No. 34. ELIZABETH SCOTT, Appellant.—*Lord Advocate* (*Jeffrey*)—*Mr. John Campbell.*

ROBERT YUILLE, Respondent.—*Mr. Tinney.*—*Mr. Rutherford.*

Cautioner.—Stat. 1695, c. 5. A party having in a bond for borrowed money bound himself with and for another as cautioner, surety, and full debtor, without a clause of relief, or an intimated bond of relief apart, found (affirming the judgment of the Court of Session) not to be liable after the lapse of seven years.

Personal Exception.—Circumstances not held to bar the cautioner from pleading the statute.

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2D DIVISION.
Ld. Cringletie.

WILLIAM and ROBERT SHORTRIDGE, in 1810, borrowed from William Scott senior and William Scott junior 1,242*l.*, for which they as principals, along with George Yuille and Robert Yuille as cautioners, granted a bond, which, after narrating the loan of the money, proceeded: "Therefore, we as principals, and with "and for us, George Yuille and Robert Yuille, esqrs., both "merchants in Glasgow, as cautioners, sureties, and full debtors, "bind and oblige us, jointly and severally, and our respective "heirs, executors, and successors whomsoever, to make payment "to the said William Scott senior and William Scott junior, "&c. of the foresaid sum of 1,242*l.* sterling of principal, with "interest and penalty." The bond did not contain any clause of relief, nor was executed any bond of relief apart. In 1819 the Shortridges became bankrupt, and George Yuille died. Thereafter William Scott senior died, and the right to the bond became vested in William Scott junior, his residuary legatee. Under the settlement of William Scott senior, his niece Elizabeth Scott, sister to William Scott junior, became entitled to an annuity of 100*l.* per annum. In security of this annuity, William Scott junior, in March 1823, assigned this bond, on which no diligence had followed, to Elizabeth Scott. Robert Yuille, the surviving cautioner, acknowledged intimation of the assignation, and paid full interest on the bond, and afterwards at a reduced rate, at his request, until a few days before Whitsunday 1824, when, holding that seven years having elapsed he was, by statute 1695, c. 5., relieved of his cautionary obligation, he intimated to her that he no longer held himself liable for the debt.

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Elizabeth Scott charged him on the bond, and Yuille suspended, raising two points, 1st. The application of the statute to a question where, although an express cautionary appeared ex facie of the bond, there was no clause of relief in the bond, nor separate bond of relief. 2d. How far the special circumstances in the conduct of the cautioner had created a personalis exceptio, to plead the statute?

The Lord Ordinary reported the case to the Court on memorial *, who, after a hearing in presence (28th Nov: 1827), found;

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* The Lord Ordinary added the following note:—" The statute 1695, cap. 5, relative to principals and cautioners, proceeds on this, that by common law a cautioner " was bound as effectually and as long as the principal debtor, whereby many were " reduced to ruin. It then enacts, first, That no man binding himself for and with " another, conjunctly and severally, in any bond or contract for sums of money, shall " be bound for longer than seven years after the date of the bond; but that from and " after the said seven years, the said cautioner shall be eo ipso free of his caution; " secondly, and 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 " this act, providing that he either have a clause of relief in the bond, or a bond of " relief apart, intimated personally to the creditor at his receiving of the bond.

" Under this act no man has ever ventured to say that where two or more are " bound, conjunctly and severally, in a bond, without any clause of relief to any of " them, any of them is free, by the mere lapse of seven years; such a plea was never " heard of; the bond subsists for forty years. Again, if the statute had intended " that a man bound expressly as cautioner was to be free at the end of seven years, " merely because he was bound as cautioner, it would have so enacted, but it does not " do so; it enacts, that when a man is bound as cautioner, ' he shall be understood " to be a cautioner to have the benefit of this act, provided that he have either a " clause of relief in the bond, or a separate bond of relief intimated to the creditor at " his receiving of the bond.' If, then, he have not a clause of relief in his bond, or a " separate bond of relief intimated to the creditor at his receiving of the bond, it " seems to the Lord Ordinary to follow undeniably that the person may be a cautioner " for another, but is not a cautioner to have the benefit of the statute 1695, c. 5.

