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HEPBURN  
v.  
CALLANDER,  
&c.

JAMES HEPBURN, Esq., of Humbie, - *Appellant.*  
Sir JOHN CALLANDER, Bart., and JAMES JUSTICE, Esq., of Justice-Hall, - - - *Respondents.*

House of Lords, 28th April 1814.

TEINDS — WARRANDICE AGAINST FUTURE AUGMENTATIONS — RELIEF.—The question was whether the appellant (as representing Adam Hepburn of Humbie) was liable in warrandice of the tithes of the parish of Crichton, to the respondents or their successors, against the future augmentations of stipend to the minister of the parish. The Court of Session held him bound in such warrandice, and therefore found him liable to relieve the respondents from such augmentations. The original title of the appellant was long leases of the tithes; and in the House of Lords, the judgment of the Court of Session was reversed; and held, 1st, that the obligation of warrandice could only extend to the endurance of the leases and prorogations of these leases, and to augmentations obtained while these leases were unexpired; and 2d, that the real right of titularity was not then vested in the Hepburns to entitle them to convey any larger right.

Certain leases of considerable endurance (six, nineteen years) were granted of the parsonage and vicarage tithes of the Collegiate Church of Crichton, which were conveyed by deed of translation and disposition to Sir Adam Hepburn, who had already acquired right to the lands and barony of Crichton, together with the patronage of the parish, holding these and the leases of the tithes by separate titles.

June 3, 1682.

In 1682, and while these rights were so held separately, Adam Hepburn of Humbie (son of Sir Adam) and his brother, David Hepburn, sold the barony of Crichton to Sir William Primrose, “with the advocation, donation, and right of patronage of Crichton.” And in the same deed there was contained special assignation of “the two tacks above-mentioned, and decree of prorogation thereof, and the assignation thereof,” etc., with this warrandice of the same—namely: “Warrant the foresaid right, assignation, and translation of teinds, parsonage and vicarage above mentioned, to the said Sir William Primrose and his foresaids, during the hail space and years contained in the said tacks and prorogation thereof, yet to run, at all hands, and against all deadly, and likewise from all future augmentations of the minister’s stipend beyond the sum of , presently payable to the minister,” etc.

Sir James Justice afterwards acquired the barony of Cricht-

ton from Sir William Primrose in July 1738, and Sir James Justice conveyed the same to Mr Livingstone, with consent of his son, Mr James Justice, in trust for payment of his debts. The lands were accordingly sold to Mr Pringle, who bought the same, with “the teinds of the said whole lands, barony, “ and others above written, both great and small, parsonage and “ vicarage,” to which these parties had now an absolute right independent of the leases ; and Mr James Justice gave absolute warrandice in these terms,—binding and obliging “ him- “ self, his heirs and successors whatsoever, not only to warrant, “ acquit, and defend the saids Mark Pringle and his foresaids “ from all minister’s stipend, future augmentations, and other “ burdens, of whatsoever nature, imposed, or that shall be “ imposed, on the said teinds, parsonage, and vicarage, of the “ said lands and barony of Crichton, excepting the stipend “ presently payable out of the foresaid teinds to the minister of “ the parish of Crichton ; and also, in case of erection of the “ foresaid teinds beyond the stipend presently payable, to “ content and pay to the said Mark Pringle and his foresaid “ such sums as shall be equal and amount to twenty-four “ years’ purchase, of any such erection.”

The barony of Crichton was sold by Mr Pringle to Colonel Ross some time afterwards, and was by him and his commissioners conveyed, in 1786, to Alexander Callander, who was succeeded by his brother Sir John, the respondent.

It appeared that the minister had, in 1777, raised a process of augmentation of his stipend, calling Colonel Ross and the other heritors, and obtained decree therein in 1781. The appellant was not called in that process, and he never heard of it until after the decree was extracted.

