

1696. *January 15.* ALEXANDER YOUNG and GEORGE SUITY *against* JAMES BAYNE.

PHILIPHAUGH reported the reduction, pursued by Alexander Young and George Suity, against James Bayne, of a decret obtained against them as cautioners for the fidelity of a factor at Campvere, to whom Bayne had consigned goods to the value of L.1300 Scots. The reason of reduction was, that the decret was unwarrantably extracted, because the Lords had, on the 13th of March 1683, superseded extract till the 1st of November thereafter, and granted a new commission to Kennedy, then conservator in Holland, to inspect the merchant's books,—Alexander Young always finding sufficient caution to pay, in case he succumbed; and yet the decret was shortly thereafter given out without any intimation made to the said Alexander, or instruments against him requiring him to find caution, or instrument taken by the pursuer against the clerk, seeking out their decret, in regard the caution was not found; there being no precise day contained in the interlocutor betwixt and which he is to find caution.

ANSWERED,—This was a conditional stop, and unless Alexander Young can say, that he, *debito tempore*, came to the clerk, and offered caution, the clerk was *in bona fide* to give out the decret upon his not fulfilling the condition, though there was no day set by the Lords: *nam, ubi dies non ponitur, præsentis die debetur*; and there was no need of requiring him, *nam dies interpellat pro homine*; and the quality adjected, “he always finding caution,” is a plain condition, being *ablative absolute posita*, which in law clearly implies a condition; and, if it were otherwise, he needed not offer caution till the 1st of November, if none could compel him; and so it should be a protection notwithstanding of his disobedience.

The Lords thought it of bad example to allow clerks to supply and explain their meaning; and therefore found the decret unwarrantably extracted; though sundry of the Lords differed: And allowed him eight days yet to find caution; and renewed the commission. What weighed with several of the Lords as a nullity, was, that the pursuer had extracted his decret without inserting the bill and deliverance thereon, superseding the extract to November.

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1696. *January 16.* LESLY *against* CARNEGIE.

HALCRAIG reported Lesly against Carnegie: who is pursued to grant a discharge or renunciation of an infertment forth of some lands; in regard the debtor showed he had the bond and seasine in his custody, which he had ignorantly retired, thinking it sufficient to exoner, free, and disburden the lands, because of the brocard, *instrumentum apud debitorem repertum præsumitur solutum*. ANSWERED,—That only holds in personal writs, which use to be extinguished by retiring; but infertments and other real rights are not,—retiring not being the *habilis modus* for denuding of these, without express renunciations.

The Lords found him not obliged to discharge; but, in regard he had declared,