

present case, express warrandice from augmentations was not given, and the price paid by the purchaser was not mentioned; but there is every reason to suppose, that the same price was paid for the teinds as for the stock, which would of itself infer warrandice from augmentations; and it is quite clear, from the exception of the stipend then paid to the Minister, that future augmentations were meant to be included in the clause of warrandice.

If the parties had held stipend to be an inherent burden on teinds, to which a general clause of warrandice did not apply, such exception would have been unnecessary; and except as to the present stipend, the teinds were disposed, with absolute warrandice.

Where augmentations are imposed on teinds held in temporary lease, a prorogation of the lease is given to indemnify the tenant; but the pursuer cannot be indemnified in this way, as the Earl was previously bound at all times to grant leases of the teinds, for payment of a penny Scots.

The understanding at that period, that a general clause of warrandice included augmentations of stipend, is evident from the disposition of the Earl of Tweeddale to the Duke of Queensberry, in which it was thought necessary to except future augmentations, from a general clause warranting from all evictions.

In dispositions of church-lands with absolute warrandice, a claim lies on the disponent, when a glebe is afterwards designed from them, though the burden of glebe be not more inherent on church-lands than stipend is on teinds; July 1663, Elphinstone against Lord Blantyre, No. 39. p. 16585.; 15th July, 1667, Watson against Law, No. 44. p. 16588.; 20th February, 1683, Bonner against Lyon, No. 64. p. 16606.

The Court, upon the general ground, that it requires express warrandice from augmentations, to give a claim of relief, refused the petition, without answers.

Lord Ordinary, *Balmuto.*

For the Petitioner, *Montgomery.*

Clerk, *Gordon.*

D. D.

Fac. Coll. No. 162. p. 363.

1800. *July 9.*

The TRUSTEES of MRS. CALDERWOOD DURHAM, *against* ROBERT GRAHAM
and Others.

Lord Torphichen, in the year 1689, sold the lands of Polbeth to Thomas Flint. In security of the purchase, his Lordship gave real warrandice over the lands of Camelty and others retained by him.

The lands of Polbeth have ever since been possessed, without objection, by Flint's heirs, on regular feudal titles.

In the mean time, the warrandice lands had been twice sold, under burden of the infeftments in security, with personal warrandice from the disponent.

No. 96.
Certain lands were sold with real warrandice over other lands retained by the disponent. The lands sold.

No. 96. were possessed without objection, upon regular feudal titles for above a century, during which infestment in security had regularly been taken on the warrantice lands. In the mean time, the latter had been twice sold with personal warrantice, and having been now sold a third time, as free from encumbrances, the purchaser refused to pay the price, till the infestment in warrantice was discharged; but the Court repelled the objection.

In the year 1796, they were, for the third time, sold by Mrs. Calderwood Durham, to whom they now belonged, to Robert Graham, by a minute of sale, which specified certain incumbrances affecting the lands, (without mentioning the infestments in security,) and bore, that there were no other on them.

Mr. Graham having discovered these infestments, refused, on Mrs. Durham's death, to pay the price to her trustees till they were cleared off, and on that ground suspended a charge for payment. He likewise brought an action against the trustees, concluding, either that they should disencumber the lands, or the bargain should be declared null, and the trustees liable in damages.

The trustees brought an action against the present Lord Torphichen, founded on the personal warrantice in the disposition of Camelty, &c. by his predecessor, concluding, that he should either disencumber the lands of the infestment in favour of Polbeth, or relieve them of the objection made by Mr. Graham.

They likewise brought an action against William Flint of Polbeth, concluding, that as his right to these lands was now completely secured by prescription, he should be ordained to renounce his infestment over Camelty, &c. as no longer of any use to him.

The Lord Ordinary reported the whole on memorials.

Graham contended, That having purchased the lands as free from any encumbrance, except those specified in the minute, among which the infestments in real warrantice were not enumerated, he was entitled to have them taken off; because, although the right to Polbeth was apparently secured by prescription, the effect of it might be prevented by minorities or otherwise, and he was obliged to submit to no risk whatever.

The trustees argued alternatively, that, as Polbeth had been so long possessed upon regular feudal titles without objection, the infestment in warrantice was now merely nominal, and could not possibly become a ground of eviction from Mr. Graham, and therefore afforded no reason for his withholding the price; or if the Court thought that Mr. Graham was entitled to have it discharged, either Mr. Flint should be ordained to relinquish it, or Lord Torphichen obliged to indemnify the trustees, upon the personal warrantice in his predecessor's disposition of Camelty, &c.

Flint maintained, that he could not be bound to relinquish his infestment, without receiving an equivalent in other lands; and that, if his security was, as supposed, useless to him, it could be of no prejudice to any other person.

Lord Torphichen admitted, that in case of eviction, of which he alleged there was no danger, he was bound to warrant the right to Camelty, &c. but he added, that it was not in his power, and he was under no obligation to disencumber the lands from the infestment in security, the disponee, from his predecessor, having accepted of personal warrantice against it.

The Court thought Mr. Graham, in the circumstances of the case, too scrupulous, and therefore conjoined the different processes, found the letters orderly proceeded in the suspension, assoilzied the defenders in the other actions, and found

the pursuer (Mr. Graham) liable in expenses. A reclaiming petition for Mr. Graham was, (18th November, 1800), refused without answers. No. 96.

Lord Reporter, *Methven*.
For Mr. Graham, *Ja. Graham*.
For Mr. Flint, *Gillies*.

For the Trustees, *H. Erskine*.
For Lord Torphichen, *Hope*.
Clerk, *Home*.

D. D.

Fac. Coll. No. 191. p. 438.

1803. *June 8.*

The KING'S COLLEGE OF ABERDEEN *against* The EARL OF KINTORE.

No. 97.

Absolute warrandice being granted by the titular to an heritor in a tack of his feinds, the titular, in the case of an augmentation, is not bound by the terms of the tack, so far as the teinds are evicted by the Minister, but is relieved from the consequences of such eviction.

Fac. Coll.

* * This case is No. 96. p. 15712. *voce* TEINDS.

1806. *May 23.*

CLARKE *against* BRUCE.

No. 98.

The estate of Kinross came by succession to James Bruce Carstairs, as heir of entail, under the burden of entailer's debts to a great amount. He obtained, by an act of Parliament, authority to sell the estate, and, after payment of the debts, to vest the balance of the price in the purchase of lands, to be settled under the same provisions and destinations as the estate of Kinross. The estate was sold, and the lands of Tillicoultry were purchased accordingly. The conveyance was made exactly conformable to the entail.

A tailzie being defective in the clauses against selling, the consequences of this in a question with a creditor.

Dr. Charles Marshall Clarke, physician in Louth, acquired right to a bond for £1,111 due by the trustees of Mr. Bruce Carstairs, and not being able to obtain payment, in the year 1783 he obtained from him a disposition of such a part of the estate of Tillicoultry, as corresponded to his debt, at the rate of thirty years purchase. No infestment was taken on this disposition. Mr. Bruce Carstairs died the following year, and his son took possession of the whole estate.

By the prohibitory clause of the entail, the heirs were debarred from selling the estate, contracting debt, or doing any deed by which the estate might be evicted or adjudged. But, in the irritant and resolute clauses of the entail, the word "sell" was omitted, while all the other prohibitions were specially enumerated.

In consequence of this omission, James Bruce of Tillicoultry, the son and heir of Mr. Bruce Carstairs, sold a part of the estate to Mr. Tait of Hervieston. This