so, in the same way as after the three years, the constitution and subsistence of the debt are both the subject of the judicial transaction of reference.[1]

If the import of the oath is only, that the defender has, on account of something collateral, a defence against the debt, as compensation, the quality is not intrinsic; unless it was pars contractus originally that there should be such set-off.[2]

The debtor's bankruptcy does not make it incompetent for the claimant to refer the debt to his oath: For although at one time it was held, that the bankrupt was not competent to prove against his creditors on a reference by a claimant,[3] this doctrine is now confined to those cases in which the debtor's evidence is objectionable on account of relationship or interest.[4]

IV. Where the original debtor has died, a distinction may be admitted, according as the prescription has begun to run before the opening of the succession, or otherwise. Where the whole term of prescription runs during the heir's time, (as where the account was closed only by the ancestor's death), the oath of the heir negative of payment will establish resting owing.[5] But if the account was closed, and any part of the term has run during the ancestor's life, the heir's oath that *he* did not pay the debt, will not make out the pursuer's case.[6]

V. Minority is not pleadable in bar of the triennial prescription. It is a plea not available against any of the prescriptions, unless by force of statute; and it is not made an exception in the statute of triennial prescription, as in the Act 1669, 9. relative to the other prescriptions already taken notice of.

CHAPTER III.

OF UNILATERAL OBLIGATIONS.

UNILATERAL obligations and bonds are either simple in their object and form, as obligations to perform an act, or to grant or to deliver a deed, or not to do a particular act; or they are more complex, as bonds of annuity, and bonds of cautionry or suretiship. There is also a peculiar form of obligation, of the first importance in a commercial country, namely, by promissory-note or bill of exchange. These shall be considered in their order.

[1] 3. Ersk. 7. 18.; 4. Ersk. 2. § 11. and 13. See also the case of DOUGLAS against GRIERSON, 18th November 1794; Signet Coll. p. 97.

[2] Contrast these cases,—RANKIN against ADAIR, 29th June 1799, Fac. Coll.; BROWN against Dow, 23d December 1707, Forb. 211. where the oath resolved into compensation, or payment to a third party; with the following, where it was at the first agreed that there should be a compensation,—MAITLAND against BAILLIE, 8th February 1707, 2. Fount. 348.; FORBES against CRAIG's Creditors, 5th June 1711, 2. Fount. 643.

[3] MORTON against GILCHRIST, 10th February 1680; 2. Stair, 754. NAIRN against DRUMMOND, 25th November 1725; Kames' Rem. Dec. p. 120.

[4] BLAIR against BALFOUR, 9th July 1745; Kilk. 444. GRANT against GRANT of Carron's Creditors, December 1788; 4. Dict. 164.

[5] LESLIE against MOLISON, 15th November 1808; 15. Fac. Coll. 3. This was an action for a law-agent's account for defending an action brought against Molison's father, whom he represented, and in which, on his father's death, Molison appeared as a party, the account continuing with him. The defence was, belief of payment by the father, and triennial prescription. On reference, the defender said he believed his father to have paid all accounts due by him, but that he did not know. The Court held the law not to presume payment during the currency of an account, but only after its close; and this presumption they held in this case to be regulated by establishing that no payment had taken place since the death of Molison's father.

[6] See WILSON against RUTHERFORD, 7th February 1826; 4. Shaw and Dunlop, 427.

SECTION I.

BONDS AND OBLIGATIONS.

An obligation may be constituted either by a regular and formal bond, or by a less formal writing, engaging to pay money, or to do some act. But without dwelling on any anomalous form of engagement, the two classes of Money bonds, and Bonds ad facta præstanda, may here be considered.

I. Money Bonds.—Bonds for money are simple in form; the essential part being an engagement, absolutely or conditionally, at a day certain, or in a specified event, to pay a definite sum of money.

1. The demand under the bond, is for the principal sum in the bond, with interest, if the term of payment be past, at the rate of five per cent, or whatever may be fixed in the bond under that rate. If there is a bankruptcy and a necessity of claiming before the term of payment, the demand is for the principal sum, with an abatement of interest to the day of payment. The claim will lie for the whole amount of the bond, if granted by several persons bound jointly and severally; or severally; or in solidum; or as co-obligants and full debtors:[1] But if the granters are bound singly, or only jointly, each will be liable for his share only.[2]

2. The evidence necessary to support the claim, is the bond itself, either holograph, or formally subscribed and attested according to the statutes.[3]

3. The prescription pleadable against bonds, is the long negative prescription of forty years uninterrupted by minorities;[4] or, if the bond be holograph, and not attested by witnesses, the prescription of twenty years from the date which the bond bears.[5] The principle of the long prescription is different from that of the short prescriptions. It is not a presumption of payment, but a presumption of abandonment, not to be overcome, but available to the debtor as equivalent to a discharge. But the term of prescription may be interrupted, either by minorities; or by the methods appointed for that purpose—as a citation in an action, specially libelling on the debt, and renewed every seven years;[6] or a charge of horning; or diligence by arrestment, poinding, adjudication, or inhibition; or an acknowledgment of the debt; or a partial payment of it.[7]

Money bonds, in England, are conceived differently from ours. The Scottish bond is a simple obligation to pay the sum borrowed, &c. with interest. The English bond is an obligation to pay double the sum of the debt, with a condition, that if against a certain day the sum of the debt be paid, the bond is to be void. Under an English bond, the creditor cannot claim the penal sum to the effect of drawing a dividend amounting to the debt. The intention of conceiving the English bond in such terms, was merely to cover interest and costs; and a claim on such a bond in Scotland, just as it would be in England, is merely for the debt, with interest and expenses.

II. Bonds ad facta præstanda.—Bonds or obligations ad facta præstanda, may be taken alternatively: The obligation may be enforced by the personal diligence of imprisonment; or the claim of the creditor may be converted into money, either in terms of the bond, or by a judgment for damages. Wherever the act has become imprestable, as our

[1] Cleghorn against Yorkston, 26th December 1707; 2. Fount. 409.

[2] 3. Ersk. 3. 74.

[3] See above, p. 323.

[4] 1469, 29.; 1474, 55.

[5] 1669, 9.; 3. Ersk. 7. §. 26. Home against Donaldson, 19th January 1773; 6. Fac. Coll. 122. See above, p. 229.

[6] 1669, c. 16.

[7] 3. Ersk. 7. 38. et seq.

law terms it, *i. e.* incapable of performance, the maxim applies, ' in loco facti imprestabilis ' subsit damnum et interesse.' A claim of damages is substituted in room of performance.

Upon such bonds or agreements, a claim, in bankruptcy, can properly be made only where the demand is capable of being instantly and certainly ascertained, so that the creditor can swear to the amount. Thus, if the agreement has been to deliver goods at a particular time, the damage is the amount of the loss suffered by the person to whom the engagement was undertaken; and *that* may be ascertained and sworn to. So, where the bond is to present a debtor, for the purpose of personal diligence by caption being executed against him; the damage is the amount of the debt, which may at once be claimed on affidavit. But, in many cases, the claim of damages, even under a covenant, arises out of so many considerations, that its amount cannot thus be ascertained, but must be fixed either by a court of law, with the aid of a jury, or by arbitration.

In bonds and covenants of this description, however, there sometimes is the reservation of a sum or penalty, (expressed alternatively with the act to be performed or abstained from), to be paid failing the performance of the act. In these cases distinctions have been admitted. The sum expressed is not always to be allowed to rank.

1. Where the spirit of the obligation is, that the engagement to perform, or abstain from a particular act, is, at all events, to be enforced; and the sum is added in order to compel implement; the creditor is entitled to the protection of an interdict, or the remedy of personal execution, to compel performance or prevent encroachment.

2. If the thing to be prevented or enforced has been done, or has become imprestable, the penalty is in equity restricted to the damage; which, as it forms the true debt, must be proved.

3. Where the agreement is cast in another form, an alternative being stipulated, not in the nature of a penalty, but permissively, or as estimated damage; the sum appears not to be subject to modification in either case; while, in the former, the party on whom the obligation to performance or payment is incumbent, may make his election to pay instead of performing.[1] It will, however, be observed, that no such election can be given to a bankrupt; who would thus fraudulently confer on his creditors a right, by the very conception of the contract, more valuable than the dividend which would be drawn on the alternative obligation for money. Nor can the creditors make such election, without paying in full, out of the estate, the whole amount of the alternative obligation.

SECTION II.

OF BONDS OF ANNUITY, AND OTHER CONTINGENT DEBTS.

A BOND of annuity has sometimes been considered as an obligation for a sum of money payable by instalments. But this is incorrect. It is a contract, in which the obligor engages to make to the obligee a certain yearly payment, in consideration of a

[1] Such questions have occurred chiefly in regard to leases, and the difficulty has been, to distinguish between these two several sorts of agreements; for it has been attempted to avoid the difficulties of ascertaining damage by stipulating an alternative rent, without the least intention of giving permission to the tenant to commit waste on the farm. A principle of equity has also had great influence in such cases, viz. that a tenant might, perhaps, reserve his option to the last years of the lease, when the injury by following a bad course of cultivation could not be repaid by the increased rent. See the cases of GRAHAM of Balgowan against STRAITON, in House of Lords, 11th May 1789; 16. Fac. Coll. 423. Note. Sir A. M. M'KENZIE against CRAIGIE, 18th June 1811; Ibid. 304. Hon. J. S. W. M'KENZIE against GILCHRIST, 13th December 1811; Ibid. 419. FRAZER against EWART, 25th February 1813; 17. Fac. Coll. 223.

sum or price deemed adequate at the time; or intending to settle on the annuitant, for family purposes, or from favour, as a permanent aliment.

Annuities are of two descriptions:—1*st*, For a fixed duration of time, or term of years certain, called an ANNUITY CERTAIN; or, 2*dly*, For an uncertain duration of time, generally depending on the issue of human life, and hence called ANNUITY ON LIVES.

1. With regard to annuities certain, the commencement and termination being fixed and ascertained, the claim for the annuity, in case of bankruptcy, is not very different from the claim for another debt, of which the term of payment is not yet come. In order to ascertain the extent or value of the debt at any given time, it is necessary only to make allowance for the legal interest during the currency of the annuity: And the term of years and rate of interest (five per cent) being given, the value of the annuity can easily be found by having recourse to tables calculated for the purpose.[1] In cases of bankruptcy, the value so found, as at the period of the bankruptcy, measures the claim of the creditor.

2. Where the annuity is of uncertain duration, it is not so easy a matter to ascertain the extent of the claim. Here, either the termination or the commencement of the annuity, or perhaps both, are uncertain, and depend upon particular events or contingencies. The most ordinary circumstances which regulate the duration of annuities, are those involved in the duration and termination of human life. An annuity may, according to the terms of the contract, exist during the life either of the granter, or of the grantee, or of any third party; or during the joint continuance of any number of lives; or during the longest of any number of lives: And it may either commence from the date of the grant, or from a more distant period; or it may depend upon the contingency of survivorship, and only commence after the extinction of one or more given life or lives; or it may depend upon a certain order of survivorship, where different lives are concerned; or upon a variety of other combinations, in which a number of lives may exist together, or in succession one after another. In all these cases, and in every case where the payment of a sum or sums of money depends upon contingent events, which may either happen or not happen; or where a sum of money is payable upon a certain event, of which, though the event itself is certain, the time is uncertain; it is impossible to state the precise amount of the claim as at the period of bankruptcy; and it is difficult to say what the contingent creditor, in competition with other creditors, whose claims are of a definite nature, ought to draw out of the common fund. Indeed, the difficulty respecting this matter had appeared so great, that, in England, it probably, in some measure, gave rise to the rule by which contingent debts were altogether excluded from any participation in the bankrupt estate; and accordingly, although in that country annuities for a term certain might at all times, like other future debts, be proved in bankruptcy;[2] and although, in the case of annuities for lives, a sort of equitable relief was given, by permitting the penalty to be taken as the debt, wherever by being in arrear the penalty was forfeited; and by allowing a value to be set on the annuity, in order to redeem the forfeiture;[3] yet annuitants were, as contingent creditors, strictly speaking, excluded from all claim in bankruptcy, until Sir Samuel Romilly's Act of 49. Geo. III. c. 121.; which by § 17. provided, that the creditors in such annuities shall be allowed to prove under a commission of bankruptcy, as creditors for the value of such annuity, to be ascertained by the commissioners; and by the new Bankrupt Act of England this provision is continued, and a method laid down for valuing the annuity.[4] In Scotland,

[1] Price's Observations, 6th edit. vol. ii. table 2. p. 268.

[2] PATTISON against BANKS, Cowp. 540.

[3] Cullen's Bankrupt Law, 92. Eden on Bankrupt Law, 114.

[4] 6. Geo. IV. c. 16. § 54.

annuity creditors never had this difficulty to struggle with; contingent creditors being entitled, at common law, to claim as well as future creditors.[1] A creditor in an annuity is held entitled to adjudge heritable property sufficient to answer the annuity; and it has also been found, that if he can discover a fund of lying money sufficient to cover his annuity, he is entitled to arrest it;[2] and, on the same principle, he is also entitled to claim, as a creditor in bankruptcy, to have a rateable share of the bankrupt's funds assigned to him, corresponding to the annuity.

The rule of law, according to which the annuitant is entitled to bring his action, to do diligence, or to rank upon the bankrupt estate of his debtor, is this:—He is entitled to claim a capital sum corresponding to the annuity; that is, such a capital as would produce an annual interest equal to the annuity; and to have that sum secured by his diligence, or to have, in bankruptcy, a dividend corresponding to this capital laid out, and the interest accruing thereon paid to him for the time during which the annuity is payable, in terms of his ground of debt. At the termination of this period, the capital is again paid, or, in bankruptcy, the dividend becomes the property of the creditors at large, and forms a fund of division among them. In this way, the annuitant is correctly secured in the annual sums to which he is entitled; or in bankruptcy is put precisely upon an equal footing with other creditors; drawing a share of the fund exactly in proportion to his debt, and suffering a proportional loss. Thus, suppose a man is creditor for an annuity of L.50 during his life, he may bring an action for securing the capital of L.1000, or whatever will cover the interest, and thereupon adjudge or arrest: Or if the debtor is bankrupt, and the estate pays 10s. per pound, and the reserved fund bears interest at five per cent; then he is entitled to have L.1000 ranked as a capital corresponding to the annuity; for that is the sum which, if lent out at five per cent, would produce an interest equal to the given annuity. The dividend corresponding to this sum is L.500, and the interest drawn by the annuitant during his life will be L.25 per annum; so that he will just draw one-half of his debt, in the same way that the other creditors draw one-half of their debts. If the reserved fund bears interest at four per cent, the capital to be ranked as corresponding to the given annuity will be L.1250. It seems to follow, as a corollary from the principles upon which this mode of ranking is founded, that the annuitant, or his representatives, should, upon the division of the capital of the reserved dividend, be entitled to a share thereof, in proportion to the amount of the arrears of his annuity remaining unpaid at the time of such division, in computation with the debts then remaining due to the other creditors.

The same legal rules hold with regard to the diligence competent on the ranking of every other contingent debt.[3] Suppose, for instance, a creditor, A, holds an obligation for a provision of L.1000, payable at the death of B, the bankrupt,—here A is entitled to raise an action for that sum, for the purpose of doing diligence in security; or he is entitled to have the principal sum ranked in case of bankruptcy, and a dividend set apart corresponding thereto; the dividend to be reserved until the death of B, when it becomes payable to A, or his heirs; the interest, in the mean time, being reserved for the debtor, or in bankruptcy thrown into the common fund of division among the creditors. Or, again, suppose L.1000 is payable to A upon the death of B, *in the event of A being then in life*,—here A is, in like manner, entitled to be secured, or in bankruptcy ranked for the principal sum, and the dividend becomes payable to him at the death of B, in the event of his survivorship; the interest, in the mean time, being reserved to the debtor, or thrown into the common fund: and in this case, if the provision should lapse by the predecease

[1] See above, p.315.

[2] For an explanation of the principle on which this proceeds, see the case of M'Donald and Elder against M'Leod, 15th January 1811; 16. Fac. Coll. 116.

[3] See 54. Geo. III. c. 137. § 48.

of the contingent creditor, not only the interest, but the capital, of the reserved dividend becomes available to the debtor or the other creditors.

Such are the legal rules to be followed in actions and diligence for security of annuities, and which are still very frequently adopted with regard to the claims of life-annuitants, and other contingent creditors in bankruptcy. Indeed, until of late years, these rules were almost universally followed in cases of bankruptcy, particularly in processes of ranking and sale of heritable estates. But since the doctrine of the valuation of annuities and reversions, elucidated by Dr Price and other writers on that subject, has come to be understood and acted upon in this country, practice has introduced another and more convenient mode of ranking annuities and contingent debts. By the former practice, the final division of the bankrupt estate was necessarily delayed till the termination of the annuity, or the emergence of the given contingency; or else, to avoid the delay thereby occasioned, the trustee was obliged to sell the reversion of the reserved dividend, perhaps at a great loss to the estate. To get free from these inconveniencies, the method now adopted is, instead of ranking the creditor for a capital corresponding to the annuity, or for the contingent capital, as has been explained; to put a value upon the annuity, or contingent debt, as at the period of division, taking into account the interest of money and the chances of life, or other circumstances, involved in the nature of the question: the creditor is ranked for this value in full of his claim, and is entitled to draw the dividend corresponding to it. In this way, the affairs of the bankruptcy may be instantly brought to a close. On this principle, the legislature has introduced into the Bankrupt Statute a clause,[1] authorizing the trustee, on behalf of the creditors at large, with consent of a majority of the commissioners, to compound and transact, either by submission or private compromise, all doubtful claims, &c. 'and all contingent debts and 'annuities due to or by the estate, the value of which it may be expedient to settle in 'that manner, in order that a final distribution may sooner take place.' It is to be observed here, that there is no power given to the trustee and commissioners, (as in England under Sir Samuel Romilly's Act), absolutely to put a value on the annuities and contingent claims, without the consent of the contingent creditors; neither is there any right vested in the creditor, according to which he can insist on his being ranked for the value of the annuity, and draw the whole dividend. The legal rules of ranking are left as before, and the valuation of the claim is a mere matter of arrangement between the contingent creditor on the one hand, and the trustee for the creditors at large on the other. If they cannot agree upon the value, or if either of them decline to enter into a compromise upon the subject, the legal rules must take effect.

The expediency of this mode of ranking, however, is so obvious, as to make it desirable that some tables were generally adopted as furnishing a practical rule, according to which annuities and contingent claims might be valued in all cases where no particular circumstances occur to render a deviation from the ordinary standard necessary.[2] In the deliberations which many years ago took place in the committees for improving the bankrupt law, that matter was much discussed; and it was proposed that a settled rule should be adopted for valuing all annuities, according to the tables annexed to the Act of the 36. Geo. III. c. 52.[3] But this was afterwards abandoned, and the value left to be fixed without the aid of any special provision. And it must be acknowledged to be very

[1] Stat. 54. Geo. III. c. 137. § 55.

[2] It might be of advantage to adopt some universal standard of this kind, without regard to particular circumstances, as a mode of valuing the claims of contingent creditors, in so far as they are entitled to a vote in the affairs of the bankruptcy.

[3] The proposed clause ran thus:—'That in the 'case of life-annuities payable by the bankrupt, or 'charged upon his estate, the trustee shall, instead of 'the procedure directed for ascertaining the value of 'contingent claims, be bound, in fixing the sum for 'which the holders of such annuities shall be ranked 'or allowed to vote, to adopt the rules of valuation

difficult to find any general rule which can uniformly be followed, according to which the value of a life-annuity is to be settled. It is a question depending on very nice and difficult data, and with regard to which the methods commonly adopted are almost as various as the persons by whom it is to be ascertained.[1]

' laid down in the tables of the value of annuities on ' single or joint lives, annexed to an Act passed in the ' 36th year of his present Majesty, c. 52. entitled, ' " An Act for repealing certain duties on legacies and ' shares of personal estate, and granting other duties ' in certain cases." '

[1] The difficulties which I found in this matter, on the occasion just alluded to, and the doubts which so often occur in practice respecting questions of this sort, made me desirous to have the aid of one of those profound and able accountants, to whom such matters are generally referred in the Court of Session. The opinion which I received was, That if the value of an annuity were referred to him, he would ascertain it according to the rate corresponding to the given age as appearing on the tables calculated by Dr Price, (Price's Observations, vol. ii. 6th edition; Table 19. for Single Lives, and Table 20, &c. for Joint Lives, at five per cent), of the value of life annuities, deduced from the bills of mortality at Northampton; and assuming interest at five per cent, without regard to any other circumstance whatever, either as to the state of health, or to the price originally paid. And this opinion proceeded on these grounds:—1. As to the rate of interest; because five per cent is the legal rate which regulates the claims of all the other creditors: 2. As to the chances of life; because the Northampton table is the rule by which all the Life Insurance societies regulate transactions of this nature, and is generally adopted also in questions between private individuals: And, 3. As to extraneous circumstances; if the given life is in good health, then the result must be considered as the fair value of the annuity. If the person is in bad health, the value of the annuity is, no doubt, less; but there is no rule by which the difference can be calculated. On the English case of Thistlewood, 1. Rose's Cases, 290. he observed, ' That ' the value put by Mr Morgan upon the annuity which ' formed the subject of the case alluded to, had been ' calculated according to the table above-mentioned; ' but it was a great mistake in the parties in that case ' to call it the *market price*, if by that term they meant ' the price which such annuity would have brought in ' the market if exposed to sale. In all probability, it ' would not have brought near so much; because no- ' body who sinks his capital to be drawn back upon a ' contingency, would be content with merely a return ' of *five* per cent, independent of the chances of life, ' which are equally for and against him. It was incor- ' rect to call it the *market price*. It should rather be ' called the *standard value*, or the *fair* or *equitable* ' *value*; the value, as it should be settled between two ' parties who are *in pari casu*, and are to settle upon ' fair and equitable terms; and upon that principle I ' think the decision was right.

' A life annuity, considered as a subject of sale, is ' susceptible of two different market prices, according ' as it is the purchaser or seller of the annuity that ' goes to market. If a man possessed of an annuity on ' his own life, or any other life, *wishes to sell it*, he ' must be content to accept of a great deal less than ' the full value; and the quantum of price at different ' periods depends upon the state of the money market. ' In general, a man who lays out his money on the pur- ' chase of annuities, demands, in the first place, as ' much as will insure the capital sum to be paid at the ' expiration of the given life; and, in the next place, ' an annual sum higher than the legal rate, sometimes ' eight, ten, or twelve per cent; at present, the market ' rate is considered seven, or even somewhat less. It ' is the difference between the legal rate of interest, ' and the higher rate demanded, that creates the differ- ' ence between the market price and the fair value of ' the annuity. On the other hand, if a man *wishes to* ' *purchase* an annuity *on his own life*, and goes to the ' market, the money dealer will demand from him a ' great deal more than the fair value. The tables, ' according to which the insurance societies in Lon- ' don regulate the annuities granted by them, are cal- ' culated at *three* per cent interest; that is to say, ' *the purchaser* of the annuity gets his money returned, ' making allowance for the chances of life, with in- ' terest only at *three* per cent; while the person who ' is forced by circumstances to sell his annuity, must ' be content to accept of such a price as will make a ' return to the money-dealer of *seven* per cent, exclu- ' sive of casualties. Upon these principles, a person, ' at the age of 34, *selling* an annuity to which he had ' right, would get about 10 years' purchase, suppos- ' ing the purchaser to be content with between seven ' and eight per cent for his money; and a person *pur-* ' *chasing* an annuity on his life, would, according to ' the three per cent table, have to pay about 16 years' ' purchase. These are the two market prices; and it ' will be observed, they depend upon the circumstan- ' ces and necessities of the party going to market. ' But in the case of bankruptcy, where the conversion ' of the annuity into a capital sum is a matter of ar- ' rangement *forced upon both parties* by circumstances ' not within their control, it would not be fair to take ' either of these values as the criterion. The fair ' value ought to be estimated according to the *five* ' per cent table, the legal rate of interest which regu- ' lates all transactions in money not arising *ex pacto;* ' and, according to this table, it will be found, that an ' annuity on a life of 34 is worth 12·623 years' pur- ' chase; so that an annuity of L. 800 is worth a trifle ' more than L. 10,000. This is the rule which, I be- ' lieve, is, for the most part, adopted in ranking an- ' nuities, as being the most convenient for all parties. ' There may be cases, however, where the annuitant

But if the parties cannot come to an agreement upon the subject, they must resort to the legal mode of ranking. That mode has already been explained; but it has been held by many persons, whose opinions are not to be treated lightly, that the above is not the only legal mode of ranking an annuity. It has been said, that as the sum for which each creditor is entitled to be ranked on the bankrupt estate of his debtor, is the sum which that debtor, if solvent, would be obliged to pay for a discharge; so an annuity creditor, whose debtor is bankrupt, is not to be regarded as spontaneously going to *market* to sell his annuity, which he has no desire to do; but rather as one who is called on to sell the annuity to the *debtor*, and who may seem to be dealt with differently from the other creditors, if he is forced to rank for a sum less than that at which he could be forced to part with his annuity, if the debtor had stipulated a power to redeem it. But in this opinion there seem to be two misconceptions.

(1.) It seems not only to be contradicted by the clause already referred to in the Bankrupt Act, but to be contrary to the annuitant's right at law; which entitles him to claim only for the interest of the equivalent capital during his life, while the trustee is not entitled to force him, instead of this, to accept of a dividend corresponding to any supposed value of the annuity. If any changes on the common law upon this point were to be made, it would seem most expedient, as well as just, that it should be left to the trustee to put a value upon the contingent claim, and with a power to the creditor to object, and to have the value ascertained, as in a question of damages. Were any attempt made to fix a standard value, without having regard to the price paid, or other circumstances, it might give rise to great frauds, and be the means of creating undue preferences. The raising of money by the sale of annuities is now becoming more common; and if there were no power reserved to the trustee and commissioners to inquire into the circumstances attending the creation of annuities of this description, but if, on the contrary, they were bound to value them according to a fixed standard, the bankrupt might, by giving an annuity equal in value to two or three times the amount of the money received for it, create an undue advantage in favour of the person who advanced the money upon such a transaction, to the prejudice of his other creditors. Thus, suppose that a person should a year or two before his failure raise L.10,000 upon the sale of an annuity on his own life, and instead of an annuity of L.1000, the fair equivalent at the time, should give an annuity of L.2000; would it be fair or proper to rank this creditor a year or two afterwards for L.20,000, (or say L.19,000, making allowance for the difference of the age), as the standard value at the time of bankruptcy, without making any inquiry into the state of the health of the granter at the time of sale, or other circumstances which might have induced him to grant him so large an annuity in proportion to the price paid? In this way, an annuity creditor might receive a great deal more than 20s. a-pound of the money advanced by him. It is no doubt true, that every person who advances money for the purchase of an annuity runs a risk of loss, and it is this which takes it out of the case of an usurious contract; but still the advantage stipulated may be so disproportionate to the risk, as to render it unadvisable to remove any checks that might be imposed upon this sort of contract, by allowing the circumstances of each case to be considered.

(2.) As to the right of the annuity creditor to have the value of the annuity ascertained at such a sum as would be required to purchase him an equal annuity in the market, there seems to be room for a distinction of cases where the annuity is on the life of the granter,

' would prefer to have a diminished annuity during his ' life; and in that case I apprehend he is entitled to ' have a capital corresponding to the annuity ranked; ' and, if so, the trustee may either delay the final di- ' vision until the death of the annuitant, or sell and ' divide the reversion immediately.'

or on that of the grantee, or another. In all cases where the annuity is upon the life of the *grantee*, and is *properly alimentary*, there is a peculiar hardship in forcing the annuitant to accept of an equivalent; and it seems to be highly equitable to consider him as entitled to be ranked for such a sum as would purchase the annuity in the market. But where the annuity is upon the life of *the granter*, or any other life than that of the grantee, and the transaction may be regarded rather as *an investiture of money* than as alimentary provision, it would seem that the conversion should be according to the medium standard, which (supposing that there are no particular circumstances in the case, and that the sale of the annuity was made *bona fide*) is the value of an annuity calculated according to the ordinary chance of life, assuming interest at five per cent. This is neither the market price for purchasers nor for sellers of annuities, but lies somewhere between them. If an annuity were purchased for the annuitant from any of the offices in London, it would be calculated by the *three* per cent table, and, consequently, cost a great deal more than the standard value. If it would not be equitable, on the one hand, to value the annuity at the price which it would sell for, *if offered for sale*, which would be less than the standard value; neither, on the other hand, would it be equitable, *in a competition with creditors*, to value it at the price that would be required *to purchase an equal annuity* from any of the offices who make it part of their business to grant annuities, and which would require more than the standard value. The creditors are all in the same unfortunate situation, and each should suffer a proportional defalcation of his debt. The debt due to the annuitant is a certain number of annual payments equal to the number of years between the age of the annuitant and the ultimate period of human life, each payment depending upon the annuitant surviving the terms at which that payment would become due; and the present value of the whole annuity is the aggregate amount of these payments severally multiplied by the chances of arriving at the respective terms, and discounting compound interest at five per cent. It is according to this rule that the tables of the values of annuities have been calculated, and so these five per cent tables seem justly to form the general standard or criterion for valuing annuities of the description last mentioned in cases of bankruptcy.[1]

In England, the same difficulties have been felt, and much discussion and inquiry has taken place, with a view to settle some certain rule on the subject.[2] In the last decision, quoted

[1] The gentleman to whom I formerly alluded, put this case by way of illustrating the point:—Suppose that a person possessed of an office for life, in want of money, goes to the Royal Exchange Insurance Office to raise a sum of money upon an annuity of L.1000 on his own life. Suppose him to be 30 years of age, they will probably give him no more than 10 years' purchase, that is, L.10,000, which, taking the chances of life upon an average, would make them a return of seven per cent. After two years, the seller of the annuity fails, and his life interest and all his property is brought to sale, and the Office claims as creditor for the annuity. Now, let it be supposed that the creditors were entitled to rank for the maximum price, that is, such as it would require to purchase him an annuity from another office, and the trustee goes to the Westminster Office, and inquires, what would they sell such an annuity for? They would look their three per cent table, and tell him they could not give it for less than 16 years' purchase. Would it be equitable in this case to rank the creditor for L.16,000; that is, L.6,000 more than had been paid for the annuity two years before? If the life was insurable at the time of sale, it is evident that, by the lapse of two years, it must be of less value than before, instead of greater; for the values of life interests are constantly diminishing by the lapse of years. It may be said, indeed, that even taking the value according to what may be considered as the standard, viz. the five per cent table, the sum to be ranked as the debt will amount in the case supposed to considerably more than the original price of the annuity. This is true: it will amount to near L.13,000, that is, about 13 years' purchase. Still, however, this is no objection to the adopting of that standard as the value; because, upon the principles before stated, in making the valuation, you are not to look to the price that was paid, unless there were some *mala fides* in the transaction; neither are you to look to the price that would be required to purchase the annuity, nor to the price at which it would sell, but to the convertible value; that is, you are to convert it into a principal sum, by assuming the ordinary chances of life, and the *legal* rate of interest, as the basis of the calculation.

[2] Ex parte THISTLEWOOD, 19. Ves. 236.; 1. Rose, 298. Ex parte WHITAKER, 1. Rose, 301. Ex parte WHITEHEAD, 1. Merivale, 10. 127.

below, Lord Chancellor Eldon made very extensive inquiries concerning the principles and methods of valuing such annuities. And he came to this conclusion: 'Upon the best 'consideration which I have been able to give to this question, which is of considerable 'importance, the conclusion at which I have arrived is, that as there are not any peculiar 'circumstances in this case to affect the price, as it is altered by the effluxion of time, and 'only by the effluxion of time, I ought to presume that the parties acted fairly at the 'time when the contract was made, and that the value of the annuity is the original sum 'given, with the variation occasioned by the lapse of time since the grant.' And this rule has been adopted by the legislature, in the new Bankrupt Act for England; the provision of the 54th section being, 'That any annuity creditor of any bankrupt, by whatever 'assurance the same be secured, and whether there were or not any arrears of such 'annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity; 'which value the commissioners shall ascertain, regard being had to the original price 'given for the said annuity, deducting therefrom such diminution in the value thereof, as 'shall have been caused by the lapse of time since the grant thereof to the date of the 'commission.'

Redeemable Bond of Annuity.—Redeemable annuities have of late years become of unusual importance. The great demand for money, and the low rate of interest allowed by law, compared with the profits to be made in the mercantile employment of capital, led to loans on redeemable annuity.

