

1628. *January 24.* THOMSON *against* KILGOUR.

IN a double pointing, betwixt Thomson and Kilgour,—the Lords decerned Kilgour to be answered of the mails of a tenement, and preferred him to Thomson; seeing Kilgour was infeft in the property of the land, by a public infeftment, four days before the sasine of an annual-rent, given by that same author of Kilgour's right, to Thomson also; albeit Thomson's right depended upon a procuratory of resignation made in his favours by the common author, for infeftment to be given to him of that annual-rent, divers years before the heritable right made to Kilgour; to the which date of the said preceding procuratory, he alleged that his sasine should be drawn back, and that he should be preferred to the other; especially seeing, since the said procuratory, he had uplifted the mails of the said tenement, for satisfying of his said annual-rent, divers years, which ought to corroborate his right in this Possessor Judgment; seeing also that his sasine, depending upon that procuratory, was but four days after Kilgour's sasine. Notwithstanding whereof, Kilgour was preferred.

*Act.* Dunlop. *Alt.* ———. Gibson, *Clerk.*

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1628. *January 31.* MARK HAMILTON *against* BROWN.

IN an action for the mails and duties of a house, betwixt Mark Hamilton and Brown,—the Lords preferred the defender to the pursuer, in the right of the mails acclaimed; the defender's right being a disposition of the land by the heritor thereof, for satisfaction of a sum adebted to him by the said heritor, contained in a contract of marriage; upon the which disposition, for the cause fore-said, the defender was infeft in the land upon the morn after the said disposition: albeit the pursuer replied, that he had comprised the lands from the said heritor, their common author, for a cause onerous; the denunciation of which comprising was made upon that same day upon which the party had acquired the said disposition, and which denunciation preceded the said sasine; and so his denunciation, being before his real right of sasine, and the same being a deed necessary, and the other being a voluntary deed done by the debtor, ought not to prejudge his lawful and more allowable diligence; but he alleged he ought to be preferred. Which was repelled, as said is, and the defender preferred.

*Hay, Clerk. Vid.* 25th March 1628, Blackburn; 17th December 1627, Lawder; 22d March 1626, Erskine; 4th Dec 1628, Logan *against* Hunter.

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1628. *February 8.* SIR JAMES DUNDAS *against* L. SWINTON.

IN an action of reduction, betwixt Sir James Dundas and L. Swinton,—the Lords sustained the action at the pursuer's instance, upon the base infeftment of the lands libelled, granted to him, flowing from the L. of Newbyres, who was

also infest therein, by a base infestment holden of the L. Houburn, his author, for reduction of a public infestment of the same lands, granted to the defender by the said L. of Houburn, before the right made to him by the L. Newbyres; because there was an argument and reason joined with this base infestment, whereby the said public infestment was desired to be reduced, *viz.* a back-bond given by the defender, that, if he paid not a sum contained in the back-bond, at the terms therein contained, that, *eo casu*, his infestment should fall; likeas the pursuer subsumed upon the failie, so that the dispute was not, if the base, or the public infestment, should be preferred, but if that public infestment was reducible upon the reason founded on the back-bond. And which was sustained; but Houburn himself, in whose favours the back-bond was made, was also pursuer. In this process also, the Lords found that a charter granted by the L. Houburn to Swinton, which had no relation to be done, for satisfying of a preceding bond of alienation of lands made to him by the L. Houburn, nor had no dependence upon the same, but which was made after the bond of alienation, and also after the back-bond whereupon the reason was libelled, and which charter had no cohesion with the same, but was made of a posterior date, and bearing to be done for causes onerous; and which the defender alleged therefore could not be affected with the condition of the said back-bond, seeing the back-bond provided, "that in case of failie therein contained, the alienation made to the defender should be null;" and so the same might affect the bond of alienation, preceding the back-bond, but could not affect nor touch this charter subsequent, done after the back-bond, which was a distinct and several perfect act, not made conform or referring to another preceding bargain, but which subsisted of itself, without respect to any other preceding writ. This charter was found to be a part of the first alienation made to Swinton, and to depend upon the preceding bond of alienation of the lands made to him by Houburn; and that the back-bond should strike against it, albeit it was after the same; because the defender could not show, nor allege any other cause or bargain, for implement whereof he had acquired the same, by and attour the first bond of alienation whereto the back-bond had relation; so that the same was reputed to depend upon that preceding bond of alienation, it being also done in August, *viz.* the said charter and bond of alienation in July, few days before; and the said charter being granted in August, was anterior to the term of Martinmas, at the which term the sum was, by the back-bond, appointed to be paid, with the provision of failie foresaid: which all discovered the charter to be a part of the preceding alienation; seeing the analyzer was obliged to give to the defender two infestments, one to be holden of himself, and another of the superior; and seeing the defender could not show that he had acquired another charter, relative to the bond, and depending thereupon. Therefore the exception thereon was repelled, and the back-bond found to affect the same. Neither was it respected, what the defender alleged, that, in the bond of alienation, the disponent's liferent was reserved; whereas, in this charter, no such reservation was contained; whereby he alleged it was manifest that it was not to be reputed a part of the first bargain. Which was also repelled.

*Act.* Aiton and Nicolson. *All.* Cunninghame. Gibson, *Clerk.* *Vid.* 20th December 1632, L. Innerweek.