

No 212.
to the benefit
of the septen-
nial prescrip-
tion.

Answered for the pursuer; The letter can never import a cautionary, Sir Samuel being therein obliged as *correus debendi*, without any express quality of relief; and the granter of a simple bond of corroboration is not a cautioner in the terms of the cited act of Parliament, but truly a co-principal.

THE LORDS found, that Sir Samuel Forbes was not a cautioner in the terms of the act of Parliament 1695; and therefore could not plead prescription.

Fol. Dic. v. 2. p. 116. Forbes, p. 402.

1715. February 8. Mr WILLIAM SCOT *against* THOMAS RUTHERFORD.

No 213.
One granting
a bond of cor-
roboration,
though he
has relief, is
not under-
stood to be a
cautioner, so
as to have the
benefit of the
act 5th, Parl.
1695.

THOMAS RUTHERFORD having charged Mr William Scot upon a bond of corroboration granted by the said Mr William Scot, he suspends on this reason, that he was not bound in the original bond, but only became bound in the corroboration; and consequently was a cautioner for the obligants in the bond corroboration, and was now free by the course of more than seven years before the charge, conform to the 5th act Parl. 1695.

It was *answered*; That the said act did not extend to every cautionary obligation, but only such as are bound for and with another conjunctly and severally in any bond or contract for sums of money, and then proceeds to explain who shall be reckoned cautioners, viz. such as are expressly bound as cautioners, or as principals, or co-principals, providing they have a clause of relief in the bond, or a bond of relief apart intimate particularly to the creditor at the receiving of the bond. The suspender is indeed *adpromissor* by the bond of corroboration, and relief is implied in law; but he is not bound expressly as a cautioner, nor has a clause of relief in the bond, nor a bond of relief apart; and the Lords have in all cases interpreted this correctory law strictly.

“THE LORDS found the act did not comprehend an obligant in a bond of corroboration.”

Fol. Dic. v. 2. p. 116. Dalrymple, No 136. p. 189.

* * * Bruce reports this case :

1715. February 9.—A BOND of corroboration being granted by Mr William Scot to Knowsouth's author, and he the assignee now after seven years insisting for payment; the point to be discussed was, Whether the act of Parliament 1695, anent the prescription of cautionaries, can be extended to the granter of the bond of corroboration?

Alleged for the defender; That he was to be accounted a cautioner, his obligation being but accessory, and relief being competent to him by law against the principal debtor.

Answered for the pursuer; That the said law being correctory, is not to be stretched by consequences. For the act does only liberate such as, *imo*, did.

engage for and with others *qua* cautioners; or, 2^{do}, such in whose favours there was a clause of relief inserted in the bond; or, 3^{tio}, to whom there was a bond of relief apart intimate to the creditor: Now the defender here is in a distinct case from any of these three. And the Lords, 21st January 1708, Ballantine *contra* Muir, No 211. p. 11010., did find, that it did not extend to bonds bearing clauses of mutual relief, but only to bonds where one of more *correi* is bound to relieve the rest. And 16th February 1710, Moir *contra* Foveran, No 212. p. 11011., they found, that an obligatory missive, whereby the writer obliged himself to procure security to the creditor of a former bond, or to pay the debt betwixt and a precise term, did not fall within the verge of the said act.

Replied for the defender; That the bond of corroboration being an accessory security, and no innovation of the debt, doth entitle the granter to the privilege of the act as cautioner: And that the first decision was nowise parallel to the present case; because a clause of mutual relief is only an explication of what the law provides, where several persons are bound as full debtors for one and the same debt: And that the second decision did as little quadrate; because the granter of the missive had bound himself *ad factum præstandum*, which was not of the nature of a cautionary for a debt.

THE LORDS found, that the granter of the bond of corroboration is not in the terms of the act of Parliament 1695.

Act. Hay.

Alt. Sir Ja. Stuart.

Clerk, Alexander.

Bruce, v. 1. No 61. p. 74.

1724. February 19. CORONET NORIE *against* PORTERFIELD of that Ilk.

PORTERFIELD being cautioner in a bond granted by George How to Coronet Norie, dated the 25th April 1699, did in December 1705, before elapsing of seven years from the date of the bond, subscribe a note on the foot of it, by which 'he dispensed with any benefit he might have from the act of Parliament 1696 anent prescription of the cautioner's obligation, and declared himself bound notwithstanding thereof.'

In February 1713, Porterfield was charged upon this bond, and in a suspension he insisted, that he was free by the act of Parliament 1696, which statutes, 'That no cautioner shall be bound longer than seven years after the date of the bond, but was thereafter, *eo ipso*, free of his cautionry.' And that though by the docquet he had renounced that benefit, yet the law being a public one introduced to prevent the bad consequences which might follow from men's facility in binding themselves as cautioners, it could not be dispensed with.

No 214.
Found that
a cautioner
could not
renounce the
benefit of the
act 1696.