

he cannot be decerned in warrandice, because the half of the bark was not evicted for want of a good security ; but by the iniquity of the Judge. The Lords ordained William Buchan to warrant the pursuer, and suspended the execution till a certain day, that the defender might reduce the Admiral's decret, if he could.

Auchinleck MS. p. 250.

No. 23.

1629. June 19. LA. PITFERRAN *against* Her SON.

In a contract of marriage, the L. of Pitferran being obliged to infest the Lady, then his future spouse, in the land therein contained ; and at the time of the said contract, some of the lands are standing under long tacks for many years, for small duties, which were set by her husband's father long before the said contract of marriage ; after the death of her husband, and after she had remained many years in possession of the said tack-duty, she charges her son as heir to her husband contracter, upon that clause obligatory foresaid, anent the giving of a valiable infestment to her, to warrant the said infestment from the said tacks, seeing the same were an impediment to the avail and efficacy thereof. The Lords found, that the heir was not obliged to warrant from that tack, it being set before the infestment, and the party not being obliged to warrant the lands from the same *specific* ; for the clause of giving a valiable infestment was found might subsist with the preceding tack, especially the Lady receiving the duty many years after the husband's decease, and she being otherwise well provided of a conjunct-fee.

Act. Nicolson.

Alt. *Advocatus et Lermonth.*

Clerk, Hay.

Durie, p. 447.

No. 24.
Warrandice
against tacks.

1629. and 1630. July 9. HAY *against* LAIRD of PHILORTH.

Hay of Crimonmogat pursues the Laird of Philorth, as heir to his father, to ratify and warrant the alienation of the lands of ———, made to the said pursuer by his umquhile father, and from his own fact and deed, and from the deed of his heirs. Young Philorth. alleged, he would warrant the said bond from any deed done by him since he was heir, or since the contract of alienation made of the said land to the pursuer ; but true it is, that the said young Laird, long before the contract, had disponed such right as he had of the said land in favours of another person, and was not able to warrant that deed done by him so long before his father's obligation, whereby he obliged him and his heirs before he became heir. The Lords repelled the allegeance, and ordained him as heir to warrant the said land from any deed done by him *quovis tempore*, for he had it in his choice to be heir to his father or renounce.

Auchinleck MS. p. 251.

No. 25.
Warrandice
from fact
and deed.

* * Durie reports this case :

No. 25.

The deceased old L. of Philorth having disposed certain lands to Hay of Crimonmogat, and in the contract of alienation, having expressly obliged him and his heirs, that he nor they hath done, nor should do no deed prejudicial to that heritable and irredeemable alienation ; his eldest son the time of that contract not being contracter, and having disposed a right, which he had in his own person, to these lands, to a third person, divers years before that contract ; by the which right the alienation made to Hay, as said is, by the father, was not valiable ; and the said son being served heir to his father, and the contract transferred in him as heir, and he charged to infest him, and to warrant the lands from that deed, done by himself before the said contract, in respect of the said clause, whereby his father obliged him and his heirs, that they had done no deed prejudicial thereto, which the charger alleged he ought to fulfil, seeing he was obliged thereto, by entering heir to his father sensyne ; the Lords found, that the foresaid clause of the said contract, whereby the father obliged him and his heirs, to infest the charger in the said lands, and to warrant the same from all bygone deeds done by them, was effectual to cause the said suspender, in whom the contract was transferred, as heir to him, to give to the charger an infestment of the said lands, and that the contract was not satisfied by the infestment given by the father, which infestment was not valid, in respect of the deed foresaid, done by the son before the contract : From the which deed the Lords found, that this suspender was obliged to warrant the father's alienation, he being now heir, albeit he was neither then contracter, nor could not be then heir to his father, who was living ; but he being now heir, it was found, that that clause, whereby the father obliged him and his heirs, that they had done no deed prejudicial, bound the son who was heir since, to warrant from that deed done before the contract, when he was not heir ; albeit that was no deed done by the son, but a right made to him of before.

The same decision was done again betwixt the same parties 22d July 1631, the same cause being then called.

Act. *Advocatus et Nicolson.*

Alt. *Mowat.*

Clerk, *Gibson.*

Durie, p. 529.

No. 26.

1629. July 14. LAIRD WARDHOUSE *against* The LAIRD BALONY.

In an action of warrandice *ex capite excambii*, the Lords found the summons relevant against the singular successor who was infest ———, by the King, and that in excambion of the lands now craved by way of warrandice.

Kerse MS. f. 200.