ÆNEAS SMYTH, Appellant. No. 34.

CLEMENTINA and MARY OGILVIES, Respondents.

Cautioner—Septennial Prescription—Stat. 1695, *c.* 5.—A creditor, holding a bond from two individuals, both bound as principal co-obligants, although one was known to be merely cautioner, having accepted a composition, and discharged the principal, reserving recourse against the cautioner; and more than seven years having elapsed from its date;—Held, (affirming the judgment of the Court of Session), 1. That the Act 1695 did not apply; and, 2. That, as the reservation was of a qualified and conditional nature, (viz. that the discharge should not be effectual to the principal in case the cautioner should thereby be liberated), the cautioner was liable for the balance.

June 7. 1825.

1ST DIVISION. Lord Gillies.

ON the 20th of June 1796, John Innes of Leuchars, W. S. borrowed L. 1000 from the respondents, Misses Ogilvie, for which he and the appellant, Mr Smyth, granted a bond, by which they bound and obliged themselves, 'conjunctly and severally,' their heirs, executors, and successors whatsoever, to content, satisfy, and pay, &c. the above sum to the respondents, in common form. Smyth was merely cautioner, Innes being the principal debtor; but no clause of relief was inserted, nor any back-bond executed. The affairs of Innes becoming embarrassed in 1805, he called a meeting of his creditors, and offered a composition of 12s. 6d. per pound. The creditors assented, and bound themselves, on receipt of the composition, to discharge Innes; and a relative deed of accession repeated the obligation 'to discharge 'him, his heirs, executors, and successors, or those who may 'have become cautioners for him, of the whole debts, principal 'and interest, and expenses due by him to us, or our constitu-'ents, preceding the date hereof; and we agree to supersede all 'manner of execution against his person or property in the 'mean time.' The minute of agreement, and this relative deed, were signed by the creditors, including the Misses Ogilvie; but they added to their signatures, 'reserving recourse against Mr 'Smyth, cautioner. They received payment of the composition, and, thirteen years afterwards, they demanded from Smyth payment of the balance.

Smyth refused to pay; and a charge having been given to him on the bond, he brought a suspension, in which he pleaded, 1. That, as he was truly a cautioner, and had been recognized as such in the discharge, and more than seven years had elapsed

June 7. 1825. from the date of the bond, he was relieved by the statute 1695, c. 5.: And, 2. That as the principal debtor had been entirely discharged, the relative cautionary obligation had necessarily fallen. The Lord Ordinary sustained the reasons of suspension, and suspended the letters simpliciter. Thereafter, on advising a representation for Misses Ogilvie, in which they alleged that Smyth was fully aware of the reservation, his Lordship ordered them to lodge a special condescendence of the facts they 'aver, and offer to prove, in regard to their 'having entered into the contract with Mr Innes, and agreed 'to discharge him of the debt, upon receiving a composition 'of 12s. 6d. per pound, with the consent and knowledge 'of the suspender Mr Smyth.' A diligence for recovering writings for this purpose was afterwards granted, from which it rather appeared that Smyth had known generally the nature of the proceedings attending the settlement with Innes. The Lord Ordinary having then reported the case on informations, the Court, 'in respect the discharge of the debt in 'question, granted to Mr Innes by the chargers, appears to be 'of a qualified and conditional nature, that the same shall not 'be effectual to Mr Innes in case the cautioner shall be liberated thereby,' repelled the reasons of suspension, found the letters orderly proceeded; and afterwards (on the 22d November 1821) adhered, by refusing a petition without answers.*

Smyth appealed.

Appellant.—1. The claim in question is cut off by Act 1695, c. 5. No doubt originally the statute was held only to embrace cases where there was an express clause of relief, or an intimated bond of relief; but latterly an equitable extension has been given to the Act to situations where the creditor is aware of the true relative character of parties, although they may be both, ex facie of the bond, bound as principals.

