

1632. July 21.

HAMILTON against _____.

IN a reduction of a consent, given by the wife to her husband's alienation of the lands wherein she was conjunct fiar, desired to be reduced *ex capite metus*, &c. ; and an exception of her voluntary consent being proponed, that she appeared before the bailies of Glasgow, and town-clerk, and before certain witnesses, and made faith that she did it voluntarily, testified by a note written by the clerk upon the back of the contract ; albeit neither that note was subscribed by the bailie nor clerk, nor an act extracted and delivered to the party thereon, nor no further extant in the clerk's books to verify it ; whereby the pursuer alleged, that it ought not to be respected ;—the Lords, *ex officio*, ordained both the parties' witnesses, *hinc inde*, to be condescended on, and the witnesses mentioned in the foresaid note to be examined ; and thereafter they would consider of the reason of *metus* and exception, and decide the cause, (for the bailie and clerk were dead,) as was decided 27th June 1632, betwixt Cassie and Fleming.

Act. Nicolson and Dunlop. *Alt.* Stuart. Scot, Clerk.

Page 648.

1632. December 1. The LAIRD of KILKERRAN against FERGUSON.

THE L. Kilkerran,—having comprised certain lands from one Ferguson, and having charged the superior to enter him therein ; and the same lands being thereafter adjudged to another creditor of this same common debtor's, who was infest by virtue of the said sentence of adjudication therein, *in anno* 1626, and, conform thereto, in possession of the lands ; but after Kilkerran's comprising, and charge given to the superior, which preceded the other party's adjudication, the said comprising being *in anno* 1625,—pursues this other creditor for repayment of the duties of the lands uplifted by the said other creditor, by virtue of his adjudication of the years 1627, 1628, 1629, and 1630. Wherein this creditor, defending himself with his adjudication, infestment, and real possession, and thereby claiming preference, seeing he alleged that Kilkerran was not infest nor seised, without which he could claim no right to the lands, especially against another creditor infest, as said is ; and that his diligence against the superior could not be equivalent to a sasine against this excipient ;—and Kilkerran claiming preference, in respect of the anteriority of his comprising and diligence : likewise, in another process of double poinding, wherein this same excipient was party, for the duty of these lands, *anno* 1631, he was decerned to be answered of that year, which must give him alike right to all years since his comprising ;—the Lords, notwithstanding of the anteriority of Kilkerran's comprising and diligence against the superior, and sentence for the year 1631 in his favours, which was given, this party being absent,—found that the excipient ought not to repay the bygone years acclaimed ; for the sentence for the year 1631 was given upon the duties of the lands then extant, neither uplifted nor consumed ; and the other years bypast, now controverted, were uplifted, and were, *bona fide*, *percepti et consumpti*, conform to a true title, and *bona fide* ; the other party hav-

ing no real right, and which could not be supplied by his diligence, albeit prior to this defender's, seeing nothing followed thereupon; and the said compriser, after he had charged the superior, did never prosecute his charge, but suffered the same to lie still and sleep, and did no more while July 1632,—at which time the superior being of new charged by him, and the superior then suspending, the suspension was discussed, and he ordained to be infest, paying to the superior the year's duty, then modified for his entry, which yet he had not paid; and so in effect it was his own fault and cessation that he was not infest, which ought not to be prejudicial to another creditor, as the excipient was to use his lawful diligence; and, having so done, and being infest and in possession, he was preferred, and assolyied from this pursuit, especially the question being for bygone years, now not extant, but consumed; the excipient having a just title *et possessionem bona fide acquisitam; et ubi præcedit titulus verus, vel etiam putativus, quamvis ex errore, si justus error sit, semper bona fides præsumitur, et possessor bona fide semper postea facit fructus suos, donec constiterit de ejus mala fide; tunc vero ab illo tempore tenetur fructus restituere, ut ait Bartol. in leg. qui, bona fide, ff. de acquirendo rerum dominio, et in l. qui scit, sect. finali, ff. de usuris; idem in l. usucapio. sect. fructus, ff. de usurp. et usucapionib. ubi dicitur bonæ fidei possessorem, non teneri restituere fructus, quamvis extantes, si per triennium possederit; mala fides autem probatur per denunciationem possessori factam: item, si fama fuerit in vicinia, eum mala fide possidere, et ipse erat vicinus; ut ait Bartol. Leg. Celsus ff. de usurpationib. et usucapionib.*

Act. M'Gill. Alt. Mowat and Neilson. Gibson, Clerk. Vid. 22d January 1633, Gordon; 14th February 1633, Charters; ult. January 1632, Ferguson.

Page 654.

1632. December 12. JOHN MARTIN against ADAM LIVINGSTON.

JOHN Martin, Englishman, having obtained decret against Adam Livingston, before the admiral, for payment of twenty-one pounds sterling, for his service in a ship called the Lyon, which was referred to his oath, and confessed to be owing, and therefore decret given against him; to which decret, John Ker, in the Cannongate, being made assignee, and suspending upon compensation of eight pounds sterling, owing by the cedent to Livingston; which being reasoned, the Lords received the compensation, *eodem modo*, against the assignee, as against the cedent: but, because the ticket subscribed by the cedent, of the sum for which compensation was craved, was dated before the sentence, and the term of payment also before the sentence, and that the decret was given against the suspender, compearing and granting the debt, being referred to his oath; at which time he neither proponed the said compensation, it being then competent, nor made no defalcation of the sum in that ticket, nor no mention thereof at that time;—therefore the Lords found, that it could not now be received against the sentence, after the same, and not being proponed before the decret.

Gibson, Clerk. Vid. 20th December 1632, Knox; and the cases there cited.

Page 659.