SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

Major General JOHN HUGHES, and Sir HEW DALRYMPLE HAMILTON, Baronet ..... } *Appellants.*

WILLIAM GORDON, Esq. of Milrig.. *Respondent.*

THE sale of a superiority* of a forty-shilling land, of old extent, with warrandice, does not necessarily imply a warranty of a freehold qualification.

In an action where the summons concludes for peaceable enjoyment of lands sold, with warrandice, or damages, in case of eviction, it is in form and substance an action upon the warrandice; and unless the pursuer proves that he is evicted of something expressed, or necessarily implied, in the warrandice, he cannot recover in that form of action.

An offer, by the defender, to meet the plaintiff in another action, if he amends his pleading, is not a waiver of the form.

A conveyance, referring to letters of a preceding treaty, but not specifying what letters, is too uncertain to incorporate the letters, and make them part of the final contract.

Such letters cannot be used in evidence, to explain the contract, by showing what was intended to be part of the sale and purchase, although not expressed in the conveyance.

THE Appellant was proprietor of the estate of Milrig, held of the crown, and estimated a 60*s.* land of old extent. The Appellant entered into a treaty with Mr. Charles Stewart, writer to the signet, who acted for the Respondent for the sale

1819.

HUGHES AND HAMILTON *v.* GORDON.

Facts of the case.

* For explanations of the nature of superiorities, and of the old extent, and the amount sufficient to confer a freehold qualification, &c. see the case of *Geddes* v. *Stewart*, and the notes, *ante*, p. 164, *et seq.*

1819.

HUGHES AND HAMILTON v. GORDON.

of Milrig; and the parties having at last come to an agreement for the sale of this estate, with the exception of the superiority of a part called the twenty-shilling land of Millside, regular instruments of obligation of feu of the part of which the superiority was to be retained, and disposition of the remaining part, were duly executed by the Appellant, and also by Sir Hew Dalrymple Hamilton and John Barnes, Esquire, now deceased, as trustees for Mrs. Hughes, whose provisions under marriage contract were secured upon the estate of Milrig. The instrument of agreement or obligation is in these words: "Know all men by these "presents, that I, Lieutenant Colonel John "Hughes, of Milrig, heritable proprietor of the "lands and others underwritten, with the special "advice and consent of Sir Hew Hamilton Dal-"rymple of Bargany and North Berwick, Baronet, "and John Barnes of Lansdowne-place, in the "county of Middlesex, Esquire, trust-disponees "of me the said John Hughes, conform to dispo-"sition by me in their favour, in trust for behoof "of Mrs. Hamilla Hamilton, my spouse, and the "other purposes therein mentioned, dated the "22d July, 1802, upon which they stand infeft, "conform to instrument of sasine, dated 1st, and "registered in the general register of sasines, the "15th September thereafter; and we the said Sir "Hew Dalrymple Hamilton and John Barnes, for "all right which we have to the lands and others "underwritten, at present or upon the decease of "the said John Hughes, in virtue of the foresaid "disposition and infeftment, considering that by

Nov. 7 and 11, 1807.

1819.

HUGHES AND HAMILTON v. GORDON.

" *missives of sale of different dates,* I the said
" John Hughes sold to William Gordon, Esquire,
" some time senior judge at Arnee in the East
" Indies, *the forty-shilling land of Milrig, and*
" *twenty-shilling land of Millside of old extent,*
" with the teinds and pertinents at the price of
" 13,125*l.* sterling, by which missives it was
" agreed that I the said John Hughes should
" retain *the superiority of the said whole lands,* in
" which I stand publicly infeft until Michaelmas
" 1808, at which time I became bound to denude
" *of the superiority thereof,* excepting the twenty-
" shilling land of old extent of Millside, so far as
" regards the superiority thereof which was to
" remain in my person, and the property thereof
" was to be held feu of me and my successors; and
" whereas the parties hereto have of even date
" with these presents executed a feu right and dis-
" position of the *said whole lands* in favour of the
" said William Gordon for payment of the feu-
" duties therein specified, in consideration of pay-
" ment of and security for the said sum of 13,125*l.*
" as the price of said lands in manner therein
" mentioned, and that it is proper we should
" grant the obligation underwritten, *as to the*
" *superiority of the said forty-shilling land of*
" *Milrig;* therefore we hereby bind and oblige
" ourselves, for our several rights and interests
" foresaid, and our heirs and successors, at and
" against the term of Michaelmas, 1808, to make,
" execute, and deliver to the said William Gordon,
" his heirs or assignees, at our expence, a formal,
" valid, and effectual disposition in his and their
" favour, of *all and whole the said forty-shilling*

1819.

HUGHES AND HAMILTON v. GORDON.

