

No. 36. minute, as if Balmerinoch had dispoſed with him ; and assigned a time to Couper to deal with Balmerinoch for ſubſcribing the diſpoſition, till which time, the Lords ſuſpended the extracting of their decret and ſentence.

Gilmour, No. 43. p. 32.

1662. *December* JOHN OGILVIE *against* SIR JAMES STEWART.

No. 37.
Import of
warrantice
from fact and
deed.

Patrick Leslie, and ſeveral cautioners, granted bond to Sir James Stewart, who assigned the ſame to John Denholme, who uſed execution, in his cedent's name, and took ſome of the debtors with caption, and being in the meſſenger's hands, this John Ogilvie aſſiſted to the making of their eſcape, and thereupon being incarcerated by the Magiſtrates of Edinburgh, (which concurrence of their authority, by their officers, as uſe is, in executing captions within Edinburgh,) by agreement the ſaid John Ogilvie paid £800 to be free, and thereupon obtained aſſignation from Sir James Stewart, to as much of the bond, with warrantice from Sir James' own deed, and excepting from the warrantice, an aſſignation formerly made by Sir James, to John Denholme. John Ogilvie having purſued one of the debtors, he was aſſoiled, upon a diſcharge granted by Sir James Stewart and John Denholme, and them both with one conſent ; whereupon John Ogilvie charged Sir James upon the clause of warrantice ; who ſuſpended, and alleged, that the ſoſaid diſcharge was nothing contrary to his obligation of warrantice ; becauſe, in the warrantice, John Denholme's aſſignation was excepted, and conſequently all deeds done by John, as aſſignee. *Ita eſt*, this diſcharge was granted by John Denholme, and would be valid, by John Denholme's ſubſcription ; and there was no prejudice done to this purſuer, by Sir James Stewart's ſubſcription, ſeeing without it, the diſcharge would exclude him. The charger answered, that John Denholme ſubſcribed but as conſenter, and was not mentioned in the diſcharge as aſſignee. The ſuſpender answered ; that the diſcharge being with his conſent, was as effectual, as if he had been principal party, and each of them diſcharged with others conſent.

The Lords found the reaſon of the ſuſpension relevant.

Stair, v. 1. p. 149.

1663. *January 21.* THE EARL OF HOME *against* THE EARL OF LOTHIAN.

No. 38.
Dependence
of a proceſs
againſt lands
exchanged, is
a diſtreſs, ſo
as to found
action of re-
course.

There being an excambion betwixt the Earl of Home's predecessor, and Sir John Ker of Hirſel, of the Abbacy of Jedburgh, with the lands of Hirſel ; and the ſaid lands being diſtreſsed by a pointing of the ground purſued at the inſtance of ——— Ker, and Mr. John Bruce her ſpouſe, againſt the Earl and his tenants ; the Earl purſues the Earl of Lothian, to hear and ſee it found and declared, that he may have recourse againſt the Lordſhip of Jedburgh *pro tanto*, effering to the diſtreſs. It was alleged, No recourse, becauſe no diſtreſs by a ſentence. It was

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.

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 disponent should warrant lands from public burdens laid on by a statute, nor that a disponent 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-

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No. 39.

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