George, By the 17th Act of Parliament 1681, the debtor's whole estate must be valued and sold, else it cannot be known whether he be bankrupt or not; because they might leave out such portions of it as would do much more than pay his debts. And *ita est* Sir Patrick, in adducing a probation of Mr George's estate, has only led it in relation to his lands of Bughtrig, and omitted altogether a right of comprising he had on the estate of Lumisden, which Sir Patrick undervalued, because he had bought these lands without it. Two things stuck with the Lords, *viz.* 1*mo*. That, in such illiquid rights, where they had not obtained possession, it was hard to put an estimate and value thereon; for neither could the summons of the apprising be the rule, nor the value of the lands apprised, till its rank and preference were known, and the rent of the apprised lands. 2*do*. If the Lords, in the sale of bankrupts' lands, considered any more but their clear liquid accessible estates, whereof they were in possession, then not one of ten of those sales would be perfected; because they would always obtrude their claims and pretences they have by apprisings, or otherwise, upon third parties' estates. Which moved the plurality of the Lords not to regard such rights as sufficient to stop the sale. Some were of opinion that the word *estate*, in the Act of Parliament, comprehended *jura*, *nomina*, *et actiones*, as well as lands and immoveables, and that the whole behoved to be exposed to sale; though, if bidders do not occur for the whole, it might be sold in parcels. The case is of great importance, and has inconveniences on both sides. The balance must fall where they are least. *Vol. I. Page* 640.

1694. *July* 28. ——— Hog, a Messenger, *against* Giels Douglass.

On a bill given in by Hog, a messenger, against Giels Douglass, who pursued him before the Lyon and his brethren, by the subsidiary action, for payment of a debt, because he had suffered George Campbell, the debtor, to escape; and he advocated on this reason,—That he had accepted of the caption with this express quality and condition, That he should not be obliged to break up Mr William Thomson's closet, in whose house he was alleged to lurk. To this it was answered, 1*mo*. This was against his oath of admission to serve the lieges faithfully, and was against the will of the letters allowing him to break up any doors in quest of the rebel. Replied, 1*mo*. *Pactis privatorum derogatur jure publico*. 2*do*. A messenger was fined at Privy Council for breaking up a writer's closet where his writs lay; and may be embezzled by the messenger's associates, though he should be answerable for his men. But the second answer took off his defence *in totum*, *viz*. That they offered to prove he accepted simply, without any such quality.

The Lords remitted the cause back to the Lyon Herald. *Vol. I. Page* 640.

1694. *July* 28. Alison Fletcher, Petitioner; and Anne Loch *against* The Earl of Southesk.

Alison Fletcher, relict of John Graham, postmaster, on a bill, gets a year's

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:—1*mo*, 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