liam Gray, the wadsetter, had not so much as taken infeftment, nor did intimate to Tullichandie that he was not paid of the annualrent, until many years thereafter, that other creditors had obtained themselves infeft upon their comprisings; and so it was his own fault he was not secured; and, through his negligence, any assignation he was to make to the wadset and clause irritant, was altogether ineffectual.

It was REPLIED,—That the wadsetter, having secured himself by this bond of corroboration, which was in place of a sufficient cautioner for his debt, he was not obliged, in law, to be at the expenses to take infeftment, nor to do diligence against the principal debtor; but Tullichandie ought to have looked to his own relief; and the irritant clause, being committed by two terms running in the third, he ought to have inquired if payment had been made, and, in the case of not payment, should have satisfied the debt, and acquired an assignation to the wadset.

The Lords did repel the defence; and found, That William Gray, the wadsetter, was not obliged to do diligence against the debtor, nor to have taken infeftment, whereupon he might have been preferred to all other creditors,—he being in the case of a creditor who had secured himself by sufficient caution, whereupon he may rely so long as he pleases; and so it is not liable, upon that ground, that the cautioner is prejudged by suffering others to do more timeous diligence; unless the defender could allege that William Gray had fraudulently abstained from doing diligence, of purpose to prefer others.

Page 210.

1671. *December* 10. SIR ROBERT BARCLAY *against* LIDDELL.

IN the forementioned action of warrandice, at Sir Robert's instance, against Liddel, being again insisted in,—it was ALLEGED for Barclay, That not only there was a clause of absolute warrandice in the assignation, but that it had this specialty, *viz.* to warrant the sums thereby transferred; which, not being ordinarily insert in such clauses, must import that the debtor is solvent.

It was ANSWERED, That these words imported no more but that *debitum vere subest.*

The Lords did find, That these words, in specialty, did not import that the debtor was solvent the time of the assignation, but only that the debt was truly resting owing, and that the debtor was not *tutus exceptione.*

Page 212.

1671. *December* 20. MR ARCHIBALD STEWART *against* WILLIAM WEILLANDS.

WEILLANDS, after many years' service of the Countess of Murray, having given bond to her son, Mr Archibald, to remove from her service at the next term, or to pay 1000 merks, being charged to pay the penalty,—he did SUSPEND upon this reason,—That the bond, being of that nature, was unlawful, and against the liberty

and freedom of the Countess to employ her own servants, or his freedom and liberty to continue in her service.

It was ANSWERED,—That he, having voluntarily granted this bond, and being conscious to himself that he had formerly made advantage of the Countess's weakness to go about her own affairs, and having the sole trust, did make a great fortune to himself; it was lawful to the charger to take such a bond for his mother's good and the children's.

The Lords did sustain the bond as valid and lawful; and found, That, *eo ipso*, that he voluntarily granted such a bond, he made himself suspect, and did acknowledge his guiltiness; and so decerned him to leave off to serve in that manner he had formerly done.

Page 215.

1672. *January* 3. The COUNTESS of BRAMFORD and LADY FORRESTER *against* The LAIRDS of CARSE and HOPTOUN.

THE Countess of Bramford, having insisted against Hoptoun, as representing his father, to make payment of the sum of 11,000 merks, as a part of the money due by the Earl of Errol, and his cautioners, to the Earl of Forth, *super hoc medio*, That he had granted a bond of warrandice to the Earl of Errol's cautioners and friends, bearing a receipt of the money from the general commissary, and that new surety was given in his name for the said sum from the Earl of Errol's friends; which accordingly was paid to him; which, by the act of restitution against the forefaulture, declaring intromitters liable, did furnish action against Hoptoun and his heirs to refund the same.

It was ALLEGED for Hoptoun, That it was clear, by the bond and the discharge therein contained, that the receipt of money from the general commissary was granted by Hoptoun's nephew, Sir Thomas Hope of Carss's son, and his mother, who was his tutor; and that the new surety, taken in the name of Hoptoun, was only in trust and for security of his bond of warrandice granted to Errol's cautioners; and, therefore, he neither having intromitted for his own use, nor having taken new bond for his own relief and security,—(but the reason of his giving bond was, because Errol's cautioners could not be satisfied by any bond from a minor or his mother,)—he could not be liable by the act of restitution declaring all intromitters to be liable.

The Lords found, That Hoptoun, having taken a new security in his own name, and that the Earl of Kinnoul's cautioners had paid the same, that he was liable to the pursuer; unless he would allege and instruct, that as he was intrusted for Carse, so the money was truly received by him and his tutor; and that he had such a discharge from them as would bind the intromission upon Carss.

Page 223.

1672. *January* 4. ROXBURGH *against* BEATTIE.

IN the action before mentioned, betwixt the said parties, Beattie, as having