

1771. February 6. LAUCLAN DUFF *against* WILLIAM INNES of Sanside.

PRESCRIPTION.

Quinquennial prescription of the Act 1669, c. 9, pleadable by the cautioner of the tenant.

[*Faculty Collection, V. 259; Dictionary, 11,059.*]

PITFOUR. The case of the defender does not come either within the words or the spirit of the Act 1695.

MONBODDO. In the case of *Hunter, 9th July 1765*, it was found that an obligation as cautioner for payment of a bond, formerly granted, did not come within the statute.

GARDENSTON. Cautionry is an accessory obligation. How can the debt subsist against the cautioner if prescribed against the principal?

KENNET. The defence is not good, because the debt is constituted by writ.

KAIMES. I am not satisfied as to that. Will the separate deed of Innes keep the question open as to the tenants?

HAILES. The defence in this cause has begun at the wrong end. The first thing to be done was to inquire into Lord Caithness's management with his factors and tenants. For ought that we know, Sandside's cautionary obligation may have been at an end, by an actual clearance with the principals. This inquiry was the more necessary, because demands were made against Sandside by the executor of Lord Caithness, which have, in the course of this process, been proved extinguished by writing.

AUCHINLECK. The quinquennial prescription cannot take place here; for Innes became bound to see the debt paid. Lord Caithness had no farther claim against the tenants.

PRESIDENT. The letter mentioning the sum is expressly conceived as *cautioner*. He did not take upon himself the obligation of the tenants. He is only *subsidiarie* liable in either debt.

On the 6th February 1771, "The Lords repelled the defence on the septennial prescription; but sustained as to quinquennial prescription. 7th March 1771, adhered."

*Act.* C. Gordon. *Alt.* D. Armstrong.

*Rep.* Stonefield.

*Diss.* As to septennial prescription, Auchinleck, Barjarg.