The present action of relief and freedom from such augmentation of stipend was then brought by the respondent’s father, Mr Callander. At the time this augmentation was obtained, the leases were expired, and the appellant, in his defence, contended—1st, That the leases of the tithes, in which he alone had concern, and in which his predecessors had given warrandice, could only apply to the period of the endurance of the leases, and no longer ; and when these expired, the warrandice contained in them expired also. 2d, That he had no concern with the warrandice granted in 1739 by Mr James Justice, in whose right Sir John Callander now was. That warrandice was a different warrandice altogether—an absolute warrandice applicable to a perpetual heritable right.

After various interlocutors of the Lord Ordinary and the

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Court, it was ultimately found, that the sum “for which the  
“respondent was entitled to relief (from 1784 to 1806)  
“amounts to £1876, 6s. 10 $\frac{6}{12}$ d., and that the augmented sti-  
“pend of the temple-lands for the same period, amounts to  
“£76, 5s. 4d., finds the defenders, James Justice and James  
“Hepburn, conjunctly and severally liable for the above two  
“sums, amounting to £1952, 12s. 2 $\frac{6}{12}$ d., as due at Lam-  
“mas last, with interest thereof from the above last term, and  
“decerns therefor accordingly, but finds the said James  
“Justice, in terms of the interlocutor of 15th June 1805,  
“and subsequent interlocutors, is entitled to relief from the  
“said James Hepburn for the above sums, in so far as the  
“same shall be paid by him; Finds, that the augmented  
“stipend of the lands of Longhaugh, Crichton Dean, and  
“Kerr’s Green for the above period, and due at Lammas last,  
“amounts to £95, 10s. 1d.; Finds the pursuer entitled to  
“relief of the above sum, from James Hepburn, with in-  
“terest, &c., and decerns with expenses;” the Court holding  
that the appellant’s obligation of relief was not limited by the  
endurance of the leases, but was absolute and unqualified in  
its nature. On reclaiming petition, the Court adhered.

Nov. 22, 1808.

Against these interlocutors the present appeal was brought, in so far as they find that the appellant, as representing Adam Hepburn of Humbie, is liable in warrandice of the tithes of the parish of Crichton, either to Sir John Callander or to Mr James Justice, or their successors, against the augmentation obtained in the process raised by the minister of the parish in 1777, or against any other or future augmentation.

*Pleaded for the Appellant.*—1. Whatever obligation may lie on the appellant as representing his ancestor, Adam Hepburn, it is totally distinct from, and has no connection with, the obligation of the respondent, James Justice, as the representative of Sir James Justice, to the other respondent, Sir John Callander.

Throughout the argument in the Court below, the respondent, Mr Justice, took great pains to impress the Court with the idea that the case between him and the appellant was exactly the same as the case between Sir John Callander and Mr Justice himself; and it was always represented as a matter of hardship, that the respondent should be found liable in warrandice to Sir John Callander, unless the appellant was found liable in relief to him. But this is a very incorrect and unjust view of the case. The claim of warrandice against the appellant, whether made by Sir John Callander or by Mr