" *land of Milrig of old extent, comprehending as* " *parts of the same, the lands of Milrig-hill, with* " *houses and pertinents of the same, excepting the* " *privilege of pasturage on the common of Galston,* " *lying within the barony of Riccarton, bailiary of* " *Kyle-stewart and shire of Ayr, as the same are* " *described in the public rights of said lands ;* which " disposition shall contain procuratory of resigna- " tion, precept of sasine, clause of absolute war- " randice on the part of me the said John Hughes, " and from fact and deed on the part of us the " said trustees, with an assignation to the clause " of warrandice in the trust deed in our favour, " assignation to writs and evidents, and to the feu " duties and casualties of superiority and other " clauses in common form ; and also a clause ex- " cepting from said disposition, the feu-right of " the said forty-shilling land and others, as con- " tained in our foresaid feu disposition in favour " of the said William Gordon ; which disposition " shall be so granted by us at the term foresaid, " under the penalty of 100*l.* sterling to be paid by " us to the said William Gordon, or his foresaids, " in case of our not granting the same, over and " above performance."

The feu right* and disposition of the superiority are agreeable to this obligation. The disposition is in the names of the same parties, and after reciting the obligation it proceeds: " Therefore we " have sold and disponed, as we do hereby, for all " right we or any of us have or can pretend in the " premises, sell, alienate, and dispone from us

* The statement of this instrument is omitted, as being immaterial to the point in question.

" our heirs and successors, to and in favour of the 1819.
" said William Gordon, his heirs and assignees
" whomsoever, heritably and irredeemably all and HUGHES AND HAMILTON *v.*
" whole *the forty-shilling land of Milrig of old* GORDON.
" *extent, comprehending as parts of the same the*
" *lands of Milrig-hill, with houses and pertinents*
" *of the same, excepting the privilege of pasturage*
" *on the common of Galston, together with the*
" *teinds, parsonage, and vicarage of the said lands*
" *lying within the barony of Riccarton, bailiary of*
" *Kyle-stewart, and shire of Ayr*, together with all
" right, title, and interest, claim of right, property,
" and possession, as well petitory as possessory,
" which we or any of us, our predecessors,
" authors, heirs, and successors have, had, or can
" anyways claim or pretend thereto, in all time
" coming; in which lands, teinds, and others
" above disponed, we bind and oblige ourselves
" and our foresaids to infeft and seise the said
" William Gordon."

The procuratory of resignation is conformable to this disposition.

The clause of warrandice is thus expressed:
" *Which lands and others above disponed*, with this
" right and disposition of the same, and infeft-
" ment to follow hereon, we bind and oblige our-
" selves for our several rights and interests before
" written, to warrant to the said William Gordon
" and his foresaids as follows; videlicet, I the
" said John Hughes oblige myself and my fore-
" saids to warrant *the same* to be free of all burdens
" and incumbrances, and grounds of eviction
" whatever, at all hands and against all deadly as

1819.

HUGHES AND HAMILTON *v.* GORDON.

" law will; and we the said Sir Hew Dalrymple " Hamilton and John Barnes, as trusteees foresaid, " do oblige ourselves to warrant *these presents* " from our own facts and deeds only; and further " we hereby assign and make over to the said " William Gordon, and his foresaids, the clause of " absolute warrandice contained in the foresaid " trust disposition in our favour, excepting always " from this warrandice the feu right and disposi- " tion before mentioned of the property of the " said lands of Milrig and others granted by us to " the said William Gordon as aforesaid."

The Respondent, in 1812, for the first time, claimed to be admitted upon the roll of freeholders for the county of Ayr, at their Michaelmas Head Court, held upon the 6th of October, 1812; and in evidence of the old extent of the lands upon which his claim of inrolment was made, he produced an extract from the records of Chancery, of a retour of the service of Alexander Nisbet, of Greenholm, as nearest lawful heir of Margaret Nisbet, his mother, *inter alia*, in the forty-shilling land of Milrig, therein retoured to be a forty-shilling land of old extent, expede before the sheriff of Ayr, on the 25th of December, 1578.

By the titles and documents then produced, the Respondent's qualification, as a freeholder, was held to have been sufficiently established, and he was accordingly admitted to the roll; but at the meeting for electing a commissioner to serve in Parliament, held upon the 23d of the same month of October, an objection to the Respondent's vote

was stated, on the part of Sir Andrew Cathcart, of Carleton, Baronet, founded upon an allegation that the document preserved in Chancery, as the warrant of the record of the retour of the service of Alexander Nisbet, in the forty-shilling land of Milrig, in that office, was not an authentic or probative retour. This objection was repelled by the Court of Freeholders; but a petition and complaint was presented, in the name of Sir Andrew Cathcart, to the First Division of the Court of Session; praying that, upon the ground above alluded to, the Respondent should be found not to have produced proper and sufficient evidence of the old extent of his lands, and that his name should be ordered to be expunged from the roll.

1819. HUGHES AND HAMILTON *v.* GORDON.

Of these proceedings the Appellants were apprised, by an instrument of protest, in the name of the Respondent, which was immediately followed by the execution of a summons, in an action of warrandice against them. In this action, however, no farther proceedings were taken until after the issue of the complaint, at the instance of Sir Andrew Cathcart, which terminated in a judgment of finding "That Mr. Gordon was not entitled, in virtue of his titles produced, to be enrolled in the roll of freeholders for the shire of Ayr." This judgment appears to have proceeded upon the ground that the registration of the retour, above alluded to in the books of Chancery, was liable to challenge, and that the document exhibited by the clerks of Chancery as the warrant of registration, did not appear to be either an original retour, or a duly authenticated

Dec. 24, 1812.

