

March 31. 1830. *Appellants' additional Authorities.*—Davie, June 2. 1814, (F. C.) Town of Edinburgh, Nov. 24. 1696, (1898.) 1567, c. 27.; 1681, c. 11.; 4. Geo. III. c. 42.

*Respondents' additional Authority.*—Edgar, June 1743; Brown's Supplement, vol. v. p. 730.

ALEXANDER MUNDELL—RICHARDSON and CONNELL,—Solicitors.

No. 15.

MARIA CAMPBELL RAE JUSTICE, Appellant.  
*Lushington—Brown.*

WILLIAM BURN CALLANDER, Esq. Respondent.  
*Spankie—Murray—A. M'Neill.*

*Adjudication—Warrandice—Passive Title.*—A party having sold land, with warrandice against augmentation of stipend; and, with part of the price received for those lands, bought two estates, which he took, under fetters of strict entail, in favour of himself and spouse in liferent, and to his son in fee, and to a series of substitutes; and having granted over one of the estates an heritable bond of warrandice; and that estate having been adjudged for augmentations;—Held, (affirming the judgment of the Court of Session), that an heir who had made up titles to the fiar, and not to the liferenter, could not prevent the other estate from being adjudged for augmentations.

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1ST DIVISION.  
Lord Eldin.

SIR JAMES JUSTICE, proprietor of the estate of Crichton in the county of Edinburgh, having contracted many debts, executed in 1725, in favour of George Livingstone, a disposition of the estate, in form absolute, but truly in trust, with power to sell, and under burden of payment of debts. Sir James having soon after died, his eldest son, James Justice, in 1737, confirmed his father's disposition, conveyed an estate belonging to himself, which lay intersected with the lands of Crichton, to Livingstone, also in trust, to sell the whole subjects, and, after payment of debts, lay out the surplus in the purchase of lands,—the destination to be to himself (James Justice) in liferent, and to Alexander Justice, his eldest son, in fee, and to a line of substitutes.

In 1738 Livingstone sold these estates to Mark Pringle, and he and James Justice granted a disposition bearing this clause:  
' And further, because the said Mark Pringle has paid as great a  
' price for the teinds of the said lands and others above disposed  
' as for the stock, therefore I, the said James Justice, bind and  
' oblige me and my foresaids, to warrant, acquit, and defend the  
' said Mark Pringle from all minister's stipend, future augmenta-  
' tions, and other burdens, of whatever nature, imposed, or that  
' shall be imposed upon the said teind, parsonage or vicarage, the

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‘ present stipend excepted.’ Pringle granted a bond for the price, in which it was provided, that ‘ for the said Mark Pringle, ‘ and his foresaids, their further security, and in corroboration of ‘ the foresaid clause of warrandice contained in the said disposi- ‘ tion, so far as it concerns future augmentations of minister’s sti- ‘ pend, or other burden that may be imposed on the said teind, ‘ it shall be lawful to the said Mark Pringle to retain so much ‘ of the sums contained in the said bond as may be sufficient to ‘ answer any augmentation of the said teind, until the said George ‘ Livingstone and James Justice shall, at the sight of, &c. secure ‘ so much of the said sums, in such manner as the said Mark ‘ Pringle, and his foresaids, may have sufficient real warrandice ‘ against such eviction of augmentation of stipend, or other bur- ‘ den imposed upon the said teinds, and which eviction is hereby ‘ agreed to be rated at 24 years’ purchase thereof, being the price ‘ paid for the said whole lands and teinds.’

Pringle having paid the full price, Livingstone purchased, with what remained over payment of the debts, the lands of Ugston and Over-Howden. In the disposition of the lands of Ugston the following clause was inserted:—‘ Providing also, that ‘ the said lands and estate above disposed, are and shall be bur- ‘ dened, in real warrandice, with the payment of any augmenta- ‘ tion of stipend that shall at any time hereafter be imposed upon ‘ the lands and estate of Crichton, in terms of the clause of ab- ‘ solute warrandice contained in a disposition by the said Mr ‘ James Justice to Mark Pringle, Esq. of Crichton, dated, &c.; ‘ and with power to the said Mr James Justice, for the said ‘ Mark Pringle, his heirs and successors, their further security, to ‘ grant them an heritable security and infeftment of warrandice ‘ upon the said lands, against the said future augmentations.’

This burden was not nominatim extended over the lands of Over-Howden; but in the deed of conveyance of Ugston and Over-Howden, executed by Livingstone 13th May 1739, in favour of Mr Justice, it was expressly mentioned, that the price had been paid by Livingstone in name and behalf of James Justice, and out of the reversion of the price of the lands and barony of Crichton. This deed was in the shape of a strict entail to James Justice and his spouse, and longest liver of them in liferent, and to Alexander Justice, their son, in fee; whom failing, the substitutes pointed out in James Justice’s deed of 1737.

