if he did not prove him paid. Some thought it hard to put one in possession to find caution. But it was better so, than to put the other, (whose right was unquestionably preferable, if not paid,) or to sequestrate the rents by placing a factor. *Vol. I. Page* 600.

1694. *February* 1. THOMAS ROME *against* JOHN IRVINE.

PHILIPHAUGH reported Mr Thomas Rome of Clouden, against John Irvine; where the like allegeance [as in the preceding case, *Johnston* against *Hamilton*,] being proponed, that he had possessed Netherwood's lands for many years, and so was paid, and craved a count and reckoning; the other was content to find the allegeance relevant, and to give him a term, and incident diligence to prove it; but shunned to enter into a tedious count.

The Lords, finding that it could not be otherwise expede, appointed a count and reckoning. *Vol. I. Page* 600.

1694. *February* 1. FOTHERINGHAM of POURY *against* ALEXANDER RAIT.

PHILIPHAUGH reported Fotheringham of Poury against Alexander Rait's *cessio bonorum*. The Lords sustained this defence to stop his liberation, That the jailer's testificate did not bear the time of his continuance in person; because they had a sham trick of getting such declarations on their coming into the tolbooth for a little time; and found it also relevant that he possessed some part of the brewery, &c. but thought it not sufficient that he carried money with him; seeing he must live, and this *beneficium cessionis* is *ex humanitate et miseratione*. *Vol. I. Page* 600.

1694. *February* 1. JOHN PATON *against* ARCHIBALD NISBET of CARFIN.

ARBUCHEL reported John Paton against Mr Archibald Nisbet of Carfin. The Lords found Paton's right preferable to Nisbet's, over the whole three roums; but in regard of the reservation in the former decreet, bearing that he should only have recourse to the Hillside, if he fell short of his annualrents out of the other two, they restricted him; he always getting his full annualrent out of these two roums, free of all burdens whatsomever; and this notwithstanding of the declaring of the back-tack; but prejudice to him to reduce that reservation in the foresaid decreet. *Vol. I. Page* 600.

1694. *February* 2. CAPTAIN DONALDSON *against* JAMES CUNNINGHAM.

ARNISTON reported Captain Donaldson against James Cunningham. The question was, Whether the defender was bound to produce the disposition of