1779. *February* 16, and 1780, *February* 17. WILLIAM REID *against* STEPHEN MAXWELL.

PRESCRIPTION.

Where diligence is done within the seven years, a cautioner is not liable for annualrents that are posterior to the seven years.

[*Faculty Collection, VIII.* 199; *Dictionary,* 11,043.]

BRAXFIELD. The privilege introduced in favour of cautioners, by the Act 1695, is in some respects different from prescription; but if, within the seven years, I make *any* demand against the cautioner, he cannot plead on the Act.

KAIMES. The Act 1695 relates only to borrowed money, and has no place here.

[The generality of this opinion was not relished by the Court.]

JUSTICE-CLERK. I never understood the sense of the Act to be other than to secure cautioners against any loss from obligations which had lain over without any diligence used for more than seven years. *Here* the cautioner was put on his guard by a demand made, which is the very thing that the law meant should be done. Were the matter doubtful, which it is not, I do not see how the Court can get over the *series rerum similiter judicatarum,* which even the ingenuity of the lawyer for the cautioner's heir cannot dispute.

HAILES. There was not only a demand made, but it was made on the very day preceding the term of seven years; which was a most intelligible warning to the cautioner that the creditor meant to obviate that very plea now urged.

GARDENSTON. In this case, Mr Erskine has given an erroneous opinion, drawn from the words of the Act, without attending to its spirit and the judgments which have been pronounced on this point.

COVINGTON. I do not think that bonds for borrowed money are the only subjects of the Act. Here there is a caution *ad factum præstandum;* and how can it be limited?

On the 16th February 1779, "The Lords found the charge given within seven years is effectual to make the cautioner liable for what was due at the time of the charge;" altering Lord Auchinleck's interlocutor.

Act. M. Ross. *Alt.* R. Cullen.

1780. *February* 17.—GARDENSTON. I am for altering the interlocutor of the Ordinary, not only on the construction of the statute, but also in respect of the course of decisions. The statute lays down a general proposition, that no cautioner shall be bound beyond the seven years: but then the question naturally occurred, What if diligence should be done within the seven years? The answer is, it shall have the effect to secure what fell due within the seven years. The law adds, without prejudice to the principal being bound for the whole contents. It is of little moment how this question is decided, but of great mo-

ment that one rule be observed: a single decision given against a train of decisions will not fix the point; but a decision in conformity with those already given will.

COVINGTON. There is great room for argument from the incorrect expressions of the statute. But then the train of decisions is uniform, supported by the opinion of all lawyers, and sanctified by the acquiescence of the nation; for there was never any one of those decisions carried to the House of Peers by appeal. No doubt the judgment of the Court has varied in some points, in consequence of changes in manners and national sentiments, but the received meaning of an Act of Parliament cannot be altered. After a train of decisions, if 100 years are not sufficient to establish one interpretation, 100 years more will not be sufficient to establish a contrary interpretation. Besides, I think that the statute has been rightly interpreted.

JUSTICE-CLERK. I thought it anomalous that a demand of payment should have the effect to make a sum become a mere *sors*, not bearing interest; but I did not take the series of decisions into my consideration. I now think it would be dangerous to the public were a different interpretation to be introduced. This new interpretation will not prevent that *growing burden* which the law meant to prevent; for, according to it, a precept on a Sheriff's decreet, not attended to by the cautioner, and not followed furth by the creditor, would make interest run on for 40 years. Besides, the first interlocutor of the Court proceeded on the supposition, that the received interpretation of the statute was the just one.

BRAXFIELD. Had I been aware of the decisions, I would have reported the cause, and not have given my own judgment. When I have formed an opinion on the sense of a statute, or on principles of law, I never give myself the trouble of consulting decisions and law-books; and when I have formed an opinion, I give it, although I should be singular. The principal sum and interest, to the date of the charge, is a debt on the cautioner by a *res judicata*; and the question is, Whether he can continue to hold the money without interest? Before the statute, a cautioner was bound for 40 years; and, in consequence of diligence being done against the principal, he might have been bound for a much longer space. It was the object of the statute to prevent this inconvenience. Cautioners bind with facility, and when the principal debtor pays the annualrents, and the cautioners are not disturbed, with the same facility they continue bound. But when a cautioner is once charged, he cannot say that he has been lulled asleep. It could not have been the view of the legislature to give relief to a cautioner in such circumstances. It was his duty to have gone on in diligence against the principal debtor. If this statute had not been made, a charge against the cautioner would have perpetuated the obligation as well for principal as for interest. The decisions on this point have been pronounced without proper attention; and I see no reason why the sound construction of the statute should not be followed.

PRESIDENT. This statute was wisely conceived, to prevent the ruin of families. Even under this statute a cautioner is severely bound, for, after denunciation, interest runs against him. The modern form, which varies the style of the bonds of cautionry, shows that the old form was not sufficient to secure creditors. If a charge could have had so great an effect as now pleaded for, there

would have been no occasion for varying the form. I think that the words of the statute are in themselves sufficiently clear. The law does not lull the creditor asleep, but rouses him, by telling him that the cautioner is not to continue bound. If the creditor denounces, he is safe. I trusted too much at first to the opinion of the Ordinary, but I was awakened by the decisions quoted by Lord Monboddo. [Some people thought that this commendation was too strong, for Lord Monboddo only added one decision to the heap, that of *Semple*, 1741.] If a statute has been once explained in a certain way for many years, it would be dangerous to explain it in another: better follow a bad rule established, than alter to one in itself more eligible.

MONBODDO. The cautionary obligation is merely a *literarum obligatio, si quis se debere scripserit quod sibi non est numeratum.* An obligation of that kind, having no natural equity in it, was properly limited by our legislature. The case is well stated by Forbes, in a case 1712. If the obligation is, in its own nature, perpetual, then it may be interrupted; but, if it is limited to seven years, then there can be no interruption. That this is not a prescriptive obligation, I think, appears from the words of the statute and the decisions of the Court. There is no mention of prescription in the statute: it says that the seven years shall run from the *date* of the bond, which is contrary to the nature of prescription. Payments make no interruption, neither is the *quadriennium utile* excepted. Although the construction put on the statute should be erroneous, yet, after *nine* cases where judgment was given for this interpretation, and *two* where it was taken for granted, and after the opinion of all our writers on law, and the acquiescence of the nation, I should incline to go on in the error.

KAIMES. This Act is dark and unintelligible, like an ancient oracle. I do not like a law that usurps upon conscience, and declares that a man shall not be bound as long as he binds himself. I would not impinge on practice where any danger could be incurred by the lieges: I will have no respect to any man's opinion when we have nothing but conjecture to determine us. The Act of Parliament serves no purpose; for, in order to elude it, the form of cautionary obligations has been altered, and I wonder that the legislature did not foresee this. What notion can I have of *prescription* but that an obligation, perpetual *sua natura*, is limited by a certain space in which it is to operate. I cannot distinguish the *limitation* of cautionary obligations from prescription, and I think that the rules applicable to the one are applicable to the other. The same is the case in a question of seven years, as in the prescription of 40 years, which limits a bond in its own nature perpetual.

On the 17th February 1780, "The Lords found that diligence used was only sufficient for subjecting the cautioner in payment of principal, and interest falling due within the term of seven years;" altering Lord Braxfield's interlocutor.

Act. M. Ross. *Alt.* R. Cullen.

Diss. Kaimes, Braxfield.