

No 45.

estate's returning to Kirkland, it was not a male fee in his person, but descendible to his heirs whatsoever, in the legal course of succession; and, therefore, upon Kirkland's discharging the clause of return, stipulated in his favour, and which was virtually done in this case, the estate would also devolve, in the legal course of succession, to the daughters of the Boyds, failing the heirs-male of their bodies.

*Lastly, quoad* the lands of Bellairdie, the defender's right, independently of every other consideration, is now rendered unexceptionable, by the positive prescription under the charter that was granted of these lands in 1674, and infeftments thereon in 1677.

'The COURT unanimously adhered to the Lord Ordinary's interlocutor.'

Act. *Nairne.*Alt. *M'Queen.*Clerk, *Campbell.**Fac. Col. No 168. p. 66.*1775. *December 12.*CHARLES LAWSON *against* WILLIAM and ANDREW ROBB.

No 46.

A person bought a feu, paying L. 20, and becoming bound to relieve the seller of the debts affecting it. The warrandice was restricted to the L. 20. By a back bond the clause of warrandice was discharged. It turned out that the seller had no right, and the property was evicted. Found, that the terms of the discharge did not free the seller from warrandice *hereditatem subesse.*

IN the year 1725, William Lindsay gardener, and Janet Robb his wife, acquired a feu of about an acre of ground at Castlebarns, near Edinburgh; and the feu-right was taken to William and Janet in conjunctliferent, and for the liferent use of William allenary; and to Janet, and her heirs and assignees, in fee.

Janet, with consent of her husband, sub-feued one half of this acre; and, after erecting some houses upon the remaining half, they granted two heritable bonds over it to Alexander Young, and infeftment followed upon these bonds.

In the year 1738, William, and Janet his wife, both died; and, as the fee of the subject was in her person, of consequence the succession then opened to her heirs at law, who (as the subject was conquest) was her immediate elder brother, but he had predeceased her, and left a family of infant children, and no person to take care of their interest.

Their uncle, Andrew Robb, and the immediate younger brother of Janet, did, immediately upon the death of his sister, enter into the possession of this estate. Andrew did not long survive; his eldest son James, the father of the present parties, sold the succession of his aunt Janet Robb, to James Watt.

As Andrew had never made up any proper titles as heir to his sister Janet; so neither did James make up any titles either to his sister or aunt; but, in the disposition, he is bound to make up proper titles when required.

James received from Watt only L. 20 Sterling in cash; and the remainder of the price Watt was allowed to retain in his hands, to pay the above two heritable debts; and of which, by the disposition, he became bound to relieve James and his heirs; consequently, these two debts, and also the above-mentioned sub-

feu granted by Janet, were excepted out of the clause of warrandice.—‘ Which  
 ‘ acre of ground, and others above disposed and resigned, with this present  
 ‘ right and disposition thereof, and infestment to follow thereupon, I bind and  
 ‘ oblige me, &c. to warrant, maintain, and defend, to the said James Watt and  
 ‘ Katharine Potter, and their foresaids, at all hands, and against all deadly, as  
 ‘ law will; excepting always from this present warrandice, &c. (as above);  
 ‘ and that, in so far alienarly as they may infer a contravention of said obliga-  
 ‘ tion of warrandice; without prejudice, nevertheless, to the said James Watt,  
 ‘ &c. to quarrel and reduce the foresaid dispositions, heritable bonds and tack,  
 ‘ or any other rights granted by the said Janet Robb, or me, upon any compe-  
 ‘ tent ground in law, which will not operate in action of recourse against me  
 ‘ upon the foresaid warrandice; which, it is hereby declared, shall no ways be  
 ‘ extended against me and my heirs, further than the L. 20 Sterling, the sum  
 ‘ presently paid to me by the said James Watt, for the granting hereof.’

Some time after this Watt sold the subject to one Gilchrist; and he there-  
 after sold about three-fourths of it to Charles Lawson.

Gilchrist was, in 1750, infest upon the precept in Watt's disposition to him; and Lawson was, in 1760, infest upon the precept from Gilchrist.

In the year 1769, Richard Robb, the son of Janet Robb's immediate elder brother, and consequently her heir at law, brought a reduction of the rights granted to Watt, and the other rights flowing from him, and a declarator of his own preferable right to this subject, and evicted this estate from Lawson; who, founding upon the warrandice of the disposition from Gilchrist to him, and from Watt to Gilchrist, as in the right of Gilchrist his immediate author, brought an action against Watt for repetition of the price paid by Gilchrist to him, amounting to L. 40; and having, upon the dependence, arrested in the hands of William and Ann Robbs, the children of James, as debtors to Watt, in virtue of the clause of warrandice contained in the foresaid disposition to him by their father; he, after obtaining decree against Watt, insisted in an action of furthcoming against the Robbs, and he obtained decree in absence against them in terms of the libel.

William and Andrew Robbs brought this decree under review by suspension, and produced a personal obligation granted by Watt to their father James, bearing the same date with James's disposition to him; by which they alleged Watt had discharged the warrandice altogether. It was, after narrating the disposition, of even date by James Robb, of the tenement of land at Castlebarns, conceived thus: ‘ And, in respect of the warrandice in said disposition, binding  
 ‘ the said James Robb, his heirs, &c. that they shall free me and my foresaid of  
 ‘ all debts and incumbrances affecting the said tenement of land; and particu-  
 ‘ larly, without prejudice of the generality hereof, a bill drawn by Peter Blair  
 ‘ skinner in Edinburgh, upon and accepted by the deceased Andrew Robb  
 ‘ tenant in Skirling, for the sum therein mentioned: Therefore, wit ye me to  
 ‘ be bound and obliged to warrant, free, and relieve the said James Robb, his

No 46.

