Thursday, July 27, 1899.

OUTER HOUSE.

[Lord Kincairney.

MACKENZIE AND OTHERS *v.* NEILL.

Sale—Sale of Heritage—Warrandice.

By minute of sale of a heritable property the sellers undertook to deliver to the purchaser "a valid disposition, with a proper legal progress of titles." The sellers, who appeared *ex facie* of the records and of the minute of sale to be the absolute proprietors of the subjects, tendered to the purchaser a disposition in which they bound themselves personally in warrandice from fact and deed only. This disposition the purchaser refused to accept. The sellers averred that they held the subjects for behoof of a third party, and that this was known to the purchaser.

Held that even assuming these averments to be true, the purchaser was not bound to accept the title offered unless a clause binding the sellers personally in absolute warrandice was inserted in the disposition.

This was an action at the instance of Charles William Mackenzie, Geelong, Australia, and John Otto Macqueen, S.S.C. his mandatory, and the said John Otto Macqueen, and Alexander Knox, solicitor, Aberdeen, for their rights and interests, against James Neill of Gourdie, Lochee, in which the pursuers sought to have the defender ordained to implement a minute of sale of the lands of Fortrie, and alternatively claimed damages. The minute of sale founded on, which was dated 12th November 1898, was entered into between Macqueen & Knox, solicitors in Aberdeen on behalf of the proprietors, and Arthur Samuel Tawse, solicitor, Aberdeen, on behalf of the defender, who agreed to purchase the estate of Fortrie at the price of £16,000. The sellers undertook "to deliver to the purchaser a valid disposition, with a proper legal progress of titles." As the result of a litigation regarding the succession of Mrs Elspeth Mackenzie, the pursuer's mother, to whom the estate of Fortrie belonged, a settlement was effected whereby her trustees disponed said estate to the pursuers Macqueen and Knox, and upon this disposition they were duly infeft. The disposition was *ex facie* absolute, but the pursuers averred that they held the subjects for behoof of the pursuer Mackenzie, to whom they truly belonged.

The pursuers tendered to the defender a disposition granted by the trustees of the said Mrs Mackenzie, with consent of the pursuers Macqueen and Knox. The warrandice offered was the fact-and-deed warrandice of the trustees as such, and of John Otto Macqueen and Alexander Knox, with absolute warrandice against the estate of the deceased Mrs Mackenzie. The defender was willing to accept the disposition by the trustees, but insisted that it should contain a clause of absolute warrandice as against John Otto Macqueen and Alexander Knox. The pursuers refused this, but offered to make Mr Macqueen, in his capacity as factor and commissioner to the pursuer Mackenzie, a party to the disposition, and to insert a clause binding the latter in absolute warrandice. The pursuers averred that the defender was aware that the subjects were held by them for behoof of Mackenzie, but this was denied by the defender.

In these circumstances the pursuers raised this action.

The defender pleaded—"(3) The defender not being bound to accept the title offered, is entitled to absolvitor."

On 27th July the Lord Ordinary (KINCAIRNEY) pronounced an interlocutor finding that the defender was not bound to accept the title offered by the pursuers, unless a clause of absolute warrandice by the pursuers Macqueen and Knox was inserted in the disposition.

Opinion.—"There is I think no doubt that a valid sale was effected by the minute of sale, and that the pursuers Macqueen and Knox are entitled to enforce that sale if they give a good title. A title has been tendered, to which, as a title, the defender has not objected, but he has maintained that a clause of absolute warrandice by Mr Macqueen and Mr Knox must be inserted in the disposition. There was such a clause in the draft disposition prepared by him, but it was struck out on revisal. He wishes it restored. The question is not as to the contract of sale, or the granter's title, but as to the clauses of the deed to be granted. It depends on the minute of sale, and chiefly on the third clause. By the minute the first party agrees to sell, and the second party agrees to buy, the property in question. That is the contract of sale, and there is no flaw in it. The third clause provides that, 'in exchange for the price, the seller shall deliver to the purchaser a valid disposition, with a proper legal progress of titles.' In construing this clause no question has arisen as to the purchaser. But who are the sellers? They are 'Macqueen and Knox, on behalf of the proprietors of the estate' sold. It was argued that Macqueen and Knox were here making a contract as agents for undisclosed principals. I cannot think that. I think the principals were disclosed, and I consider that they were disclosed on the face of the public records. They were John Otto Macqueen and Alexander Knox as individuals. There can be no doubt that Macqueen and Knox, the law-agents, were acting for these individuals, who happened to be, but might not have been, the sole partners of that firm. They may have been acting for other people besides, and it is conceivable that they have bound other people, although it does not appear that they did so. What do these contracting parties undertake to do? To deliver a valid disposition. *Prima facie*, that is surely an obligation to give a title proceeding from the proprietors on record. No one can give a title unless he is infeft, or the assignee of a proprietor infeft. No other title would

be in order. The defender has in fact accepted a different title, because I understand he considers the consent of Mr Macqueen and Mr Knox equivalent to a disposition by them; but the natural implement of the undertaking in the minute of sale would be a disposition by Mr Macqueen and Mr Knox. Whether they would have implemented their bargain by granting in the first place a disposition to Charles William Mackenzie, and recording it, and then tendering a disposition by Mackenzie to the defender, I do not say. That question is not raised by the record. No such step has been taken, and no disposition of that kind has been offered.