Justice, has no more connection with the claim of warrandice made by Sir John Callander upon Mr Justice, than if they related to totally different estates, or to the tithes of a totally different parish. Sir William Primrose got an unquestionable right to the patronage of the parish, which at that time was an effectual right in its own owner, but gave no right to the teinds. The Acts 1690 and 1693 took away the proper right of patronage, but, as a recompense, gave in place of it the tithes not previously disposed. Sir James Justice acquired full right from the family of Primrose; and he had an unquestionable title as titular of the teinds of this parish. Having thus a perfect right, he conveyed to the author of Sir John Callander, not *leases*, or any temporary rights, but the real and unquestionable property of the teinds themselves, for ever. The title, as an heritable right, being as undoubted as any title known in Scotland, he would have no difficulty in warranting it as good against all the world. But as the statutes which constituted it, did expressly subject the teinds thus to be held heritably by the patron to the burden of a competent stipend to the minister of the parish, the purchaser, Mr Pringle, had insisted that Sir James Justice should undertake, for ever, to warrant the perfect right thus conveyed against a burden to which it was by its nature subject. If this was to be undertaken at all, the obligation was, from the very nature of the thing, perpetual; because the right which was warranted against it was unlimited, and in all other respects perfect. Accordingly, the terms of the conveyance and of the warrandice are absolute. Sir James Justice disposes *the tithes themselves*, as being his undoubted property, and without reference to any limited title; and then the warrandice is not qualified as relative to any particular title, but it is simple and general, in respect of the price paid, to “warrant, acquit, “and defend the said Mark Pringle from all minister’s stipend, “future augmentations, or other burdens, of whatever nature, “imposed, or that shall be imposed, on the said *teinds, parsonage* “*and vicarage, excepting,*” &c. This is the obligation to which the respondent, Mr Justice, is liable; and there cannot be the least doubt that it is effectual to Sir John Callander. Accordingly, Mr Justice has admitted this, and has entered no appeal against the judgments of the Court of Session, finding him liable in relief upon the warrandice. But it is not the obligation of the appellant. The appellant’s ancestor had ceased to have any connection either with the lands or with the teinds nearly *sixty* years before that obligation was granted.

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The obligation of warrandice which he had truly granted, was different in every essential particular. He neither had given, nor pretended to give, any perpetual or real right to the teinds. He warranted no such right, either against eviction or against augmentations; and in the warrandice which he did give, he confined it specially to the limited right conveyed, and to the years during which that limited right was, by its nature, to subsist. 2. But, in the second place, the real right of titularity of the tithes of Crichton was never vested in Adam Hepburn, the granter of the disposition in 1682; and no right was conveyed by him, or obligation granted, except with references to the leases.

*Pleaded for Sir John Callander.*—1. At the date of the conveyance in the year 1682, by the appellant's predecessor, Sir Adam Hepburn of Humbie to Sir William Primrose, the right and interest of the former in the teinds of the barony of Crichton, even, independently of the existing leases of those teinds, was of a kind so effectual and substantial, as to be the fair subject of purchase by the latter, and of consequence to be the fair subject of legal warrandice. As the patron of the church of Crichton, Sir Adam Hepburn had in his power, the legal means of securing to himself and his successors, the actual possession of teinds, subject to the existing burdens, by taking from the successive beneficiaries in the church, a renewal or prorogation of those leases. The acknowledged lawfulness of such transactions had given to the patrons of churches, even prior to the Act of Parliament 1690, "concerning patronages" a right over the free teinds of their respective parishes and churches, which was practically equivalent in value to a direct right of property. 2. By the above conveyance, Sir Adam Hepburn did, in fact, transfer to the purchaser of the lands of Crichton, all that right and influence which, as patron of the parish, he possessed over the teinds. It contains a direct conveyance of the right of patronage of the provostry of Crichton, together with a right to all the existing leases, with the teind sheaves, and vicarage teinds, themselves mentioned in the said leases, "together with all kindness and possession of the said teinds perpetually in all time coming." In consideration of this effectual conveyance of the lands "*in all time coming*," Sir William Primrose paid a price equal in right to that which he actually paid for the property of the lands themselves; manifesting in this manner, the clear knowledge and understanding of the parties as to the substantial and permanent nature of the right, which

was the subject of the purchase. Besides, “in regard that the  
“said Sir William Primrose paid as much for the said teinds,  
“as for the stock of the lands,” out of which they are payable,  
Sir Adam Hepburn became bound to warrant the foresaid  
right, not only during the currency of the existing leases, but  
likewise “from all future augmentations of minister’s stipend,  
“beyond the sum then payable.”

*Pleaded for James Justice.*—1. The right to the teinds  
purchased by the respondent’s author, Sir William Primrose,  
though indirect in its form, was in its nature and legal effects,  
absolute and perpetual. 2. The same price was paid for  
land and teind, and upon the narrative of that circumstance,  
the same absolute warrandice was given as to both. 3. Be-  
sides, the teinds, at that conveyance, were expressly warranted  
against all future augmentation, which of itself is decisive of  
the question.