" 2d. The Lord Ordinary understands it to be now a fixed principle of law, that " whenever a statute alters the common law, or confers privileges of any sort, not " competent by common law, and this under certain conditions or provisions, these " must be specifically and in ipsis terminis obeyed, otherwise there is no claim to the " benefit of the statute. It is not, therefore, enough that a person be bound as a " cautioner in any bond or contract, in order to entitle him to plead the limitation " introduced by the statute 1695, c. 5. He must observe its provisions, and have the " clause of relief in the bond, or a separate obligation of relief intimated to the " creditor; and it won't even do to intimate this at any time; it must be done when " the creditor receives his bond.

" Now the Lord Ordinary admits that different interpretations have been put by " the Court on this statute. In Ross v. Craigie, 11th December 1729, the Court " thought it was enough that a person was described ' to be cautioner, to entitle him

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" That the suspender is entitled to found on the septennial limi-" tation of the statute, without a clause of relief in the bond " granted by him as cautioner, surety, and full debtor for the " principals in the bond charged on," but remitted to the Lord Ordinary to hear parties further on the other points in the cause. * Thereafter the Lord Ordinary suspended the letters with expenses, and the Court adhered.†

Elizabeth Scott appealed.

Appellant.—1. The words of the statute expressly and explicitly ordain that only such cautioners shall have the benefit of the limitation as have either a clause of relief in their bond, or a separate bond of relief intimated to the creditor. To disregard this provision would not be a mere liberal construction of the statute, but a direct infringement of a positive and precise enactment. Any cases sanctioning a different doctrine are against law and should be overruled.

2. The cautioner has by her acts and deed barred herself from founding on the statute, and remains bound.

Respondent.—1. Where a party is bound expressly as cautioner in a bond, the statute does not require a clause of relief, or a separate bond of relief; that is only necessary where the party has been bound as co-principal. The provision in question was introduced to protect the creditor, and if the bond shews him

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" to the benefit of the statute.' In Burnet v. Middleton, 39th June 1742, the Court " found the reverse. In cautionary obligations in a suspension, the Court have found " that the statute did not apply; and here there could be no doubt as to the obligant " being a cautioner. In the case of Douglas, Heron, & Co. v. Riddick, 22d Nov. " 1792, the Court returned to that of Ross v. Craigie, most improperly in the Lord " Ordinary's opinion. On appeal of the case, the House of Lords did not affirm the " decision on that ground. They found it unnecessary to determine it, as there " were other grounds for affirming the judgment. See Morrison's Dictionary, " p. 11,032, and 11,045 et seq. It seems clear to the Lord Ordinary that the House " of Lords were not satisfied with the law to be deduced from that decision, otherwise " they would have affirmed it; and the Lord Ordinary, considering the case open, " thinks it right to give the Court an opportunity of reconsidering it; presuming at " same time to give his own decided opinion against Ross v. Craigie, and the reitera-" tion of that judgment in Douglas, Heron, and Co. v. Riddick."

* 6 Shaw and Dunlop, p. 137.

† 8 Shaw and Dunlop, p. 485.

that the party is a cautioner, any other information of that fact is clearly uncalled for. That has been the construction given to the statute in various cases, and in practice has been relied on by conveyancers.

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2. The respondent is not by his conduct barred from pleading the statute.