This transaction is a complicated one: ostensibly a purchase of a redeemable annuity on a certain life, with security for payment of it; really a contract by which the lender or his heir is secured in a high interest, and in a return of the capital on the expiration of the life. The bond contains, 1. An acknowledgment of the receipt of the money as the price of an annuity. 2. An obligation to pay to the person advancing such purchase-money a certain annuity during the life selected, and the not-redemption by the grantee. 3. In security of this annuity, caution is given; or more commonly, lands are conveyed, with procuratory and precept for infefting the lender, under a declaration, on the one hand, that the right shall be redeemable, at the option of the borrower only, and, on the other, that the conveyance and obligation shall become void and ineffectual on the termination of the selected life. 4. The annuity is made large enough to cover both the high interest required by the lender, and a premium of insurance of the selected life, by which the lender may, if he please, secure himself and his heirs absolutely, on the death, in payment of the sum advanced. This is a most oppressive sort of security; but there do not appear to be grounds in law for refusing effect to it. The objection naturally occurring against such a transaction lies on the statute of usury; and the words of the statute of Queen Anne[1] are very broad and comprehensive, extending to all persons who shall take or accept, 'by 'corrupt bargain, loan, exchange, chevizance, &c. or by any deceitful way or means, 'or by any cover, engine, or deceitful contrivance, for the forbearance or giving day of 'payment for one whole year, of money, &c. above the sum of L. 5, for the forbearance 'of L. 100 for a year,' &c. But there are no words directly applying to a contract of this special nature. It is an annuity during the selected life; redeemable by the borrower; and the danger of the death without redemption, relieves from the legal imputation of usury.[2] This is a risk, indeed, against which provision may be made by insurance; but that insurance being an act of the creditor alone, and not stipulated to be done by the debtor, it is collateral to the contract, as the insurance of bottomry would be. The policy is exclusively the creditor's; and where he chooses to sell that

[1] 12. Anne; Stair, 2. c. 16. See above, p. 308.

[2] In Glen against Pearson, 6th March 1817, such a transaction, though exceedingly harsh and oppressive, held not to be usurious; 19. Fac. Coll. 317.

policy, the debtor is not, in redeeming the annuity, entitled to credit for the price received for it.[1]

In all these annuity transactions, unless the parties look a great deal farther, and provide more cautiously than is commonly done, the creditor may, in bankruptcy, be very much disappointed. He can rank on his security only for the annuity proportioned to the life: And supposing that life to be the borrower's, and the rate to have been calculated so as to cover the price at whatever time the insolvency may happen, the debtor may fall into disease, which may make his life not worth two years' purchase, and yet he may outlive his bankruptcy many years; whereby the creditor must suffer the loss of his annuity and advance of his premium for a considerable time. It may be questioned in such cases, What deduction is in equity to be made in admitting the claim for the term that has passed since the original purchase? it being unreasonable to allow, after the elapse of years, the full original value of the annuity, as settled between the parties.[2]

As to the claim to be made on the insolvency of the granter of a redeemable annuity, the question is, Whether the *redemption money* is to be taken as the measure of the *value of the annuity?* It seems to be clear, that the redemption money ought not to be taken as the criterion. It may be either more or less than the convertible or standard value. If it is *less* than the value, the annuity creditor seems to be entitled to claim for the full value of his debt, while the trustee for the creditors at large is not entitled to take the benefit of a condition in the constitution of the debt, unless he implement that condition by making full payment of the redemption money. He must either, therefore, rank the annuity creditor in such a manner as to allow him to draw a rateable *annual* dividend; or rank him for the full value of his debt; or pay him the full amount of the redemption money. On the other hand, if the redemption money is *greater* than the standard value, the trustee seems to be entitled to deny to the annuity creditor a right to rank for more than the full value of his debt. The clause of redemption was optional to the borrower; and therefore can never operate in favour of the lender, unless the borrower, or those coming in his right, choose to act upon it.[3]

When the annuity is irredeemable, the creditor is not, on bankruptcy, bound to take the original purchase-money. He may exercise the option of remaining a creditor for his annuity, with such security as he may hold over the debtor's land.[4]

[1] LYON against M'KLEW, 2d June 1821; 1. Shaw and Bal. 47. A redeemable bond of annuity of L.321 was granted for L.2200, no mention being made of insurance in the deed of annuity. The creditor insured the granter's life, and afterwards sold the policy to the insurance office. In redeeming the annuity, the debtor insisted on deduction or allowance of the price so obtained. But he was found not entitled to it.

[2] See the case of LE COMPT, 1. Atk. 251. where, in the year 1720, the claimant had for L.300 bought an annuity of L.30; and in making claim in 1738 for the value of the annuity against a bankrupt, the whole L.300 was claimed. Lord Hardwicke referred it to the commissioners to settle the value of the life, holding it unreasonable that the claimant should claim the full purchase-money after enjoying the annuity for eighteen years.

[3] In a late publication on the subject of annuities, reversions, &c. will be found rules for solving all varieties of questions relative to annuities, contingent and reversionary interests. 'The Doctrine of Life 'Annuities and Assurances analytically investigated 'and practically explained, by Francis Baily,' 2 vols. 8vo.

[4] HAMILTON against ROGER, 22d May 1823; 2. Shaw and Dunlop, 325.

SECTION III.

OF JOINT AND SEVERAL OBLIGATIONS.

WHERE more than one are joined in the obligation, it is important to mark the terms of the engagement and the particular species of the contract, as materially affecting the nature of the obligation to the creditor, and the reciprocal responsibilities of the co-obligants to each other.

I. EXPRESS TERMS OF THE BOND.—The bond is differently expressed, where the intention is to bind each party for the whole, and where it is designed to make the obligation only pro rata. The general rule is, that an obligation in solidum is not to be presumed; and that, in order to produce that effect, the bond must bear an engagement beyond the rateable proportion of the debt.

1. Where co-obligants are bound 'jointly and severally,' they are each liable for the whole, and may either be called upon to pay jointly, or any one may be singled out for the demand, leaving him to find his own relief.[1]

2. Where the co-obligants are bound each severally, 'as co-principal and full debtor,' each is bound for the whole, although in such cases it has sometimes been argued that the omission of the words conjunctly and severally imports a restriction of the obligation.[2]

3. The term 'jointly or conjunctly,' may, in strict propriety of language, import an obligation undertaken, not separately, but each to perform his part; the converse of an obligation by each severally: But the construction put on it in law has been different; it is held to be an obligation in which each is bound for the whole.[3]

4. Where parties are bound simply, the obligation is held to be only pro rata; each being liable for his own share, not in solidum for the whole.[4] But where the bond bears the money to be for the use of one of the parties, the rest are held to be cautioners, and liable for the whole.[5]

5. Where each is bound 'for his own share,' it is by force of the express words an obligation pro rata only. So where each subscribes a specific sum, as underwriters in a policy of insurance, or co-obligants with a public officer, trustee, &c.

II. IMPLIED OBLIGATION.—To the general rule, and even to the effect of particular expressions, there are exceptions arising from the special nature of the transaction, or connexion of the parties, or from usage. And,

1. Where the subject of the obligation is indivisible, the parties are bound in solidum.[6]

[1] 3. Ersk. 3. § 74.

[2] CLOVERHILL against LADYLANDS, 26th January 1631; Durie, 559. Here the parties were not bound conjunctly and severally, but as full debtors to pay the sum to the creditor.

DUNBAR against Earl of DUNDEE, July 1665; Gilm. 114.

CLEGHORN against YORSTON, 26th December 1707; Forb. 212.; 2. Fount. 409.

[3] M'MILLAN against SLOAN, 5th February 1751; Elch. voce Sol. and Pro rata, No. 1. Notes, 431. This was an engagement for a bargain of sheep, M'Millan engaging to become bound 'conjunctly.' The decision proceeded partly on the nature of the bargain, as pro indiviso; but also 'unanimously we found him 'liable in solidum, which is the common acceptation 'among the commons of the word conjunctly.' See also M'KELLAR against CAMPBELL, 7th June 1811; 16. Fac. Coll. 272.

[4] 3. Ersk. 3. § 74. It is otherwise in England, on the ground that, by uniting, the parties show their intention to bind for the whole.

[5] GRANT against STRACHAN, 6th July 1721; Rem. Dec. 57.

[6] GRANT against SUTHERLAND, 14th June 1672;

But where the principal obligation becomes imprestable, and resolves into pecuniary damages, the expression of the obligation will give the rule.[1]

2. Where the obligants are partners, or joint adventurers, or even joint purchasers, the obligation is held to be in solidum.[2]

3. Where, in an obligation ex mandato, the parties have a joint interest in the employment which forms the object of the contract,[3] unless where there is an express limitation of responsibility, the parties are bound in solidum.[4]

4. By the usage of trade, bills and promissory-notes are held to infer a joint and several obligation.[5]

III. Effect among the Co-obligants of joint or several Obligations.—The reciprocal obligations of co-obligants, raise questions of relief between the co-obligants. Relief is the indemnification that a co-obligant, paying more than his share, is entitled to demand from those who are bound along with him. The rules are these :—

1. Where each is bound only pro rata, and pays his own share and no more, he has no claim of relief against the other obligants. But if he should pay more than his own share, he is entitled to an assignation from the creditor, under which he may recover what he has paid beyond his own share.

2. A person bound jointly may insist on all the co-obligants being called; and if any be insolvent, the solvent obligants divide the responsibility.

3. If the co-obligants be bound jointly and severally, any one may be taken for the whole debt. But if truly a cautioner, such person is entitled to an assignation to recover the whole from the principal, and their proportions from the co-obligants.[6]

SECTION IV.

OF CAUTIONARY OBLIGATIONS.

Cautionary obligations are granted, by way of security, for the fulfilment or performance of primary or principal engagements. They are classed as accessory obligations. They correspond with Suretiship in English jurisprudence; and the principles which

Dirl. 68. Here the action was grounded on a contract of carriage of goods, which, though not absolutely indivisible, is so by the usage of trade.

[1] Urie against Cheyne, 20th January 1630; Durie, 482.; Spottis. 66.

[2] Mushet against Harvey, 16th December 1710; Forb. 452.; 3. Ersk. 3. § 74.

[3] Anderson against Sinclair, February 1726; 2. Dict. 385.
Chalmers against Ogilvy, February 1730; Ibid.
French against E. of Galloway, 21st November 1730; Ibid.
Walker against Brown, 23d November 1803, 13. Fac. Coll. 271. where a meeting of distillers employed an agent.
Wilson against Sir W. Honeyman, 10th July 1813; 17. Fac. Coll. 437. One of the parties in a division of commonty held liable in solidum for the expense of a survey.
Wilson against Magistrates of Dunfermline, 17th May 1822; 1. Shaw and Bal. 417.
Ellis against Connel, 26th June 1822; 1. Shaw and Bal. 528.

[4] Murdoch against Hunter, 15th February 1815; 18. Fac. Coll. 216. Here the obligation was to pay expenses according to the amount of the respective debts; held liable only pro rata, not in solidum.

[5] M'Morland against Maxwell, 29th January 1675; Gosf. Mor. 14,673.; 2. Stair, 313.; Dirl. 110. A bill drawn abroad, without the words jointly and severally, settled to be joint and several on a report of mercantile usage. Confirmed Rutherford against Donaldson, 18th February 1707; 2. Fount. 350.
M'Kellar against Campbell, 7th June 1811; 16. Fac. Coll. 272.
See below, Of Bills.

[6] Ledingham against M'Kenzie, 5th June 1824; 3. Shaw and Dunlop, 113.

regulate these obligations are nearly the same in both countries. By a cautionary obligation, one becomes bound that the principal debtor shall pay to the creditor the debt which, by the principal obligation, he engages to pay; or that he shall deliver or perform what, by that principal obligation, he has undertaken.[1]

§ 1. OF CAUTIONARY ENGAGEMENTS, OR SURETISHIP IN GENERAL.

A cautionary obligation may either be constituted along with the principal obligation, and in the same bond or contract; or separately; or subsequently: And the essence of the engagement being, that the principal debtor shall perform his undertaking, two consequences arise:—1. The cautioner is entitled to insist that the creditor shall do his best to compel performance on the part of the principal debtor; and, 2. When the cautioner is forced to answer for the principal, he shall have his remedy against the principal debtor. The former is called the RIGHT of DISCUSSION: the latter, the RIGHT of RELIEF. 3. Another right arises to cautioners, where more than one is bound as surety, and the words of the bond do not exclude it, called the RIGHT of DIVISION; by which each is entitled to refuse to answer for more than his own share, the other cautioners being solvent.

In relation to these peculiarities of the doctrine of cautionary obligations, it may briefly be stated, 1. That cautioners, bound as such, are entitled to the benefit of discussion; 2. That if there be more than one, they have also the benefit of division; 3. That they have a right of relief against him for whom they engage, and against each other, so far as they have paid more than their share; and, 4. That where they are bound as full debtors, or conjunctly and severally, they renounce thereby, in favour of the creditor, the benefit of discussion and division; but retain, as against the principal debtor, and against each other, their right of total or of pro rata relief.

There is a species of cautionary obligation, the nature and effect of which is not always sufficiently attended to. In accomplishing loans on heritable or other security, the lender frequently desires to have a collateral personal obligation for the regular payment of the interest; and not unfrequently the agent of the borrower, in reliance on the rents and produce of the estate being sufficient to secure himself against risk, undertakes ‘ to ‘ pay regularly, every half-yearly term, a certain sum of interest during the not-payment ‘ of the principal sum.’ This looks like an obligation for the interest only; but if the subject of the security fail, it seems to result in an obligation for the principal sum, or an annuity redeemable by payment of that sum; and must be ruled by the same principles which regulate annuities.[2]

Questions on cautionary obligations may arise in several situations which require to be distinguished: as, 1. Where the principal debtor has failed; 2. Where the surety or cautioner has failed; 3. Where both have failed; and, 4. Where the principal debtor and one or more of the cautioners have failed, the others being solvent.

1. WHERE THE PRINCIPAL DEBTOR HAS FAILED, THE CAUTIONERS BEING SOLVENT.—1. If the creditor have already been admitted to rank on the funds of the bankrupt,

[1] See below, Of Constitution of Guarantee, p. 370.

[2] See above, p. 336. A case of this kind occurred in the ranking of FAIRHOLM’s Creditors. On the removal of an arrestment which had been used by the trustee for Fairholm’s creditors, an obligation was granted for payment of the interest of a sum of money until the principal should be paid. The fund for payment of the principal failed; and Fairholm’s trustee claimed on the collateral obligants for the arrears of interest, and for the principal, as equivalent to that part of the obligation which was not implemented. The Court of Session gave judgment to this effect. The case was afterwards appealed, and remitted on a specialty, and compromised.

the cautioner is not also to be admitted. Not only would that be to sanction a double ranking of the same debt on the same estate; but it is manifest, that whatever is drawn by the principal creditor from the principal debtor's estate, must accrue to the benefit of the cautioner: For, had the cautioner paid the whole debt, and himself claimed upon the principal debtor's estate, he would just have drawn the same dividend which the principal creditor has drawn; and, consequently, would have suffered precisely the same loss which now falls on him.[1]

2. Where the surety pays the debt for the principal debtor, he becomes the creditor of the principal debtor, and is entitled to be ranked for the debt, either in his own name in consequence of an assignation, or in the original creditor's name.[2]

3. If the principal creditor have not proved his debt, the cautioner is entitled to prove as a contingent creditor, to the effect of having a dividend set apart for him, in case the creditor should, without entering a claim on the debtor's estate, call on the cautioner to pay the debt.

4. It is a consequence of the benefit of discussion, that if the creditor hold a security for the debt over the estate or effects of the principal debtor, directly or indirectly, by heritable bond, pledge, retention, or compensation, the cautioner has a jus quæsitum, or right to insist that the creditor shall apply the full benefit of that security towards extinction of his debt, and claim from him, as cautioner, only the balance; or that he shall at least, when he demands payment from the cautioner, assign the benefit of his security. The creditor will not, however, be bound thus to apply his security exclusively; or, perhaps, at all; or to assign it; where the security is indefinite, and not appropriated to this particular engagement, and where the creditor has other debts due to him by the principal debtor, to which the security may be held to apply.

5. If there be more than one cautioner, bound jointly and severally, the creditor may demand the debt from any of them, on assigning his remedy against the principal and the other cautioners: Or after drawing from the principal debtor what he can, he may claim the balance from any of the cautioners so bound: Or where the cautioners are not so bound, the others lose the benefit of division, by the insolvency of those who are solvent.

6. Sometimes it happens that one of the cautioners has a security on the estate of the principal debtor for his own safety. And it may be questioned what shall be the effect of it, on the one hand, as against the creditors of the principal debtor; and, on the other, as against the favoured cautioner?

As to the creditors of the principal debtor, no exception can be taken by them against the operation of the security to the full extent. That security would undoubtedly be available to the favoured cautioner, if called upon to pay the whole debt. Nor could he claim any right of relief against the co-cautioners, while he held the funds or security of the principal. They would be entitled to defend themselves, on the ground that, holding funds of the debtor sufficient to extinguish the debt, he cannot claim from them more than the balance.[3]

[1] It will be recollected, however, that the subject under discussion is only the claim of indemnification against the general fund. The cautioner may have *security* for his indemnification,—1. By heritable security; 2. By pledge, or other security on moveables; 3. By retention or compensation. In all of these cases he will be entitled to a total relief, so far as his security reaches.

See farther, below, Of Cross Bills or Cross Paper.

[2] See NORMAN LESLY against GRAY, 10th January 1665; 1. Stair, 247. WOOD against GORDON, 12th December 1695; 1. Fount. 687. ERSKINE against MANDERSON, 14th January 1780; 8. Fac. Coll. 189.

[3] FISHER'S Creditors against CAMPBELL'S Creditors, 18th December 1778; 8. Fac. Coll. 87. Campbell, with several others, were cautioners for a cash-account of L.600 in Fisher's name. Campbell got from Fisher an heritable security in relief of his engagement, and was infeft. Fisher failed, and the other cautioners having paid their shares into Campbell's

As to the cautioner who alone has stipulated for security, it is more difficult to determine whether he shall, to his own prejudice, be obliged to communicate the benefit of that security. A near relation, or confidential friend, may not think himself entitled to require security, while a stranger may be well justified in refusing to engage without it. And there seems to be no equity in obliging the latter to communicate the benefit of his precaution to one who would not himself have stipulated for it. At least where such a difference has been openly made between cautioners, and with the knowledge of each other, it is probable that the Court would not communicate the security. But where, the cautioners being originally equal, one gets an advantage over the rest on the demand being likely to arise; or where the security to one is secret; the principle which rules the case is, that the co-cautioners are bound to act, or held to have acted, for the general benefit; so that what is given for the relief of one, is to be communicated for the benefit of all.[1]

But an exception has been admitted to the rule now laid down, where the cautioners are bound, not in one and the same obligation, but each separately for his own particular part; and this either in separate bonds, or even in the same bond, each for a specific sum. In such cases, if one of the cautioners have stipulated a security, it has been held to be peculiar to himself.[2] This question was not decided without some difference of opinion on the Bench; and it well deserves reconsideration, for there are many important cases that would fall under the rule, which may admit of question. In the case of a composition contract, (which was the nature of the contract in the case below); or in that of a cautionary obligation for a bank agent, (in which this sort of engagement is

hands, he paid the debt to the bank. Adjudications having been led of Fisher's estate, a competition arose, in the ranking and sale, between the cautioners who held no security, and the adjudging creditors; Campbell being quite indifferent. The Court 'found, that 'after Campbell himself is secured, there remains a 'residuary security to his co-cautioners on his infeft-'ment.'

[1] CAMPBELL against CAMPBELL, 18th July 1775; 7. Fac. Coll. 102. Here, on a demand against a debtor and his cautioners, the former induced a friend to pay up the debt, and gave him heritable security in relief. One of the cautioners indemnified the stranger, and got an assignment to his security. The security not being sufficient to cover his whole advances, he claimed relief against a co-cautioner, who pleaded that they were tanquam socii, and that he was not bound to pay without a communication of the benefit of the security. The Court did not sanction the notion of a *society*, but considered the cautioner who paid up the debt as a negotiorum gestor, and held him bound to communicate the security, so far as related to the debt on which he and the defender were jointly bound.

MILLIGAN against GLEN, 20th May 1802; 13. Fac. Coll. 82. Milligan and Glen were co-cautioners in a cash-account to a bank, to the extent of L.300, for Muncie. Glen some years afterwards got a disposition of land in security of a sum which he had advanced, and also in relief of his obligation under the bank credit; and out of the price of this land he paid L.150 as his share of the bond to the bank. Milligan being forced to pay the balance, brought an action against Glen for one-half, in relief. The Court held him liable, on the ground that the payment from the debtor's funds was available to both the cautioners.

NICOL against DOIG and BAXTER, 16th June 1807. Doig obtained from Baxter a conveyance to heritable property, in security of a cautionary obligation which he and Nicol had undertaken to the Bank of Scotland for a cash-credit to Baxter. Lord Newton held, 'that 'Nicol and Doig, being jointly and severally bound 'as cautioners for Baxter in the said cautionary obli-'gation, Doig was not entitled to apply the whole 'proceeds thereof for his own relief; but is obliged 'to communicate one-half of the same to Nicol, for 'relief pro tanto of his share of the said cautionary 'obligation.' To this judgment the Court adhered, by refusing a petition without answers.

[2] LAWRIE against STEWART, 6th June 1823; 2. Shaw and Dunlop, 368.; Fac. Coll. 274. Here three cautioners were bound in the same bond for a composition to be paid to the creditors of Menzies, but each for a specific sum; Lawrie binding for L.500, Stewart for L.300, and so on. Lawrie paid his L.500, but coming to learn that Stewart and others had, by arrangements with Menzies, got securities against loss, he raised an action to compel a communication of the security. Some of the Court held this a joint cautionary obligation and commune negotium; but Lord Alloway, as Ordinary, and the majority of the Court, held the defenders not to be correi, but each bound to the amount of his own individual subscription, as if by separate bonds.

very often undertaken); it seems more equitable, and more according to common understanding, to follow the general rule,—to hold the responsibility to be joint, each cautioner being considered as *negotiorum gestor* for the whole, and as bound, when possessed of funds of the debtor, to apply them in extinction of the principal debtor's obligations in the first place.

7. Where any one of several cautioners takes for his own security a collateral obligation, not over the funds of the principal debtor, but from a third person; it seems very doubtful whether he is bound to communicate the benefit of it to the rest. It has sometimes been contended, that cautioners are in society; but this, like all attempts at analogy in matter of law, has, on examination, been found not to be correct. It has also been said, that, on principles of equity, they ought to be held as negotiorum gestores for each other; but this also seems not to be satisfactory. And if the true ground of the right to communication of the benefit be, that the funds of the principal debtor primarily liable are in the hands or under the power of the cautioner, and are to be first applied, that will afford no ground, in the case now under discussion, for demanding a communication of the collateral security. There has not occurred any case in which the benefit of the security stipulated and obtained by one cautioner has been communicated to others, where it was not a security over the funds of the principal debtor. It may further be questioned, whether, in one case, the benefit even of a collateral personal security would not be available to the other cautioners? namely, where he who has so secured himself collaterally has failed to pay his share, and the other cautioners have been obliged to discharge it. Would they not in such case be entitled to recourse against the collateral obligant?

2. WHERE THE CAUTIONERS OR SURETIES HAVE FAILED, THE PRINCIPAL DEBTOR BEING SOLVENT.—1. In the case of a cash-credit or standing guarantee, the natural course is to require new securities, or to withdraw the credit. But a hold may still be kept of the cautioner though insolvent, either if such change of security be not required, or if no new cautioner be procured to supply the place of the former.

2. A cautioner, bound as such, is liable only after discussion of the principal; but, in case of the cautioner's bankruptcy, a contingent claim may be entered on his estate, either before discussion of the principal, or before the condition or term of payment of the obligation have arrived, to the effect of having a dividend set apart. Out of this dividend the creditor will be entitled to have payment of whatever is deficient in the payment by the principal debtor, on proceeding to discuss him; but the effect of a payment from the principal will be, not to limit the *ranking* on the estate of the cautioner, provided the claim has been made against the cautioner before such payment, but merely to prevent the creditor from drawing on the whole more than his debt.

3. WHERE BOTH THE CAUTIONERS AND THE PRINCIPAL HAVE FAILED.—1. If the debtor fail, and also all the cautioners, whether bound as such or not, the creditor is entitled to claim on the estate of each cautioner, as well as on that of the principal debtor, for the full amount of the debt. The effect will be to entitle the creditor to draw, on the whole, payment of his debt, and no more. The bankruptcy of the principal is sufficient discussion. If he is not yet made bankrupt, it will be still competent for the creditor, even where the cautioner is bound as such, to rank on the cautioner's estate as a contingent creditor, in order to have set apart for him, till the principal debtor be discussed, a dividend, out of which he will be entitled to draw what may be deficient in the payment by the principal. Care should be taken to claim on all the estates before the debt is diminished by payment.

2. Where all the cautioners are bankrupt, and the dividends to be drawn from all their

As to the cautioner who alone has stipulated for security, it is more difficult to determine whether he shall, to his own prejudice, be obliged to communicate the benefit of that security. A near relation, or confidential friend, may not think himself entitled to require security, while a stranger may be well justified in refusing to engage without it. And there seems to be no equity in obliging the latter to communicate the benefit of his precaution to one who would not himself have stipulated for it. At least where such a difference has been openly made between cautioners, and with the knowledge of each other, it is probable that the Court would not communicate the security. But where, the cautioners being originally equal, one gets an advantage over the rest on the demand being likely to arise; or where the security to one is secret; the principle which rules the case is, that the co-cautioners are bound to act, or held to have acted, for the general benefit; so that what is given for the relief of one, is to be communicated for the benefit of all.[1]

But an exception has been admitted to the rule now laid down, where the cautioners are bound, not in one and the same obligation, but each separately for his own particular part; and this either in separate bonds, or even in the same bond, each for a specific sum. In such cases, if one of the cautioners have stipulated a security, it has been held to be peculiar to himself.[2] This question was not decided without some difference of opinion on the Bench; and it well deserves reconsideration, for there are many important cases that would fall under the rule, which may admit of question. In the case of a composition contract, (which was the nature of the contract in the case below); or in that of a cautionary obligation for a bank agent, (in which this sort of engagement is

hands, he paid the debt to the bank. Adjudications having been led of Fisher's estate, a competition arose, in the ranking and sale, between the cautioners who held no security, and the adjudging creditors; Campbell being quite indifferent. The Court 'found, that 'after Campbell himself is secured, there remains a 'residuary security to his co-cautioners on his infeft-'ment.'

[1] CAMPBELL against CAMPBELL, 18th July 1775; 7. Fac. Coll. 102. Here, on a demand against a debtor and his cautioners, the former induced a friend to pay up the debt, and gave him heritable security in relief. One of the cautioners indemnified the stranger, and got an assignment to his security. The security not being sufficient to cover his whole advances, he claimed relief against a co-cautioner, who pleaded that they were tanquam socii, and that he was not bound to pay without a communication of the benefit of the security. The Court did not sanction the notion of a *society*, but considered the cautioner who paid up the debt as a negotiorum gestor, and held him bound to communicate the security, so far as related to the debt on which he and the defender were jointly bound.

MILLIGAN against GLEN, 20th May 1802; 13. Fac. Coll. 82. Milligan and Glen were co-cautioners in a cash-account to a bank, to the extent of L.300, for Muncie. Glen some years afterwards got a disposition of land in security of a sum which he had advanced, and also in relief of his obligation under the bank credit; and out of the price of this land he paid L.150 as his share of the bond to the bank. Milligan being forced to pay the balance, brought an action against Glen for one-half, in relief. The Court held him liable, on the ground that the payment from the debtor's funds was available to both the cautioners.

NICOL against DOIG and BAXTER, 16th June 1807. Doig obtained from Baxter a conveyance to heritable property, in security of a cautionary obligation which he and Nicol had undertaken to the Bank of Scotland for a cash-credit to Baxter. Lord Newton held, 'that 'Nicol and Doig, being jointly and severally bound 'as cautioners for Baxter in the said cautionary obli-'gation, Doig was not entitled to apply the whole 'proceeds thereof for his own relief; but is obliged 'to communicate one-half of the same to Nicol, for 'relief pro tanto of his share of the said cautionary 'obligation.' To this judgment the Court adhered, by refusing a petition without answers.

[2] LAWRIE against STEWART, 6th June 1823; 2. Shaw and Dunlop, 368.; Fac. Coll. 274. Here three cautioners were bound in the same bond for a composition to be paid to the creditors of Menzies, but each for a specific sum; Lawrie binding for L.500, Stewart for L.300, and so on. Lawrie paid his L.500, but coming to learn that Stewart and others had, by arrangements with Menzies, got securities against loss, he raised an action to compel a communication of the security. Some of the Court held this a joint cautionary obligation and commune negotium; but Lord Alloway, as Ordinary, and the majority of the Court, held the defenders not to be correi, but each bound to the amount of his own individual subscription, as if by separate bonds.

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7. Where any one of several cautioners takes for his own security a collateral obligation, not over the funds of the principal debtor, but from a third person; it seems very doubtful whether he is bound to communicate the benefit of it to the rest. It has sometimes been contended, that cautioners are in society; but this, like all attempts at analogy in matter of law, has, on examination, been found not to be correct. It has also been said, that, on principles of equity, they ought to be held as negotiorum gestores for each other; but this also seems not to be satisfactory. And if the true ground of the right to communication of the benefit be, that the funds of the principal debtor primarily liable are in the hands or under the power of the cautioner, and are to be first applied, that will afford no ground, in the case now under discussion, for demanding a communication of the collateral security. There has not occurred any case in which the benefit of the security stipulated and obtained by one cautioner has been communicated to others, where it was not a security over the funds of the principal debtor. It may further be questioned, whether, in one case, the benefit even of a collateral personal security would not be available to the other cautioners? namely, where he who has so secured himself collaterally has failed to pay his share, and the other cautioners have been obliged to discharge it. Would they not in such case be entitled to recourse against the collateral obligant?

2. Where the Cautioners or Sureties have failed, the Principal Debtor being solvent.—1. In the case of a cash-credit or standing guarantee, the natural course is to require new securities, or to withdraw the credit. But a hold may still be kept of the cautioner though insolvent, either if such change of security be not required, or if no new cautioner be procured to supply the place of the former.

2. A cautioner, bound as such, is liable only after discussion of the principal; but, in case of the cautioner's bankruptcy, a contingent claim may be entered on his estate, either before discussion of the principal, or before the condition or term of payment of the obligation have arrived, to the effect of having a dividend set apart. Out of this dividend the creditor will be entitled to have payment of whatever is deficient in the payment by the principal debtor, on proceeding to discuss him; but the effect of a payment from the principal will be, not to limit the *ranking* on the estate of the cautioner, provided the claim has been made against the cautioner before such payment, but merely to prevent the creditor from drawing on the whole more than his debt.

3. Where both the Cautioners and the Principal have failed.—1. If the debtor fail, and also all the cautioners, whether bound as such or not, the creditor is entitled to claim on the estate of each cautioner, as well as on that of the principal debtor, for the full amount of the debt. The effect will be to entitle the creditor to draw, on the whole, payment of his debt, and no more. The bankruptcy of the principal is sufficient discussion. If he is not yet made bankrupt, it will be still competent for the creditor, even where the cautioner is bound as such, to rank on the cautioner's estate as a contingent creditor, in order to have set apart for him, till the principal debtor be discussed, a dividend, out of which he will be entitled to draw what may be deficient in the payment by the principal. Care should be taken to claim on all the estates before the debt is diminished by payment.

2. Where all the cautioners are bankrupt, and the dividends to be drawn from all their

estates taken together will exceed the claim of the creditor, it would appear that questions of relief among the bankrupt estates of the cautioners will be settled in the following manner:—*First*, If one cautioner's estate is able to pay 15s. in the pound, and another only 5s., the debt will be extinguished by the payment of these dividends, and there will be no relief between the two estates; each being bankrupt, and having already paid the dividend corresponding to the whole of the debt which is properly due out of that estate. *Secondly*, If one estate pay a dividend of 15s., and the other a dividend of 10s., the former will, of course, be relieved of the cautionary debt to the extent of 5s., and so they are equal. *Thirdly*, But if the former precede the other in paying the dividend, justice is not done unless it shall be allowed to the creditors, or trustee on that estate, to come into the creditor's place, to the effect of drawing back 5s. from the co-cautioner's estate. And yet if the cautioner, while solvent, had paid the debt, he would not in his own person have been entitled to rank for more than one-half, according to a determination in the House of Lords in a case to be afterwards quoted.[1]

3. Where the cautioners are taken bound in different proportions, the responsibility of their estates will be different in different circumstances. Suppose a debt of L.10,000 with three cautioners; one bound to the extent of L.5000, another of L.3000, another of L.2000: Their estates will all be liable in these proportions for the debt; or each will be liable in the above proportions, should the principal debtor fail while the whole debt is due. But if there shall have been paid off as much as to reduce the balance to the smallest of the sums for which the cautioners are bound, the estates of all the cautioners seem to be liable in an equal responsibility for that balance; or, in other words, a claim on each seems to be competent to the extent of such balance.

