1714. *June* 11. HUGH ROSS of KILRAVOCK *against* ALEXANDER INGLIS of Murdistoun.

No. 79.
If upon eviction the warrandice is not incurred, there can be no repetition of the price.

Alexander Inglis of Murdistoun having assigned to Hugh Ross of Kilravock a bond, due by Hay of Park to Mr. Thomas Hay, to which Murdistoun had right by progress; and Murdistoun's right to that bond having been found null in a process, in which Kilravock had timeously cited him to defend, and the assignation flowing from him having fallen of consequence, Kilravock pursued Murdistoun for repetition of the price paid to him for that assignation.

Answered for the defender, That he having obliged himself to warrant the assignation to the pursuer, from fact and deed allenarly, and no contravention thereof being subsumed upon, no process can be sustained against him who gave the right *talis qualis*.

Replied for the pursuer: Albeit the defender cannot be insisted against as a contravener of the warrandice, yet in all sales, equity and law infer an obligation upon the seller to refund the price to the buyer, if the thing sold be evicted through the seller's having had no right, and the assignation granted to the pursuer was *venditio nominis*; yea, restitution of the price is to be made to the seller although it be explicitly pactioned that he should not be liable in any warrandice, *L.* 2. § 18. *D. De. action. empti.* And the doctors of the law are of the same opinion, Cujac Comm. in L. 27. C. De. evict. Ant. Perez, in Tit. 6. De evict. § 23, Papon, Arrests De Cours souverains, Lib. 2. Tit. 4. §. 3. Brillon Dictionaire verb. Eviction, No. 2. And so the Lords decided 28th February 1672, E. Argyle against L. Aiton, No. 52. p. 16598. where the disponer of rights affecting lands with warrandice from fact and deed was found liable to repetition, albeit the warrandice was not contravened, in respect he had no right to the subject disponed.

Duplied for the defender: It is in vain here to insist upon a subtlety of the Roman law, where our custom hath expressly receded from it, whereby that clause of warrandice from fact and deed in any contract makes it entirely a bargain of hazard, so as no recourse can be had against the seller more then if *factus retis* had been sold; and so the Lords decided, 14th December 1678, Dick against Blairs, No. 58. p. 16603. But the practique betwixt E. Argyle and Aiton doth make nothing in favour of the defender, because there the cedent had expressly obliged himself to warrant *debitum subesse*, which only influenced the decision, and if it were otherwise, there should be no difference betwixt warrandice from fact and deed, and absolute warrandice.

The Lords assoilzied the defender.

Forbes MS. fi. 60.