

No 76.
 Cautioners
 in suspension
 fall not under
 the intendment
 of the act of
 Parliament
 1695, limiting
 cautionary
 obligations.

1715. February 4. JAMES HOPE in Peebles, against FOWLIS of Ratho.

FOWLIS of Ratho having become cautioner in a suspension, at the instance of Dalmahoy and Maleney, against the said James Hope, and the suspension not being discussed in seven years; afterwards a decret being obtained against the principals, and a charge given to the cautioners; in a suspension of that charge, the question being, *Whether cautioners in suspensions, fall under the act 1695?*

It was *alleged* for the charger, That Ratho's bond did not fall under this act, because the law relates only to *such as were bound and engaged for, and with another, conjunctly and severally, in any bond or contract for sums of money,* but cautioners in suspensions are not in that manner bound; besides, that such cautionry would otherways be elusory, and most of such cautioners would escape, which the creditor could not prevent, seeing discussing of suspensions requires a course of time, frequently exceeding seven years, nor can the creditor use any kind of diligence against such a cautioner, till he first obtain decret against the principal debtor: *zdo, Esto* they fell under the act, yet the *septennium* could only be reckoned from the date of the decret, seeing before that time no diligence could be used against the cautioner.

Answered for the suspender, That he was founded on the very letter of the law, narrating, *That men are easily induced to become cautioners for others,* which allegiance holds with greater reason in cautioners in suspensions than others, because they are the more easily engaged, where they have some hope of liberation by the event of a process. And the law, in the statutory part, does not distinguish, whether they be bound for another *judicially* or *extrajudicially*.

Replied for the charger, That in all laws, especially such as are correctory, the narrative, which is the legislators' motive, is much larger than the statutory part. And it is ridiculous to pretend prescription here, from the date of the principal bond, or the bond of cautionry, when the cautioner is neither bound conjunctly nor severally for the principal sum; not hath a clause of relief in the principal bond, nor a separate bond of relief apart intimated to the creditor, (all which are required in the act) since this was indeed no less than to explain the act, contrary to the express tenor thereof.

THE LORDS found, That the cautioners in suspensions fall not under the act of Parliament 1695.

Act. Sir James Nasmyth.

Alt. Sir Walter Pringle.

Clerk, M^r Kenzie.

Bruce, No 58. p. 70.

See This case by Dalrymple, *voce* PRESCRIPTION, *Septennial*.