March 3, 1813.

1819.

HUGHES AND HAMILTON *v.* GORDON.

copy of such retour. Having been thus removed from his place on the roll of freeholders, until he should be able to establish, by better evidence, the old extent of his lands, the Respondent began to move in the action which he had previously instituted against the Appellants.

The summons, in this action, proceeds upon a narrative of the transactions between the Respondent and Appellants, and particularly upon a recital of the deeds of conveyance executed in favour of the former; consisting, in the *first* place, of the disposition of the whole lands to be held in feu of the granters; *secondly*, of the obligation to convey at a certain subsequent term, the superiority of that part of the lands called Milrig and Milrig-hill; and *thirdly*, the disposition and conveyance of that superiority in terms of the previous obligation. This last is the deed mainly founded on, and from that deed the clause of warrandice, already quoted, is given as the basis of the action. The summons then proceeds to narrate the history of the Respondent's inrolment, and the nature and grounds of the complaint against that inrolment, which was then in dependence; and upon these premises the summons proceeds to aver, that "in the bargain between the said John "Hughes and William Gordon, for the purchase "of the said lands of Milrig, it was stipulated as "aforesaid, that the said William Gordon was to "have a freehold qualification at Michaelmas, "1808, and in terms of the obligation before re-"cited, and disposition granted by the said John "Hughes, Sir Hew Dalrymple Hamilton, and 'John Barnes, they, for their respective interests,

1819.

HUGHES AND HAMILTON v. GORDON.

" are liable in warrandice of the said disposition, " and are bound to free and relieve the pursuer of " all risk and consequences of the petition and " complaint before mentioned, and of any decreet " or act and warrant to be pronounced in the " same," &c. The summons concludes alternately, that the Appellants should maintain the pursuer in the peaceable possession of the said freehold qualification, " or otherwise, and in case of " *eviction* of the said freehold qualification and " right of voting, as aforesaid, by any decreet or " act, and warrant, to follow and be pronounced in " the foresaid petition and complaint, the said " defenders ought and should be decerned and " ordained by decree foresaid, to make payment " to the pursuer of the said sum of 1000*l.* sterling, " as the price and value of the said freehold qua- " lification, with the legal interest thereof, from " the date of *eviction*, by any decreet or act, and " warrant, to be pronounced in the foresaid peti- " tion and complaint; as also to make payment " to the pursuer of the sum of 500*l.* sterling, in " name of damages, and by way of recompence " for the loss sustained by the pursuer through " the said eviction, and *in solatium* of the detri- " ment arising from the loss of the pursuer's vote " and right of electing at the said election meet- " ing; together with the expences incurred, or to " be incurred, by the pursuer, in the said petition " and complaint," &c.

The following defences were stated by the Appellants:—" None of the writings founded on in " the summons of this action have been produced, " and until they are seen, the defenders cannot

1819.

HUGHES AND HAMILTON v. GORDON.

" know whether by their terms they afford any " ground for the pursuer's conclusions. From " the pursuer's own shewing, however, it would " appear that he made a slump bargain of the pro- " perty as well as the superiority of Milrig, and " that no warrandice was undertaken by General " Hughes, that the superiority afforded a freehold " qualification, but only that the superiority truly " belonged to him, which is not disputed, no " *eviction* of the superiority having taken place, " or even been threatened. In point of fact, " General Hughes is conscious that he never " meant to undertake any warrandice of a freehold " *qualification;* and that if such a thing had been " required of him in the course of the transaction, " he would rather have been off from the bargain " than agreed to it. If, therefore, there is " any thing in the writings referred to in the " summons importing such warrandice, it must " have crept in *per incuriam*, and was not *pars* " *contractûs* between the parties.

" As to the other defenders, Sir Hew Hamilton " and Mr. Barnes, nothing is stated in the summons " that can implicate them in the alleged warran- " dice. They are merely said to have warranted " from their own facts and deeds; and as no " breach of this is alleged, they will fall to be " immediately assoilzied and found entitled to " their expences."

This action came before Lord Glenlee, Ordinary, and his Lordship on hearing parties appointed the case to be stated to the Court in mutual informations.

In the information for the Respondent in the

court below, certain letters of treaty preliminary to the conveyances were offered to prove an obligation by the Appellants to convey and warrant, not only the lands and superiority, or crown vassalage of Milrig, but absolutely a freehold qualification in the county of Ayr. The Appellants denied that these letters were admissible evidence in the case after the execution of formal instruments; and they also pleaded that if they had been admissible, they did not prove the obligation alleged by the Respondent.

The second division of the Court of Session pronounced the following interlocutor: "Upon "report of Lord Glenlee, and having advised the "informations for the parties, the Lords repel the "defences proponed; find it relevant to diminish "the price of the lands, that it was intended by the "parties that the lands should entitle the pur-"chaser to a qualification as a freeholder, affording "a right to vote at elections; ordain the pursuer "to give in within ten days, a pointed conde-"scendence of the amount of diminution of price "demanded by him, as well as of the damages "concluded for, and reserve consideration of the "conclusion for expences till the issue of the "principal cause."

Dec. 1, 1814, signed 2d. First interlocutor of the Court appealed from.

