ESKGROVE. The right is in the debtor, although the creditor have power to sell.

On the 11th March 1786, "The Lords dismissed the complaint."

Act. A. Wight. *Alt.* A. Abercrombie.

N. B.—There was some doubt arising from the case of *M'Adam*, but the circumstances of that case were not distinctly explained.

1786. *June* 21. ROBERT HAY *against* ROBERT FULTON.

QUALIFIED OATH.

In what cases payment to a third party, at the desire of the creditor, is held to be an intrinsic quality.

[*Fac. Coll. IX.* 422; *Dict.* 13,220.]

ESKGROVE. Qualities natural to the constitution and extinction of obligations are intrinsic: so payment made by the intervention of a third party is intrinsic. This case goes farther: Fulton offers to prove, in consequence of his own oath, that he voluntarily paid a sum equivalent to his debt, to the creditor of his creditor. He ought to prove, by the pursuer's oath, that he received the money.

JUSTICE-CLERK. When a man swears directly *not resting owing*, the law will believe him; but here the defender does not deny the debt; he only says that he paid the money by order of the creditor.

On the 21st June 1786, "The Lords found that Robert Fulton has not brought sufficient evidence of his having paid the sum of L. 11 : 14 : 8 to Limeburner, in consequence of the pursuer's order;" adhering to the interlocutor of Lord Elliock.

Act. R. Cullen. *Alt.* Ed. M'Cormick.

1786. *June* 22. SIR ARCHIBALD EDMONSTONE, Bart. *against* WILLIAM LANG.

WRIT.

Such cautionary obligations only valid in which the statutory solemnities have been observed.

[*Faculty Collection, IX.* 427; *Dict.* 17,057.]

BRAXFIELD. It is a settled point that a cautionary obligation is a *litera-*

rum obligatio, and must be executed by a perfect writing. The seeing the principal party in possession is nothing.

ESKGROVE. The acknowledgment of the writing is not sufficient in this case, although it might be *in re mercatoria*.

MONBODDO. When a subscription is acknowledged in a writing which does not fall under the Act 1681, that constitutes a *literarum obligatio*. Besides, the cautioner, on seeing his son-in-law, the principal party, possessed of the subject, ought to have intimated to the factor that he would not be bound for him. A man may become bound by what he omits to do.

SWINTON. In our law we have *literarum obligationes* and consensual contracts: the former are in matters of importance. A cautionary obligation is of that nature.

PRESIDENT. I also imagined this point to be settled: *in re mercatoria* such informal writings are permitted to have force, but not in other cases. In the case of *Lenox of Woodhead*, the *ratio decidendi* was, that the cautionary for 500 bolls of victual was *in re mercatoria*. There is no danger from a decision finding the cautioner not bound; on the contrary, this will make men more attentive to the regularity of their contracts.

HAILES. The factor has been exceedingly careless, and a legal advantage has been taken of him.

ROCKVILLE. Of the same opinion; and added, that the first offer was of two cautioners, and the factor ought to have had it adjusted whether one of the cautioners was willing to become bound by himself.

On the 22d June 1786, "The Lords assoilyied the defender;" altering the interlocutor of Lord Ankerville.

Act. William Craig. *Alt.* John Morthland.

Diss. Justice-Clerk, Monboddo, Ankerville.

1786. *June* 27. ROBERT DUNMORE and COMPANY *against* RICHARD ALLAN and OTHERS.

INSURANCE.

A ship warranted to sail with convoy, though she did not sail till several days after the convoy, overtook it, and a few weeks afterwards were separated from the fleet in a gale: and was finally taken by the enemy. The Court found the Policy null.

[*Fac. Coll. IX.* 432; *Dict.* 7101.]

HENDERLAND. A policy of insurance is a contract *stricti juris*: here the question is, What risk was undertaken? It was of a ship warranted to *sail* or to *depart* with convoy. Now, the fact is, that the ship insured sailed without convoy, and did not join the fleet for three weeks: had she been taken before she joined convoy, the insurers would not have been liable. How then could they afterwards become liable? The insurers undertook no risk unless the