

The Court, however, after a hearing in presence, altered this interlocutor, and found "the cautioner liable for no more than the principal, and seven years interest."

No 241.

Lord Ordinary, *Braxfield*. Act. *Matthew Ross*. Alt. *Cullen*.
S. *Fol. Dic. v. 4. p. 102. Fac. Col. No 105. p. 199.*

1793. *March 1.* DOUGLAS, HERON, and Company, *against* WILLIAM RIDDICK.

IN 1773, William Kirkpatrick as principal, and Robert Riddick and David Currie as his cautioners, granted a bond for L. 3000 to Douglas, Heron, and Company, payable on the 29th of October 1778.—

Robert Riddick died in 1777.

William, his son and representative, then about 16 years of age, chose curators. But the chief management of his affairs devolved on Mr Macdowal, accountant in Dumfries, who acted under a factory granted by him with their consent.

Mr Home, factor for the Company, before the bond became due, warned Mr Macdowal that punctual payment would be expected.

For some time after that period, and both before and after the lapse of seven years from the date of the bond, a correspondence was carried on between them, in which the former stated the necessity of having recourse to legal measures, unless this and the other claims of the Company against Riddick were instantly satisfied, while the latter solicited delay, as the only means of preserving his client from bankruptcy.

In January 1779, the Company obtained a decree in absence on the bond against Riddick. A few months afterwards a partial payment was made, but no further legal steps were taken till the end of the year 1789.

Riddick being then sued for payment, *contended*, That the debt was extinguished by the septennial prescription introduced by 1695, chap. 5. and

Pleaded, imo, The object of the statute was to diminish the bad consequences arising from that two common facility, which leads men to enter into cautionary obligations for which they afterwards neglect to provide, it is therefore entitled to a liberal interpretation.

Although commonly ranked under the title of prescriptions, it does not, like them, proceed upon the presumption of dereliction or of payment; it cannot be interrupted in the same manner, and its benefit cannot be renounced; 19th February 1724, *Norrie contra Porterfield*, No 214. p. 11013.; *Erskine*, b. 3. tit. 7. § 24.; *Bankton*, b. 2. tit. 12. § 30. 48. and b. 1. tit. 23. § 47. It liberates the cautioner *ipso jure* at the end of seven years, in the same manner as if the bond had expressly limited the duration of his obligation to that period. Even the moral obligation to pay is then at an end, and what is paid may be recovered *condictioni indebiti*; 5th August 1778, *Carrick against Carse*, No 11.

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Septennial prescription introduced by act 1695, c. 5. barred by a decree in absence. Cautioner in that case liable only for the principal sum and interest falling due within seven years from the date of the bond. Decree in absence not considered as a *novatio debiti*. A cautioner found to be barred *personali exceptione* from pleading the benefit of the statute, when delay had been solicited by his factor.

No 242. p. 2931. It contains, however, the following reservation, ' That what legal diligence, by inhibition, horning, arrestment, adjudication, or any other way, shall be done within seven years, by creditors against their cautioners, for what fell due in that time, shall stand good, and have its course and effect after the expiring of the seven years, as if this act had not been made.' But if a simple decree of constitution had been sufficient to exclude the benefit of the statute, this enumeration would have been unnecessary.

Besides, upon that supposition, the same effect must be given to a decree of registration, and even to the execution of the summons, (the contrary of which last was found 24th January 1712, Stewart against Hill, No 235. p. 11039.), and the object of the statute, whether in shortening the duration of cautionary obligations, or wakening the attention of the cautioner, would be frustrated.

But the term ' legal diligence,' both in technical and common language, is distinguished from a decree. The latter denotes the sentence of the judge, the former the different modes in which that sentence is carried into execution; Erskine, b. 2. tit 11.; Preface to Kames's Dictionary, p. 11. see also, *voce* LEGAL DILIGENCE. A mere decree of constitution would not be reckoned diligence in a question on the bankrupt act 1621.

Further, it appears to have been the intention of the statute, at least such is the opinion of Mr Erskine, b. 3. tit. 7. § 24. that diligence within seven years should not prevent the extinction of the cautionary obligation, but merely secure to the creditor the special subjects his diligence has attached during that period. No subjects, however, are attached by a decree; Erskine, *Ibid.*

Answered, This statute must be strictly interrupted. It is correctory of the common law; Erskine, b. 3. tit. 7. § 23. and is of very doubtful expediency. Its chief effect has been, that persons who are in fact cautioners, are since its date taken bound as co-principals, instead of appearing in their true character.

The authority of Mr Erskine, however respectable, cannot prevail in opposition to an uniform train of decisions, in which the statute has been considered as introducing a species of prescription, capable of being interrupted in the same manner as every other; 13th June 1738, Rowand against Lang, No 238. p. 11041.; 7th January 1752, Irvine against Copland, No 239. p. 11043.

These decisions are equally adverse to the doctrine that the creditor is obliged to follow out the diligence he has used; Bankton, b. 1. tit. 23. § 47. This supposition is indeed altogether inconsistent with the terms of the statute; for though an arrestment or an adjudication may afterwards be followed out, the same cannot be said of an inhibition, or of a horning, which have no connection with the effects of the debtor.

