No. 21. it to their bankers in London, Messrs. Foster, Lubbocks, and Company. It became payable on the 3d of July 1807, that being the last day of grace; on that day it was presented for payment; and payment being refused, it was noted by William Armstead, a notary, in the usual way, "2, 6 W. A. 3d July 1805."

Thus noted, but without any regular instrument of protest, it was returned to Brown and Company, who wrote immediately to Dunbar in these terms:

"The bill we received from you the 9th of May (say R. Ogle upon Sinclair "Wright, No. 21, Whitehorse Lane, London, from the 30th April 1805, at "two months, amount £125.) is returned to us for non-payment, *but, not being "protested, have returned it* to our bankers to have the needful done. When "we receive it, shall send it to our friend in Edinburgh, who will call upon "you for payment."

Dunbar refused to pay the bill. Brown and Company gave him a charge for payment, which he suspended.

The suspender stated various defences, in particular that the bill had not been protested in due time, and that due notice of the dishonour was not given to him, since the letters of the chargers mentioned the bill *not being protested*, which authorised him to think that it was not negotiated, nor any recourse against him intended.

The Lord Ordinary "Sustained the reasons of suspension."

But on a reclaiming petition and answers, the Court were clear that the *noting* was sufficient negotiation, and that the letter, signifying only that the bill had not yet been *protested*, left fully to be understood the fact that it had been *noted*, which is a common practice, the protest being afterward drawn out in regular form. The Court therefore altered the Lord Ordinary's interlocutor, and sustained the recourse against the suspender.

Lord Justice Clerk, Ordinary. Act. *James Moncrieff.* Alt *James Keay.*
S. Macknight, W. S. and *David Wardlaw*, Agents. *F.* Clerk.

M. *Fac. Coll. No.* 13. *p.* 39.

1808. *June* 24. JOHN SHARP *against* MARGARET HERVEY and Others.

No 22.
An acceptor of a bill, "*as security jointly and severally*," has not the benefit of the act 1695, ch. 5.

ON the 3d June 1796, the pursuer drew a bill, which was duly accepted, as follows:

"£938. 7*s.* 3*d. Sterling.* *Stirling, June* 3, 1796.

"Against the term of Whitsunday next, pay me, or order, at the house of "James Thomson, jun. Stirling, £938. 7*s.* 3*d.* Sterling, for value received of "(Signed) JOHN SHARPE."——(Addressed) "To James Thomson, jun. "Stirling, as principal, and John Hervey merchant there, as security, jointly "and severally. (Signed) JAMES THOMSON, jun. JOHN HERVEY."

No, 22.

During its currency in the years 1797, 8, 9, 1800, and 1801, various payments were made to account.

Thomson became embarrassed in his affairs; and, on the 17th August 1803, applied for and obtained an act of sequestration. Before the expiry of the ten months allowed by the bankrupt statute to every creditor to produce his grounds of debt and oath of verity thereon, Thomson made an offer of a composition of 12s. per pound, of which himself and Mr. Mayne of Powis were to grant bond for 10s. His own bond was to be taken for the remaining 2s. The offer was unanimously accepted by the creditors present, and the bankrupt was discharged. The pursuer, however, was not present at any of the meetings, and had not produced his grounds of debt.

Thomson made payment of £60. 15s. but it became necessary to raise an action against Thomson, Mayne, and Harvey, for payment of the balance.

Thomson offered no defence. Mayne objected that his bond of caution made him only liable for a composition, "*on such debts as are or shall be ranked;*" *now the debt pursued for is not ranked, and the document of debt is ex facie prescribed. Before any decreet can go out against the defender (Mayne) the debt must be proved against Thomson.*

Hervey objected, 1*st*, That in respect of the act 1695, ch. 5. he is entitled to be free.—2*d*, That the pursuer did not give in his claim under the sequestration, in consequence of which he has not only been deprived of his dividends, but has allowed the bankrupt to obtain a discharge on a composition of no more than 12s. in the pound.

The decision on Hervey's first defence only is to be noticed.

