

suspended because of the foresaid *proviso*. We thought that this condition of the bond could not be disappointed by assigning even in a contract of marriage;—but we thought for the wife's necessary use it might be spent, and that she ought not to starve while that money was owing; therefore we would not oblige the husband to find caution to repeat the money upon the conditions existing, because should the wife be reduced to beggary, the cautioner would remain bound. But we found the husband obliged to give his own bond to repeat in that event, whereby there might be execution against his effects if he any had, 19th February 1747. But, June 30, we altered, and obliged him to give caution.

The Lords, 30th June, found that this bond being granted by the brother, Kilrie, without any antecedent cause, therefore that Margaret Beatson's husband, as her assignee, could not uplift the money without caution to repeat in case of no children.

No. 25. 1748, July 16. ARMSTRONG *against* JOHNSTON.

In a contract of marriage betwixt this Johnston and one Armstrong, Christopher Armstrong, the bride's brother, and another Christopher Armstrong, became bound for L.10 sterling of tocher; and the husband was to be bound, in case of the wife's survivance, to pay her L.10 sterling, and proposed one George Johnston to be cautioner, who was not present. The contract was accordingly written out, and signed by all parties except George Johnston, the husband's cautioner, and was left in the writer's hand to get it signed by him, and till he got payment of his own dues,—and the marriage went on:—This was in 1732, and the intended cautioner, George Johnston, is now dead, without signing. The husband had paid the writer, and got up the contract, and charged Armstrong, who is bound for the tocher, who suspended. Strichen, Ordinary, took the writer's oath as a depositar, and the fact came out as above. The reason of suspension was, that the contract was imperfect, and he not bound, because George Johnston, the husband's cautioner, had not signed. Strichen found the letters orderly proceeded, the husband finding new caution to the wife. On a reclaiming bill, when sundry precedents were quoted, Arniston (in the chair) greatly doubted of the interlocutor. However, in respect marriage had followed, whereby the wife dispensed with George Johnston's subscribing, and that the suspender had no interest in it, therefore we adhered, and refused the petition.

No. 26. 1751, Feb. 26. MRS FORRESTER *against* BELL.

27th December 1743, Elizabeth Sommerville was married to John Forrester, without any marriage contract, and sometime after he fell ill, and 28th April 1744 executed a bond of provision for his wife on the narrative of the marriage and verbal conditions then agreed on, of 12,000 merks in liferent, in case she survived him, and to the bairns, one or more, to be procreated of the marriage in fee, whom failing, to the wife, and in further security made over his plantation in Jamaica, and in the same event of her survivance made over to her his household furniture, and these provisions are declared to be in satisfaction to her of all terce of lands, half or third of moveables; and it contained a clause dispensing with the not delivery; but no mention was made of his present sickness, or danger of death, and at the same time he consented to a testament executed by her of a por-

tion of 5000 merks in favours of certain friends, and he died a few days after. His sister confirmed some few moveables he had in this country, and Bell became cautioner in the confirmation. The relict recovered decret in absence against the executrix, and then insisted against Bell the cautioner, who alleged, that this being a settlement in contemplation of marriage, became void by the dissolution of the marriage within year and day. Answered, It was no contract of marriage, but a donation *mortis causa*, being then on death-bed, and given over by his physicians, and he died in a few days, and it contains a clause dispensing with the not delivery, and it was not delivered. It was revocable and alterable, and not a marriage settlement; and 2dly, Though it were, yet parties contractors can dispense with the year and day, and that must be presumed to have been his meaning; since he knew he could not live a month instead of seven months. Minto reduced the bond because of the dissolution of the marriage within year and day. And this day we Adhered, *sed renit.* President, Drummore, Minto, &c. I was for the interlocutor, because the bond was plainly in contemplation of the marriage, without the least insinuation of his present sickness, or that the apprehension of death was the *causa donandi*; on the contrary he provides the fee to children one or more to be procreated; and though it proved eventually that he was on death-bed, yet there was no appearance that he knew or supposed it at the time. And on a reclaiming bill and answers we adhered, 16th July 1751, though the petitioner offered to prove that the physicians had given him over, and that he thought himself dying.

NEAREST OF KIN.

No. 1. 1744, Nov. 27. CREDITORS OF MR HUGH MURRAY *against*
HIS RELICT.

See Note of No. 15, *voce* EXECUTOR.

NEGOTIORUM GESTOR.

No. 1. 1736, Jan. 27. HEIRS OF MURDIESTON *against* MRS LOCKHART.

THE question was, whether total relief was competent against any of the representatives of Murdieston, or only partial? It carried total. Some of us voted total against Alexander, but only partial against the heir of line, William, which was counted as total. Thereafter the vote was stated, Whether the heir of line is liable *in solidum* in relief?—and it carried in the affirmative.