

annualrent of the sum she liferents upon Lumisden of Invergelly's estate, (she having a preferable right,) on her bond to refund, if, in the ranking of the creditors, it should be found not due. Yet Anne Loch, relict of William Carnegie, seeking an aliment to be modified to her from the Earl of Southesk, with whom she and Balnamoon, donatar to her husband's escheat, had a count and reckoning depending, alleging the Earl was his debtor in considerable sums; the Lords refused it, in regard Arniston, auditor to the count and reckoning, declared that they had not insisted before him to bring it to any period this session.

*Vol. I. Page 640.*

1694. *July 31.* CUTHBERT OF CASTLEHILL *against* CUTHBERT OF DRAKIES.

THE Lords found the solvency or insolvency of cautioners, as to their mutual relief, or burdening others with their share, is not to be considered as it is at the time of the engaging, but at the time of the distress or pursnit.

*Vol. I. Page 641.*

1694. *July 19 and November 6.* MR HUGH BLAIR *against* MR PATRICK BELL.

*July 19.*—MR Hugh Blair, late minister at Ruglen, against Mr Patrick Bell, cautioner for Mr William Nimmo, whose reason of suspension was,—I must be assoilyied from the debt, because I offered you the principal, annualrent, and expenses, and you refused to accept of it, unless I would give Mr William, the principal debtor, a *supersedere*, as you had done; to which I was not bound. ANSWERED,—Before your offer, I had transacted with the principal to accept of my sum in parcels, and had given him a personal protection for a time, and so I could not simply assign; and you took advantage to make a captious and sham-offer at that time; and he is in as good condition now as then, and so you have no prejudice.

The Lords thought that a *supersedere*, given by a creditor to the principal debtor, could not debar or seclude the cautioner from his relief. And, if the creditor had only sought to have excepted it from the warrandice of his assignation, it would have been reasonable: but, upon reading the instrument of offer and the creditor's answer, they found he required the cautioner also to allow him the same *supersedere* he had given him, which he was not obliged to do. Therefore they sustained the reason of suspension on the offer as sufficient to liberate him; he proving, by the notary and witnesses inserted in the instrument, that he refused the assignation, except with the burden of protection to the principal debtor: and ordained them to depone.

*Vol. I. Page 634.*

*November 6.*—Upon a bill and answers, Mr Blair's charge against Mr Patrick Bell, mentioned July 19, 1694, was heard again. The Lords were clear that the fact in the instrument was not *nuda verborum emissio*, and so might be proven by instrumentary witnesses. But thir points weighed with them:—*1mo*, That the offer of assigning, in Blair the charger's letter, was conditional, if before Whitsunday; and so, not being accepted nor performed till long after, it

did not bind ; though such irritancies should be purgeable at any time. *2do.* That he offered him a discharge without an assignation, which, on the clause of relief, would have reached Nimmo the debtor, notwithstanding the *supersedere* given by Blair. *3tio.* That Bell, the cautioner, could not subsume that he was prejudged by the want of the said assignation ; seeing Nimmo is as solvent now as then, being broke at both times.

Thir grounds being new, not formerly represented, the Lords altered their former interlocutor, and found the reason of suspension not relevant, founded on the instrument of offer ; and therefore decerned ; and found the letters orderly proceeded against Bell, the cautioner. *Vol. I. Page 641.*

1694. *November 7.* LADY KINFAWNS *against* The CREDITORS of CARNEGIE of KINFAWNS.

LADY Kinfauns, by a petition, represented, That she brought 30,000 merks of tocher with her, whereof 22,000 merks was in my Lord Nairn's hand, secured on infestment : That though she had conveyed it in her contract-matrimonial to her husband, yet nothing followed thereon ; and she stood last infest ; and her husband's creditors had not affected this sum ; and, being provided in a jointure of 2500 merks, she desired the Lords would allow her to charge for the annualrent of this sum, to be ascribed in payment of her liferent, *pro tanto*, during the dependence of the competition ; from the event whereof it will clearly appear there is a considerable superplus estate above the payment of her husband's debts.

The Lords found the disposition in the contract denuded her so fully, that her husband's heirs and creditors might exclude her ; so she could not legally charge for that sum. Yet, after weighing all circumstances, they gave her a year's interest of said sum by way of aliment, and to be imputed in her jointure ; she finding caution to refund it *in eventu* that the creditors be found preferable to her. Some called this equity, but not law ; yet it is frequently done to extraneous creditors. *Vol. I. Page 641.*

1694. *November 8.* DR ROBERT TROTTER *against* The LADY HARVISTON, and DUNDASS, her Son.

THE Lords found a decret quarrelled *de recenti*, upon informality or wrong extracting, might be recalled summarily on a bill ; but, after any considerable space, that they ought to proceed by way of reduction. Yet, in this case, because the charger refused to discuss summarily on the bill of suspension given in by the Doctor, who was cautioner for Watson in the suspension ; therefore, though they would not force the charger to produce his decret *hoc ordine*, yet, *ad informandum animum judicis*, they ordained Mr John Dalrymple, clerk to the process, to produce the grounds and warrants of that decret to Phesdo, before whom the bill of suspension was presented ; that if he found any irregularity in extracting that decret, he may then pass the suspension without cau-