The Lord Justice-Clerk, Ordinary, (22d Feb. 1805) found, "That the "ground of debt pursued on in this case is struck at by the act 1695, respecting the septennial limitations of cautionary objections."

During the dependence of the cause before the Lord Ordinary, the defender Hervey died; and his heirs and trustees sisted themselves.

The case came before the Inner-house by petition and answers.

Argument of the pursuers.

The act 1695, C. 5. applies only to *bonds or contracts for sums of money*, where there is a clause of relief in the bond, or where a separate bond of relief is intimated to the creditor. This statute, being correctory of the former law, has always been subjected to a rigid interpretation, and limited to the precise cases provided for by its enactments.

Thus it has been determined by numerous decisions, that bonds of corroboration and other accessory securities do not come under this act. Dict. *voce* PRESCRIPTION. DIV. 7. Sect. 2. No. 223. p. 11025.

So likewise a cautioner in a bond of relief is not entitled to the benefit of the act, 29th July 1762, Ewart against Lothian, No. 226. p. 11027.

Neither is a bond of presentation, nor a bond *ad factum prestandum* included in it. Dict. *voce* PRESCRIPTION. DIV. 7. Sect. 1. No. 209. p. 11010.

No. 22. Likewise, no cautioner has the benefit of the statute but he who is bound along with the principal in the original bond, and not he who accedes *ex post facto*—Cayes against Spence, No. 221. p. 11020.

Thus restricted in its interpretation, the act cannot include a cautionary obligation in a bill of exchange.

1st, Because in the year 1695 such a document was almost unknown, and had not obtained any of those privileges which that species of document has, from the subsequent extension of commerce, obtained. By the act 1681, C. 20. *foreign* bills had, from their importance, been privileged in registration and execution; but it was not till the year 1696, a year after the act now in question was passed, that inland bills were put in the same situation. According to Sir George Mackenzie, (Observations on act 1681,) these privileges had been withheld, "because, if that had been allowed, all debts had still been constituted by bills and not by bonds; and so had been privileged by too summary petitions." Inland bills, therefore, could not at that time have been a means of borrowing money; and were not in law considered to be either a contract or bond. They were an unprivileged and unimportant document, and could not have been in the contemplation of the Legislature when the act was framed.

2d, Because a cautionary obligation can only be constituted by a writing accompanied by the solemnities of the act 1681; 21st July, 1772, Crichton and Dow against Syme, No. 328. p. 17047; November 25, 1782, Wallace against Wallace, No. 333. p. 17056. In a bill, therefore, which is destitute of these solemnities, a cautionary obligation cannot be contained.

3d, Because the nature, uses, and privileges of a bill are altogether inconsistent with the constitution of a cautionary obligation; and the term cautioner, to which alone the act is directed, cannot apply to an acceptor or indorsee. In law, a bill is not a bond or contract, nor is it acknowledged as a mode of borrowing money. "A bill is an open letter, a request, addressed by one person to a second, desiring him to pay a sum of money to a third, or to any other to whom that third shall order it to be paid; or it may be payable to the bearer," (Jacob's Law Dict. *voce* Bill of Exchange.) By law, a bill is destined and created for mercantile convenience; and for this purpose is invested with extraordinary privileges. All the acceptors and indorsees are jointly and severally liable; and the onerous holder cannot be met with many of those objections which might be pleaded against the original creditor, or any of the successive indorsees. But to permit, in favour of an acceptor, an exception under the act 1695, would be to impede the credit and circulation of bills, and deprive them of that quality which alone can render them useful in mercantile affairs.

In fact, every indorsee is a cautioner, and is entitled to be relieved by the person from whom he received the indorsation, *retro* to the drawer. But it has never been maintained that the act 1695 applied to such a case.

No. 22.

