

1626. *March 22.* ROBERT ERSKIN *against* TENANTS.

ROBERT Erskin, being infeft in a tenement in the Canongate, upon resignation made by Joseph Cunningham, who is infeft therein, proceeding upon a comprising against Sir James Erskin, who was heritor thereof; pursues the possessors for the mails and duties. Compeared in this process the Lo. Erskine, and defends the tenants, as his tenants, and who had paid him, in respect of his infeftment thereof granted to him by the said Sir James, for an onerous cause, being a debt owing by the said Sir James; which debt was before the debt owing to the pursuer's author, for the which he comprised the lands; likeas his infeftment was before the compriser's infeftment. And it being replied, that the Lord Erskin's infeftment was after the denunciation made by the said Joseph Cunningham, for apprising of the lands from Sir James; and so the same could not be sustained as lawful to exclude his right, proceeding upon a comprising, the denunciation whereof was anterior to his infeftment; neither could the priority of the excipient's debt be respected, seeing he had done no diligence to recover the same from the common creditor; but only, by his voluntary resignation, had obtained the said infeftment, which ought not to prejudice the pursuer's right, and more timely diligence. And it being controverted, that this reply could not come to be tried in this Judgment Possessor, so summarily to take away the excipient's right,—the Lords found, that, seeing the excipient's right was made before the pursuer's author's comprising and sasine, albeit after the denunciation thereof, that, in this Judgment Possessor, the said excipient's heritable right foresaid being clad with possession, they would not annul the same, *hoc ordine*, by way of exception, upon that reason of the preceding denunciation and voluntary deed of the common debtor, and the not doing diligence by the excipient; but reserved the same to be discussed by way of reduction, *prout de jure*. And the Lords declared, that, if the comprising was expired before the infeftment granted to the Lo. Erskin, albeit the compriser's sasine was after his sasine, in that case they would prefer the pursuer's infeftment, and repel the exception foresaid in this same judgment, if the comprising was completed before the excipient's infeftment; for the comprising so denuded the debtor that he could not, by any deed thereafter, prejudice the same.

*Act.* Hope. *Alt.* ———. Gibson, *Clerk.* *Vid.* 1st July 1624, L. Balveny; 22d July 1626, ——— *against* ———, where a land is twice disposed to sundry parties; *ult.* January 1628, Mark Hamilton.

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1626. *March 31.* The EARL of KINGHORN *against* COLLACE.

IN an action of removing, pursued at the instance of the Earl of Kinghorn *against* Collace, an exception was admitted to the defender's probation, upon a right made to the defender, of the lands libelled, or to his father or goodsire; and, at the term of probation, an incident being produced, raised at the defender's instance, against certain persons called as Havers of these evidents, whereby he behoved to prove his exception; this incident was sustained, albeit