naces or threats towards him, nor yet that ever the cancelled discharge, now produced, was Mr Roderick's delivered evident; so that the qualifications of concussion, however relevantly libelled, were not proven.

The Lords found what was proven not sufficient to infer reduction of Mr Roderick's rights upon the head of concussion; but thought it reasonable he should communicate to John Binning the eases he got from his creditors; and ordained him to count for the same, at the sight of two of the Lords.

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1696. *February* 26.—In the cause mentioned 13th current, pursued by Boid of Trochrig, and John Binning, against Mr Rory M'Kenzie, for reducing his rights on concussion; Mr Rory being assoilyied, the question now arose anent his communicating the eases and compositions he got from John Binning's creditors, which he was willing to do; but the *cardo controversiæ* lay in this,—Who should prove the eases; whether Mr Rory or John Binning? Mr Rory opponed his dispositions and assignations, bearing, he had paid sums equivalent, and other onerous causes; and so this narrative was probative, unless redargued by his oath that he paid less. Mr Binning opponed the 16th Act of Parliament 1695, where parties are only to have action against forfeited persons for the sums they paid, and no farther; *ergo*, they must instruct what they paid; and to make the restored parties burdened with such a difficult probation, is to deprive them totally of the benefit of the eases.

The Lords considered the Act of Parliament, and found it did not expressly determine what should be the *modus probandi* in such cases; and that it were hard to examine debtors on what they got, or other persons present at the payment, or to put a party to prove what he paid. *2do.* The Lords found the narrative of Mr Rory's disposition, bearing his payment of 2800 merks, and other onerous causes, was sufficient, unless they would convell and redargue the same by his oath; in which case they would allow the receivers of the price, or other witnesses, to be confronted with him for refreshing his memory.

The pursuers were so displeased with this interlocutor, as prejudicial to all forfeited persons, that they were threatening to protest for remeid of law to the Lords of Parliament; and cited several contrary decisions, in the pursuits against Grierson of Lag, Lieutenant-general Douglas, and others;—but these were in the case of fines, or compositions paid for forfeitures. The Session rose without any such appeal given in.

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1693, 1694, *and* 1696. Sir Archibald Murray of Blackbarony *against* Sir George Campbell of Cesnock.

1693. *February* 8.—The Lords found the Act of Parliament in 1690, anent retouring annualrents in non-entries, to be declaratory, and to draw back to years prior to the Act wherein the infeftment of annualrent was in non-entry, if the action of declarator was posterior to the said Act; as here, not only the declarator, but the very gift, were after the date of the Act. Some doubted what the meaning of this pursuit was; whether he would have exacted the full annualrent for the non-entry, because then *valebit seipsum;* and also have exacted it over again by the obligement of the heritable bond: But others conjectured that his design was, that Cesnock being one of the forfeited persons

who, by the act of restitution in 1690, have right to claim an abatement of annualrents during the forfeiture, Blackbarony, the donatar, has intended, by this non-entry, to have got payment of these years' annualrents. Some of the Lords did not think the Act anent retouring annualrents declaratory, so as to cut off superiors for years preceding that law; which is not to be inferred except where it is expressed. *Vol. I. Page 555.*

1694. *July* 13.—Sir Archibald Murray of Blackbarony against Sir George Campbell of Cesnock, about the non-entry. The first question was, Whether the infeftment was holden of the king or not; seeing the confirmation did not bear whether it was *a me*, or *de me*; and Mr William Wallace's heirs had seemed to make their election, by taking a precept of *clare constat* from Cesnock: yet the Lords found it was held of the king; and so the non-entry was in his hands, because it bore *tenen. de nobis et successoribus nostris.* The second point was anent the receipt of the renunciation, which bore that they had renounced the said infeftment of annualrent, except as to the sum of 19,000 merks. A doubt arose, 1*mo.* If this could be divided, so as not to acknowledge that sum resting. 2*do.* If the real right was reserved, *pro tanto*, for security of that 19,000 merks, or if it was a total renunciation, and only a personal obligement for that sum.

The Lords resolved first to expiscate anent the existence of the said renunciation, and to examine Blackbarrony, his daughter-in-law, &c. about it; as also anent the transaction alleged made by Blackbarrony with the Earl of Melford for 23,000 merks. *Vol. I. Page* 631.

1696. *February* 27.—In the process, Sir Archibald Murray of Blackbarrony against Sir George Campbell of Cesnock, for a declarator of the non-entry of an infeftment of annualrent, which Mr William Wallace, his daughter-in-law's father, had in these lands:—ALLEGED,----There can be no declarator of non-entry, because the infeftment was extinct;—1*mo.* by extrinsic payment; 2*do.* by a renunciation.----See *February* 1671, *Wishart* against *Arthur.* ANSWERED,----Extrinsic payment cannot extinguish in prejudice of the superior's casualty; and the renunciation was null, being granted by one not validly infeft.

The Lords sustained the declarator, but restricted it to serve allenarly for a security to Blackbarrony of the sum of 19,000 merks, yet resting of that heritable bond; otherwise the Lords inclined to have repelled it. The non-entry of annualrents is now rectified by the Act 1690. *Vol. I. Page* 716.

[See another Case between thir Parties, 11th February 1697, Dictionary, page 970.]

1696. *February* 28. SIR WILLIAM KER *against* SUNDRY ELDERS of KELSO.

SIR William Ker of Greenhead, as the Earl of Roxburgh's bailie of the barony of Kelso, having pursued sundry elders put in by Mr William Jack, minister there, for choosing and placing a reader and precentor to the church, without consent of the heritors, who had bestowed it on Mr James Kirkwood, the schoolmaster; and, in respect of their contumacy, he having imprisoned them, they applied to the Lords by a bill of suspension and charge to set at liberty: And the Lords considering that such an affair was more ecclesiastic than civil, and that it exceeded the jurisdiction of a baron court, and seemed to be from pique and humour, they ordained the men to be presently set at liberty, without caution or consignation. *Vol. I. Page* 716.