

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