

1604. *January 27.* BRUCE *against* LAIRD of PITTENCRIEFF.

George Bruce having bought certain lands from the Laird of Pittencrieff, and being infeft in warrandice thereof in the lands of Pittencrieff, the principal lands being evicted, George Bruce pursued Pittencrieff and his tenants to remove from the lands of Pittencrieff. It was alleged by the defenders, that the pursuer being infeft in the lands libelled only in warrandice of the principal lands, he could never have action of remeid therefore, unless the principal had been evicted, and that he had obtained a declarator thereupon decerning him in respect thereof to have recourse to the principal; 2dly, The warrandice could not exceed the avail of the principal, and it is of verity, that the principal lands were only worth five chalders of victual, and the lands of Pittencrieff were worth twelve chalders; and therefore in case it were found that the principal were evicted, yet the pursuer could have no farther warrandice but according to the avail of the lands evicted. It was answered, That the eviction of the principal lands was sufficiently known by a pursuit moved by Weims sister to the Laird of Pittencrieff, who, upon an obligation made to her by her said brother of 2,000 merks, having ser ved inhibition before the said George Bruce's infeftment, pursued him for reduction thereof; and after litiscontestation made, and probation renounced to stay the decret, he was forced to pay to her the said sum, and so the lands were to be repute evicted. Likeas, he was decerned to pay to the Guidman of Tibbermure, certain annual-rents out of the said lands, conform to an anterior infeftment he had thereof before the said George's infeftment; and last Pittencrieff had set a part of the land to George for chalders victual which he had set in tack before for £17, whereof there were many years to run. The Lords repelled the exceptions, in respect of the reply and process at the pursuer's instance, ay and while the defender relieved the said George Bruce from distresses qualified in the principal.

Haddington MS. v. 1. No. 688.

1610. *February 1.* OTTERBURN *against* MOUBRAY.

Mr. Walter Moubray having sold to umquhile Alexander Otterburn the lands of Whitelaw, and in warrandice thereof having infeft him in a tenement in Edinburgh, the principal lands being evicted by recognition; Thomas Maxwell, as assignee constituted by the relict and heirs of the said umquhile Alexander Otterburn, pursued the possessors of the said tenement to pay him the mails and duties of the same, as heritor thereof, in respect of the eviction of the principal. It was excepted, that the pursuer could have no right to the mails and duties of the tenement disposed to him in warrandice, because if any eviction was of the principal, it was in default of the said umquhile Alexander Otterburn, because the sasine taken by himself before he had obtained the King's confirmation, was the cause

No. 4.

When the principal lands are evicted, the purchaser has right to possession of the full rents of the warrandice lands until he be completely reimbursed.

No. 5.

Eviction happening by neglect of the purchaser.

- No. 5. of the recognition, and so the annailzier was not obliged to warrant the buyer from the inconveniencies proceeding of the buyer's own fact and fault. It was answered, the annailzier knowing his lands to be ward, and binding himself duly and sufficiently to infest the buyer, he should have given him a charter, and purchased him infest by the superior before any sasine taken. The Lords considering the contract of alienation, whereby Moubray was obliged to infest Alexander Otterburn in Whitelaw, as freely as he held the same, either by charter and sasine following thereupon, or upon resignation, that the buyer was obliged to purchase the superior's consent, and because he took sasine before he got the superior's consent, the failzie proceeded upon his own default; and therefore they found the exception relevant to elide the warrandice.

Haddington MS. v. 2. No. 1770.

1610. *July 14.*

PORTERFIELD *against* KER.

No. 6.

Warrandice
from fact and
deed.

In an action pursued by William Porterfield of that ilk, as son and heir to Mr. John Porterfield of that ilk, against Daniel Ker of Kirkland, as son and heir to Thomas Crawford of Jordanhill, and Janet Ker his spouse, the Lords granted action for the bygone farms of the lands and Mains of Inchmain, which were set in tack by the said Thomas, and the said umquhile Mr. John, *in anno 1571*, for payment of £80, and that for 19 years, and that notwithstanding the said Mr. John never required entry at any time during the said space of 19 years; but that the said Thomas had *bona fides* to uplift the same in respect of a clause irritant contained in the tack, whereby it is provided, that if he failzie in payment of the duty, the tack should be null; which allegiance was repelled, in respect of the tack, which had a special time of entry therein contained; and that the setter had granted a receipt of the first year's duty in fore-mail, and had uplifted the mails and duties, in doing whereof he did against his own deed, and so was *in mala fide*. In the same cause the Lords would not grant to the pursuer other 19 years, because the hail 19 years were expired, and therefore they assoilzied from that part of the summons whereby he craved to be entered to the lands.

Kerse MS. f. 200.

1612. *February 4.*

LORD SANQUHAR *against* CRICHTON.

No. 7.

In an action of warrandice pursued by the Lord Sanquhar against William Crichton of Ryhill, the Lords assoilzied Ryhill, because, by the contract he was only obliged to transfer all tacks and rights which he had of the patronage of Sanquhar, without any clause of warrandice; and albeit it was answered, that the contract was mutual, and contained onerous causes, and that since the contract