4. Where the cautioners have each granted bond for the same debt, they are all liable to the creditor equally; and they are also bound in mutual relief to each other, whether they are aware of each other's obligation or not. The cautioners have this relief on the principle of the beneficium cedendarum actionum without actual assignment. So on a bankruptcy of them all, the creditors may claim as if they were jointly and severally bound in the same bond; and any one of them paying the debt will be entitled to the same claim on the estates of the others, as if one bond were signed by the whole.

5. Frequently additional security is subsequently taken by bond of corroboration or otherwise, saving to the creditor all the effects of the former caution. This happens where a cautioner fails or dies; where the credit of the principal himself has received a shock; where a demand is made which cannot be answered; where the principal debtor is charged to pay, and suspends on caution; and so forth. The relief, as between the new and the old cautioners, seems to be regulated on these principles:—

First, If the subsequent engagement have been undertaken at the desire of the principal debtor, not at the desire of the cautioners, or to relieve them from an impending demand;[2] then the new cautioner has only a rateable relief, as if he were a party to the original bond.

[1] Sir R. MAXWELL'S Creditors against HERON'S Trustees. See below, p. 354. Note [1].

[2] ARNOLD against GORDON, 23d February 1671, 1. Stair, 728.; where the principal in a bond, with four cautioners, suspended on caution; and the cautioner in the suspension having paid and got assignation to the debt, charged the original cautioners: He was held to have right so to do, deducting his own fifth part.

KERR against GORDON, February 1685; Harcarse, 58. Riddel, bound with Kerr as cautioner, afterwards corroborated the debt with a new cautioner, Gordon. Kerr paid the debt, and claimed half against Gordon, and was found entitled to it.

MURRAY of Broughton against Heirs and Cre-

Secondly, If the new cautioner have interposed at the request of the former cautioners; or if the first cautioners have suspended on caution; or even if the former cautioners have been apprized of the application to the new cautioner, and have approved of it, as tending to relieve them from present demand; then the new cautioner is entitled to a total relief, and, on paying the debt, may claim the whole from the insolvent estates of the former obligants.[1]

Thirdly, In distinguishing the cases to which these rules are to be applied, the legal *presumption* is, that the new cautioner has interposed for the debtor alone, since the debtor is liable in the first instance, the cautioners being liable only after he is discussed;[2] and particular indications are required to establish a right to a total relief against the other cautioners.[3] Among such indications, it seems sufficient that a demand has

ditors of ORCHARDTON, 15th December 1722; affirmed in the House of Lords 21st March 1723-4; 1. Robertson, 465. Here the question was much discussed. Sir A. M'Culloch and his son, with Maxwell as cautioner, were bound for 2000 merks. Five years afterwards, the son, and new cautioners, Lord Kenmuir and Murray, gave a bond of corroboration; and Murray paid the debt, and on an assignation claimed total relief against the original cautioners. He was found to have relief only as co-cautioner; and this was affirmed in the House of Lords.

This was confirmed in a subsequent case, LOCKHART against Lord SEMPLE, 19th December 1738; Elchies, *Cautioner*, No. 9. See also next Note.

[1] WALLACE against FLEMING, 27th February 1685; 1. Fount. 344.; where a cautioner in a second suspension, at the instance both of the principal, &c. and of the cautioner in the first suspension, was held entitled to total relief against the first cautioner.

POLLOCK against Sir R. POLLOCK, 10th July 1745; Kilk. 117. 'It is, no doubt, in general true,' says Lord Kilkerran, 'that the equity on which the relief 'among cautioners is founded, (for as nullum negotium gestum est between them there is none in strict 'law), obtains no less where they are bound in different deeds, and at different times, than where they 'are bound in the same deed. And so it has been 'often found, that where the principal granted bond 'of corroboration with a new cautioner, there was a 'mutual relief between the cautioner in the original 'bond and the cautioner in the bond of corroboration; 'particularly, 15th December 1722, Murray of Broughton against the Creditors of Orchardton. From the 'analogy in which decision, which was affirmed by the 'House of Peers, though there was only an appearance ex parte for reversing the decree, and from 'the general presumption that the interposition of a 'new cautioner is on account of the principal debtor, 'some able Judges were for sustaining the defence in 'this case; and it may be admitted, that the general 'presumption lies that way. But the circumstances of 'the case, upon which the decision of all questions of 'this kind depends, appeared to the Court to be sufficient to elude such presumption here: For, as the 'principal debtor was dead; the circumstances of his 'children encumbered; as there was direct access to 'diligence against the cautioner; and, last of all, as it 'was become necessary to compel him to pay, as his 'cautionary obligation was near expiring, and the bond 'actually registrated for that end; it was thought the 'intention of the bond of corroboration could be supposed to be no other than to save the cautioner from 'diligence.

'But in every case wherein it appeared from circumstances, that the interposition of the new cautioner 'was on account, or at the desire, of the *cautioner in* 'the original bond, the new cautioner has been found 'entitled to a total relief from the cautioner on whose 'account he interposed.'

[2] LOCH and Lord STRATHALLAN against Lord NAIRN, 18th December 1701; 2. Fount. 130. See also Kilkerran's dictum in the preceding Note.

[3] The doctrine was fully discussed in SMEITON *v.* MILLAR, Nov. 15. 1792; 11. Fac. Coll. 8. Here Millar held a bank credit with the British Linen Company for L. 800, on a bond by him and three other persons jointly and severally bound. Walker, one of the cautioners, died; and the bank having required a new cautioner in his room, Millar granted a bond of corroboration along with Smeiton as cautioner. On Millar's bankruptcy and death, Smeiton, the new cautioner, sought total relief against the old cautioners. They pleaded, that he had interposed not for them, but for Millar, the principal debtor. And the Court held his engagement to be as cautioner, entitling him to a rateable relief, but no more.—Lord Justice-Clerk M'Queen said,—'This is a general and 'important question. The decisions have not differed; 'they all tend to one general rule; and this rule is 'founded in common sense, That where a new surety 'engages on account of the principal debtor, and for 'the purpose of saving him from diligence, there is 'nothing that ought to difference his case from that 'of the cautioners in the original obligation: they are 'all cautioners for the principal debtor. There is 'another case, where the principal and cautioners are 'distressed, and a person interposes to relieve them. 'It is clear, that this person interposes for them all; 'and that, with regard to him, they are all principal 'debtors; and consequently, when he pays the debt, 'he has a claim for a total relief against the whole. 'The analogy of the law in other matters confirms me 'in the opinion which I have formed. Thus, it often

actually been made against cautioners;[1] and that the creditor has forborne to urge payment on receiving new cautioners: Or that the debtor is abroad, which opens immediate access to the cautioners, and that the creditor has made his demand: Or that the debtor is dead, which still more distinctly brings forward the responsibility of the cautioners: Or that the first cautionary obligation is near expiring, and the bond recorded for diligence.[2] But it is not sufficient to change the presumption, and ground an inference of the corroborating cautioner having engaged merely in support of the cautioners, that he has granted bond by himself, without taking any letter or obligation of relief from the principal debtor.[3]

'happens, that where a security is given over a particular subject, the creditor demands a farther security, and other lands are added to those over which the creditor's security formerly extended.—There can be no question here, as long as these subjects remain the property of the debtor. But I shall suppose them to be sold to different purchasers, and that the creditor comes to demand his payment from the purchaser of the last property. "Why attack me?" says the purchaser. "Make your demand rather from that subject over which you were first secured, or, at least, divide the demand." The creditor answers, "I will not divide my payment:" and so the purchaser of the last subject must pay. But then he is entitled to a conveyance; and he comes against the estate over which the debt originally extended, and he ranks on it pro rata according to the respective values of the two. There are many cases to the same purpose; as for example, the case of catholic creditors and secondary creditors. The doctrine applies to all of these cases. The secondary creditor has no right to a total relief, but to a proportional one; and these considerations strengthen in my mind the principle which I think ought to regulate this case. Cautioners are often hurt by lenient creditors, who, by accepting of new cautioners, enable the debtor to enlarge his debt. In this case, no favour whatever was done to the other cautioners by the interposition of Smeiton, the additional cautioner; and they must be entitled to relief against him, just in the same way as if his cautionary obligation had been contained in the same bond with theirs.' Dreghorn,—'Ex facie the cautioners are principals in the original bond. But Smeiton's obligation is in the same terms, and he must therefore have known that they were cautioners.' Swinton,—'Put the case, that, in place of joining in a bond of corroboration, Smeiton had paid the debt, Would he not have been entitled to recourse upon the cautioners in the original bond? If so, the bond of corroboration is not in the same situation with the original bond. It appears to me to place Smeiton in the same situation as if he had paid the debt. The former cautioners ought to be held as all principals to Smeiton.' Lord Henderland said, that the matter appeared to him in the same light. Lord President Campbell,—'If Lord Swinton were right in the view which he has taken of these bonds, the case would come to the same point with that of M'Dowall of Canonmills, where there were two sets of cautioners, and the question came to be, whether the new bond superseded the old one? Your Lordships ultimately thought that it did, and that the original cautioners were free. But this is a different case: it is one of those questions where the general rule of law is, that all cautioners have a claim pro rata, whether they be bound in one or more deeds, seeing they are all bound for behoof of, and at the request of the principal debtor alone. This is the general rule; and yet it may appear from circumstances, that the new obligation has been entered into on account of the cautioners, as well as on account of the principal; and then there is an exception from the general rule, and the new cautioners have a relief from those for whose benefit they became bound. Here there are two sets of cautioners: the second was bound not for the cautioners, but for the principal; and therefore, in deciding betwixt them, they must be entitled to relief pro rata.'

[1] CLARKSON against EDGAR, 1st December 1703; Dalrymple, 49.; 2. Fount. 130. Fountainhall misses the point. Dalrymple states that the charge was given 'against the principal and *cautioners*.'

M'KENZIE against M'KENZIE, 30th November 1752; 1. Fac. Coll. 249.; Sel. Dec. 27. Charge against two co-obligants. M'Kenzie became cautioner in a bond of corroboration, paid the debt, and on assignation charged both. One of the co-obligants then produced a bond of relief from the other, in proof of his being only a cautioner. The Court gave total relief.

[2] See the case of Sir ROBERT POLLOCK as reported by Kilkerran, above, p. 352. Note [1]. See also Elchies' Rep. Notes, p. 89.

[3] LENNOX against CAMPBELL, 18th May 1815; 18. Fac. Coll. 359. Two cautioners signed a bond of credit to the Bank of Scotland with Lee for L.400. One of them died, and Campbell signed a bond of corroboration, binding himself jointly and severally with the obligants in the prior bond. He took no letter of relief from Lee. The same thing took place on the death of the other original cautioner, and Still became cautioner. Lee died with a balance due the bank. The representatives of the deceased cautioners paid up the debt, and claimed relief pro rata against Campbell and Still. They attempted a distinction, on the ground, that in the former cases the new cautioner was bound along with the principal debtor, while here he had

4. WHERE THE PRINCIPAL DEBTOR, AND ONE OR MORE OF THE CAUTIONERS, HAVE FAILED, THE OTHERS BEING SOLVENT.—1. Where the principal debtor has failed, and there are *two* cautioners, one of whom is solvent, the other insolvent; the creditor, after discussing the principal, may either go against the solvent cautioner, and make him pay the remainder of the debt; or he may, if he think fit, claim to be ranked for the full amount of the debt upon the estate of the insolvent cautioner, and, after drawing a proportional dividend for it, take the balance of the debt (after imputing such dividend) from the solvent cautioner. But he can so claim for the *whole* debt, only before receiving payment of any part.

If the creditor go first against the solvent cautioner, and compel him to pay the whole debt, such solvent cautioner is entitled to be ranked upon the estate of the insolvent cautioner for one-half only of what he pays: For as, where there are two cautioners, each stands indebted as principal for one-half of the debt, and as cautioner for the other, when a solvent cautioner pays the whole debt he necessarily extinguishes that moiety of it in which he stands indebted as principal; and, of course, he can claim and prove against the co-cautioner's estate only the other moiety, which he has thus paid in the character of surety for his co-cautioner.[1]

When, on the other hand, the creditor goes first against the estate of the insolvent cautioner, he is entitled to be ranked upon it for the full amount of the debt, and to draw a proportional dividend, in regard that both cautioners are bound to him *in solidum*.

But although the creditor is thus entitled to be ranked upon the estate of the insolvent cautioner for the full debt, yet the estate of the insolvent cautioner is entitled to no further relief against the solvent cautioner, than in so far as the estate may pay more than the insolvent cautioner's moiety of the debt. It has been contended, that as, in the event of the creditor proceeding in this manner, the estate of the insolvent cautioner is made to pay a dividend, not only upon that moiety of the joint debt which is his own proper debt, but upon that moiety of it for which he is only a cautioner, his estate ought to have relief of half of the dividend that may be drawn by the creditor, whatever it may be: But this has been overruled; and it has been held, that unless the dividend drawn by the creditor from the estate of the insolvent cautioner, exceed that moiety of the debt which he must have paid had he continued solvent, the estate is entitled to no relief; and that it is only for the excess above such moiety that any relief is competent.[2]

The doctrine thus established does, in its consequences, seem inequitable and arbitrary; since, according as the creditor may think fit to proceed, very different results to the parties arise. If the creditor choose to take full payment from the solvent cautioner, it will be ultimately for the advantage of the estate of the insolvent cautioner. If, on the

executed a bond alone. But the Court refused to sanction this distinction.

[1] Sir R. MAXWELL's Creditors against the Trustees of PATRICK HERON, 8th February 1792, 11th June 1794. The Court of Session held the co-cautioner, on paying the debt, entitled to be ranked for the whole, to the effect of drawing one-half. But the House of Lords reversed this judgment, and ordained the cautioner who had paid the debt to be ranked on the estate of the other cautioner 'for half of the sums 'due on those debts in which they were jointly bound 'along with the principal debtor, each of them having 'been indebted, as principal, for a moiety thereof, and 'as security for the other moiety.' 10. Fac. Coll. 433. and App. 7.

[2] CRANSTON against M'DOWALL, 22d May 1798; 12. Fac. Coll. 174. Dr M'Farlane and James M'Dowall were cautioners for A. M'Dowall to Heriot's Hospital and to the Royal Bank. A. M'Dowall failed, with a balance of L. 700 due to the hospital and L. 240 to the bank. Dr M'Farlane failed; and although James M'Dowall, the other cautioner, was solvent, the hospital and the bank ranked on the estate of Dr M'Farlane for the whole debts, and drew less than one-half. The trustee for M'Farlane's creditors brought an action of relief against the heir of James M'Dowall, the co-cautioner, on this and other accounts. On this question the Court assoilzied M'Dowall's heir from the claim for any part of the dividends received out of M'Farlane's estate upon debts for which M'Farlane was jointly bound, in respect those dividends do not exceed the proportion of those debts for which M'Farlane was liable.

other hand, he think fit to go, in the first place, against the estate of the insolvent cautioner, it will be ultimately for the advantage of the solvent cautioner.[1]

2. Where the principal debtor has failed, and there are *three or more* cautioners, some of whom have failed, and the others remain solvent, the creditor will, in like manner, be entitled to go either against the solvent or the insolvent cautioners, after discussing the principal; and a difference will, upon similar principles, take place according to the way in which he exercises this option.

If the creditor go first against one of the solvent cautioners, and that cautioner pay the debt, he will be entitled to demand against the co-cautioners relief of all that he has paid beyond his own proportion. The intricacy of the cases which may arise in such circumstances requires some discrimination.—1. If the cautioners are all solvent, the rule is simple: In claiming relief from any one of the co-cautioners, he who has paid is entitled to demand that co-cautioner's own proportion, and one-half of the proportions falling on the rest; and thus the payment and the risk is equally divided, and each is left to seek his relief against the rest for that share which has been advanced on his account.[2] 2. If some of the cautioners are solvent, the solvent cautioners are bound each to repay his own share, and also his proportion of the share that should have been paid by the insolvents; and thus each suffers the loss equally, and has a right to claim on the insolvent estates of the cautioners who have failed for the amount of what he has advanced for them. 3. The difficulty is, to find a rule for ranking him who pays, on the estates of the insolvent co-cautioners; for although it be generally true, that in a question between two cautioners, (although there may be more), the cautioner who has paid the debt is entitled to relief of one-half, that proceeds on the supposition that relief is open against the estates of those on whose account any higher demand is made than the co-cautioner's own proportion; which would be excluded, if, in the case supposed, the cautioner who has paid should demand relief of one-half from each insolvent estate. But, perhaps, the benefit of having a clear practical rule, seconded by the consideration, that cautioners, unable to indemnify the person who advances their proportion, ought to be barred from competing with him as creditors in relief, may recommend to adoption the same rule as in the simple case already under consideration, (p. 354.), namely, that the cautioner who pays the debt should be ranked for one-half on the estate of each insolvent cautioner, to the effect of drawing his full relief for all beyond his own proportion.

To have a practical illustration of this rule,—Suppose there are three cautioners, A, B, and C; and, 1*st*, Let it be supposed that A pays the debt of L.1000, and that B and C are insolvent. Here A is entitled to rank upon each of the estates of B and C for L.500; and if each of the estates pays 13s. 4d. per pound, the dividend from each will be L.333. 6s. 8d., which will be just equal to the remainder of the debt that ought to fall upon A, the solvent cautioner. In this case, therefore, A will be entitled to draw the full dividends. But supposing each of the estates to pay 15s. per pound, the dividends

[1] In this respect the law of England coincides with the law of this country. Thus, in ex parte ELTON, March 21st and 22d, and July 28th 1796, Vesey, Junior, vol. iii. p. 240. Lord Chancellor Rosslyn expresses himself thus:—'Suppose in the case of A and 'B, partners, the former remains solvent, the latter 'becomes a bankrupt, and there is a joint debt of 'L.1000;—the creditor making his claim first against 'the separate estate, (of the bankrupt partner), paying 'a dividend of 10s. in the pound, receives L.500. 'Can the assignees claim against the solvent partner 'what they have paid? His answer would be, they 'could only claim the same right the bankrupt could; 'and as against the bankrupt, he is entitled to retain: 'he has paid his moiety of the partnership debt. If 'the case is turned the other way, and the creditor 'first sues the solvent partner, he recovers all the debt 'against him: and he has a right to come in as a se-'parate creditor of the bankrupt, to the amount only 'of a moiety of that debt; for a moiety only of the 'debt of the partnership he could have recovered 'against him if he had been solvent. That makes a 'very great difference to the separate creditors.'

[2] See Kames' Principles of Equity, B. 1. p. 1. § 3.; Elucidations, art. 29.

would be L. 375, and they must therefore be restricted to L. 333. 6s. 8d.; so that in this case also, each will ultimately bear an equal share of the loss. If, however, it should be supposed, that the estate of B pays 10s. per pound, and the estate of C 15s., then the dividends would be, from B, L. 250, and from C, L. 375. Here A would be entitled to draw the whole dividends from both estates; because, although the dividend from C's estate exceeds L. 333. 6s. 8d., the third of the debt, yet it does not exceed the loss ultimately falling upon A: for, after imputing the L. 250 received from B's estate, one-half of the difference, L. 375, is just equal to the dividend from C's estate.

But if the creditor should go first against the insolvent cautioners, he will be entitled to rank upon the estate of each for the whole debt, to the effect of drawing full payment; and if he should draw from the estate of any of the bankrupts more than the share payable by such bankrupt, the trustee for the creditors at large on that estate will be entitled to relief against the solvent cautioners for the surplus.

In the practical application of this rule, the creditor would be entitled to rank for the full sum of L. 1000 upon each; and if each of the estates paid 10s. per pound, or more, he would draw L. 500 from each; and each of the estates would have a claim of relief against the solvent cautioner for the difference between L. 500 and L. 333. 6s. 8d., their respective shares of the debt.

3. Where an annuity bond is granted by several persons, jointly and severally, and they are all bankrupt, the grantee may claim on the estate of each for the entire annuity, to the effect of drawing the full annuity on the whole; or, if the parties agree, he may be ranked on the estate of each for the converted value of the annuity, to the effect of drawing that value upon the whole.

4. Where one of the co-obligants is bankrupt, and the rest solvent, if the parties should agree to convert the annuity, the true method seems to be the following:—1. If the bankrupt is the primary or proper debtor, the rest only cautioners, the annuitant should be ranked on the bankrupt estate for what is the ascertained value; relieving the co-obligants, as cautioners, of the future annuities, to the extent of such annuity as the dividend may purchase,—or pay the dividend to the co-obligants, on their securing him in payment of the whole annuity. 2. Where they all are principals, the proper course seems to be, to rank the annuitant on the bankrupt estate for the whole ascertained value, to the effect of his drawing the share payable by the bankrupt, and so relieving the co-obligants, as before, to the extent of that part of the bankrupt's share of the annuity to which the dividend may correspond. 3. Where the bankrupt is a mere cautioner, the annuitant will, of course, be entitled to demand new caution; and will even be entitled to rank on the bankrupt estate, as a contingent creditor, before the principal has failed.

EXTINCTION OR DISCHARGE OF CAUTIONARY OBLIGATIONS.

Claims on cautionary obligations may be barred or discharged, not only by extinction or satisfaction of the principal debtor's obligation, but also by the statutory limitation; by implied discharge; by neglect, and want of due diligence in recovering against the principal.

1. Commentary on the Act limiting Cautionary Obligations.—In 1695, an Act was passed for limiting the endurance of cautionary obligations to the term of seven years from the date of the bond. This law was made in order to prevent the 'great hurt and 'prejudice that hath befallen many persons and families, and oft-times to their utter ruin 'and undoing, by men's facility to engage as cautioners for others, who, afterwards failing, 'have left a growing burden on the cautioners, without relief.' 1695, c. 5. But this law,

with those wise and humane purposes, was ill concerted for the attainment of its object. The enacting words are,—'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; but that, 'from and after the said seven years, the said cautioner shall be eo ipso free of his caution.' Had the Act stopt here, it would have been well; but it proceeds in these words:—'And 'that whoever is bound for another, either as express cautioner, or as principal, or co-prin-'cipal, shall be understood to be a cautioner, and have the benefit of this Act, providing 'that he have either clause of relief in the bond, or a bond of relief apart, intimate per-'sonally to the creditor at his receiving of the bond, without prejudice always to the true 'principal's being bound in the whole contents of the bond or contract: As also, of the 'said cautioner's being still bound conform to the terms of the bond, within the said 'seven years, as before the making of this Act.' A clause is added, providing,—'That 'what legal diligence by inhibition, horning, arrestment, adjudication, or any other way, 'shall be done within the seven years by creditors against their cautioners for what fell 'due in that time, shall stand good, and have its course and effect after the expiring 'of the seven years, as if this Act had not been made.'[1] The Act being thus confined to cases in which the cautioner engages professedly as such, or as a co-obligant, having a bond of relief from the principal, intimated at the time to the creditor; it has been in many cases entirely defeated by the obvious device of taking all the obligants bound as principals, and by the creditor keeping himself ignorant of the relief stipulated among them.

In order to give to a cautioner the benefit of this Act, and free him from a demand by the creditor after seven years, these points are necessary:—

1. The statute, by its words, applies only to bonds for sums of money; and this has been held, rather too strictly perhaps, to apply only to loans of money, to be repaid within the seven years: Cautioners ad facta præstanda have not the benefit of it;[2] nor judicial cautioners, as in suspensions, or loosing arrestments;[3] nor cautioners in marriage contracts;[4] nor for the discharge of an office:[5] Neither has a cautioner in a bond of relief the benefit of this Act.[6] Cautioners for payment of a composition on bankruptcy are not comprehended under the Act.[7]

2. Either the cautioner must appear in the bond expressly as cautioner, (the law, however, not being held to extend to the case of a bill wherein one signs as cautioner): Or,

[1] This Act appears to have been carefully considered in a committee of Parliament; and probably the objections stated by monied men likely to suffer by the weakening of their securities, had led to the temporizing and qualifying expressions which have deprived the Act of half the salutary effects intended in the original proposal.

[2] ROBERTSON against M'KINLAY, 3d December 1736; Elchies, *Cautioner*, No. 6. And observe the distinction where the character of a bond ad factum præstandum is lost in the money obligation. Sir R. MONRO against BAIN, 22d July 1741; Kilk. 419. See Elchies' Notes on No. 10.

[3] HOPE against FOULIS, 4th February 1715; Dalr. 188. M'KINLAY against EWING, 14th February 1781; 8. Fac. Coll. 63.; 2. Hailes, 881. The Court found,—'That the Act 1695 does not apply to cau-'tionary obligations in judicial proceedings in suspen-'sion.'

[4] BALVAIRD against WATSON, 18th January 1709; 2. Fount. 481. STEWART against CAMPBELL, July 1726; 2. Dict. 115. The obligation in chief was to have ready a sum, and to lay it out for the wife's liferent, and the heirs of the marriage in fee. It was found, that the cautioner being bound ad factum præstandum, and not to pay a certain sum of money, his case did not fall under the Act.

[5] FLEET against STRANG, 5th January 1709; 2. Fount. 478.

[6] BRUCE against STEIN, 26th June 1793; 11. Fac. Coll. 143.

[7] CUTHBERTSON against LYON, 23d May 1823; 2. Shaw and Dunlop, 330. See also ANDERSON against WOOD, 23d May 1821; 1. Shaw and Ballantine, 28.

3. If he there appear as co-obligant, it is necessary that, at the time of settling the transaction, there shall have been intimated to the creditor the principal debtor's obligation to relieve his co-obligant;[1] and this notice must be notarial or judicial,[2] mere private knowledge not being sufficient:[3] But, 1. The law does not extend to the case of co-obligants stipulating by a clause of relief their mutual remedies.[4] 2. It does not comprehend the case of the granter of a simple bond of corroboration for a debt already constituted.[5] 3. An engagement by letter, or otherwise, to pay or see paid, a sum already lent, is not within the Act.[6] And, 4. A letter of guarantee in a mercantile transaction is not within the Act.[7]

The obligation of the cautioner will be extended beyond the seven years in the following cases:—1. Where the bond shall have been renewed, or a corroboration granted by the cautioner; or negociations for answering the demand of the creditor carried on with the cautioner, so as to bar him personali exceptione from pleading on the Act:[8] and the doctrine of Erskine (B. 3. tit. 7. § 24.) is not law, that nothing but diligence ought to prolong the obligation; and that even a declaration by the cautioner, that he stands bound for the debt, will not prevent the obligation from expiring with the seven years. 2. It will also extend beyond the seven years, where the creditor shall have raised diligence against the cautioner within the seven years:[9] The doctrine of Erskine is also in this point objectionable, in so far as he says, that diligence raised within the term shall have no effect but to secure the special subjects affected by the diligence; for though this may appear to be the import of the words used in the Act, the Court deliberately adjudged the construction not to be thus limited. And, 3. The obligation will be continued where the creditor shall have obtained decree against the cautioner;[10] mere citation in an action not being sufficient as in ordinary prescription.[11]

[1] Ross against Craigie, 11th December 1729; 2. Dict. 116. Douglas, Heron and Company, against Riddock, 20th November 1792; 11. Fac. Coll. 13.
See below, Note [8].

[2] Bell against Herdman, 14th February 1727; 2. Dict. 116.

[3] It was, however, sustained as enough, that the creditor was both writer and witness in the bond of relief. M'Rankin against Shaw, 22d June 1714; Dalr. 181.—'The Lords found private knowledge not 'relevant; but found that the charger's writing the 'bond of relief, and signing as witness to it, of the 'date of the bond charged on, was a sufficient intima-'tion.'

[4] Park's Creditors against Maxwell, 16th February 1785.

[5] Rutherford against Scott, 8th February 1715; Dalr. 189. This doctrine was held in a very strong case: the Court considering it, *first*, As a necessary inference from the statute; and, *second*, As settled by practice and the legal understanding of the country. Lady Henrietta Gordon against Tyrie, 16th November 1748; Kilk. 422. See Elchies, *Cautioner*, Notes, No. 10.

[6] Caves against Spence, 4th December 1742; Kames' Rem. Dec. p. 54. Kilk. 420.

[7] Bertram, Gardner and Company, against Sprott, 3d March 1795; Mr Baron Hume's Sess. Papers.

[8] Douglas, Heron and Company, against Riddock, 1st March 1793; 11. Fac. Coll. 80.; House of Lords, 2. App. 1800. Kirkpatrick, with Currie and Riddock as his cautioners, granted bond to Douglas, Heron and Company, payable 29th October 1778. Riddock died in 1777. Decreet in absence was taken in 1779. In a correspondence with the curators of his heir, the company threatened diligence, and the curator solicited delay. This began before and continued after the elapse of the seven years. Afterwards the company proceeded to diligence, and the statute was pleaded. But the correspondence was held a bar personali exceptione.

In the House of Lords the judgment was affirmed, and it was held unnecessary to consider certain other pleas, 'in respect of the transaction which is proved 'by the correspondence between the company and the 'factor of Riddock and his curators, and which is 'established to have been approved of by him, where-'by he is barred from insisting on the benefit of the 'Act 1695.'

[9] Irving and Copland, 7th January 1752; Kilk. 423.

[10] Douglas, Heron and Company, against Riddock, 1st March 1793. This formed one of the points in the case supra, Note [8].; the decree in absence in 1779 was held as diligence. But on this point the House of Lords gave no judgment.

[11] In the Dictionary, vol. iv. p. 102. there is a decision shortly noted inconsistent with this: Clark

This difference, however, will be observed between the septennial limitation and ordinary prescriptions, that the diligence or action raised within the seven years does not operate like an interruption or stop to the course of prescription. The effect of the limitation is perfect in stopping responsibility on the part of the cautioner, except for what becomes due before the expiration of the seven years.[1] So he is chargeable with such interest only as arises within the seven years.[2]

2. Effect of the Discharge of the Principal Debtor or Co-surety.—A cautioner is presumed to engage for the principal debtor, partly in reliance on his solvency, or the efficacy of his funds in rendering the engagement safe; and partly in reliance on the co-operation and relief to be afforded by co-cautioners. The creditor therefore cannot discharge the principal debtor, or give up any funds of which he may be possessed, affording the means of satisfying the debt; or grant an acquittance to any co-obligant bound to relieve the cautioner; without virtually discharging, to the extent of such discharge or renunciation, the obligation of the cautioner.

1. The discharge of the principal debtor, granted by the creditor without the cautioner's consent, is a discharge to the cautioner.

2. A discharge of a cautioner, in the same way, without the co-cautioner's consent, is an acquittance to the co-cautioner for the share which the discharged cautioner should have borne. Thus, if there be two solvent cautioners, and one of them is discharged, the creditor can, on the debtor's bankruptcy, charge the other with only one-half of the debt: If there should be many co-cautioners, and some of them insolvent, the discharged cautioner would have borne both his own share, and also his proportion of the share falling on the insolvent cautioners; and so the creditor must, in charging any other solvent cautioner, give allowance for these: If the claim is made against an insolvent cautioner, there is a difficulty on the principles explained above, and perhaps no deduction would be given but of the discharged cautioner's own proportion.

3. The renunciation of any security held by the creditor over the debtor's estate, is also a discharge of a cautioner to that extent.

4. The discharge of the debtor from prison has been held an entire acquittance to the cautioner, it being impossible to estimate the effect that personal diligence may produce. But the creditor may depart from inchoated personal diligence, without discharging the cautioner.[3]

5. If the creditor, without consent of the cautioner, accept of a composition from the principal debtor in discharge of the debt, so as to alter the cautioner's security, or increase his risk, this will be an acquittance to the cautioner.[4] At the same time, where the cau-

against Stewart, 10th March 1779. But I doubt the correctness of that note; and there is no report of any such case in the Faculty Collection, or elsewhere.

[1] The Editor of Erskine (edition 1812) seems to have misapprehended the principle of this doctrine, where, objecting to Erskine's text, he says,—'The 'effect of doing diligence within the seven years, seems 'to be *that of interrupting the prescription, and of saving 'to the creditor the bond.*' P. 620. Note †.

[2] Rowand against Lang, 13th June 1738; Clerk Home, 148. Reid against Maxwell, 17th February 1780; 6. Fac. Coll. 199. See the above case of Irving and Copland, Kilk. 423.

[3] M'Millan against Hamilton, 21st January 1729; 3. Ersk. 3. 66.; 1. Dict. 226. The creditor had apprehended the debtor on a caption, and kept him some days in the messenger's custody, but without incarceration. He afterwards set him at liberty. It was admitted that a creditor can pass from no consummated diligence or security; but contended, that he may begin, without being obliged to complete, his diligence. The cautioner was held not to be liberated.

See ex parte Glendinning, Buck's Cases in Bankruptcy, 517. Ex parte Gifford, 6. Ves. 809.

