charger, though intimated to him, they passed it in these terms, in respect the act of Parliament is so plain. Though the act was a great inversion of our former law, yet, if it were minded by creditors, it were an easy matter once in seven years to interpel the cautioner, or use some legal interruption against him to stop the prescription; but country people do forget the tenor of that new act, so much deborded from the former law and practice, and made upon occasion of Langton and Cockburn, so interwoven as co-cautioners, and their sudden breaking, to the loss of many poor family. Since this act, few take bonds with cautioners, but bind them all as *correi* and principals, whatever bonds of relief they may have among themselves in writs apart. No 370.

Fol. Dic. v. 2. p. 124. Fountainhall, v. 2. p. 404.

1710. *February* 2. ROBERT HEPBURN *against* The Duchess of BUCCLEUCH.

No 371.
Found conform to Crichton against Viscount of Air, No 362. p. 11182.

I REPORTED Robert Hepburn of Bearford against the Duchess of Buccleugh. Bearford held some lands in the parish of Norham off the Hepburns, Earls of Bothwell, who being forfeited, their estate was gifted to Stewart Earl of Bothwell. And he being likewise forfeited in 1591, for attempting to seize upon King James in the Abbey, and for consulting with wizards and sorcerers how long King James would live, the Earl of Buccleuch was made donatar to his forfeiture; and he, in 1633, dispones the superiority of these lands to Sir Robert Hepburn then of Bearford, with absolute warrandice, and for causes onerous; yet afterwards, the same Earl dispones the same superiority to the Earl of Winton in 1647, who transfers it to the Viscount of Kingston, his son, who raises a reduction and improbation against the vassals of the Lordship of Haills, and amongst the rest, in 1662, calls Hepburn of Bearford. The Lord Kingston having, in 1679, sold these lands to Sir James Stanefield; and Sir David Dalrymple having bought them at a roup in 1697, he wakens the old process intented against the vassals by Kingston, and amongst others insists against Bearford, who, for his own relief, raises a summons of declarator against the Duchess of Buccleuch, as representing her grandfather, the maker of the disposition, to warrant the same, and relieve him of the distress, and threatened hazard of eviction at Sir David Dalrymple's instance, as having contravened his warrandice, (though it had been only from fact and deed, as it truly was absolute), by granting a posterior disposition to my Lord Winton of the same superiority. *Alleged* for the Duchess, That he ought to have no regress against her, seeing the warrandice is mainly incurred through his own default and negligence; for if he had infeft himself upon the right he got in 1633, he would have been preferable to Winton and Kingston; but he suffering them to be infeft before him, *sibi imputet*, who did not perfect his right; and that he had a competent time appears, that the second disposition was not made till 1647; so he had thirteen years to have prevented them, but did it not; and the Duchess is farther prejudged, for

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. 2*do*, 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 opponed, 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 decreet of eviction, as had been oft found. 3*tio*, 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 decreet; and Stair seems to be of that opinion, Lib. 2. Tit. 3. Infeftment 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 granter 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 decreet 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.