

- 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 disponent 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Rattery from Patrick Johnston of Gormoch; and as his right thereto was only a gift of forfeiture (which was thereafter rescinded) Mr.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

of those interim rents, as a damage arising from the eviction, is really secured upon the warrantice-lands: And in support thereof pleaded, That personal warrantice, in all onerous contracts, both by the Roman law and ours, has always been understood, not only to extend to the value or price of the subject evicted, but to the whole damage arising from the eviction: And if this holds with respect to the warrantice implied in a sale, when it is not expressed, with what reason can it be said, that, where lands are disposed in real warrantice in a sale, the warrantice has a more narrow and different signification? That a real security is thereby intended for the value of the subject evicted only, and not for the whole damage arising from the eviction? For what good reason should the legal construction of warrantice be different in real warrantice from what it is in personal? That in the one it should signify a security for the value of the subject evicted, and in the other, whether warrantice be expressed or implied, should import an obligation to refund the purchaser's damage and interest? And if this is so, that a purchaser's damage is really secured upon the warrantice-lands, it is impossible that an infestment of warrantice can be an infestment of property, entitling the purchaser, immediately upon the eviction, to the property of the warrantice lands, equal in value to the lands evicted. An infestment for security of a claim of damage and interest, is the most different thing that can be figured from a claim of property: It is an infestment for a sum illiquid indeed, but which must be liquidated. The regress that is competent in excambion, stands upon very different principles, and is governed by very different rules from recourse: In an excambion, in case of eviction, the party recurs to his own lands, and the property reverts to him, as if the excambion had never happened, without any process of liquidation; and that his regress cannot be barred, though the purchaser should offer to make good his damages arising from the eviction; because, by the eviction the contract is resolved, and consequently, the purchaser's right to the lands: But, in recourse upon real warrantice, as the seller is only bound to make good the purchaser's damage and interest; if he is willing to pay up this damage when it is liquidated; he fulfils his obligation, and extinguishes as the personal, so the real warrantice. Again, suppose the eviction not to be any part of the property, but of a sum of money, which was a real burden upon the lands; in such a case, the real warrantice can be no infestment of property, and, consequently, the recourse on the real warrantice must be a security for the sum. Or, suppose the real warrantice to be granted on a mill, or upon the teinds for other men's lands, and that the subject evicted is a land estate; if the real warrantice is a conditional infestment of property, of a subject yielding as much rent as the lands evicted; then, upon eviction, recourse will only be had to mill-rent, worth but ten or twelve year's purchase, or to teinds worth but six or nine year's purchase, in place of lands worth twenty-four. Again, suppose the subject affected with the real warrantice, is also affected with a preferable life-rent, and that, when the eviction happens, the life-rent excludes the recourse for twenty or thirty years; surely it is not to be maintained, that, because of the liferent, the real warrantice was intended to be re-

No. 84. stricted: That the purchaser has all that was intended by his real warrandice, when twenty or thirty years after the eviction, he gets lands of equal rent with those evicted so many years before; and yet this would be the case, if an infeftment of warrandice were a conditional infeftment of property. But as warrandice implies a recourse for the damage arising from the eviction, that, as the value of the subject evicted, so the want of the rents through the fact of the seller would come under the warrandice, and would be really secured by the infeftment of warrandice.

Answered for the defenders: It is true, that, both by the Roman law and ours, personal warrandice is implied in all onerous contracts, which imports an obligation in case of eviction, not only to pay the value of the subject evicted, as it was the time of the bargain, but likewise every damage that has arisen to the purchaser by means of that eviction at the time thereof; but there is no ground in law for extending the action, so as to comprehend any damage that ensues after that has happened; so that whether the subject increase or diminish after the eviction, the claim upon the warrandice remains the same, as is evident from many authorities both in the Roman law and our own. If, then, damages sustained through an eviction are to be estimated according as things stand at that time, then the pursuer would have no right to insist, even upon his personal warrandice, were he in an action against the heir of his author for the rents of the evicted lands, for any years that have run since the eviction, seeing these rents cannot be said to have been evicted from him, and since that damage had not arisen at that time; and far less can he, in the present process, have recourse for the value of these rents upon the warrandice lands. It is another question, how far the pursuer has an action against the heir of his author for the interest of the amount of the damage sustained by his father at the time of eviction; but whatever may be in that, it is sufficient to observe, that the pursuer is not at present in a process for recovery of these annual-rents, as he is only insisting for the value of the rents of the lands, which may be either more or less than the annual-rents of that sum; and therefore, whatever claim he may have to the annual-rent of that money, that claim will not support his demand of the value of the rents, were the question even with the heir of the lands, much less when it is with singular successors.