In consequence of this interlocutor, various proceedings * took place in the Court below, to ascertain the value of the freehold qualification in

* These proceedings are not stated, because the question which gave rise to them became immaterial by the judgment of the House of Lords upon the preliminary question of right upon the terms of the contract.

1819.

HUGHES AND HAMILTON *v.* GORDON.

dispute, and the expences incurred by the Respondent in the proceedings against him in the Freeholders' Court and Court of Session, upon the subject of his right to vote and remain upon the roll of freeholders.

Feb. 3, 1816, signed 8th. Third interlocutor of the Court appealed from.

Upon these points the Court pronounced the following interlocutor: "The Lords having resumed "consideration of the cause, and advised the con- "descendence and additional condescendence "for the pursuer, with answers thereto, decern "against the defender for payment of 538*l.* 18*s.* 4*d.* "sterling, as the amount of diminution of price, "to which the pursuer is entitled in terms of the "judgment of the Court, with legal interest of "the same, from and after the 3d March 1813, as "the date of eviction; also for payment of 167*l.* "8*s.* 3*d.* sterling, being the amount of the ex- "pence incurred by the pursuer in maintaining "his title as a freeholder against the challenge of "Sir Andrew Cathcart; find the defenders liable "in expences, subject to modification, and remit "to the auditor to report on the account thereof "when lodged; and *quoad ultra* assoilzie the "defenders from the conclusions of the libel and "decern."

Against these several interlocutors an appeal was presented to the House of Lords, and on 23d March, 1819, came on to be argued.

For the Appellants—*the Solicitor General* and *Mr. Lumsden.* For the Respondents—*Mr. Wetherell* and *Mr. Abercrombie.*

Two principal questions were argued.

1. Upon the question as to the admissibility of the preliminary correspondence as evidence on the part of the Respondent, Stair's Inst. Tit. Probation, *Clinan v. Cooke*, Scho. and Lef. Rep. vol. i. p. 22; and *Wiglesworth v. Dallison*, Doug. Rep. p. 206, were cited; and it was compared to the cases of latent ambiguity, where parol and external written evidence has been admitted to explain a deed.* Upon the general question, *Hughes v. Gordon*, decided in the Court of Session before the Second Division in the year 1811, was cited.

2. Upon the question whether the contract implied a warrandice, it was said the parties agreed to sell and to buy the lands of Milrig, both parties understanding that the 40*s.* land had the quality of affording Mr. Gordon a title to be inrolled as a freeholder, and both understanding it on grounds equally known to both, viz. the actual enrolment and the title-deeds.

For the Appellants the arguments were thus stated:—

There is no reason to doubt, that *de facto* the crown-vassal in the 40*s.* land of Milrig had been

* On this point, see *Beaumont v. Field*, 1 Barnewell and Alderson's Reports, 207, which was a case of letters written upon a previous treaty, and admitted to explain a deed.

The deed in that case purported to convey coal mines by a certain description; and there were no mines corresponding to the description. So in this case, if the disposition had professed to convey, or the warrandice had included a freehold qualification by an erroneous or mistaken description, the letters might have been held admissible.

1819.

HUGHES AND HAMILTON *v.* GORDON.

a freeholder in virtue of his right to these lands, from the very commencement of such freehold rights. The lands had afforded a freehold qualification during the possession by the Appellant General Hughes, since he actually stood enrolled on these lands. It continued for three years and more after the sale and disposition to the Respondent, and till after the Respondent too was enrolled, when an objection was stated. The objection was not that the lands were not truly 40*s.* lands of old extent, and therefore substantially sufficient to confer title to a vote. But it was this, that the extract of the retour of the lands of Milrig, which purported to be taken from a writing held to be a retour about the end of the 16th century, had now for the first time been discovered to have been taken from a writing of that period, but which was not a regular retour. In this way, the existing evidence of the old extent of Milrig which had supported the vote on these lands from time immemorial, happened on the fourth year of the Respondent's possession of these lands, to be destroyed by an investigation, which the dilatory and imprudent conduct of the Respondent, in waiting for years, till the eve of a general election, before he claimed enrolment, had occasioned.

It cannot constitute a case of eviction or of warrandice, either express or implied, for it is clear that there was no eviction of any subject whatever by any person; and it is equally clear, that the mere fact of parties believing a subject to have any quality, would not constitute warrandice, even although it never had such quality at all;

otherwise actions of warrandice would be infinite; for there always are prevalent opinions as to the qualities of subjects sold which turn out to be erroneous. Far less, however, could a claim of warrandice arise, when the subject did possess that quality as believed by both parties, and by a subsequent accident, which neither could foresee, was afterwards found to want evidence to support the claim. This is a case of *periculum rei venditæ et traditæ*. The subject was sold by the Appellant to the Respondent, with a supposed quality, without any express warrandice of this quality; and nothing was said or done by the Appellants, to which the belief of the Respondent that the subject was so qualified can be attributed. After three years, an accidental discovery is made, and the quality perishes. This seems no more the ground of claim against the seller, than if a volcano had burst out from under the lands, or if they had sunk into a gulph. Though these catastrophes had been prepared by the operation of centuries, yet no claim would on that account have existed against the seller, who never could be construed to warrant the duration of the subject sold, in all its value against innumerable accidents. It may be asked where the claim could stop? The date of the retour was about the end of the 16th century. Since that time the lands may have passed through twenty hands, by similar bargains. With whom is the responsibility to rest? Prescription cannot operate; it never does operate in cases of eviction and warrandice, except from the date of the eviction or breach of war-

1819.

