

infestment of the lands to one Lockhart, who had possessed the same ever since, and craved an incident for producing of Lockhart's infestment. The defender alleged no process in this method, but the pursuer ought to have insisted upon the infestment against the tenants, and if Lockhart had defended them upon his right, he ought to have intimated the plea to the defender, especially in this unfavourable case, which hath lain dormant near 40 years. It was answered, That though that be the ordinary course, yet it is not exclusive of this order, and there was no reason to throw out expenses needlessly in a process that could have no effect.

The Lords found no process in this order.

Stair, v. 2. p. 402.

No. 56.
heir of the warranter, alleging that there was a prior infestment exclusive of the one warranted.

1676. July 1. LAIRD of AUCHINTUILL *against* LAIRD of INNES.

The Laird of Innes having disposed certain lands to Auchintuill, with absolute warrantice, *in anno* 1630; thereafter *in anno* 1643, there was an addition made to the Minister's glebe, to make it up four acres, according to the act of Parliament, out of the lands that were disposed, being kirk-lands; whereupon Auchintuill pursues recourse against the Laird of Innes, who alleged, Absolvitor, because absolute warrantice cannot extend to this case, which the buyer should and might have known, whether there was a sufficient glebe designed, and that the lands being kirk-lands, were liable to a glebe.

The Lords found, that the warrantice could not extend to a glebe of kirk-lands designed after the vendition, although by a law before the vendition, unless it had been specially expressed in the warrantice, it being a notour burden upon the land.

Stair, v. 2. p. 436.

No. 57.
Absolute warrantice of lands found not to extend to make good an addition to a glebe.

* * See contrary cases, Elphinston against Blantyre, No. 39. p. 16585.; Watson against Law, No. 44. p. 16588.; and Bonnar against Lyon, *infra*.

1678. December 14. DICK *against* BLAIRS.

Umquhile Janet M'Math having arrested a sum in the hands of Tyrie of Drumkilbo for satisfaction of a bond due to her by Kilspindie as principal, and the Lord Oliphant and others as cautioners, she was excluded by an assignation to the same debt granted by Kilspindie, intimated by a charge of horning before her arrestment; but thereafter having improved that assignation as false, Dick of Grange her son insisted against Sir Lawrence Oliphant as he who had apprised Drumkilbo's estate upon the false assignation, and thereby did enjoy the profits or price thereof in prejudice of the legal diligence by arrestment, to make pay-

No. 58.
Warrantice from fact and deed of the cedent, secures not from falsehood, to which the cedent was not accessory.

No. 58.

ment thereof to the pursuer ; and also against Blair of Gleschune, to whom Sir Lawrence Oliphant had disposed his apprising ; in which pursuit Sir Lawrence was found liable *in quantum lucratus*, either by the profits of the land, or getting more for his right than he gave to his author ; whereupon he deponed, that he disposed his right to Blair of Gleschune, who had married Drumkilbo's daughter, and that as a part of the bargain he had taken bond from Blair to relieve the Lord Oliphant of that bond, in which he was cautioner for Kilsplindie to Janet M'Math ; which bond of relief being adjudged by Grange as representing the said Janet his mother from the Lord Oliphant, he doth now insist against Blair for payment of the foresaid bond due to his mother by Drumkilbo. The defender alleged, *1mo*, That the bond of relief could take no effect, because the Lord Oliphant was not distressed ; *2do*, Because the true cause of granting the bond of relief was the right disposed by Sir Lawrence Oliphant to Blair, which now being found null, as proceeding on a false assignation, the bond of relief *cadit in non causam*. It was answered, That the Lord Oliphant was distressed by horning. And as to the second alleigance, it was answered, that the cause of the bond of relief was the disposition by Sir Lawrence Oliphant, which bears expressly warrantice from Sir Lawrence's fact and deed allanerly, and therefore the right was taken *talis qualis* Sir Lawrence had it upon Blair's hazard, so that except by Sir Lawrence's fact, the right for which the bond of relief was granted, was found null, the bond cannot fall *ob non causam*. It was replied, That the warrantice from fact and deed doth import *quod debitum subest*, and that the right disposed is valid in itself, though it may be excluded by a better right ; and therefore if a bond were assigned with warrantice from fact and deed, if the said bond were improved, or null for want of solemnities, the sum paid for the assignation would be recovered. It was duplied, That warrantice from fact and deed allanerly doth import a bargain of hazard, and therefore can give no recourse or warrantice, but only upon the fact and deed of the cedent, and so though the right assigned was found false or null without the author's fact or fault, there can be no recourse against him for repetition of the price, which is further cleared from the common custom and stile of assignations, and dispositions of apprisings, or other securities of money, in which this clause of warrantice is ordinary, that the debt is truly due and resting, and that there is no deed done by the author that may make the security ineffectual, in which case if the debt was not found due, either by falsehood or nullity, it would infer warrantice or repetition by virtue of that clause ; but otherwise there can be neither warrantice nor repetition either upon falsehood or nullity, or preference of a better right, unless there were found a fact or fault of the author by which the right granted by him was made ineffectual.

The Lords found, that the disposition by Sir Laurence, being but warrantice from his fact and deed, Blair had accepted the same upon all other hazards, except Sir Laurence's fact and deed ; and that the falsehood of the assignation made use of by Sir Laurence's author, whereunto he was not accessory, could neither make him liable for the warrantice, or the bond of relief fall as *incidens in non causam*, seeing the cause was the disposition, with the foresaid hazard.