[4] This is part of the doctrine already laid down, and the same authorities may be referred to. This doctrine was first applied in English cases by Lord Thurlow, after great consideration: as in the case,

tioner is himself insolvent, or when he has been called on, and neglects to answer for the debtor, by paying the debt, and taking the principal debtor in his own hand, it is not to be expected that the creditor shall abstain from taking what he can get from the principal's estate; and a composition may be the most advantageous arrangement for paying off the debt. In such a case, the creditor may safely take the composition, after having given due notice to the cautioner, provided he reserve his recourse against the cautioner in so doing.[1]

6. To concur in accepting a composition under the Sequestration Act, without the consent of the cautioner, or at least without giving him an opportunity of dissenting, where such concurrence has the effect of carrying through the composition, and rendering the discharge imperative on all the creditors, is a discharge to the cautioner. In one case a different doctrine seemed to be adopted:[2] But when carefully examined, that case is an authority only for this qualification of the general doctrine, that where the creditor makes a demand on the cautioner, and the cautioner either refuses or is unable to pay the debt, and take his own relief, the creditor may follow such prudent measures as, in the circumstances of his debtor's affairs, may be advisable, without being held thereby to discharge the cautioner.

7. It follows of course, that to take a composition which, without the creditor's concurrence, has, under the Sequestration Act, been voted and confirmed, is not a discharge to the cautioner.

8. Where several persons are bound for an annuity, it may be inferred, perhaps, on the general principle, that the creditor will not be entitled to enter into a compromise for valuing the claim against the principal debtor, without the consent of the cautioner.

3. NEGLIGENCE AND IMPLIED DISCHARGE.—It is important to consider the creditor's

ex parte SMITH, 3. Brown, 1. See also, decided by Lord Thurlow, ex parte SMITH and Others, Cook's B. L. p. 170. Ex parte GIFFORD, 6. Ves. Jun. 805. by Lord Eldon.

See FLEMING against WILSON, 24th May 1823; 2. Shaw and Dunlop, 336.

[1] SMITH against OGILVY, 22d November 1821; 1. Shaw and Ballantine, 169.; Fac. Coll. Innes and Smith were co-obligants for L. 1000 to Ogilvy. Smith was a cautioner; and the creditors were aware of this. Innes became bankrupt; and Smith, when called on, was unable to answer the demand. Innes proposed a private composition; and Smith was aware of this, and of Ogilvy's being requested to accede to it. They did accede at last, 'reserving recourse against Mr Smith, 'cautioner.' Smith pleaded on this as a virtual discharge to him: But the Court held him bound, in respect the discharge was qualified, and under condition that the same shall not be effectual to Mr Innes, in case the cautioners shall be liberated thereby.

[2] WHITELAW and KIRK against STEINS, 20th May 1814; 17. Fac. Coll. 610. Certain persons having guaranteed a purchase by Small from Steins, both Small and they failed, and were sequestrated. Steins ranked on Small's estate, and also on that of Whitelaw and Kirk, the cautioners, for L. 1374. The cautioners offered a composition, which their creditors accepted, and Steins among others. They, accordingly, paid the first instalment, reserving their relief against Small. Small having also proposed a composition, Steins and their other creditors accepted it, and without Stein's concurrence it could not have passed. Then the cautioners pleaded an acquittance, in consequence of the creditors having accepted the composition. The Court, however, held them bound.

That case does not deny the general doctrine above laid down, and which, in England, has received effect so often in cases of this description. Much of the weight of the decision appears to rest on the circumstance, that by the demand made against the cautioners, they had the opportunity of paying up the debt, and taking their remedy; which, if a cautioner does not or cannot do, he may be held as leaving the creditor to do what he can for his own benefit. The doctrine delivered by Lord Meadowbank does not appear to be guarded with all the care that the occasion required. The question was not, What were the motives which actuated the creditor in assenting to the discharge? but, Whether had he not by such assent cut off the relief of the cautioners? In the case then in question there was no alternative, at least none which the cautioner had it in his power to adopt; for, being a bankrupt, he could not pay the debt. Although, therefore, the judgment seems unimpeachable, the reasons of it, as delivered by that eminent Judge, cannot be assented to without more consideration than seems to have been bestowed on them.

duty to the cautioners, and how far the neglect of measures proper or necessary for the common interest, will furnish to cautioners a defence against liability. On the one hand, the creditor holds the direct power of compelling payment from the principal, and the neglect of obvious means of safety may be said to be a voluntary incurring of risk, which it is not equitable to lay on the cautioners. But, on the other hand, the cautioners are bound to look to the condition of the debtor for whom they interpose; and even without paying up the debt, which is always in their power, the law provides them with remedies, by inhibition, adjudication, or arrestment in security, to protect themselves against the insolvency of the debtor. Unless, therefore, there is something in the peculiar nature of the debt, implying a particular course of diligence, as in the case of bills; or something confidential in the nature of the transaction, as in the case of cautionary obligations for the fidelity of a bank agent; or something of fraud, or collusion, or gross negligence approaching to dole; the creditor is not held chargeable to such a degree with the protection of the cautioners, as to be under any special necessity of doing diligence;[1] though, as already said, he cannot discharge his diligence when completed, without freeing the cautioners.

1. It will not then be a sufficient answer to his claim on the cautioners, in the ordinary case, that, by due diligence, he might have recovered from the principal.

2. If, however, there is a particular privilege annexed to the debt, by which the creditor may have a preference over the debtor's funds, it would seem that it can no more be neglected with safety to the claim of recourse against cautioners, than a security which ought to have been available to the cautioners may be renounced or neglected. In loans, for example, by means of Exchequer bills, under particular statutes, or on bonds to the Excise or Customs, the person binding as co-obligant or surety has it in his power, on paying up the debt, to secure a preference by writ of extent. If he neglect this till it be too late, and then come against other persons bound to him as cautioners or guarantees, they would seem to be entitled to defend themselves on the ground of virtual discharge.[2]

3. It is not required that the creditor shall, in an ordinary money bond, or in a bargain on a certain term of credit, instantly enforce payment of the debt on the expiration of the term.[3] But where the creditor has, by positive contract, given time, the case is different from that of mere inactivity; it being by such contract put out of the power of the surety to have recourse against the principal in the same way in which he might otherwise have proceeded.[4]

4. It is a question of some difficulty, what shall be the effect of the creditor's neglect to take proper means of completing the security stipulated. An heritable bond, for example, if good, will be available to the cautioners, but may be rendered ineffectual by an error in completing the sasine on the titles: It seems to require a very special stipulation to prevent such a neglect from discharging the cautioners.[5]

[1] See 3. Ersk. 3. § 66.

[2] MORRISON against BALFOUR, 25th June 1822, 1. Shaw and Ballantine, 525. was a case in which this defence seems to have been repelled, on the ground, that the sub-cautioners had absolutely bound themselves to pay up the whole sums, at the four stated terms in the bond, 'and give you your name from the 'obligation.' By this obligation, they may be held to have undertaken the active superintendence of the principal debtor, and the onus of preserving the privileged diligence for themselves.

[3] FLEMING against WILSON, 24th May 1823; 2. Shaw and Dunlop, 336.
FRAZER against M'TURK, 25th June 1822; 1. Shaw and Ballantine, 524. See below, Note [5].

[4] SAMUELL against HOWARTH, 1817; 3. Merivale, 272. Where one selling goods on the suretiship of another, at the usual credit, either takes a bill which he renews, or on the expiration of the credit takes a bill at a renewed credit, the surety will be discharged.

[5] FLEMING against THOMSON, 24th November 1825;

§ 2. OF CAUTIONARY OBLIGATIONS FOR THE FAITHFUL PERFORMANCE OF AN OFFICE; AS BANK AGENT, MESSENGER, NOTARY, &c.

Cautionary engagements are frequently undertaken prospectively, for the faithful performance of an office; or for payment of such sums as, in the course of the intromission with, or administration of, a particular estate, or the exercise of the duties of a place of trust, may become due.

1. CAUTIONER FOR A BANK AGENT.

The national banks, and also some private bankers, have branches established in provincial towns, the business of which is carried on by agents or factors. This is a trust of great delicacy, and in the administration of which, the temptation to take undue advantages is often too great to be resisted. The great classes of transactions in which there is hazard, are, the taking of money on deposit; the lending of money on bills; and the making of advances on bank-credits, or cash-accounts.

1. The agent commonly is intrusted with the power of taking money in deposit for the bank, which is perhaps the most dangerous power of all to the bank, and which is the least under check.

2. He is also intrusted with the power of discounting bills, and lending money on notes; he himself, however, being responsible to the bank for the bills so discounted, or the notes so taken. In this respect he resembles a factor with a del credere commission; the bills so discounted belonging to the bank, while the agent is indebted for the balance, including the dishonoured bills.

3. The power of granting cash-credits is generally reserved to be exercised by the directors of the bank themselves; the advances being afterwards made by the agent without any personal responsibility or risk.

The checks interposed on the agent's fidelity consist,—1. Of regular weekly statements transmitted to the head office, showing the discounts and advances, and accompanied by the bills themselves: 2. Of check officers, as tellers and accountants, named by the bank, by whom regular balances ought to be made of their books, and reports transmitted: And, 3. Of occasional and unlooked-for visitations and examinations of the vouchers, and of the state of cash in the strong-box. The cautioners who engage for the balance that may arise in these perilous transactions, naturally trust to those checks in a great measure, as at once a protection to the bank and to them. And the delicacy of interfering with bank transactions seems to subject the cautioners still more to a dependence on the vigilance which the bank itself ought to exert in keeping their agents to a strict and rigid accounting. On this ground, some very distressing questions have lately arisen on the sudden failure of bank agents, where demands have been made on their cautioners for enormous sums, as the result of a scrutiny into the agent's accounts for many years back. How this question is to be determined in the various cases which such situations present, or what degree of neglect on the part of the bank will bar their claim against the cautioners, is not yet correctly settled, although several cases have lately been determined on the subject.

There is a very obvious difference between the guarantee of a debt to be paid at once, and an engagement of this prospective nature, in which the cautioner is neither entitled,

4. Shaw and Dunlop, 221. Here the heritable security was rendered ineffectual, by an error in completing it; and the Court appears to have held the cautioners liable only in virtue of the special terms of the contract. It is not, therefore, to be received as a decision weakening the doctrine of the text; and it was reversed in the House of Lords, 23d May 1826; Wilson and Shaw's App. Cases, ii. p. 277.

by paying up the sum engaged for, to discharge his obligation, and take the debtor in his own hand; nor at liberty to take precautions, or interpose, for his own security, checks that may have the effect of impeding the operations of the bank, or impeaching the credit of their agent. The bank, in taking security from their agent, is not understood so much to contemplate their protection against those irregularities which they have it in their power to check, as those frauds which elude detection, and those perils against which the del credere guarantee is directed. The cautioners, on their part, trust to the bank protecting themselves by vigilance, and by the observance of the ordinary regular precautions. It seems to result from these considerations, that the bank, though protected as by a del credere guarantee against the insolvency of customers, and also against the frauds, and peculations, and irregularities of the agent, when not encouraged or connived at; will not be entitled to relief of sums allowed to accumulate by long continued irregularities, and the neglect of the ordinary and regular course of accounting.[1] Where, for example, the weekly or regular accountings, or bill-lists of an agent, are neglected to be transmitted, or permitted to be sent full of obvious errors; where his accounts are not checked; where he is permitted to go on with a series of transactions, augmenting continually a balance which ought to have been kept down; the bank will scarcely be allowed to take recourse against the cautioners.[2] But this must have its limits; for cases may easily be imagined where the agent has so exercised his lawful powers as to incur, in unfavourable times, a responsibility which cannot at once be rectified; which it is the interest of all parties gradually to reduce; and which the bank cannot suddenly check, or take public notice of, without doing incalculable mischief: And certainly it cannot be said, that cautioners are entitled to require a bank, on the occurrence of every difficulty or embarrassment in the conduct of the agency, to correspond with them; or at once to wind up the responsibilities and dealings of the agent, and stop the operations of such delicate machinery.[3]

Bonds given on those occasions are made to indemnify the bank against past as well as against future loss. It is therefore important to observe, that wherever the bank, in requiring caution, have concealed the real state of affairs, it will afford a fair ground of exception against their availing themselves of the bond to cover their past loss. If, for example, a bank have begun to doubt the regularity of their agent's transactions, and, on occasion of the death of cautioners, require additional security for his continuing in office, holding him out as a trust-worthy person, without explaining to the cautioners that there already stands a great balance against him, which secretly they intend the cautioner

[1] In the House of Lords, in SMITH against BANK of SCOTLAND, Lord Redesdale mentioned a case before him in Ireland, where a banking company had trusted their clerk too far, and had not called him to account in the ordinary regular manner. He became indebted to them in a large sum, which he was unable to pay, and they called on his sureties. They contended, that the bank had not acted fairly by them, in not calling on the clerk to account in the ordinary manner, which, if they had done, the deficit would have been much smaller, and, perhaps, the misconduct would never have occurred. Lord Redesdale remarked, that the principal ought to call on the agent to account in the ordinary regular course of business, and that it certainly was not acting altogether fairly by the surety to be negligent in this respect. On this opinion the case appears to have been settled. 1. Dow, 296.

[2] Yet this plea was rejected in an early case. It would probably not be held a precedent now to be followed; BRITISH LINEN COMPANY against NISBET, July 1773; Tait's Cases, 5. Brown's Sup. 409.

[3] THOMSON against BANK of SCOTLAND, 29th January 1822; 1. Shaw and Bal. 275. In 1808 a bond of caution was granted for the faithful administration of a bank agent, limited to L.10,000. In 1811 additional security, by heritable bond, was taken, when the responsibility of the agent was at L.40,000; and also a note for that sum, reserving other sureties. The agency closed in 1812, and the cautioners were charged to pay their L.10,000. The chief defence was rested on the bank having permitted the agent grossly to misconduct the business, to give extravagant accommodations, and in particular large discounts to a house connected with the agent in trade. The Court of Session held the cautioners liable. But the judgment was reversed in the House of Lords.

to undertake, the cautioner seems to have a good exception to their action, in so far as grounded on the balance due at the requisition.[1]

A stipulation is generally contained in such bonds, by which a stated account, made out from the books of the bank, and signed by the accountant, (or other officer), shall be sufficient to constitute and ascertain a balance, to the effect of authorizing a charge and other diligence. This fixes the amount of the claim for which the bank is entitled to do diligence against the cautioners,[2] or to rank on the estates of the several co-obligants, principal, and cautioners.

But such a stipulation in the bond does not preclude the cautioners from requiring to see the particulars of the account as appearing in the books.[3] They will be entitled to this inquiry even in the way of suspension, if any good ground can be shown for refusing summary execution on the bond: And when a claim comes to be entered in bankruptcy, the bank may in the same way be called on to exhibit a copy of the account.

It is also sometimes stipulated, that no suspension shall be competent of a charge on such an account, unless upon consignation of the balance. This, however, is not a legitimate or effectual stipulation.[4]

The bond generally provides, that the co-obligants shall be chargeable with interest on the balance appearing on the stated account, from the time that the demand is made. Where no such provision is made, interest seems to be due from the date of the balance being ascertained, and a demand made for payment; for from that time the sum exists as a debt due by the principal, which the cautioners may discharge.[5]

2. CAUTIONER FOR A MESSENGER.

The cautioners for a messenger are taken bound 'for the damage, interest, and ex-'penses which the lieges shall sustain, through the negligence, fraudful, or informal

[1] No case has been determined of this precise nature. But, in the House of Lords, in the case of SMITH against the BANK OF SCOTLAND, a case was mentioned at the bar and on the Bench which illustrates it.

Sir Samuel Romilly mentioned at the bar, FISHMONGERS' COMPANY againt MALTBY. Maltby was a clerk of the company, with several sureties. Some of them died, and he was required to renew the suretiship. The company coming to be dissatisfied with his conduct, directed an inquiry into the state of his accounts, and found that he was indebted to them in a very considerable sum, which had been increasing from year to year, and at last became greater than was likely to be paid. Before settling accounts with him, they required new sureties, and a bond was executed accordingly. Immediately afterwards, Maltby was removed. The case was before the Lord Chancellor, on a motion; and the light in which it appeared to him was this,—'That if he knew himself to be cheated by an 'agent, and, concealing that fact, applied for surety 'in such a manner, and under such circumstances, as 'held him out to others as one whom he considered as 'a trust-worthy person; and any one, acting under the 'impression that the agent was so considered by his 'employer, had become bound for him, it appeared to 'him that he could not conscientiously hold that se-'curity. He was, accordingly, of opinion, that the 'Fishmongers' Company could not hold their security.' On this opinion the case was settled. And Lord Eldon said, in Smith's case, that 'he had since reconsidered 'the matter, and still retained his former opinion, and 'would act upon it judicially, if occasion offered.' 1. Dow, 294.

[2] FISHER against STEWART, 11th February 1824; 2. Shaw and Dunlop, 695. The objection stated was, that there was no authority in the registration clause to register the account, so as to be a ground of charge. The cautioner's bill of suspension was refused.

[3] BANK of SCOTLAND against FRAZER's Cautioners, Winter Session 1818. Lord Alloway authorized an inquiry into the accounts of a bank agent, where the balance, as ascertained in the stated account, was given as the result of a scrutiny for many years back. The case was settled on the result of the investigation.

[4] FORRESTER, for Bank of Scotland, against WALKER and HUNT, 27th June 1815. The case was very deliberately considered; and, in the report of it in the Faculty Collection, the opinions of the Judges are fully given; 18. Fac. Coll. 467.

[5] See below, p. 366., General Rules of Responsibility.

'execution of the messenger.'[1] This is a very great responsibility, considering the infinite delicacy and importance of the acts which a messenger has to perform; that it protects both the employer and the person against whom the diligence may be erroneously executed; and that it extends to all acts of usurpation and injury to which the messenger is admitted by means of the diligence.[2] (See below, p. 367. Note [2].)

The claim against a messenger, or his cautioners, is to be constituted by a decree of the proper court, ascertaining the damage, and decerning for the amount. It is held,—1. That the cautioners are liable only for what the messenger does, or neglects to do, in his proper office of messenger; not in the office of agent, in which occasionally a messenger is employed in combination with his ministerial duties.[3] 2. That the messenger, as such, has no discretionary power. 3. That it is not enough to characterize his employment as that of agent, that he is addressed as 'writer.'[4] 4. That the cautioners are liable not merely to the employer of the messenger, but to those against whom he has committed any fault.[5] 4. That, in estimating the damage arising from neglect, the creditor is not bound to show his loss; the law presuming that the damage arising from the non-execution of diligence is the amount of the debt.[6] 5. That where the diligence to be executed is personal, which operates indirectly, this presumption is absolute, and not to be overcome by proving the desperate circumstances of the debtor, and the hopelessness of recovering the debt;[7] nay, even where the diligence is direct, (as poinding), the Court does not admit any evidence to show, speculatively, that this diligence would probably not have produced payment;[8] although clear evidence of the impossibility of deriving payment from such diligence must undoubtedly be received as a sufficient defence; as, for example, where an arrestment is blundered, and it turns out that on a balance of accounts there are no funds in the hands of the arrestee.

[1] This is the form of the bond used in the Lyon Office, in compliance with the Act 1587, c. 46.

[2] KENNEDY against M'KINNON, 13th December 1821; 1. Shaw and Ballantine, 210. The messenger, in arresting a ship, removed the pump, took possession of the ship abandoned by the crew, and, in attempting to navigate her, run her on shore and lost her. The cautioners were held liable.

[3] WELSH against M'VEAGH, 18th January 1781, 2. Hailes, 876.; where the messenger, instead of poinding the debtor's effects, received them from him, and sold them by public auction, and applied the proceeds to his own purposes. His cautioners were not held liable for the money allowed to come into his hands, as his malversation was in the character of agent.

In HAMILTON against FRAZER, 14th February 1817, 19. Fac. Coll. 291., the action not being against the cautioners, there was no occasion to discriminate correctly between the character of agent and messenger; but the defender was found liable for the misconduct of another messenger to whom he sent the diligence to be executed. As argued by the pursuer, this must have been on the ground of an agent's responsibility. But the expression used by the Court leaves it doubtful, whether he was not held liable as messenger.

[4] WILSON and Company against SNODY, 31st January 1817; 19. Fac. Coll. 268. Here the messenger was held as acting in that official capacity, and not with the discretionary power of an agent, although the letter sending the diligence was addressed, 'Mr N. 'Snody, writer.'

[5] GRANT against FORBES, 8th July 1758; 2. Fac. Coll. 216. Affirmed 7th March 1759. This case was confirmed in KENNEDY against M'KINNON; supra, Note [2].

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[7] The same rule is followed here as in the escape of a prisoner, where, without inquiring into probabilities, the Magistrates are subjected for the whole debt. DEAN against MAGISTRATES of AYR, 27th January 1803; 13. Fac. Coll. 175. AFFLECK against MAGISTRATES of KIRKCUDBRIGHT, 17th June 1803.

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3. CAUTIONER FOR A NOTARY.

Notaries, before they are admitted to the exercise of their office, find surety for the faithful exercise of their function;[1] and questions on the negligence or irregularity of their proceedings, must be determined on the same principles which regulate the case of a messenger.

1. It is no defence against the cautioner's responsibility, that the act has proceeded from want of skill; and that the legitimate provision against that is the examination before admission.

2. It is not necessary to make out a case of fraud or dole; the cautioner will be liable also for error or neglect.

3. It has been held, that the cautioner for a notary is not responsible for errors or neglects in the exercise of the office of town-clerk, which is separate from that of a notary. And,

4. It rather appears, that when a writer sends a sasine, &c. to a notary to be executed, already written out, but erroneous, the notary will not be liable, nor his cautioners responsible, for the errors into which he is thus betrayed.[2]

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1. That it will depend much on the expression of the bond, whether it is to be extended to prior as well as to future intromissions.

2. That where the sureties are bound generally for the intromissions or faithful administration of the principal, and subjoin a limitation of their responsibility to a certain sum, should the balance due on his intromissions happen to exceed the sum limited in the cautionary obligation, the engagement of the cautioners is held to be a security for that balance, after applying in extinction of the debt whatever the estate of the principal may afford in the way of dividend. The cautioners are not, therefore, entitled to require that such dividend from the principal's estate should be rateably applied in extinction of their engagement; the creditor is entitled to apply it in payment pro tanto, leaving the engagement of the cautioners as his last resource. As, for example, if caution has been given to the extent of L. 500 for the intromissions of a trustee, and he fails with a balance of L. 1000 against him; the creditor, after receiving a dividend from his estate of 10s. in the pound, would still be entitled to demand from the cautioners the L. 500 which they had guaranteed.[3] This, it will be observed, is different from the case of advances made

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beyond a sum limited in a cash-credit. *There* an engagement is tacitly undertaken, to give no enlargement of the credit but on the footing of a common creditor; and so the cautioners will be entitled to an equality with the creditor: But in stipulating responsibility for a bank agent, the presumption is, that the surety is to answer for a deficiency, which cannot in the nature of things be limited.

3. That if no special stipulation is made as to the evidence by which the balance is to be struck and ascertained, it must be constituted by an action on the account between the officer and his principal, or those to whom he is accountable; or by a claim in bankruptcy, accompanied by the account and vouchers.

4. That the demand against the officer's estate for the balance is a mere personal debt, on which no preference can be claimed, unless in so far as the funds intrusted to him can be identified as part of the trust-estate; in which case they may be vindicated from the fund divisible among his other creditors.

5. That cautioners having once engaged for an officer's fidelity, cannot suddenly withdraw from that responsibility, to the effect of throwing the affairs intrusted to the officer into confusion. For example, the cautioners for a bank agent cannot, on a sudden, stop the whole operations of the bank, by withdrawing. But they may withdraw, by giving notice of their resolution so to do, after a reasonable time allowed for a new arrangement.

5. That notwithstanding the death of the cautioner, the engagement still subsists against his representative, as cautioner, unless *he* shall, by a similar notice, terminate his obligation.[1] And,

6. It has been held (but the question is full of doubt) that the bankruptcy of the cautioner annihilates the bond, so that it cannot revive, but requires to be renewed.[2]

§ 3. OF CAUTIONARY OBLIGATION FOR A CASH-CREDIT WITH A BANK.

The use of credits with bankers, or merchants having a great command of capital, has, in all trading countries, been productive of great advantages, by enabling dealers, without imprudence, to extend their trade farther than they otherwise could do. The operations on such credits are carried on in various ways; by the discounting of bills, or by drafts or checks on the banker, as if he held money of the dealer.

The trade of Scotland has been fostered by a peculiar sort of cash-account or bank-credit, which, from the time of their first institution, the Scottish banks have been accustomed to open with their customers; and which have produced great benefit in all branches of trade and manufactures. A cash-credit of this description is an undertaking on the part of a bank to advance to an individual, or to a partnership, such sums of money as may from time to time be required, not exceeding on the whole a certain definite amount; to be repaid, and a continual circulation kept up by the replacing in the

indebted to the bank in L. 5000, and the bank received a dividend of L.1200. They then brought an action against the cautioners for L.1000 each. They pleaded their right to have a communication of the dividend. The Court held the cautioners bound that Ferguson should account indefinitely; and that a taxation of this to L.1000 each, no doubt freed them from paying ultra, but did not entitle them to any share of Ferguson's effects till the bank was totally paid.

Borthwick (East Lothian Bank) against Balfour and Gibson, 29th January 1819; 19. Fac. Coll. 641. In this case the same question was raised as in Maxton's case. Lord Pitmilly decided it on the very same principles, and the Court adhered. Affirmed, 1. Shaw's App. Cases, 131.

[1] See University of Glasgow against Sir W. Miller, 18th November 1790; 8. Fac. Coll. 302.; Bell's Cases, 140.; 2. Hailes, 1091.

[2] Hibbert against Mann, 1818; so determined by Lord Alloway in the Outer-House, where the cautioners of a messenger had failed and been discharged, and had again become rich, his bond remaining all the time in the Lyon office, and appearing, on occasion of a subsequent malversation by the messenger, to be the sole cautionary obligation for his fidelity.

bank of small profits and sums as they come in. The security upon which the advances are made, is a bond with sureties, generally two in number, for the repayment on demand of the sums actually advanced, with interest upon each issue from the day on which it is made; interest at a lower rate being allowed by the banker for the sums paid into the bank. And the credit is continued as long as the bank finds its advantage in doing so, and while the person having the credit proceeds with a circulating capital to a certain proportion beyond the amount of the credit. The security on which such credits are given, may be either that of heritable property or personal suretiship. In the application of heritable securities to this purpose, there was formerly danger, both at common law and under the provision of the bankrupt law, against the granting of securities for debts to be afterwards contracted. And although those dangers have now been removed,[1] bankers decline heritable security, and rather wish to have the personal credit pledged to them of such sureties or cautioners as will immediately answer a demand when made.

The form of the bond is that of a joint and several obligation by the principal and his sureties, as co-obligants; the principal being no otherwise distinguished in the bond than as the person in whose name the account is to be kept, and who, by his draft and orders, is to operate on the credit to the extent of the obligation. In this way the parties evade the septennial limitation of the Act 1695, c. 5.[2] The nature of the operations or transactions by which the principal is to take advantage of the credit, and which the banker is entitled to comprehend within the cover of the bond, is usually defined by an enumeration in the bond of all sorts of cash transactions which can occur in daily practice.[3] The credit is limited to a precise amount; the balance at any time due, to be ascertained by a signed or certified account from the cashier.[4]

Correctly proceeding under the bond, the banker ought to enter regularly as articles in the cash-account, every bill or note discounted, which it is his intention to cover by the security. But it appears to be more convenient for all parties, on the one hand, that the cash-credit shall not be held as operated upon, and perhaps exhausted, by every bill transaction, however high in credit the parties whose names are on the bills may stand; and, on the other hand, to give the banker a right of throwing into one general account, at the ultimate settlement of the balance, all the responsibilities of the holder of the credit. When the question was first raised, it was greatly doubted, whether bills could be introduced under such a bond of credit, to be covered by the responsibility of the cautioners, if not originally entered in the account, though perhaps discounted for other persons than the holder of the account. And it appeared to be a practice of reprehensible looseness in bankers, to introduce subsequently into the account opened under the bond of credit, all the bills and responsibilities of the holder of the credit, however unconnected in their origin with the credit of the cautioners. There could be no doubt that a bond expressed as above, (or even more generally expressed), was, strictly speaking, capable of comprehending such transactions; but it was thought, that where the banker, at the time of making the discount, or entering into the transaction, did not place it to the debit of the cash-account; or where it was not truly a cash transaction for the benefit of the holder of the account; it ought to be held that the transaction was not on the credit of the names in the bond;

[1] Of this hereafter, in Book IV.

[2] See above, p. 356. et seq.

[3] The parties bind themselves, jointly and severally, as co-obligants and full debtors, to the bank, 'for the 'sum of L. , or such sum as the said A 'shall value for, or be due to the bank, by orders or 'drafts on the cashier, or by receipts to him, or by 'letters addressed to him, or by accepted, indorsed, or 'discounted bills, promissory-notes, letters of credit, 'guarantees, or in any other manner of way.'—'And 'it is hereby declared, that an account, made out from 'the books of the bank, and subscribed by the ac-'countant, shall be held fully to liquidate and ascer-'tain the balance due, and for which a charge may 'proceed,' &c.

[4] See, as to the effect of this, above, p. 364.

and that the discount of a bill should be held as a purchase merely of the obligations which that document carries with it,—a separate transaction, made on the faith and credit of the bill alone. It was said to be the proper way of entering a bill discounted for the person who holds the credit, when intended to be under the bond, to make it at the time an article in the account, exhausting pro tanto the credit; or, at least, to enter it short in the account, leaving its fate, as affecting the balance, to be determined by the event. But other views have prevailed. The terms of the bond were found to have been carefully devised to avoid this construction, and with a view to give to bankers the privilege of bringing under the security bond the whole of their customer's responsibilities. Accordingly, the Court held, that the cautioners were liable for the specified amount of the credit, comprehending in the balance, bills, notes, and engagements, which were not at the time specifically brought into the account, or directly taken on the security of the bond.[1]

The general rules of the creditor's obligation to sureties, apply to such a case. The bank will not be held bound to do diligence against the holder of the credit. But, on the other hand, they will not be entitled to renounce any security which they hold. They will not be bound to discuss the parties to bills, but will not be entitled to include under the account bills which they have failed duly to negociate. They will be fully entitled to renew bills, and give time both to the holder of the credit, and to those who, in the course of his discounts, come to be collaterally bound to them: For the very purpose of the credit is to enable the bank to give every facility that may be useful to those who hold this accommodation, looking at last to the guarantees of his mercantile credit.

The bank will be bound to assign to the cautioners such obligations as they have brought into the account; under this qualificaton, that if the balance due to the bank exceed the sum secured by the bond, the banker will not be required to give up bills or other securities on which advances have been made, unless they have at the time of the transaction been introduced into the cash-account, and discounted expressly on the credit of the cautioners. It has been held, that they cannot demand the benefit of collateral securities; as long dated bills, lodged as a fund of credit.[2] But this is very questionable; and the case seems rather to fall under the rule already explained, p. 352–3.

The cautioners, in cash-accounts, may put an end to their responsibility when they please, by giving notice to the bank, and to the person in whose name the account is kept. The former is the essential notice. But the death of the cautioner does not discharge his bond: The bond binds the parties, their heirs and successors; and it still subsists against representatives, not merely for the debt as it stood at the cautioner's death; but prospectively, as if they were the original obligants for what may become due under the credit, till the recall of the responsibility.[3] Notice ought to be given to the

[1] LIDDELL against Sir W. FORBES and Company, July 1820. A credit of L.1000 was given to Sibbald and Company, on a bond by W. Sibbald and J. Liddell, in the terms above, (p. 368.) The credit being nearly exhausted, a bill for L. 5000 at twelve months by W. Sibbald was lodged and accepted to Sibbald and Company as 'to your credit when paid.' On Sibbald and Company's failure the cash-account showed a small balance in their favour, but two bills discounted, and then current, but not entered in the account, having been dishonoured, were brought into the account, turning the balance in favour of the bank, and a demand was made on the cautioners. Liddell pleaded, 1. The bills not being discounted under the credit, or entered in the cash-account at the time, cannot affect the balance: 2. If liable, he is in relief entitled to the collateral security of the L. 5000 bill. Lord Alloway repelled both pleas, holding, 1. That the bond covered these bills, and that their eventual dishonour altered the balance as it stood at the bankruptcy; and, 2. That the bill of L. 5000 was merely a source of additional credit *beyond* the cash-account, and not intended as any additional security for that cash-account; and that the whole balance was below the sum in the bond. The responsibility was accordingly divided as under the bond: And this judgment was adhered to by the Court.

[2] See above Note.

[3] COMMERCIAL BANK of Aberdeen against CALLENDER, 4th February 1801; Baron Hume's Papers and Notes. There John Durno had a cash-credit, with Barclay and Callender as co-obligants. Callender died; and the bank having, as usual, required a new cautioner, Leslie of Summerhill signed a bond of cor-

representative of the obligation; for as it happens in most cases that the heir has no means of knowing that such engagements have been undertaken by his predecessor, the hardship may be very great of a sudden and unforeseen demand in consequence of such an undertaking: And although it cannot be said, that such notice is necessary to continue the responsibility, a court will examine very strictly into the equities of a claim in which this has been neglected.