2. The ratio decidendi of the judgment appealed from is contrary to the express terms of the contract; for the discharge to Innes is total and unqualified. If it were qualified, as the Court has found, the discharge could have, in regard to Innes, no meaning: for, if the cautioner were subjected, then he would have re-

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* 1. Shaw and Ballantine, No. 190; and F. C.

course against Innes; and if not subjected, then, ex ratione decidendi, the respondent had recourse against Innes. Besides, this very reservation should have an opposite result to the one sanctioned by the Court; for the reserved right could be exercised against Innes only if the appellant was not subjected; and yet the appellant has been found liable, on the ground that the respondent has not liberated Innes. But farther, the ground of the interlocutor only would have warranted a decree against Innes, and not against the appellant.

3. But even if Innes was truly discharged in toto, the reservation in favour of the respondents is ineffectual. They had no right to grant the discharge without the appellant's consent and knowledge. Cautionary obligations are strictly interpreted. When any thing is done by the creditor, having a tendency to weaken the cautioner's right of relief, the cautioners are freed; much more so when he passes from the security he held against the principal obligant's person and estate. It is in vain to speak of a private reservation of recourse. Such transactions would give rise to endless frauds, and expose cautioners to the most ruinous consequences.

Respondents.—1. There being no clause of relief in the bond, and no bond of relief apart having been granted and intimated, the appellant cannot take advantage of the statute 1695, c. 5. which has not received the latitude of construction contended for.

2. There is no rule of law which prescribes to a creditor, having two parties jointly liable for his debt, which of the two so liable he shall sue; or, having sued one, shall prevent his discontinuing such suit, and recurring on the other. Whether cautioner or not, the appellant, who bound himself as principal coobligant, cannot assume the character of cautioner, if that assumption prove prejudicial to the respondents.

3. The appellant has suffered no injury from the qualified discharge granted to Innes; against Innes he still has relief. It was justifiable, and indeed the course dictated by common prudence, for the respondents to reserve recourse against Innes; and the meaning of the reservation was unquestionably what the Court gave to it. The evidence shews that these proceedings were all known to the appellant, who must now fulfil the engagement which induced the respondents to part with their money.

The House of Lords ordered and adjudged, 'that the appeal 'be dismissed, and the interlocutors, so far as complained of, 'affirmed.'

June 7. 1825. *Appellant's Authorities.*—Paisley, Jan. 13. 1776, (8228.); University of Glasgow, Nov. 18. 1790, (2104.); 3. Ersk. 3. 66.; Wallace, Jan. 25. 1717, (3389.); 1. Bell, 275.; 2. Bell, 503.

Respondents' Authorities.—Leitch, July 10. 1680, (2077.); Whitelaw, May 20, 1814, (F. C.)

J. CHALMER—A. DUTHIE,—Solicitors.

No. 35. JEAN BROWN and her Curator ad litem, Appellants.

MARY BOGLE and Husband, Respondents.

Process.—Found, (affirming the judgment of the Court of Session), That the Court of Session have, on good cause shewn, power to recall letters of advocation after they have been signetted.

June 8. 1825.

1ST DIVISION.

JEAN BROWN, the wife of Richard Monkhouse, instituted an action of damages for defamation in the Commissary Court of Glasgow, against Mary Bogle, wife of Michael Gilfillan. The action was allowed to fall asleep without defences having been lodged. Thereafter, a new libel relative to the same defamation, and concluding for damages, was raised in the Court of Session, in which Bogle, founding on the action in the Commissary Court, pleaded lis alibi, and the Lord Ordinary before answer ordered condescendence and answers.

Bogle having wakened the action in the Commissary Court, and lodged defences, the Commissaries found, that she and her husband were entitled to insist that the summons of damages should either be proceeded with or abandoned, and decree of absolvitor obtained; therefore sustained the summons of wakening at their instance, and before answer ordained Brown to reply to special defences pleaded to the summons of damages.

Brown then presented a bill of advocation, but she did not lay the Inferior Court process before the Lord Ordinary, or intimate the step thus taken to Bogle. His Lordship passed the bill without caution ob contingentiam; and the clerk indorsed the fiat ut petitur. Next day, the letters were expede, and passed the signet. On that day, Bogle having learned what had happened, presented a note to the Lord Ordinary, craving time to petition the Court, but did not intimate the note to Brown. The Lord Ordinary thereon prohibited the expeding the letters of advocation for eight sederunt days, that she might present a petition to the Court. By the time, however, that this deliver-