

mutual relief, which is implied, though not expressed; but only to bonds where one of more *correi* is obliged to relieve the rest of the whole debt.

No 211.

Fol. Dic. v. 2. p. 116. Forbes, p. 225.

. Fountainhall reports this case :

1708. *January 22.*—ROBERT MUIR, provost of Ayr, and three others, having granted bond for 2000 merks to John Ballantyne, factor for Alderman Smith, and being charged thereon, he suspends on this ground, that the bond bore a clause of mutual relief, and so fell under the 5th act 1695, declaring all cautioners free after seven years, if not insisted against; and *ita est*, this bond is dated in 1699, and so prescribed *quoad* three parts, and he is willing to pay his fourth share, some of the other obligants being dead and broke. *Answered*, This case fell noways under the act of Parliament; for that was where one was principal and the rest cautioners, or where one was obliged to relieve his co-obligant of a greater share than what he would be tied to by law; but here all the four were bound as co-principals, and only a clause to relieve one another *pro rata*, which is implied though it had not been expressed; and so being no more but what they were bound to perform without it, it noways falls under the case of that act. THE LORDS found, the act being correctory, non est recedendum a jure quod prius obtinuit, except where the case was in the precise letter or meaning of the law; and that this clause inerat de jure, et ex natura rei, though it had been omitted; and therefore repelled the reason of suspension, and found this bond fell not under that act; but in respect of the clause, arising from a new law, they assoilzied from the penalty, he always paying the principal and annualrent within the days of the charge.

Fountainhall, v. 2. p. 422.

1710. *February 16.*

GILBERT MORE, Writer in Edinburgh, *against* SIR SAMUEL FORBES of Foveran.

SIR SAMUEL FORBES, to stop diligence at the instance of Gilbert More against Robert Keith of Fedderate, *alias* Lentush, and Mr Alexander Johnston merchant in Edinburgh, for 600 merks contained in their bond, having by his letter August 5th 1697 to Mr More, obliged himself to procure security to him, or to pay the debt betwixt and Martinmas then next; it was *alleged* for Sir Samuel, when pursued for payment, That he being only a cautioner by his letter, was free, in respect no diligence was done thereon within seven years of the date, in the terms of the act of Parliament 1695. And he must be understood a cautioner, in so far as the letter was accessory and relative to, and corroborative of an antecedent principal obligation, and implied that he was to be relieved by the granters thereof.

No 212.

A person who obliges himself by letter to procure security to the creditor, in bond granted by others, or to pay the debt himself, is not a cautioner in terms of the act 1695, and not entitled

No 212.
to the benefit
of the septen-
nial prescrip-
tion.

Answered for the pursuer ; The letter can never import a cautionary, Sir Samuel being therein obliged as *correus debendi*, without any express quality of relief ; and the granter of a simple bond of corroboration is not a cautioner in the terms of the cited act of Parliament, but truly a co-principal.

THE LORDS found, that Sir Samuel Forbes was not a cautioner in the terms of the act of Parliament 1695 ; and therefore could not plead prescription.

Fol. Dic. v. 2. p. 116. Forbes, p. 402.

1715. February 8. Mr WILLIAM SCOT *against* THOMAS RUTHERFORD.

No 213.
One granting
a bond of cor-
roboration,
though he
has relief, is
not under-
stood to be a
cautioner, so
as to have the
benefit of the
act 5th, Parl.
1695.

THOMAS RUTHERFORD having charged Mr William Scot upon a bond of corroboration granted by the said Mr William Scot, he suspends on this reason, that he was not bound in the original bond, but only became bound in the corroboration ; and consequently was a cautioner for the obligants in the bond corroborate, and was now free by the course of more than seven years before the charge, conform to the 5th act Parl. 1695.

It was *answered* ; That the said act did not extend to every cautionary obligation, but only such as are bound for and with another conjunctly and severally in any bond or contract for sums of money, and then proceeds to explain who shall be reckoned cautioners, viz. such as are expressly bound as cautioners, or as principals, or co-principals, providing they have a clause of relief in the bond, or a bond of relief apart intimate particularly to the creditor at the receiving of the bond. The suspender is indeed *adpromissor* by the bond of corroboration, and relief is implied in law ; but he is not bound expressly as a cautioner, nor has a clause of relief in the bond, nor a bond of relief apart ; and the Lords have in all cases interpreted this correctory law strictly.

“ THE LORDS found the act did not comprehend an obligant in a bond of corroboration.”

Fol. Dic. v. 2. p. 116. Dalrymple, No 136. p. 189.

* * * Bruce reports this case :

1715. February 9.—A BOND of corroboration being granted by Mr William Scot to Knowsouth's author, and he the assignee now after seven years insisting for payment ; the point to be discussed was, Whether the act of Parliament 1695, anent the prescription of cautionaries, can be extended to the granter of the bond of corroboration ?

Alleged for the defender ; That he was to be accounted a cautioner, his obligation being but accessory, and relief being competent to him by law against the principal debtor.

Answered for the pursuer ; That the said law being correctory, is not to be stretched by consequences. For the act does only liberate such as, *imo*, did.