

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 life-rent 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 infestment of warrandice was to be restricted, and upon performance of the hail conditions, &c. Moriston was obliged to renounce his infestment of real warrandice, except as to a security of the teinds, &c. which did not mean, that he was to reserve the whole infestment 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 Goddard were purged; and found, that Moriston could not now retain his real warrandic on account of Sir John's life-rent-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. Colwill et Dun. Forbes.
Reporter, Lord Paincailand. Clerk, Hall.

Edgar, p. 77.

1732. January.

CRAIG against HOPKIN.

No. 82.

Lands which were sold with warrandice from fact and deed allenary, 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

- No. 82.** all other hazards; and therefore if eviction happen otherwise than through the fact and deed of the disponent, he bears the loss. The Lords assoilzied. See APPENDIX.

Fol. Dic. v. 2. p. 518.

No. 83.

1635. February 19. PEACOCK *against* FORBES.

Warrantice from fact and deed adjected to a disposition *mortis causa*, of all debts and sums of money, does not free the donee from being liable to the defunct's debts; for a disposition of an *universitas* must pass *cum suo onere*, and the warrantice is only meant to guard against future gratuitous alterations. See APPENDIX.

Fol. Dic. v. 2. p. 515.

1741. November 6.

JAMES BLAIR of Ardblair *against* HELEN HUNTER, Relict of PATRICK JOHNSTON of Lowercarse, &c.

No. 84.

The nature
and extent of
real war-
randice.

The said James Blair's father did, in the year 1683, purchase the lands of Hatton of Rattery from Patrick Johnston of Gormoch; and as his right thereto was only a gift of forfeiture (which was thereafter rescinded) Mr. Blair did not think himself safe to rely on Gormoch's title to the lands, or his personal warrantice, but he obtained real warrantice for security of his purchase: And accordingly Gormoch disposes to Mr. Blair the lands of Hatton, &c. as for the principal, and the Mains of Gormoch, &c. and that in special clause of warrantice, and relief and security of the principal lands. The dispositive clause (so far as concerns this question) was in the following terms: "Swa that it shall happen the said lands of Hatton, principally disposed, to be evicted, in hail or in part, from the said James Blair, &c. at the instance of any person, or that they be any ways troubled, &c. in the peaceable bruiking or enjoying the same; then, and in that case, the said James Blair, &c. shall have, immediately thereafter, full and free power, regress and ingress to the said lands of Gormoch, &c. in real warrantice, as said is, and to the intromitting with, and uplifting the mails, farms, and duties thereof; at least, to sa meikle of the same as shall effeir and correspond to the said eviction or distress, *pro rata*." The lands of Hatton were evicted by decret in the year 1722: And, after some other litigation, the said James Blair brought a declarator of recourse against the heirs and creditors of Gormoch his author, for asserting the damages he had sustained through the eviction; for declaring, that he had recourse upon the warrantice lands for those damages; and that the warrantice lands were really affected with the value of his damages:

In the course of this process, he proved the rents of the evicted lands at the date of the eviction, the value thereof, and that he had been excluded from the possession of the principal lands from the year 1722; and therefore, that the loss