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 Kinfawns, 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 infeftment: That though she had conveyed it in her contract-matrimonial to her husband, yet nothing followed thereon; and she stood last infeft; 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 decreet 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 decreet *hoc ordine*, yet, *ad informandum animum judicis*, they ordained Mr John Dalrymple, clerk to the process, to produce the grounds and warrants of that decreet to Phesdo, before whom the bill of suspension was presented; that if he found any irregularity in extracting that decreet, he may then pass the suspension without cau-

tion, seeing the charger will not insist. For some thought there might be cases where a suspender ought not to be put to find caution, where he had a relevant reason, and that likewise proven as a discharge of the debt. But it was ANSWERED,—There was still need of caution, seeing the discharge may be quarrelled as false; but, if a decreet be extracted *spreto mandato*, after a stop given, I think it may suspend without caution.

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1694. *November* 18. SINCLAIR of HADDOWS-MILL *against* DUFF of BRACO.

SINCLAIR of Haddows-mill, against Alexander Duff of Braco, about a thirlage. Sinclair's active title was a charter of the mill, granted by Frendraught, bearing, *per expressum*, the multures of these lands of Turtrie, now belonging to Braco. His defence was,—My lands never belonged to Frendraught, nor lay within his barony, but are a part of the barony of Rothemay; and my authors, long prior to 1632, which is the date of that charter of thirlage, were infeft *cum molendinis et multuris*, and so not liable.

ANSWERED for the pursuer,—That, as he had a title of prescription, (though it were *a non domino*,) so he had forty years' possession since, which, by the Act of Parliament 1617, was sufficient; unless they founded on interruptions, not of a few acts of withdrawing, but public and solemn.

The Lords found, That, in prescribing of property, any title, though never so null and invalid, was sufficient, if clad with forty years' uninterrupted possession; but, in thirlage, (where the lands are not a part of the barony,) any withdrawing was enough to interrupt, seeing it was *actus meræ facultatis*, and their own mill was then ruinous; whereas, in other cases, it must be a forbearance for a considerable tract of time together. But here, where the thirled lands are no part of the barony, and that it is not a King's mill, the same acts that constitute may also take it off. See *June* 29, 1665, *Heritors of Keithock's Mill* against *The Feuars*, where they are found thirled to the mill, because within the barony, and had paid insucken multure.

There were other acts of interruption proponed here, as also upon an agreement. But the Lords decided on the first point.

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1694. *November* 18. MARGARET NISBET *against* BAILIE FALL in Dumbar.

THE Lords would not grant her a farther diligence against witnesses not contained in the first diligence, though she offered to make faith they were newly come to her knowledge; because a pursuer should be *instructus*, and know his own probation; and, where he craves a new one, there is fear of subornation. Yet it has been allowed in some cases.

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