

No 236.

Annualrent found due by a cautioner from the date of the creditors denunciation ay and while payment be made, the charge being within seven years of the bond.

1714. February 24. M'KILIKIN against MONRO.

M'KILIKIN having charged Monro on his bond, he suspended on the 5th act, Parl. 1695, being only bound as cautioner in the bond charged on, and seven years elapsed; and it being *answered*, That he was charged within the seven years, which interrupted that prescription, and subjected him to the principal and annualrents even after the seven years; the LORDS having found, that the charge within the seven years, did only subject the cautioner for the annualrents within the seven years, but not for annualrents afterwards; it was further *alleged*, That the suspender was still liable for annualrents of the principal sum, ay and while payment, and likewise of the annualrent of the by-gone annualrents due at the time that the suspender was denounced, conform to the 20th act, Parl. 23d, 1621, ordaining annualrents to be due after horning and denunciation.

It was *answered*; The act of Parl. 1695, provides that no cautioner shall be bound longer than seven years after the date of the bond, and from that time the cautioner shall be *eo ipso* free, and the only exception is, that he shall still be bound for the seven years, and that diligence for what fell due in that time, shall stand good, and have its effect.

It was *replied*; Albeit the cautionary obligation becomes void after the seven years with the said exception, yet the diligence for what fell due in that time, stands goods, and hath its course and effect for what fell due within the said years, as if the act had not been made; and the effect of the denunciation is, that the sums in the horning and denunciation shall bear annualrent, notwithstanding that there be no paction or condition for that effect.

' THE LORDS found annualrent due after denunciation till payment.'

*Fol. Dic. v. 2. p. 117. Dalrymple, No 103. p. 144.*

\* \* \* Forbes reports this case:

1714. February 5.—MR JOHN M'KILIKIN having pursued the Representatives of Captain Andrew Monro, for payment of a debt contained in a bond granted to the pursuer, by William Monro of Culcragie as principal, and the said Captain as cautioner; the defenders *alleged*, That the bond *quoad* the cautioner is prescribed by the act of Parliament 1695.

*Answered* for the pursuer, That he had done diligence by horning, upon the bond, within the seven years, which took off the prescription.

*Replied* for the defender, The pursuer's diligence doth save only from prescription, the principal sum and annualrents that fell due within the seven years, conform to the express words of the statute, consequently cannot entitle him to action for any annualrents falling due thereafter.

*Duplicated* for the pursuer, The words of the act, declaring the diligence good for what fell due within the seven years, must comprehend annualrents in all time thereafter, as accessory to the principal sum that fell due within that time, seeing *dies cessat* as to these *licet nondum venerat*. 2do, The defender's argument *a contrario sensu* (which is the weakest of all arguments) is never admitted in application of a new correctory law. No 236.

THE LORDS found, that the diligence executed against the cautioner within seven years, stands good only for what fell due in that time. 24th February, thereafter, the pursuer *alleged*, That the act of Parliament 1695 in favours of cautioners, did exempt the defender from annualrent, in virtue of the bond falling due, after elapsing of the seven years; yet he being denounced to the horn before, must be liable from the denunciation in all time coming, not only for annualrent of the principal sum, but also for annualrent of those annualrents that fell due within the seven years, by the act 20th, Parl. 23d Ja. VI.; and a decision 11th February 1673, Smith *contra* Waugh; No 24. p. 491. Which allegiance the LORDS found relevant.

*Forbes, MS. p. 22.*

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1728. January 9. HUNTER against ADAIR.

No 237.

FOUND, That arrestment used against the cautioner, is sufficient to preserve to the creditor all manner of diligence competent against the cautioner for what fell due within the seven years, though it was *pleaded*, upon the express words of the act, That any diligence raised within the seven years must be followed forth after the seven years, but no diligence could be insisted in; it being *answered*, That the statute intended an *ipso jure* liberation to the cautioner for what should fall due after the seven years; but as to what falls due within that space, a proper prescription is introduced to be interrupted by any thing that interrupts another prescription. See APPENDIX.

\* \* \* THE same had been found thrice before, *anno* 1717, Hunter *contra* Muir; December 1720, M'Cornock *contra* Coltran; and, February 1726, Fairholm *contra* Cuninghame. See APPENDIX.

*Fol. Dic. v. 2. p. 117.*

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1738. June 13. ANDREW ROWAND against WILLIAM LANG.

No 238.

THOMAS MITCHELL as principal, and the said Lang as cautioner, granted a bond to John Rowand for 100 merks, of date the 29th of January 1714, in the town-court books of Glasgow, and, that same day, both principal and cautioner

A charge given to a cautioner by a town-officer.