Although the stipulation in the bond will entitle the bank to summary diligence on the certified account shewing a balance, (p. 364.), a claim in bankruptcy must be made in the ordinary way, by producing the bond, with a certified copy of the account, and the vouchers of that account. The claim, of course, may be made against each obligant to the full amount, so as to draw, on the whole, the full sum of the debt, and nothing more.

In suretiships having a prospective operation, as in cash-credits, standing guarantees, &c. it is important to mark the effect of a change of the persons concerned in the transactions.

1. Where there is a change on the part of the creditor; where a cash-credit bond, for example, is granted to a banking house, the partners of which happen to be materially altered during the currency of the credit,—do the cautioners continue responsible, notwithstanding such change, and without any notice, or any renewal, of their engagement? It would be a great hardship, even on the customers, if on every change all the bonds of credit of a banking-house were to be renewed; but there does not seem, in law, to be any necessity for this; and, generally, there is a stipulation against it in the bond. See below, Partnership.

2. Where there is a change on the part of a company, for whose use and in whose name the credit is to be operated on, the responsibility will be more easily discharged. The same inconvenience cannot here be stated as in the renewal of all the cash-credit bonds of a banking-house; while the confidence reposed, the very occasions of cash operations, the whole character of the debtor whose dealings are guaranteed, undergo a radical change. The death or retiring of an old partner, or the adoption of a new one, if known to the bank, will discharge the cautioner; unless there is either a renewal expressly of the cash-bond; or, at least, an implied assent to the change, in consequence of distinct notice given to the cautioners.[1]

§ 4. OF LETTERS OF CREDIT OR GUARANTEE.

Guarantee may be taken as the generic term, comprehending both letters of credit and engagements to be answerable for debt. The nature of the engagement is, an undertaking to be answerable for the payment of a debt, or for the price of goods, or for the balance arising in a course of dealings, or for the performance of an undertaking, by another person, liable in the first instance. It has commonly in contemplation future rather than past transactions; but not unfrequently is applied to a series of dealings, of which some have already taken place. It is distinguished from a formal cautionary obligation, chiefly by the looser epistolary form of the writing.

roboration. Durno exhausted the credit, and failed; Leslie also failed; and Callender's executors were called on by the bank. They pleaded,—1. That the bank had kept the obligation latent from them till after Durno's failure; 2. That Leslie came in Durno's place. But the Court repelled the defences.

PATERSON against CALDER, 5th July 1808; 14. Fac. Coll. 235. The principle of the determination was, that the representatives were, 'as principals, indisputably liable; and, as cautioners, they were liable on 'the precedent of Sir W. Miller's case.'

[1] SPIERS against ROYAL BANK, 22d June 1822; 1. Shaw and Dunlop, 554. The account here was to be kept in the name of Archibald M'Nab and Company, which then consisted of two partners. One of them retired, and announced this in a newspaper; others were assumed; but the firm remained unchanged; and no notice was sent to the bank of the shifting of partners. The cautioner was held liable; for, although it was said the bank took in the newspaper in which the change of partners was announced, no notice was proved.

The doctrine of the nature and construction of contracts and obligations, already laid down, is applicable to this engagement. In England, the statute of frauds (29. Car. II. c. 3. § 4.) denies action on any collateral obligation for the debt, default, or miscarriage of another, unless upon a note or memorandum thereof in writing, signed by the party:[1] while it is held not to apply, if the promise be not collateral, but an original and absolute undertaking to pay the debt.[2] In Scotland the rule is, that no cautionary obligation or guarantee can be constituted by parole agreement; so that an acknowledgment or a reference to oath will not constitute an effectual guarantee. But this is not carried so far as, in England, the words of the statute have compelled the Courts to go: If goods be furnished, or money paid, or indulgence given from the immediate execution of diligence, on the faith of the engagement, though verbal, and with the knowledge of the person so engaging, the obligation will be effectual by the law of Scotland.[3]

1. Letters of Credit, strictly speaking, are mandates, giving authority to the person addressed to pay money or furnish goods on the credit of the writer. They are generally made use of for facilitating the supply of money or goods required by one going to a distance or abroad, and avoiding the risk and trouble of carrying specie, or buying bills to a greater amount than may be required. The debt which arises on such a letter in its simplest form, when complied with, is between the mandatory and mandant: though it may be so conceived as to raise a debt also against the person who is supplied by the mandatory. 1. Where the letter is purchased with money by the person wishing for the foreign credit; or is granted in consequence of a check on his cash-account; or procured on the credit of securities lodged with the person who grants it; or in payment of money due by him to the payee; the letter is in its effects similar to a bill of exchange drawn on the foreign merchant. The payment of the money by the person on whom the letter is granted raises a debt, or goes into account between him and the writer of the letter; but raises no debt to the person who pays on the letter, against him to whom the money is paid. 2. Where not so purchased, but truly an accommodation, and meant to raise a debt against the person accommodated, the engagement generally is, to see paid any advances made to him, or to guarantee any draft accepted or bill discounted; and the compliance with the mandate, in such case, raises a debt both against the writer of the letter, and against the person accredited.

2. Letters of Recommendation and Guarantee.—There is a species of letter of credit, used both in foreign and in domestic transactions, which is of the nature of a proper guarantee, or cautionary obligation, where the writer of the letter gives assurance of the responsibility of a third person.

The chief difficulty is to distinguish these from mere letters of recommendation. A guarantee raises a credit on the pecuniary responsibility of the writer of the letter; a simple recommendation infers no responsibility on him whatever, unless the representation shall turn out to be fraudulent and false. It would appear,—1. That when the person who writes in commendation of the character and credit of another, does so in consequence of an application on the part of him who is about to engage with that other in transactions,

[1] So even where, in consequence of a promise to see the price of goods paid, in reliance on which the goods have been delivered, there is no action. Anderson against Hayman, 1. H. Blackst. 120. Kirkham against Master, 2. Barn. and Ald. 613. Barber against Fox, 1. Starkie, 270.

[2] Goodman against Chase, 1818; 1. Barn. and Ald. 297.

[3] Hunter against Carson, 17th February 1824; 2. Shaw and Dunlop, 716. Hunter, going to market with sixty Highland bullocks, met with Carson and Gordon; the latter of whom proposed to buy his cattle. Carson spontaneously assured Hunter, that there was not a better man in Scotland for the price, and that he might take Gordon's bill without hesitation, as it was as good as the Bank of Scotland. On this the bargain was struck for L.427, for which, on the above assurance of Carson, Hunter took Gordon's bill at three months. The Court held Carson bound to guarantee the bill.

his expressions are to be interpreted largely in his own favour; and so that the friendly information thus drawn from him may not entrap him into a guarantee:[1] 2. That he will be liable for the consequence of wittingly deceiving another into a transaction with one unworthy of credit. This, however, is a case difficult to be made out. The examples of it which are to be found in the books, are in cases where the recommendation was spontaneous:[2] 3. That a recommendation spontaneously given, if expressed in general terms, speaking merely of the respectability, regular conduct, and good credit of the person introduced, is an introduction only, not a letter of credit:[3] But where there is a distinct allusion to a particular transaction, and an assurance of safety in entering into it, this, where spontaneous, is held to amount to a guarantee,[4] even where it is only a colloquial or verbal expression of assurance.[5]

3. GUARANTEES are often granted of single bargains or transactions relating to cash or bills; and there is no set phraseology in which they must be expressed. The chief point is, that the particular transaction shall be so described, as to comprehend distinctly the claim of indemnity that is grounded on it; and that the condition of acceptance, or otherwise, shall have been complied with.[6]

In the stamp laws, there is an exception from the duties for agreements, or minutes, or memorandums of agreements, of 'memorandums, letters, or agreements made for, or relating to, the sale of any goods, wares, or merchandise.'[7] And under one of the earlier Acts, having the same exception, it was held that a guarantee of a purchase of goods did not require a stamp:[8] But letters of guarantee for intromissions, and other similar engagements, require a stamp.

[1] See much discussion on these points in HAYCROFT against CREASY, 2. East, Rep. 92. et seq. See also M'IVER against RICHARDSON, 1. Maule and Selw. 557., where the Court construed the letter to be an answer to inquiries made, but to import only an *offer* to guarantee, which required acceptance.

See also SYMMONS against WANT, 2. Starkie, 371.

[2] BALFOUR, JUNOR and Company, against RUSSELL, 8th March 1815; 18. Fac. Coll. 335. This was a case of misrepresentation of a trader's circumstances, the writer being quite aware that he was in a state of great embarrassment. He was held responsible for the debt.

CORBET against GRAY, 27th February 1794. This was a similar case, decided in the same way. Farquhar Gray wrote to Corbet, of a man whom he knew to be in labouring circumstances, that 'he had re-'quested my line of introduction to somebody in the 'trade in Glasgow; and if you and he can agree as to 'the price, I have no doubt of your dealing to a con-'siderable extent.'

[3] See opinions of the Court, especially of Lord President Blair, in RANKEN against MURRAY, finally decided 15th May 1812; 16. Fac. Coll. 562.

[4] Such was the letter in the above case of Murray, which, however, occasioned considerable doubts. The letter was introductory of one Shannon to Ranken, as 'intending to open for a sale of spirits and ale at the 'term. The lad has always behaved himself with pro-'priety hitherto, and I doubt not will give satisfaction 'in any transactions he may have with you.' The Judges held this to be a letter of *introduction* in the first part of it, a letter of *guarantee* in the latter part. But there was much doubt in the case.

Observe, however, the distinction taken in the case of M'IVER against RICHARDSON, (see above, Note [1]), where the assurance is to be construed merely as an *offer* to guarantee, and where acceptance is necessary.

[5] HUNTER against CARSON, 17th February 1824; 2. Shaw, 716.

See also MATHER against MATHIE, 4th March 1823; 2. Shaw and Dunlop, 263. FERMIN DE TASTED and Company against M'QUEEN, 26th February 1824; ibid. 747. and 750.

[6] M'IVER against RICHARDSON, 1. Maule and Selw. 557.

[7] See above, p. 319.

[8] WARRINGTON against FURBOR. In this case, Furbor proposed to purchase Manchester goods to the value of L.1070 from Martin, and offered the guarantee of Warrington, who gave an unstamped letter of guarantee for the price, at a credit of six months. The goods were furnished on this credit, and a bill drawn at six months. The buyer failed, and Warrington paid L.1000 under the guarantee, and brought his action for indemnification. One defence was the want of a stamp, and the question, whether it did not fall under the exception of the 23. Geo. III. c. 58. § 4. as a contract relating to the sale of goods? The Court held, that the law did not limit the exception to the case of an immediate sale of goods between buyer and seller, but, by the very words, extended to agreements *relating* to the sale of goods; 8. East, 242.

It is a rule, that one who takes a guarantee is bound to inform the surety fairly of the nature of the contract to which his credit is to be interposed, and not to avail himself of a private compact which does not appear, on the face of the guarantee, to be known to the surety.[1]

LIMITATION OF GUARANTEES AND LETTERS OF CREDIT.—It is important to observe any limitation in respect of the transaction, the person, or the time to which a guarantee may be meant to extend. The language used, the nature of the transaction, and the plain understanding between the parties, must all be taken into consideration. But the general rule is, that the strict words of the agreement, where intelligible, must be adhered to, and at all events never carried beyond the plain and manifest intent of the party.

I. LIMITATION IN RESPECT OF THE TRANSACTION.—It seems to be settled by decided cases,—

1. That where any particular transaction is specified, or distinctly pointed at, the guarantee can be held to extend only to that transaction: As where a letter of credit is subjoined to an order for goods, the guarantee is confined to that order.[2]

2. That where the expression is general, for goods to be furnished from time to time, or for *any* dealings, to a limited extent; the guarantee will be limited in respect of the sum, but extended to successive transactions, and held, in mercantile phrase, to be a STANDING OR CONTINUING GUARANTEE.[3] But care must be taken that the expressions indicate an engagement for goods to be furnished successively, or from time to time.[4]

[1] JACKSON against DUCHAIRE, 3. Term. Rep. 551. Here Welch wishing to assist Duchaire, who was entering on a house that had been occupied by Jackson, agreed to purchase for Duchaire, at the price of L. 70, the goods left by Jackson in the house. There was a private agreement between Jackson and Duchaire, that L. 30 more should be paid for the goods. This was held a fraudulent concealment from Welch.

PIDCOCK against BISHOP, 3. Barn. and Cress. 605. Here Bishop guaranteed the payment of L. 200, value to be delivered to Tickel in pig iron. There was a private agreement, that besides the market price of the iron, Tickel should pay 10s. on every ton toward extinction of an old debt. This was held a fraud on Bishop, varying the degree of his responsibility.

[2] CRICHTON, STRACHAN, BELL and Company, against JACK, 30th June 1797; 12. Fac. Coll. 97.

In RANKEN against MURRAY, (p. 372. Note [4]), one difficulty with the Court was, what should be the extent of such an engagement? Lord President Blair said, and the Court concurred with him, though the point was not necessary in the judgment,—'One difficulty is, Where is this to stop? But it appears to 'me, that this guarantee only applies to the first transaction under the letter, the object of which transaction was to enable Shannon to open his shop for business.'

[3] MERLE against WELLS, 1810; 2. Camp. 413. The general word 'any' is in such cases important. Thus, one binding for 'any debts the person alluded 'to may contract to the extent of L.100,' the sum mentioned is held the sole limitation, and the guarantee applicable not merely to the first, but to subsequent debts to that extent. 'The guarantee,' said Lord Ellenborough, 'is not confined to one instance, but 'applies to debts successively renewed. If a party 'means to be surety only for a single dealing, he 'should take care to say so. By such an instrument 'as this, a continuing suretiship is created to the 'specified amount.'

MASON against PRITCHARD, 1820; 2. Camp. 436. A guarantee, 'for any goods he hath, or may supply 'my brother with, to the amount of L.100.' Baron Wood held it necessary to give notice to stop the guarantee after any furnishings, if there was a design to limit it farther than to the L.100. And the Court of King's Bench refused a rule holding it a cautionary guarantee.

BASTOW against BENNET, 3. Camp. 220. A guarantee 'to the extent of L.300 for any tallow or soap 'to be supplied.' Lord Ellenborough said,—'Without the word *any*, it might perhaps have been confined 'to one dealing to the amount of L.300; but as it is 'actually worded, I am of opinion it remained in force 'while the parties continued to deal on the footing 'established when it was given.'

[4] MELVILLE against HAYDEN, 1820; 3. Barn. and Ald. 593. The guarantee here was, 'the payment to 'A. M. to the extent of L.60, at quarterly account, 'bill two months, for goods to be purchased by him 'of D. M.' There had been goods delivered for three quarterly accounts, and paid. The default was in the fourth, and for that the action was brought. Abbot, Ch.-J., held at the trial, that the guarantee was at an end before the goods of the fourth quarter were furnished. The Court of King's Bench held this to be law, there being here no provision for guaranteeing goods to be delivered from time to time.

3. That where the guarantee is unlimited in extent, the discretion of those to whom it is addressed is strictly referred to.[1]

4. That a guarantee for the payment of goods to be supplied, will apply to goods agreed to be sold the day before, but not delivered till after.[2] But where the words plainly point to subsequent transactions, or rather, where they do not plainly comprehend past transactions, the guarantee will not cover dealings prior to its date.[3]

5. It is sometimes difficult to distinguish whether a transaction be fairly comprehended within a guarantee which describes, in general terms, what is intended to be done: As where one agrees to guarantee a loan, or accommodation to be granted to another, supposing it to relate to some future accommodation, but where truly it is intended only to settle past accounts. If the words be clear, they must guide the determination; if not, the obvious meaning and understanding of the parties must be taken, not carrying the engagement beyond the strict words.[4]

6. That which is a necessary part of the transaction guaranteed, comes under the guarantee.[5]

II. LIMITATION IN RESPECT OF THE PERSON.—Guarantees, and letters of credit, are limited to the persons to whom they are addressed; in whose discretion the writer is presumed to have peculiar confidence. So, 1. A letter addressed to *one person*, authorizing him to introduce the bearer to dealers, will not authorize *another* to introduce him, to the effect of making a guarantee by the writer.[6] 2. A letter of credit addressed

[1] See below, No. II. and the cases in the following Notes.

[2] SYMMONS against KEATING, 1819; 2. Starkie, 426. On 6th December, one had applied for goods and selected them; but the plaintiffs would not deliver them without a respectable reference for her responsibility. On the 7th, she brought a letter engaging, in consideration of supplying M. C. with such goods as she wished to buy, the defendant would guarantee the payment, not exceeding L. 50. Held that the sale not being complete till delivery, and delivery being subsequent to and on the faith of the guarantee, the defendant was liable.

[3] DYKES against WATSON, 3d June 1825; 4. Shaw and Dunlop, 69.

See HOUSTON'S Executors against SPIERS, 12th May 1826; 4. Shaw and Dunlop, 566.

[4] GLYN against HERTEL, 1818; 8. Taunt. 208. Here a mercantile house was largely indebted to its banker, for which the banker held the Company's note with security bills. The account being in a very unsatisfactory state, the banker insisted for payment or further security; and made application to the aunt of one of the partners to become security. The letter to her led to the conception, that ready money was to be advanced to the house. The guarantee desired to be sent was, 'to guarantee the transactions in the account of 'S. M. and Company with your house, to the extent of 'L. 5000.' The letter actually written was, 'I will be 'answerable for the extent of L. 5000, for the use of the 'house of S. M. and Company.' On receiving this, the note was cancelled, and the security bills delivered up. The bills were then redelivered with a new note, but no money passed. The Court held the guarantee to contemplate only a future loan, and that the transaction did not amount to a loan of money, so as to charge the defendant.

[5] SIME against DUNCAN and Company, 13th January 1824; 2. Shaw and Dunlop, 604. Duncan indorsed Leach's bill; Leach failed to pay it; and the holder agreed, on a guarantee by Duncan and Company, to give indulgence to Duncan, by raising money on bills in the meanwhile, and pushing Leach. The guarantee was in these terms: 'As you seem to apprehend loss 'from your friendly interposition in the business with 'Leach, we therefore guarantee you against this.' The original bill was not paid, and more debt was accumulated on the bill transactions for intermediate accommodation. Duncan and Company acknowledged their liability for the original bill, but refused to pay the balance. The Court held them liable for the loss attending the drawing of bills, originating from Leach's bill remaining unpaid.

[6] STEWART against SCOTT, 31st May 1803. Three persons applied to Scott for a letter of recommendation to corn-dealers in Leith. He gave them a letter to Mr Sandeman, begging him 'to introduce the three 'gentlemen, who will deliver you this, to any of your 'corn or grain merchants, assuring them of their safety 'in what bargains they make with them.' And the three names were subjoined. Two only of those persons went to Leith, and not finding Sandeman, they went direct to a corn merchant, Stewart, and opened the letter to him, allowing him to take it as their recommendation. He sold them a whole cargo of oats,

to a dealer, will not authorize him to send the bearer of it to another dealer.[1] 3. A letter of credit to A, will not authorize B to furnish the goods.[2] 4. A letter of credit addressed to a company, will not authorize dealings with that company after a radical change in it.[3] But probably the doctrine already stated, relative to credit-bonds with companies,[4] would be held to apply even to guarantees. 5. A guarantee of furnishings to be made to a company, will not authorize furnishings after a radical change in the partnership; though, if such furnishings are made bona fide, and in ignorance of any change, the guarantee will be effectual.[5]

III. Limitation in respect of Time.—Although guarantees do not fall under the limiting statute of 1695, c. 5.[6] they are strictly limited in respect of time by the words made use of. 1. In a single transaction, if the surety has engaged on the footing of a credit of a certain extent in point of time, the creditor can in no sense extend the time without the surety's consent; and, on the other hand, the time cannot be abridged.[7] But often the time is specified, without the terminus a quo being distinctly set down; as, for example, a person

price L.1849. It was an imprudent bargain; and Stewart brought his action against Scott on the above letter as a guarantee. The Court was very doubtful whether it was a guarantee, or any thing else than a mere letter of introduction. But assuming it to be a guarantee, they held,—1. That Scott had relied on all the three persons, and on their mutual discretion in the proceedings to be taken under his letter. 2. That he had mainly relied on Sandeman's discretion to introduce his friends to proper dealers. 3. That it was (if a letter of credit at all) limited only by the discretion of the persons directly referred to acting in conjunction. Accordingly, Scott's defences were sustained.

[1] Philip against Melville, 21st February 1809; 15. Fac. Coll. 204. Melville recommended Yetts to Durie for a supply of spirits, adding,—'I am sure she 'will pay you at the time she may fix with you; so 'you are quite sure with her, as Mr Gordon can also 'inform you.' Durie wrote on the back of the letter of credit an assurance to C. and J. Philip, that, not having the article himself, he had sent Yetts with this letter of credit, on which they might rely. C. and J. Philip furnished the spirits, and Yetts failed. They brought their action against Melville. The Court held,—1. That Melville's was an effectual guarantee of the transaction, if made with Durie. But, 2. They held unanimously, that a letter of credit addressed to a particular person, is limited to him; and that the writer must be held to have granted it in reliance on his prudence and discretion in acting upon it: that such a letter contains no general power to interpose the writer's credit or transmit his guarantee; and that this is specially to be observed, where the general terms of the letter make the personal limitation the only restraint on the responsibility of the writer.

[2] See preceding Note.

[3] Myers against Edge, 7. Term. Rep. 254. Edge addressed a letter of credit to Myers, Fulden, Ainsworth and Company, promising to be answerable for a certain quantity of cotton-twist. At this time Ainsworth was a partner, and continued so for half a-year, during which furnishings were made; and they continued after Ainsworth ceased to be a partner. Then the dealer failed, and an action was brought by the company against Edge. Certain technical objections to the action were overruled. The jury, under the direction of Mr Justice Rook, who held the security as having been given to the house, and not to the individuals, found a verdict for the plaintiffs. But the Court of King's Bench delivered a different opinion, holding the contract as having been made with a party, of which, perhaps, Ainsworth was the very person chiefly relied on.

See the same doctrine strongly stated by Lord Ellenborough, in Strange against Lee, 3. East, 484.

[4] See above, p. 369, 370.

[5] Douglas, Wilson and M'Auley, against Gordon and Company, 24th December 1814; 18. Fac. Coll. 127. It was held, that notice in the Gazette of such radical change was not sufficient to ground a plea of mala fides against the furnishers, the guaranteer not having given notice to the furnisher to stop.

[6] See above, p. 356.

[7] Bacon against Chesney, 1. Starkie, 192. In a guarantee of a small vestment of goods for London, at eighteen months' credit,—on the question, whether evidence of the credit being only twelve months? Lord Ellenborough said,—'The claim, as against a 'surety, is strictissimi juris; and it is incumbent on 'the plaintiff to shew that the terms of the guarantee 'have been strictly complied with. If I engage to 'guarantee, provided eighteen months credit be given, 'the party is not at liberty to give twelve only, and, 'after the expiration of six more, to call upon me.'

binds himself to guarantee 'the due payment of a bill of A B for six puncheons of spirits 'at three months.'—It seems, in such a case, that the custom of trade will regulate the date of the bills or terminus a quo; that in an inquiry into the custom, it is either the universal custom or the local usage which is to be followed; and that the surety will not be held to authorize such an extension of credit in point of time, as, though frequent, is only given as an indulgence; this being too arbitrary to be adopted in a court of law.[1] 2. Where it is of the nature of a standing guarantee, it will subsist till recalled, or till circumstances alter, unless there be some limitation of time expressed.

It has been questioned, Whether the indorsation of a bill which has been guaranteed by a separate letter, accompanied by delivery of the letter of guarantee, will give to the indorsee the same right as if the letter itself were a negociable instrument, passing without any latent qualification? It is generally held by bankers, that when they thus acquire right to the guarantee, they are entitled to demand payment from the surety, as if the letter had originally been addressed to themselves; and this has been adjudged by the Court of Session in reliance on such understanding.[2] Before the point can be held established, a much more deliberate inquiry must be made into the usage; if, indeed, any usage can establish a point against the principles of law, which this seems to be. It may be, that the very design of expressing the guarantee by letter, instead of indorsing the bill, is to preserve to the writer the full benefit of his remedy against the person to whom the letter is addressed: And it is anomalous at once to confer on such an engagement the privileges of an indorsible and negociable instrument, and yet not to give to the granter of it the benefit of that strict negociation which is the counterpart of the privileges of bills.

Guarantees are frequently undertaken in consideration of a premium paid. This is of the nature of an insurance of solvency; the price of the risk of which, though it may be difficult to ascertain it on any settled principle, the parties themselves may be permitted to settle. It does not appear that any question at law has been raised on such undertakings; but many examples of it are in the English books,[3] and many occur in consultation. This is a sort of transaction which has lately been introduced into Scot-

[1] The doctrine of this paragraph may be extracted out of the case of M'Laggan and Company against M'Farlane, 19th November 1813; 17. Fac. Coll. 451.

[2] Sir W. Forbes and Co. *v.* M'Nab, May 29. 1816; 19. Fac. Coll. 137. In this case, Cubie had bought from Wilson a quantity of salt, for the price of which he accepted a bill, and M'Nab gave to Wilson a letter of guarantee, in which, after describing the bill, he used these words—'Which I hereby guarantee to see regu-'larly retired when due.' Sir W. Forbes and Company discounted the bill on seeing the guarantee, and the letter was delivered up along with the bill. In the meanwhile, M'Nab, the surety, had a letter from the bill-holder, acknowledging that the letter of guarantee had been granted, and adding, 'The goods for 'the bill not having been delivered, I hereby free 'and relieve you from all the consequences attending 'the said bill.' The action was by Sir W. Forbes and Company against M'Nab, upon the letter; and the Court held the letter to be effectual to Sir W. Forbes and Company. Lord Meadowbank, Lord Glenlee, and Lord Robertson, doubted very much of the letter being transferable *with privileges*, like the bill of exchange itself. An inquiry into practice was thought to be proper; but the inquiry was made only by way of written answer from bankers to a case; and the persons applied to gave *opinions*, but no evidence of *practice*. These opinions seem to be objectionable on two grounds, when considered as the foundation of a judicial decision:—1. They stated no facts or practice; and, 2. This was a question of law; for merchants could only say, that, in practice, the delivery of the letter was held a transfer of it. It still remained, in point of law, to be determined, what should be the legal effect of such transfer? whether the letter so transferred to the banker could, in his hands, produce any other effect than if it had remained in the hands of the original holder? And, on this point, the question appears to be extremely doubtful.

[3] Thus, in ex parte Adney, Cowper, 460. the question arose on a guarantee in these terms:—'In 'consideration of the sum of L. 1. 10s. 7d. I hereby 'make myself answerable for the due payment of G. 'Husband's note, dated 10th June, for L. 306,' &c. No doubt ever was raised as to the efficacy of this engagement.

land, and which may be attended with beneficial effects in periods of alarm to mercantile credit. It is difficult to find any principle on which effect can be denied to such a transaction, while del credere commission (which is just a guarantee of solvency for a premium) is supported. There is, however, one old case in Scotland, in which the Court held the stipulation of a premium for undertaking the risk of a borrower's insolvency to be contra bonos mores, though not usurious.[1] Such a judgment would not probably be pronounced now, unless there should appear to be collusion and usury in the transaction.

DISCHARGE OF GUARANTEE.—The principles already stated concerning the discharge of cautionary obligations, hold with respect to guarantees. 1. The acquittance of the principal; the giving of time; the renunciation of any collateral security; the discharging of diligence actually done, will free the guarantee.[2] One who guarantees a bill will not be acquitted by the bill not having been duly presented, if the acceptor had previously become a bankrupt;[3] but if he had not become bankrupt, this neglect will discharge the guarantee.[4] 2. As to the notice to which one who guarantees a bill or note is entitled, although our early cases seem to imply an obligation to give the same notice as to an indorser of the bill or note, this does not accord either with later determinations, or with the English cases. The rule deducible from the English cases seems to be, that it is only where the neglect to give notice has produced loss or prejudice to the person who has guaranteed the bill, that he is entitled to relief from his engagement.[5] The Scottish cases seem to have gone at one time even further than this.[6] But the rule followed in England, as being most consistent with the principles of this class of obligations, will probably be followed in such cases hereafter.[7]

GUARANTEE ON DEL CREDERE COMMISSION.—Merchants who conduct business for others, as factors or otherwise, sometimes engage to guarantee their dealings, (or to stand del credere, as the phrase is), on receiving a certain commission. This is called a del credere commission. But to a certain extent factors are, by their implied undertaking, held to guarantee the payment of their principal's money, without this extraordinary commission.

So, in PHILIPS against ASTLING, 2. Taunton, 206. the guarantee was in these words:—'We undertake to 'guarantee a payment of L. 500, at L. 5 per cent say, 'by a bill drawn,' &c. No doubt was moved as to the validity of this undertaking.

[1] KING against KERR, 24th January 1711; 2. Fount. 631. Kerr applied to Simpson for a loan of 800 merks, who refused to lend it without caution: on which Kerr applied to King, who agreed to become security for the debt on Kerr giving him a bond for L. 100 Scots, in consideration of 'trouble, risk, and 'hazard.' Kerr paid the bond regularly, and the cautioner was never called on. He, however, demanded payment of his bond; and Kerr defended himself on the plea of usury and illegal contract. The Court did not find it direct usury, to infer the penal effects, but that it was turpe lucrum et pactum contra bonos mores, and declared the bond null, and assoilzied from it.

[2] See above, p. 359.

[3] WARRINGTON against FURBOR, (supra, p. 372. Note [8].) 8. East, 242. where a guarantee for the acceptor was held bound in such circumstance.

[4] PHILIPS against ASTLING, 2. Taunt. 206.

[5] Bayley on Bills of Exchange, p. 232-3. 4th edition.

[6] HAMILTON against CARLISLE and DUNLOP, 13th June 1766; 4. Fac. Coll. 255.

[7] HOUSTON's Executors against SPIERS, 12th May 1826; 4. Shaw and Dunlop, 567. This question made a point in the case. It was on one side contended, that certain bills which fell under the guarantee, and which ought to have been provided for regularly, not having been announced as dishonoured, the guarantee was discharged: on the other hand, that whatever might be the rule as to a single bill, it does not hold as to a guarantee intended to cover a long course of transactions. The Court held the guarantee to be effectual.

To 'stand del credere' in any transaction, is an engagement to be answerable as if the person so binding himself were the proper debtor. This seems to be the correct legal import of the undertaking; and it is as nearly as possible the meaning of the Italian phrase which we have adopted. Where a factor, employed to sell goods, receives a del credere commission, he is liable to the principal for the price to be recovered, whether he ever receive it or not. He is placed, in relation to the principal, precisely in the same situation as if he had actually received in loan the money of the principal; and no payment that would not be effectual, as between debtor and creditor, will discharge his responsibility.[1] This sort of guarantee is not, on the one hand, a cautionary obligation, in the common sense of that expression; for the factor with a del credere commission is liable directly, and without any benefit of discussion: Neither is it, on the other, to all intents and purposes, a delegatio debiti; for, if the guarantee fail, the principal is entitled to resume his character, and recover from the proper debtor, if he have not previously paid to the guarantee.[2]

A del credere engagement may be undertaken by a factor employed to sell the goods of another; or by a bank agent; or by an insurance broker, who engages underwriters to insure a risk for his principal; or by one who undertakes to remit money; or, generally, by any one whose interference is necessary in the conduct of a transaction involving the credit and responsibility of persons who may be unknown to the principal.

In the case of a foreign factor, where the principal cannot possibly know the buyers, it seems to be held, that when nothing is said as to commission, a del credere commission is to be paid, and the sales guaranteed.

A del credere guarantee may be undertaken not only expressly, but also by implication, where goods are sent to a factor on the footing of a del credere commission, and he keeps the goods without declining the guarantee. It will depend on his following the rules of mercantile practice relative to offers and acceptance, whether he shall be held bound.[3]

[1] Scott against M'Kenzie, 15th January 1795; Bell's Cases, 138. The case turned on the risk of *remitting the money*, and strongly illustrates the doctrine, that a del credere commission places the principal and factor in the condition of proper debtor and creditor. M'Kenzie and Lindsay of Dundee sold wheat on account of Claud Scott of London, and took bills at three months' credit. In their account sales they charged commission at 4 per cent, which it was not disputed consisted of $2\frac{1}{2}$ per cent on the sales, and $1\frac{1}{2}$ for del credere. Scott having desired to have a remittance, M'Kenzie and Lindsay purchased a London bill from Bertram, Gardner and Company, private bankers in Edinburgh, at 75 days, on Baillie, Pocock and Company, of London. This bill was made payable to M'Kenzie and Lindsay, and was by them indorsed to Scott. Before it fell due, both the Edinburgh and the London house, which were in fact the same, failed. At first M'Kenzie and Lindsay wrote for indulgence, as if acknowledging responsibility, but afterwards defended themselves, on the ground, that the del credere guarantee bound them only for the solvency of the buyers. The Court disregarded the letters begging indulgence, as proceeding on an opinion in point of law, which, if erroneous, ought not to bind the party: Then on the question of the effect of the guarantee, the Court holding, (in another case, see below, p. 379. Note [4]), that without a del credere commission the factor would not have been responsible for the remittance,—were of opinion, that the del credere bound them; and that no payment but that which would have discharged a proper debtor was sufficient.