In the *next* place, supposing personal warrandice were as extensive as the pursuer would have it, no consequence can be drawn from thence, that real warrandice is equally wide; for, where one person grants and another accepts a right to lands with real warrandice, it is not the intention of parties to grant or accept thereof as a pledge or accessory security to the personal obligation; but only, that, in case of eviction, the right of the warrandice lands should become absolute and irredeemable: Whence it follows, that, after an eviction, the person from whom the lands are evicted can have no claim for the value of the rents of the land evicted, since he, as proprietor, has a right to those of the warrandice lands from that time. And the only difference there is betwixt a regress upon an ex-cambion and recourse upon warrandice lands, in case of a sale, is, that the condi-

tion is expressed in the one, and implied in the other infestment; and these two contracts agree likewise thus far, that there is a personal warrantice competent in an excambion as well as in a sale, the one being an onerous contract as well as the other, which shews that there is no inconsistency in a personal warrantice, being more extensive than that which is real: For, though a person from whom a part of the lands given him in excambion has been evicted, has an action for all the damage he has sustained through that eviction against his author; yet it cannot be said, that that whole damage is a real burden upon the lands to a proportional part whereof he is entitled to return. Besides, a contract of sale is, in effect, as much dissolved upon the eviction of the subject sold as the contract of permutation is: Nor is there any inconsistency for a purchaser of land, from whom a sum of money, which was a real burden upon his purchase, has been recovered, to recur to as much of the property of the warrantice lands as will answer that eviction, the matter being more easily extricated here than in the common case of an eviction of lands, seeing there must be a proof of the value of these; whereas, in the other, the extent of the eviction is clear. And, with respect to the supposition of the real warrantice lying upon a mill or teinds, the defenders cannot discover any thing in the least contrary to law, that, in such a case, recourse should be had to lands equal in value to what was evicted; for it is not necessary that the rents of the two subjects should be equal, but that the value thereof should be the same. And if the case supposed should happen, of a subject affected with a real warrantice, which was also affected with a preferable liferent, the acceptor of such warrantice must be understood to have relied upon the personal security of his author, in case it should happen that the lands principally disposed were evicted before the liferent was extinguished.

The Lords found, That the infestment of warrantice gives the pursuer a real right and security in the warrantice lands, not only to the extent of the value of the principal lands at the time of the eviction, but also, that the said real security extends as far as the personal obligation of warrantice to all his damages, arising before or after the eviction, without any fault in the pursuer.

C. Home, No. 179. p. 297

* * This case is reported by Kilkerran.

In an action for recourse upon real warrantice, and for ascertaining the damage a purchaser had sustained through eviction, wherein he libelled not only the value of the principal lands at the date of the eviction, but also the interim rents thereof since the year 1722, at which time he had been obliged to cede the possession, wherein the heir of the disponent, as also Helen Hunter and others, real creditors, in possession of the warrantice lands, were called; it was found, November 22, 1740, " That the clause of warrantice gave the pursuer only a real right to the extent of the value of the lands evicted at the death of the eviction, but no real right to the extent of the rents of the evicted lands since that time; reserving to

No. 84: the pursuer to insist against the intromitters with the rents of the warrantice-lands since the eviction as accords.”

The Lords were much divided upon this point. What prevailed at this time with the plurality was a suggestion from the Bench upon the nature of an infestment of warrantice, That an infestment in warrantice of other lands principally disposed was really a separate disposition of property pendent upon the condition of eviction of the principal lands ; which condition being purified by the eviction, the purchaser becomes directly proprietor of the warrantice-lands, without the aid of an adjudication, to the extent of the value of the lands evicted, and has direct action of mails and duties, like any other proprietor, against intromitters with the rents from the time of the eviction ; which, should it be illuded by the defence of *bona fide* possession, there is no remedy upon the real warrantice. For even supposing the disponent himself to be the intromitter, and as such liable in an action of mails and duties, still the purchaser can have no real lien for the same upon the warrantice-lands : For an infestment of warrantice being, as was said, a right of property, does not, by its nature, admit a real lien to the proprietor for the rents of his own lands.

It was admitted to be otherwise in an infestment for relief, or in security of the personal obligation of warrantice ; for that such infestment was a security upon the warrantice-lands for all damage arising from the eviction : But it was urged, that where the infestment is only in security of the lands principally disposed, and which was the stile of this, and generally is the stile of all infestments in real warrantice, then the infestment is not an infestment for relief, but a conditional right of property, the effect whereof is as aforesaid.

But this was truly to confound an infestment of warrantice with an infestment of excambion : The latter is indeed a conditional right of property, and the regress thereon, which ariseth without any process of liquidation, cannot be barred by an offer to make up the damage arising from the eviction ; whereas in recourse upon real warrantice, which requires a declarator for liquidating the damage, as the seller is only bound to make good the purchaser's damage and interest, so if he is willing to make up this damage when it is liquidated, he fulfils his obligation, and extinguishes the real as well as the personal warrantice.

Upon these principles it was, upon a review, found by a great plurality, “ That the infestment of warrantice gave the pursuer a real right and security in the warrantice lands, not only to the extent of the value of the principal lands at the time of the eviction, but also that the said real security extends as far as the personal obligation of warrantice, to all his damages arising, before or after the eviction, without any fault in the pursuer.”

Kilkerran, No. 1. p. 592.