

1679. December 11. CREDITORS of MOUSEWELL *against* The CHILDREN.

No. 59.

A father disposed his estate to his eldest son, reserving a power, "to burden it with a certain sum for provision to his bairns and other lawful affairs," with a clause of warrantice from his own fact and deed allenary: Notwithstanding of this clause of warrantice, it was found, That this faculty was not exhausted by the father's anterior debts, but that both were burdens upon the son; it being pleaded that such clauses of warrantice contained in gratuitous dispositions, where nothing is intended but to give the right *talis qualis*, are not understood to guard against prior debts, especially in this case, where the father reserved only a life-rent of a part of the lands, no more than sufficient for an aliment.

*Stair.*

\* \* This case is No. 60. p. 934. *voce* BANKRUPT.

1680. June 23. MARY PIERS *against* JOHN BLACK, Vintner.

No. 60.

The warrantice of this tack would indeed import that there should be no eviction, nor pretender to the property or possession of the house, that should disturb or dispossess him, but will not extend to a casual accident of a neighbour's building, which, though it incumbered the entry to his house, yet did not totally obstruct it; for if the obstruction had been total, I think the Lords would have freed him from the duty, as they do with tenants in *prædiis rusticis*, when there is a total vastation *per vim graculorum*, by thunder, and if falling out *sine culpa conductoris*. L. 9, 33, and 35. C. De Locato.

*Fountainhall MS.*

1681. June 23. CLERK *against* GORDON of Gordonston.

No. 61.  
Eviction by  
process,  
whether it  
must be  
intimated?

Alexander Clerk's name being put in trust in a thirty-two part of a caper-ship for the behoof of Mr. Thomas Buck, after whose death Gordonston having confirmed Mr. Thomas Gordon executor-creditor to his behoof, did count with Clerk, and received a disposition of Buck's share of the caper, and payment of £80 as his share of the profit by the caper, by making prize of the ship called the Calmer; whereupon Gordonston granted to Clerk a discharge of all that could be acclaimed from him upon account of the caper-ship, or profits thereof. Thereafter the Lords reduced the adjudication of the Calmer, and Clerk and the other owners were decerned *in solidum* to refund the value, whereof Clerk's share came to 200 merks; whereupon he charged Gordonston upon his warrantice, who suspended on this

No. 61. reason, that the warrantice could import no more but repetition of what Gordonston received, which was only £80. It was replied, That Clerk was seeking no benefit by the warrantice, but to be relieved of the distress, which he was specially obliged to warrant. It was duplied, That no intimation was made to Gordonston of the process inferring the distress.

The Lords found Gordonston liable to relieve Clerk of the whole distress, albeit the plea was not intimated to him, unless he can allege or instruct a relevant defence, that could have defended Clerk in whole or in part.

*Stair, v. 2. p. 882.*

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No. 62. 1682. *January 6.* LUMSDEN *against* GORDON of Tarpersie.

Found that absolute warrantice in an assignation to a tack of teinds, did not make the disponer liable to a supervenient burden of augmentation to the Minister of the parish by act of Parliament.

*Harcarse, No. 963. p. 274.*

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No. 63. 1682. *March.* GORDONSTON and NICOLSON *against* GEORGE PATON.

One who had disposed lands with absolute warrantice, being quarrelled for a liberty and servitude of casting some peats in a moss, granted by his authors *in anno* 1625, the Lords assoilzied the defender, in respect the servitude was so old, and notourly known, and so inconsiderable in these parts.

*Harcarse, No. 1013. p. 288.*

\* \* Sir P. Home's report of this case is No. 12. p. 14170. *voce* SALE.

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No. 64. 1683. *February 20.* BONAR *against* LYON of Brigton.

Some acres of kirk-lands formerly disposed with absolute and real warrantice, being designed for a glebe, the party recurred upon his warrantice against the disponer.

For whom it was alleged : That this eviction happening by virtue of a public law, cannot fall under the warrantice, especially considering, that though his danger might have been foreseen, as arising from the nature of church-lands, yet the same is not expressly provided against in the clause of warrantice.

Answered for the pursuer : The clause of warrantice secures from all evictions, dangers, and inconveniencies ; *2do*, The present eviction doth not occur from any