

answered, That the dependence of a process is a distress, wherein, if the Earl of Lothian shall compear and obtain absolvitor to the Earl of Home, the decree of recourse will evanish.

The Lords sustained process, superseding execution against the Lordship of Jedburgh, till the Earl of Home, or his lands, should be distressed by a sentence.

Gilmour, No. 68. p. 50.

No. 38.

1663. July.

ELPHINGSTONE *against* The LORD BLANTYRE.

The Lord Blantyre's father having disponed to Harry Elphingstone the kirklands of Calderhall, with absolute warrantice; thereafter *in anno* 1642, four acres of them were designed to the Minister, and three acres farther *in anno* 1649, whereupon Harry Elphingstone having pursued a transferring of the disposition against this Lord Blantyre, as heir to his father, he obtained decree, and charged thereupon; which was suspended upon this reason, that the eviction was not from the defect of Harry Elphingstone's right, but by a supervenient law. The English Judges found the letters orderly proceeded, notwithstanding of the reason. And Blantyre having intented a review, he resumed and enlarged the same reason, There can be no warrantice in such a case, where the lands were taken away from Calderhall, by a designation warranted by act of Parliament; no more than a disponer should warrant lands from public burdens laid on by a statute, nor that a disponer should warrant them from a decreet of buying teinds, or from a school-master's stipend for a school erected after the disposition; and therefore where this eviction doth arise *ex natura rei*, which the buyer should know, and not *ex defectu juris*, there can be no warrantice. It was answered, That absolute warrantice importeth security against all inconvenients whatsoever, whereby the thing warranted is taken from the buyer, and made to belong to another, or is burdened with former deeds; and it is not alike, as when public burdens are imposed; for these take not the dominion of the lands from the buyer; nor are they founded upon private deeds made in favours of private persons, but are *publica onera*, imposed for public use, and for the good of the people, and consequently for the buyer's own good; and yet if any of these burdens be owing the time of the disposition, absolute warrantice will relieve the buyer thereof; sicklike of school-masters' stipends. And as to a decree of buying teinds; *esto argumenti gratia* it were so as said is and alleged, the reason is, because the buyer cannot pretend prejudice, seeing he by the decreet gets the value and worth of the teinds, according as the price is settled by a general law. Likeas, before the lands were acquired by Calderhall, there was of a very long time an act of Parliament ordaining Kirklands to be liable to the designations of manses and glebes; and the absolute warrantice making no exception thereof, it must carry all hazard redounding to the buyer by the act of Parliament then standing.

The Lords assoilzied from the reason of review as to the four acres of land, in regard the eviction was by no supervenient law. But as to the three acres, in re-

No. 39.

Churchlands, being disponed with absolute warrantice, whether the disponer bound to warrant against designation of a glebe?

No. 39. gard the eviction was by a supervenient law *in anno* 1649, they declared they would hear the parties farther *in presentia*.

Gilmour, No. 88. p. 68.

1664. June 16. WILLIAM HAY *against* JOHN NICOLSON.

No. 40.

A clause of warrantice "against all deadly" contained in an assignation of a bond found not to extend to the solvency of the debtor.

John Nicolson having an assignation *in anno* 1653, of a bond granted to him by James Crichtoun, Sheriff of Nithsdale, principal, and umquhile William Livingstoun cautioner, the name of the assignee was left blank till 1663, at which time William Hay's name was filled up, and which assignation contained a clause of warrantice against all deadly, as law will. William Hay having used execution on the assignation, against the principal and cautioner in the bond, returns upon the warrantice, and charges Nicolson; who suspends on this reason, that the clause of warrantice, as it is conceived in the assignation, could import no more, than that the debt assigned, was a real debt resting, and not to be evicted by any other right; especially seeing it did not bear expressly, to warrant it to be good, valid, and sufficient, which might infer to warrant, not only the assignation should clear the right of the debt, but that the debtor should be *solvendo*. And *secondly*, considering that there is no onerous equivalent cause for granting the assignation, Nicolson the creditor might have discharged Livingstoun the cautioner, and given him an assignation that he might thereupon charge the principal. The charger opposed the clause of absolute warrantice; which clauses have ever been esteemed to reach to the debtors' being *solvendo*.

The Lords found the clause thus conceived, could not extend to the sufficiency of the debtor.

Stair, v. 1. p. 198.

1665. February 15. BOYD *against* TENANTS OF CARSLUITH.

No. 41.

A superior being bound to warrant his vassal against wards *per expresseum*, this was found only to comprehend wards already fallen.

Stair.

* * This case is No. 11 . p. 7758. *voce* JUS SUPERVENIENS, &c.

1666. July 17. BURNET *against* JOHNSTON.

No. 42.

Warrantice found to give recourse,

Johnston of Frosterhill having disposed his lands with absolute warrantice in favours of Gordon of Lesmore; reserving his own and his wife's liferent; and