

ANSWERED.—There was no such conclusion in the summons.

REPLIED.—There was the equivalent ; seeing the lands were sought to be declared as recognosced by alienation of the major part, which evidently presupposed ward.

The Lords, observing there was a probable ground of doubting as to that holding, and that it would be rigorous to lay down a preparative for sustaining the bygone recognition here ; therefore they, in this odious case, refused to sustain process on this summons, seeing there was no express conclusion for declaring that the lands held ward.

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1693. *February 14 ; and Nov. 10 & 15.* DOCTOR WEYMES of KIRKLISTON
against SIR HEW CAMPBELL of CALDER.

THE Lords, by plurality, found, That Calder, being only cautioner for the Marquis of Argyle, and not bound on the corroboration given by the Earl, that he had not the benefit of the defence founded on the act rescissory of fines and forfeitures in 1690, nor of the Earl of Argyle's special act of restitution in 1689 ; seeing the Marquis was not restored, and no forfeitures were rescinded but these which had been pronounced since 1665, and the doom of forfeiture against the Marquis was in 1661 ; and that the bond of corroboration given by the Earl could not prejudice Doctor Wymes, the creditor, of insisting against any of them. Two of the Lords were of a contrary opinion ; and thought, that the last Earl of Argyle, having corroborated the debt, though Calder was not bound with him therein, yet the creditor, having accepted it, it stated the Earl as principal debtor, and consequently gave Calder the benefit of his restitution, *viz.* to be free of the annualrent during the forfeiture ; at least the committee of Parliament is to cognosce thereon, and what sort of execution should pass for the principal ; for, if the Earl had been heir to the Marquis, his father, then Calder would have been reputed as cautioner for him ; and they argued this was *par casus.*

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November 10.—In the petition given in by Sir Hew Campbell of Calder, against Doctor Wymes, mentioned 14th February last, the generality of the Lords seemed to think the clause in the Act of Parliament 1693 was but a relative clause, and so could go no farther than the act 1690 ; but, in regard it had the words “ cautioners for the debt,” more than the first act, which only speaks of the forfeited person's cautioners ; therefore they ordained that point to be heard in their own presence, if this last act superadded any thing in favours of cautioners more than was in the first act ; or if it was only a bare repetition and exegetical of the former, without any design of extension of the favour and privilege, which some thought exorbitant enough before.

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November 15.—The Lords, after a hearing, advised the cause of Wymes against Calder, mentioned 10th current ; and, notwithstanding that there was some variation in the words of this last Act of Parliament from the former, and that it seemed to relate to cautioners for the debt, rather than for the person forfeited ; and that *verba in statutis non debent esse otiosa, sed aliquid operari,* and that it was attested these words were adjected by the Parliament on purpose to comprehend Calder's case ; yet the Lords found this clause only rela-

tive, and made no alteration of the former act, and therefore adhered ;—looking on the act as severe enough without the help of any extension. This was carried by six votes against five. *Vol. I. Page 570.*

1693. *November 18.* MR ROBERT KEITH of LENTUSH *against* JOHN DAVIDSON.

ON a petition given in by Mr Robert Keith of Lentush, against John Davidson, the President and some of the Lords demurred to modify expenses against Lentush as a calumnious litigant, though he succumbed, and the charger had denied the reason of suspension upon oath ; seeing he had required his oath of calumny, if he had just ground to propone that reason, and he had given it in the affirmative ; which is like a transaction ; and, being *juratum*, it must at least liberate him from expenses as *temere litigans*. But, before answer, they ordained the agent to depone on the truth of the debursement of the expenses in the account ; which was also alleged to be exorbitant. *Vol. I. Page 570.*

1693. *November 22.* LOCKERBIE'S CREDITORS *against* LADY LOCKERBIE.

UPON a bill given in by Hill and Johnston, and other creditors of Lockerbie, against the Lady, bearing, that she had taken decreets before inferior courts against the tenants, and was threatening to distress them, albeit the competition and ranking was depending before the Lords ; whereas, *lite pendente nihil est innovandum*, and craving that they might be recalled, and execution sisted thereon :—

The Lords thought it unwarrantable, yet would not grant any such general order ; but thought it was more formal, that, if they were yet depending processes, bills of advocation might be given in thereon ; and, if decreets were passed, that suspension might be expedite thereof without caution or consignation. *Vol. I. Page 570.*

1693. *November 23.* The LADY ST. JOHNSCLEUGH, and ROBERT MUIRHEAD her Husband, *against* The LAIRD of COVINGTON'S CREDITORS.

THE Lady St. Johnscleugh, and Robert Muirhead, her husband, gave in a bill against the sale of Covington, that it was done in June, when there was no Session, that diet having been set on a supposition that the Session would be then sitting ; and that Castlehill, who made the greatest offer, was one of Covington's interdictors ; and that sundry things, and particularly a superiority, were omitted to be valued.

The Lords refused their grounds ; considering, that, if they loosed such judicial venditions on niceties, this great security would prove ineffectual ; and that Castlehill did not buy *proprio nomine*, but for his pupil and nephew, Carnwath, and that there was another interdictor ; but allowed them to be heard, whether that superiority should be included in the sale or not, and if it was formerly rentalled, and if the debtor was in possession of it. *Vol. I. Page 570.*