

DIVISION VII.

Septennial Prescription of Cautionary Obligations,
by act 5th Parl. 1695.

SECT. I.

Relates to Obligations for Money.

1907. *January 5.* STRANG and ROBERTSON *against* FLEET.

FLEET of Carroway in Orkney being charged on a bond of L. 1000 Scots by Strang, and Robertson his assignee, he suspends, that it was the price of lands, and that they were bound to purge incumbrances, and particularly an inhibition against Strang the disponent, served by Magnus Cromarty, which they had not done. *Answered*, The inhibition is prescribed and extinct, in so far as it is raised on a bond of relief and cautionry, and nothing done on it by the space of seven years after its date, and so prescribed by the act 1695, declaring cautioners after seven years free, if no diligence be used against them within that time. *Replied*, *imo*, This bond of relief is before the act of Parliament, which has no retrospect, but only to regulate subsequent cases; *2do*, I am minor, and so prescription cannot run against me; *3tio*, The act relates only to obligations given by principals and cautioners for liquid sums; but this was only a bond of cautionry for a tutor, that he should make true and faithful account to his pupil; and the act being correctory and unfavourable to creditors, is not to be extended. THE LORDS found such bonds did not fall under the act of Parliament, and so the inhibition behaved to be purged.

Fol. Dic. v. 2. p. 115. Fountainhall, v. 2. p. 478.

No 205.

The benefit of the septennial prescription refused to a cautioner for a tutor that he should make true account to his pupil.

1709. *January 18.* MR DAVID BALVAIRD *against* THOMAS WATSON.

GRISSEL RAMSAY, relict of one Watson, being provided to L. 200 Scots of jointure, gets a bond of corroboration from her husband's son for payment thereof, and Thomas Watson merchant in Dundee is cautioner therein. The princi-

No 206.

A cautioner for an heir, to the relict, for her jointure,

No 206.
found not to
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pal being deceased, Grissel and Mr David Balvaird her second husband charge the cautioner. He suspends on the fifth act 1695, that after seven years a cautioner is free, and *ita est*, his bond is in 1697, and so is prescribed, no diligence being used against him in that time. *Answered*, The act relates only to bonds for liquid sums, which this is not, being a prestation of a fact to pay an yearly annuity, which is every year a new obligation; and the years now insisted for, being the eighth and ninth years of her liferent, were not fallen due during the currency of the seven years, *dies tunc nec venit nec cessit* as to the years now acclaimed, even as feu and teind duties above forty years prescribe, not being claimed within that time, as was found betwixt the Earl of Athole and Strowan, (See APPENDIX.) *Replied*, The act is general as to all bonds and contracts for sums of money, which this certainly is, et ubi lex non distinguit nec nos distinguere debemus; yea, a cautioner may charge a principal debtor to free, relieve, and skaithless keep, and oblige him to pay and report a discharge for his liberation, as was lately decided betwixt Forbes of Tolquhon and Waterton, (See APPENDIX.) The Lords argued, That though the act is not restricted to bonds of borrowed money, yet here no diligence could be done as long as the annuity was punctually paid, which they carefully did all the seven years, and then failed; whereas, on a bond of borrowed money, I could inhibit and adjudge for the principal, which could not be used for years to run of this annuity, seeing every year *nata erat nova obligatio*. THE LORDS, by plurality, found this case did not fall under the act of Parliament, which as a correctory law is not to be extended.

Fol. Dic. v. 2. p. 115. Fountainball, v. 2. p. 481.

* * * Forbes reports this case ::

JAMES WATSON, heir to William Watson mariner in Dundee as principal, and Thomas Watson merchant there as cautioner, having in February 1697 granted a bond of corroboration of a liferent annuity of L. 200 provided to Grissel Ramsay in her contract of marriage with the said William Watson; Mr David Balvaird, the said Grissel Ramsay's second husband, pursued Alexander Watson of Wallacecraigie, as heir to the cautioner, for a year and a half's annuity preceding Whitsunday 1707; who pretended to be free of his father's cautionry by the 5th act of the Parliament 1695, whereby cautioners for sums of money in bonds or contracts are free after seven years from the date of the bond.

Alleged for the pursuer; The said act concerns only cautioners for liquid sums; whereas the defender's father was cautioner for a fact or annual prestation provided in Grissel Ramsay's contract of marriage, which was not due, nor could be exacted the time of the engagement, seeing a new obligation for the annual prestation ariseth yearly; and the last clause in the statute securing legal diligence done within seven years for what fell due in that time clears that

those debts only fall within the verge of that act, which were due, and for which diligence could have been done within the seven years. No 206.

Answered for the defender, *1mo*, The words of the law are general concerning principals and cautioners, *Et nostrum non est distinguere*; *2do*, The reason of the law, viz. to prevent the ruin of persons and families by the growing burden of cautionry, pleads more in favours of a cautioner in an annuity than any other; because a cautionry for a definite sum is liquid, and the hazard known, whereas an annuity grows yearly, and may run out to an indefinite ruinous length: A cautioner in a bond being distressed or getting assignation, may adjudge once for all, and the fear of expiring of the legal will force relief; yea the principal debtor in a bond may be charged upon the obligation to free and skaitless keep, which imports that he should pay for the cautioner's liberation; whereas a cautioner for an annuity cannot adjudge once for all; nor is a creditor obliged to accept of a stock in money in lieu thereof; *3tio*, It is not to the purpose, that subsequent annuities could not have been exacted the time of the engagement; for the seven years run from the date of the writ, without respect to the term of payment.

Replied for the pursuer; The act 1695 was only intended to prevent the hurt and prejudice arising to persons and families by cautionry for borrowed money, which was a burden of itself, and became a growing burden, as the law terms it, by the running on of annualrents unpaid. No body was prejudiced by the expiring of the cautionary obligations for sums of money; seeing the creditor might call for his whole money within the *septennium*: But a cautioner *ad factum præstandum*, as to pay a sum annually, or a cautioner in a suspension, &c. cannot be brought under that correctory law without many absurdities. Again, the cautioner in this case was only obliged conditionally for so many years as the liferentrix should happen to live. Which conditional obligation, not being like a conditional obligation for individual sums, falls not within the compass of the act 1695, but it is determined by L. 108. D. de Verb. Signif. Debitor intelligitur is, a quo invito exigi pecunia potest. And seeing he became debtor only from the time the annuity fell due, when he could be distressed, prescription cannot run in this case; seeing otherwise some creditors would have seven years to do diligence against their debtor's cautioners, others but one year; yea a cautioner for a liferent provision could not stand bound longer than seven years, which cannot be designed by the law; *2do*, Albeit the seven years in the act are declared to run from the date of the writ, it must be understood with this quality, so be the cautioner was seven years bound.

THE LORDS found, That the act of Parliament 1695 doth not extend to this case; and therefore repelled the defence: For if the said act were not restricted to bonds of borrowed money, no person could be effectually cautioner in a contract of marriage, or in clauses of warrandice or requisition.