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.

No 80.
the debt, when the charger's right had been set aside by reduction brought by one not a party to the suspension.

The original holder of the bill in question, Edward Cowan, instituted an action for setting aside the charger's right. After this process of reduction had been conjoined with the suspension, he insisted for a decreet, not only against the suspenders, but also against John Marshall, who had become their cautioner in the suspension.

In support of this demand, so far as regarded the cautioner, Edward Cowan

Pleaded: The purpose of introducing cautionary obligations in suspensions was, that the sums contained in the decreet under challenge, might be recovered, if ultimately found due. The obligation of the cautioner is therefore, by the modern usage, sustained to the same extent with that of the principal party; nor can the former be discharged while the latter remains bound. Erskine, book 3. tit. 3. § 71.; Act of Sederunt, 29th January 1650, Hamilton against Calder, No 24. p. 2091.; Act of Sederunt 23d November, 1717.

Answered: Where a suspender does not controvert the validity of the charger's claim, but only insists, as in multiple-poindings, that he shall pay with safety, his cautioner is justly found liable, though another party should, in the competition, be preferred to the charger. It is the true meaning of such an interposition, that upon the suspender's being warranted against future claims, the surety, in his default, shall make good the debt. In like manner, when during the pendency of a suspension, a third party is brought by arrestment or assignation into the place of the original charger, the benefit of the cautionary obligation, as accessorial to the right itself, will at the same time be transferred to the assignee or arrester.

The difference, however, between cases such as these and the present, is sufficiently obvious. Here, in the question between the original chargers and those who obtained the suspension, the plea of compensation urged by the latter was unquestionably relevant to free them from every claim. The same defence would have been equally effectual, in a question with the pursuer, if coming by assignation into the place of the original chargers; and it is only by means of a reduction, in which the charger's right is set aside, from circumstances entirely unknown when the suspension was obtained, that any thing can be demanded from the suspenders themselves. Agreeably, therefore, to the decisions quoted on the other side, in which the cautioner was held to be bound, not according to the *words* merely, but to the *spirit* of his engagement, his obligation in the present case must be completely dissolved. The state of the question, to which his interference was solely applicable, is now in every respect essentially altered and departed from. Fount. 5th July 1706, Macdougal, No 74. p. 2148.

THE LORD ORDINARY found, 'That, in respect there was a relevant reason of suspension against the original chargers, the cautioner in the suspension must be free, although, in the final event of the conjoined processes of reduction and suspension, the pursuer should succeed in the reduction, and in consequence thereof should be entitled to a decreet finding the letters orderly proceeded.'

Upon advising a reclaiming petition, with answers, the Lords adhered to the judgment of the Lord Ordinary. No 80.

Lord Ordinary, *Braxfield.* Act. *Maclaurin.* Alt. *Cullen.* Clerk, *Menzies.*
Craigie. *Fol. Dic. v.* 3. *p.* 121. *Fac. Col. No* 186. *p.* 291.

1786. *February* 7.

SIR MICHAEL STEWART, Bart. *against* WILLIAM MITCHELL.

No 81.
The cautioner in a suspension is at liberty to resile before his security has been accepted of by the charger.

WILLIAM MITCHELL signed a bond, as cautioner in a suspension offered by a tenant of Sir Michael Stewart's; but his security not being thought sufficient, the bond was, in common form, delivered to the suspender's agent, for the purpose of getting it attested.

Two different attestations were successively offered, but not accepted; and, in the mean time, the suspender became notoriously insolvent. Sir Michael Stewart, the charger, then insisted for delivery of the bond; and

Pleaded: The security offered, though not judged fully adequate, was not, however, finally rejected. Neither can it be reasonably imagined, because the charger was desirous of the collateral warranty of an attester, that he had it in view, if that could not be had, to renounce altogether the right he had already acquired. A contrary doctrine, indeed, would be full of injustice; for if, instead of allowing the suspender to procure additional security, the cautioner had been peremptorily refused, a certificate of caution not being found, might have been obtained; and, by means of immediate diligence, the charger might have had an opportunity of recovering payment, which is now altogether precluded.

Answered: The interposition of a cautioner in supensions, is viewed, in practice, merely as an *offer*, from which, at any time before its being accepted by the clerk of the bills, the party *offering* is at full liberty to recede. Hence, when his sufficiency is doubted, the bond signed by him is invariably returned, without any receipt, to the person by whom it is presented. Nor has the charger any reason to complain of this; because it is in his power, at any time after the day assigned by the Lord Ordinary, to extract the certificate, and so to proceed to the execution of his diligence.

THE LORDS found, that the cautioner was not bound.

Lord Ordinary, *Rockville.* Act. *Maclaurin.* Alt. *Cullen.*
Craigie. *Fol. Dic. v.* 3. *p.* 121. *Fac. Col. No* 257. *p.* 393.

1793. *June* 12.

JOHN HERBERTSON and Company *against* JAMES RATTRAY and Others.

No 82.
The cautioner in a suspension found not liberated

ROBERT RATTRAY was cautioner for James Rattray in a suspension of a decree of a Sheriff, pronounced in absence against him. James objected to the decree,