

in the debate, the principal was paid, and he wanted only some annualrents and expenses of the infestments. 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 infestment of annualrent out of the lands of Newhall, whereof the Lady was heretrix; and he now craving to point 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 prejudice Mr Preston now.

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

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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 16th *January* 1628, *Finlayson*; where *deducta in uno judicio* were sustained *coram alio*, in things *quæ tractu temporis mutationem non recipiunt*; and