

No 47.

tion, and so it could not militate against him; for if he had been called, he would have produced his author's right; likeas now he is content to produce the same. THE LORDS did find that the sub-vassal, being in possession as heritor, ought to have been called; and that the improbation could not militate against him, albeit his right was not confirmed; and if it were otherwise, it were easy to superiors, upon collusion or default of their immediate vassals, to take away the sub-vassals' right, albeit they had the principal rights, and were ready to produce the same, and so they reponed him against the improbation.

Gosford, MS. No 844. p. 534.

No 48.

1685. March 12. Captain ANDREW DICK against CRAIGIE of Gairsey.

CAPTAIN Andrew Dick against Craige of Gairsey, being reported by Pitmedden, the LORDS found, seeing Gairsey was but cautioner for Oversandy his uncle, in the suspension, it was competent for him to propone any defences, though omitted by the principal party; and they did not stint him to prove them *instanter*, but allowed him terms for that effect.—This has been formerly so decided, as appears from Stair.

Fol. Dic. v. 2. p. 351. Fountainhall, v. 1. p. 352.

No 49.

1709. December 20. HAMILTON against CALDER.

A decree having been taken out by the tacksman of the customs against his cashier, for a balance in his hands, without calling the cashier's cautioner, the LORDS, in a suspension, allowed the cautioner to be heard against the accounts, as if he were yet *in libello*, and found the decree not to be *res judicata*, either as to relevancy or probation.

Fol. Dic. v. 2. p. 351. Forbes.

. This case is No 24. p. 2092, *voco* CAUTIONER.

No 50.

1738. July 28. ELIZABETH WALKER against CHATTO.

Where a Bailie had fined for a riot, the Commissary's sentence fining of new for opprobrious expressions sustained.

WHERE a person had been guilty of a riot, and of giving opprobrious language, at one and the same time, in one continued act, which commonly happens, and had been convened before the Bailies of Kelso for the riot, which the libel bore to be aggravated by the opprobrious language, and fined for the offence; it was notwithstanding found, that he might thereafter be pursued before the Commissary for the opprobrious language, as a distinct crime from the