

feftment out of the warrandice lands ; which infeftment, the Lords found effectual, to burden the said warrandice land, notwithstanding of the defender's infeftment thereof, granted to him in warrandice of the principal lands difponed, ay and while he were legally diftressed in the said principal lands difponed ; and found, that the transaction, (fpecially being alleged to be verbal, and not offered to be proved to have been by writ) was not impediment to the pursuer, to bruik validly the right of the said annual-rent out of the lands foresaid, difponed in warrandice, nor yet to the excipient, to have recourse to the principal lands difponed to him, notwithstanding of the alleged transaction.

*Durie, p. 875.*

No. 34.

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1662. February 4. LORD MELVIL *against* LAIRD OF FAIRIN.

The Lord Melvil pursues the Laird of Fairin, for warrandice of a disposition of certain lands and teinds, sold to my Lord by him, with absolute warrandice, and condescends that the teinds were affected with 13 bolls by a locality to the Minister *in anno* 1641. The defender alleged absolutor, because this distress was known, or might have been known to the pursuer the time of the bargain, at least to his tutors who made the bargain. *Secondly*, there is no legal distress but voluntary payment made all the years bygone.

The Lords repelled the defence ; and found, that seeing the distress by the stipend was unquestionable ; payment made thereof without process, prejudged not, and that the pursuer's knowledge could work nothing, being then a pupil.

*Stair, v. 1. p. 91.*

No. 35.

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1662. June. PURIE *against* LORD COUPER.

By a minute of contract betwixt the Lord Couper and the Laird of Purie Fotheringame, Purie having a right of wadset, and comprising of certain lands, pertaining to the Lord Balmerinloch ; the Lord Couper taking burden upon him, disposes a parcel to Purie, and obliges himself to cause Balmerinloch dispone with him, with warrandice mentioned in the minute. Couper being charged upon the minute, suspends upon this reason, that it is imprestable by him to cause Balmerinloch subscribe, and he is content *præstare damnum et interesse*. It was answered, That it is not a fact impossible of itself ; and he being expressly bound to it, he ought precisely to fulfill it ; especially, seeing Balmerinloch being his brother's son, he ought to have considered his own difficulty in it. Likeas, Purie was content to take a right from Couper himself, of the lands, and real warrandice out of his other estate, in case of eviction by Balmerinloch.

The Lords found, that Couper should dispone, taking burden upon him for Balmerinloch, and should be obliged personally to the warrandice mentioned in the

No. 36.  
Obligation  
that a third  
party shall  
grant warran-  
dice.

**No. 36.** minute, as if Balmerinoch had disposed with him ; and assigned a time to Couper to deal with Balmerinoch for subscribing the disposition, till which time, the Lords superseded the extracting of their decret and sentence.

*Gilmour, No. 43. p. 32.*

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1662. *December* JOHN OGILVIE *against* SIR JAMES STEWART.

**No. 37.**  
Import of  
warrantice  
from fact and  
deed.

Patrick Leslie, and several cautioners, granted bond to Sir James Stewart, who assigned the same to John Denholme, who used execution, in his cedent's name, and took some of the debtors with caption, and being in the messenger's hands, this John Ogilvie assisted to the making of their escape, and thereupon being incarcerated by the Magistrates of Edinburgh, (which concurrence of their authority, by their officers, as use is, in executing captions within Edinburgh,) by agreement the said John Ogilvie paid £800 to be free, and thereupon obtained assignation from Sir James Stewart, to as much of the bond, with warrantice from Sir James' own deed, and excepting from the warrantice, an assignation formerly made by Sir James, to John Denholme. John Ogilvie having pursued one of the debtors, he was assoilzied, upon a discharge granted by Sir James Stewart and John Denholme, and them both with one consent ; whereupon John Ogilvie charged Sir James upon the clause of warrantice ; who suspended, and alleged, that the foresaid discharge was nothing contrary to his obligation of warrantice ; because, in the warrantice, John Denholme's assignation was excepted, and consequently all deeds done by John, as assignee. *Ita est*, this discharge was granted by John Denholme, and would be valid, by John Denholme's subscription ; and there was no prejudice done to this pursuer, by Sir James Stewart's subscription, seeing without it, the discharge would exclude him. The charger answered, that John Denholme subscribed but as consenter, and was not mentioned in the discharge as assignee. The suspender answered ; that the discharge being with his consent, was as effectual, as if he had been principal party, and each of them discharged with others consent.

The Lords found the reason of the suspension relevant.

*Stair, v. 1. p. 149.*

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1663. *January 21.* THE EARL OF HOME *against* THE EARL OF LOTHIAN.

**No. 38.**  
Dependence  
of a process  
against lands  
excambed, is  
a distress, so  
as to found  
action of re-  
course.

There being an excambion betwixt the Earl of Home's predecessor, and Sir John Ker of Hirsell, of the Abbacy of Jedburgh, with the lands of Hirsell ; and the said lands being distressed by a pointing of the ground pursued at the instance of ——— Ker, and Mr. John Bruce her spouse, against the Earl and his tenants ; the Earl pursues the Earl of Lothian, to hear and see it found and declared, that he may have recourse against the Lordship of Jedburgh *pro tanto*, effeiring to the distress. It was alleged, No recourse, because no distress by a sentence. It was