

No 229. The Lord Ordinary "repelled the objection;" and a reclaiming petition having been preferred to the Court by the objectors, it was refused, without answers.

Lord Ordinary, *Kennet.*

Act. *Sinclair.*

S.

*Fol. Dic. v. 4. p. 101. Fac. Col. No 198. p. 311.*

1792. *November 20.*

DOUGLAS, HERON, & COMPANY *against* WILLIAM RIDDICK.

No 230.

A person expressly bound as cautioner, has the benefit of this statute, though the bond should not contain a clause of relief, and though there should be no separate bond of relief intimated to the creditor at receiving the bond.

WILLIAM KILPATRICK was principal obligant, and Robert Riddick and David Currie were his cautioners, in a bond granted to Douglas, Heron, & Company, in 1773.

Riddick's representative, being sued for payment in 1789,

*Pleaded* the septennial prescription introduced by 1695, c. 5.

*Answered*; This statute makes a violent encroachment on the common law, and must therefore be strictly interpreted. It declares, That 'whoever is bound for another, either as express cautioner, or as principal or co-principal, shall be understood to be a cautioner, to have the benefit of the act; providing that he have either clause of relief in the bond, or a bond of relief apart, intimate personally to the creditor at his receiving of the bond.' As there is neither clause nor bond of relief in the present case, the statute is inapplicable.

Upon this point the Bench were a good deal divided in opinion. Some of the Judges thought the existence of a clause or bond of relief absolutely necessary to entitle the cautioner to the benefit of the act.

A majority of the Court, however, influenced, some solely by the decision, 11th December 1729, Ross against Craigie, No 217. p. 11014., others by considering that the sole object of this clause of the statute was to inform the creditor of the situation of the obligants, concurred in finding, 'That as, by the bond in question, the petitioner's (defender's) father was bound expressly as cautioner, there was no necessity for a clause of relief in the bond, or a separate bond of relief, intimated to the creditor, in order to entitle the cautioner to the benefit of the statute 1605.\*'

Lord Ordinary, *Dreghorn.*

Act. *Solicitor-General, Geo. Fergusson.*

Alt. *Dean of Faculty, M. Ross, Corbet.*

Clerk, *Menzies.*

D. D.

*Fol. Dic. v. 4. p. 102. Fac. Col. No 5. p. 12.*

\* Several other points on this statute, which occurred between the same parties, were decided at the same time. See 1st March 1793, Sec. 4. *infra*, p. 11045.