

No. 93. Aitken in the year 1756 sold it, with absolute warrantice, to Dewar ; and for completing the purchaser's right, assigned to him the unexecuted procuratory in the disposition to himself from Johnston.

Dewar, however, did not take infeftment ; and in the year 1766 was called in an action of mails and duties, by a person in the right of the heritable bond, which had till this period remained a personal deed. Having been obliged to pay the debt therein contained, he recurred against Aitken, his author, upon the warrantice ; who

Pleaded in defence : Where eviction has followed through default of the purchaser, the seller is not bound ; L. 56. § 3. D. De evict. ; L. 51. § 2 ; L. 27. Ibid. From Mr. Dewar's delay alone, in not completing his right by infeftment, this debt, with which the seller had no sort of connection, is available against the subject.

Answered : When a purchaser has allowed his right to be defeated, from circumstances occurring after the sale, and nowise imputable to the seller, he has himself to blame. But he is not obliged to get the start of his competitors. It will not, therefore, deprive him of his recourse, that by following out a particular train of management, he might have eluded an incumbrance affecting the subject of his purchase. Hence, by statute 1617, actions of warrantice prescribe only from the term of eviction ; whereas, if the defender's argument was well founded, as a purchaser in the space of 40 years may, by proper steps, secure his right against the whole world, there was no reason for exeeming him from the general rule.

The Lord Ordinary found, " That by the obligation of warrantice, Aitken, who sold the subject to Dewar, was bound to clear the subject of the incumbrance of the heritable bond granted by Johnston, his author, to Geddes."—And to this judgment " the Lords adhered, upon advising a reclaiming petition for Aitken, with answers for Dewar."

Lord Ordinary, *Monboddoo*.

Act. *Geo. Wallace*.

Alt. *Rolland*.

C.

Fac. Coll. No. 122. p. 225.

1788. *January 14.*

BALFOUR *against* MONCRIEFF.

No. 94.

Doubted, but not precisely determined, how far a claim of real warrantice could be effectual against a singular successor, if it was not specified in the war-ranter's infeftment.

Fac. Coll.

* * This case is No. 79. p. 10267. *vide* PERSONAL AND REAL.