

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

No. 98. was the same part of the estate which had in the year 1783, been disposed by his father to Dr. Clarke. The substitute heirs of entail called in question his powers to sell; but it was ultimately found by a decision of the House of Peers, that he was not restrained by the provisions of the entail from selling the estate.

After the question under the entail had been finally decided, Dr. Clarke raised an action against Mr. Bruce, founded on the bond and the disposition, and concluding that he should be bound either to cede to him the lands, or to pay him the price obtained from Mr. Tait.

The Lord Ordinary pronounced the following interlocutor: " Finds it not necessary here to determine the general question, Whether the entail of Tillicoultry, having been found, by decree of the Court, affirmed in the House of Lords, to be so essentially defective as to want a resolute clause in case the heir selling, can be at all effectual even against creditors; but finds it to follow as a necessary consequence of said decree, that the late James Bruce Carstairs, the defender's father, had power to sell a part of the said lands, in payment of the debt libelled, which he owed to the pursuer: Finds, That he exercised that power, by granting the disposition libelled in the pursuer's favour, on which infeftment has not yet followed: Finds, That the defender having, after his succession to said estate, made a posterior sale to another person, of the lands contained in the foresaid disposition to the pursuer, and in which lands the last purchaser stands infeft, and has therefore a preferable right in the lands themselves, to any that can be made up in the pursuer's person, is, as representing his father, to that effect liable in the warrantice of the disposition to the pursuer to repay the sum libelled, accepted by his father as the price of the lands contained in the said disposition; to which sum the pursuer has restricted his claim, and decerns accordingly."

The defender reclaimed to the Court, and

Pleaded: The right held by the pursuer under his bond and disposition, can be considered in no other light than an heritable security for a debt contracted by Mr. Bruce Carstairs. It can never be viewed as a *bona fide* purchase. The disposition was never acted on by the pursuer, and no step was taken in consequence of it, for more than twenty years. Though the entail has been found ineffectual to defend the estate to the heirs of entail against a *bona fide* onerous sale, completed in the person of the purchaser, it is nevertheless completely effectual to prevent the attachment of the lands for a debt of an heir of entail, and to render null and void every deed of security which the heir could possibly grant for such a debt.

But whether the disposition be considered as a security, or as a sale, the defender cannot be made liable for it; because, though there was a defect in the irritant clause of the entail, which rendered a sale valid to an onerous purchaser who had completed his title to the lands, the prohibitory clause against selling the estate was binding on the heirs of entail in possession; and, as the defender only represents his father as heir substitute of the entail, he cannot be made liable to

implement an obligation entered into in direct violation of the provisions of the entail.

Answered : The defender's predecessor had as good a right, under the provisions of the entail, to sell these lands to the pursuer, as the defender had to sell them to Mr. Tait. By the decision of the House of Lords, the validity of both sales is ascertained. Mr. Tait's sale being completed by infestment, gives him a preferable right to the lands. But the defender, by taking up these lands which had previously been lawfully sold by his father, must be bound either to restore the lands, or, since that is not in his power, to pay the price to the pursuer.

The objection that the transaction was latent, may be made by an onerous *bona fide* purchaser to secure his purchase ; but it cannot avail the heir, who has only a right of succession under all burdens and encumbrances. The circumstance of the sale being made with the view of obtaining value for the bond, does not in the least degree alter the nature of the transaction, which was, by the defect of the entail, a valid and effectual sale to all intents and purposes.

The Court adhered to the interlocutor of the Lord Ordinary, and afterwards refused a reclaiming petition, without answers.

Lord Ordinary, *Polkemmet.* Act. *Dickson.* Agent; *A. Steel, W. S.*  
 Alt. Solicitor-General Clerk, *Moncrieff.* Agent, *Ja. Gibson, W. S.*  
 Clerk, *Walker.*

J.

*Fac. Coll. No. 249. p. 556.*

What claim the purchaser, transacting the ground of eviction, has against his author bound in Warrantice ; See MUTUAL CONTRACT.

See APPENDIX.