

1715. February 4.

Mrs CATHARINE BORTHWICK *against* CRAWFURD of Crawfordland and
BOYD of Pitcon.

No 207.

A cautioner
in a bond
payable after
the death of
the creditor's
wife, found
not entitled
to the benefit
of the septen-
nial prescrip-
tion.

CRAWFURDLAND and Pitcon being *in anno* 1699 bound as cautioners for Ker of Kersland in two bonds granted to Colonel Borthwick, payable at the first term after decease of the Colonel's lady, and assigned by him to Mrs Catharine his sister; upon her charging and their suspending, this defence was proponed, that by the act 1695 cautioners are liberate in seven years after the date of the bond, which space is now elapsed.

To which it being *answered* for the charger, That the bonds being only payable at the term foresaid, and the Colonel's lady having only died within these two years, the seven years could not begin to run till after her decease.

Replied for the suspenders; That they opponed the act of Parliament, bearing, that cautioners should not be bound for longer than seven years after date; so that this was a special act communicating a privilege to cautioners, not to be regulated by the common rule of prescription, the seven years being precisely to be counted from the date of the obligation, as the act bears; *2do*, Though the money could not be exacted within the seven years, yet other diligences such as inhibition, arrestment, adjudication, &c. might have been used.

Duplied for the charger, *1mo*, That either the law is to be restrained to cases concerning cautioners, in which the term of payment and exigibility is within seven years, in which case the present cautioners cannot have the benefit of the act; or if it be extended to all cautioners, even where the term of payment is beyond the seven years, then *in sano sensu* the seven years can only run from the term of payment; otherwise it were almost impossible to bind a cautioner in any conditional bond, where the condition might happen not to be, or could not be purified within the seven years; nor could cautioners be bound where the term of payment is expressly stipulated beyond the seven years, which could never be the meaning of the act; *2do*, As to using diligences, this is to be understood of cases wherein these could be used *cum effectu*, and not bare inchoate diligences, but such as may be compleated.

THE LORDS found, the act of Parliament 1695 statutes only in the case where sums fall due, for which diligence could be used within seven years; and that in this case no sums did fall due within seven years of the date of the bonds charged on; and therefore repelled the defence founded on the said act of Parliament.

Act. Sir Wal. Fringle.

Alt. Hut. bison.

Clerk, Alexander.

Fol. Dic. v. 2. p. 115. Bruce, vol. 1. No 54. p. 68.