

Glorat's witnesses, asserting his minority, that it looked like a premeditated tale which had been taught them, and wanted not suspicion of prevarication : and the Lords modified large expenses against Glorat. *Vol. I. Page 750.*

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1697. *January 5.* DRUMMOND OF RICARTOUN *against* SIR WILLIAM NICOLSON of that ilk, and His CREDITORS.

IN an action at Drummond of Ricartoun's instance against Sir William Nicolson of that ilk, and his Creditors, for proving, that, though he was bound coprincipal with him in a bond, yet he was but truly cautioner ; and that, a little before Sir William's death, he had ordered the drawing a bond of relief, and was satisfied with it, but prevented, by his falling distracted ; and so it was not gotten signed ; and which he had proven by the comuners, witnesses, and writer.

ALLEGED for the Creditors,—That the heir being dead, he who now fell to be apparent heir must be called, ere the process can go on.

ANSWERED,—The Creditors are the only true contradictors now, the estate being roup'd.

The Lords ordained the heir to be cited *incidenter* in this state of the process, ere they would proceed to advise it. And it may have difficulty how such a point can be made out by witnesses ; for though it be pregnant against Sir William's heirs, that he acknowledged Ricartoun was only cautioner, and that the comuners depone he was willing to give him a bond of relief, yet it seems hard to make such a probation meet the creditors, having been only taken by the Lords *ex officio*, and before answer, without determining the relevancy, and what it should import, being more than a *nuda emissio verborum*, which used not to be allowed to be probable by witnesses. *Vol. I. Page 750.*

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1697. *January 7.* COUNTESS OF KINCARDEN *against* WILLIAM ERSKINE.

PHESDO reported Veronica, Countess of Kincarden, against Mr William Erskine, to count for the rent of £500 Scots, possessed by the Lady Cardross, his mother, for the years he was factor of that estate ; seeing, though she was a creditor, and had an infetment of annualrent, yet, by the decret of ranking, not only the Lady Kincarden, but several other creditors were preferred to her.

ALLEGED,—That the factors, before his entry, and those since his overgiving, always allowed her to possess ; and it had been unreasonable that he only should have quarrelled his mother's right, and have removed her.

ANSWERED,—The decret of ranking was his rule ; and though the Lady Kincarden connived when the rent paid her full jointure, yet it being now considerably fallen, that can never exoner him from the diligence incumbent on a factor ; and if he thought it uneasy, or undutiful to interfere with his mother, he might have given over the place.

The Lords did not decide it ; but thought, if he knew of the decret of rank-

ing, that then he was obliged to have made it the rule of his management and administration.—On a new report he was found liable for this rent.

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1697. *January 7.* JOHN MENZIES *against* The CREDITORS of SIR ADAM BLAIR of CARBERRY, and STRACHAN of GLENKINDY.

THE Lords heard and advised the debate between Mr John Menzies, and other creditors of Sir Adam Blair of Carberry, (who was donatar to Strachan, of Glenkindy's bond of £20,000, incurred through his not producing some tenants in the process for the murder of Alexander Sour,) against the said Glenkindy. His reasons of reduction of the said bond and act of adjournal, (which was remitted by the Parliament to the Lords, else, the justiciary being a sovereign judicatory, the Lords would have been straitened in point of competency and jurisdiction,)---were, *1mo.* This bond was extorted *vi carceris*; for, being in prison on suspicion of his accession to the said slaughter, he could not otherwise obtain his liberation but by granting this bond, though the crime wasailable; and so it was impetrated by concussion and *metu potentia*, which he could not then resist. *2do.* The exacting of such a bond was most unjust; for it is against the law of nature to oblige a man to furnish probation against himself; likeas, it was impossible for him to produce men that were not in his power, but had fled. *3tio.* The bond was taken for a most exorbitant sum, both contrary to the 166th Act Parliament 1593,—that the penalty for a baron shall be only £1000, and a freeholder 500 merks,—but also against the claim of right, condemning all such exorbitant fines. *4to.* The bond was never forfeited; because, being taken, in general terms, to produce his men, tenants, and servants to be witnesses in that criminal trial against him, it was neither proven they were his men, tenants, nor servants, nor were their names intimated to him.

ANSWERED,—The bond was most legal and warrantable; for, there being violent presumptions against Glenkindy, loading him with that base murder, the Lords of Justiciary did most justly imprison him; and he petitioning to be set at liberty on caution, the Lords adjected this quality, that he should not only find caution for his appearance, but likewise produce his servants, who were the material witnesses; and he having accepted of his liberation in thir terms, he cannot now reclaim, because it was optional and free to him to have lain still and abide the criminal trial, but he choosed rather to accept of the favour, as it was offered. And, in many cases, one may be obliged to furnish probation against themselves, as in the case of tutors and factors, and where actions are pursued *ad vindictam publicam*: neither was there any impossibility in the case; and though there had, *loco facti imprestabilis succedit damnum et interesse.* And, by the 94th Act 1587, the pledge may be executed to the death, if the pledger do not redress the depredations made; and, by the Acts of Parliament for securing the peace of the Highlands, masters are bound to produce their tenants and servants; and particularly by Act 6th, 1528: and the 166th Act, cited, relates only to legal penalties, but not to pactional ones; and, as to the incurring the bond, the creditors opposed the writs produced.

The Lords began with the objections against the legality and warrantableness