This judgment was affirmed in the House of Lords, 19th December 1796; 6. Brown's Parl. Cases, 280.

[2] In Grove against Dubois, 1786, 1. Term. Rep. 112. it was laid down by Lord Mansfield, 'That this 'is an *absolute* engagement to the principal by the 'broker, and makes him liable in the first instance. 'There is no occasion for the principal to communi-'cate with the underwriter, though the law allows 'the principal for his benefit to resort to him as a 'collateral surety. But the broker is liable at all 'events.' Mr Justice Buller said,—'I remember many 'actions brought at Guildhall against brokers with 'commissions del credere, and I never heard any in-'quiry made in such cases, whether there had been a 'previous demand upon the underwriters, and refusal; 'and I can venture to say that such is not the prac-'tice.'

[3] Watson and Company against O'Reilly and Company, 16th February 1826; 4. Shaw and Dunlop, 475. Goods were sent to Jamaica; saying, 'we ex-'pect you will charge no more than 5 per cent for

Under an engagement of this nature,—1. The factor is entitled, he being himself solvent, to claim on the bankrupt estate of the buyer, or underwriter, or banker, whose credit he has warranted. 2. If the factor or broker fail before payment by the proper debtor, the principal may claim on the estate of the proper debtor. 3. The principal is entitled to enter his claim for the whole debt on the estate of him who agrees to stand del credere, at the same time that he enters his claim on the estate of the proper debtor.

Implied Guarantee.—It has been supposed, that when a factor or agent of any kind has actually received the money of his principal, he is in the same case, in the remitting of it, as if he had agreed to stand del credere. But this is not strictly true. He undertakes to manage the remittance, as the other parts of the transaction, with all due discretion and fidelity; but he does not undertake the responsibility of a proper debtor, as in the other case. In making his remittance, therefore, he is free from responsibility,—1. If he follow the directions of his principal, or the course which his principal has sanctioned: Or, 2. If he remit the money, either by one of the chartered banks, or even by a private banking-house of established good credit at the time;[1] acting as carefully for the principal as for himself: Or, 3. If he remit in the way settled by common mercantile custom or local usage.[2] But where he departs from any of those modes of remitting, he will be held to guarantee the solvency of those through whom the remittance is made.

When the agent pays the money which he collects into his *general* account with his banker, and his banker fails, he is liable; because the money is thus exposed to all the risks of his own trade, and as if still in his own drawer:[3] but where he places the money specifically for security in a bank, in his principal's name, till he has an opportunity of remitting, he will be safe, provided the bank was in established credit. Or if he draw in favour of his principal on his general account, and his draft is accepted, it would seem that the effect must be the same as if he had carried the money to the banker for the specific purpose of buying a bill for his correspondent; which will discharge his responsibility, if the banking-house be at the time in established credit.[4] Where the

'selling and guaranteeing.' The letter was received 23d October, and answered 24th November, declining the guarantee. It was sent by the first regular mail packet; but two private ships, authorized by 39. Geo. III. c. 6. to convey letters, had sailed in the interval. The Court held the answer to be in time; and that there was no guarantee.

[1] Knight against Lord Plymouth, 3. Atk. 480. Baines against Turnbull, 1st December 1795, is to be regarded as a special case. Before any general doctrine can be established, going so far as to decide such a case against the factor paying in monies, on account of the principal, to a banker in established credit at the time, a very serious reconsideration of the principles would be required. The ample discussion which took place in this case, will be found in the Signet Collection of Cases, p. 220.

The view taken in M'Kenzie's Trustees against Jones, Fox and Company, 12th December 1822, 2. Shaw and Dunlop, 82., seems to confirm the doubts which I have ventured to express. There Gaffney, as agent for Sharp and M'Kenzie, sold cotton to Park and Brothers, who agreed to pay in bankers' bills. He took these drafts on their bankers, not accepted; and they were dishonoured. Gaffney did not stand del credere.

[2] Russell against Hankey, 1794, 6. Term. Rep. 12. The custom of trade was held to rule this, which was a very strong case; where a person in the country having sent bills of exchange to his London bankers to receive payment, they took in payment the acceptor's check on his banker; but it turned out that the banker on whom the check was drawn had no account with the person who drew it. The London bankers were held exonerated, in respect of the custom of trade.

[3] Massey against Banner, 1820; 1. Jacob and Walker, 241. This doctrine fully laid down and illustrated by Lord Chancellor Eldon.

[4] In Baines against Turnbull, 1st December 1795, a difference of opinion arose between two emi-

factor takes a bill in his own name, and indorses it to his principal, he is presumed by his indorsation to guarantee the remittance.[1]

§ 5. OF JUDICIAL CAUTION.

Bonds of caution, in judicial proceedings, may ground a demand against the cautioner, where they have been made for securing appearance in an action; or payment of the sum in the expected decree. Or such bonds may become the ground of a claim of relief by the cautioner against the estate of the person for whose appearance or obedience to the judgment he has become surety.

1. BONDS OF CAUTION DE JUDICIO SISTI.—As the practice, in Scotland, does not, on all occasions of this sort, seem to have accorded exactly with the principles of Scottish jurisprudence, a few preliminary observations may be proper before stating the result of the authorities.

Bail, in civil cases, is of two kinds; either for appearance or for payment. In the civil law it was distinguished (and we have adopted, at least, the terms) by the expressions of 'satisdatio de judicio sisti,' and 'satisdatio de judicatum solvi.' The former bound the sureties to present the party in judgment; reum judicio exhibere; neque necesse fuit litis exitum expectare:[2] the latter bound them absolutely to the payment of what should be awarded against the person for whom they engaged.[3]

nent Judges, Sir Ilay Campbell, President, and the late Lord Justice-Clerk M'Queen. Both concurred in this, that the factor is liable in law, as there is no draft drawn, whether the money is in his own pocket, or in his bank account: but Sir Ilay held a draft on the account to produce no alteration; Lord Justice-Clerk held it to be equivalent to buying a bill from the house. See p. 379. Note [1].

[1] This circumstance had great weight in Baines' case. See preceding Note, and Note [1]. p. 379.

[2] By the civil law, the prosecutor was bound to find caution, that he should prosecute within two months; that he should abide the issue of the trial; and that he should pay to the defendant, if he failed, a tenth part of the sum claimed, (Nov. 96. c. 1.) The defendant was bound to find caution de judicio sisti; which, by the old law, was fully complied with by presenting him in Court, without abiding the sentence; but which Justinian declared should imply, 'Quod in judicio permaneat usque in terminum litis.' (4. Instit. xi. § 2.) In those causes, where, in the latter periods of the law, it was not necessary for the parties themselves to appear, but competent for them to delegate a procurator, the procurator of the pursuer was not admitted, unless he had a mandate; in which case, if the mandate was clear and express, he was not bound to find caution; but if he had only a presumed or general mandate, his caution was 'rem ratam habiturum dominium.' The procurator of the defender was not admitted without caution de judicatum solvi. (Inst. loc. cit. § 5.)

[3] Voet. lib. 2. tit. 8. § 16.

The bail required, by the English law, to liberate from the arrest upon the capias ad respondendum, is merely de judicio sisti, according to the original meaning of that term in the Roman law. The bailees are taken bound to the sheriff, in a bond to a certain amount, with this condition,—'that if the said A B do 'appear before the Justices of our Sovereign Lord the 'King, at Westminster, on the morrow of the Holy 'Trinity. to answer C D, of a plea of debt of L. 'Sterling, then this obligation shall be void,' &c. Upon the return of the writ, accordingly, or within four days after, the appearance must be made, either by the debtor's body being brought up, or by putting in new bail to the action. The new bail must be, at least, two in number; and, after justifying themselves by oath to be housekeepers, worth double the sum for which they are bail, after payment of all their debts, they enter into a recognizance in Court, or before the Judge, at his chambers, or before a commissioner in the country; jointly and severally undertaking, that, if the defendant be condemned in the action, he shall pay the costs and condemnation, or render himself a prisoner, or that they shall pay it for him.

3. Blackstone, 291. He proceeds to draw the distinction between the obligation of the fidejussores in the civil law de judicatum solvi, and the special bail to the action in England; the former being 'bound to see 'the costs and condemnation paid, at all events; where- 'as the English special bail may be discharged by 'surrendering the defendant into custody, within the 'time allowed by law; for which purpose they are, 'at all times, entitled to a warrant to apprehend 'him.'

In Scotland, the caution de judicatum solvi is recognized only in maritime actions, before the Court of Admiralty, and this by special statute, 1681, c. 16. Caution de judicio sisti is competent in meditatio fugæ warrants;[1] and in actions of a mercantile, but not maritime nature, before the Admiralty. Much has been said in favour of a right of imprisoning strangers under a meditatio fugæ warrant, till caution should be given judicatum solvi: But, from the first case to the last, this has been uniformly refused.[2]

The principle of the Scottish law, upon which all the proceedings against a debtor, as in meditatione fugæ, are grounded, is widely different both from the principle of the Roman, and from that of the English law. Those laws require the actual presentment of the debtor himself in court: By the law of Scotland, this does not seem to be necessary.

It was a principle in the very constitution of the Roman judicial proceedings, that the parties should be personally present, and not be represented by a procurator; for, neither as an actio legis,[3] nor as implying the solemn contract of litiscontestation,[4] could these proceedings admit of a procurator. The satisdatio de judicio sisti, therefore, implied an actual presentment of the person; and when the old forms were relaxed, still a procurator for the defender could not be admitted without caution de judicatum solvi.[5]

But as an ordinary step of judicial proceeding, no man is, in Scotland, bound to appear personally in court, except in a criminal action.[6] All that he is bound to do, whether a native or a foreigner, is to remain within the country; in the farthest corner of which the arm of the law will reach him, for the purposes of personal execution, unless he have acquired a right of exemption, by privilege, personal protection, or the sanctuary. If he is not meditating removal from the country, no circumstance whatever can entitle the

[1] SCOTT against SANDILANDS and MANDERSTON, 7th December 1744; 1. Falc. 18. The Court found the commitment of Scott illegal, 'in respect it was until 'he should find caution to make payment to the de- 'fender, Manderston; whereas, even had the commit- 'ment been regular in other respects, he should have 'been committed only in case he failed to find caution 'judicio sisti.'

HERRIES against LIDDERDALES, 7th March 1755; 1. Fac. Coll. 225. Herries having come from abroad to this country, of which he was a native, his creditor applied for a warrant against him, on the ground of his having fraudulently come here to avoid his debts. The sheriff imprisoned him, till he should find security, not only de judicio sisti, to answer in courts, but de judicatum solvi, to pay whatever should be awarded against him. The cause was brought before the Court of Session; and although Herries's situation, as a foreigner settled abroad, was strongly founded upon as strengthening the necessity for caution de judicatum solvi, the Court ordered Herries to be set at liberty, upon finding caution judicio sisti. It was observed from the Bench, 'That an arrestment juris- 'dictionis fundandæ causa is usual in most countries, 'and in our country; but to oblige a defender to find 'caution judicatum solvi is not usual, except in mari- 'time cases, before the Admiral Court: that it seem- 'ed unreasonable one should be obliged, at the com- 'mencement of an action, to give the pursuer more 'security than he had before; and that it would be 'dangerous to commerce, and to personal liberty, if a 'debtor were always obliged, when found in a foreign 'country, to find caution judicatum solvi.'

[2] RAE against BELLAMY, 21st June 1763; 3. Fac. Coll. 259.; 1. Dict. 328. In Mrs Bellamy's case, where the Court refused, during the course of the litigation, to require caution de judicatum solvi, it was observed from the Bench, 'That there is neither jus- 'tice nor necessity for ordering it: No justice, be- 'cause such order might bear extremely hard upon 'foreigners, who, though they may find persons inclin- 'ed, from humanity, to become cautioners judicio sisti, 'will not always have it in their power to procure 'caution judicatum solvi: No necessity, because, when 'decree is pronounced, the pursuer may apply to the 'Judge ordinary; and, upon making oath that the de- 'fender is in meditatione fugæ, he will obtain a warrant 'to apprehend.'

[3] L. 23. De Regulis Juris.

[4] 3. Instit. 20. § 3, and 4.

[5] The English law proceeds to the same end upon another principle. The arrest of a defendant, in England, is grounded on the fiction of a trespass, for which the person is to be detained, in order to punishment. The acceptance of bail is a temporary relief, enabling the defendant to go about his concerns in the meanwhile, under the easier imprisonment of his bailees; whom the law regards as his jailors, bound to present him corporally, in court, for judgment and execution.

[6] Balfour, 297. c. 1.

creditor to insist on bail for his actual appearance. If the creditor swear to his suspicion, and bail is found, it is only to secure the creditor against what he has sworn he suspects, namely, a fraudulent departure from Scotland; and, by this bail, the defender is restored to the same state as if there were no ground for suspicion. But, in the absence of such suspicion, no warrant can be granted for enforcing personal appearance. In short, if the debtor be preparing to escape from the country, the law will stop him in his flight; but he cannot be obliged, upon a charge of such design, whether well or ill-founded, to tie himself to a particular spot; to appear in court at the call of his creditor, which the law does not require him to do; or to forego any legal privilege within the country, which he may either at that moment possess, or be in the legal capacity of acquiring. Neither can a creditor, who has no ground for suspecting flight from Scotland, apply; and it is only against such flight that the law has provided.

The difference, in principle, between the obligation contained in a bond of presentation, and the caution proper to sustain an action, is very obvious. The liberation on a bond of presentation is a redemption from proper imprisonment in execution; the necessary consequence of which is, that the cautioner in the bond becomes (like the special bail in England) the jailor of the debtor, entitled to insist upon presenting him personally in a particular place, and liable for the debt should he fail so to do. But a cautioner, in a commencing action, is in a different situation: his creditor has no right of execution against the debtor, who is not a redeemed prisoner, but a person under bond not to leave the country, and that is all. The invasion which the law has been forced to permit of the common rights of the subject, had no other object than to vindicate its own authority; to prevent a person from escaping from the execution of legal diligence. If a Judge, as in the case of Watson and Mollison, is to be punished for giving a warrant against a man who was only going to leave the part of the country where he dwelt, the law should not be so inconsistent as to authorize caution to be insisted for, that shall have the effect of preventing him from thus changing his residence; or which shall hurry him back from the remotest corner of Scotland, to present himself before his creditor, who is bound, at common law, to follow him with his diligence, and entitled only to insist, that he shall not leave the territory over which the force of that diligence extends.

According to just principles, caution de judicio sisti should not prevent the debtor from taking the privilege of sanctuary, or pleading any intermediate protection which may have been granted to him, or any privilege of peerage or of parliament, to which he may have succeeded or been elected. Against these privileges, the meditatio fugæ warrant was never meant to be a defence. And if no warrant could be taken out to interdict such privileges, or to prevent a debtor from applying for protection, neither should a warrant, issued upon other grounds, and for the purpose of warding off other dangers, act as a prohibition against the taking of sanctuary, or petitioning for personal protection. And so caution de judicio sisti ought not, by implication, to secure the creditor against evils which could not be made the object of a direct application. Here, again, the distinction is plain between the bond of presentation, and caution de judicio sisti. In the former, the debtor is enlarged, under the condition, that he shall be restored to his creditor, at a particular time, a prisoner; as accessible to his diligence as ever. In the latter, the defender never was a prisoner further than in being confined within the country; and the creditor's rights are uninjured if he remain within it. In the former case, the principal, as well as the cautioner, is truly debtor in an obligation ad factum præstandum; and the sanctuary would seem to give no protection against the cautioner in demanding the person of the principal. If the import of the caution de judicio sisti be, that the cautioner shall present the debtor in Court, (and the form of the bond is so), upon the same prin-

ciple, the cautioner should be entitled to bring the debtor out of the sanctuary; but otherwise the cautioner can have no title to take the debtor from the sanctuary.[1]

Form of the Bond in Practice, and Effect of it.—But, in practice, the form of the bond is much more favourable to the creditor. It in general is, that the creditor 'shall appear personally, and attend personally, at all or any of the diets of Court.' And it rather seems to be held as law, that a pursuer is entitled to demand caution in those terms. It has been decided, 1. That under such bonds the cautioner is liable, unless the debtor be presented personally in Court, unprotected, and as open to diligence as at the time of his apprehension on the warrant de meditatione fugæ.[2] 2. That the pursuer may make his requisition either during the litigation, or after decree, at any time before the lapse of the period allowed for extracting the decree; or even at any time before extract.[3] It is held, that any action beginning in an inferior court, is not concluded by decree pronounced there, if it shall be removed into a higher court by advocation; the decree is not final, nor the action at an end, till the proceedings have been extracted; or, in other words, the record made up and signed by the clerk.[4]

The obligation of the cautioner, when the bond is forfeited, is to be answerable for the debt, according to the decree, with costs of suit, and such interest as may be adjudged to be paid. And in bankruptcy the claims will, accordingly, be made to this extent. The pursuer will, however, be obliged to establish his ground of action, which will not be taken for granted merely from the debtor's absence.

The cautioner's obligation may be extinguished in four several ways:—1. If the debtor die during the course of the action. 2. By the cautioner giving the creditor due notice, and presenting the debtor in Court, and protesting for freedom.[5] 3. If the creditor

[1] Telfer against Muir, 15th December 1774; 5. Fac. Coll. 374. Here judgment went agreeably to the above view. Muir was taken upon a meditatio fugæ warrant, and found caution de judicio sisti, that he 'should appear, and answer to any action to be brought 'against him by Telfer, within six months;' or in default, the said Muir leaving the country, the cautioners were to pay the debt. The creditor brought his action against the debtor, with a conclusion against the cautioners; but the Lord Ordinary, in pronouncing judgment against the principal, decided, that 'in respect 'Muir has not left the country, and appears to this 'action, and that the bond of caution is only de judicio 'sisti, the cautioners were free.'

[2] Cowan against Aitchison, 28th November 1797; 10. Fac. Coll. 104. Tasker against Mercer, 27th February 1802; 11. Fac. Coll. 50.

[3] In the case of Telfer against Muir, above cited, a second question arose. The decree having passed against Muir, Telfer extracted his decree, but Muir kept out of the way, and Telfer applied for a decree against the cautioners. The Court, 'in respect 'the pursuer did not at any time during the depend-'ence, or before extract, require the cautioners to 'produce the person of Muir in Court, found, that the 'cautioners were liberated from their obligation de 'judicio sisti.'

In Brown and Company against Wilson, 24th June 1790, 10. Fac. Coll. 282. decree went in absence against the defender, but was not extracted. At a considerable interval afterwards, a new action was raised against the debtor, and concluding upon the bond against the cautioner; and the sheriff of Dumfries found him liable. When the cause came into the Court of Session by advocation, 'the opinion of the 'Court was, that, by the mere act of obtaining judg-'ment, without requiring the cautioner to produce the 'body of the defender, the security of the creditor 'was not entirely at an end; but that such a requisi-'tion might be made at any time before the elapsing 'of the period allowed for extracting the decree.' They freed the cautioners.

Stewart against Frazer, 8th July 1809; 13. Fac. Coll. 404. The Court here held, that the requisition might be made even after the lapse of the time allowed for extracting, if before actual extract, (though in that particular case the decree was not ready for extracting); the proper limitation to the endurance of the cautioner's obligation consisting in the remedy which is open to him, by producing the defender, and protesting.

[4] In Wright against Graham, 22d November 1766, Kames' Sel. Dec. 322. advocation was found competent any time before extract; and in the case of M'Culloch, 10th February 1666, 1. Stair's Dec. 360., it was decided, that, during the dependence of an advocation in the Court of Session, the cautioner was entitled to insist before the inferior court to be freed from his bond, by presentation of the debtor.

[5] Stevenson against Chisholm, 11th March 1812; 16. Fac. Coll. 552.; where the bond was, that the defender should appear personally, and also personally

at any time, even before decree, require implement of the bond, (in which he will be indulged on shewing cause, and allowing a reasonable time for performance), the cautioner may be free, on accompanying his presentment of the debtor with a protest to that effect, so that the creditor may be put upon his guard. 4. If the pursuer do not, before extracting the decree, require the presentment of the debtor's person, he is presumed to be satisfied that he has no ground for suspicion, and that no other precautions are necessary for securing him: The cautioner, therefore, is free.

When, under a bond of caution de judicio sisti, the creditor requires the debtor to be produced; or the cautioner gives notice, and presents the debtor under protest for freedom; he must either suffer imprisonment to abide the decree, or find new caution. The caution, after decree, has an object somewhat different from that de judicio sisti, in so far as the creditor now meditates the execution of personal diligence. But it is not caution judicatum solvi that the pursuer is entitled to demand: It is merely that the debtor's person shall be produced at any time within such space as may enable the creditor to execute diligence against him.[1] It still may be suggested as a doubt, whether the creditor can be entitled to demand more, than that the person of his debtor shall be secured within the country; since the creditor can have no sort of title to any extraordinary privilege which another creditor holding personal diligence would not enjoy.

2. Bond of Caution Judicatum Solvi.—This is an obligation on which no creditor is entitled to insist, except in maritime causes before the Court of Admiralty. That Court has, by 1681, c. 16. a privilege 'to cause parties become enacted and find caution, not 'only for compearance, but for performance of the acts and sentences of his Court.' By the bond, the surety binds himself 'as cautioner and surety de judicio sisti et judicatum 'solvi acted in the books of the High Court of Admiralty for B, in a process presently 'depending before the Judge of the said High Court at the instance of C against the said 'B; and I, the said B, oblige myself to free and relieve my said cautioner of his caution-'ary obligation above written, and of all damages and expenses he may sustain thereby.'

1. The cautioner is thus liable for all that the defender may be adjudged to pay by the decree of the Admiral: 2. He is not freed in consequence of the judgment against the defender being brought by suspension or reduction before the Court of Session:[2] 3. He has been held not to be freed by a decree of absolvitor, while it is still under trial by review in the Court of Session;[3] and, 4. In Lord Stair's time it was held, that the cautioner's obligation was discharged by the defender's death before sentence;[4] and considered on the analogy of imprisonment, in room of which it comes, this seems just: But, in Kilkerran's time, the point having come to be reconsidered, the Court looking to the practice of Admiralty, and also to that of other trading nations, reversed the rule, and held the

attend at all or any of the diets of court when required, Lord Craigie, after ordering an inquiry into the practice of the sheriff courts, held it 'to be the general re-'sult of the inquiry now made, as well as the true pur-'pose and meaning of caution de judicio sisti, that the 'cautioner, after action brought, and after due notice 'to the pursuer, may produce in court the person for 'whom he is cautioner, to the effect that the pursuer 'may either obtain caution of new, or have the defen-'der put in prison, according to the discretion of the 'court in which the action has been brought.'

[1] Sir James Cockburn against Inglis, 28th February 1776; Morrison's Dict. *voce* Cautio Judicio Sisti, App. No. 1.
Two cases were decided in 1790, in which, at the final pronouncing of decree, the creditor was found entitled to insist for caution to produce the debtor's person, during such time as should be requisite for carrying the decree into execution by a caption. (Masterton against Hutton and Duncan, petitioner).

[2] Stewart against Gedd, 16th November 1636; Durie, 821. Myles against Lyal, 1st December 1797; 12. Fac. Coll. 107.

[3] Robertson, Coutts and Co., against Ogilvy, 2d March 1762; 3. Fac. Coll. 190.; Kames' Select Decisions, 259.

[4] Hodge against Story, 20th January 1680; 2. Stair, 743.

cautioner bound; and that it was competent to call the representatives by an edictal citation.[1]

3. Bond of Caution in Suspension or Advocation.—The bond in a suspension is, 'that the suspender shall make payment to the charger, or to any other person to whom 'payment shall be ordained to be made, of the principal sum, &c. as contained in the de-'cree and letters of horning, in case it shall be found by decree of the Court of Session 'that he ought so to do, after discussing the suspension:' And there is added an obligation 'to pay whatever sum the Lords shall modify in name of expenses, in case of 'wrongous suspending.' By the recent Judicature Act,[2] bills of advocation against final judgment of Sheriffs, and other inferior Judges, are to be passed on caution only for expenses. The bond in an advocation is, 'that the advocator shall make payment to A, 'or to any other person, &c. of the expenses incurred in the inferior court, and also of 'such expenses as may be incurred in the Court of Session, in case it shall be found that 'he ought so to do.'

The cautioner is not freed by the death of the suspender or advocator:[3] Nor even by the decree being turned into a libel.[4] But he will not be liable where, at the time of suspending or advocating, there was sufficient ground for so doing, though this has afterwards been removed.[5]

Cautioners in such bonds have not the benefit of the septennial limitation.[6]

§ 6. of bonds of presentation.

The occasion of this bond is the execution of personal diligence against a debtor. The purpose of the cautioner's interposition is to allow the debtor time to settle the debt. And the effect of the bond is to restore the person of the debtor to the operation of the creditor's diligence, as at the time of the cautioner's interposition; or otherwise to secure the creditor in payment of the debt, with interest and expenses.

The responsibility on such bonds was formerly much less strict than at present.

1. Not only death, but sickness, or inevitable accident, will excuse the cautioner, provided the debtor is presented as soon as the impediment is removed;[7] but no impediment will serve as an excuse to which the voluntary act of the debtor has contributed.[8]

2. Formerly what was called a *modica mora* was allowed,[9] but the presentation must now be at the very hour appointed.[10] The prisoner is, by the cautioner's interposition, redeemed from actual imprisonment, on the sole condition that he shall be presented at a

[1] Dundas against M'Leod, 27th January 1744; Kilk. 115.

[2] 6. Geo. IV. c. 121. § 41.

[3] Act of Sederunt, 29th January 1650. Dickie against Thomson, December 1743; Kames' Rem. Dec. 76.

[4] Act of Sederunt, 27th December 1709. Herbertson and Company against Rattray, 12th June 1793; 11. Fac. Coll. 129.

[5] Somervail against Colt, 2d January 1683; Pres. Falconer, 20. More against Finnison, 27th November 1685; ib. 73. M'Dougal against Maxwell, 5th July 1706; 2. Fount. 341. Cowan against Marshall, 21st December 1784; 9. Fac. Coll. 291.; decided by Lord Braxfield, and affirmed by the Court.

[6] Hope against Fowlis, 4th February 1715; Bruce, 70. M'Kinlay against Ewing, 14th February 1781; 8. Fac. Coll. 63. B.

[7] Polstead against Scott, 7th July 1681; 2. Stair, 888. Callander against Bruce, 12th February 1704; 2. Fount. 222.

[8] As inlisting, Henderson against Graham, 22d July 1710; imprisonment for another debt, Polstead against Scott, 7th July 1681; though this seems doubtful.

[9] E. Southesk against Bromhall, 12th February 1663; 1. Stair, 177. Kennoway against Davie, 16th November 1672; 2. Stair, 119. Ockley against Grierson, 3d March 1682; Harc. 54.

[10] Pitblado against Mayne, 22d November 1695; 1. Fount. 680.

particular hour, and at an appointed place: and the creditor has a right to insist on strict observance; for the whole effect of his diligence may be defeated by the debtor being allowed one hour's indulgence longer.

3. It may well be doubted, notwithstanding an old case to the contrary,[1] whether the cautioner is liable, should the debtor be taken, in the meanwhile, on another caption; for this is, in one sense, an inevitable accident, and the creditor has all the benefit that he could have had by himself imprisoning the debtor, there being no preference by priority of personal execution.

The claim against the cautioner under this species of bond is for the debt, interest, and expenses; leaving him to operate his relief against the principal debtor, as he may.

SECTION IV.

OF BILLS OF EXCHANGE AND PROMISSORY-NOTES.

BILLS OF EXCHANGE, inland bills, and promissory-notes, the simplest of all obligations in form, and the least trammelled with solemnities, are, in respect of performance, the most strict, and in execution the most rapid, of all the obligations known in law: For although, in England, there is not the same expeditious mode of obtaining payment of a bill as in the case of a bond, warrant of attorney, statute staple, or statute merchant; in Scotland, by means of a legislative provision of great simplicity, bills are enforced by every sort of diligence known to the law, without any necessity for a previous action, and in the most summary way possible.

These instruments may be regarded either as simple modes of constituting money obligations; or as methods of conveying or assigning debts; or as the great instrument of exchange in money transactions between one country and province and another. The only circumstance in their history which it is of much consequence to point out, is, that as a branch of practical jurisprudence, or as a circulating medium in trade, bills of exchange were unknown to the Romans; that without their aid foreign trade cannot proceed to any great extent; and that this affords one of the best proofs of the remarkable difference between the state of trade in ancient and in modern times.

1. BILLS OF EXCHANGE are used for transmitting money from country to country, and for adjusting the exchange or differences in the value of the circulating medium of countries with each other, and the premium to be paid according to the balance of trade or the demand in the market for means of remittance. This is the proper mercantile instrument, governed by the general law-merchant, as involving the interests of persons resident in different countries. It is a billet or request in writing, addressed by a person called the DRAWER, in one country, to his debtor, friend, or correspondent, in another, called the DRAWEE; desiring him to pay to a third person, called the PAYEE or PORTEUR, on a particular day, or within a certain number of days, weeks, or months, or on the bill being presented to him, a particular sum. And this being presented to the person to whom it is addressed, and by him signed in token of his agreement or ACCEPTANCE of the order, it constitutes a debt against him in favour of the porteur or payee; completes the assignment of the sum due to the drawer in favour of the payee; and has the effect of transmitting the money, as if it had been sent by a carrier, and lodged in the hand of the person drawn upon, for the use of him in whose favour the bill is drawn.

[1] POLSTEAD'S case, above, p. 385. Note [7].

2. After such bills had been in use for some time, and dealers had become familiarized with the use of them, the INLAND BILL seems to have been introduced upon the same model. This instrument is designed for making those payments of the price of commodities sold in the inland trade of a country, which it is convenient so to settle, with an allowance of the usual credit, or delay of payment, given to dealers in that particular article. Here there are properly only two parties, the seller and the buyer; though a payee is often introduced as in the proper bill of exchange. The former addresses his request or bill to the latter, desiring him to pay the price at a precise day; the latter signs the bill in token of his acceptance; and the bill so completed remains in the repositories of the seller, or is assigned over, by indorsement, under the proper discount, in payment of debt or for ready money; and if not paid on the day of payment, it may be put to immediate execution. This instrument furnishes so easy a mode of settling debts and constituting a transmissible obligation, that it has gradually come to be used in all sorts of transactions, whether connected with trade or not.

3. Last of all, though the simplest in form, came PROMISSORY-NOTES; which are more strictly appropriate to the purpose of constituting a debt, or settling the price of a commodity bought on credit, or adjusting and reducing to a transmissible form the balance of an account between dealers. Here the debtor, called the MAKER of the note, promises on a particular day, or within a certain time, to pay to the creditor by name a certain sum. This is the form in which bank-notes are conceived, with this difference, that they are made payable to the bearer.

In the history of bills in England, as well as in Scotland, this progress may be distinguished.[1] The privilege of indorsation, by which the usefulness of bills and notes is infinitely increased, followed in the same order, being first admitted in bills of exchange, taken to order; afterwards to bills of exchange, even without being taken to order; afterwards to inland bills; and finally to promissory-notes.

Bills and notes are, mercantile instruments. They are on that account exempted from the more cumbrous forms of authentication necessary in common deeds. But the greater danger of forgery to which they are thus exposed ought to be counterbalanced, by requiring the strictest conformity to such requisites as law and mercantile custom have established in respect to their constitution.

The two great privileges of bills and notes are, summary execution, and transmission by indorsation. And in respect to both of them, it is important to keep strictly to the forms and evidence which correctly belong to the instrument.

1. In England, payment of bills is enforced only by means of an action. In Scotland, as already explained,[2] a summary process, by registration of the protest, having the bill prefixed, is competent any time within six months; an extract of which contains a warrant for issuing the king's letters of horning, which is followed by caption. In cases where the interposition of a Judge is required to settle any debateable point, the person against whom the diligence is issued may apply to the Lord Ordinary on the Bills for suspension of the diligence. On cause shewn, and on a cautionary obligation being lodged in Court, (see above, p. 385.) execution will be suspended, to the effect of having the matter tried in Court. To entitle a bill or note to the privilege of summary execution, it must be without any vitiation or taint apparent on the face of it; and the subscriptions

[1] See Bayley on Bills of Exchange, p. 1.; 9. and 10. William III. c. 17.; 3. and 4. Anne, c. 9.

In Scotland, 1681, c. 20. giving the privilege of summary execution to foreign bills of exchange. 1696, c. 36. extending the privilege to inland bills. 12. Geo. III. c. 72. extending the privilege to promissory-notes, made perpetual by 23. Geo. III. c. 18. § 55.

[2] See above, p. 4., for the doctrine of registration for securing execution, 1681, c. 20.; 1696, c. 36.; and 12. Geo. III. c. 72. § 41. and 42.

of the parties must be regular and full subscriptions: For although subscription by initials has sometimes been sustained as sufficient constitution even of money obligations, bills so signed are not legal grounds for warrants of summary diligence.

