; and a bond was also granted by him as principal, and Richard Lothian of Staffold as cautioner, for relieving them of the company debts.

By this bond, after reciting the several debts due to the company, and the above agreement entered into by the partners, the said John Graham as principal, and Richard Lothian as cautioner, surety, and full debtor, with and for him, ' Bound and obliged them, conjunctly and severally, their heirs, &c. to ' free, relieve, harmless and skaithless keep, the said Robert Ferguson, James ' Ewart, and Robert Cutler, and each of them, of and from the sums of money ' particularly before written, due and addebted to the said company, to the ' several persons therein designaed, amounting, in whole, to the sum of L. 1236 ' 19s. 3d. Sterling of principal sums, and of and from the several penalties

No 225.

The act 1695, about the prescription of cautionry, is not applicable where the term of payment of the bond is more than seven years after the date.

No 226.

A person becoming cautioner for one partner of a company, to relieve the other partners of the company debts, not entitled to the benefit of the act 1695.

No 226. ‘ obliged for the same, and annualrents thereof, bygone, resting unpaid, and  
 ‘ in all time coming : And, for their further security thereanent, the said John  
 ‘ Graham and Richard Lothian bound and obliged them, conjunctly and se-  
 ‘ verally, betwixt and the term of Martinmas 1756, to make payment of the  
 ‘ said principal sums due to the several creditors, in manner before mentioned ;  
 ‘ and also of the hail annualrents, bygone, and in time coming, due upon the  
 ‘ respective principal sums, as aforesaid ; and of the hail expenses, if any be  
 ‘ or shall be, or diligence done or to be done, for the recovery of the same ;  
 ‘ and to retire and deliver up to the said Robert Ferguson, James Ewart, and  
 ‘ Robert Cutler, the several bonds, bills, and other vouchers of the said debts,  
 ‘ with habile discharges thereof : And further, the said John Graham as prin-  
 ‘ cipal, and Richard Lothian as cautioner, bound and obliged them, conjunct-  
 ‘ ly and severally, to free and relieve the said Robert Ferguson, James Ewart,  
 ‘ and Robert Cutler, of and from all other debts and sums of money, if any be  
 ‘ due by the said company, more than these particularly before mentioned ;  
 ‘ all under the penalty of L. 250 Sterling, over and above performance.’

Matters being thus settled, Graham carried on the trade for several years upon his own account ; but having thereafter failed, without paying up the whole of the company debts, the other partners charged Mr Lothian upon his bond to relieve them of these debts.

Mr Lothian suspended this charge ; and, in bar of it, *pleaded* the benefit of the septennial prescription, introduced by the act 1695.

*Answered* for the chargers ; The act 1695, being a correctory law, has always been restricted to the precise case provided for by its enacting words, viz. cautionry obligations, in bonds or contracts, for the payment of liquid sums of money to the creditors in such bonds or contracts. But, in the present case, the suspender is bound not only to pay the precise liquid sum of L. 1236 19s. 3d. the computed amount of the principal sums due to the company creditors, but also for the annualrents, bygone, and in time coming, with the expenses incurred, or to be incurred, thereupon ; and is likewise taken bound to relieve the former partners “ of all other debts and sums of money, if any be “ due by the said company, more than those particularly above mentioned.” From whence it appears, that his obligation is not for a precise liquid sum. Besides, it is not a bond for a sum of money due by Graham to his former partners, but only an obligation of relief, by which Graham and his cautioner became bound to pay the whole company debts to the company creditors ; and, consequently, whatever plea the cautioner might have upon this statute against the creditors of the company, after the lapse of seven years, he can have no such plea against the creditors in this bond, to whom no sums are payable by the principal debtor and his cautioner, and who are only creditors for relief of those debts which the principal and cautioner had undertaken to pay to the proper creditors. With respect to the other partners, it is a mere obligation *ad factum præstandum*, which can never fall under the enactment of the statute.

“ THE LORDS found, that Richard Lothian, the suspender, had not the benefit of the septennial prescription ; and, therefore, found the letters orderly proceeded.”

No 226.

For the Chargers, *Advocatus.*For the Suspender, *Ja. Ferguson.**A. W.**Fol. Dic. v. 4. p. 100. Fac. Col. No. 94. p. 211.*

1765. July 9.

HOGG and COMPANY *against* HOLDEN.

Hogg and Company, merchants in London, being creditors in certain sums to Richard Holden, Abraham Holden, his brother, wrote to them as follows :  
 ‘ (13th January 1753.) I am very much obliged to you for this, as well as former favours done my brother. For this L. 50 you have given your acceptance, at six months date, I will see you paid, though he should not return ; and, if you think a further acknowledgment or security requisite, shall have it. I had a letter from him of the 24th last, wherein he informs me, that he had an opportunity to carry out goods to a pretty large value, and had applied to you, who was so good as to send him your acceptance for L. 50, at six months date, and proposed to send you his will and power till he returned ; however, though he should not send it, I will see you paid.’

In 1764, Hogg and Company brought an action against Robert Holden, son and heir of Abraham, for payment of this sum.

The defender *pleaded* the septennial prescription, upon the act 1695, c. 5.

*Answered* for the pursuers ; The act gives the benefit of that short prescription to such only ‘ as are expressly bound for another as cautioners, or who have a clause of relief in the bond, or a bond of relief apart, intimated personally to the creditor at his receiving the bond.’ As none of these is the case here, Abraham Holden was not a cautioner in terms of that statute ; and, therefore, the defender cannot plead the benefit of it.

*Replied* ; The defender’s father was strictly and properly a cautioner for Richard. The letter founded on contains nothing that can import a *novatio* of the debt, or a freedom of the principal debtor from payment ; on the contrary, Abraham binds himself only in case Richard should fail to pay. The case appears extremely similar to one collected by Lord Harcarse, June 1661, Home against Lockhart, No 1. p. 2072. ; and another by Fountainhall, 20th January 1693, No 2. p. 2072. ; in both which, persons bound much in the same terms with Abraham Holden, were found to be cautioners not *expromissors*.

*Duplied* ; It is unnecessary to enquire whether Abraham Holden was properly a cautioner or not. It is certain, he was not a cautioner in terms of the statute, which, being correctory, may not be extended beyond the words ; More

No 227.

A party granted a letter, promising to see the debt of another paid. Found, that the septennial prescription did not apply.