

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reason of reduction was, that the decret was unwarrantably extracted, because the Lords had, on the 13th of March 1683, superseded extract till the 1st of November thereafter, and granted a new commission to Kennedy, then conservator in Holland, to inspect the merchant's books,—Alexander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.

*Vol. I. Page 700.*

1696. *January 16.*

LESLEY *against* CARNEGIE.

HALCRAIG reported Lesley 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,

in the debate, the principal was paid, and he wanted only some annualrents and expenses of the infestments. They decerned for that, unless they offered to prove by his oath it was also paid him with the rest.

*Vol. I. Page 701.*

1696. *January 17.* JOHN PRESTON *against* SIR GEORGE CAMPBELL of CESNOCK and His LADY.

THE pursuer had an old infestment of annualrent out of the lands of Newhall, whereof the Lady was heretrix; and he now craving to point the ground, they suspended on the 16th Act 1695, allowing retention, to the forfeited persons now restored, of as many years' annualrents as they paid for years wherein they stood forfeited; and subsumed that Cesnock's forfeiture continued three years, and yet during all that time Mr Preston uplifted his annualrents; and for which they must now have retention and compensation. ANSWERED,—They were not in the terms of that Act of Parliament, which meant only debtors personally bound, which Cesnock was not, the *fundus* being properly debtor. *2do.* It was only in the case where the forfeited persons were dispossessed; but so it is, the Lady enjoyed her proper inheritance of Newhall during all the years of the forfeiture, which carried the *jus mariti*; and though it was a gift from King James, yet that cannot prejudice Mr Preston now.

The Lords found Cesnock's claim for retention had no foundation in the Act of Parliament; and therefore decerned in the pointing of the ground.

*Vol. I. Page 702.*

1695 and 1696. ISOBEL ANDERSON and JAMES HENDERSON *against* CHARLES MURRAY and AGNES FLEEMING.

1695. *January 9.*—THE point was, If the decret of mails and duties should stop, because there was a reduction of the right depending, *ex capite lecti*, which was ready to be debated. The Lords decerned in the mails and duties, reserving the reduction, as accords; as they offered to find caution to refund the rents, if they succumbed in their reduction.

*Vol. I. Page 656.*

1696. *January 21.*—In the action pursued by Charles Murray and Fleeming against Isobel Anderson and James Henderson, being a reduction *ex capite lecti*; and the pursuers repeating a probation of the deathbed, led in another process at Grange Dick's instance:—in regard the witnesses who were examined there could not be repeated now, being dead, the Lords found such witnesses transmitted from the one process to the other could not be used as probative here, being *res inter alios acta*; and he might have had objections against them, or further interrogators to have refreshed their memories, and made them depone on other circumstances, which were not in the examination on the first process put to them; and that, in law, *testibus non testimoniis credendum est*. Yet see Dury 16th *January* 1628, *Finlayson*; where *deducta in uno judicio* were sustained *coram alio*, in things *quæ tractu temporis mutationem non recipiunt*; and