No 219.

'That Cambuscurry should on a day certain compear personally at Inverness 'in the messenger's house, and then and there pay the hail sums, principal 'annualrent, and penalty mentioned in the letters of caption, with all other 'expenses of diligence, together also with the sum of L. 600 Scots of penalty to 'be paid by me and my foresaid cautioner, in case I the said Dingwall of Cam-'buscurry shall not compear day and place and hour above mentioned,' was, in a suspension by the cautioner, "found *quoad* the obligation upon him, to fall under the act of Parliament anent the prescription of cautionries."

A simple bond of presentation that the debtor should present himself, would not have fallen under the act of Parliament; but the cautioner's being here bound that the debtor should also pay, was found to distinguish the case; notwithstanding it was *pleaded*, that by the words the cautioner being not bound to pay, but only that the principal should pay, and so the cautioner being only liable consequentially upon the principal's failure, he was no more bound for a sum of money than he is in a simple bond of presentation, whereby he becomes also consequentially liable upon the principal's failure to present. See No 211. p. 11010.

Fol. Dic. v. 4. *p.* 100. *Kilkerran*, (Prescription.) *No* 9. *p.* 419.

No 220.

In an action upon a bond, a co-obligant defended himself upon the septennial prescription of cautionary obligations. Found that this prescription applied only to cautioners who had a clause of relief in the obligation, or a separate bond of relief.

1742. *June* 29. Mrs Ann Burnet *against* Patrick Middleton.

Robert Bannerman and Patrick Middleton granted bond in January 1733, to Gilbert Burnet for L. 80 Sterling, of the following tenor: "I Robert Bannerman, &c. grants me to have borrowed and received from Gilbert Bannerman, &c. all and hail the sum of L. 80 Sterling, whereof I grant the receipt, &c.; which sum, with the annualrents, &c. I the said Robert Bannerman, and with me Mr Patrick Middleton, &c. bind and oblige us, conjunctly and severally, our heirs, &c. to content and pay to the said Gilbert Burnet," &c. Mrs Ann Burnett, as executrix to Gilbert her father, brought an action for payment against Patrick Middleton, as representing Patrick Middleton, one of the obligants in the bond.

The defence was founded on the 5th act, Parl. 1695, which ordains, "That no man binding and engaging for hereafter, for and with another, conjunctly and severally, in any bond or contract for sums of money, shall be bound for the said sums, for longer than seven years after the date of the bond," &c. In terms of this clause, the defender subsumed, that his predecessor was bound for and with Mr Bannerman, conjunctly and severally, in a bond for a sum of money; that the seven years are elapsed, and therefore his predecessor became thereby *eo ipso* free. Neither can the following clause in the act vary the question, declaring, "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 hath either clause of relief in

the bond, or a bond of relief apart intimated personally to the creditor at his receiving of the bond." No 226.

The defence, therefore, falls to be sustained on the first clause, unless the pursuer make out that it is restricted by the latter clause. But when the whole is considered, it will appear the last was intended as an extension, not as an alteration or restriction of the former. The act proceeds on the narrative of the ruin brought on families by men's engaging as cautioners; with respect to which, it is evident the form of the deed is of no manner of consequence, viz. whether one is bound as cautioner, or has a bond of relief, or in whatever other manner the security is conceived; the substantial matter is, who has got the money, and who has furnished his credit? If the security is so conceived as this must be known to the creditor, so as to put him on his guard against the prescription, the case comes fully up to the narrative of the act. "One bound for and with another, conjunctly and severally," is as well entitled to the remedy as any one. *Ex facie* of the bond, it appears that he is cautioner, because he is bound for another, who is declared to have received the money. This must put the creditor as much on his guard, as where there is a clause of relief, or bond of relief apart, intimated to him. The act does not say, that the cautioners described in the last clause, and these only, shall have the benefit; this would be contradicting the former clause, giving the benefit to a cautioner, bound for and with another, conjunctly and severally; surely it would have a strange appearance, that a statute, introduced for the benefit of cautioners, should not take place, in the case of him who is, in the most proper sense, a cautioner. 2*dly*, Supposing the remedy provided in the act were to be confined to the forms mentioned in the latter clause, the defender *pleads*, That his case falls under one of the branches thereof, his predecessor being bound as express cautioner. It is true, the word *cautioner* is not in the bond; but, as there is no charm in the word *cautioner*, it is not to be supposed, the remedy will be confined to the word, and not to the thing. The words *fidejussor*, or *surety*, would surely give a title to the benefit of the statute; and nothing is plainer than that Mr Middleton's engagement is as cautioner only. Bannerman borrowed and received the money, and Middleton became bound, not only with, but for him; so that no doubt can remain he was really a cautioner, though not designed as such.