"The question now is, whether a clause of absolute warrandice by them should be inserted in the title as it stands. I am disposed to think that it should. I think the question is, whether such a clause would have been appropriate in a disposition by Mr Macqueen and Mr Knox, and if so, whether it should be inserted in the disposition tendered and accepted as equivalent to such a disposition. There is very little authority on the point, and the precise question is, so far as I am aware, a new question. The pursuers argued that Macqueen and Knox should only give the warrandice proper to trustees; and it is well settled that that is warrandice from fact and deed—Bell's Prin. sec. 2000. That rule seems to rest on the case of *Forbes' Trustees* v. *Mackintosh*, June 15, 1822, 1 S. D. 497—and I have not found any later case. The case of *Read* v. *Storie*, July 9, 1831, 9 S. 925, quoted by the defender, does not seem to apply at all, because there the absolute warrandice of the trustee was not asked, but the warrandice of creditors. That does not, however, signify, because no doubt the rule has been fixed by *Forbes' Trustees* v. *Mackintosh*, that trustees when selling an estate are not bound to grant absolute warrandice, but only warrandice from fact and deed.

"It appears clearly from the reports of *Forbes' Trustees* v. *Mackintosh* that the sellers acted throughout ostensibly as trustees, and that their own title was on the face of it a trust title. The sale was by public roup, and the articles of roup bore that 'the exposers as trustees foresaid' bound themselves, '*qua* trustees,' to 'grant a disposition.' The rule founded on *Forbes' Trustees* v. *Mackintosh* goes, I think, no further than that case authorises, which is, that trustees acting openly and professedly as such are not bound beyond warrandice from fact and deed. Does, then, that decision and the rule and practice resting on it apply in this case, where Macqueen and Knox had an absolute title to the property, and where there is no allusion in the minute of sale to their trust title? I think not. I think that a party contracting with another with an absolute recorded title has no call to inquire further. The defender quoted the case of *The Union Bank* v. *The National Bank*, December 10, 1886, 14 R. (H.L.) 1, in support of that doctrine, about which there is no doubt. Such a contractor is entitled to rely on the absolute title, and where a person who is truly a trustee takes an absolute title he must accept the consequence of absolute ownership. It is averred that the defender knew that Macqueen and Knox were only the nominees of Mackenzie. The defender denies that averment, and at first I thought that it might be proper to allow a proof on the point; but I have come to think that such knowledge would not signify, and that the defender would in any case be entitled to rely on the absolute right of Mr Macqueen and Mr Knox resulting from their absolute title.

"I am therefore of opinion that the defender is not bound to accept the title offered unless the clause of absolute warrandice struck out by Macqueen and Knox on revisal be restored.

"I cannot go any further at present. A decision on the question of interest raised by the conclusions of the summons and the defender's fifth plea would be premature and unsafe until the disposition is adjusted."

Counsel for the Pursuers—A. O. M. Mackenzie. Agents—Mackay & Young, W.S.

Counsel for the Defender—Cook. Agent—Henry Bower, S.S.C.

Thursday, November 23.

OUTER HOUSE.

[Lord Low.

NELSON'S TRUSTEES *v.* M'CAIG.

Process — Proof — Interdict — Possessory Action—Limitation of Proof to Possessory Period—Road.

In an action raised by the proprietors of certain lands to have the owner of the adjoining lands interdicted from constructing a road upon their property, the respondent alleged the existence of a public road, or alternatively of a servitude road, upon the complainers' lands. The complainers denied the existence of such a road.

Held that the respondent's averments regarding the existence of the alleged road could not be competently established in a possessory action, and that the proof with respect to the use thereof must be limited to the possessory period.

Mrs Jessie Kemp or Nelson and others, the trustees of the late Thomas Nelson, proprietors of the estate of Achnacloich in Argyleshire, presented a note of suspension and interdict against John Stuart M'Caig, proprietor of the adjoining lands of Ardnaskie, craving the Court to interdict the respondent from constructing or proceeding further with the construction of a road upon, or from otherwise encroaching on, the complainers' lands, and to ordain him to restore the ground to its former condition.

The complainers averred that the respondent, in connection with a system of roads