HUGHES AND HAMILTON *v.* GORDON.

randice. The claim then must run back to the date of the retour, and be handed from purchaser to purchaser, till it reaches that period. Supposing the lands to have been sold by A. B. in 1599, and that A. B. had heirs at this day, would they be liable in warrandice? Yet on what principle could the burden be laid on any intermediate possessor? Another case may be put:—Suppose the lands had been sold as a forty-shilling land while both the parties understood that there was no vote on them. Suppose then, that a retour had by accident been found, could the Appellant, General Hughes, have brought a claim of any kind against the Respondent? Surely not. The answer would have been, that this was an accession *rei venditæ et traditæ*, to which the buyer was fully entitled; and if the Appellant, General Hughes, had pretended to push his claim, he would have been told, that the lands might have passed through many hands while this capacity of accidental improvement existed, and that he must blame his own bad fortune or negligence that the lucky accident did not happen in his time. But the very same argument applies in the converse case. The retour has accidentally been found to be irregular while the estate is held by the Respondent. It must equally follow, that the Respondent must bear this accidental diminution of value, as enjoy an accidental increase. *Cujus est commodum ejus debet esse incommodum.*

For the Respondent were cited the cases of *Wilson v. the Creditors of Auchinleck*, Nov. 14, 1764, Dict. of Decis. vol. iv. p. 210; (in which

the purchasers at a judicial sale were allowed a restitution of one fourth of the price of the teinds; the whole of which they had bought and paid for with the lands; it having been discovered after the sale that one fourth of the teinds did not belong to the bankrupt, but to the crown:) *M'Lean v. M'Neil*, Fac. Coll. June 28, 1757; (in which it was found relevant to diminish the price of lands, that it was intended by the parties that the lands should entitle the purchaser to a qualification as a freeholder having right to vote at elections *;) and *Edwards v. M'Leay*, Cowper's Rep. p. 308.

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* The facts of this case were thus stated by the Appellant's counsel from the Sessions papers. Two parcels of lands were sold to M'Neil by minute expressly describing *each of them as separately a two merk land of old extent*, and over and above this, it was not only the understanding of the parties, but distinctly expressed between them, that the lands did afford a vote in the county, and were bought with a particular view to that quality. In truth, however, the lands taken together, were only a two and a half merk land, and *for that reason*, did not afford a vote. It was a long time before M'Neil, the buyer, made up his titles. In doing that he found out the fact, and it did not appear possible that the error could have been innocent on the part of the seller. Having found this out, M'Neil appears to have resisted payment of the price, and M'Lean's heir brought an action against him. M'Neil pleaded alternatively, that he was entitled either to rescind the sale or have a deduction from the price; and he aided this plea by very strong allegations, and proofs of wilful deceit in M'Lean. M'Lean's heir, the pursuer, attempted to defend himself, on the plea, that the lands being or not being of four merks of old extent, and affording or not affording a vote, was not in law a valuable or estimable quality. The first interlocutor by Lord Drumore, Ordinary, upon the

1819.

HUGHES AND HAMILTON *v.* GORDON.

In the course of the argument, Lord Redesdale made the following observations.

merits, is dated Feb. 22, 1754. In it the Lord Ordinary finds "the allegation made by the defender, that it was *actum et* "*pactatum* betwixt him and the deceased Lochbuy and his inter- "dictors, at the time of executing the minute of sale, that they "should dispone to the defender such an estate as would entitle "him to vote for a member of Parliament in that county, neither "competent to be proven by the interdictor's oath, nor relevant "to resolve the sale or abate the price, in respect the defender "does not qualify any damage he sustains by the want of such "vote; and allows the defender's procurator to see the writs "produced for instructing that the incumbrances are purged."

This interlocutor was adhered to by refusing a petition for M'Neil, the defender. The defender presented a second reclaiming petition, which was remitted to the Lord Ordinary, (Lord Kames, Lord Drumore having died.) It appears that the pursuer, at advising the last reclaiming petition, had made an offer of taking back the lands. To which the defender's counsel had stated, they were not instructed to make an answer at that time. With this the cause went to the Lord Ordinary. Before the Lord Ordinary the defender's counsel appear to have signified their acceptance of the pursuer's offer; but by this time the pursuer had changed his mind, and refused to adhere to his offer. Upon this the defender again petitioned the Court against the former interlocutor, in respect the pursuer had refused to take back his lands, and because the Lord Ordinary had refused to judge in that matter. This petition was answered. In the answers the pursuer pleaded *res judicata*, and maintained that he had eight interlocutors in his favour, and that the cause was finally decided. Upon this petition and answers an interlocutor was pronounced, which is the interlocutor quoted in the report as a final one. It is in these words: "The Lords find it relevant to diminish the price of the lands; "that it was intended by the parties that the lands should entitle "the purchaser to a qualification as a freeholder having right to "vote at elections." But this interlocutor was *not* final. On the contrary, a petition was presented for M'Lean's heir of this