Answered for the pursuer, That, after the first clause, the act proceeds to determine who shall be understood to be a cautioner, to have the benefit thereof; as to which, one of two things are specially required; either, that he have a clause of relief in the bond, or a bond of relief apart, intimated personally to the creditor. So that the substance of the statute resolves into these two propositions, viz. that a cautioner, bound for and with another, shall be free from his obligation after seven years; 2*dly*, That such shall be understood to be cautioners, who have either a clause of relief, or bond of relief apart intimated; the meaning of which is obvious, that the creditor must be duly certified of the

No 220. character under which the party became bound, at the time of contracting the debt. And this is not left to arguments and conjectures; as two certain and visible signs are fixed upon, one or other of which must necessarily be adhibited, otherways the remedy cannot have effect. It is a correctory law, and therefore not to be extended, by analogy, to similar cases. And as to the argument, That Bannerman received the money, and Middleton bound with him in the payment, and therefore free by lapse of time; it was *answered*, That this was separating one part of the act from the rest; which is plainly one proposition, whereof the *first part* is governed by the *second*, provided, &c. Nay the defender cannot even subsume, in the terms of his own explication; for, according to his doctrine, the party pretending to be a cautioner only must be bound for and with another; and the strength lies in the first of these; as it is only being bound for another, that can make a cautioner; and yet this word, which is assumed in the argument, is not to be found in the bond. Surely being bound with another, is, of itself, no mark of a cautioner. And, if the question were betwixt the parties themselves, who are bound in the bond, the manner in which it is conceived would not, by itself, be sufficient to entitle the one to a total relief against the other; for the fact might have been, that Bannerman got the money to be employed for the use of the other; or, if he had intended to make him a present of it (which may be presumed, as there is no clause of relief) in either of these cases, the bond for the creditor's security, would have been properly conceived in the terms as it now stands; yet no relief would have been competent to the one against the other; see 8th February 1715, Rutherford, No 213. p. 11012.; 14th February 1727, Bell, No 234. p. 11039.

The Lords repelled the defence founded on the septennial prescription.

Fol. Dic. v. 4. *p.* 100. *C. Home, No* 101. *p.* 334.

No 221.
A having granted bond to B for L. 50, C gave a holograph obligation in these words: "Whereas B did, at my desire, lend to A L. 50, conform to his bond, I hereby oblige me and mine, that A shall repay the said sum and annualrents; or else

1742. *December* 4. Katharine, &c. Caves *against* David Spence.

Anno 1710, Robert Bannerman granted bond to James Clark for L. 50; and, in the 1712, Mr Spence granted an holograph obligation to Clark, in the following terms: "Whereas James Clark did, at my desire, lend to Robert Bannerman L. 50 Sterling, conform to his bond given thereupon; therefore I hereby oblige me and mine, that the said Robert Bannerman shall truly repay the said sum and annualrents; or else to content and pay the same myself, upon demand, to the said James Clark, he giving me an assignation to the said bond."

The Caves having a right to this obligation, brought an action for payment against Spence. The defence was the septennial prescription upon the act 1695.