

COALSTON. For the vassals. No act or deed of an heritor can astrict a tenement to which he has no right.

GARDENSTOUN. Immemorial possession regulates thirlage. No argument shall convince me of the contrary, nor shall any argument convince me against an express stipulation.

PRESIDENT. My doubt is on account of teind and stock being *separata tenementa*; and, so standing the case, I cannot presume any thing from possession.

Diss. Auchinleck, Coalston, Kennet, Ellick, President.

1766. *July 30.* CAPTAIN CHARLES BARCLAY MAITLAND of Tillicutry and OTHERS, Heritors of that Parish, *against* ROBERT MAY, Feuor in Drimmie, and OTHERS, also Heritors of that Parish.

KIRK-YARD.

The Court of Session, as Commissioners of Teinds, have no power to fix a New Church-Yard for a Parish.

THE pursuers insisted, in an action before the Lords-Commissioners for valuation of teinds, for transportation of the Church of Tillicutry, and concluding "that the new church-yard should be the burial place for the said parish in time coming, and that the inhabitants should be decerned and ordained to bury in the said new church-yard in all time coming."

On the 30th July 1766, "the Lords decerned in the transportation of the church, but assoilyied from the conclusion as to the church-yard."

The President thought that the Court had no power therein.

1766. *August 1.* MAGISTRATES of EDINBURGH *against* ROBERT GARDINER, Esq. late Commissary of the Army in Scotland.

CAUTIONER.

One, who had for some time been Treasurer of an Hospital, being called upon by the Managers to find caution, and a cautioner having become bound for him "that he shall make just compt of the revenue of the said Hospital so far as the same shall be introrited with by him,"—*found* that the cautioner was liable for a deficiency previously existing.

THE Magistrates and Town-Council of Edinburgh are governors of the Trinity Hospital. In 1762 they appointed George Pitcairne treasurer of the hospital, but neither exacted caution from him nor any regular obligation to account. The treasurer of Heriot's Hospital proved bankrupt, and, as he had

not found caution, the hospital thereby suffered a considerable loss. This made the magistrates come to a resolution of dismissing the treasurers of all the hospitals, whereof they had the administration, unless such treasurers found caution. This resolution having been intimated to George Pitcairne, he, on the 29th February 1764, proposed to find caution for his intromissions as treasurer of the Trinity Hospital, to the extent of £400, and he proposed Mr Gardiner for his cautioner. The proposal was accepted. Accordingly, on the 3d April 1764, a bond was made out, and signed by Pitcairne and Gardiner. It begins in the name of George Pitcairne : It recites his having been appointed treasurer to the hospital, and his having proposed to give bond by himself and Mr Gardiner : that the Magistrates and Council had approved of the proposal, and that they had enacted, that, in all time hereafter, " the treasurer of the hospital, for the time being, shall, within three months after his being elected, find caution to the satisfaction of the Magistrates : therefore, I, as principal, and with and for me as cautioner, the said Robert Gardiner, do hereby bind ourselves conjunctly and severally, &c. that the said George Pitcairne shall make just compt of the revenue of the said hospital, so far as the same shall be intromitted with by me, and to pay over the same, &c. ; and that I shall lodge all the vouchers of my several receipts and payments, within three months after the term of Martinmas, annually, during my continuance in office. And we, jointly and severally, oblige us to make good all deficiencies, to the extent of L.400 sterling, attour performance." It does not appear that, at the time of Pitcairne making the proposal of signing the bond, any thing was expressly provided as to finding caution for payment of the arrears. A few weeks after the granting of this bond, Pitcairne became bankrupt. Upon examination of his accounts it did appear that he stood indebted to the hospital in L.447 sterling, mostly incurred before caution had been found. The magistrates of Edinburgh threatened an action against Gardiner, for payment of the L.400 sterling, contained in his cautionary obligation. Upon this, Gardiner brought suspension of a supposed charge : his reasons of suspension were discussed summarily upon the bill.

ARGUMENT FOR THE SUSPENDER :—

The question is, Whether, in terms of the bond, the suspender is liable for all the arrears incurred by Pitcairn from the commencement of his office, or only for his arrears incurred from the date of his cautionary obligation. Whenever one obliges himself that another shall faithfully administrate an office, the obligation must be presumed to respect the administrating in time to come, unless the contrary is expressed ; for this, on the part of the cautioner, is an obligation *ad factum præstandum*, not for payment of a debt. Thus, if a person continue long in one office, he may have different cautioners bound for him as to different periods ; but the cautioner who acceded last will not be bound for the administration during prior periods, when there were other cautioners. A cautionary obligation is in its nature *stricti juris*, and not to be extended by implication. As it is to be presumed that an obligation to become cautioner for one already in office, must respect future intromissions, it is incumbent on the magistrates to point out the clause whereby such obligation is entered into. If such clause cannot be pointed out, then the legal construction of cautionary obliga-