After hearing counsel,

THE LORD CHANCELLOR said,

“My Lords,\*

“The question in this case is, whether in a deed executed by  
Adam and David Hepburn, a warranty against all future augmen-  
tation of minister’s stipends, was a warranty against augmentations  
in all time to come, or only during the currency of certain tacks of  
the teinds of the Collegiate Church of Crichton.

“The Lord Ordinary was of the latter opinion. His Lordship  
pronounced the following interlocutor:—(Here his Lordship read  
the interlocutor of the 15th June 1805), which stated the import  
of the deed, 1682, most correctly.

“In considering this question, whether the granters of this deed  
meant to warrant the teinds from all augmentations of stipend, not  
only during the time for which the teinds were assigned, but in all  
time coming, your Lordships heard a very able argument from a  
gentleman, who, then, I believe, appeared for the second time at  
your Lordship’s bar with great credit to himself (Mr J. A. Mur-  
ray),† upon the point—In whom were the tithes vested in 1682?  
But, I think it may be distinctly stated, that the direct right to the  
teinds was not in the warranters, so as to enable them to convey  
the inheritance of them.

“In the respondents’ cases, it is stated that by management a  
patron might get a right to the tithes free from the burden of  
future augmentation; and this may be very true, but in one part of  
this deed, 1682, the lands and patronage are conveyed, and there  
is a warrandice of “against all deadlie,” and there the interest

\* Taken by Mr Spottiswoode.

† Now Lord Murray.



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“Warranty is *stricti juris*, but this rule must give way to *express terms*, declaring that the warranty was to go beyond the terms assigned; such an extension of the warranty is not probable, and on looking at the words of it, it is clear that the warranty is only during the terms of the tacks. The obligation is to warrant the tacks, &c., during their terms, and to warrant from farther augmentations during those terms. No, say the respondents, *that* is done already in the deed, and this must mean something more. They are right in this; for the first warranty would not have secured against future augmentations—this warranty had no connection with the *title* to the subjects, but to something more. But the respondents say farther, that the purchaser paid as much for the teind as for the stock of the lands, which is a reason why the warranty should be perpetual. The answer to this is, that there was a term of 80 years of the leases to run, which was sufficient to account for the price.

“If the operative part of the instrument goes no farther than to warrant during the terms of the leases, we must abide by it. There is, indeed, no reason for carrying the warranty further. If any right to the teinds could only be acquired by management on the part of the patron, the granters of the deed, by giving the inheritance of the patronage, put the purchasers into the same situation as themselves, and there could be no motive for any ulterior warranty.

“It appears to me that it will be necessary, in our judgment, to find that the warranty continued only during the terms of the tacks, according to the finding of the Lord Ordinary (15th June 1805), to reverse all that is not consonant to this, and to remit to the Court of Session to proceed accordingly.”

LORD REDESDALE said,

“My Lords,

“I perfectly concur with what the noble and learned Lord has said. I have no doubt upon the subject.

“Before the Reformation the Provost of Crichton had no right to the vicarage tithes, but the rectorial tithes he had a right to appropriate to himself.

“The effect of the Reformation was to leave the title to the tithes in great uncertainty. Where tithes were not vested in the Crown by the Act of Annexation, the patron took possession of them. The patron of Crichton, in appointing the provost, made such bargain as he chose with him. The act appointing stipends for ministers, authorized the commissioners to prolong the tacks of tithes, when the stipend modified exceeded the amount of the rent.