Lord Chancellor.—My Lords, I have, for a considerable time, formed an opinion upon the first point which has been raised before your Lordships, and have now upon the second point also come to an opinion, that I ought to advise your Lordships to affirm the decree of the Court below. The two points to which I have adverted have been very fully and ably argued at the bar. On the question touching the construction of the act of parliament, taken upon its own words, or upon the authority of the cases which have been adverted to, I entertained no doubt at any time, and therefore I shall not trouble your Lordships upon it at length. The act was passed in the year 1695, and is not very accurately penned, an instance of which occurs in the use of the words "said cautioner," in the clause "as also of the "said cautioners being still bound, conform to the terms of the bond, "within the said seven years, as before the making of this act." I have taken an opportunity of referring to the printed statutes, and not only to the printed statutes in common use, but to the very valuable reports possessing the authority of fac-similes of the ancient records, and I find that the clause exists in precisely the same form in that original. Be that as it may, the words of the statute undoubtedly, in the clause principally brought into question here, are by no means clear, and from that want of clearness has arisen this discussion, both in the Court below and at your Lordships' bar. After the statement, that many persons and families have been injured by men's facility to engage as cautioners for others, who, afterwards failing, have left a growing burden on their cautioners, without relief, it is statute and ordained, "that no man binding and "engaging for hereafter," that is, in future, "for and with another, "conjunctly and severally, in any bonds or contracts for sums of "money, shall be bound for the said sums for longer than seven years "after the date of the bond"—not that no action shall be maintained —and this is a very material distinction, in reference to the second part of the argument—not that no legal remedy shall continue longer, as against the obligor or cautioner, but that he shall not be bound—the obligation shall cease and determine at the end of seve years; and then, having put affirmatively the extinction of the obligation, it proceeds to put it negatively, by words more strong than I

Sept. 15, 1831. remember to have seen used in any statute, Scotch or English, with respect to any thing in the nature of limitation or prescription, (I shall presently shew I do not think it involves either limitation or prescription;) " but that, from and after the said seven years, the said " cautioner shall be eo ipso free of his caution." Nothing can be stronger than those terms. The statute lays down, first, that after seven years the obligation shall be extinguished—shall cease to exist; and secondly, as if that were not enough, that the cautioner shall, after the lapse of that time, be free eo ipso; that is, he shall, by the bare lapse of time—without any other circumstance—without any release—without any more ado but the lapse of seven years, be eo ipso entirely free and discharged from his caution. Then, my Lords, all this having been ordained with respect to the person who is cautioner or co-obligor with the other, comes the clause on which this question arises — " and " that whoever is bound for another, either as express cautioner"— that is unnecessary—that is superfluous; therefore something must be meant by that beyond what had been done before—" or as prin- " cipal or co-principal, shall be understood to be a cautioner, to " have the benefit of this act, providing that he have either a clause " of relief in the bond, or a bond of relief apart, intimated personally " to the creditor at his receiving of the bond"—that is to say, the bond of relief must be intimated personally to the creditor — the obligor knows his own obligations—but the bond relief, it is to be intimated personally to the creditor at his receiving of the bond. Now, there may be some doubt whether that does not mean the principal bond. I rather incline to think it does. It certainly can only be from the time that that is intimated to the obligee that the seven years can be taken to run, for it would be the hardest thing in the world if you were, at the end of six years, to convert a man into a cautioner; therefore I conceive the bond of relief apart must be part of the same transaction, and be intimated to the obligee. The construction contended for by the appellant is, that the part I have last read of this remedial act, beginning with " whoever is bound " for another," is not to be taken as an extension of the remedy, as a new clause coming in where the first fails, but that it is to be taken rather as an exception out of the restriction of the persons who shall have the benefit of the general provisions of the act; because, though in one case, they extend to principals and co-principals, yet, according to that construction, they shall be restricted as to remedy in respect of express cautioners. My Lords, this is not, in my opinion, a sound construction. It is plainly contrary to the general meaning of the first clause. It is not by way of exception that those words are introduced into the act, but by way of express provision; this is by way of addition—this is some-

