

1628. *March 4.* FORRESTER *against* GEORGE CLERK.

GEORGE Clerk is decerned to pay annualrent, albeit the bond bears no annualrent, because he was in use of payment thereof for the said sum six or seven years before.

Page 9.

---

1628. *February 29, and March 4.* JAMES MAXWELL *against* The LAIRD OF WESTRAW.

IN the improbation pursued by James Maxwell against the Laird of Westraw, for the lands of Glendinning,—the Lords found, That no bonds nor obligations were necessary to be produced but those whereupon inhibition or real rights proceeded.—*29th February 1628.* *Item,* Discharges of blank sums cannot be produced by a singular successor. *Item,* No apprisings can be produced, but infestments following thereupon allenarly. *Item,* No retours nor services older than the year of God 1544, at which time the registers were burnt, the parties giving their oaths that they have none in their own hands. *Item,* Retours made since 1544 should be produced, although it was alleged that they were registrate in Chancellary; for, by that argument, charters registrate in the Chancellary should not be produced.—*Ibid.* *Item,* No decreets nor contracts registrate in the books of Council should be called to be produced. *Item,* If the defender alleges, that he has an older right than the pursuer produces for his title and interest, he must first produce the said alleged elder right before his allegiance be found relevant.—*Ibid.*

*Item,* In the said action it was alleged, That James Maxwell, donatar to the forfeiture of the Lord Maxwell, could not compel the Laird of Westraw to produce his rights of the lands of Glendinning, as pertaining to the king by the forfeiture, except some right were produced where the Lord Maxwell had right to the said lands; for the Act of Parliament made *in anno 1584*, anent the five years' possession, could not compel Westraw to produce, seeing there was no declarator passed upon the Act, neither could be, till, by an inquest, it were found that the Lord Maxwell was reputed heritor of the said lands, and that he had been five years in possession before the forfeiture; for the king would be in no better condition nor the Lord Maxwell himself; and seeing the Lord Maxwell could never constrain Westraw to produce any right made by the king or the Lord Maxwell to him or his authors, without prejudice of a right to instruct his title, no more can the king, as succeeding to his place by the forfeiture. To the which it was answered, That the king and his donatar are in better cases; for the king may enjoy all benefit that may arise to him by the forfeiture, but is subject to no damage (as warrandice, and payment of the forfalter his debts,) and so may not compel the defender to produce without production of the forfealted person's right. In respect of this reply, the Lords repelled the defender's exception.—*4th March 1628.*

In the said action, it was alleged, That Westraw was not obliged to produce procuratories nor instruments of resignation, where the charters made mention of them, nor precepts of seaisine, where the instruments of seaisine contained the tenour, conform to the Act of Parliament *in anno* 1594, cap. 214. The Lords ordained the charters and seaisine to be first produced, before they would admit the allegiance founded on the said Act.—*4th March* 1628.

[See the remaining part of the report of this case, 4th March 1618, in the Dictionary, p. 6688, No. 111.]

*Page* 91—93.

1627, *December* 15; and 1628, *March* 5. ARCHIBALD DOUGLAS *against* LAUDER.

THE minister of Northberwick, being addebted to one Lauder, makes him assignee to certain victual, to be paid to him by Sir John Hoome, for his stipend of the crop 1627. The assignation is dated in March 1627, and, immediately thereafter, intimated to the said Sir John, in April 1627. The said minister borrows from another man a certain sum, upon his bond, to be paid in September following. Archibald Douglas arrested the victual in Sir John Hoome's hands in July; and, October thereafter, raises summons against the said Sir John, to hear and see the arrested goods forthcoming to him. Compears Lauder, for his interest, and alleges, That he ought to be preferred, by reason of his assignation, first intimated, before arrestment; and Douglas alleges he used great diligence, in so far as he both arrested and raised summons first. Lauder alleged that Douglas's diligence was *nimia*, because he raised before the term of payment was come. The Lords preferred the assignee.—*15th December* 1627; and, *5th March* 1628.

*Page* 13.

1628. *March* 7. WILSON *against* L. DRUMLANRICK.

AN arrestment may be used *activè*, for payment of sums contained in an heritable bond; albeit the sums of an heritable bond may not be arrested *passivè*.

*Page* 12.

1628. *March* 11. ——— *against* ———.

THE donatar to the liferent of one of the Earl of Marr's vassals of Dryburgh, pursues a declarator. It is alleged, The summons must bide continuation, because it must be proven by the Earl of Marr, his superior. It was answered, By the Earl of Marr's seaisine, produced, it was clearly proven that the Earl is