

No. 36. minute, as if Balmerinoch had disposed with him ; and assigned a time to Couper to deal with Balmerinoch for subscribing the disposition, till which time, the Lords superseded the extracting of their decret and sentence.

Gilmour, No. 43. p. 32.

1662. *December* JOHN OGILVIE *against* SIR JAMES STEWART.

No. 37.
Import of
warrantice
from fact and
deed.

Patrick Leslie, and several cautioners, granted bond to Sir James Stewart, who assigned the same to John Denholme, who used execution, in his cedent's name, and took some of the debtors with caption, and being in the messenger's hands, this John Ogilvie assisted to the making of their escape, and thereupon being incarcerated by the Magistrates of Edinburgh, (which concurrence of their authority, by their officers, as use is, in executing captions within Edinburgh,) by agreement the said John Ogilvie paid £800 to be free, and thereupon obtained assignation from Sir James Stewart, to as much of the bond, with warrantice from Sir James' own deed, and excepting from the warrantice, an assignation formerly made by Sir James, to John Denholme. John Ogilvie having pursued one of the debtors, he was assoilzied, upon a discharge granted by Sir James Stewart and John Denholme, and them both with one consent ; whereupon John Ogilvie charged Sir James upon the clause of warrantice ; who suspended, and alleged, that the foresaid discharge was nothing contrary to his obligation of warrantice ; because, in the warrantice, John Denholme's assignation was excepted, and consequently all deeds done by John, as assignee. *Ita est*, this discharge was granted by John Denholme, and would be valid, by John Denholme's subscription ; and there was no prejudice done to this pursuer, by Sir James Stewart's subscription, seeing without it, the discharge would exclude him. The charger answered, that John Denholme subscribed but as consenter, and was not mentioned in the discharge as assignee. The suspender answered ; that the discharge being with his consent, was as effectual, as if he had been principal party, and each of them discharged with others consent.

The Lords found the reason of the suspension relevant.

Stair, v. 1. p. 149.

1663. *January 21.* THE EARL OF HOME *against* THE EARL OF LOTHIAN.

No. 38.
Dependence
of a process
against lands
excambed, is
a distress, so
as to found
action of re-
course.

There being an excambion betwixt the Earl of Home's predecessor, and Sir John Ker of Hirsell, of the Abbacy of Jedburgh, with the lands of Hirsell ; and the said lands being distressed by a pointing of the ground pursued at the instance of ——— Ker, and Mr. John Bruce her spouse, against the Earl and his tenants ; the Earl pursues the Earl of Lothian, to hear and see it found and declared, that he may have recourse against the Lordship of Jedburgh *pro tanto*, effeiring to the distress. It was alleged, No recourse, because no distress by a sentence. It was