tions, and the natural presumption arising from the fact, must take place. Had the magistrates meant to include an obligation for arrears, they would have inserted it in the bond. This they did not do; but, on the contrary, the words used are, "As the same shall be intromitted with by me;" plainly referring to the time to come. The words, "to make good all deficiencies," must be explained in consistency with the former clause, which relates to what *shall* be intromitted with; for the obligation to make up deficiencies can never extend beyond the obligation to hold count and reckoning; and, if the latter respects the future, so must the former. Besides, were all deficiencies explained in a wide sense, then it would extend to a larger sum than L.400 sterling; for Pitcairne might have intromitted with more than L.400: but this is contrary to the express obligation in the bond, and consequently cannot be the true meaning of the phrase. Besides, according to this construction, had Pitcairne been removed by the magistrates on the day after the suspender became cautioner for him, the suspender would have been liable to the extent of L.400, and, at the same time, conferred no favour on his friend Pitcairne. This shows that the intention of the cautionry was to continue Pitcairne in his office, and that the faithful administration of that office in time to come was the thing in view of the parties.

ARGUMENT FOR THE CHARGERS:—

The object in view was that of securing the hospital. It would have been absurd to have limited this security to intromissions which might be after the date of the bond, for this might have involved the chargers in a question with the cautioner as to the dates of the intromissions. The Act of Council, which provides that the treasurer shall find caution within three weeks of his election, points out that intromissions prior to the bond of cautionry were comprehended; for it could never have been the intention of parties that no security should be given for the treasurer's intromissions during the first three weeks of his office. The proposal of Gardiner, as cautioner, was made and accepted on the 29th February 1764: the bond was not signed till the 9th March 1764. The suspender might with equal justice maintain that he was not liable for intromissions during the interval: but this he cannot do; and therefore his argument is defective. The narrative of the bond, which mentions the time of Pitcairne's election to the office, shows that bygones were in the view of the parties. Had Gardiner refused to become cautioner to the extent that the chargers say he did, it is obvious that Pitcairne would have been displaced from his office.—As this was the thing which Gardiner meant to prevent, the words of the obligation must be interpreted against him. But indeed the words are not ambiguous. The commentary on the word *shall* is not sufficient to remove the force of the obligation as to all deficiencies. This bond is not merely *ad factum præstandum*; the principal part of the bond is to pay what shall be due; the obligation to account, or *ad factum præstandum*, is only an accessory for ascertaining what shall be due. Were different cautioners to become bound at different times, as in the case suggested by the suspender, there would be no impropriety in holding them all bound *in solidum*. Of this they could not complain; for they might have taken care to ascertain the precise periods during which they were to be bound.

On the 16th July 1766, the Lords found the letters orderly proceeded, ad-

hering to Lord Strichen's interlocutors of December 18, 1765, and February 15, 1766.

On the 1st August 1766, the Lords refused a reclaiming petition, and adhered. *Act. J. Montgomery. Alt. R. Blair, A. Lockhart.*

OPINIONS.

PITFOUR. The cautionary obligation extends to all intromissions, without distinguishing prior from posterior.

COALSTON. Cautionary obligations are not to be extended.

AUCHINLECK. The narrative of the bond mentions the date of Pitcairne's commission. This unnecessary, if the bond related solely to what he was afterwards to receive.

KAIMES. The general rule, that cautionary obligations are not to be extended, may be departed from according to circumstances; but, here, there are no such circumstances. Here, caution was taken for the first time: What title had the magistrates to exact caution for bygones? *Actus non operantur ultra intentionem*: And there are no circumstances here to extend that intention to bygones, unless it be said that the *res gesta* was, that Pitcairne was to be turned out unless he found caution for bygones, and that upon this account Gardiner became cautioner.

GARDENSTON. It is most rational to suppose that caution was only meant to be exacted for the future: if otherwise, Why was there no mention of arrears? A cautionary obligation is a *literarum obligatio*, not to be extended beyond its tenor. This he illustrated from various Acts of Sederunt respecting cautioners in suspensions. *Trades of the Canongate against Angus. Sir John Douglas.*

BARJARG. The balance could only appear by posterior accounting, so that it is necessary to extend the caution to arrears. Pitcairne, by keeping a balance in his hand, intromitted anew.

JUSTICE-CLERK. Why should Gardiner become caution in L.400 for time to come, and not for time past?

ALEMORE. The words of the obligation comprehend both principal and cautioner alike.

Diss. Coalston, Kaimes, Elliock, Gardenston, Hailes.

1766. *August 2.* DOROTHEA, COUNTESS FIFE, and her Husband EARL FIFE, for his interest, *against* SIR JOHN SINCLAIR of Stevenson, Baronet.

SUCCESSION.

Nearest Heir-Male of Line Whatsoever.

[*Faculty Collection, IV. 260; Dictionary, 14,944.*]

A competition arose between those parties concerning the succession to the