‘ heirs, executors, and all others whom it effeirs, from all debts, sums of money, and incumbrances whatsoever, affecting or that shall affect the said tenement of land; and declaring, that the warrandice in the said disposition shall have no effect, and nowise burden the said James Robb or his foresaids for fulfilling the same; and that I shall be liable for all the debts that affect or may affect the said tenement: As also, it is hereby specially provided and declared, that, notwithstanding of the said James Robb his receiving L 20 Sterling, as a part of the price of the said tenement, (the rest of the price being allowed me, towards the payment of all the debts affecting the said tenement), yet his receiving the said sum of L. 20 Sterling is nowise to make him liable for payment of the debts to any of the creditors upon the said tenement, that has already affected, or that may, in any time hereafter, affect the same, or wherein I may be liable, as heir to the deceased Janet Robb; the said James Robb excluding himself, his heirs, and all others his successors, from any pretensions or claim they may have to the said tenement any manner of way; and that it shall not be in the power of him or his foresaids to call for or pursue a reduction of the said disposition, otherwise these presents shall be void and null in all time thereafter.’

This was a question of construction; and, upon this point, the pursuer *argued*, That the meaning and purport of this deed is to protect Robb from being prosecuted upon the warrandice in his disposition, if any other debts of his aunt Janet Robb, than the heritable debt excepted out of the warrandice, should afterwards appear to have affected the subject sold, either by inhibition or otherwise; and, *2dly*, to oblige Watt to pay any other personal debts of Janet Robb, whether creating a real lien upon her heritable subject or not. In short, it seems to have been the intention of parties, that Watt was to pay L. 20 for this estate, and to take his chance of Janet Robb’s debts, and to relieve James Robb of the whole of them; and, as the writer of the disposition saw no other debt of Janet’s but those mentioned in the disposition, he thought it sufficient if they only were excepted out of the warrandice; but the other advisers of James Robb being of a different opinion, did suggest to him the propriety of taking from Watt the obligation now founded on, as explanatory of the true meaning and intent of the bargain. The interpretation which the defenders would force upon this last deed is not only unjust in itself, but is perfectly inconsistent with the nature of the contract. The warrandice to the extent of L. 20, in the case of the total eviction of the subject, neither is nor was intended to be discharged by this obligation.

*Observed* on the Bench: Clear there was here an *emptio hereditatis*, and the effect of such is, that the seller is liable to warrant that he has right to the subject, *i. e.* that he is heir to the subject; not that the succession is *lucrosa*. Now the question is, if this warrandice is given up? The obligation in question is not very accurately expressed; but appears to import, that the buyer was obliged to relieve the seller of all debts of the predecessor, but does not import a dis-

charge of the warrandice *hereditatem subesse*, and that he the disponer was the heir.

No 46.

The following judgment was pronounced :

' THE LORDS find the letters orderly proceeded to the extent of the L. 20 Sterling, the sum paid by Watt to James Robb, at granting the disposition 1740.'—See WARRANDICE.

Act. Geo. Buchan-Hepburn.

Alt. Pat. Murray, M<sup>c</sup>Queen.

Clerk, Campbell.

Fac. Col. No 204. p. 147.

1797. May 30.

JEAN M'NAB and Others, against MRS ELIZABETH SPITTAL, and her HUSBAND, for his Interest.

CAPTAIN SPITTAL disposed the house in which he resided, with the offices, and a small inclosure, to Jean M'Nab in liferent, and his natural son by her in fee. The disposition also conveyed to them ' the whole plenishing and household furniture of every denomination, and every other article of all sorts and descriptions whatsoever, presently belonging to me, and contained in the subjects hereby disposed, and particularly in my dwelling-house, and office-houses in the said subjects, or which may be therein contained at the time of my decease, dispensing with the generality hereof, and declaring these presents to be as valid and effectual as if every article herein conveyed were particularly enumerated.'

No 47.  
A clause conveying a house, and all that it contained, found not to include documents of debt or money.

At his death, Mrs Elizabeth Spittal, his only lawful child, succeeded to the family estate, and her agent took possession of some documents of debt, bank-notes, money in gold and silver, and some trinkets, which lay in a cabinet, in the house conveyed by the disposition, and likewise of a gold watch, found in the house.

Jean M'Nab, and the Tutors of her son, brought an action for repetition of them.

THE LORD ORDINARY found, ' That the settlement libelled does not extend to; nor can be constructed to comprehend, any of the articles in the defender's possession.'

In a petition, the pursuers contended, ' That the clause was sufficiently broad to support their claim; *L. 21. l. 49. ff. de verb. sign. ; Vinnius, l. 2. t. 2. § 1. ; Hærcarse, voce LEGACY, No 663., and Fountainhall, v. 1. p. 244. 22d. November 1683, Oswald against Mortimer, voce GENERAL ASSIGNATION ; Dalr. p. 23. 1st December 1699, Henderson against Beer, IBIDEM ; that this was a question of intention, and that Captain Spittal meant to leave the disponees wherewith to live comfortably in the subjects disposed to them, his heir at law being sufficiently provided aliunde.*