

It was ALLEGED for the said Agnes, That she having a decret of preference standing, whereof there was never any reduction intented, it ought to maintain her possession, aye and while it [was not] reduced; conform to the 3d Act, 9th Parliament, K. Ja. VI. To this it was ANSWERED for Watson, That, by the said Act of Parliament, decreets of double poinding being only for any thing that was then shown, and against parties not compearing, it was declared that they might be heard *in secunda instantia*; so that, there being a new suspension raised in name of the tenants, there was no necessity of a reduction, seeing both parties might here dispute their rights.

The Lords, having considered the Act of Parliament, and that the said Agnes, the liferenter, would be cut off of the annualrent, since the date of the suspension, by an expired comprising; and that the suspension was only raised in name of the tenants; whereas the Act of Parliament ordains the party, against whom the decret of preference was gotten, that he should be pursuer *in secunda instantia*: Therefore they found the letters orderly proceeded, reserving Watson's reduction as accords; and declared, they would do so in the like case thereafter.

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1670. February 1. CAPTAIN ROSS *against* MARION WILLIAMSON.

IN an action of warrandice, pursued at Ross's instance, who was assignee, made by the said Marion, to a bond of Colonel Home's; wherein she was obliged to warrant the assignation to be good, valid, and sufficient, at all hands, and against all deadly: whereupon he [maintained] that he had done utmost diligence against the Colonel, but could not recover payment; and therefore craved, that the said Marion might refund the sums given her for the assignation: It was ALLEGED, That, by the common law, it was clear that such clauses of warrandice did only import that the debt assigned was a true debt, and the assignation gave a full right thereto; but did not extend to the sufficiency of the debtor.

The Lords, finding that these clauses were generally understood otherwise by our law, did ordain the cause to be heard *in præsentia*.

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1670. February 3. GARDINER *against* CHRISTIE.

IN a spuilvie, pursued at Christie's instance, as assignee, by one MacAndrew, who was tenant to Gardiner, whereupon he had recovered decret; there was a suspension and reduction raised upon this reason,—That the ground of the decret was, that the discharge granted to Gardiner was posterior to the assignation made to Christie, the pursuer; and seeing the discharge was relative to a disposition, prior to Christie's assignation, which was not proponed: And that

Gardener's advocates, who are made compearing in the decreet, have deponed upon oath, that they had proponed their allegiance only upon the discharge, but not upon the disposition that was relative thereto; and that they were never called the time of the advising of the cause:

The Lords did repone Gardiner against the decreet of spuilie, and ordained it to be turned into a libel; that both parties might be heard to allege, as if they were *in prima instantia*; and that, notwithstanding the decreet was extracted, as being *in foro contradictorio*: because they found, that it was done by the error or negligence of the clerk.

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1670. *February 4.* GEORGE DRUMMOND, Bailie in Edinburgh, *against* JOHN HALL, Bailie there.

IN a suspension of double poinding, raised at the instance of Alexander Arnot, who was debtor to Robert Walker in Queensbridge; which Robert, was common debtor to the said Drummond, and Hall, who were contending for preference:—It was ALLEGED for Bailie Drummond, That he ought to be preferred; because Walker having made an assignation, to one Stothart, of Arnot's bond, which was intimated before any arrestment made by Bailie Hall, he did write a missive letter to Stothart to transfer his right to Bailie Drummond; whereupon he arrested in Stothart's hands all writs and papers, before the arrestment used by Hall against Arnot; and thereupon did obtain a translation dated that same day that the Bailie did arrest. It was ANSWERED for Bailie Hall, That he ought to be preferred notwithstanding; because it is clear, by Stothart's translation, that his name was only borrowed to the behoof of Walker, the common debtor; and any intimation he had made of the assignation was only to Walker's behoof, who, being the common debtor, could not debate with him: And, for his arrestment upon the missive letter, it was only an execution by a town-officer in Edinburgh, upon a verbal order, which could not be respected; it being neither upon a decreet nor any dependence of a process, without which no letters can be directed by the Lords of Session, or any other judge.

The Lords, before answer, did ordain the custom of burghs to be proven in such cases; finding it of a general concernment that the Bailies should give warrant to arrest, where the ground was for no civil debt: and reserved likewise to give answer to the first part of the allegiance; which they inclined not to sustain *per se*.

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1670. *February 10.* GEORGE HAY of BALHOUSE *against* BANE of DELNY.

IN an action pursued at Balhouse's instance, as heir to his father, for payment of the sum of £1730, as part of £2501, against Bane of Delny, as heir to his fa-