No 78. bond of cautionry, they are only liable to pay what shall be decerned against Alexander Hall personally, and that now, after his death, there can be no such decerniture against him.

'THE COURT notwithstanding found them liable in terms of the act of sederunt.'

Fol. Dic. v. 3. p. 121. Rem. Dec. v. 2. No 48. p. 76.

1781. *February* 14. ROBERT M'KINLAY *against* WILLIAM EWING.

No 79.
The act 1695, introducing the septennial prescription of cautionary obligations, does not apply to cautionary obligations in suspensions.
See No 76. p. 2152.

IN a process of suspension, of a charge, at the instance of Ewing against James Macadam, John Macadam was offered as cautioner to the clerks of the bills, who consented to receive him, upon having put into their hands the following letter, addressed by M'Kinlay to the suspender's agent: '8th August '1771. I understand John Macadam, tenant in Stockrodgeart, has become 'cautioner for James Macadam, tenant in Bellock, in the suspension at his in-'stance, against Robert Ewing of Lochend, and that he is refused at the Bill 'Chamber; I therefore hereby attest, that the said John Macadam is a suffi-'cient cautioner in said suspension, and is able to pay the sums charged for.'

This missive was subscribed by M'Kinlay; but was not holograph; nor was the subscription attested by witnesses. The subscription, however, was judicially acknowledged.

In 1779, Ewing having previously discussed both the suspender and cautioner, raised an action against M'Kinlay, as attester of the sufficiency of the latter.

Pleaded by the defender: In the *first* place, the letter founded on by the pursuer contains nothing farther than a declaration, that the cautioner was sufficient at the time. It by no means imports any obligation upon the defender to become liable, *subsidiarie*, in the event of his future insufficiency. In order to produce this obligation, the form prescribed by act of sederunt, 27th December 1709, would have been requisite, by which 'attesters of cautioners are to 'be taken bound as fully as the cautioners themselves.' *Secondly*, The missive is defective in the statutory solemnities. And, *thirdly*, Though it were valid, both in substance and form, it would fall under the septennial prescription of cautionary engagements, introduced by act 1695, cap. 5. which, from its spirit and design, should be interpreted to extend equally to all cautioners, whether judicial or extrajudicial. Nay, if even the strict letter of the statute be adopted, the former, as well as the latter, may be said 'to be bound and engaged in bonds 'or contracts for sums.'

Answered by the pursuer, to the *first* defence: The nature of the obligation incurred by the defender appears from the circumstances of the case, from the whole strain of the letter, and especially from the words, 'I hereby attest, &c.'

To the *second*: The judicial acknowledgement of subscription saves from any legal nullity supposed to arise even from the statute 1681, Fountainhall, v. 1. p. 692. 26th December 1695, Beatie *contra* Lambie, *voce* WRIT; but especially

in the case of missive letters; Kilkerran, p. 605. Crawford *contra* Wight, 16th January 1739, *voce* WRIT; Kilkerran, p. 609. Foggo *contra* Milligan, 20th December 1746, *voce* WRIT; Kilkerran, p. 612. Neil *contra* Andrew, 8th June 1748. *voce* WRIT. And, indeed, in all cases where writing is not essential to an obligation, it would seem that such an acknowledgement ought to have that effect; since, at first, nothing more would have been necessary to constitute the obligation. No 79.

Answered to the *third* defence: The principle of the septennial limitation is none of the presumptions on which prescription is founded. Hence the objection of *non valentia agendi*, is not applicable to this limitation. According to the defender's doctrine, then, were a litigation to be protracted during the whole of the seven years, at its termination, when only the bond could possibly become effectual, the cautioner would, *ipso jure*, be liberated. In this manner, judicial cautionry might be rendered a vain and useless ceremony. But, besides that this interpretation of the statute would, in its consequences, annihilate that security, it seems in itself truly impracticable. Thus, the cautioner is bound, not only for the amount of the matter in dispute, but likewise for the expenses of the process. These, it is plain, increase gradually; and consequently, at a variety of successive periods, give rise to an equal variety of obligations. Is a new term of prescription then to commence with each of the obligations? Or, can they be understood as running a course of prescription before they shall have existed?

The COURT desired to know the practice of the Bill Chamber, with respect to the form of attesting judicial cautioners; and the answer made by the clerks was, That, in order to render an attester liable *subsidiarie*, they were in use to require compliance with the form prescribed by the act of sederunt; and would not have considered the letter in question as sufficient for that purpose.

It was not necessary to give judgment with respect to the statutory solemnities. With regard to the other two particulars, the LORDS found, 'That the 'act 1695 does not apply to cautionary obligations in judicial proceedings in 'suspensions; but sustained the defence, that the attestation was irregular and 'invalid.'

Lord Ordinary, *Westhall*. Act. *Morthland*. Alt. *M'Cormick*. Clerk, *Menzies*.

Fol. Dic. v. 3. *p.* 121. *Fac. Col. No* 35. *p.* 63.

1784. *December* 21. EDWARD COWAN *against* JOHN MARSHALL.

No 80.
A cautioner in a suspension found not liable for

A CHARGE of horning having been used against the acceptors of a bill of exchange, they obtained suspension on this ground, That the persons in whose behalf the charge was given, were debtors to them to a much greater amount.