SECT. III.

Effect of Intimation to the Creditor.—Interruption of the Prescription.

1714. *February* 24.

JOHN M'RANKIN, Merchant in Straiton, *against* JOHN SCHAW of Daltoun.

No 232.
A creditor in a writ granted by two co-obligants, being both writer and witness in the bond of relief granted by one of them to the other, this was found a sufficient intimation to entitle the cau- to the benefit of the act 1695.

JOHN M'RANKIN having charged John Schaw for payment of 2000 merks, which he and Alexander Schaw stood obliged, as co-principals in the charger's contract of marriage with Helen Schaw, to pay to the charger, in name of tocher with the said Helen, John Schaw suspended, upon this reason, that though he was bound in the contract as a co-principal, yet the charger had with his own hand written a bond of relief by Alexander Schaw in favours of the suspender, of the same date with the contract, and subscribed the same as a witness, which stated the suspender in the case of a cautioner having his relief intimated personally to the creditor, who, by the act 5. Sess. 5. Pal. King William, is free of his caution after seven years from the date of the obligation. And *ita est* that the seven years are elapsed without any diligence done against the suspender.

Replied for the charger; Seeing the act of Parliament, which is a correctory law, requires intimation to the creditor, it must be strictly interpreted, by intimation in a proper sense, by a notary and witnesses, which cannot be supplied by equivalents, as the creditor's private knowledge inferred from his writing and subscribing witness to the bond of relief; especially considering that writing and subscribing the bond of relief did not make it a complete deed without delivery; and a debtor's private knowledge of an assignation doth not supply the solemnity of intimation; 15th June 1624, Adamson *contra* Mitchell, No 61. p. 859.

Duplied for the defender; The statute prescribes no certain form of intimating the relief to the creditor, but requires only personal intimation in general, in order to certiorate him; which is better done by his writing and bearing witness to the paper, than by any notary's attestation. Nor is it of any moment to allege that the bond of relief might, though written and subscribed, have never been delivered, unless the suspender offer to prove that it was not delivered at the subscribing; since it is presumed to have been then delivered, being now in his hands. There is no parity betwixt the intimation of assignations and intimation in the present case; because assignations are intimated not simply to notify, but to determine competitions betwixt assignees, or betwixt them and arresters.

THE LORDS found, That the charger's not only writing, but also subscribing witness to the bond of relief, are equivalent to a sufficient intimation to him, at receiving of his bond, as required by the act of Parliament. No 232.

1714. *June* 23.—JOHN SCHAW of Daltoun, and Alexander Schaw his uncle, being bound conjunctly and severally in a contract of marriage past betwixt John M'Rankin and Helen Schaw, John's sister, whereby they obliged themselves to pay 2000 merks in name of tocher with the said Helen, and John Schaw being charged with horning on this contract, he suspended, upon this ground, that he was only cautioner for the tocher, as appeared by a bond of relief granted to him by Alexander Schaw, his uncle, of the same date with the contract, and so was free by the act of Parliament 1695, no diligence being done by the charger within seven years.

Replied for the charger; That the bond of relief could not state the suspender in the case of a cautioner, the same having never been intimated to the charger, in terms of the said act, by a formal instrument under the hand of a notary and witnesses.

Duplied for the suspender; There was no necessity of such a formal intimation, because the creditor was both writer and witness in the bond of relief granted *unico contextu* with the principal obligation. For though intimation, whereof the principal design is not to notify and certiorate the party, but in order to a further end, to draw a certain performance from him, as when eviction is intimated, must be made with the legal solemnities; yet when simple certioration is designed, and nothing more intended than to let the creditor know that the suspender is but a cautioner, though bound as co-principal in the contract, private knowledge or intimation arising from the nature of the affair sufficeth, and is *qui certus est certiorari non debet L.* 1. § 1. *D. De action. empti, et ib. Gloss. ad lit. G.* So private knowledge was found equal to intimation, 28th March 1707, in a competition of Lord Ballenden's Creditors, No 71. p. 865.

Triplied for the charger; 1*mo*, Private knowledge that one of the co-obligants is only a cautioner, cannot be understood as personal intimation, which the act requires, seeing the words of that correctory statute, indulging a special privilege, must be strictly interpreted, and taken, not in a lax, but in a strict and proper juridical sense. *Quod contra rationem juris receptum, non est producendum ad consequentia;* and though private knowledge in the general may be thought easy to be defined, yet in application to particular cases, much debate hath been with respect to what makes private knowledge, seeing *scire et scire debere in jure non equiparantur.* 2*do*, Though private knowledge could be sustained, yet the chargers being writer and witness in the bond of relief, doth not infer, that the delivery of that writ consisted with his knowledge, which was necessary to make it effectual against him, because his knowledge of the delivery can never be inferred from any deed before the delivery.

