No. 184.

1796. *July* 1. MURCHIE *against* MACFARLANE.

Action was refused on a bill, where the date appeared to have been altered, though it did not appear by whom, or for what purpose the alteration was made.

Fac. Coll.

*** This case is No. 55. p. 1458. *voce* BILL of EXCHANGE.

1798. *June* 6. JOHN SHIRRA *against* JAMES DOUGLAS.

No. 185.
The heir of a person who had subscribed the minutes of a meeting of creditors, as cautioner for the trustee, found not to be liable, the minutes not being probative.

The estate of Smith and Macnicol having been sequestrated, under the 23d Geo. III. C. 18. David Fleming, at a meeting of their creditors, was appointed trustee, and Samuel Douglas subscribed the minutes as his cautioner, along with the trustee and preses of the meeting. The minutes were not written by Douglas, nor attested by witnesses.

The effects of the bankrupt were accordingly conveyed to Fleming by order of the Court, and he entered upon the management; but having been afterwards removed from the office, in consequence of his bankruptcy, John Shirra, his successor, brought an action against him and Douglas, to force them to make good his intromissions.

Samuel Douglas having died before the merits of the cause were stated, and before there was an opportunity of proving the transaction by his oath, the action was transferred against his brother James, who did not dispute his predecessor's hand-writing; but he, *inter alia*, contended, that the minutes were not obligatory, from the want of the statutable solemnities.

The pursuer,

Pleaded: 1*mo*, As the 23d Geo. III. C. 18. fixed no particular form in which the caution should be taken, the mode of doing so must be regulated by the practice; and the subscription of the minutes by the cautioner, without a formal bond, was always deemed sufficient.

The proceedings of creditors, under a sequestration, are judicial. Their minutes, though signed only by the preses, bind the whole creditors, § 8, 18, 19, 46. The trustee cannot act without finding security, and his confirmation is a judgment of the Court, that the previous requisites have been complied with.

2*do*, The intromissions of Fleming, upon the faith of the obligation undertaken by Samuel Douglas, bar the present action, *rei interventu*; 28th November, 1794, Brown against Campbell, Sect. 11. *h. t.* and case of Sinclair there referred to.

Answered: Regular bonds of caution were always granted under the original bankrupt act in the year 1772, and are so under the present. But by 23d Geo.

III. C. 18. the form of the security was not specified, and the creditors sometimes contented themselves with having the minutes subscribed by the cautioner; but this practice was not uniform, and was illegal.

No. 185.

The proceeding of creditors are not judicial; and, even in matters strictly of that description, a distinction is made between the steps of process, and personal obligations which occur in the course of it. The latter require the usual solemnities, as, for instance, the bond granted by the cautioner for a purchaser at a judicial sale, or for a factor *loco tutoris*.

2do, The plea of *rei interventus* always supposes some previous obligation, which might otherwise be resiled from; and this obligation must be proved *habili modo*. In this case, the intromissions of the trustee do not prove it, because he might have had a different cautioner from Samuel Douglas, or caution might have been dispensed with. The minutes must be thrown aside, as they are not probative; and the oath, or judicial acknowledgment, of the alleged cautioner, cannot now be obtained. The object of the oath or acknowledgment, in such cases, is not to make the informal writing probative, but to prove the obligation subject to every intrinsic quality which may be adjected to it, as that it was subscribed through force or fear, or the like; 21st July, 1772, Crichton and Dow against Syme*, Sect. 11. *h. t.*; consequently the circumstance of the heir not disputing the subscription of the deceased is not sufficient.

The Lord Ordinary, " in respect of the decisions of the Court, found that the obligation of cautioner for David Fleming in question, was valid and binding on the deceased Samuel Douglas, and that the respondent (defender) is bound to implement the same."

Upon advising a petition, with answers, the Court thought that the first plea of the pursuer was ill founded, and that the death of Samuel Douglas, for the reasons stated by the defender, distinguished the case from those of Brown and Sinclair.

The Lords altered the interlocutor, and sustained the defences.

Lord Ordinary, *Meadowbank*. Act. *Williamson*. Alt. *T. W. Baird*. Clerk, *Pringle*.

D. D. *Fac. Coll. No.* 79. *p.* 184.

1799. *November* 15.

GEORGE DEMPSTER and Others *against* SOPHIA WILLISON and Others.

No. 186.
A person having bequeathed the

George Willison, in the year 1795, executed a trust-deed conveying his whole property, real and personal, to George Dempster and others, for the purposes mentioned in a deed executed of the same date.

* It is believed that the case, 26th May, 1790, Carlisle against Ballantine, (Not reported,) was decided on the same principle. See APPENDIX.