So far as the act 1695 is concerned, it makes no difference whether there is a clause of relief in the bond or contract, or there be a separate bond of relief intimated to the creditor. Now, if, in the present case, the acceptance had been unqualified, and a separate bond of relief had been intimated to the drawer, it is clear that the act of Parliament could not have applied. Such a plea could not have availed against an onerous indorsee; yet, if the act applies at all, it must reach this as well as any other case, and the expiry of seven years must have brought with it a relief from the obligation. The frequent change of the creditor, arising from indorsation, and the privileges granted and required to render a bill indorsable, shew that it is not a *bond or contract* in the sense of the act.

Every creditor, likewise, (who has not dispensed with it) is entitled to the *beneficium ordinis*. But all the acceptors of a bill are jointly and severally liable; and the word *cautioner* introduced into the bill itself can serve no other purpose but to ascertain with more accuracy the ultimate relief of the one acceptor against the other. On these principles the Court have proceeded in deciding several cases.

Thus, it was decided, that where there were three acceptors of a bill, and another person had, by a separate missive, promised that, *in farther security*, the bill should be paid when demanded, the act 1695 did not apply to this separate obligation, 7th Dec. 1784, Howison against Howison, No. 228. p. 11030.

So likewise it was found that a cautionary obligation could not be constituted by bill; the term *cautioner* added to the subscription of an acceptor was held *pro non scripto*, and he was found jointly and severally liable; 27th November 1753, Gibson against Campbell, No. 11. p. 1406.

Nether is there any room for argument on the ground that a person, who has incurred only the qualified obligation of a cautioner, cannot be subjected to the unqualified obligation of an acceptor. Every person subscribing a bill or any other obligation is presumed to be acquainted with the law by which his obligation is governed.

Argument of the defender.

Bills of exchange, both inland and foreign, had become of national importance, and were known and sustained in law, at a date far previous to the year 1695. Foreign bills had, in the year 1681, been clothed with the privileges they at present enjoy; and inland bills were put in the same situation in the year 1696. From this it is obvious, that in practice their importance had been acknowledged, and their utility discovered; and the Legislature, in this as in most other cases, merely obeyed the antecedent dictates of public opinion. But there is evidence from the decisions of the Court, that bills had been in use at a much earlier period; 1st Feb. 1669, Brown against Johnston, No. 6. p. 16603; Stair, B. 1. Tit. 11. § 7; 23d July 1629, Lindsay against Gray, No. 123. p. 1543. The proper subject of bills is money; and whether they are used as a mode of borrowing money, or transferring it from one place to ano-

No 22. ther, is a circumstance altogether contingent and accidental. In daily practice, the object of a bill is to borrow money; and it was so in the present instance. Of all the modes of borrowing money, that by bill comes the most forcibly within the intention of the act. The formalities attending the execution of a bond afford the cautioner time for reflection; while, in a moment of rashness and facility, a bill, from its simplicity, is the most likely to be subscribed. Whether, therefore, the importance of the document, its object, or its simplicity be considered, there is no reason for concluding that it was not in the view of the Legislature. But farther, a bill is a *contract*. By one writer, it is called a contract of *mutuum*; by another, a contract of *mandate*; and by another it is said to partake of the nature of both. To what class it belongs is immaterial; but it is, in this case, a contract containing, *in gremio*, a clause of relief. Stair, B. 1. Tit. 11. § 7. Bankt. B. 1. Tit. 13. § 1. Ersk. B. 3. Tit. 3. § 25.

That, in a case where the bill has undergone indorsation, and where the bond of relief is contained in a separate writing, the act 1695 should not apply, is obvious. A bill is not liable to any objections which do not appear *ex facie*. But, on the other hand, a bill is liable to every objection appearing on the document itself. Now, in this case, the qualified acceptance was on the face of the bill; and every indorsee must have seen that it came within the act 1695. Accordingly, a qualification more inconsistent with the nature of a bill, was sustained in a case wherein the exclusion of the *jus mariti*, in a bill taken to a wife, was found to be effectual; 11th January 1750, Mungel, No. 9. p. 5771.