The objection to the form of proceeding as stated by Lord Robertson, is that the present date. The petition was answered. This case was not decided upon this petition and answers; but memorials were ordered upon a point, whether a retour in 1609 shewed the value of the lands to have been four marks. The Appellants have not been able to discover the final judgment. But there appear to have been memorials given in. That for M'Neil is dated Jan. 5, 1758, and that for M'Lean, Feb. 6, 1758.—The following passages in the papers will shew the nature of the facts and pleadings in the case.—In the answers Aug. 5, 1757, by the defender, M'Neil, are the following passages:—" Want of qualification implies a " fraud on the part of the seller, as he must have known the " defect at the time of the bargain; and as this defect existed " from the very beginning it could not arise from the purchase, " nor could be supplied with regard to the subjects sold.

" The last observation in the petition, that in fact the lands of " Ardlussa and Knockintavel, are part of the barony of Moy, which, " by an old retour in 1609, is valued at eighty merks of old extent, " and that if this old extent was divided, a proportion of four " merks would belong to the lands of Ardlussa and Knockintavel, " which, as the law stood at the time of the purchase, would " entitle to a vote, is clearly founded upon a *wilful mistake* as " to the import of this retour. Though it is true that in the " valent, it is said, ' *Quod omnes et singulæ superscriptæ terræ,* " *&c. tempore pacis valuerunt octogentas mercas,*' yet when the " particular description of the lands in the retour is adverted to, " those in question are thus described: ' *Terris duarum merca-* " *torum terrarum et dimidiata terrarum de Ardlussa et Knockint-* " *avel in insula de juray;*" so that here the particular propor- " tion of the old extent belonging to these lands is expressly " described and specified in the retour."

In the memorial for M'Neil, Feb. 6, 1758, are the following passages: " In the sequel it shall be made appear that this false " description could not possibly have proceeded from error and " mistake."

After saying that the lands are falsely described, it proceeds:

1819.

HUGHES AND HAMILTON *v.* GORDON.

action rests entirely upon the warranty. Whether the objection to the form of proceeding has been

" For the Defender is now in condition to aver, that from the " examination made of all the title-deeds produced for " Lochbuy, conceived in favour of his predecessors, from " the earliest period down to this day, this decription is not to " be found in any one of them. They were neither described in " any of these title-deeds, as a four merk land, nor as of any " old extent whatever. On the contrary, your Lordships will " observe, from what is now called the retour 1699, and from " another retour in 1615, that they are described to be but a " two and a half merk land, without the least mention of old " extent;" " and therefore the defender must be pardoned to " insist that when the aforesaid false description was for the " first time assumed in this minute of sale, *res ipsa loquitur*, " these false colours were hung out purposely, and of design, " to deceive and impose upon the defender, and to induce him " to give so much a higher price, upon the supposition that, " being truly of that extent, they entitled to the qualification of " a freehold in the county.

" And that this must have been the case will further appear " to your Lordships, from the disposition granted by John " M'Lean of Lochbuy to Lauchlan M'Lean his son, no farther " back than the 18th of Jan. 1733, of the whole lands and " barony of Lochbuy, which was but four years prior to the " minute of sale, in which disposition the lands of Ardlussa and " Knockintavel are especially described as a two and a half " merk land, without the addition of old extent. And it is from " hence submitted to your Lordships, what possible excuse " can be offered for so material a variation in the description of " these lands assumed by the said John and Lauchlan M'Lean " in the minute of sale, 1737?

" But neither is this all. It further appears, that the same " Lauchlan M'Lean in the year 1742, which was but five years " posterior to the minute of sale, did execute a disposition to " these very lands to himself in life-rent, and to Hector M'Lean " his son in fee, under the description of the two and a half

waived by the defender's answer to the information, is a question to be considered. If that

1819.

HUGHES AND HAMILTON v. GORDON.

"merk land of Ardlussa and Knockintavel, without the addi-
"tion of old extent; and the after titles to these lands are made
"up under this last description. So that, from first to last,
"except in this single instance of the aforesaid minute of sale,
"these lands had never received, in any one of the title-deeds,
"any other description, but that of a two and a half merk
"land, without the addition of the words of old extent. How
"then this description came to be varied in the minute of sale,
"and these lands to be therein set forth and described as a four
"merk land of old extent, will require some better apology
"than has yet been attempted, to induce a belief that this was
"not done of design and intention to increase the value and
"price of the lands at the sale."

From these passages, and from the interlocutors coupled with the defective report, it was contended to be quite clear, 1mo. That there was a deficiency of a subject expressly mentioned in the minute of sale, i. e. conveyed and warranted in the minute of sale, viz. *the old extent* of the lands; and that it was in consequence of this deficiency the lands did not afford a vote. 2do. That there were strong allegations and apparent evidence of wilful deceit by the seller. 3tio. That after all it does not appear that the claim of M'Neil was ultimately sustained.

In the court below, and slightly also in the arguments upon the Appeal, a point of Scotch pleading was discussed, viz. whether the *actio quanti minoris*, i. e. for compensation or reparation in damages, on account of a latent insufficiency or defect of the subject of purchase can be sustained, except in cases of fraud.

