1717. *February* 22. SIR JOHN HOUSTON *against* CORBET of Hardgray.

No. 80.
In evictions of whatever subjects, rights in security, lands, &c. the recourse upon the warrandice is not restricted to the price paid for the conveyance, but reacheth to the real worth of the subject evicted.

William Anderson, late provost of Glasgow, being creditor to Maxwel of New-wark, his son Captain William Anderson was confirmed executor to him; who having obtained decreet *passivè* against New-wark's son, an adjudication was led thereon in the year 1686: This adjudication was transmitted by assignation to Corbet of Hardgray, and by him disponed to Sir John Houston, with this clause of warrandice, "which disposition and assignation above written, I bind and oblige me, my heirs and successors, to be good and valid, to the said Sir John Houston and his foresaids, frae all perils, dangers, and inconveniencies whatsoever, any ways proceeding from my own proper fact and deed, or frae the proper fact and deed of the said umquhile William Anderson late provost of Glasgow, or frae the said deceased William Anderson his son my cedent allenarly." Thereafter, New-wark's heir having insisted in a reduction of Sir John Houston's rights upon the estate of New-wark, particularly of the above adjudication disponed to him by Corbet of Hardgray; in that process it was instructed, by a discharge under the said William Anderson younger his hand, that 1360 merks of the sums for which the foresaid adjudication was led, was paid to the said William as executor confirmed to his father: Whereupon the Lords cut off the penalty and whole accumulations in the adjudication, and restricted it to a security for the principal sum and annual-rents remaining, after deduction of the sums contained in the discharge. Thereupon Sir John Houston, in a process against Corbet of Hardgray, insisted upon the clause of warrandice above narrated, for making good his damage and interest sustained by him, in consequence of the above deed of contravention of the warrandice; declaring, though he is well founded to insist for the whole damage sustained by opening the adjudication, which otherwise would have had the benefit of an expired legal, and at least would have procured him payment of the whole accumulations, with the interest thereof; yet he insists only for the sum and annual-rents thereof discharged by Anderson. On the other hand, it was contended for Hardgray, That the action of warrandice could go no further, than for repetition of the sums paid by Sir John to Hardgray for the disposition of the adjudication, deducing therefrom whatever Sir John Houston had by virtue of that adjudication recovered out of the estate of New-wark: That this being an action of warrandice against an assignee, where the warrandice was incurred by no fraud or fault of his, but by a deed of his cedent, which he could not know; and that the subject of the transaction being with respect to a personal right; the warrandice could be extended no farther than to make up to the purchaser *quod deest* of what he paid for the purchase, and to free him from any loss; which is distinctly held forth by Lord Stair, Lib. 2. Tit. 3. § 46. Par. 4. where, speaking of the eviction of lands, he says, "The whole worth of what is evicted, as it is the time of the eviction, is inferred, because the buyer had the lands with the hazard of becoming better or worse, or the rising or falling of rates; and therefore is not obliged to take the price he gave:" And then he adds, "But in

No. 80. warrandice of personal or redeemable rights, the matter is ordinarily liquid; and there is no design of hazard, but an absolute relief." The plain sense of which word is, that however warrandice be expressed in personal rights, the intention of parties is, that the warrander shall be no further liable, than what he really gets for the transmission; though indeed in the sale of lands, the warrandice is more strictly interpreted according to the words, because of the subsequent uncertainty of the subject of the sale; for lands may turn better, or worse; the rents may rise, or fall; which are all upon the purchaser's hazard; but in acquisition of debts, and personal rights, there are no such uncertainties; they still remain in the state they were given, unless the assignee's negligence intervene; which is not chargeable upon the warrander. And thus also it was determined, 28th February 1672, Earl of Argyle against Aiton, No. 52. p. 16598.

In answer to this, it was pleaded, That here the action is not only upon account of a damage sustained by Houston, which is the common case of evictions, but of a *lucrum* had by the cedent; a sum uplifted and intromitted with by him, to which Sir John Houston has right; or, which is the same thing, by William Anderson, in whose place the cedent has stated himself by the tenor of his obligation. This in reality is not so much an action to free Sir John from a distress, as the claiming a sum lying in Anderson's hands, which belongs to Sir John Houston, and which Hardgray is liable for, as he who by an express obligement has taken burden upon him for Anderson;—so that in any proper view of the matter, the dispute comes to be no other than this, If one *prudens et sciens* is bound to perform his rational contracts? The bargain was made betwixt Sir John and Hardgray, upon this express view and supposition pactioned and agreed upon, That at least the whole sums were resting; as to the sufficiency of the debtor, and preference of the diligence, that indeed Houstoun took his hazard of; but that the debt was truly due, and no part thereof paid, was undertaken, and reasonably undertaken by Hardgray. The decision mentioned, is not the same with this; Aiton had indeed given warrandice to the Earl of Argyle, that the sums were owing not paid; and so they were truly, though his right was excluded by a preferable right, viz. that of the treasure-depute. But here the ground of eviction is not, that Sir John's right is excluded by any preferable; but that the warrander, or his author, has actually intromitted with, and discharged so much of the sums assigned.

Replied for the defender: There is no difference betwixt the cases, that can have any influence; in both, the warranders were directly bound, that the debts should be good debts to the assignees; in neither case was the warrandice incurred by any fault of the warrander; and it certainly has no effect upon the action of warrandice, whether it happen to be incurred in respect the warrander never had a right, being excluded by nullities, or the preferable right of another, which was Aiton's case; or if there was once a subsistent debt, but discharged, which is the present case. The Lords found expressly the meaning of Aiton's warrandice to be, that the claim should be a valid claim to the Earl of Argyle;

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. No. 80.

" 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 annual-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, *1mo*, An inhibition raised at the instance of Andrew Cockburn, as cashier for the African Company; *2do*, An inhibition at the instance of Ursilla Goddart, upon a depending process before the Court of Session; *3tio*, 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