

**No. 32.** should have been sent and shewn; *2do*, The defender did not desire to know the cautioner's name; and he hath no prejudice by the delay, having possessed since. And as to any superplus rent above the annual-rent, the defender is *in lucro captando*, and the pursuer *in damno evitando*.

The Lords sustained the requisition to restrict; which is contrary to former decisions.

*Harcarse, No. 1031. p. 293.*

\* \* \* The following, although of a later date, is the same case.

1694. *July 18.*

ELIZABETH RAMSAY and Mr. ASHTON, in Northumberland, her Husband, *against* CLAPPERTON of Wylie-cleugh.

**No. 33.**

Same subject.

The question was, *à quo tempore* Wylie-cleugh was to count for the superplus mails and duties of the wadset-lands more than paid the annual-rent of his wadset sum? It was contended, it behoved to be from the date of the offer of caution conform to the 62d act of Parl. 1661, between debtor and creditor, obliging them either to cede the possession, or else to impute the superplus fruits *in sortem*. It was objected against the instrument produced, that it did not bear the production of the factory and procuratory. Answered, it was not required nor called for; in which case it was sufficient, that the instrument bore *quod de ejus potestate liquido notario constabat*. The Lords repelled this objection. The second was, that though offered caution, yet it was only in general, and did not condescend upon any particular person; nor did it bear that any bond with a cautioner was offered, and so it was null. Answered, they offered to supply it now by finding caution beyond exception. The Lords found the instrument was not in the terms of the act of Parliament, and therefore could not oblige Wylie-cleugh to count for the superplus rents above his annual-rent from the date of it. Yet it was remembered, that in a case of the Earl of Marishal against his wadsetters, it was sustained that there was a general offer of caution, and a condescence allowed *ex intervallo*; but this was not so conform to the act of Parliament.

*Fountainhall, v. 1. p. 633.*

1697. *January 22.*

MARISHALL *against* CARGILL.

**No. 34.**

Same subject.

The Lords considered a petition given in by the Earl of Marishal against Cargill of Auchtidonald, with the answers thereto. It was craved, he being a wadsetter, and near paid by the superplus duties more than satisfied his annual-rent; that, during the dependence of the count and reckoning, he might either cede his possession, and accept of sufficient caution from the Earl for what shall be found due to him upon the event of the counting, or else, if he chuse rather to continue