

No 371. his goodsire had a temporary warrandice against any incumbrances for the space of sundry years, and Bearford by not moving, has made her lose that recourse. *2do*, This action is prescribed, whether you count it from the date of Earl Walter's disposition in 1633, or my Lord Kingston's improbation raised in 1662; so whatever period you take, more than forty years is run preceding this declarator, and so the warrandice is prescribed. *Answered*, No law obliges parties to perfect their right but when they please; and if I think fit to rely upon the validity of my warrandice, it affords no defence to you that have made contrary rights, that I did not complete mine before you made the second, by which you have so plainly incurred and contravened your warrandice. To the *second*, The act of prescription 1617 is opposed, declaring that warrandice does not begin to prescribe from its date, but from the distress, which is not the citation of the summons, but the decret of eviction, as had been oft found. *3tio*, It was *contended* for the Duchess, That no declarator of recourse can be sustained till there be an actual distress and eviction, seeing a process may be cast and never come to a decret; and Stair seems to be of that opinion, Lib. 2. Tit. 3. Infesment of Property, § 46.; that the effect of warrandice is only to make up what is warranted, in so far as shall be evicted; so that this process can have no other effect save an intimation of the distress. *Answered*, Stair in that same place acknowledges, an action may be effectual to decern the grant-er of the warrandice to free the thing warranted of that which undoubtedly may infer a distress; and what can more probably produce that effect than the granting of double rights, as was done here. THE LORDS repelled the defences, and found the Duchess liable to fulfil her grandfather's warrandice, and to free the lands in case of eviction; but only *declaratoria juris*, so as no execution can pass against her till a decret of eviction be obtained against Bearford, and then he can liquidate the damage he sustains by the eviction, but not till then. See WARRANDICE.

Fol. Dic. v. 2. p. 123. Fountainhall, v. 2. p. 562.

1712. February 12.

SCOT against Duchess of BUCCLEUCH.

No 372.

ONE of two cautioners in a bond having paid the debt upon distress, and got a discharge thereof, the LORDS found that the action for relief, competent to the distressed cautioner against the co-cautioner, did begin to prescribe, not from the time of the distress, but from the time that the debt was paid.

Fol. Dic. v. 2. p. 123. Forbes. Fountainhall.

* * * This case is No 16. p. 3360, *voce* DEBTOR and CREDITOR.