mer bill had been given at the same time, but Proven showing it to the company in the other room it appeared unformal, and thereupon this was given, and in this chaffer Calder and Mary Proven were about an hour together. In a process for payment of this money, (the bill having been put by her in another person's hands in the company, who next day gave it up,) the Ordinary allowed a proof, and the fact came out as above, particularly that Calder was so drunk that he staggered, and was not allowed to ride home that night. And the Ordinary found the bill binding on Calder, and that the other did wrong in giving it up, and decerned against both jointly and severally. The defender reclaimed. To me it appeared that the bill was given as a security that Calder would marry the pursuer, or which is the same as a penalty in case he refused to marry her. Whether did there lie action for such penalties, or was there still *locus pœnitentiæ?* I gave no opinion, only it appeared more agreeable to our ancient practice that action did lie. But then I thought such a conventional penalty could not be constituted in the form of a bill; *2dly*, if it could, yet as Calder was drunk, there was place to repeat. The President understood this bill as given in consideration of favours granted or to be granted by the pursuer, and therefore thought it binding (for they had been an hour in a room by themselves.) On the other hand, I thought if that was the case the bill was reducible as granted *ob turpem causam*, but as no such thing was alleged by either party or proved, I could not reduce it on that ground. But the President differed in the point of law, and thought the distinction in the civil law betwixt money and an obligation given *ob turpem causam* was not founded on reason, and not binding upon us. On the question, the defences were sustained and the defender assoilzied. If the President's opinion held, if a bond were given to commit murder or perjury, to vote in an election, &c. action might be sustained on it although the cause were acknowledged or even expressed in the writing. Altered by the President's casting vote. Royston, Minto, Drummore, Haining, Dun, Leven, and President, were for altering. *Con.* were Justice-Clerk, Strichen, Kilkerran, Balmerino, Monzie, *et Ego.*—31st July, Adhered by President's casting vote.

No. 26. 1742, June 18. ALEXANDER *against* SCOTT.

A BILL being drawn on one as principal and two as cautioners conjunctly and severally, and accepted by them and afterwards paid by the two cautioners; after the death of all the three, action was sustained at the instance of the cautioners' executors against the heir of the principal for re-payment, and the nullity objected to the bill sustained. In this process two precedents were quoted, one of a case reported by Strichen 4th December 1731, and another reported by me in 1735, (that I do not remember) where bills drawn on one as principal and another as cautioner were sustained, and a third case reported by Kilkerran, where such a bill was found null. The President was of opinion it was a good bill, but that point we did not determine; only as the cautioners had paid, and possibly on the faith of these two first decisions, we thought they should have recourse.

No 27. 1742, July 7. LADY FORRESTER *against* LORD ELPHINGSTON.

IN the question of the prescription of bills, having appointed memorials which were given in, which turned upon this, whether by the law of nations there is any prescription,