

February 27.—THE LORDS gave a hearing *in præsentia* to the petition of the Duke of Gordon *contra* Jerviswood, mentioned 8th current. And it was debated both from the grounds of the common law, and on the two acts of Parliament, the one general and rescissory of fines and forfeitures, and the other special; that the Duke's *bona fides* was sufficient to defend him against restitution of the bygone rents of Jerviswood's lands, intromitted with by him on the gift of forfeiture before the Revolution; and decisions and authors were cited on both hands for proving how far such restitutions *per modum justitiæ* extend; as *Gayl. Tractat. de pace publica*; and *Perezius ad tit. C. de sententiam passis*. But *Mathæus ad tit. C. de indulgentia principis*, thinks all these restitutions are to be strictly interpreted, and not to be stretched to bygone fruits which were *bona fide percepti et consumpti*, unless it expressly bear the same. And here Jerviswood's speciality does not mention the bygone rents; though it was *alleged*, This was a mere omission through negligence, and *Cesnock's*, with the special acts, bore them; and it could signify nothing if it did not import this.—THE LORDS demurred if restitution would follow on the principles of the common law; but the generality found the special act took off the Duke's *bona fides*, and so decerned restitution. In this case it was remembered, that in the late government, the Earl of Callander and Sir Alexander Hope of Kerse were forced to give back both the principal sums and annualrents, which they got of the the Earl of Bramford's forfeiture. But, *imo*, It was not by a decision *in jure*, but an arbitration; *2do*, The authority for forfeiting Bramford was *funditus* rescinded, (See *supra*). But it was not so in Jerviswood's case.

Fountainball, v. 1. p. 667. & 673.

1697. January 8.

CARMICHAEL *against* STEWART.

WHITEHILL reported Carmichael of Bonnington against Sir Thomas Stewart of Coltnes, for payment of L. 2000, and the bygone annualrents contained in his bond. *Alleged*, This was a debt wherein he was bound with Baillie of Hardington; and Sir Thomas being forfeited by the act rescissory in 1690, he has abatement of all the annualrents during the time he stood forfeited. *Answered*, That act is only introduced in favours of principal debtors forfeited, but not of their cautioners, as Coltness is here; for the law considered, if the principal was not forfeited, then the cautioner had his recourse for relief against him *quoad* all these years. *Replied*, There is the same parity of reason for both, and Coltness would assign the creditor *quoad* these years annualrents to his relief competent against the principal; only Hardington the principal was here bankrupt and gone. THE LORDS found the cautioners were not in the case of the act of Parliament, and could not plead the benefit of it, though the case existed, that the cautioner now could have no effectual relief.

Fol. Dic. v. 1. p. 315. Fountainball, v. 1. p. 752.

No 63.

Cautioners
not entitled
to the benefit
of the act 18,
Parliament
1690.