No 43. ought to have intimated to his agent, or the writer of the bill, the name of the cautioner offered.

THE LORDS found the clerk liable, in respect of the instrument being attested by the witnesses' oaths, seeing he did make no intimation to the suspender, or the writer of the bill, of the name of the cautioner; but in case the instrument was not approved, the LORDS declared they would hear the general case in their own presence, how far the clerk of the bills is liable for the sufficiency of cautioners, or what diligence he ought to do for finding the same. See PUBLIC OFFICER.

Stair, v. 2. p. 810.

1680. *December* 10.

GEORGE DRUMMOND, Merchant, *against* JAMES DUNBAR, Messenger.

No 44.

THE LORDS sustained a libel relevant against him, for paying a debt, for malversing, in giving a declaration to the Privy Council that the Laird of Dundas was only incarcerate upon one caption, whereas he was likewise imprisoned by him on the pursuer's caption, by which concealment he was put at liberty.

1681. *July* 6.—GEORGE DRUMMOND late Bailie in Edinburgh against James Dunbar messenger, anent his arresting the Laird of Dundas; 'the LORDS found where one is imprisoned for a riot by order of the Privy Council, and is arrested in prison by virtue of a caption for a civil debt, if the Privy Council release him, he cannot be detained on pretence of the arrestment, because it falls by consequence, the first cause of imprisonment on which it depends, being relaxed.' Yea Halton, (who stood very high in this cause for the Privy Council's jurisdiction,) and some others, went this length, that though the first cause of imprisonment had been on a caption for debt, and the second only by the Council, yet he might be liberated by the Council's order; which seems most arbitrary and unjust.

Fol. Dic. v. 2. p. 342. Fountainhall, MS. & v. 1. p. 146.

No 45.
Where an inhibition had been marked as registered, but not in fact booked, the clerk and his representative held to be liable for damage and loss thence accruing.

1696. *January* 3. SCOTS *against* JOHN GRIEVE.

SCOTS, younger children of Tushilaw, pursue a reduction *ex capite inhibitionis*, served upon their bond of provision against Mr John Grieve of Pinackle, and Michael Anderson, who had purchased the lands after their inhibition was executed. *Alleged*, The inhibition is null, not being duly registrated within 40 days, conform to the act of Parliament 1617; in so far as, though it be marked as duly registrated, and recorded by the clerk and keeper of the shire's Register at Selkirk; yet, upon search, there is no such inhibition standing

registrated in the book. *Answered*, Parties who inhibit, or do any other diligence or security, such as hornings, sasines, &c. can do no more but take out their inhibition marked by the clerk; and no law obliges them to see it actually put in the books; and the 19th act of Parliament 1686, has fully cleared this case, by declaring it shall be sufficient, if parties shew their rights marked by the clerk as recorded; and if it be not, the party prejudiced is to have reparation of his damage against the clerk and his cautioners. And, though the said act mentions only sasines and reversions, yet it bears also the general word of "any other writs," so these have been only named for examples; and though it seems statutory, yet in other parts it looks like a declaratory law, and so ought to have a retrospect, as the act anent debtor and creditor had 1661, and the new act for obviating the fraud of apparent heirs in 1695. And it arose on a debate, in a case between Sir Daniel Carmichael and Sir John Whitford of Milton, see APPENDIX. THE LORDS considered this as a most inconvenient law in securing all buyers and purchasers, who can do no more but search the registers for inhibitions and other incumbrances; and finding none, think themselves *in tuto* to proceed in their bargains; whereas, if it shall be sufficient to produce an inhibition or sasine marked by a clerk, (though not inserted in the register books) then we shall be as much exposed to fraud as England is in their purchases, for want of registers; and seeing this seems to be the greater inconvenience, it may concern the wisdom of the Parliament to re-consider that act; but the LORDS abstracting from the general point in this case, ordained the clerk, or his representatives, to be summarily and *incidenter* cited in this process, to answer why he should not be decerned to make up the parties' damage and loss, occasioned by his negligence or malversation, in giving a false attest of its being registrated, when it is not truly done.

No 45.

Fol. Dic. v. 2. p. 342. Fountainhall, v. 1. p. 695.

1709. *December* 9. Sir JOHN JOHNSTON *against* JOHN PEDER.

No 46.
An inferior commissary-clerk gave out a precept of poinding against one of many defenders, although there was no decerniture against him. This being suspended, and the suspender dying in the meantime, the debt was lost. The clerk was found liable.

SIR John Johnston of Caskieben, pursues sundry debtors before the Commissary of Aberdeen, and amongst the rest, one Isobel Drum, for the sum of L. 111 Scots, and takes out from John Peder Commissary clerk depute there, a precept of poinding against her; whereupon she being charged suspends; and Sir John finding the precept would not instruct his charge, when he came to discuss her suspension, he goes to Peder, the clerk, and craves an extract of the decreet. He answers, I have searched the warrants of that process, and find no decreet nor signature against her, and confesses his inadvertency and rashness in giving out the precept, which now he finds wanted a warrant. Sir John upon this requires him by way of instrument; which he refusing, there is a process raised against him for payment of the foresaid sum of L. 111, and all his damages and expenses occasioned by his fault, the mean of proba-