For the Defender upon this point, the cases of *Hanway*, 26th Jan. 1785, and *Hughes* v. *Gordon*, 1811, were cited. For the Pursuer, the following authorities were cited: *Stair*, i. 9, 10. b. i. 14. 1.; *Bank*, i. 9. 2. i. 11—15.; *Ersk.* iii. 3. 10. as explained by iii. 3. 9.; 23d June, 1757, *Macneil* v. *Maclean*; 26th Jan. 1785, *Hannay* v. *Creditors of Bargally*; 13th Feb. 1782, *Lloyds* v. *Paterson*; 23d Jan. 1801, *Gray* v. *Hamilton*. It was also argued, that the Appellant, the Defender in the

1819.

HUGHES AND HAMILTON *v.* GORDON.

were decided in the affirmative, a further question arises, viz. whether there is in the disposition a sufficient reference to incorporate the letters, and enable the Respondent to proceed upon them. The letters undoubtedly import, that in the contemplation of the parties, the property carried a freehold qualification. That could hardly be otherwise; for the vender was then a freeholder entered and standing upon the roll.

Upon the question as to the form of action, it is necessary to attend to the words of the conclusion of the summons; "or otherwise, and in "case of eviction, &c. to pay the price, &c. and "damages of 500*l.*" The satisfaction in value is claimed distinctly for eviction, and the damages also for injury sustained by eviction.

The information for General Hughes objects to the form of action. The Respondent is thereby challenged to amend his pleading in order to raise the question; but he has made no amendment.

March 25, 1819.

At the conclusion of the arguments, *Lord Redesdale* delivered his opinion to the following effect:

The first interlocutor finds it relevant to diminish

Court of Session, had waived the objection to the informality of the pleading, by a passage in his information, by which he submitted, that "If the Court should be of opinion that the "Pursuer was intitled, without any amendment of his libel, to "change entirely the grounds of his action, and to substitute "an action *quanti minoris*, for an action of warrandice, the "Defender was ready to meet him."

See the argument and the opinions of the judges, Fac. Coll. June 15, 1815.

the price of the lands; that it was intended, by the parties, that the lands should entitle the purchaser to a qualification as a freeholder, affording a right to vote at elections. The second interlocutor decerns, that the defender (Appellant) is to pay ——*l.* as the amount of diminution of price, to which the pursuer (the Respondent) is entitled, with interest, expenses, and costs. The proceedings in this case were founded on a transaction between General Hughes and Mr. Gordon for purchase. After much correspondence, they came to an agreement, and conveyances were executed in pursuance of the agreement. The form of action is unquestionably of warrandice. The summons, reciting the agreement, states that it was carried into execution, by conveyances, (for the sum of ——*l.*) of the lands of Milrig, &c. with absolute warrandice, on which the pursuer was infeft. The obligation proceeds upon the narrative, that it was agreed Hughes should retain the superiority until Michaelmas, 1808, &c. Two dispositions were made, because the lands were immediately conveyed; but as to the superiority, part was to remain with the Appellant, and other part was to be conveyed to Mr. Gordon; and it was understood that the superiority would convey the right of voting. The procuratory of resignation is consonant to the previous disposition, and the clause of warrandice is thus expressed: "Which "lands, and others above disponed, with the right "and disposition of the same, and infeftment to "follow thereon, we bind and oblige ourselves, for "our several rights and interests before written, to "warrant to the said William Gordon, and his

1819.

HUGHES AND HAMILTON v. GORDON.

" foresaids, as follows, videlicet, I, the said John " Hughes, oblige myself and my foresaids to war- " rant the same to be free of all burdens and in- " cumbrances, and grounds of eviction whatever, " at all hands, and against all deadly as law will: " and we, the said Sir Hew Dalrymple Hamilton " and John Barnes, as trustees foresaid, do oblige " ourselves to warrant these presents from our " own facts and deeds only; and further, we " hereby assign and make over to the said Wil- " liam Gordon, and his foresaids, the clause of " absolute warrandice, contained in the foresaid " trust disposition, in our favour; excepting " always from this warrandice the feu right and " disposition before-mentioned of the property of " the said lands of Milrig, and others, granted by us " to the said William Gordon, as aforesaid." The summons proceeds to state that Gordon was infeft; and that an extract of the retour was delivered among the title deeds. The right of voting was not made out by Mr. Gordon, and his name was expunged from the roll. He had called on Hughes to appear and defend him from eviction. The summons concludes that defenders are liable in warrandice, &c.; that the value of the freehold qualification is 1000*l.* and concludes also for damages, all which is required, in consequence of the warrandice of the disposition being incurred. The summons demands that the defender should maintain the pursuer in peaceable possession, or otherwise; and in case of eviction, should be decerned to make payment of ——*l.* by way of compensation. I have stated this summons of warrandice at length; because it is important to be considered