2. The power of transmitting such an instrument by INDORSATION, confers on it great value as a medium of circulation in trade. But this extraordinary facility ought to be confined to proper bills and notes made in correct form.

The ease with which money transactions may be conducted by means of bills and notes, has induced persons to adopt those instruments in the constitution of ordinary money obligations. And although, at first, the courts of law hesitated whether to give sanction to this introduction of mercantile facilities into ordinary transactions unconnected with trade,[1] it is now settled, that there is no distinction in the law of bills and notes, on account of the parties or the transaction not being connected with trade. The law of England and of Scotland, in relation to this most useful instrument, is now the same, with such slight varieties in practice and operation, as necessarily arise from the different systems of judicial proceeding.[2]

§ 1. OF THE FORM AND REQUISITES OF BILLS AND NOTES, AND OF OBJECTIONS APPEARING EX FACIE.

In considering bills and notes, the first particular to be examined is the form and external appearance of the instrument. But it is an important observation to be kept in mind, that, in bankruptcy, the *debt* is to be distinguished from the *instrument.*

1. Where independently of the instrument there is a debt, it may be claimed and established notwithstanding any objection fatal to the bill. Of this, usury affords an example: the *bill* may be null under the statute as usurious; but the *debt* may notwithstanding be proved by evidence of goods furnished, or money paid.[3] So a bill that is vitiated is good for nothing; but the debt may be proved independently of it.[4] So also a bill which has fallen by the sexennial prescription is utterly gone;[5] but the debt may be established by other proofs. But,

2. Where the debt exists only by force of the instrument, an objection fatal to the bill seems to annihilate the claim.[6] This rule seems to apply to an accommodation-bill, to which the bankrupt has put his name as cautioner for him for whose use the money was borrowed.

The external requisites of a bill may be referred to the form of words used; the paper on which it is written; the genuineness of the subscriptions; the authenticity of the written instrument itself; or the subsistence of the obligation.

1. FORM OF BILLS AND NOTES.—No particular form is necessary. Provided the words amount to an undertaking, obligation, or promise, absolutely to pay a precise sum of money, at a definite time, it is a good note or bill.[7] A note or bill cannot be drawn

[1] SARSFIELD against WITHERLY, Carth. 82.

[2] Since the former edition of this Work, there has been published a very good and useful treatise on the Law of Bills of Exchange, Promissory-notes, &c. in Scotland, by Robert Thomson, Esq. Advocate. In that work, all the cases, English and Scottish, which have been determined on this important subject, are digested with great conciseness; and the doctrine, with the distinctions and peculiarities of the law of the two countries, very ably and clearly stated.

[3] See above, p. 312.

[4] MURDOCH, ROBERTSON and Company, against LEE, ROGERS and Company, in the House of Lords, 26th December 1801. A bill vitiated by an alteration was held to be no legitimate ground of action; without prejudice to the pursuers bringing any action on or in respect of the original debt. See p. 391. Note [4].

[5] 12. Geo. III. c. 72. § 37.

[6] See LONG against MOOR, 3. Esp. 155. Note.

[7] The statute 17. Geo. III. c. 30. made perpetual by 27. Geo. III. c. 16. providing that bills and notes

conditionally, to the effect of enjoying the privileges of a bill; though, when holograph, it may constitute a good voucher of debt. It must also be for money, and not for commodities;[1] and so strictly has this been adhered to in England, that a note payable in money, 'or Bank of England notes,' was held null.[2]

Where there are words added to the obligatory clause of a bill which qualify its terms, and make the bill conditional, they will destroy it as a bill: But where the words are explanatory merely, and touch not the essence of the obligation, they will not have this effect. So words importing a discharge when paid, do not hurt the bill:[3] So of a bill addressed to one as cautioner.[4] Finally, a clause of interest does not vitiate the bill: So it has always been held in England.[5] On this point there was a great vacillation in the earlier decisions of the Court of Session; but the Judges, in the latest case recorded, repelled this objection to a bill, moved by the general understanding and practice of merchants regarding the stipulations of interest on bills.[6]

The material parts of a bill or note are—the Date, at least where that date in any degree regulates the term of payment; the Term of payment; the Sum; the Name and Address of the payee; the Name and Address of the person drawn upon. These must be clear, correct, and intelligible, in order to entitle the instrument to the summary execution of a proper bill or note.

2. Stamp.—The bill or note must be written on the proper stamp required by law; and it is peculiar to those stamps, that they cannot be affixed, nor, on pretence of mistake, an erroneous stamp corrected, after the bill or note is written. But, on this subject, reference may be made to what has already been said concerning the stamp laws.[7] The consent of the parties will not remove the objection on the stamp laws.

3. Subscription.—A bill, of which the signature is forged, is no legal ground of action or of diligence, and will not sustain a claim in bankruptcy.[8] But if one have given sanction and currency to acceptances or indorsations forged by a particular person, as binding on him, he will be liable, as having adopted that subscription, and authorized it as his own:[9] And it would seem that not only action, but summary diligence, may proceed on such a bill, the plea of forgery being effectually met by that of adoption and virtual procuration.

Bills and notes can be effectually drawn, accepted, or indorsed, only by the subscription

under L. 5. shall specify the name and place of abode of the payee, and be attested by a subscribing witness, and be made payable within twenty-one days, is an English Act not applicable to Scotland.

[1] Lesly against Robertson, 16th December 1713. Douglas against Erskine, 18th February 1715; Dalr. 193. Bruce against Wark, November 1729; 1 Dict. 95. This does not seem inconsistent with the other two cases. See Morr. p. 1309.

[2] Ex parte Jamieson, 2. Rose, Bankrupt Cases, 225.

[3] Trotter against Shiel, 1. Dict. 95.

[4] Gibson against Campbell, 27th November 1753; 1. Fac. Coll. 141.

[5] Kennedy against Nash, 1. Starkie, 452. Cameron against Smith, 2. Barn. and Ald. 305.

[6] Sword against Blair, 23d June 1790; 10. Fac. Coll. 280.: See, for the opinion of the Court, Errata at the end of the volume. See Chitty, 537.

[7] See above, p. 320.

[8] Wilson against Hart, 25th February 1826; 4. Shaw and Dunlop, 504. Bill of suspension passed without caution, on report of engravers that the subscription was forged.

[9] Barber against Gingell, 3. Esp. N. P. 60. where the drawee having answered several bills, accepted by one Taylor writing his name; this was held sufficient to answer the plea of forgery, as being an adoption of the acceptance.

Leach against Buchanan, 4. Esp. 226. Jones against Ryde, 1. Marsh. 159.

In one case in Scotland, bills had been to a great extent, and during a considerable course of time, accepted by a forged signature, and at last the forger absconded. In answer to the plea of forgery, it was attempted to make out a case of currency given by acquiescence on the part of the person whose name was forged; and the proof which was chiefly relied on was, the notice sent to him as indorser, intimating the dishonour of the bills. But it appeared that the forger had always contrived to intercept the letters, and provide for the bills, so that it was not possible to establish acquiescence against the person whose name had been forged. The action of course failed. Park's Representatives.

of the name of the person so drawing, accepting, or indorsing, or by the subscription of a procurator authorized by him. But sometimes illiterate persons become parties to such instruments; and it is necessary to observe how they may effectually bind themselves. In strict law, no bill ever ought to have been sanctioned under any other than the full legal subscription. But considerations of hardship, grounded on a prevailing usage with illiterate persons to sign bills and notes by the initials of their names, and even by marks, and the want of a due discrimination between the admission of such writings as documentary evidence, and the sustaining of them as bills, have led to great confusion in this matter.

1. The subscription of the initials of the parties is not effectual to constitute a bill; but if it appear from the instrument that it was signed before witnesses, an action, or on bankruptcy a claim of debt, will be sustained, on evidence, *first*, Of this being the customary mode of subscribing used by the party; and, *secondly*, That the initials actually were subscribed by him.[1] Such instruments, however, are properly to be considered as evidence only of simple contracts or obligations, not as bills. They cannot authorize summary execution, because they require extrinsic proof of their authenticity; differing in this respect from forged bills, (above, p. 389.) as showing their defect ex facie.[2]

2. Neither will a bill signed by a mark be sustained as a ground of diligence,[3] though it may be received as an *adminicle* of documentary proof in an action.[4]

If a person sign his name upon a blank paper stamped with a bill stamp, he will be held the drawer or acceptor, as it may be, of any bill which shall afterwards be written above his name to the sum of which the stamp is applicable.[5] These in trade are called skeleton bills, and are too frequently in use.

The same rule is applicable to those cases in which, intentionally, or even by carelessness, drawers or acceptors allow a bill to be so altered as to deceive third parties into a belief of their having signed a bill to a greater extent than the actual amount of the original instrument. Where a blank, total or partial, is left in a bill; or the sum is so written as to be capable of alteration without detection; the parties will be liable to summary diligence by the bill-holder. This proceeds not on the principle of mandate, but on the obligation to indemnify loss occasioned by fault or negligence; the fault or negligence being a good answer to the plea of interpolation: And so, if the falsification is so clumsy as not to deceive a person of ordinary vigilance, the exception will be good.[6]

[1] THOMSON against SHIELL, July 1729; 2. Dict. 534. M'ILWRAITH against M'MIKEN, 23d June 1785; 9. Fac. Coll. 333.

[2] MONRO against MONRO, 14th November 1820. A bill, signed by initials, and with the subscription of witnesses, was held insufficient to authorize summary diligence.

[3] STEWART against RUSSELL, 11th July 1815; 18. Fac. Coll. 496. Here a charge on a bill for L.400, drawn and indorsed by a mark, without the subscription of witnesses, was suspended.

[4] COCKBURN against GIBSON, 8th December 1815; 19. Fac. Coll. 47. Here a bill signed by a mark before witnesses, was held not to authorize summary diligence; but the debt not being denied, decree was given in an ordinary action, which had been raised and pursued at the same time with the charge on the bill.

[5] COLLIS against EMMET, 1. Hy. Blackst. 313. where, on a shilling stamp, the name of Emmet having been signed to a blank, a bill of L.1551 was afterwards written by Ewing and Company, to whom it had been delivered; and this bill was regularly transferred to Collis and Company, who sued Emmet on it. Emmet was found liable.

RUSSELL against LANGSTAFFE, Douglas, 496.

USHER against DAUNCEY, Bayley, 128. N. 59.

POWELL against DUFF, 3. Camp. 182.

LITTLE and Company against MUIR, 23d February 1803. A bill, in similar circumstances, was in Scotland held to be binding, first by Lord Meadowbank, and afterwards by the Court. The plea chiefly relied on was the prohibition of blank writs by 1696, c. 25. But this plea was repelled.

[6] Compare Scacchia, Tr. de Comm. § 2. gl. 5. quæst. 15. with Pothier, Tr. du Cont. de Change, vol. ii. p. 134.

The decisions of the Court of Session have proceeded on the principles so well laid down by Pothier.

PAGAN and HUNTER against WYLLIE, 19th June

Bills blank in the drawer's or payee's name, were formerly held to fall under the Act relative to blank writs, 1696, c. 25. But the view now taken is, that this statute does not apply to the case of bills; and that the acceptance is an undertaking to pay to the person who shall have right to the document; like a note payable to bearer.[1] On this ground even an executor has been allowed, after the death of the drawer, to sign a blank bill found in his repositories, and raise diligence on it.[2] See below, p. 396.

4. VITIATIONS AND ALTERATIONS.—Alterations or erasures of bills and notes in *material parts*, without consent of the parties, are fatal; independently of the objection on the stamp laws. Thus, the alteration of the *date* of the bill was held to annul the bill:[3] An alteration *on the term of payment*, from payable *at sight*, to payable *one day after date*,[4]

1793; 11. Fac. Coll. 136.; where the bill was for eight pounds, but room enough left to convert the *eight* into *eighty-four*. It was held binding on the acceptor to the full extent.

GRAHAM against GILLESPIE, 27th January 1795; Fac. Coll. 345.; Signet Cases, p. 105. 107.; where an opportunity occurred for drawing the distinction. A bill for L. 58 having been written out with a blank at the place of the stamp, an opportunity was given to fill up the sum of 'four hundred and' before the words 'fifty-eight,' so as to make the bill appear a fair bill for L. 458. Another bill was manufactured in nearly similar circumstances, but so clumsily, that it was palpable at first sight. Both bills had been discounted by the Thistle Bank of Glasgow. The Court sustained the former, and found the latter ineffectual.

[1] OGILVIE against MOSS, 28th June 1804; 13. Fac. Coll. 382.; where the drawer, not having signed as such, (though he had indorsed the bill), the Court repelled the plea that the bill was null as a blank writ.

[2] This was first determined in the negative, ROBERTSON and ROSS against BISSETS, 25th July 1777. But in 1801 the point was solemnly decided in favour of the representative. FAIR against CRANSTON, 11th July 1801; Morr. 1677.

And afterwards, the Court would not even hear an argument, lest they should seem to unsettle the point. M'DONALD's Trustees against RANKIN, 13th June 1817; 19. Fac. Coll. 351.

[3] MURCHIE against M'FARLANE, 1st July 1796; 11. Fac. Coll. 530. The date was here altered from 7th to 17th June. The effect was to prolong the credit.

In England, the case of MASTER against MILLER, 4. Term. Rep. 320.; 2. H. Blackst. 141.; was of the same complexion. The bill was originally dated 26th March, and was afterwards, in the hands of the payees, altered to 20th March, without the acceptor's knowledge, and afterwards indorsed. The effect here was to shorten the credit. The bill was held to be vacated. See the doctrine applied to other instruments, (viz. a sale note), POWELL against DIVETT, 15. East, 29.

HAMILTON against MONTEITH, 1st December 1824; 3. Shaw and Dunlop, 345. Bill held null by a vitiation of the figure 5 in 25. December.

ROBERTSON against ANNAN, 27th May 1825; 4. Shaw and Dunlop, 40. Vitiation from 'as cautioner,' to 'conjunctly and severally,' held to annul a bill.

HAMILTON against KINNEAR and SON, 17th June 1825; 4. Shaw and Dunlop, 102. Vitiation from 1826 to 1825. Bill of suspension passed without caution or consignation.

CORRIE against BARBOUR, 26th November 1825; 4. Shaw and Dunlop, 228. Similar decision on an obvious vitiation from 1. to 8. October.

WALTON against HASTINGS, 4. Camp. 223. In England, bill held null for alteration of date from 5th to 10th July.

[4] See MURDOCH, ROBERTSON and Company, against LEE, RODGER and Company. In this case, an acceptance of L. 1000 having been given for the purpose of liquidating a balance due on a banker's account, it was, when due, renewed for the principal sum and interest. It was allowed to lie over for some years as the voucher of the debt due; and the cashier of the bank, when he came to demand payment, finding it payable on *demand*, altered it to payable *one day after date*, merely to preserve interest. The Court, taking the whole case into view, pronounced judgment in an action *grounded on this bill*, for a sum equivalent to the amount of the original bill and interest. 11th February 1800.

In the House of Lords the matter was taken more strictly; and the action, as grounded on the bill, dismissed, 'but without prejudice to the pursuer's bringing any action on, or in respect of, the original bill for L. 1000, granted by Lee, Rodger and Company, as effectually as if they had amended their libel according to a permission granted by the Court of Session so to do. The Lord Chancellor, on this occasion, said, that had an action been brought in England upon the second bill, it would have been sufficient, laying all the other circumstances of the case out of consideration, to have stated that the bill, in consequence of the alteration, was not the contract of the parties; that the alteration of that bill (a voluntary, if not a criminal, act of the pursuer) had annihilated it, and it could not be restored or made a ground of demand.' 26th December 1801.

LONG against MOOR, a similar case in England; 3. Esp. Cases, 155. in Note.

was also held to annul the bill. An alteration of the sum was held fatal:[1] The substitution of another drawer,[2] or indorsee, is also fatal.[3] As to vitiation of receipts on the back, see case below.[4]

Where the alteration is not material, as not on an essential part of the instrument, or merely to correct a mistake, and in furtherance of the original intention, it will not invalidate the bill: Thus, to add *to order* where omitted,[5] or to convert a promissory-note into a bill, in conformity with the original agreement,[6] or to adjust the date as at first intended.[7] It is scarcely necessary to state cases, to show the different circumstances in which the consent of the parties will be held as established; but if the alteration is made by the whole parties, or with their full consent, it will be effectual, provided the stamp laws are not violated; and on that ground, perhaps, such a case as that of Bryce may admit of reconsideration.[8]

The place of payment of a bill is material in many respects: and, where there is an alteration of the instrument so as to add a place of payment in the body of the bill;[9] or to add a place of payment, to the effect of making qualified an acceptance originally quite general;[10] or otherwise to convert a general acceptance into a qualified acceptance;[11] or

[1] GRAHAM against GILLESPIE and Company, supra, p. 390. Note [6]. See cases next Note.

[2] CALLENDAR against KIRKPATRICK, 10th December 1812; Fac. Coll.

FLEMING against SCOTT, 1st July 1823; 2. Shaw and Dunlop, 446.

[3] MACARA against WATSON, 3d June 1823; 2. Shaw and Dunlop, 360. Alteration of the indorsee's name from William to Thomas.

[4] LOWE against CAMPBELL, 10th December 1825; 4. Shaw, 299.

[5] In England, it must in such a case appear to have been at first intended to make the note negociable. KERSHAW against Cox, 3. Esp. Cases, 246. where these words omitted, but strong evidence to shew it a mere mistake. BATHE against TAYLOR, 15. East, 412. See KNILL against WILLIAMS, 10. East, 431. In Scotland this is always to be implied. See below, Of Indorsation, p. 401.

[6] WEBBER against MADDOCKS, 3. Camp. 1. where Maddocks agreed to give Webber a bill of exchange for L.110, and having sent him a promissory-note, Webber instantly returned it, and it was altered into the form of a bill.

[7] In England, JACOB against HART, 2. Starkie, 45. Altered from 3d May to 3d April, after acceptance, but with acceptor's consent, and as originally intended. BRETT against PICCARD, Ryan and Moody, 37. Altered from 1822 to 1823.

In Scotland, HENDERSON against HAY, 20th February 1802; Fac. Coll. Bill dated October 1799—Time of payment made March 1780—Altered to what was obviously meant 1800. Sustained.

[8] BRYCE against DICKSON, 16th November 1810. Spital, in drawing a bill for the price of cattle, which, by the bargain, was to be payable at Lammas, made it, by mistake, payable at Candlemas. The mistake was immediately perceived, 'Candlemas' delete, and 'Lammas' written. It was then signed by the drawer and acceptors. One of the acceptors (who was only surety) pleaded that the bill was null, and so the Court found.

In a subsequent case, FAIRWEATHER against ALISON, 12th February 1817; 19. Fac. Coll. 289.; a bill, of which the term of payment was altered by the acceptor in accepting it, was sustained against the representative of the acceptor after his death.

[9] TIDMARSH against GROVER, 1. Maule and Sel. 735.; a bill accepted payable at Bloxam and Company's. On their failure, the drawer erased Bloxam and Company's, and substituted Easdale and Company's. The bill held null.

See REX against TREBLE, 2. Taunt. 328. SAUNDERSON against BOWES, 14. East, 500.

[10] COWIE against HALSALL, 4. Barn. and Ald. 197. The bill here was accepted generally. The drawer, without the consent of the acceptor, added, 'payable 'at Mr Bedlake's, 48. Chiswell-street.' This held to vitiate the bill. Abbot, Ch. J. said, 'An acceptance 'is a material part of a bill of exchange, and may be 'either general or special. By a general acceptance, 'the acceptor undertakes to pay the bill at any place 'where he may be called upon. By a special accept-'ance, he undertakes to pay at the place named in 'the bill. This alteration made it a special acceptance.' Bayley, J. thought this a material alteration, 'for it 'might subject the party to some inconvenience. The 'holder would present the bill at bank, where of course, 'under these circumstances, it would be dishonoured; 'and he might then, after sending by the post notice 'of the dishonour, immediately sue out a writ and 'arrest the acceptor.'

[11] See 1. and 2. Geo. IV. c. 78. TURNER against HAYDON, 1825; 1. Barn. and Cress. 1. M'INTOSH against HAYDON, 1826; 1. Ryan and Moody, 362.

to substitute a place of payment for that mentioned in the original acceptance;—these will be held as material alterations.

SEXENNIAL PRESCRIPTION.—In Scotland, within these fifty years, a limitation of bills and notes has been introduced by statute.[1] The Act declares, 'That no bill of exchange, 'inland bill, or promissory-note, shall be of force, or effectual to produce any diligence 'or action in that part of Great Britain called Scotland, unless such diligence shall be 'raised, or action commenced thereon, within the space of six years from and after the 'term at which the sums in the said bills or notes become exigible.' But it is provided, 'That it shall and may be lawful and competent, at any term after the expiration of the 'said six years, in either of the cases before-mentioned, to prove the debts contained in 'the said bills and promissory-notes, and that the same are resting owing, by the oath or 'writ of the debtor;' § 37. 39.

1. The term of six years runs from the last day of grace in bills payable at a fixed term.[2]

2. If the bill be payable *on demand*, it has been held to be due, and the six years to run from the date of the bill.[3] The expression in the Scottish statute, 'from the term 'at which the sums in the note or bill become exigible,' has been held to support the above construction. In England, it seems to be held otherwise; a bill payable on demand not giving 'cause of action' till a demand is made.[4]

3. If payable *at sight*, it is exigible only when it shall have been presented; and therefore prescription will run only from the presenting.[5] Whether the day of presentment, or the last day of grace, is the period a quo in such a case, is doubtful. See below, Of Presentment.

4. To preserve the bill from prescription, it is not sufficient to protest the bill, or even to register the protest. There must be, within the six years, a demand, either, 1. By legal diligence executed;[6] or, 2. By judicial process raised by the creditor; or by judicial demand; *i. e.* by an action, neither blank in the summons,[7] nor informal;[8] or by the production of the grounds of debt, and the entry of a claim in a ranking and sale;[9] or by claiming in a sequestration; or, generally, by claiming in a multiplepoinding, or any other process of competition. Action of suspension by the debtor has not been held to stop the prescription of a holograph bond, and the analogy seems to hold as to bills.[10] Judicial proceedings have been held necessary, notwithstanding outlawry.[11]

[1] 12. Geo. III. c. 72. made perpetual by 23. Geo. III. c. 18. § 55.

[2] DOUGLAS, HERON and Company, against GRANT'S Trustees, 19th November 1793; 11. Fac. Coll. 157. Affirmed in House of Lords, 6. Brown's P. C. 276.

See, in England, WITTERSHEIM against Countess D. of CARLISLE, 1. Hy. Blackst. 631.

[3] STEPHENSON against STEPHENSON'S Trustees, 16th June 1807; 13. Fac. Coll. 639.

[4] In an analogous case, where one was to account for goods sold, it was held in England, that the cause of action arose only with the demand for an account. TOPHAM against BRADDICK, 1. Taunt. 572. See also 15. Ves. Jun. 487.

Mr Selwyn has quoted a case as establishing a different doctrine, in the case of a promissory-note; CHRISTIE against FONSICK, 1. Selwyn, N. P. 126.; but he has not given the circumstances or argument on which the judgment proceeded.

[5] HOLMES against KERRISON, 2. Taunt. 323.

[6] DOUGLAS, HERON and Company, against RICHARDSON, 26th November 1784; 9. Fac. Coll. 282. Here bills with registered protests were produced in a ranking: the protest registered was found insufficient to interrupt the prescription; the production in the ranking sufficient.

[7] BAILLIE against DOIG, 2d March 1790; 10. Fac. Coll. 238.

[8] GORDON against BOGLE, 23d June 1784; 7. Fac. Coll. 249. Here one of the interruptions pleaded was a *blank* precept before the Admiral, afterwards filled up with the debt in the bill.

[9] DOUGLAS, HERON and Company, against RICHARDSON, supra, Note [6].

[10] WRIGHT against WRIGHT, 11th December 1717.

[11] BRODIE against SHEDDAN, 20th February 1821; 20. Fac. Coll. 232.

5. There is a difference between the Scottish prescription of bills, and the limitation of the English law. By the words of the Scottish Act, the bill is annihilated as a ground of diligence or action, and the proof of the debt confined to writ or oath. In England, the limitation may be discharged by *any* acknowledgment of the debt, even the slightest, and by parole.[1]

According to the words of the Act, there cannot, in Scotland, after the expiration of six years, be any action grounded on the bill or note itself. In any action for payment after that time, the *debt* ought to be libelled: yet this strictness of judicial proceeding has not always been required so rigidly as it ought to have been. The law correctly appears to be, 1. That although the bill may be produced in the way of adminicle or documentary evidence, the proof on which alone judgment can proceed is the writ or oath of the debtor. 2. That if an action is laid on a bill or note after the term of prescription has expired, decree pronounced in absence strictly ought to afford no legitimate ground of adjudication, or other diligence; and the debtor should be entitled, without caution or consignation, to suspension of a charge on such a decree. 3. That a reference to oath on such a libel is not, strictly speaking, a reference of the debt; but in the relaxed method of libelling actions in the Court of Session, it has been held an effectual reference to sustain decree.[2] The most important question connected with this point, relates to the engagement of one who, as surety for the person truly indebted, becomes a party to a bill or note; and there may seem to be room for distinguishing two cases:—1. Where two or more persons engage as debtors in a bill, without the creditor being aware of the one being the principal, the others cautioners, it has been held not to be enough for one, on a reference to oath, to swear that the money was not received by him, his interference being only as cautioner, and depending on the mere act of his subscription of the document now extinct and annihilated.[3] 2. Where the creditor is aware of the engagement being merely as surety, it may be contended, that the co-obligant being not properly debtor, but only engaging as surety, and by a limited obligation, the duration of his responsibility must be measured by the natural course of the engagement, while the creditor cannot rely on any more extended obligation. But the Court has not sanctioned this distinction. In several cases, the same rule has been applied which decided the questions with onerous indorsees.[4]

[1] See the cases to this effect collected by Mr Selwyn, vol. i. p. 127.

[2] LAIDLAW against HAMILTON, 31st May 1826; 4. Shaw and Dunlop, 636. Here the libel was on a bill of L.220, dated 24th January 1814. The bill was prescribed. A reference was sustained, and the deposition was, that the bill had been signed by Hamilton, but only as cautioner, and he had never received value. The Judges were divided in opinion. Some holding, that the libel was incorrect, and the debt consequently not established by the oath; the majority, that the bill was only demonstrative of the question, whether the debt expressed in the bill was owing, and so the oath intelligible, and relevant.

[3] PHILP v. MILNE, Jan. 15. 1800; 12. Fac. Coll. 349. Here a bill in the hands of an onerous indorsee was prescribed; but the joint acceptor, though he had interposed as cautioner merely, not pretending that the bill was paid, but defending merely on the ground of the annihilation of the bill, and the necessity of proving a debt against him. The Court seem to have taken (if the report is accurate) an incorrect view of the law, 'the general opinion being, that the bill was as much 'due now as on the day it was accepted; and that it 'was not a relevant defence, that it was originally 'granted without value.'

GIBSON against FORRESTER, 8th June 1820. Here the case was decided by the Lord Ordinary on the precedent of Philp's. But the Court distinctly placed it on this footing,—that proof of the subsistence of the *debt* was required; and although there was no reference to oath, the want was supplied by special defences, which, as a judicial admission, were held equivalent to oath; and that the import of this defence was an admission of the debt.

See cases next Note.

[4] M'NEIL against BLAIR, 21st January 1825; 3. Shaw and Dunlop, 459. Blair, with the full knowledge of the creditor, became surety for Jeffrey, by subscribing as acceptor of a bill. At the distance of more than six years an action was raised, and the debt was

6. It is held in England, that as payment by one of several obligants in a bill is payment for all, so admission by one is admission by all, and the law raises the promise to pay where the debt is admitted to be due.[1] This is not law in Scotland.[2]

In Scotland it has been decided, that decree taken within the six years against one of several joint acceptors of a bill, 'interrupts the prescription as to all of them.'[3]

7. No document on the bill, or by relative writing, will preserve the bill in force, or, in strict terms, interrupt the prescription. It can have the effect only of establishing the debt itself. But, 1. As this, like the other short prescriptions, is grounded on the presumption of payment, it will not avail the creditor that there is on the back of the bill a marking of a partial payment, or of the payment of interest within the six years; for these do not exclude the presumption, that payment was made before the bill was discharged by operation of the Act, in consequence of the expiration of the term.[4] 2. Such markings, provided they are in the debtor's handwriting, on the very last day of the six years,[5] or after the expiration of the term,[6] are bars to the plea of prescription; or rather, proofs of the subsistence of the debt. 3. It seems to follow, that such proofs ought not to suffer the limitation proper to a bill; but the Court has considered such a constitution of the debt by relation to the bill, as subject to a prescription as short as that of the original bill.[7]

9. The years of minority of the holder are not computed in the six years; § 40. of the Act.

§ 2. OF THE DRAWING, ACCEPTANCE, AND INDORSEMENT OF BILLS AND NOTES.

These three points comprehend the main part of the doctrine of bills and notes:—

1. DRAWING OF BILLS.

1. The subscription of a drawer is necessary in order to obtain a warrant for summary execution.[8] It has already been said, that the representatives of the drawer may sign the

referred to Blair's oath, who swore to the bill having been signed by him as cautioner, with the knowledge of the creditor. The Court held Blair liable; and that his obligation was not limited by the sexennial prescription. This case was appealed, and compromised, by a great sacrifice on the part of M'Neil.

LAIDLAW against HAMILTON, supra, p. 394. Note [2].

[1] WHITCOMB against WHITING, Douglas, 629., where four persons being bound in a joint and several note, one of them paid interest and part of the principal within the six years, (which, in England, is held as a discharge of the limitation), and the question was, whether action lay against the others? The Court (Lord Mansfield, and Willis, Ashhurst, and Buller, J.) held them all liable.

So in JACKSON against FAIRBANK, 2. H. Blackst. 340., the payment of a dividend by the bankrupt estate of one of the obligants in a note, was held such an acknowledgment as to take the case out of the statute as to the other.

[2] HOUSTON against YUILL, 31st May 1822; 1. Shaw, 487. M'INDOE against FRAME, 18th November 1824; 3. Shaw and Dunlop, 295.

[3] GORDON against BOGLE, 23d June 1784; 7. Fac. Coll. 249.

[4] FERGUSON against BETHUNE, 7th March 1811; 16. Fac. Coll. 226. It is held otherwise in England; Chitty, 479.; 1. Selwyn, 107.

[5] CAMPBELL, 19th May 1797; 10. Fac. Coll. 59.

[6] RUSSELL against FAIRIE, 23d May 1792; 8. Fac. Coll. 444. SCOTT against GRAY, 3d February 1784. Also the above case of FERGUSON, supra, Note [4].

[7] This question was raised on the Bench in Russell and Fairie's case, (preceding Note). The question was debated on the Bench, and the Judges much divided in opinion, seven Judges and the Lord President holding the limitation to take place, while the other seven Judges were of a different opinion. But the point was decided as above, HORSBURGH against BETHUNE, 13th February 1811; 16. Fac. Coll. 194.

See also FERGUSON *v.* BETHUNE, (above, Note [4]); though, as to this point, that case is not reported with sufficient precision to be entirely satisfactory.

[8] Erskine, b. 3. tit. 2. § 28., goes too far in saying,

bill, if found unsigned in his repositories.[1] It may be signed by the drawer after the death or bankruptcy of the acceptor,[2] or at any time before producing in judgment.

2. The act of drawing a bill in favour of a third party, implies an undertaking to the payee, and all acquiring right to the bill, that the person drawn on shall accept, and that he shall pay the bill; or that if he shall fail in either particular on due negociation, the drawer himself will retire the bill. This evidence may be counteracted by the writ or oath of the holder of the bill.

3. When one draws a bill in a representative character, as factor or otherwise, he must, in order to be free from personal responsibility, limit his draft to that character; for the law holds, that the act of drawing the bill affords legal evidence of an obligation against the drawer in his own person; and that recourse, according to a general rule, and without distinction, must be competent upon all bills which do not ex facie bear the exception.[3]

4. Foreign bills are drawn in sets, that they may be transmitted safely. Each set or double of the bill must bear a condition, that it shall be payable only while the others there enumerated remain unpaid; as 'Pay this my first exchange, second and third not 'paid;' or 'Pay this my second of exchange, first and third not paid.' All the copies must be delivered to the payee or indorsee, otherwise he may have difficulty in negociating. The bill that is first presented and accepted is alone entitled to payment, and payment of it discharges the drawee;[4] so that no banker is in safety to discount one set of a draft before acceptance, without the rest being delivered to him or destroyed, or without taking indemnity against the risk of another being first presented.

