der horning and caption, and so not able to be cautioner, and in effect being the principal party.

The Lords did assoilyie from the reduction and suspension; and found, That a cautioner in a suspension being distressed, making payment, may seek his relief of the principal, notwithstanding that he might have just grounds to reduce the decreet; he not being obliged to debate the same with the principal for whom he was distressed: As likewise, they found, That the desiring him to be cautioner in a new bill of suspension, which he refused, as being under caption and horning, could not prejudge him as being a sufficient intimation; and that it was necessary, for putting him *in mala fide*, that the principal should have obtained a new suspension both for himself and his cautioners, and had procured another to be cautioner in the new suspension, and, after passing thereof, should have intimated the same to Alexander Simpson before payment.

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1676. *July* 14. GAVIN HAMILTOUN of RAPLOCH, and JEAN LOCKHART, his Spouse, *against* JAMES BONNER.

IN an action at Raploch's instance, and his spouse, against James Bonner, as representing his brother, John Bonner, for payment of the sum of 4000 merks, upon this ground,—That John Bonner, the said Jean's first husband, having received in tocher an assignation to a bond of 6000 merks, granted to her by Allan Lockhart; by a special provision, he became obliged, that, failyieing of children of the marriage, that 4000 merks of the said portion should return to the said Jean Lockhart: which case having now existed by the death of the said John Bonner; his brother, as representing him, ought to be decerned to make payment.

It was ALLEGED for the defender, That he could not be liable for payment, but only for making a retrocession to the said Jean of the right assigned; seeing he did never receive payment from the said Allan Lockhart, notwithstanding that he did exact diligence against him in England; and the contract of marriage and provision bearing no obligement to make payment, but only a substitution failyieing of children of the marriage, there is no ground in law to make the husband's heirs liable; unless he had received payment, especially having done diligence.

It was REPLIED, That the defender ought to make payment notwithstanding; because, by the contract, the husband being expressly bound, in the case of no children, that sum should return to the wife, she was not concerned whether he got payment or not; or did diligence for recovery against the principal debtor; wherein she was not interested, the husband having taken his hazard of the tocher: and in contracts of marriage, which are most favourable as to all provisions made to the wife, who can only assign her portion to the husband, who only can do diligence, if he should be negligent, or the debt not prove good; then, contrary to the meaning of parties, and the favour which the law

allows, all conjunct fees or provisions in favour of the wife would be elusory without her fault. And married persons having lived long after the contracts, it hath been found, by several practicks, that wives are not obliged to instruct payment of their tocher.

The Lords found, That the husband, being assigned to a bond, with that provision,—"In case of no children, the half to return to the wife,"—that he was bound to do diligence for recovering payment; which not having obtained, his heirs were only obliged to retrocess, but not to make payment: being moved upon these reasons, that there was no obligement in the provision, after dissolution of the marriage, to make payment. *2d.* That it was irrational to conceive that it was *mens contrahentium*, that, albeit the husband should do diligence, and the tocher prove desperate, that, notwithstanding the husband should pay back again what he did not receive, having sustained *onera matrimonii.*

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1676. *July 25.* CAPTAIN ALISON and JAMES M'LURG *against* BAILIE CARMICHAEL and ANDREW AICKMAN.

IN a poinding of the ground, pursued at the instance of James Alison and James M'Lurg, as being infeft in an annualrent out of the lands of Thurstoun, compearance was made for Bailie Carmichael, who ALLEGED, That he ought to be preferred; because he stood infeft, by virtue of a disposition, in the said lands, made by the common debtor in November 1672, whereupon he was infeft, and immediately entered in possession, by labouring and sowing the lands, and granting tacks to tenants, before the annualrenter's right was either made public by confirmation or clad with possession.

It was ANSWERED and ALLEGED for Captain Alison and James M'Lurg, That they ought to be preferred notwithstanding; because they were infeft in the annualrent in June, which was long prior to Carmichael's infeftment, and was made public, by confirmation in the Exchequer, that same day that Bailie Carmichael's disposition was confirmed: and, as to any possession by labouring of the lands and granting tacks, it can be no ground of preference; because, not only the disposition was granted by the common debtor after he was denounced rebel and under caption; but his right, and entering Bailie Carmichael to the possession, was voluntary, and in favours of his own good-brother; which makes it most suspected; and is never sustained against a prior infeftment of annualrent; whereupon no diligence could be done, for apprehending possession, until after the first term of payment, which was posterior to Carmichael's voluntary infeftment: and the preference of posterior rights being only founded upon that point of law, that those who had prior rights did no diligence, whereby the condition of the common debtor might be made known, that reason ceaseth in this case, where the annualrenters were incapacitated to do diligence.

It was REPLIED for Carmichael, That the bond for infefting the annualrenters were two years before they took any infeftment, so that they were *in supina negligentia:* and, albeit their infeftment was prior to his, yet they, being both base, and his clad with possession before any of them was made public by