No 232.

Quadruplied for the suspender; It is not an affected ignorance, or a pretence that possibly he might not have known of the delivery of the back-bond that will be sustained to support his plea. For that back-bond being now in the suspender's hand, it is presumed to have been delivered of the date it bears, conform to the decision 29th January 1663, Scot *contra* Dickson, No 37. p. 5799, unless the charger prove the contrary; especially considering, that the bond is written by himself *unico contextu* with the contract, wherein he is likewise writer and witness, and the delivery thereof of as great importance to the cautioner, as delivery of the contract to the charger.

The Lords found, That the charger being both writer and witness in the bond of relief, which is of the same date with the contract charged upon, equivalent to a sufficient intimation to him, as required by the act of Parliament 1695, and therefore assoilzied the suspender.

Forbes, MS. p. 32. & 65.

*** Dalrymple reports this case:

M'Rankin having married Dalton's sister, Shaw of Grimmet and Dalton, as co-principals, gave bond for the portion; which bond was suspended by Dalton, on this reason, that albeit he be bound as co-principal, yet on the matter he is but a cautioner, and the debt now prescribed, being about seven years since the granting of the bond. That he is but a cautioner, appears by a back-bond granted by Grimmet to the suspender, obliging him to pay the sum, and thereby relieve the suspender; and this back-bond is of the date of the bond, and written by the charger, and he a subscribing witness to it.

It was *answered*; The 5th act, Parl. 1695, in favours of cautioners, provides, That there be a clause of relief in the bond, or a bond of relief apart, personally intimated to the creditor at his receiving the bond, which cannot be subsumed in this case; and this being a correctory law, taking off the effect of express and positive law, is not to be extended, for many reasons; and if the extension were allowed in this case, by parity of reason, there might be an extension pleaded in every case, where the creditor knew to whom the money was really applied, which happens very frequently; and it would be of very dangerous consequence, tending to stop commerce, if the private knowledge of the creditor should extend the benefit of this correctory law to all that are known to have relief provided, without intimation in the method prescribed in the act; for the writing and being witness to the bond of relief, is only a probation of private knowledge, which could always be proved by oath, and in many cases by other documents.

It was *replied*; That private knowledge does not prejudge the creditor; but the writing and being witness to a bond of relief, ought to afford the benefit of that act, because it is really an intimation of the suspender's being but a cautioner; for the law does not provide that the intimation should be by a notary

before witnesses; and it were indeed a very affected unnecessary formality to have made such an intimation to the charger, who had written and signed witness to the bond of relief, of the date of the bond charged for. No 232.

"THE LORDS found private knowledge not relevant; but found, that the charger's writing the bond of relief, and signing as witness to it, of the date of the bond charged on, was a sufficient intimation."

Dalrymple, *No* 108. *p.* 151.

1715. *January* 19. GORDON *against* Sir ARCHIBALD CAMPBELL.

No 233.
The septennial prescription in favour of cautioners found to run from the date of a letter by the cautioner promising payment, and not from the date of the bond.

JOHN GORDON charges Sir Archibald Campbell, on his bond, dated 12th May 1704; he suspends on this reason, that he was only cautioner for Mr George Campbell, and seven years elapsed before the charge.

It was *answered*; The prescription did not run from the date of the bond, but from the date of a letter writ by the suspender the 23d March 1710, acknowledging the kindness done him in delaying to seek his money so long, and assuring the charger that he might depend upon his payment against Martinmas then next, and intreating delay till that time.

It was *replied*; That letter was writ within seven years of the bond, when he was truly under the obligation, and in that respect only promised to pay, which is to be interpreted in the terms, and under the conditions implied in that bond; neither can any advantage be taken from his desiring delay; for the charge was given so long after the seven years, that, adding the time of the desired delay from the date of the letter to Martinmas, which is the utmost that can be inferred from the letter, still the prescription was run.

It was *duplied*; The act of Parliament anent cautioners being correctory, and also being found not to carry those advantages that were proposed at making of the act, it was most strictly to be interpreted; and the letter ought to have the most favourable interpretation for the creditor, whereof the true import was this, That the writer of the letter did thereby corroborate the former obligation, and consequently the prescription began to run from the date of that letter; for the promise to pay at a certain term the money for which he was formerly bound as cautioner, is of its own nature a corroborative security; there could have been no question, if that letter had borne these words, 'in corroboration of the former obligation;' which words are implied, and the letter must have the same effect, as if they were expressed; and so the charger has understood it, or otherwise he would not have failed to have used diligence by horning and denunciation, and thereby preserved to himself the effect of his bond; and this suspender, who did not make payment according to his faithful promise, which he said the charger might depend upon, has no reason to complain.