*jure*, are declared to be no debts, in so much that they could not be founded on by way of compensation? [No 218.

As to the quotations from the civil law, they are of no force; for the doctrine of *constituta pecunia* has, at present, no place in the practice of nations; but, supposing it had, the *L.* 14. says only, that a definite sum needs not be contained expressly in the paction, which received the name of *constitutum*. But still, in order to make it effectual, it must have been certain, either by the agreement itself, or by relation to somewhat which rendered it so; which is not the case here; as the obligation founded on supposes an uncertainty, to be determined by instructions afterwards to be produced. Further, the law seems to relate to a person's entering into a *constitutum* for his own debt, and not for another's; in such a case, if he who had the benefit of a temporal exception brings himself under a fresh obligation, he is supposed to renounce the benefit of the exception competent against the first. Neither is the decision in point, as the acknowledgment there was made by the debtor himself; and, though the debt was not mentioned, yet it would appear to have been under the party's view at the time; but that can afford no argument in this dispute, where a third party intervenes, and grants an obligation which relates to no particular debt.

As to the question, What could be done in order to save the bonds from prescription, other than charging the defender in terms of his obligation? it was *answered*, That Captain Blair should have produced the instructions of his debts, until which there could not regularly be a charge on this obligation; and, as that was not done, such a general charge, which was entirly uncertain in itself, and was not made certain by relation to any other document, could never interrupt the prescription running against that to which it had no relation.

With respect to the alleged specialty arising from the defender's getting Bonshaw's estate, that cannot vary the argument; as there is no evidence produced that he was discharged; and innovation is never presumed; nor does it make any difference, that the obligation was granted after the original debtor's death; seeing one may become cautioner in a bond as well after as before the principal's decease.

THE LORDS repelled the defence of prescription.

But, upon a reclaiming bill and answers, "They sustained the defence."

*C. Home, No* 10. *p.* 29.

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1741. *July* 22. SIR ROBERT MONRO *against* BAIN. No 219.

A BOND of presentation granted in 1724 by Dingwall of Cambuscurry as principal, and Bain of Tulloch as cautioner, whereby they bound themselves,

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'That Cambuscurry should on a day certain compear personally at Inverness 'in the messenger's house, and then and there pay the hail sums, principal 'annualrent, and penalty mentioned in the letters of caption, with all other 'expenses of diligence, together also with the sum of L. 600 Scots of penalty to 'be paid by me and my foresaid cautioner, in case I the said Dingwall of Cam-'buscurry shall not compear day and place and hour above mentioned,' was, in a suspension by the cautioner, "found *quoad* the obligation upon him, to fall under the act of Parliament anent the prescription of cautionries."

A simple bond of presentation that the debtor should present himself, would not have fallen under the act of Parliament; but the cautioner's being here bound that the debtor should also pay, was found to distinguish the case; notwithstanding it was *pleaded*, that by the words the cautioner being not bound to pay, but only that the principal should pay, and so the cautioner being only liable consequentially upon the principal's failure, he was no more bound for a sum of money than he is in a simple bond of presentation, whereby he becomes also consequentially liable upon the principal's failure to present. See No 211. p. 11010.

*Fol. Dic. v.* 4. *p.* 100. *Kilkerran*, (Prescription.) *No* 9. *p.* 419.

No 220.

In an action upon a bond, a co-obligant defended himself upon the septennial prescription of cautionary obligations. Found that this prescription applied only to cautioners who had a clause of relief in the obligation, or a separate bond of relief.

1742. *June* 29. Mrs Ann Burnet *against* Patrick Middleton.

Robert Bannerman and Patrick Middleton granted bond in January 1733, to Gilbert Burnet for L. 80 Sterling, of the following tenor: "I Robert Bannerman, &c. grants me to have borrowed and received from Gilbert Bannerman, &c. all and hail the sum of L. 80 Sterling, whereof I grant the receipt, &c.; which sum, with the annualrents, &c. I the said Robert Bannerman, and with me Mr Patrick Middleton, &c. bind and oblige us, conjunctly and severally, our heirs, &c. to content and pay to the said Gilbert Burnet," &c. Mrs Ann Burnett, as executrix to Gilbert her father, brought an action for payment against Patrick Middleton, as representing Patrick Middleton, one of the obligants in the bond.

The defence was founded on the 5th act, Parl. 1695, which ordains, "That no man binding and engaging for hereafter, for and with another, conjunctly and severally, in any bond or contract for sums of money, shall be bound for the said sums, for longer than seven years after the date of the bond," &c. In terms of this clause, the defender subsumed, that his predecessor was bound for and with Mr Bannerman, conjunctly and severally, in a bond for a sum of money; that the seven years are elapsed, and therefore his predecessor became thereby *eo ipso* free. Neither can the following clause in the act vary the question, declaring, "That whoever is bound for another, either as express cautioner, or as principal, or co-principal, shall be understood to be a cautioner to have the benefit of this act, providing that he hath either clause of relief in