

1685. *March 13.* MR. ALEXANDER FERGUSON *against* ROBERT FERGUSON.

**No. 67.**

Where eviction is imminent.

The case of Mr. Alexander Ferguson of Isle against Robert Ferguson of Hallhill, his uncle, was debated and advised : Hallhill by his bond is obliged to pay Isle the annual-rent of 2,000 merks, so long as he shall bruik the peaceable possession of these lands of Halhill ; and he being pursued therefore, alleged, The condition of the bond had failed, for John Bannatine having a prior inhibition, raised a reduction, and obtained a decret. Answered, This decret was no sufficient eviction nor distress, because it was only a decret of certification for not producing his writs, which he should not have suffered to pass ; *2do*, He had gotten a ratification from the reducer, which must accresce. Replied, A certification was all one in this case, because, though he had produced his writs, he would certainly have succumbed ; *2do*, Though the ratification bore *gratis*, yet he offered to prove it stood him 700 merks. The Lords, after a hearing in presence, found that decret of certification was no sufficient distress, but that he should have defended, seeing there might be nullities in the execution of the inhibition ; and there was probable ground to think the inhibition was paid, by his transacting with others, whose rights he had reduced.

*Fountainhall, v. 1. p. 352.*

---

1686. *January.*

MAJOR BUNTIN and DRUMMELZIER *against* MURRAY of Stanhope.

**No. 68.**

The casualty of marriage never understood to be warranted against ; and therefore a feu vassal, whose right was after the act 16th Parl. 1633, being pointed for the avail of his superior's marriage, was found entitled to no relief.

*Harcarse.*

\* \* \* This case is No. 16. p. 7763. *voce* JUS SUPERVENIENS, &c.

---

1687. *January 18.*

SMITH *against* ROSS.

**No. 69.**  
Double alienation.  
See No. 51.  
p. 16596.

David Ross of Balnagoun being pursued by Patrick Smith of Braco, on the warrantice of his father's disposition ; and the process having slept thirteen years, and a wakening being now raised, the clerk-register, to whose behoof it was, got it to be summarily called without its being seen or inrolled *in communi forma* ; whereon Balnagoun gave in a bill, representing this was contrary to the regulations, whereby the clerks are discharged to write upon any such process, &c.

The Lords allowed him only to see in the clerk's hands for 14 days, and then to be ready to debate in presence.

No. 69.

1687. *February 23.*—Lord Tarbet, clerk-register, having raised a pursuit in the name of Smith of Braco, as mentioned 18th January, 1687, against David Ross of Balnagoun, for contravention and recourse of warrantice, on double deeds, (which is *crimen stellionatus*) and for damages; and Tarbet resolving to have it advised this Session, and Balnagoun doubting the event, the Lords not having full leisure and deliberation in the end of the Session, he borrowed up the process and absconded with it; whereupon Tarbet gets William Nicol, Sir Robert Colt's man, who borrowed it up, and James M'Dougall, Sir James Dalrymple's servant, who lent it, imprisoned; and a warrant from the Lords to apprehend Mr. Charles Ross, or any they suspected, and an order to all Sheriffs and Magistrates in general, to apprehend and arrest Balnagoun for stealing up the papers; yet he detained up the process till the Session was over, and then appeared and delivered it back.

1687. *June 10.*—The Lords advised that involved case between Patrick Smith of Braco, and David Ross of Balnagoun, anent the contravention of a warrantice, mentioned *supra*, 23d February, 1687, (and in Stair's Decisions, 17th February, 1672. No. 51. p. 16596.) It being supposed to be for Tarbet's behoof, Balnagoun gave in a declinator against him, and Balcasky his son-in-law, and Collington his step-father. Tarbet denied on oath, that it was for his own behoof, but for his good-brother's, Sinclair of Maye's children, and so, though this excluded himself, yet it could not reach the other two. And being interrogated, if he was not a creditor, he confessed he was in the beginning of the process, but was now paid by the recognition of Losline. Yet Balnagoun produced a bill written and subscribed by Tarbet, in the end of the last Session, when the process was abstracted, asserting he had no other way to be paid of 25,000 merks, which some thought could not well be reconciled with his oath. But the Lords rejected the declinator; and they found the 11,000 merks was proved to have been paid to Balnagoun's father by Sinclair of Dunbaith's father, but found no annual-rent due, because the sum due was not consigned, and so no contravention; but that his damage ought to be liquidated. And it was stated, whether it should be 10,000 or 20,000 merks, and the last carried it only by Collington's vote; whereon the President told him, that he saw Balnagoun had reason to decline him; for the President did not go along with Tarbet's design in this affair; and he affirmed it was the highest damage that ever was modified in the Session for so small a sum as 11,000 merks.

The interlocutor runs thus:—The Lords found, that Balnagoun having disposed the reversion of Sir John Sinclair's wadset of Easter Barachies and Cadbol to Dunbaith, and thereafter to Mr. Thomas M'Kenzie, the same was in the case of double alienations and a contravention, and did furnish to the pursuer recourse of warrantice; and found it nowise competent to Balnagoun to allege that Dunbaith had the most preferable right, both rights being valid against the granter: And

No. 69. find the offer made by Balnagoun to purge Mr. Thomas M'Kenzie's right could not exonerate him, in respect of the incumbrances upon Balnagoun's authors, from whom he had acquired Mr. Thomas's right; and the Lords liquidated the damage in this manner, viz. They find it sufficiently instructed, that Dunbaith had paid 11,000 merks to Andrew Ross, Provost of Tain, conform to Balnagoun's father's precept and his discharge, but do not find the instrument of consignation, (although sufficient *quoad* the solemnity of the order) sufficient to prove that the money did remain consigned, so as to make Balnagoun liable for the annual-rent thereof; as likewise, do not find that the disposition of the reversion to Dunbaith, and the re-delivery of Dunbaith's back-bond which he had given to Balnagoun, with a discharge thereof by Balnagoun, sufficient to instruct that Dunbaith had paid 14,000 merks farther as the full price of the reversion: But, in respect of the great trouble and expense Dunbaith had been put to in this long dependence, and in several other processes occasioned by the said double alienations, the Lords do modify as for damage and prejudice, and for lying out of the 11,000 merks he had advanced and paid, the sum of 20,000 merks, and so liquidated the whole eviction to 31,000 merks, and assoilzied *pro reliquo*.

Tarbet grudged extremely that they had only given him 31,000 merks, for he expected much more; so he gave in a bill, craving to be heard why the 14,000 merks was not due, and the annual-rents also: But the contradiction of his oath being insinuated to him, he inclined to hear of terms of accommodation. See No. 73. *infra*.

*Fountainhall, v. 1. pp. 441, 449, and 455.*

---

1687. February. EARL OF MARSHALL *against* SCOT of Lethem.

No. 70. Lethem being pursued on a contravention of a clause of warrantice, contained in a contract of alienation, he offered to reponer the pursuer in his own place, and refund expenses.

Answered for the pursuer: That *res* was not *integra*, he having in contemplation of that bought in another prior right.

The Lords sustained the defence of reponing, &c.

*Harcarse, No. 1018. p. 289.*

\* \* \* The like defence was sustained for Sir John Sinclair against Lord Southesk, June, 1687. *Ibidem*.

---

1687. February. AGNEW *against* AGNEW.

No. 71.

A wadsetter of ward-lands having deceased, and his son having got the gift of ward, the donatar in the redemption contended, That the duties during the ward might not be imputed to the rents of the wadset.