thing adjected into what had passed before, as if the legislature had said, first, let it be understood whoever is bound for another as express cautioner shall have the benefit of this septennial limitation; and next, whoever is bound as principal or co-principal shall have the benefit of the act, provided that he is so made a cautioner, not by being express cautioner, but by having a clause of relief in the bond, (one case left unprovided for by the generality of the first part of the statute,) or a separate bond of relief, intimated at its execution to the obligee—to the creditor, which is another case left unprovided for by the first part of the act. There is another reason, for which I hold this to be the sound construction of the statute. Intimation of the bond of relief apart is perfectly intelligible, if the person is bound as co-principal and does not, on the face of the instrument which binds him, appear to be a cautioner; then it is very fit that the obligee should know the true character of that person so as not to allow the seven years to elapse, which would extinguish his remedy against the cautioner. But it is perfectly unintelligible that this bond of relief apart must be intimated at the delivery of it, if it is to be applied to the express cautioner. What is the use of intimating it at the delivery? The instrument itself, which declares the cautioner, is sufficient intimation to the obligee that it is at his peril if he does not take his legal remedy in the seven years; but it is perfectly intelligible, as respects the co-obligor, who does not appear upon the instrument to be an express cautioner, that there shall be an intimation. If the provision as to a clause of relief in the bond, which gives him the intimation at once, be perfectly intelligible, is it not consistent with the remedy, and just towards the obligee, that if the bond of relief is apart from the principal instrument, so that upon the face of it he shall have no such notice, he shall have positive intimation of the bond, that he may at once know that the man whom, upon the face of the instrument, he never could have discovered to be a cautioner, and therefore entitled to avail himself of the septennial period, is a cautioner; and that, therefore, it is at the obligee's peril, if he does not look well after him? My Lords, the cases, when you come to look into them, are really in favour of that construction. In the first place, the case of Ross—that I will not advert to particularly, because that is admitted to be on all-fours with this, and that if the one stand the other must; but the authority of that case is disputed, and it is said that subsequent cases do not bear it out. I do not think, however, that this is by any means the only case. I think the case of Gordon is an authority, though decided, undoubtedly, on the other point; yet that case never would have come before this House for their decision, if this case of Ross was not well decided. The judges who decided

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that case of Gordon had certainly the same view, or they would not have found "that the seven years' prescription by the act of "parliament of 1695 doth in this case run, not from the date of the "bond, but from the date of the letter." Now, there was no clause of relief in that bond, nor was there any bond of relief apart. Then, what is the meaning of this, if a clause of relief in the bond, or a bond of relief apart, is necessary to give the benefit of the statute of 1695 to the cautioner. They say that the prescription in the act of parliament of 1695 does in this case run, not from the date of the bond, but from the date of the letter. If the case of Ross is law, it is an authority for this decision; for there was no clause of relief in that case, neither was there a bond of relief apart intimated to the creditor. If it is not law, there would be in the case of Gordon not only no running from the date of the bond, but no running from the date of the letter; this case of Gordon, therefore, is just as much a case upon all-fours with the present as the case of Ross, so far as regards the first point. Then, my Lords, I find the case of Douglas was decided by the Court of Session twice—explicitly decided; and though true it is that the House of Lords did not deal with that proposition, because it was unnecessary, I do not consider that to be an overruling of the judgment of the Court below, but, as far as it goes, the decision here is consistent with it; for unless the Court were of opinion that the septennial period would but for other circumstances have run, there would have been no necessity to go into that other point; and the House of Lords ought to have said, You have no business to go to that, for the septennial period would not run. Their going into the circumstances seems to imply that it would have run, but for those circumstances. Those cases, therefore, appear to me to be authorities applying distinctly to the case now before your Lordships. Then, my Lords, let us look to the authority, at least to the decision in the case of Ninian Hill, in 1787. That case recognizes the same principle here contended for, and I cite that, though a distant case, because I find Mr. Baron Hume, the professor of Scotch law, resting upon it, among other authorities, his opinion of the construction of the act; he cites that case, as well as the case of Ross, as plainly laying down the law in the way I state, and he gives it in his lectures as the known and recognised construction of the act of parliament. Erskine's authority, as far as it goes, is to the same effect. Lord Bankton's authority is express; he was about contemporaneous with the decision of Burnet, relied upon on the other side; and he says, "Immunity to cautioners takes place where no diligence "is done against them within seven years of their obligation." This holds where they are either bound expressly as cautioners, so insert in the bond, or a bond of relief is granted to them, and intimated to

