

1637. July 7. LA. BALBEGNO *against* L. BALBEGNO.

No. 33.

Where eviction happens by a super-venient law.

The La. Balbegno pursuing after her husband's decease, the heir of Balbegno, to warrant the lands of her conjunct-fee, from all annuities, teinds, and feu-duties, whereto her husband had obliged himself and his heirs to her in contract of marriage, and whereby she might bruik the conjunct-fee-lands provided to her, viz. the mains of Balbegno, and that the same might be made free and sure to her, worth 12 chalder of victual, conform to her contract of marriage; and in particular, she pursuing for relieving her of the annuity, imposed by the commission of teinds, and of the duty appointed to be paid for her lands, to the reader of the kirk, and whereby she might bruik the lands free without these burthens, as said is;—and the defender alleging, that the burthen of the annuity being laid on by virtue of an law, he ought not to relieve her thereof; and the reader's burthen should be born by the Lady conjunct fiar, who bruiked the benefit of the lands, during her lifetime;—the Lords in respect of the words of the contract, found, that the heir should relieve the conjunct-fiar both of the annuity and of the stent for the reader, which they found that the Lady ought not to pay, but the heritor, seeing she consented not thereto, in respect of the clause foresaid of the contract, whereby her umquhile husband had bound himself and his heirs, to relieve the Lady of the annuity, and teind-duties, and that the lands should be worth 12 chal- ders of free victual; and that the Lady libelled, and replied that the lands were not worth that duty, beside these burthens.

Act. *Nicolson, junior.*

Alt. *Fletcher.*

Clerk, *Gibson.*

Durie, p. 849.

1639. February 19. FLEMING *against* ROBERTSON.

No. 34.

May warran- dice lands be burdened to the preju- dice of the warrandice?

Umquhile Robert Robertson infests John M'Duff in an annual-rent of £80, to be uplifted out of his lands of Belligallan, whereto Fleming is constituted assignee by M'Duff, who both desire the ground of the saids land to be poided there- fore. And another Robertson compearing, and alleging, that he was infest in the lands of Leadgreen as principal, and these lands libelled in special warrandice there- of, and that long before the pursuer's right, and from the same author; likewise after the said infestment, their said common author and this defender, before the pursuer's right, transacted also together, that the disponent should retain the princi- pal lands, and the defender, the warrandice lands, and either of them should rest satisfied therewith; conform whereto the defender has ever bruiked the warrandice lands these 14 or 15 years bypast, and the author the principal, and so the pursuer cannot seek poiding of these lands libelled; the Lords repelled this alleagance; for they found, that the defender's infestment of the land in warrandice, could be no impediment to the common author to give, nor to the pursuer to receive an in-

feftment out of the warrandice lands ; which infeftment, the Lords found effectual, to burden the said warrandice land, notwithstanding of the defender's infeftment thereof, granted to him in warrandice of the principal lands difponed, ay and while he were legally diftressed in the said principal lands difponed ; and found, that the transaction, (fpecially being alleged to be verbal, and not offered to be proved to have been by writ) was not impediment to the pursuer, to bruik validly the right of the said annual-rent out of the lands foresaid, difponed in warrandice, nor yet to the excipient, to have recourse to the principal lands difponed to him, notwithstanding of the alleged transaction.

Durie, p. 875.

No. 34.

1662. February 4. LORD MELVIL *against* LAIRD OF FAIRIN.

The Lord Melvil pursues the Laird of Fairin, for warrandice of a difpofition of certain lands and teinds, sold to my Lord by him, with absolute warrandice, and condescends that the teinds were affected with 13 bolls by a locality to the Minister *in anno* 1641. The defender alleged absolutor, because this diftress was known, or might have been known to the pursuer the time of the bargain, at least to his tutors who made the bargain. *Secondly*, there is no legal diftress but voluntary payment made all the years bygone.

The Lords repelled the defence ; and found, that seeing the diftress by the stipend was unquestionable ; payment made thereof without process, prejudged not, and that the pursuer's knowledge could work nothing, being then a pupil.

Stair, v. 1. p. 91.

No. 35.

1662. June. PURIE *against* LORD COUPER.

By a minute of contract betwixt the Lord Couper and the Laird of Purie Fotheringame, Purie having a right of wadset, and comprising of certain lands, pertaining to the Lord Balmerinoch ; the Lord Couper taking burden upon him, difpones a parcel to Purie, and obliges himself to cause Balmerinoch difpone with him, with warrandice mentioned in the minute. Couper being charged upon the minute, suspends upon this reason, that it is imprestable by him to cause Balmerinoch subscribe, and he is content *præstare damnum et interesse*. It was answered, That it is not a fact impossible of itself ; and he being expressly bound to it, he ought precisely to fulfill it ; especially, seeing Balmerinoch being his brother's son, he ought to have considered his own difficulty in it. Likeas, Purie was content to take a right from Couper himself, of the lands, and real warrandice out of his other estate, in case of eviction by Balmerinoch.

The Lords found, that Couper should difpone, taking burden upon him for Balmerinoch, and should be obliged personally to the warrandice mentioned in the

No. 36.
Obligation that a third party shall grant warrandice.