

1794. *November 28.* GEORGE BROWN *against* ALEXANDER CAMPBELL.

No. 337.

An informal missive, importing a cautionary obligation, found effectual, where the subscription was acknowledged by the grantor, and the other party had acted on the faith of it.

Thomas Brown having agreed to become cautioner in a suspension for John and Daniel Scots, they, along with Alexander Campbell, granted the following missive :

“ *Perth, 15th May, 1769.*

“ As you are to sign cautioner in a bill of suspension, &c. we hereby bind ourselves, conjunctly and severally, to free and relieve you of all cost, skaith, and damage, you may sustain by signing the bond of cautionry. And we are, &c.”

This obligation was not holograph of Campbell, nor were the solemnities required by the act 1681 observed in its execution ; but in consequence of it, Thomas Brown signed the bond of caution the day following.

The letters having been found orderly proceeded, and the debt recovered from Thomas Brown, George, his representative, afterwards brought an action of relief against Alexander Campbell, who admitted his subscription, but in defence

Pleaded : As the missive infers a cautionary obligation, it is null, as wanting the statutable solemnities ; 22d December, 1710, Gordon against Mackintosh, No. 224. p. 16974. ; 4th February, 1725, Campbells against Campbell, No. 125. p. 16898. Nor can this objection be obviated by the defender’s acknowledging his subscription ; Wallace, 21st July, 1772, Crichton and Dow against Syme, No. 328. p. 17047. ; 25th November, 1782, Wallace against Wallace, No. 333. p. 17056. ; 23 June, 1786, Sir A. Edmonstone against Lang, No. 335 p. 17057. ; 22d May, 1790, Macfarlane against Grieve, No. 336. p. 17057.

Answered : Although a cautionary engagement cannot be established by witnesses, yet it is not a *literarum obligatio*, which requires writing as an indispensable solemnity ; 21st July, 1772, Crichton and Dow against Syme, No. 328. p. 17047. Like the contract of loan, it may be proved by the oath or acknowledgment of party ; and as in the present case the defender neither disputes his subscription, nor the import of the missive, he consequently admits the obligation.

Besides, as Thomas Brown subscribed the bond of caution on the faith of the missive, and has since paid the debt, a *rei interventus* has taken place, which must exclude every objection to its formality ; 5th December, 1765, Henderson and Cowan against Murray, No. 236. p. 16986.

The Lord Ordinary assolizied the defender.

But, on advising a reclaiming petition and answers, the Court were unanimously of opinion, that the interlocutor should be altered. Some of the Judges went upon the ground first stated for the pursuer. Others seemed to be of opinion, that, *rebus integris*, an informal cautionary obligation was not binding ; but that in all cases where, as here, there had been a *rei interventus*, the *locus penitentiae* was barred, and that the case of Sir Archibald Edmonstone against Lang, founded on by the defender, had been erroneously decided.

The Lords unanimously decerned against the defender, and found him liable in expenses. No. 337.

A similar judgment was pronounced, 3d February, 1796, Sinclair against Sinclair. See APPENDIX.

Lord Ordinary, *Abercromby.* Act. *Craigie.* Alt. *W. Erskine.*

R. D.

Fac. Coll. No. 134. p. 307.

1797. *January 31.*

ROBERT HENDERSON, *against* GEORGE WILSON and CATHARINE and CHRISTIAN MELVILLES.

The objection to a deed, that it did not mention the number of pages, repelled; because it bore that it was written on three sheets of paper, and that the eleven first sides were signed by the granter, and the last by the granter and witnesses.

No. 338.

Fac. Coll.

* * This case is No. 59. p. 15444. *voce* TAILZIE.

1802. *January 12.*

CRICHTON, Petitioner.

A testamentary deed being improbativè, not sustained as a conveyance of moveables.

No. 339.

Fac. Coll.

* * This case is No. 31. p. 15952. *voce* TESTAMENT.

1802. *February 20.*

HENDERSON *against* HAY.

A report on printed papers was made from the bill-chamber of a bill of advocacy, against a judgment of the Sheriff of Stirlingshire, admitting as a legal document of debt a bill of exchange, dated 7th of October, 1799, which seemed to have been first made payable at Martinmas 1780 years, and afterwards corrected, so as to be payable at Martinmas 1800.

The acceptor objected to payment of this bill, in as much as it was null, being vitiated, and therefore completely improbativè: Supporting his reasoning on the judgment of the House of Lords, in Lee, Rodgers, and Company against Murdoch Robertson and Company on 26th December, 1801. See APPENDIX.

No. 340.

A bill of exchange altered in the term of payment, admitted as a legal document; the alteration appearing to have been made merely to correct a mistake.