

far as the committee consisted of eight persons, and it is only subscribed by four of them ; for, though the committee first named was only seven, yet, at the next diet of Privy Council, my Lord Forbes was superadded and adjoined ; and this made them eight. Likeas, it was *ultra vires compromissi*, there being nothing tabled before the Council but the riots, and not the purchasing her jointure ; which he has neither inclination to, nor benefit by it, but is merely *in damno vitando*.

ANSWERED,---That first draught, which Balschiry calls a decret, was nothing but a rude scroll or minute to be shown to the parties, that, after adjustment, it might be extended *in mundo* ; and therefore it is not subscribed by the whole committee as arbitrators, but only by the Earl of Buchan, as their preses at the time, which shows it was never designed for a final decret. And, though no more but the riots were at first before the Council, yet, to make a full understanding betwixt the parties, all their differences were submitted ; which may very well comprehend the jointure : and, though my Lord Forbes was added to the committee, yet the first nomination was only of seven, and the submission was made to them before his assumption ; and so four, subscribing the decret, make the major part of the whole. And, for the right, she and her husband have possessed these lands these twenty years, and none has ever appeared to quarrel their right ; so the warrandice is in no hazard.

The Lords found, that my Lord Buchan's subscribing the decret, as preses, was not sufficient, unless all the rest of the arbiters had subscribed it as well as he ; and so annulled the first decret as illegal. And, as to the nullity objected against the second, found it wholly depended on this single point of fact,—If my Lord Forbes was named and adjoined before the parties submitted : for then it is certainly null, as not signed by the plurality of the arbitrators ; but, if he was added after the submission was entered into, the decret was good, as signed by the major part ; and ordained that matter of fact to be tried.

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1708. July 16. THOMSON *against* WILLIAMSON of CARDRONA.

THOMAS Williamson in Peebles disposes a tenement lying there to one Thomson, bearing love and favour ; but afterwards he makes another disposition of it, for onerous causes, to Williamson of Cardrona ; and, in regard he was only apparent heir, he gives a procuratory to serve him, which the first disposition wanted ; and on this Cardrona entered to the possession ; and the house being burnt down, he rebuilt it. Thomson, resolving to perfect his right, applies to John Frier, one of the bailies, to cognosce his author heir, and then to infest them both ; which he refusing, as seeing no warrant, Thomson protests against him, and that his offer may be equivalent to an infestment. Some time thereafter, Cardrona produces to the same bailie his disposition, containing not only a procuratory of resignation, but also to serve his author heir ; which the bailie obeys, and infests him. Upon this follow mutual reductions of one another's rights ; and Thomson claims preference to Cardrona, though first infest, because he had done all that law required of him, viz. to instrument the bailie on his refusal, for his partial gratification, in preferring one before another.

ANSWERED,—*1mo*, Your right is gratuitous ; mine is onerous. *2do*, Was not obliged to infest you ; because you wanted a necessary mid couple, viz. a procuratory to serve your author. *3tio*, If one bailie refused you, you might have applied to another ; and though, in Exchequer, the presenting the first signature prefers to a posterior one first past, yet that is not the case here ; for the bailie could not cognosce a man without a warrant from him.

REPLIED,—My disposition bore a sufficient warrant to serve him, by that general clause—“to do all that was necessary in the premises for perfecting my right.” Likeas, I had the writs and evidents of the lands to instruct the progress, and showed them to the bailie.

The Lords neither went on the latency of Thomson’s disposition being kept up for many years, nor on its being gratuitous : for, if he had got the first infestment, he would have been clearly preferable. But the Lords fixed on this point, That his disposition was defective, wanting a procuratory to serve, which Cardrona’s had ; and therefore preferred him : otherwise, the requiring the bailie would have been equivalent to any infestment, had it not been for want of that step in the progress.

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1708. *July 20.* JANET BUCHANAN, Lady Leny, *against* The DUKE of MONTROSE.

JANET Buchanan, Lady Leny, as apparent heir to the Laird of Buchanan, and also a creditor in £1000 sterling, pursued a reduction and improbation of all rights the Duke of Montrose has upon that estate, and craving certification against the grounds and warrants of his apprisings and adjudications.

It was ALLEGED for the Duke,—These being led more than twenty years ago, he was not obliged to produce the letters and executions of apprising *post tanti temporis intervallum* ; but the decret of apprising itself was now sufficient to satisfy the production by the constant form and practice of the house, which did not oblige the lieges to keep such small papers after so long a time, and presumed all to have been *solemniter acta*.

ANSWERED,—It is true this presumption doth liberate the defender from producing them, when they are not extant ; but I offer to prove, by the Duke’s oath, that he has them ; and, in this case, *præsumptio cedit veritati* : and this was so found, within these few years, betwixt *Beatson of Kilry* and *Polguild*, that, after twenty years, they were bound to depone whether they had them in their hands or not.

REPLIED,—It is now become a fixed custom, that the grounds and warrants, except it be the instructions of the debt, are not to be produced after twenty years ; as was decided, *11th February 1681, Kenway against Craefurd* ; after which time *omnia præsumuntur solemniter gesta*. And it were against common sense, that he who keeps his writs carefully should be in a worse condition than such who lose them : the careless keeper is free, and he who preserves them must exhibit upon oath, and run the risk of all the nullities, informalities, and defects they contain ; which opens a door to many pleas, and overturns many peaceable possessions and securities upon niceties of executions, escaping very prudent men’s observations.