A variety of cases have been quoted, in which decrees are opposed to diligence; in many others, however, they are considered as synonymous; Stair, b. 3. tit. 1. § 42. tit. 8. § 66. and b. 4. tit. 35. § 17.; Act of Sederunt, 28th February 1662. The purpose of the statute must determine whether the narrow or more extensive meaning of the word is here to be adopted; and as its great object was to prevent a growing burden from arising against the caution-

er, who may perhaps have entirely forgot his obligation, the execution of a summons is surely sufficient to waken his attention.

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The Court were of opinion, that the statute must be strictly interpreted; but at the same time they in general thought, that the decree must be considered as diligence, and pronounced two interlocutors to that effect.

The defender next

Pleaded; The effect of the diligence must at all events be limited to the principal and the interest falling due within seven years; Erskine, b. 3. tit. 7. § 24.; Bankton, b. 2. tit. 12. § 30.; Forbes' Inst. part 2. b. 3. ch. 2. tit. 3. § 6.; 8th July 1725, Maclellan against Allan, Edgar, No 61. p. 4967.; 13th June 1738, Rowand against Lang, No 238. p. 11041.; 1741, Semple against Dewar, see APPENDIX; February 1780, Reid against Maxwell, No 241. p. 11043.

Answered; The statute declares, that the diligence used shall be effectual in the same manner as before the date of its enactment. It must therefore secure both the principal sum and interest till payment. It is true, any diligence done within the seven years, can only attach the interest due at the date of its execution; but it does not follow, that interest shall not afterwards be exigible if payment is delayed; Mackillikin against Monro, No 136. p. 11040.

Besides, the decree must be held as creating a new obligation, altogether independent of the original bond.

Replied; The order of the Judge enjoining performance cannot alter the nature of the obligation to be performed.

The Court thought it established by the case of Reid against Maxwell, No 241. p. 11043., though some Judges doubted the propriety of that decision, that the interest falling due within the seven years could alone be demanded.

A decree in absence, it was observed, cannot be considered as a *novatio debiti*. One Judge thought a decree must have as strong effects as a bond of corroboration, and that therefore interest was due till payment.

The Court found, that the decree of constitution, could only have the effect to make the defender liable for the principal sum and interest falling due within the seven years*.

Lastly, The pursuers

Pleaded; The conduct of Mr Macdowal, which was approved of both by the defender and his curators, bars him from pleading the benefit of the statute, 16th November 1748, Gordon against Tyrie, No 223. p. 11025.; 13th July 1747, Wallace against Campbell, No 224. p. 11026.

Answered; Laying aside the diligence which has been done upon it, the bond is *ipso jure* extinguished, by the lapse of seven years from its date. If Mr Macdowal's conduct has been such as to create a new obligation, there may be room for bringing an action *de dolo* against him; but the *exceptio doli* cannot be pleaded against the defender.

* On the 20th November 1792, No 230. p. 11032., the Court had on this branch of the cause adhered to the interlocutor of the Lord Ordinary, finding the defender liable for interest, till payment.

No 242. THE COURT, by two consecutive interlocutors, found the defender "barred *exceptione doli* from pleading the benefit of the statute."

Lord Ordinary, *Dregborn.* Act. *Solicitor-General, G. Fergusson.*
 Alt. *Dean of Faculty, M. Ross, Corbet.* Clerk, *Menzies.*

D. D. *Fol. Dic. v. 4. p. 103. Fac. Col. No 40. p. 80.*

* * * This case was appealed :

The following was the interlocutor of the House of Lords :

It is declared, that it is unnecessary to decide upon the question debated before the Lord Ordinary, and decided by his interlocutor, 9th July 1791, and which was affirmed by the Lords of Session 22d November 1792, and 1st March 1793. And it is further declared, that it is unnecessary to decide upon the parts of the interlocutor complained of by the cross appeal, in respect of the transaction, which is proved by the correspondence between the respondents, and the factor of the late appellant and his curators, and which is established to have been approved by the late appellant, whereby he is barred from insisting on the benefit of the act 1695; and on this ground it is ordered and adjudged, that the rest of the interlocutors complained of in the original appeal, be affirmed, with the following variations, viz. in the interlocutor of 22d November 1792, after the word 'barred,' leave out '*exceptione doli*,' and in the interlocutor of 1st March 1793, after the word 'barred,' leave out '*exceptione doli*,' and it is further ordained, that the said cross appeal be dismissed this House.

D I V I S I O N . V I I I .

Q u i n q u e n n i a l P r e s c r i p t i o n .

S E C T . I .

P r e s c r i p t i o n o f A r r e s t m e n t s

No 243.

1685. *November 10.* SCHAW *against* M'NEIL.

FOUND, that the act 9th Parl. 1669, touching prescription of arrestments, extends to those arrestments which are laid on in the debtor's own hands, and generally to all arrestments.

Fol. Dic. v. 2. p. 117. Falconer. Fountainhall.

* * * This case is No 63. p. 733., *voce* ARRESTMENT.