

1672. February 28. EARL of ARGYLE *against* LAIRD of AYTON.

## No. 52.

Warrantice  
incurred,  
how far  
extended?

Andrew Paterson having obtained a gift of the escheat of the lands of Craig, did thereupon pursue the Earl of Dundee for intromission with Craig's moveables, and obtained a decret against him, which he assigned to the Laird of Ayton, who thereupon apprised the estate of Dundee, and did assign the apprising and grounds thereof to Sir Colin Campbell, for the use of the Earl of Argyle, with warrantice from Ayton's own fact and deed, and that the sums were truly due, resting, and owing; but thereafter the treasurer-depute having obtained a second gift of Craig's escheat, and thereupon a decret of Exchequer against Paterson, founded upon two acts of Exchequer anterior to Paterson's gift, and thereupon decerning Paterson to give a back-bond, and declaring the gift affected therewith, as if it had been given *ab initio*, in respect Paterson had surreptitiously and unwarrantably taken out the gift, without giving of the back-bond; likewise the treasurer-depute, as having a gift from the King of *ultimus hæres* to the Earl of Dundee, and upon the said second gift and decret, having reduced Ayton's apprising, as being founded upon Paterson's gift, which was extinct, as being before satisfied of all his interest, conform to the back-bond; the Earl of Argyle and Sir Colin Campbell charge Ayton upon the warrantice, who gave in a bill of suspension; and the Lords having appointed the cause to be discussed upon the bill, Ayton insisted on this reason, that his warrantice being but limited to his own fact and deed, and that the debt was just, it was not contravened, for the reduction proceeded not upon his deed, but upon Paterson's deed; neither was he called in the decret of Exchequer, nor could it be questioned that the debt was due by Dundee to any representing Craig, whose moveables he intromitted with; *2do*, Though he should be liable, the clause of warrantice ought not to be lucrative, but only to restore Argyle to the sums he paid Ayton, *cum omni causa*, there being neither fraud nor fault on Ayton's part; and the Lords have oftentimes found, that if any party transact upon a clear ground of distress, the warrantice reaches no more than the sums he transacted for. It was answered, That the warrantice was contravened, in so far as it was now found that there was no debt due by Dundee to Ayton or his assignee; for albeit Dundee remained debtor to the representatives of Craig, that cannot be the meaning of the clause, seeing *verba sunt sumenda cum effectu*, but that the debt should be due by Dundee's representatives to Ayton or his assignees.

The Lords found that to be the meaning of the clause, but gave recourse only for the sums paid to Ayton, with the annual-rents thereof and whole expenses, as Argyle should give up the same upon his word of honour.

*Stair, v. 2. p. 81.*