“Sir Gideon Murray, the provost, granted a tack to William Murray, for his life, and three 19 years after his death, with con-



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sent of the patron and chapter. This was before a stipend was allotted to the minister. Just before this the provost granted a tack of the vicarage tithes also. When the commissioners proceeded to make a provision for the minister, it greatly exceeded the rents reserved to Sir Gideon Murray, they therefore granted a prorogation of the tacks as a compensation, but in process of time, the representative of Sir Gideon Murray, Scott of Branxholm, sold the barony and patronage of Crichton to Sir Adam Hepburn. Sir Adam bought also, from the Elibank family, the tacks of teinds made by Sir Gideon Murray, and prolonged by the commissioners. The Hepburns sold them to the Primrose family. By the instrument in question, they first conveyed the barony and patronage of the provostry, and the lands of the provostry. When the Hepburns warrant the property and the patronage, they make the warrandice absolute; but as to the lands of the provostry, they do not warrant them beyond their own acts and deeds. They then recite all the transactions respecting the lands, and assign all the interest they had in the teinds, and warrant the assignation of the tacks, thereby demonstrating that they had but a defective title to the provostry lands.

“How could a warranty ‘during the hail years,’ &c., be a warranty of the fee simple of the teinds? But it is said, that the patron, by having the right to appoint a person as provost to receive the parsonage teinds, had right to them himself, and that the provost could appoint a vicar to receive the vicarage tithes; that the baron had the patronage of the provostry, and the provost of the vicarage; that tithes were left without an owner at the Reformation, if acts were not made to dispose of them, and that teinds being, in 1690, by Act of Parliament annexed to the patronage, the person acquiring from the Hepburn’s family became entitled to the teinds.

“How is it possible, then, in this view, to conceive that the warranty of the Hepburns could apply to teinds, the right of which was not in the Hepburns?

“An argument was attempted to be raised out of the word ‘kindness,’ &c., conveyed. This was an indulgence or predeliction only in favour of an old tenant, which could not become a subject of absolute warrandice.

“The interlocutor of the Lord Ordinary, of 15th June 1805, is right, so far as it declared the extent of the warranty, but one part of it is founded upon a misapprehension of the facts. It states ‘the terms and years yet to run of the tack,’ &c. Now, it is clear, that the tack of the patronage teinds ended in 1737, and that tack was at an end before the augmentation was granted. The tack of the vicarage tithes for his own life, or for the life of William Murray, is at an end. If, for his own life, adding fifty years, it would have expired in 1787.

“ It is, therefore, doubtful if the tacks, or any of them, existed at the date of the interlocutor.

“ It therefore becomes necessary to find, that so much of the Lord Ordinary’s interlocutor as assumes the existence of the tacks be altered, in order to leave the question open.”

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The LORD CHANCELLOR,

“ I move the adjournment of the cause, in order to have time to draw up the precise words of the judgment.”

The Lords in Parliament find, that the obligation contained in the disposition of 1682, by Adam Hepburn to Sir William Primrose, extends only to free and relieve the patronage and vicarage teinds, respectively comprised in the tacks and prorogations of tacks, by such disposition respectively assigned, from all augmentations of the minister’s stipend, during the hail space and years then to come and unexpired of the said tacks, and prorogations of tacks respectively, and that, therefore, the appellant, James Hepburn, is not bound to relieve the said teinds respectively, after the expiration of the said tacks and prorogations of tacks respectively; and inasmuch as the several tacks and prorogations of tacks of the said parsonage teinds, and vicarage teinds respectively, might expire at different times: Find, that after the expiration of the tacks and prorogations of tacks, of one of the said denominations of teinds, the said Adam Hepburn is bound to such relief only in proportion to the charge of stipend on the other, of the said denominations of teinds, and during so long time only as the tacks and prorogations of tacks of such other denomination of teinds should continue: and it is therefore ordered and adjudged, that all parts of the several interlocutors complained of in the said appeal, which are inconsistent with the said findings, be, and the same are hereby reversed. And it is further ordered, that the cause be remitted back to the Court of Session in Scotland, to do therein what may be just and consistent with the said findings and reversal.

For Appellant, *Wm. Adam, Jas. Moncreiff.*

For Respondent Sir J. Callander, *Sir Saml. Romilly, Tho. Thomson.*

For Respondent Jas. Justice, *Wm. G. Adam, John M’Farlane.*

NOTE.—Unreported in the Court of Session.