

1672. February 17.

SMITH of Braco *against* Ross.

No. 51.

Warrantice found to infer recourse for payment of the value of the pursuer's damage, although there had not happened any actual eviction.

The Laird of Balnagoun's grandfather having granted a wadset of the lands of Rarachies to Sir John Sinclair of Stevenson, redeemable for 25,000 merks, the reversion was taken in the name of Ross of Wester Ginies, who assigned the same to Balnagoun's father, and he granted translation thereof to Dunbaith, who at the same time granted a back-bond, declaring the lands redeemable for 36,000 merks, and thereafter Balnagoun sold the lands to Mr. Thomas M'Kenzie for 50,000 merks, and assigned him to any reversion granted by Dunbaith, and discharged in his favours Stevenson's reversion, that he might bruik the lands irredeemably; but before Mr. Thomas M'Kenzie's right was perfected, Dunbaith prevailed with Balnagoun, being his good-brother, to deliver back Dunbaith his back-bond, with a discharge on the back thereof, upon trust and condition that Dunbaith should give a greater price, and take his hazard of Mr. Thomas M'Kenzie, or otherwise deliver back the back-bond; and being pursued before the Commissaries of Ross, and the trust and conditions referred to his oath, he was holden as confessed, and decerned to deliver back the back-bond; the successors of Dunbaith pursue this Balnagoun as heir to his father on this ground, that his father's translation to Dunbaith, bearing absolute warrantice, his father had contravened the warrantice, by his disposition to Mr. Thomas M'Kenzie, containing a discharge of the reversion, which he had before transferred to Dunbaith. The defender alleged, That there could be no recourse against him, because there was neither eviction or exclusion of Dunbaith, who by his back-bond was obliged to redeem Stevenson's wadset, which he neither did, nor did any diligence for that effect. It was replied, That warrantice may take effect where there is no actual eviction, if the cause inferring eviction be evident and clear, especially if the same be the deed of the party warrantice, who is most unfavourable, having granted double dispositions, which were by express act of Parliament declared fraudulent, as in this case; and it had been for no purpose for Dunbaith to have attempted any suit against Mr. Thomas M'Kenzie, who acquired right to Stevenson's wadset, he having a clear defence upon Balnagoun's discharge of the reversion, which discharge was registrated before Dunbaith's translation was registrated in the register of sasines and reversions; and so, though posterior to the translation, yet would have excluded the same, because the translation would have been found null, as not being registrated in due time. It was duplied, That albeit recourse upon warrantice may in some cases be sustained *declaratorie*, to declare that the warrantice is incurred; but never *petitorie* to liquidate or obtain payment of the value of the warrantice, until actual eviction or exclusion; *2do*, The exclusion of Dunbaith did arise through his own negligence and fault, in neglecting to registrate his translation. It was triplid, That Dunbaith's negligence cannot prejudge him in favours of the party that granted double dispositions, to whom he was not obliged to do diligence, and who has no interest

to quarrel the negligence, because, if Dunbaith had excluded Mr Thomas M'Kenzie, he would have had recourse upon the warrantice in his disposition against the defender ; so in either case he is liable, and has no prejudice.

The Lords found the recourse to be effectual for the satisfaction of the pursuer's prejudice, seeing the defence was clear, and followed upon double dispositions.

Stair, v. 2. p. 71.

* * * Gosford reports this case :

Braco, as assignee constituted by the heirs of Sinclair of Dunbaith, in and to the obligation of warrantice contained in a reversion of the lands of Easter Ginies assigned to him by the Laird of Balnagoun, did pursue for damage and interest upon this ground, that Mr. Thomas M'Kenzie having acquired the wadset of these lands from Sir John Sinclair of Stevenstoun, Balnagoun had discharged the reversion of the wadset of the said lands in favours of Mr. Thomas, which being registrated, Dunbaith, nor his assignee to the reversion, could never redeem the said lands ; and therefore Balnagoun being obliged in warrantice of Dunbaith's right to the reversion, ought to refund the whole damage and interest, viz. the value of the lands, in so far as it exceeded the sums upon the wadset, which did amount to 2,000 merks. It was alleged, That this being an action of warrantice, it could not be sustained, unless there could be a distress shown, and therefore the pursuers ought first to have used an order of redemption against Mr. Thomas M'Kenzie the wadsetter, in which case Balnagoun being called, might have taken off Mr. Thomas' right, or otherwise would be liable to damage and interest. It was replied, That this action being founded upon double deeds made by Balnagoun expressly contrary to the act of Parliament, the pursuer was well founded to pursue this action for damage, seeing *frustra* he could make use of the assignation by using an order, the defence upon the right made by Balnagoun being unanswerable.

The Lords did find a difference upon an obligation of warrantice where a distress is from a third party, as having a prior and better right, *quo casu* there must be a distress before an action of warrantice can be pursued ; and the action of warrantice which results in damage and interest, where one and the same person hath made double deeds, whereby he that hath the best right will undoubtedly seclude the other from all pursuit, *quo casu* there needs no distress ; seeing in vain the party who hath the worst right can make use thereof, as in this case ; and therefore they sustained the action as it is libelled without a previous distress.

Gosford MS. p. 245.

* * * See more of this cause of future dates, *infra, h. t.*