If, however, a cautionary obligation cannot be constituted by bill, the document must be null. By the act and consent of the drawer himself the obligation was qualified, and the acceptance would not have been adhibited but upon that condition. To hold *pro non scripto*, so important a condition, and to extend an obligation beyond the intention and without the consent of the person by whom it is to be incurred, is inconsistent with the principles of justice *.

* The following cases may not perhaps be unacceptable, and may throw some light on the subject of this report. They are to be found in a collection of cases in the form of a dictionary, made by the late Lord Elchies, and *lately* presented to the Advocates' Library by Sir James Montgomery, Bart. (J. W.)

MSS. Elchies' Collection, p. 54. *voce* Bill.—A bill drawn upon, and addressed to a father and son, the father as principal and the son as cautioner, but accepted by both simply, was found null *quoad* the cautioner, 15th Jan. 1736, Gillespie against Barr.

Ibid. p. 56.—A bill drawn on one as principal, and other two as cautioners conjunctly and severally, being paid by and indorsed to the cautioners, recourse sustained against the successors of the principal, 18th June 1742, John Alexander against Scott.

Ibid. p. 61.—A bill accepted by one as principal, and another as cautioner, being suspended by the cautioner, for that a cautionary obligation could not be created in the form of a bill; the suspender, on oath, acknowledged that he had wrote the bill; that he agreed to become cautioner, and therefore wrote it in that form; that the charger objected to the word cautioner, and that the suspender answered, that he would be bound in no other way. First Lord Kilkerran, and then the whole Court, repelled the reason of suspension; and Drummore (who was in the chair,) doubt-

Several of the Judges agreed with the interlocutor of the Lord Ordinary; and expressed their opinion, That what might be the effect of such a qualified acceptance in a question with indorsees, it was unnecessary to inquire. This was a question with the drawer, by whose act and consent the acceptance was qualified and cautionary. The obligation was distinctly that of a cautioner. A bill might be evidence of the contract of *mutuum* as well as a bond or any other writing; and is one of those obligations incurred in an urgent and momentary exigence, which it was the humane intention of the statute to limit to seven years. Where a person has accepted a bill as cautioner, the obligation must either be of that nature, or null; because it is impossible, consistently with justice, to render an obligation more extensive than the parties themselves have stipulated. There is no greater anomaly in such a qualified acceptance, than in an indorsation without recourse, which is frequent in practice. No. 22.

But a majority of the Judges were of a different opinion; and observed,

A bill is a document of a nature distinct from that of a bond or contract; is introduced for different purposes; and is invested with different privileges. Its province is in law considered to be the transference, not the loan of money. It does not, therefore, come under any of those transactions enumerated in the act 1695, and to which that act was intended to apply.

With the nature of a bill, a cautionary obligation is altogether incompatible; and in a question with the drawer or creditor, there can be no cautioner. A party subscribing incurs a joint and several obligation, and is not entitled to the benefit of discussion. The law, therefore, by which cautionary obligations are governed, totally fails in its application to such a case; neither is any injustice committed against the acceptor, because every one voluntarily subscribing either a bill or any other obligation, is presumed to know the legal consequences of the obligation which he has undertaken.

The following interlocutor was pronounced, 24th June 1808.

"The Lords having resumed consideration of this petition, and advised the "same, with answers thereto, adhere to the interlocutor reclaimed against, in so "far as it repels the defences stated for John Hervey, and decerns; finds the "respondent entitled to the full expense of extract, but no other expense, and "decern; but remit to the Lord Ordinary to hear parties on the question "against whom the decree shall go out, and to do thereanent as his Lordship "shall see cause."

Lord Ordinary, *Justice Clerk.* Act, *John Macfarlan.* Alt. *Ar. Fletcher.*
Jo. Brunton and *A. Jaffray*, Agents. *M.* Clerk.

J. W. *Fac. Coll. No.* 61. *p.* 226.

ed if being bound as cautioner was a nullity, 27th November 1753, James Campbell against David Gibson.—(This newly acquired Collection of Decisions by Lord Elchies, will be inserted in APPENDIX, PART II.——W. M. M.)