No. 80.

the claim was not found to be valid to the Earl, the contravention was directly incurred, and yet they gave only recourse for the sums paid to Aiton, and there is no reason it should go farther here.

"The Lords found, That Hardgray, by the clause of warrandice in his disposition to Sir John Houston, is not only obliged to make Sir John *indemnis* and skaithless, as to the sum he paid for the said disposition; but also, that he is further obliged to pay to Sir John, the sum of 1360 merks with annnual-rents, contained in the discharge and obligement granted by Captain William Anderson, the defender's author, to New-wark."

Rem. Dec. No. 4. p. 5.

1724. *July.*

MR. JOHN SWINTON, Advocate, *against* ANDREW KER of Moriston.

No. 81.
Real warrandice may be restricted, according to the extent of eviction.

Sir John Swinton, the pursuer's father, having sold certain lands to Ker of Moriston, granted him an infeftment of warrandice upon other lands in security of his purchase, on account of some appearances of distress; but as parties judged, that the distressess might soon be purged, it was agreed, "That upon performance of the hail conditions mentioned in the conveyance, and no otherwise, Moriston and his, &c. should be holden and obliged to renounce their infeftment of real warrandice of the lands therein mentioned, except as to a security of the principal lands, teinds, and others thereby disponed, against all teind-duties, teind-bolls, blench-duties, annuities of teinds, Minister's and Schoolmaster's stipends, reader's fees and augmentation of Minister's stipends, and other duties and services due and payable forth of the same, whereof Moriston and his foresaids were to be altogether free in time coming, except as to a proportion of the Minister's stipend then condescended on: And in case all the conditions mentioned, and incumbrances affecting the principal lands, were not purged, renounced and discharged, then and in that case, the said Andrew Ker, &c. was obliged to restrict his infeftment of real warrandice for warrandice and security only of what was not performed, and for security of the principal lands and others, disponed, against teind-duties, &c."

The particular incumbrances in view were, 1*mo*, An inhibition raised at the instance of Andrew Cockburn, as cashier for the African Company; 2*do*, An inhibition at the instance of Ursilla Goddart, upon a depending process before the Court of Session; 3*tio*, A distress that might have happened on pretence of Sir John's liferent-escheat's being fallen; and, *lastly*, A general imaginary incumbrance, from claims of teind-duties and augmentation of Minister's stipends, which might arise, but did not appear.

Mr. Swinton brought an action against Moriston, to have it declared, that the particular incumbrances were purged, and that he should be obliged to restrict

No. 81.

his warrandice to a sufficient security against the imaginary claims, and offered to allow him to retain his infeftment of warrandice upon lands to the value of 2000 merks of yearly rent, which was more than triple the value of his whole teinds.

It was objected for Moriston, *1mo*, That the inhibition at Cockburn's instance was no otherwise purged, than as the debt upon which it proceeded might be supposed to be sunk, as due to the African Company, which was now dissolved; as to which it was contended, that debts being vested in the Crown by the 15th act of the Union-Parliament, whatever action was competent to the Company might still be taken up by the Crown, and therefore it was not clear that this incumbrance was purged; *2do*, As to Goddart's inhibition, though Mr. Swinton had a decreet-absolvitor in his favours before the Court of Session in that process upon which the inhibition was raised, yet she might still enter an appeal; in which if she prevailed, it would be a question, how far the inhibition might not remain effectual to her; *3tio*, Sir John was expressly bound to obtain a gift of his own liferent-escheat, to dispone the same to Moriston, which being in his power, and he neglecting to do it, imported his consent to the standing of the real warrandice as to that point. *4to*, As to the teind-duties, teind-bolls, &c. the warrandice was not to be discharged, because there was an exception from the general renunciation and discharge, and the meaning of the exception was, That as to these particulars, the warrandice was to continue and remain in the same force and extent, as if no discharge or renunciation had been made; and the whole warrandice-lands were to continue subject to Moriston's relief as to the teind-duties, &c. though they might be declared quit and free from any tie or engagement on account of the other incumbrances.

It was answered for Swinton to the first, *1mo*, That although the debts which were owing to the African Company were vested in the Crown, and that the commissioners of the equivalent might, in their own name, have sued for them, yet they could not take up the process and inhibition used by Cockburn against Sir John Swinton; *2do*, The claim against Sir John was for money subscribed for but not duly paid in, and by a preceeding clause in the same act all such claims were discharged; *3tio*, Mr. Swinton had brought evidence, that the Company had got payment from Mr. Robert Blackwood, and therefore there remained no action at the Company's instance against Sir John.

As to Goddart's inhibition, it was answered, That the decreet-absolvitor was a legal discharge of the inhibition, and though she should appeal, and the decreet be reversed, yet the inhibition would not revive, otherwise this absurdity would follow, that an incumbrance once lying upon an estate could not be purged, except where there was a voluntary discharge of it; and even not then, because it might be in the power of a purchaser claiming the subsistence of a warrandice, to object to such a discharge upon the most trifling grounds, but which could not be over-ruled without a decree, and that decree (if Moriston's reasoning was just) might be appealed from, and so the warrandice would stand to a perpetuity, there being no prescription in matters of appeal.

No. 81.

It was answered to the objection of Sir John's not having obtained a gift of his escheat, and made it over, to Moriston, that it did not appear that Sir John's liferent had fallen; and though it had, yet since it could not be pretended that it ever was gifted, it consequently was done away by the several indemnities which had passed since that time, and the defender had not met with any trouble, nor could qualify any damages upon that account.

It was answered in the last place as to the teind-duties, &c. That Moriston could not retain his real warrandice, so as to affect the whole lands for them, neither from the nature of the thing, nor the express words of the clause, because, *1mo*, When warrandice is given to secure against particular incumbrances, parties consider the extent of them, and give security upon a greater or less estate in proportion, and when the greatest or any part of these incumbrances are purged, the security is restricted to what is sufficient for the safety of the purchaser, and this would obtain, though there should be no express paction, as just and equitable; *2do*, Where there is an express paction, it puts the matter out of doubt, as in the present case, where the security or infeftment of warrandice was to be restricted, and upon performance of the hail conditions, &c. Moriston was obliged to renounce his infeftment of real warrandice, except as to a security of the teinds, &c. which did not mean, that he was to reserve the whole infeftment in security of the teinds, but only so much as was a full and ample security for them.

The Lords found, That the inhibition raised by Cockburn and Goddart were purged; and found, that Moriston could not now retain his real warrandic on account of Sir John's liferent-escheat's not being gifted and conveyed to Moriston. And found, that all the rest of the incumbrances being purged, except the teind-duties, &c. that Moriston could not retain his real warrandice, so as to affect the whole lands, and that the lands worth 2000 merks of yearly rent offered by the pursuer, was a sufficient fund for that effect.

Act. *Ro. Dundas* advocatus *et Hew Dalrymple*, sen. Alt. *Ja. Colvill et Dun. Forbes*.
Reporter, *Lord Paincaitland*. Clerk, *Hall*.

Edgar, p. 77.

1732. *January*. CRAIG *against* HOPKIN.

No. 82.

Lands which were sold with warrandice from fact and deed allenarly, being evicted, but not through default of the disponer, the purchaser brought an action, not upon the warrandice, which was not incurred, but upon this ground of equity, That, if he has lost the land, he ought at least to have repetition of the price. It was answered, That when one sells with warrandice from fact and deed, the intention is not to sell the subject absolutely, which would be the same as selling it with absolute warrandice, but only to sell it so as the seller himself has it, that is, to sell what title and interes the has in the subject, the purchaser taking upon himself