

1752. *January 7.* IRVING and COPLAND, competing.

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THE LORDS found, that where diligence had been done by horning against the cautioner within the seven years, it was sufficient to make the cautioner liable for what fell due within the seven years, although the horning had been allowed to expire, and could not be followed forth.

They did not understand that clause in the statute, which provides, ' That what diligence is done within the seven years by inhibition, horning, &c. shall have its course and effect after the seven years,' as if the Legislature had intended to limit the creditor to follow out that specific diligence: For besides that some of the diligences mentioned in the statute cannot be followed out, such an inhibition, which is incapable of being followed forth by its nature, and where no deed happens to be done by the debtor in contempt of it, becomes absolutely useless, the statute will not admit of such a limited construction. For it is statuted, that the cautioner shall be bound for what fell due within the seven years as before making the act; which in other words imports, that whatever would, before making the act, have interrupted a prescription of the bond, must, since the act, preserve to the creditor what fell due within the seven years. And after the statute has declared, that the cautioner shall be bound for what fell due within the seven years as before the making the act, it is not to be conceived, that the further provision subjoined, which is also in favour of the creditor, that what diligence shall be done within the seven years, shall have its course and effect, for what fell due in that time, could be intended to detract from what had been allowed to the creditor by the immediately preceding general clause.

Accordingly the LORDS found as above, agreeable to several former decisions.

Kilkerran, (PRESCRIPTION,) No 19. p. 423.

1779. *March 10.* CLARK *against* STUART.

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FOUND, that executing a summons within the seven years was sufficient to interrupt this prescription.

Fol. Dic. v. 4. p. 102.

1780. *February 1780.* WILLIAM REID, and others, *against* STEPHEN MAXWELL.

MAXWELL, as cautioner of Sheills, granted to Reid and others a bond for borrowed money.

Within seven years of its date the bond was registered, and a charge for payment given upon it to the cautioner. But many years had afterwards

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Where diligence is done within the seven years, a cautioner is not

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liable for annualrents that are posterior to the seven years.

elapsed, when, Shiells having become bankrupt, an action was brought against the cautioner.

In this action, the question occurred, to what extent, in terms of the act 1695, c. 5. the cautioner was liable for the debt; whether he was liable for the principal sum and annualrents only which fell due during the seven years, or farther, for the annualrents of all the subsequent period.

Pleaded for the cautioner: The purpose of the statute is declared in its preamble to be that of preventing debtors from leaving 'a growing burden on their cautioners;' and the method by which it has effected this design, is by limiting the time within which any obligation on cautioners can exist. After the lapse of seven years, it is enacted, that cautioners become '*eo ipso* free from their obligation;' nor can any act of the creditor continue it beyond that period, the course of which is not, like that of prescription, subject to interruption, the statutory limitation being in its nature absolute, and not founded on any presumption which is capable of being disproved. If then, beyond the limited period, the obligation itself cannot subsist, it is impossible that any claim of interest can afterwards arise upon it; although, with respect to what shall fall due during the seven years, that may no doubt be secured by diligence, which, though done within the period, will have effect after its lapse; for this is agreeable to the object of the statute, which contains a provision to that purpose; Forbes's Institute, part 2. b. 3. c. 2. tit. 3. § 6.; Lord Bankton, b. 2. tit. 12. § 30; Erskine, b. 3. tit. § 7. 24.; Dalrymple, February 24. 1714, Mackilliken *contra* Monro, No 136. p. 11040.; Irvine *contra* Copland, No 239. p. 11043.

Answered for the Creditors: It must be admitted, that during seven years cautionary obligations subsist in full force. It has even been allowed, that diligence done within that period will preserve them beyond it, as far as they then extended. In this case a charge on the bond was timeously given, when the cautioner, in terms of his obligation, ought surely to have discharged the debt, in which case, all the interest that has since arisen on the principal would have been in the creditors pockets. Having, however, failed to do what was thus incumbent on him, is he to profit from the omission, by being allowed to retain those annualrents which he could never have touched but by wrongfully with-holding payment so long from his creditors? The statute does not countenance such an abuse. Its object was to obviate the danger resulting to cautioners from the creditors delaying to demand payment for a length of time, in which it might have become impossible for the former to operate their relief against the principal obligant. But diligence being timeously done, and cautioners sufficiently protected against that danger, the obligation of course must subsist

The Lord Ordinary found, "That the diligence which was done by the charge within the seven years, is sufficient to prove against the cautioner, the principal and whole annualrents bygone, and in time coming till payment."

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."

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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.