ANSWERED.—That, in a posterior decreet of declarator, that was competent and omitted by Colvil.

REPLIED.—It was not competent; because he knew it would be repelled *illo ordine*, till he had first reduced that decreet against him for denuding, and their adjudication.

DUPLIED.—Their adjudication was neither libelled on, nor founded upon in the debate; and so could not hinder them from proponing it.

Several of the Lords thought, competent and omitted being a penal exception, introduced to repress dole and fraud in protracting pleas, that it ought to be understood, where the exception was relevant and competent *cum effectu*; therefore, that it did not take place in this case so circumstantiate. Yet the plurality repelled it now; because they found it was competent then, and should have been proponed, and was omitted. *Vol. I. Page* 569.

1693. *November* 15. The EARL of KINTORE and MR JAMES KEITH *against* HOME of NINEWELLS, AUCHTERLONY, and COUTTS.

MERSINTON reported the cause of the Earl of Kintore and Mr James Keith, against Home of Ninewells, Auchterlony, and Coutts, conform to the new Act of Parliament in summer last, by reading the minutes, signed by both parties' advocates.

The defence was a declinator of the Lords as incompetent; it being a question about a part of the King's revenue, (the retoured and non-entry duties of Falconer of Newton's lands,) which was only proper for the Exchequer, by the Act of Parliament 1633; seeing there was no competition between parties in point of right here, and that the precept bore *capiendo securitatem.*

ANSWERED.—The nature of the debt was here innovated by taking a bond of corroboration; and it was not taken in Sir Thomas Moncreiff the cash-keeper's name, but in the Sheriff-depute's; and it was no more the King's, being gifted to Kintore for his salary as Knight-marshal; and, by this rule, all wards, non-entries, and marriages, and such like casualties of the Crown, might all be claimed to be judged *privativè* by the Exchequer.

The Lords, by plurality, found this case more proper to be judged by the Exchequer, and remitted it thither; but, in regard the charge of horning proceeded upon letters raised before them,—lest they should go on to denounce upon that charge, they declared that diligence null, for securing the suspenders *medio tempore.* *Vol. I. Page* 569.

1693. *November* 15. ———— *against* SIR ANDREW MURRAY.

IN a declarator of recognition pursued by ————, against Sir Andrew Murray, upon this ground,—That, though his charter bore a blench-holding, yet it had this adjection, "and the other services contained in the old infeftments;" and, by the tenor of the prior infeftments, it appeared that the lands held clearly ward: and therefore, *primo loco*, the pursuer insisted to have it declared it was a ward-holding.

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. *Vol. I. Page 569.*

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 prejudge Doctor Weymes, 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.* *Vol. I. Page 559.*

November 10.—In the petition given in by Sir Hew Campbell of Calder, against Doctor Weymes, 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 Weymes 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-