No 61. had ordained Kerse to repay. He, since the Revolution, obtained a remit from the Parliament to the Lords to review and recognosce that decreet, without regard to its being *res judicata*, and to consider its grounds, whether it was *bene* or *male judicatum;* without which dispensation the Lords could not reduce their own nor their predecessors decreets upon iniquity. And no informations having been given in for Spot, the Lords proceeded, and found it was unjust to decern him to restore that money he had received *bona fide* and for an onerous cause, and he was not to regard whether it was Bramford's or not; seeing, if he had not got payment out of this fund, he would have got it out of another, *et qui suum recepit condictione non tenetur.* Some were of opinion there was a hardship in the Lords' sentence in 1672, decerning Kerse not only to refund to Bramford's heirs the principal sum, but likewise the annualrents; but the Lords this day reduced the decreet *quoad* both; several of their number being unclear.

See this case fully debated in Stair's Decisions, 9th January 1672, (*supra,*) and in Sir George M'Kenzie's Pleadings.—One of the grounds insisted on by Kerse was, that Bramford's restitution in 1661 did not bear expressly *per modum justitiæ;* but though it had not these precise words, yet it had the equivalent, that justice required he should be restored, all his crime being his appearance for his Prince in the late troubles.

On the 22d July 1697, the Lords having again advised this case, inclined to find Kerse behoved to condescend he was a creditor to the estates for an onerous cause; and allowed either party to prove before answer; Spot, that it was but a gratification; and Kerse, that the cause was onerous. And, on the 15th February 1698, on advising that probation, they found it proven; and so assoilzied Kerse.

Fountainhall, v. 1. *p.* 768.

No 62. 1695. *February* 8. Bailie of Jerviswood *against* The Duke of Gordon.

A forfeiture having been rescinded by a special act, it was found, that the donatar, though possessing *bona fide*, was bound to make restitution to the heir of the rebel.

The Lords repelled the first defence against the title, in regard he was both executor and heir served, and his not being infeft was through the defender's fault, who being his superior refused to enter him, and so could never obtrude that defect. As to the *second*, anent his restitution of the bygone rents, it was founded not on the general act rescissory in 1690, but on his special act; and the Lords repelled the allegeance, that as *bona fide possessor fecerat fructus consumptos suos*, by virtue of a law then standing; for the special act proceeding upon nullities in his trial, and the probation adduced against him by witnesses, who were *socii criminis* unpardoned, and so under the terror and impression of death, they thought this sufficient to interrupt the Duke's *bona fides*, though others called this *durus sermo*.

February 27.—THE LORDS gave a hearing *in præsentia* to the petition of the Duke of Gordon *contra* Jerviswood, mentioned 8th current. And it was debated both from the grounds of the common law, and on the two acts of Parliament, the one general and rescissory of fines and forfeitures, and the other special; that the Duke's *bona fides* was sufficient to defend him against restitution of the bygone rents of Jerviswood's lands, intromitted with by him on the gift of forfeiture before the Revolution; and decisions and authors were cited on both hands for proving how far such restitutions *per modum justitiæ* extend; as *Gayl. Tractat. de pace publica;* and *Perezius ad tit. C. de sententiam passis.* But *Mathæus ad tit. C. de indulgentia principis*, thinks all these restitutions are to be strictly interpreted, and not to be stretched to bygone fruits which were *bona fide percepti et consumpti*, unless it expressly bear the same. And here Jerviswood's speciality does not mention the bygone rents; though it was *alleged*, This was a mere omission through negligence, and Cesnock's, with the special acts, bore them; and it could signify nothing if it did not import this.——THE LORDS demurred if restitution would follow on the principles of the common law; but the generality found the special act took off the Duke's *bona fides*, and so decerned restitution. In this case it was remembered, that in the late government, the Earl of Callander and Sir Alexander Hope of Kerse were forced to give back both the principal sums and annualrents, which they got of the the Earl of Bramford's forfeiture. But, 1*mo*, It was not by a decision *in jure*, but an arbitration; 2*do*, The authority for forfeiting Bramford was *funditus* rescinded, (See *supra*). But it was not so in Jerviswood's case. No 62.

Fountainhall, v. 1. *p.* 667. & 673.

1697. *January* 8. CARMICHAEL *against* STEWART.

No 63.
Cautioners not entitled to the benefit of the act 18, Parliament 1690.

WHITEHILL reported Carmichael of Bonnington against Sir Thomas Stewart of Coltnes, for payment of L. 2000, and the bygone annualrents contained in his bond. *Alleged*, This was a debt wherein he was bound with Baillie of Hardington; and Sir Thomas being forfeited by the act recissory in 1690, he has abatement of all the annualrents during the time he stood forfeited. *Answered*, That act is only introduced in favours of principal debtors forfeited, but not of their cautioners, as Coltness is here; for the law considered, if the principal was not forfeited, then the cautioner had his recourse for relief against him *quoad* all these years. *Replied*, There is the same parity of reason for both, and Coltness would assign the creditor *quoad* these years annualrents to his relief competent against the principal; only Hardington the principal was here bankrupt and gone. THE LORDS found the cautioners were not in the case of the act of Parliament, and could not plead the benefit of it, though the case existed, that the cautioner now could have no effectual relief.

Fol. Dic. v. 1. *p.* 315. *Fountainhall, v.* 1. *p.* 752.