No 11.
A perſon accepted a bill ſubjoining the words 'as 'cautioner.' Being purſued, he objected, that a cautionary obligation could not be conſtituted by bill. The objection repelled.

1753. *November* 27. DAVID GIBSON *againſt* JAMES CAMPBELL.

DAVID GIBSON, merchant in Inverary, ſigned, as drawer, a bill addreſſed in the following terms: 'To Archibald Campbell tackſman of Succoth principal, and 'James Campbell of Raſhoily cautioner, conjunctly and ſeverally.' Both theſe perſons accepted; but Archibald ſubjoined principal, and James cautioner to his acceptance. Archibald, who received the value of the bill, became bankrupt; and Gibſon purſued James Campbell for payment.

James Campbell judicially acknowledged, that both the bill and its addreſs were written by himſelf; and that he had agreed to become ſurety for the ſum contained in the bill: he *contended*, nevertheleſs, that he was not liable in payment; for that a cautionary obligation may not be conſtituted in form of a bill: and he *pleaded*, that the law holds bills, when uſed as the vehicles of commerce, to be equal to ready money, and therefore exempts them from the ſolemnities requiſite in other probative writings: in them the ſubſcription of the party conſtitutes the obligation, and renders them probative; but whenever they deviate from their proper form, their nature is underſtood to be changed; they ceaſe to be bills, and are deprived of theſe extraordinary privileges. According to theſe principles, the writing, on which this action is brought, cannot be conſidered as a bill; for that a bill preſumes value received by the acceptor: now this cannot be applied to a cautioner, who receives not value himſelf, but becomes bound for the debt of another perſon. If a cautionary obligation could be conſtituted by a bill, the principal would be bound to relieve the cautioner, and the cautioner would have the benefit of the ſeptennial preſcription; and theſe things are equally inconſiſtent with the nature, and foreign to the purpoſe, of bills: neither is the caſe altered by theſe words *conjunctly and ſeverally*, which are added to the addreſs: it is the acceptance, not the addreſs, which conſtitutes the obligation; the term *cautioner* qualifies the acceptance; and as the purſuer founds on this writing, he muſt found on it with all its qualities.

Anſwered for the purſuer, The queſtion is not, whether the defender became cautioner by his acceptance of the bill? but whether his qualified acceptance as cautioner be ſufficient to withdraw him from that obligation to which his ſimple acceptance would, in terms of the addreſs, have ſubjected him? The bill is drawn on him and his co-obligant Archibald Campbell, conjunctly and ſeverally: they both accept: they are therefore conjunctly and ſeverally liable; more eſpecially as the underwriting of a bill, in what form ſoever, is, by the cuſtom of merchants, held ſufficient to bind the underwriter. But although it ſhould appear, that in fact the defender meant not to be bound as co-obligant, and that in law he cannot be bound as cautioner, yet muſt he ſtill be liable. It appears from his own judicial acknowledgement, that he agreed to become cautioner for the ſum in the bill; and as he thereby induced the purſuer to rely on his ſecurity, and to ad-

vance the money, he will not in equity be permitted, under the pretext of legal nullities, to render his engagements ineffectual. No 11.

THE LORDS repelled the objections againſt payment of the bill.

Act. *J. Erſkine.* Alt. *A. Lookhart.* Clerk, *Gibſon.*

Fol. Dic. v. 3. *p.* 74. *Fac. Col. No* 93. *p.* 141.

1762. *February* 24. SCOUGAL *againſt* KER.

No 12.
The privilege of ſummary execution, and of barring compenſation, held to go together; the one being loſt, ſo muſt the other.

IN one particular a bill of exchange differs widely from a bond. Lent money is intended to remain with the borrower for his behoof, as well as that of the lender, till the one chuſe to pay, or the other to demand payment. The rule does not apply *quod dies interpellat pro homine;* for a term of payment is added not to bind the borrower to pay it at the day, but only to empower the lender to make a demand at any time after that day. The debtor is not *in mora* by not paying, until a demand be made by the creditor. But where a money tranſaction is eſtabliſhed by a bill, prompt payment is expected. In this caſe *dies interpellat pro homine.* The acceptor is not to wait for a demand, but ought to offer the money, at the term of payment, and a place is added where he is to offer the money. The whole ſteps neceſſary in negociating a bill, depend on the foregoing principle. Where a bill is drawn payable to a third party, it is incumbent upon that third party to preſent the bill for acceptance, at or before the term of payment, without which the money cannot be paid at the time. If the acceptor offer not the money at the term, or within the days of grace, it is in him a ſort of bankruptcy, which requires a proteſt by the porteur for not payment, and a notification by him to the drawer, of the diſhonour of the bill: And if any of theſe ſteps be neglected, the riſk of the acceptor's inſolvency is juſtly laid upon the porteur. From theſe premiſſes it follows, that if a bond be aſſigned to a creditor, it is underſtood to be in ſecurity only. The aſſignee who comes in place of the cedent, has the ſame privilege with the cedent to demand payment, or to continue the ſum upon intereſt. But the nature of a bill is not changed by being indorſed to a creditor; and therefore he is bound to the ſame ſtrict negotiation that a porteur is who purchaſes a bill with ready money. From the ſame premiſſes it follows, that a bill, before the term of payment, is conſidered as a bag of money, to paſs from hand to hand without obſtruction. But as the acceptor has broke his engagement, if he ſuffer the term of payment to elapſe without offering payment, a bill, after the term of payment, can no longer be conſidered as a bag of money. It degenerates into an ordinary ſecurity, reſembling a bond after the debtor has ſuffered a denunciation to paſs againſt him. No man will take ſuch a bill in expectation of prompt payment, more than an aſſignment of a bond; and therefore every exception competent in the one caſe, ought to be equally competent in the other. For this reaſon, againſt a bill of L. 16 Sterling, accepted as the price of cattle, and claimed upon by an indorſee, for value, 18 months after the