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the creditor. He puts two cases, just as I do: He says, if either the person is expressly a cautioner by the frame of the bond, or, not being a cautioner by the frame of the bond, if he takes a bond of relief apart, and intimates that to the obligee, then the act applies, which is just the case at bar. Burnet's case has been commented upon in the course of the argument, as it was in the Court below: that case was clearly decided, if Lord Kilkerran is any authority, it was clearly decided, if Lord Elchies is any authority—on this ground, that the word "for" not being in the cautionary obligation, he was not a cautioner upon the face of the bond. Then, if he was not a cautioner upon the face of the bond, he comes within the latter clause, and he behoved to have a separate bond of relief intimated, otherwise he did not come under that part of the statute, namely, the general enactment of relief. Upon these grounds, therefore, I entertain no doubt that the Court of Session has come to the proper decision on the construction of this statute, and I hope we shall never have the question again raised in the Court of Session, or, at all events, not again brought to this House.

The next question was, whether the payment of interest subsequent to the seven years, or the acknowledgment of intimation of assignation by the cautioner, was sufficient to take him out of the statute? And I hold, for the reason I am about shortly to assign, that the Court below was right here also, for that those facts did not take the case out of the statute. This is not a prescription or limitation in the common sense of the word. I have stated already, in going over the act, that the words are of a very different and much stronger nature, and that they effect a complete extinguishment of the debt, as much as if the seal were raled from the bond—as much as if there was a release, and even more—it is a statutory extinguishment of the cautionary obligation;—the words are as strong and as stringent as it is possible for lawyers to make them. My Lords, I find this is the opinion of a very high authority in the law of Scotland, I mean that of Erskine, who employs almost the words I have now made use of; for he says, "though, in compliance with the common way of "speaking, this statute is classed here among those which establish "the short prescriptions, it would seem that the limitation of caution- "ary obligations is somewhat stronger than the prescription, notwith- "standing the decision observed to the contrary. The act 1695 "provides, not that cautionary engagements shall prescribe in seven "years—for prescription is not once mentioned in the statute—but "that no cautioner shall continue bound for a longer term than seven "years, and that after that period he shall be eo ipso free—this "emphatical expression seems to be made use of on set purpose, to "distinguish the limitation from prescriptions, and to make the

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The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

Appellant's Authorities.—Statute 1695, c. 5. Ross's Lectures, p. 81; 3 Ersk. 7, 9; 1 Stair, 17, 3; Ballantine, 22d Jan. 1708 (Mor. 11,011); Stewart, 22d July 1712 (Fountainhall II., 758); More, 16th Feb. 1710 (M. 11,011); Scott, 8th Feb. 1715 (Mor. 11,012); Forbes, Feb. 1726 (Mor. 11,014); Burnet, 29th June 1742 (Mor. 11,018); Blackwood, 9th June 1752 (Mor. 3396); Kay, 4th Dec. 1742 (————); Hogg, 9th July 1765 (Mor. 11,029); Howison, 7th Dec. 1784 (11,030); Elchies v. Bill of Exchange, No. 11; Clerk Home, p. 20; Gillespie, 15th Jan. 1736 (Elchies Bill of Exchange, No. 11); Andrew, (Buc. Rep. p. 52); Douglas, Heron, and Company, 20th Nov. 1792 (Mor. 11,032).

Respondent's Authorities.—Statute 1695, c. 5. Clark, 10th March, 1792 (——); Douglas, Heron, and Company (——); 1 Ersk. 7, 24; 3, 3, 65; Black. Com. p. 87; Gordon, 19th Jan. 1715 (Mor. 11,037); Ross, 11th Dec. 1729 (Mor. 11,014); Munro, 22d July 1741 (Elchies Cautioner, No. 10); Hill, Aug. 1787 (——); Forbes, II. 3, 2, 3; 2 Bank. 12, 30; 1, 23, 48; 2 Ersk. 2, 24; Baron Hume's Lectures; 1 Bell's Com. p. 273; Bell's Prin. p. 146; Russell on Con. p. 486; 2 Juridical Styles, 2d Edit. p. 49; Bell's Law Dic. v. Prescription; M'Lellan, 8th July 1725 (Mor. 4967); Balfour, 18th Jan. 1670 (Mor. 5640); Carrick, 5th Aug. 1778 (Mor. 2931).

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