

ply to this bill, Repels the defence founded on the sexennial prescription of bills: But with respect to the defence founded on the septennial prescription, finds, That the bill in question being granted for value received in cash, that value must be presumed to have been received by the three acceptors; and therefore the defender, who grants the letter in question, must be understood to be the cautioner; and as the letter bears that he is bound in security, it is the same thing as if, in terms of the act he had been bound expressly as a cautioner; in which case, no bond or obligation of relief would have been necessary; therefore, upon this ground, alters the interlocutor, and finds the defender not liable for the debt."

No 228.

The Court, however, " found, That John Howison's case did not fall under the act 1695; but adhered to the Lord Ordinary's interlocutor with respect to the sexennial prescription."

Lord Ordinary, *Monbuddo*.
S.

Act. *Honyman*.

Alt. *Macleod*.

Clerk, *Colquhoun*.

Fal. Dic. v. 4. p. 101. Fac. Col. No 181. p. 285.

1785. February 16. CREDITORS OF PARK against PATRICK MAXWELL.

ARTHUR PARK and WILLIAM ROWAND granted bond thus: ' We grant us to be justly addebted and owing, equally betwixt us, the sum of L. 67, &c.; which sum we bind and oblige us, conjunctly and severally, to pay, &c. And we oblige us to bear just and equal burden with each other in the premises, and to free, relieve, disburden, and skaithless keep one another, *hinc inde*, thereanent, *pro rata parte*, &c. No diligence was done upon this bond within seven years from its date. Afterwards, however, an adjudication having been led for the whole debt against the subjects of Park, his other creditors

No 229.

The benefit of the act 1695 extends not to co principals, though there be mutual stipulations of relief.

Objected; Park being, as to one half of the sum, a cautioner, having in his favour a clause of relief in the bond, was, on the lapse of seven years, ' *eo ipso* ' free of his caution,' by virtue of the statute 1695; and so far the adjudication is null. For there is not any distinction to be made between those co-obligants whose interests and cautionary engagements are reciprocal, and such as interpose themselves as cautioners only; January 1728, *Muir contra Ferguson*, No 216. p. 11014.

Answered; The statute is in favour of those cautioners only who have a total relief; not of co-principals who have a mutual relief; whether it arises *ex lege*, or from stipulation; and therefore, two persons having granted bond, with a clause of mutual relief, one of them having been charged for the whole by the creditor, was found not to have the benefit of the statute; 22d January 1708, *Ballantine contra Muir*, No 211. p. 11010.

No 229. The Lord Ordinary "repelled the objection;" and a reclaiming petition having been preferred to the Court by the objectors, it was refused, without answers.

Lord Ordinary, *Kennet.*

Act. *Sinclair.*

S.

Fol. Dic. v. 4. p. 101. Fac. Col. No 198. p. 311.

1792. *November 20.*

DOUGLAS, HERON, & COMPANY *against* WILLIAM RIDDICK.

No 230.

A person expressly bound as cautioner, has the benefit of this statute, though the bond should not contain a clause of relief, and though there should be no separate bond of relief intimated to the creditor at receiving the bond.

WILLIAM KILPATRICK was principal obligant, and Robert Riddick and David Currie were his cautioners, in a bond granted to Douglas, Heron, & Company, in 1773.

Riddick's representative, being sued for payment in 1789,

Pleaded the septennial prescription introduced by 1695, c. 5.

Answered; This statute makes a violent encroachment on the common law, and must therefore be strictly interpreted. It declares, That 'whoever is bound for another, either as express cautioner, or as principal or 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 of the bond.' As there is neither clause nor bond of relief in the present case, the statute is inapplicable.

Upon this point the Bench were a good deal divided in opinion. Some of the Judges thought the existence of a clause or bond of relief absolutely necessary to entitle the cautioner to the benefit of the act.

A majority of the Court, however, influenced, some solely by the decision, 11th December 1729, Ross against Craigie, No 217. p. 11014., others by considering that the sole object of this clause of the statute was to inform the creditor of the situation of the obligants, concurred in finding, 'That as, by the bond in question, the petitioner's (defender's) father was bound expressly as cautioner, there was no necessity for a clause of relief in the bond, or a separate bond of relief, intimated to the creditor, in order to entitle the cautioner to the benefit of the statute 1605.*'

Lord Ordinary, *Dreghorn.*

Act. *Solicitor-General, Geo. Fergusson.*

Alt. *Dean of Faculty, M. Ross, Corbet.*

Clerk, *Menzies.*

D. D.

Fol. Dic. v. 4. p. 102. Fac. Col. No 5. p. 12.

* Several other points on this statute, which occurred between the same parties, were decided at the same time. See 1st March 1793, Sec. 4. *infra*, p. 11045.