in the debate, the principal was paid, and he wanted only some annualrents and expenses of the infeftments. They decerned for that, unless they offered to prove by his oath it was also paid him with the rest.

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1696. *January* 17. JOHN PRESTON *against* SIR GEORGE CAMPBELL of CESNOCK and His LADY.

THE pursuer had an old infeftment of annualrent out of the lands of Newhall, whereof the Lady was heretrix; and he now craving to poind the ground, they suspended on the 16th Act 1695, allowing retention, to the forfeited persons now restored, of as many years' annualrents as they paid for years wherein they stood forfeited; and subsumed that Cesnock's forfeiture continued three years, and yet during all that time Mr Preston uplifted his annualrents; and for which they must now have retention and compensation. ANSWERED,—They were not in the terms of that Act of Parliament, which meant only debtors personally bound, which Cesnock was not, the *fundus* being properly debtor. *2do.* It was only in the case where the forfeited persons were dispossessed; but so it is, the Lady enjoyed her proper inheritance of Newhall during all the years of the forfeiture, which carried the *jus mariti;* and though it was a gift from King James, yet that cannot prejudge Mr Preston now.

The Lords found Cesnock's claim for retention had no foundation in the Act of Parliament; and therefore decerned in the poinding of the ground.

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1695 *and* 1696. ISOBEL ANDERSON and JAMES HENDERSON *against* CHARLES MURRAY and AGNES FLEEMING.

1695. *January* 9.—THE point was, If the decreet of mails and duties should stop, because there was a reduction of the right depending, *ex capite lecti*, which was ready to be debated. The Lords decerned in the mails and duties, reserving the reduction, as accords; as they offered to find caution to refund the rents, if they succumbed in their reduction. *Vol. I. Page* 656.

1696. *January* 21.—In the action pursued by Charles Murray and Fleeming against Isobel Anderson and James Henderson, being a reduction *ex capite lecti;* and the pursuers repeating a probation of the deathbed, led in another process at Grange Dick's instance:—in regard the witnesses who were examined there could not be repeated now, being dead, the Lords found such witnesses transmitted from the one process to the other could not be used as probative here, being *res inter alios acta;* and he might have had objections against them, or further interrogators to have refreshed their memories, and made them depone on other circumstances, which were not in the examination on the first process put to them; and that, in law, *testibus non testimoniis credendum est.* Yet see Dury 16*th January* 1628, *Finlayson*; where *deducta in uno judicio* were sustained *coram alio*, in things *quæ tractu temporis mutationem non recipiunt*; and

25th January 1632, *Kaidly*; where the Lords found a passive title in one process proved in another by production of the decreet, without adducing the probation *de novo*. *Vol. I. Page* 702.

1696. *January* 22. JOHN ROBERTSON *against* DAVID BEATSON of POWGUILD.

Rankeilor reported Mr John Robertson against David Beatson of Powguild, for payment of 3000 merks contained in his bond, bearing that Robertson had assigned him to 7000 merks due to him by the Earl of Dalhousie, with this quality,—that he should do diligence for that, as well as for the sums due to himself by Dalhousie; and that he should pay him the said 3000 merks out of the first and readiest of what he should receive from Dalhousie, either by virtue of the rights assigned to him by Robertson, or any other rights whatsomever standing in his own person: and Robertson subsumed that Powguild had got considerable sums from Dalhousie, and so the condition of paying him the 3000 merks was come, *dies tam venerat quam cesserat.*

ALLEGED,—That his receiving money from Dalhousie *non relevat*, unless it was by virtue of Robertson's assignation; and these words, "or by virtue of any other right," can admit no rational sense and construction but this, by virtue of any other right in his person relating to the sums transferred to him by Robertson. And it is not to be presumed he would have given him 3000 merks for nothing, which he would be forced to do, if this were sustained: for he offered to prove, he got no money from Dalhousie by Robertson's assignation, because he was either excluded by preferable rights, or it was paid before the assignation.

ANSWERED,—This was a bargain of hazard, like the *jactus retis* mentioned in law,—I give you right to 7000 merks, providing you pay me 3000, if either you get payment by my right, or by the debts due to you by Dalhousie standing in your person at the time of the transaction, extending to 20,000 merks and more; and I offer to prove you got payment of your own.

The Lords found this a bargain; and that he was liable for the 3000 merks, if he got as much from Dalhousie, by virtue of any right standing in his person at the time of the agreement with Robertson; but thought it relevant to infer warrandice against Robertson, if Powguild proved the sum assigned was paid before the assignation; but found his being debarred by preferable rights not relevant. *Vol. I, Page* 703.

1696. *January* 24. MUIR of MONKWOOD *against* CRAWFURD of NEWARK.

IN the cause Muir of Monkwood against Crawfurd of Newark; this allegeance was proponed,—I cannot pay this sum contained in my father's bond, because your cedent, from whom you derive the right to it, was my tutor, and so *præsumitur intus habere ante redditas rationes*, he not having as yet counted with me for his administration. ANSWERED,—That brocard only extended to debts acquired by tutors or curators, *durante tutela et curatela*; but this debt