Mr and Mrs Justice were forthwith infeft in liferent, and Alexander Justice in fee. In the same year James Justice granted to Mark Pringle an heritable bond of warrandice, narrating the sale

April 6. 1830. of Crichton, the obligation of warrandice, the stipulation in the bond for the price, and the reserved power to grant an heritable security over Ugston. It then proceeded thus: ‘ Therefore wit  
 ‘ ye me, pursuant to the foresaid provision and power and faculty  
 ‘ contained in the said disposition (of Ugston) to me, and in im-  
 ‘ plement of the foresaid clause of warrandice contained in the said  
 ‘ disposition (of Crichton), and provision contained in the said  
 ‘ bond (for the price), and in corroboration and fortification of  
 ‘ the same, and without any innovation thereof, &c. to be bound  
 ‘ and obliged, as I by these presents bind and oblige me, and my  
 ‘ heirs and successors whatsoever, not only to warrant, acquit, and  
 ‘ defend the said Mark Pringle, and his foresaids, from all mini-  
 ‘ ster’s stipend, future augmentations, and other burdens of what-  
 ‘ somever nature, imposed, or that shall be imposed upon the said  
 ‘ teind, parsonage or vicarage, of the said lands and barony of  
 ‘ Crichton,’ excepting the present stipend; ‘ but also, in case of  
 ‘ any eviction of the foresaid teind beyond the said stipend pre-  
 ‘ sently payable, to content and pay to the said Mark Pringle, and  
 ‘ his foresaids, such sums as shall be equal and amount to twenty-  
 ‘ four years’ purchase of every such eviction, and that at the terms  
 ‘ of Whitsunday and Martinmas at which such augmentation shall  
 ‘ commence, or other burden be imposed respectively.’ He then  
 disposed the lands of Ugston in real security of this obligation;  
 and Pringle was thereupon infeft.

Alexander Justice having predeceased his father, James, the second son, made up titles as heir of tailzie to Alexander under the deed of entail 1739. And James was succeeded by his daughter, the appellant, Miss Justice, under the same entail.

During James’s lifetime several augmentations of stipend had been granted to the minister of Crichton; and in the meanwhile the estate of Crichton, with right to the deeds relative to the obligation of warrandice, had been acquired by Sir John Callander’s trustees. In relief of these augmentations they obtained decret of adjudication of the lands of Ugston, agreeable to the terms of the heritable bond of warrandice, and also of the estate of Over-Howden.

Of this decret of adjudication of Over-Howden, Miss Justice instituted an action of reduction; but the Lord Ordinary assoilzied the respondent, (now in right of the estate of Crichton), and the Court (1st December 1826) adhered.\*

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\* 5. Shaw and Dunlop, 68.

Miss Justice appealed.

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*Appellant.*—1. The obligation to grant warrandice, although originally expressed in general terms, was satisfied by the heritable bond of warrandice granted over Ugston.

2. Even if the obligation remained unlimited, it cannot reach Over-Howden, or affect the appellant. James Justice was solvent when he took the disposition, under fetters of strict entail, of May 1739, to himself and his wife in liferent, and his son, &c. in fee. The personal obligation, therefore, cannot touch Over-Howden, nor can it bind the appellant, who does not represent James Justice, but made up titles as heir of entail. In doing so, she did not incur the passive title of *præceptio hereditatis*. There is no room for the operation of the statute 1621; and if there had been, it is cut off by prescription.

*Respondent.*—1. James Justice came under an obligation of warrandice against all future augmentations. This obligation was not renounced because an heritable bond of warrandice was obtained over Ugston; the previous personal obligation remained entire to its full extent.

2. The lands of Over-Howden having been bought with the balance of the price of Crichton, the appellant, who enjoys Over-Howden, must be liable in the obligation assumed by her ancestor. Alexander Justice, by anticipating the succession, became liable; so did his brother, and so must the appellant. The case is the same as if the claim had been made during the lifetime of Alexander. The entail may be effectual inter hæredes, but cannot affect a creditor of the entailer.

The House of Lords ‘ordered and adjudged, that the interlocutors complained of be affirmed.’

*Appellant's Authorities.*—2. Bell's Com. p. 192.; 3. Stair, 7. 7.; 3. Ersk. 8. 92.; 3. Bank. 7. 3.; 1621, c. 18.; 1469, c. 28.; 1474, c. 54.

*Respondent's Authority.*—3. Ersk. 8. 87.

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