

imbursement of his expenses; because by his bond charged upon, he is bound and obliged to perfect the said gift on his own charges.

The Lord Craigie inclined to find, if Tarbet had uplifted the said 5000 merks, then to decern him in repayment thereof to this pursuer; but if it was yet in the debtor, *viz.* the second donatar's hands, then reserved action to the pursuer against him as accords.

*Advocates' MS. No. 202, folio 102.*

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1671. *July 5.* LAURENCE PARK *against* ELIZABETH BINNIE, Relict of MR. LAURENCE SCOT.

ONE Laurence Park, pursues Elizabeth Binnie, relict of Mr. Laurence Scot of Bavillaw, one of the clerks of Session, by way of declarator, to hear and see it found and declared that it was Mr. Laurence his mind and intention to settle the fee of a sum contained in a bond granted to him by ——— on the said pursuer as his godson. The acts out of which he elicited his intention, were these, *1mo*, That in his lifetime, before famous witnesses, he declared the right of that sum belonged to Laurence Park's father; *2do*, He ordered a writer to draw an assignation to the said bond, to be given by him to the said Laurence; which, though it was never subscribed, yet having died suddenly, it was found amongst his papers, and it was a thing he was minded to do. *3tio*, They referred it to the relict's own oath, that it consists in her knowledge, that it was her husband's firm resolution that this sum should belong to this pursuer, with sundry others.

My Lord Craigie was content to give them the Lords' answer thereupon; who, before answer, ordained all writs that might anyways clear the trust and Bavillaw's intention, especially the said unsubscribed assignation, to be produced.

*Advocates MS. No. 205, folio 102.*

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1671. *July 7.* MURDOCK *against* SIR ANDREW DICK.

SIR Andrew as administrator of the law to his son William Dick, sells a tenement of land to one Forester, and he to Murdoch. Sir A. is obliged to warrant this right at all hands, and to procure his son's ratification at his majority. Sir A. and his son altogether disagreeing, he was so far from procuring his son's consent, that his said son has intended action of reduction of this alienation made by his father in his nonage to his prejudice. Murdoch finding his right thus drawn under question, intents a summons against Sir A. for warranting him, and for obtaining his son's ratification.

Against which it was ALLEGED,—That Sir A. could never be decerned to warrant till there were a distress; but *ita est* there is no distress condescended upon, save only a naked citation given by Sir A.'s own son to this pursuer for reduction of his right; which, till decret follow thereon, can never be the ground of an action

for warrandice; because *nondum constat* whether he will evict or not, or how much, whether it will be in whole or in part; and till the *quantum* be known, there can be no warrandice decerned, because that must be proportionate to the eviction.

To the next, anent the obtaining his son's consent; that is *factum speciale et quidem alienum*, and in the condition he is now stated with his son, altogether unprestable by him; so that in law *non tam præcise tenetur* for performance; but all that can be sought of him is *damnum et interesse*, sustained by them through his not obtaining his son's ratification, which how soon as they liquidate it, he is content to pay.

This was found relevant. And because my Lord Craigie inclined to sustain this action, at least *pro declaratoria juris*, in case Mr. Dick prevailed against Murdoch in his reduction, it was urged, that such a sentence being general would be altogether useless and insignificant; and that warrandice upon eviction being *actus legitimus*, it neither admitted *diem* nor *conditionem*. And caution being craved of Sir Andrew, it was judged by some very unreasonable till the distress were manifest.

*Advocates' MS. No. 207, folio 103.*

1671. *July 8.* The COMMISSARIES of Edinburgh *against* The SHERIFF and his DEPUTES.

THE commissaries of Edinburgh, and the sheriff and his deputes falling in contest about that seat in the north side of the hall, each of them laying claim thereto as their own; and the matter being brought before the Lords by a bill given in by the commissaries; the Lords found, that before the building of the Parliament house, they had different seats, and that they so continued till both the offices came to be in person of one, viz. of Claud Hamilton, in the beginning of the English, who having done with the one Court, sat still and kept the other; and that sinsyne the sheriff deputes have used that seat through tolerance from the commissaries; and therefore find they may either take their own way for getting a new seat; or if they please they may sit down and hold their court at twelve o'clock when the commissaries are up. If there had been an active sheriff, (he being both far more honourable and far more ancient than the commissariot,) it may be thought he would not have lost the interlocutor.

*Advocates' MS. No. 208, folio 103.*

1671. *July 8.* Anent GIFTS of ESCHEAT.

A LORD of regality having gifted the escheat of one who lived within the regality, and the donatar seeking general declarator; it was ALLEGED,—The gift is null; because the person was denounced and registrate at the horn before the erection of the regality; and so that escheat belongs to the king, and not to the