whether this is to be taken as an action principally on warrandice, or of two descriptions, on warrandice, and for damages. It appears to me, following the opinion of one of the judges in the Court below, that the action rests on the warrandice; and the question is, whether any thing has been evicted. It is admitted, that the Respondent has the superiority; and the complaint is, that he has no vote. But the warrandice is not of the vote; and you cannot go beyond the disposition. It is said, indeed, that the disposition has reference to the missives on which it is founded; but, although it refers to the missives, it *does not specify* what missives. The question now is upon the disposition of the superiority, which expresses only a conveyance of the superiority.* The obligation is the foundation of the warrandice in the disposition, and in that, there is no reference to the missives. But suppose the missives were referred to in the obligation, the introduction of the mere words "missives" would not give a construction to the deed, although it might give a right to have the deed reformed, or of action upon the case, on the ground of fraud, or misrepresention, if that could be made out. As to the correspondence, if it were admissible, there is the proposal of sale; the answer requiring particulars, and whether there was a freehold qualification, &c. the reply, that it has a vote, and undoubtedly here is a representation; but it is not clear that this was the subject of final agreement. For after this, it appears there was an end of the treaty upon the terms proposed. Afterwards,

Here the Noble Lord read the letters, which are omitted as immaterial.

*. See pp. 290, 291.

1819.

HUGHES AND HAMILTON v. GORDON.

a new proposal, as to price, is made by the Respondent's agent, which is accepted, on the terms that Gordon should take the lands as they stood. These letters I have stated to show how dangerous it would be to admit, in actions of this kind, such evidence. How does it appear, if Hughes had been called on to warrant the vote, that he would not have said as he did, with respect to the admeasurement of the lands; I will not warrant, you must take it as it stands. It is highly dangerous to admit such evidence to explain a deed, unless there is fraud or misrepresentation to afford a ground. The question is, therefore, whether upon a deed, which does not express warranty of the vote, it can be held that the Appellant is bound. The action proceeds upon the supposed eviction of something contained in the warranty. Nothing, as to the right of voting, is contained therein; nor is it necessarily, *incident* to the subject thereby disponed. Before the statute of 1681, the right was confined to a forty-shilling land of old extent; and where that is the ground of claim the statute of 16 Geo. 2. requires proof by retour of old extent, of a date prior to the statute, 1681. On the part of Respondent, it is contended that, by reference to the missives, the deed contains the grant of a right of voting; but the authorities cited from the laws of Scotland, and of England, do not, in any degree, sustain the argument. As to the case of *Wigglesworth* v. *Dalison*, where by the custom of the country a way-going crop was allowed to the tenant for years, that was an action of trespass, which was met by a plea of title

This fact appeared by the correspondence.

Wigglesworth v. *Dalison*, Doug. 196. Whether a right decision in all its parts, Quære.

and custom; and there may be a question, whether that decision is right in all its parts. The Court held, that a general custom, applicable to lands, gave a construction to the deed. The real state of the case is, that where custom warrants a way-going crop, unless the tenant has the way-going crop, he has not, in effect, the land for twenty-one years. When a transaction is concluded by solemn deed, that settles the right between the parties; and unless there be misrepresentation, knowingly made by one of the parties, the legal and technical import of the deed must prevail. As to the case of *Clinan* v. *Cooke*, rightly understood, it is an authority against the Respondent. If this had been the case of a lease executed, it must have stood according to the terms expressed, unless reformed for fraud or misrepresentation. There is nothing here to connect the deed with the correspondence.

1819.

HUGHES AND HAMILTON *v.* GORDON.

1 Scho. and Lefr. Rep. p. 22. See the note next page.

The form of action being on a warrandice, the question is, whether the thing described in the warrandice is evicted. As to the conclusion, with the claim of damages, it cannot warrant a total departure from all forms of action.

As to the waiver alleged, the expression is, If you amend, I shall be ready to meet, &c.; but this, I think, is no waiver. Lord Robertson says, the action appears to rest entirely upon the warrandice. If the Respondent wished to have the right of voting warranted, he should have taken care to have had it so expressed in the disposition. The summons contains no conclusion for damages, but in respect of the eviction of the thing war-

1819.

HUGHES AND HAMILTON *v.* GORDON.

See the note, p. 307.

ranted. The judgment is upon an action *quanti minoris*, if it can be sustained in such a case; not a judgment on the warrandice. It is founded upon the supposed previous contract between the parties. The case of *Edwards* v. *M'Leay*, which was cited from Cooper's Reports, was decided on the ground of a misrepresentation, or else the deed could not have been affected. It is important to preserve the forms of actions. But if he is advised that he has grounds to maintain such action, the judgment here is not to preclude Mr. Gordon from insisting upon his claim, in a right form of action.

Judgment *reversed*, without prejudice to any relief which in any other form of action the Respondent may be entitled to.

Note. In the case of *Clinan* v. *Cooke*, (which was decided by Lord Redesdale, when he was Lord Chancellor of Ireland) the Defendant, by public advertisement, had offered lands to let for three lives, or thirty-one years. A treaty took place upon the footing of this advertisement; and, finally, the agent for the Defendant signed a contract for a lease of the lands to the Plaintiffs: but the term for which the lease was to be made was not specified in the agreement, and as it contained no reference to the advertisement, parol evidence to connect the agreement with the advertisement was rejected; and the bill, which was for a specific performance of the contract, was dismissed, upon the ground, that the term for which the lease was to be made was unascertained by the agreement.