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

ship sailed *with* convoy; it is not enough to say that she afterwards overtook it and joined it.

Justice-Clerk. Insurers are only liable for the risk undertaken: It is nothing to say that the risk *run* was less than the risk *undertaken*. The question is, Was the condition of the policy fulfilled, or was it not? It was not; for the ship sailed *without* convoy, neither did she see the convoy for three weeks after sailing. There have been various cases decided in the King's Bench on the principles which I have laid down.

President. I once was of opinion that a contract of insurance was *bona fide;* and so I gave my judgment in the case of the ship that touched at Morrison's Haven, but the House of Lords corrected me, and found that it was a contract *stricti juris*. On reconsidering the case, I became satisfied of my mistake.

Eskgrove. Were it not for the judgment of the House of Lords, I should think, that, where the risk is not increased, the policy ought to be held subsisting. I see no evidence of the premium being demanded back and repaid, in a case where convoy was not joined, and yet the ship arrived safe: here is a rigorous advantage when there was no *mala fides* or evil intention on the part of the insured.

On the 27th June 1786, "The Lords suspended the letters;" adhering to the interlocutor of Lord Braxfield.

Act. Ilay Campbell. *Alt.* Wm. Craig.

1786. *June* 29. Purdie, Crum, and Company *against* The Magistrates and Town-Council of Montrose.

PRISONER.

Act of Sederunt, 11th February 1671. Magistrates of a Burgh found liable for the escape of a Prisoner.

[*Faculty Collection, IX.* 440; *Dict.* 11,757.]

Justice-Clerk. The principle of the interloctor is erroneous, for it supposes that, if a prison is not worse now than it was formerly, the Magistrates are not liable for the escape of a prisoner: *this* implies that the present Magistrates are permitted to be as careless as their predecessors were.

Monboddo. The jailor omitted to secure the principal door: he was guilty of negligence, and the Magistrates are liable for it.

President. A man has not the choice of the prison to which he must convey his debtor, and therefore particular diligence is required from Magistrates.

On the 29th June 1786, "The Lords found the Magistrates and Town-Council liable, and found expenses due;" altering the interlocutor of Lord Henderland.

Act. W. Bailey. *Alt.* H. Erskine.