5. During the last war, bills drawn or negociated from France were prohibited to be paid.[5]

2. ACCEPTANCE OF BILLS AND NOTES.

The only proper acceptance of a bill by the person on whom it is drawn, is by his full subscription.[6] The mere subscription of the name is a sufficient acceptance: The full form is 'Accepted,' or 'Accepts,' with the name subscribed: Or where it seems necessary to take unusual precaution, it runs thus,—'Accepted for the sum of so much,' with the name subscribed. When accepted in any of these forms, the bill or note may be protested, if not duly paid; and on that protest diligence may be summarily issued against the acceptor.

In England, a separate acceptance may be taken without endangering the remedy on the bill; because in all cases an action is necessary, and the production of the bill, with

that a bill without the drawer's name is null. See OGILVIE against Moss, 28th June 1804, supra, p. 391. Note [1]. DRUMMOND against DRUMMOND, 8th February 1785; 9. Fac. Coll. App. 11.; HARE against GEDDES, 22d November 1786; Ib. p. 12.; were cases in which it was objected to a claim in bankruptcy, that the bill was null, as wanting the drawer's subscription, but the objection was repelled. In the first case, an action was brought on the bill.

[1] See above, p. 391.

[2] SANDILANDS, 12th November 1742; Kilk. 71.; Elchies, *Bill*, No. 28. HENDERSON, 25th November 1748; Elchies, *Bill*, No. 41.

[3] See Bayley on Bills, 54—58. CONNELL against M'LELLAND, 5th July 1782; where a factor having drawn a bill in his own name, was held responsible to an onerous holder. 9. Fac. Coll. 79.

DOUGLAS against Lord DUNMORE, 27th November 1800, where the governor of a West India island drew a bill on the treasury, but not having expressed his ministerial character, he was held to have made himself liable to the indorsee, the bill having been dishonoured when presented. 12. Fac. Coll. 457.

[4] LAMBTON and Company against MARSHALL, 21st June 1799; 12. Fac. Coll. 302.

[5] 54. Geo. III. c. 9. § 2. See DUHAMEL against PICKERING, 2. Starkie, 90.

[6] See below, Of Acceptance by Procuration, p. 399.

such evidence as is deemed sufficient to establish that the person drawn upon undertook to answer the request, may as easily be made the ground of the judgment on which execution is to follow, as if written on the bill itself. But even a written acceptance, separate from the bill, would not be sufficient, in Scotland, to authorize a decree of registration; there being in the ordinary course of procuring a decree of registration, no judicial authority to take cognizance of such extraneous evidence; and a parole acceptance, whatever effect it may have in constituting a debt, or in completing an assignment, can have none at all in constituting an accepted bill, on which execution can pass summarily. This keeps the rule of acceptance in Scotland to that state of correctness which ought never to have been departed from in England;[1] and which is now restored by statute (1. and 2. Geo. IV. c. 78.), whereby 'no acceptance of any inland bill of exchange shall be suffi-'cient to charge any person,' unless it be by writing on the bill, or on one of its parts, if there be more than one.

It is necessary, however, to observe a distinction respecting the acceptance of bills, from which important consequences are deducible. Considering a bill as an order on the drawer's debtor to pay his debt to a third person, the acceptance, or what is equivalent to acceptance, will complete the transfer of the debt. And therefore,

1. Although it cannot, in strict law, be said that acceptance may be by anticipation;[2] yet when a debtor promises by letter clearly and unequivocally to accept a particular draft; and such draft is given to the payee, accompanied by the letter; or taken by a third party in reliance on the promise; it is at least a letter of credit that will avail the payee of the draft, and discharge the person drawn on from the necessity of accepting another draft for the debt.[3] But the promise must be unequivocal and clear.[4] It should

[1] Lord Kenyon said,—'It was much to be lament-'ed that any thing has been deemed to be acceptance 'of a bill of exchange, besides an express acceptance 'in writing: but he admitted, that the cases had gone 'beyond that line, and had determined that there might 'be a parole acceptance.' 1. East, 103. And Lord Ellenborough has said,—'That if the law in this res-'pect were to be framed de novo, it might perhaps 'be desirable to have nothing else taken as an accept-'ance, than an acceptance in writing on the bill itself, 'that every one to whom it passed might see, on the 'face of the instrument itself, whether or not it were 'accepted; but that it is now much too late to recur 'back to that, after the various decisions in the time 'of Lord Hardwicke and Lord Mansfield.' 4. East, 67.

[2] See JOHNSON against COLLINS, 1. East, 103, 104. SHEPHERD (Frazer's trustee) against CAMPBELL, FRAZER and Company, 28th May 1823; 2. Shaw and Dunlop, 346. C. F. and Co. wrote, 'Your draft on 'C. F. and Co. will meet due honour,' &c. This letter was shown to John Frazer, who advanced L. 500 on a draft drawn conformably. The fund on which C. F. and Co. relied failed, and they refused to accept the bill. They were held liable for the amount of the bill.

[3] PILLANS against VAN MIEROP and HOPKINS, 3. Burrow, 1663. where the defendants, London merchants, wrote that they would accept such bills as a foreign house should draw on the credit of White for L. 800. The foreign house was held to have made an effectual draft, which was to be held as accepted, although White in the meanwhile failed, and the London house attempted to retract; the foreign house having advanced money on the faith of the engagement. Lord Mansfield, Mr Justice Wilson, and Mr Justice Yates, laid down the law clearly.

Lord Mansfield went farther in PIERSON against DUNLOP. Dunlop had written to MacLintot, acknowledging receipt of a navy-bill, and saying that his draft would receive due honour; and he verbally said to the holder of the draft, that it would not be accepted till the navy-bill was paid. The navy-bill was paid. Lord Mansfield said, in the course of the argument, when the letter to MacLintot was maintained to be an acceptance,—'I rather think it a letter of 'credit; and that to make it an acceptance it should 'have been sent to the holder of the bill.' After argument he said,—'I consider what the defendants 'did as an acceptance. It has been truly said, as a 'general rule, that the mere answer of a merchant to 'the drawer of a bill, saying, "he will duly honour it," 'is no acceptance, unless accompanied with circum-'stances which may induce a third person to take the 'bill by indorsement. But if there are any such cir-'cumstances, it may amount to an acceptance, though 'the answer be contained in a letter to the drawer.' Cowp. 571.

[4] REES against WARWICK, where 'your draft shall '*merit due attention*,' was held insufficient, 2. Starkie, 411. In SHEPHERD's case, supra, Note [2]. the expression was different.

follow, that the holder of the draft to which the promise applies, ought to be preferred on the fund in the hand of the person drawn upon.

2. A verbal acceptance is also, in this view and to this effect, even by anticipation, good;[1] and though, in Scotland, such an acceptance will not ground summary diligence, it seems to be effectual to transfer the fund in the hands of the person drawn upon.

3. It is said, that a *refusal* to accept, written on a bill, is an acceptance: but it can be so only in two cases; either where the presenter of the bill is deceived into a belief that it is an acceptance, and not a refusal;[2] or where the drawee is possessed of a fund, and his refusal to accept is evidence of notice, so as to give the porteur right to the fund as assignee.

Acceptance may be implied, from detention of, or refusing to redeliver, a bill left for acceptance.[3]

Acceptance is sometimes made conditional. Thus,—

1. Where the person drawn upon does not choose altogether to reject the bill, and expects to receive those funds on the faith of which the bill is drawn, he accepts conditionally; as 'to pay when in cash by a particular remittance;' or 'to pay on arrival of 'a particular ship;' or 'to pay when goods consigned shall be sold,' &c. Such acceptance is held good on the condition being performed,[4] not otherwise.[5]

2. Acceptance may be so far qualified as to vary from the tenor of the draft. Thus, 1. It may be for a part only of the sum drawn for, to which extent it will be effectual;[6] or, 2. It may vary in the mode of payment;[7] or, 3. It may vary in time of payment.[8]

3. A bill may be accepted conditionally in respect to place.[9] But, 1. The condition must be in writing, in order to qualify the drawee's obligation to third parties taking the bill for value without notice of the condition.[10] 2. The porteur is not *bound* to take such conditional acceptance; and he is not *safe* so to do, without giving immediate notice to the drawer and other parties, so as to prevent them from pleading a discharge of their respon-

[1] LUMLEY against PALMER, 2. Strange, 1000. where a solemn argument was ordered, to settle the point. Lord Hardwicke, as Chief-Justice, had directed the jury, that verbal acceptance was sufficient. But the Chief-Justice had ruled it otherwise in the Common Pleas. The Court, in their argument, held a verbal acceptance sufficient; and that the Judge's direction to the jury to that effect, was agreeable to constant practice. Lord Hardwicke said afterwards, that on a conference with the Chief-Justice of the Common Pleas, he had changed his opinion, and agreed with the Court of King's Bench. The point taken for granted by the Court and bar. SPROAT against MATTHEWS, 1. Term. Rep. 182.

[2] And so it seems to have been held by Lord Mansfield. In the last edition of Mr Justice Bayley's Treatise, p. 78. there is this note:—'In Ann. 75. is 'this note,—"Underwriting or indorsing a bill thus,— 'I will not accept this bill, is held by the custom of 'merchants a good acceptance; but by Lord Mans- 'field, in PEACH against KAY, in sittings after Trin. 'Term 1781, it was held by all the Judges, that an 'express refusal to accept, written on the bill, where 'the drawee apprized the party who took it away 'what he had written, was no acceptance; but if the 'drawee had intended it as a surprise upon the party, 'and to make him consider it as an acceptance, they 'seemed to think it might have been otherwise."'

[3] Mere keeping of a bill, however, does not seem sufficient; unless it amount to *detention;* or unless the bill be destroyed, knowing that the payee relies on its acceptance. JEUNE against WARD, 2. Starkie, 327. and Note 330. See Bayley, 149, 150.

[4] PIERSON against DUNLOP, above, p. 397. Note [5]. SPROAT against MATTHEWS, 1. Term. Rep. 182. MILNE against PREST, Holt, 181.; 4. Camp. 393.; Bayley, 155.

[5] BANBURY against LESSET, 2. Strange, 1211. where a bill was accepted to pay as remitted; but no remittance: the opinion of Lord Chief-Justice Lee was, that the drawee was not bound. See SPROAT against MATTHEWS, 1. Term. Rep. 182.

[6] Bayley, 135. and cases there cited.

[7] PETIT against BENSON, Bayley, 136.

[8] WALKER against ATWOOD, Bayley, 136.

[9] See above, p. 392. and below, p. 409.

[10] MASON against HUNT, Dougl. 286.

sibility. 3. Where the condition is verbal, the indorser must have notice, otherwise he will not be liable.[1] 4. But acceptance as a cautioner is deemed an absolute acceptance; and the qualification, whatever effect it may have in a question of relief between the parties themselves, has none at all as against the holder of the bill.[2]

It has sometimes been said, that an acceptance once written on a bill cannot be retracted, cancelled, or cut off; even while the bill is in the drawee's own power. In one sense this may be true, namely, that a debtor to the drawer is bound so absolutely, that he cannot free himself by cancelling his signature. But to this extent the right of the holders will depend on the notice given of the assignment, not on the acceptance. To the extent to which it has been carried, the doctrine seems to be irreconcileable with principle, and to be justified only by the rule, that the drawee can write nothing on a bill which substantially injures and defaces it, without being held to accept it; and that the act of accepting requires no delivery to make it effectual, but from the moment of its appearing on the bill is beyond recall. It is a doctrine inconsistent with all the foreign authorities;[3] and, in England, it is much doubted.[4]

Acceptance may be by an agent having a PROCURATION; but the holder is not bound to take such acceptance without seeing the procuration; nor, indeed, is he safe so to do without giving notice to the other parties; for he would thus take on himself the risk of the authority; and, if it were not binding, he would discharge the other parties. If the agent's acceptance be taken, the effect of such acceptance will be determined by the following rules.—

1. The acceptance made in virtue of an express procuration, will as effectually bind the principal as if made by himself. Such procurations are commonly granted by letter or power of attorney to confidential clerks, or factors, or riders for manufacturing houses, to draw, accept, indorse bills, or make promissory-notes for the principal. It is a dangerous power, and ought not only to be granted with reserve, but acted upon by third parties very scrupulously.

2. The doctrine of the older authors[5] is certainly more wholesome, that such power must be in writing: But mercantile practice has introduced a degree of looseness in this point, to which there is no authority for denying effect. On the contrary, it has been sanctioned in England in several cases, both in the common courts and in the House of Lords;[6] insomuch, that not only verbal authority to subscribe is held sufficient, but a power of procuration is inferred from the practice of so subscribing recognized by the principal: And, in a recent case, where the Court of Session had found that there was

[1] Lord Ellenborough said, the plaintiff had a right to refuse this acceptance, for the drawee of a bill has no right to vary the acceptance from the terms of the bill, unless they be unambiguously and unequivocally the same. BOEHM against GARCIAS, 1. Camp. 425. See also SEBAGS against ABITHOL, 4. Maule and Sel. 460.; and GAMMON against SCHMOLL, 5. Taunt. 344.

[2] CAMPBELL against GIBSON, 27th November 1753; Elchies, *Bill of Exch.*, No. 54. M'DOUGAL against FOYER, 13th February 1810, where one of the acceptors signed 'David Foyer, as cautioner for them '(the other acceptors).' The Judges were clearly of opinion, that cautionary obligations in bills of exchange could have no other effect than that of settling the question of relief.

[3] Dupuy de la Serra, l'Art des Lettres de Change, c. 10. p. 81. 2. Pothier, 114. Cont. de Change, No. 44.

[4] BENTINK against DORRIEN, 6. East, 200. There was no occasion to decide the point; for the plaintiff had, by noting the bill for non-acceptance, barred himself from the benefit of it as an accepted draft. But Mr Justice Lawrence took occasion to say, that when the general question shall arise, it will be worth considering how that which is not communicated to the holder can be considered as an acceptance, while it is yet in the hands of the drawee, and where he obliterates it before any communication made to the holder. See in Chitty, p. 242. the English cases collected.

[5] Beawes, Lex Mercat. No. 86. Forbes, 15.

[6] Bayley on Bills, 226. Bayley, Principal and Agent, 117. Chitty, 31. and 34.

no power of procuration without a special mandate, this law was denied in the House of Lords.[1]

3. A general authority as agent or factor for a merchant residing abroad, will be sufficient to bind the principal by his acceptance; but a limited power must be strictly observed.[2]

4. The person who accepts *per* procuration should be careful to express his representative capacity, otherwise he may render himself individually liable.[3]

5. The recall of such procurations will deprive of efficacy any draft or indorsement made by him who held it; nor does any advertisement or notice of such recall seem necessary in order to protect the principal from its abuse. Any one who trusts to the power without seeing the procuration in possession of the procurator, acts at his own risk. See hereafter, Of Mercantile Agency.

6. In England it has been held, that a collateral undertaking may be constituted by a subscription as acceptor, in circumstances which do not admit of a proper acceptance. Thus, after the person drawn on has accepted, there can be no proper acceptance by another person; but a signature as acceptor will raise a collateral undertaking.[4] In Scotland, a different view has been adopted; and, instead of a collateral undertaking, the subscription has been held to import a joint undertaking, as acceptor of the bill, or maker of the note.[5] The English doctrine is consistent with mercantile practice and understanding, but not quite so with the stamp law; the Scottish doctrine is not quite reconcileable to either. It would present, for example, a question requiring some consideration, Whether a person subscribing, as in the case of Don and Watt, having no notice of the dishonour of the bill, would be liable for the payment of the bill at any time within the sexennial prescription?

7. A partner of a company has power to accept bills and make notes for the company in the ordinary course of trade, and of the company's dealings; although it should be stipulated in the contract, that only one of their number should have that power. But this is subject to qualifications:—1. If the party to whom the bill is accepted is aware of the stipulation in the contract, he must show that he gave value for the acceptance or

[1] DAVISON against ROBERTSON and others, in the House of Lords, 4th July 1815; 3. Dow, 218. There was no occasion to give judgment on this point, the case being remitted for reconsideration. Lord Chancellor Eldon said,—'Here a greater error has occurred 'than he ever remembered to have met with, if the 'commercial law was the same in Scotland as in Eng-'land. In one of the interlocutors there is a find-'"ing, that an indorsation per procuration requires a 'special mandate." His opinion was, that no such 'thing was absolutely necessary: for if, from the 'general nature of the acts permitted to be done, the 'law would infer an authority; the law would say, that 'such an authority might exist without a special man-'date, and that an indorsement per procuration might 'be good, though there were no such mandate.' The cause was remitted to receive such evidence as might be properly offered with respect to the several points of the case.

This doctrine must, however, be confined to mercantile cases. LAWSON against MATTHEW, 18th November 1823; 2. Shaw and Dunlop, 502.

[2] Chitty, 31. et seq.

[3] As in the case of a drawer mentioned above, p. 396. (3.) See below, Of Collateral Undertaking.

[4] See below, p. 404.

JACKSON against HUDSON, 2. Camp. 447.; where Jackson drew a bill on Irving, and he accepted. Hudson wrote under this acceptance,—'Accepted, Jos. 'Hudson;' and Hudson was sued as acceptor, the plaintiff stating it as a case of suretiship by Hudson, without whose interposition he refused the goods to Irving. Lord Ellenborough held this to be neither an acceptance by a drawer, nor for honour of the drawer; but a collateral undertaking that the bill should be paid.

[5] DON against WATT, 26th May 1812; 16. Fac. Coll. 647. A note, payable to Don, expressed in the singular, 'I promise,' &c. and signed A. Watt, was subscribed on the back by T. Watt. The Court of Session held this a joint and several note.

WATTERS, petitioner, 7th March 1818; 19. Fac. Coll. 489. Here, the name of Watters was on the back of the bill: he was held an acceptor.

See also M'DOUGAL against FOYER, 13th February 1810; 15. Fac. Coll. 579.

note.[1] 2. If the party is aware that the partner is using the company firm for his own private purposes, he must prove the assent of the company in order to recover on the bill:[2] And this rule will be applied even where the company is indirectly benefited.[3]

A partner accepts either by signing the firm, or by subscribing his name for 'himself 'and partners.'

ACCEPTANCE SUPRA PROTEST.—A friend or agent of any of the parties to a bill may accept it supra protest, for their honour; and then he will be liable to all the parties in the bill, except to him for whose honour he has accepted; and, on paying under such protest, will have a good claim against the person for whom he has accepted, and against all who in the bill are responsible to him: Or an accepted bill may, in the same way, be paid supra protest, and then the person paying will have his remedy against that person for whom he has so interposed, and against all who in the bill are responsible to him.[4]

3. INDORSEMENT AND TRANSFER OF BILLS AND NOTES.

The transfer of bills and notes by indorsation, is one of the most distinguishing privileges of those instruments, and that by which, next to bank-notes, they have become the great circulating medium of the trading world. In England, the words, 'to 'order,' or 'to bearer,' in the bill or note, make it transferable by indorsement as against all the parties to it:[5] And it is held, that without words making it assignable, the indorsement will be good only against the indorser himself, but not so as to transfer the bill, or make the drawer or acceptor liable to the indorsee.[6] In Scotland, a note or bill is held indorsible, although it bear no words of assignment.[7]

An indorsation is an order written on the back of the bill, directing the contents to be paid to a particular person: Or the mere subscription of the name of the holder implies such order as may be written there. Such indorsement is at once a transfer of the bill or note, and an obligation to indemnify the indorsee or holder, if the bill should not, on due negociation, be paid.

1. An indorsement which states the name of the indorsee, is called a full indorsement; an indorsement which does not, is called a blank indorsement. The latter is equivalent to an order making the note payable to the bearer;[8] and it has been held, that while the first

[1] GRANT against HAWKES, 1817, at Guildhall, before Lord Ellenborough; Chitty, 42.

[2] Chitty, p. 43. et seq.: GREEN against DEAKIN, 2. Starkie, 347. BLAIR MILLER against DOUGLAS, 22d January 1811; 14. Fac. Coll. 154. See below, Of Partnership.

[3] JOHNSTON, SHARP and Company, against PHILIPS, 3d February 1819; reversed in House of Lords, 22d July 1822; 1. Shaw's Appeal Cases, 244.

[4] On the acceptor's failure, and a protest for better security, acceptance for the drawer's honour held to give the acceptor for honour right to the dividends from the original acceptor's bankrupt estate. Ex parte WACKERBATH, 5. Vesey, Jun. 574.

[5] Bayley, 97.; Chitty, 140, 141.

[6] HILL against LEWIS, Salkeld, 132. Lord Holt held a note, without the words *to order*, to be well transferred by indorsation only, so as to make the indorser chargeable to the indorsee.

This doctrine seems to explain the difficulty in KERSHAW against COX, where the insertion of the words would, in Scotland, have been held immaterial.

[7] CRICHTON against GIBSON, January 1726; 1. Home, 211.

[8] SCOTT and Company against KILMARNOCK BANK, 27th February 1812, 16. Fac. Coll. 528.; where a bill with a blank indorsement was discounted at the Kilmarnock Bank by a stranger, and the bank was held entitled to recover from the acceptor.

PEACOCK against RHODES, 1781, Douglas, 611.; where a draft indorsed in blank was stolen, and afterwards bought by Peacock for value, acceptance and payment were refused: But the Court held there was no difference between a note indorsed in blank, and a note payable to the bearer. 'The law,' says Lord Mansfield, 'is settled, that a holder coming fairly by 'a bill or note has nothing to do with the transac-

indorsement continues blank, the bill is assignable by mere delivery, notwithstanding subsequent full indorsements, on their being cancelled.[1]

2. An indorsement in full may be restrictive or conditional:—1. It is not restrictive merely by omitting the words, 'or order,' an indorsation by such indorsee being good.[2] 2. An indorsement, 'Pay to A B only,' or 'Pay to A B, for my use,' is restrictive, and gives no power to reindorse.[3] 3. An indorsement 'without recourse on the indorser,' is a good transfer; but the condition is effectual to protect the indorser from a claim, if the bill be dishonoured.[4] 4. The payee may annex a condition to his indorsement, which will bind the person drawn on, if it be so annexed before he accepts; and the non-performance of which will reinvest the debt in the payee.[5]

3. An indorsement for a part, seems to be bad, unless the other part has been paid.[6]

4. Where a bill is payable to a company, any of the partners may, even for his own account, indorse it effectually by the firm,[7] provided the indorsee has no notice of the abuse of the partner's power, or no indication, from the circumstances, of such misapplication. But the indorsement will be bad, if applied with the knowledge of the indorsee to a private engagement of the partner who makes the indorsement; to the purpose, for example, of guaranteeing a previous debt not of the company, but of the partner himself.[8]

5. Indorsations may be made by procuration: As to which see above, p. 399.

6. Bills and notes may be carried by indorsation, both before and after the term of payment.[9] And it has been held, 1. That even an onerous indorsee before the term

'tion between the original parties. I see no difference between a note indorsed blank, and one payable to the bearer. They both go by delivery, and possession proves property in both cases.'

[1] See below, p. 404.

[2] Bayley, 104, 105.; and the cases there cited.

[3] Ibid. p. 102.

[4] GOUPY against HARDEN, 7. Taunt. 159.

[5] In ROBERTSON against KENSINGTON, 4. Taunt. 30. Sir W. Forbes and Company had drawn on Kensington and Company, to the order of Robertson, at forty-five days, for L.180. Robertson indorsed it thus:—'Pay Clerk and Ross, on my name appearing in the Gazette, as ensign in any regiment of the line between the 1st and 64th, if within two months from this date, 19th November 1808.' The bill was afterwards presented for acceptance, and accepted. It was afterwards discounted in the Bank of England. Kensington and Company paid it when due, although Robertson's name had not appeared in the Gazette. Robertson brought his action against Kensington and Company, and the Court gave him judgment. Bayley, 103.

[6] HAWKINS against CARDY, Lord Raym. 360.; where a bill was for L.46. 19s. and indorsed with an order to pay L.43. 4s. to Hawkins.

See JOHNSON against KENNION, where the indorsation held good for the part unpaid; 2. Wilson, 262.

[7] SWAN against STEELE and WOOD, 7. East's Rep. 210.; RIDLEY against TAYLOR, 13. East, 175.; where there was something very like an indication that the property or means of the company were applied to the use of the individual partner.

[8] STEIN against CALDER, 2d February 1794. A bill indorsed with the firm by a partner, manifestly out of the line of the company's trade, was held not binding on the company.

See also M'NAIR against HENDERSON and Company, 19th January 1803.

BLACKWOOD and Company against BOWER, 11th July 1805, and 17th June 1806, same parties. A partner using the firm in his own concern, held not to bind the company; but this altered on the bill appearing in the company's books.

BLAIR MILLER against DOUGLAS and Company, 22d January 1811; where the firm used by a partner for his private debt, and known so to be without any communication to the other partners. The company held not liable.

CLERK against SHEPHERD, 30th November 1821; 1. Shaw and Ballantine, 192.

The same doctrine held in England, SHERIFF against WILKS, 1. East, 48.; HOPE against CUST, 1. East, 53.; where Fordyce, a separate trader, and also partner with others, being indebted on private account to Hope, gave him a guarantee in the company's name. Under the direction of Lord Mansfield held bad.

[9] FREER against RICHARDSON, 18th November 1806; 13. Fac. Coll. 579.

As to English law, see Bayley, 118.; Chitty, 163. There is an exception in England of bills and notes

of payment, will be liable to the same exceptions which may be pleaded against the indorser, if he is aware of the bill having been dishonoured by refusal to accept.[1] 2. That if he acquire by indorsation after the term of payment, very slight evidence will be sufficient to presume his knowledge of the dishonour.[2] 3. That if there be any marks of dishonour on the face of the bill, the indorsee taking it after the term of payment will be liable to all the objections competent against the indorser.[3] But, 4. The decisions have been different in England and in Scotland, on the inference deducible from the mere circumstance of the bill being acquired after the term of payment. In England, the point was much questioned at one time;[4] but is now held settled, that the indorsee, as having notice by the bill being past due, is liable to the objections competent against the indorser.[5] But in Scotland it is still held, though not settled, that the mere circumstance of the indorsation being after the term of payment, unaccompanied by any marks of dishonour on the bill, does not expose the indorsee to the exceptions pleadable against his indorser.[6]

7. But although a bill may itself be transferred, after the term of payment, by indorsa-

under L.5, which cannot be indorsed after the term of payment. 17. Geo. III. c. 20. § 1.

See MUTFORD against WALCOT. Lord Holt said, he remembered a case where a bill was negociated after the day of payment; and he had all the eminent merchants in London with him at his chambers, and they all held it to be very common and usual, and a very good practice. 1. Lord Raymond, 575.

[1] CROSSLY against HAM, 13. East's Rep. 498. See above, for the case of an indorser taking without value.

[2] TAYLOR against MATHER, 3. Term. Rep. 83. Note.

[3] BROWN against DAVIS, 3. Term. Rep. 80. Here the payee of a bill having indorsed it, had it returned from the indorsee noted for non-payment. The drawer gave him money, with which he retired the bill; but, instead of returning it to the drawer, he indorsed it for value to Brown. Lord Kenyon held the evidence of knowledge not sufficient. On a motion for a new trial, it was held, that it must be left to the jury, on the slightest circumstance, to presume knowledge; such as any mark of discharge on the face of the bill.

See WALKER against WILSON, 30th November 1811, 14. Fac. Coll. 361.; where this doctrine is taken for granted on the Bench.

[4] In BROWN against DAVIS, 3. Term. Rep. 80. Buller and Ashhurst, Justices, held, that where a note or bill is overdue, its being out of the common course of dealing is alone such a suspicious circumstance, as makes it incumbent on the indorsee to satisfy himself that it is a good one; and that, if he omit this, he will stand in the place of him who was holder when it was due.

Mr Justice Buller had directed a verdict, on the principle, that the indorsation, subsequent to the term of payment, made the indorsee take it on the indorser's credit. Lord Kenyon, as already stated, had required evidence of notice. And in a previous case, the Court of King's Bench had held an indorsement after action brought on a note or bill, sufficient to give the indorsee a right of action, unless he had notice of the action. COLUMBIES against SLIM, Chitty, 165.

[5] Bayley, 118.

BROWN against TURNER, 7. Term. Rep. 630. Pritchard indorsed to Brown, for a prior debt, a bill accepted by Turner, and past due. Lord Kenyon thought that a fatal objection competent against Pritchard must affect Brown, his indorsee, in those circumstances; and the Court sanctioned his direction, by refusing a new trial. His Lordship has, in BOEHM against STIRLING, (7. Term. Rep. 429.), explained the grounds of his opinion, and his sanction to the rule laid down by Mr Justice Buller. See Bayley, edit. Beawes, 63.

TINSON against FRANCIS, 1. Camp. 19. Lord Ellenborough says, after a note or bill is due, it comes *disgraced* to the indorsee, and it is his duty to make inquiries concerning it. If he takes it, though he gives a full consideration for it, he takes it *on the credit of the indorser*, and subject to all the equities with which it may be encumbered.

The case of CHARLES against MARSDEN, 1. Taunt. 224., turned upon the validity and effect of a plea that the bill was for accommodation.

[6] M'GOWAN against M'KELLAR, 24th February 1823; 4. Shaw and Dunlop, 498. A bill indorsed five years after the time of payment, but without any noting or mark of dishonour on it. The indorsee was held not liable to latent exceptions competent against the indorser.

WILSON against WILKIE, 30th November 1811; 16. Fac. Coll. 361.

CRAWFORD against ROBERTSON's Trustees, 30th June 1814; 17. Fac. Coll. 668.

See ROBERTSON against ANNAN, 27th May 1825, 4. Shaw and Dunlop, 40. observation from the Bench.

tion, this short-hand and privileged mode of assigning does not seem competent for carrying a protest which has been taken on the bill; or any other proceeding, for the purpose of obtaining diligence; or the diligence itself.[1] These seem to require a conveyance by assignation.

8. A collateral engagement may be undertaken by signing as indorser in circumstances which do not admit of a proper indorsement. Thus, no one can properly indorse who has no right to the bill. But the subscription as an indorser, with the intention of giving credit to the bill, is an effectual collateral undertaking.[2] See above, p. 400.

9. A blank indorsement makes a bill or note transferable by mere delivery. And it has this effect, notwithstanding subsequent indorsements in full. On these being cancelled, the full efficacy of the blank indorsement is restored;[3] so that it is a proper precaution to fill up all the preceding blank indorsations, to prevent accidents, in case of the bill being lost.

§ 3. OF THE PARTIES BY WHOM, AND AGAINST WHOSE ESTATES, A DEMAND MAY BE MADE ON BILLS AND NOTES.

A demand on bills or notes is commonly made effectual by means of summary diligence, or by ordinary action. But where the parties are bankrupt, the debt must be proved on the bankrupt estate, by producing the bill, and making affidavit to the debt.

Such demand or claim may, according to circumstances, be made by any of the several parties whose names appear on a bill or note: In real transactions, by the porteur or payee, by an indorsee, by the drawer, or by one paying for honour: In accommodation-bills, by the holder before payment, or for relief by the person who has paid for behoof of the person accommodated, in whatever character he may appear on the bill.

No one can be made liable as a party to the bill, unless his name or firm be on it.[4]

1. DEMAND ON BILLS AND NOTES IN REAL TRANSACTIONS.

1. DEMAND BY THE PAYEE.—The payee is the person in whose favour the draft is made; the proper original creditor in a bill of exchange or promissory-note. A bill may be drawn blank in the name of the payee, and afterwards effectually filled up by a bona fide holder with his own name.[5]

[1] FREER against RICHARDSON, 18th November 1806; 13. Fac. Coll. 579. (supra, p. 402. Note [9]). The Court took occasion to say, that the bill was carried by the indorsation, but not the protest. It came into competition with arrestments, and the indorsees were preferred.

[2] DON against WATT, 26th May 1812; 16. Fac. Coll. 647. Watt having bought goods from Don, gave his note for the price at seven months' credit. Watt's father signed his name, 'Thos. Watt,' on the back of the note, without any previous indorsation. He was held liable.

[3] SMITH against CLARKE, 1. Espin. Cases, 180. A bill was indorsed in blank. After some other indorsements it came to Jackson, who sent it to Muir and Atkinson, but did not indorse it. They discounted it with Smith, who struck out all the indorsements but the first, which continued in blank. Lord Kenyon held this good. See also CHATERS against BELL, 4. Esp. Rep. 129. See also 1. Camp. 175.

[4] TELFORD (Stirling Bank) against JAMES, WOOD and JAMES, 5th February 1822; 1. Shaw, 320. Arnot, general agent of James, Wood and James, drew a bill in his own name for the price of goods of theirs sold to Paterson; but their name was not on the bill. He discounted it with the Bank. He and Paterson failed, and the bank brought an action against James, Wood and James, as liable for Arnot their agent's act. They were held liable. But this was reversed in the House of Lords, May 1825.

[5] CRUCHLEY against CLARENCE, 2. Maule and Selwyn, 90. Clarence drew a bill of L. 200 in Jamaica on H. Man of London, leaving a blank for the payee's name. It was afterwards negociated in England by Vashon, who indorsed it to Cruchley for an old debt, and Cruchley filled up his own name in the