

to give up the subject to the challenger ; and he would nevertheless be entitled to recur upon his warrandice, provided it appeared that no good defence could have been pleaded by the seller, had he been in the field. Voet. ad Dieg. L. 51. De Evictione. See No. 61. p. 16605. Now if this would hold good on one hand, it was equally clear upon the other, that the seller might, whenever the challenge was made, immediately tender to the purchaser, his *damnum et interesse*, and insist that he should restore the subject ; and if the purchaser did not incline to do so, but to litigate the matter, he could not surely insist that the seller should be liable to him for an additional value to which the subject had accidentally risen during the dependence of an untenable process. In the present instance, therefore, had the pursuer immediately yielded the subject, he would have drawn merely the price he paid, the houses not having then increased in value ; if the defender had tendered the *damnum*, the result would have been the same ; and hence it was reasonable that the period of challenge should be that at which the damage was or might be ascertained, without requiring a sentence, or paying any regard to the accidental duration of a law-suit.

3tio, According even to the pursuer's doctrine, the period of eviction could never be brought down latter than the date of the Lord Ordinary's interlocutor, sustaining the adjudication only as a security ; as by this judgment the title as a right of property was cut down, and the subject of course completely evicted.

The Court found, " That the eviction of the shops and brew-seat within mentioned took place at the date of the interlocutor pronounced by the late Lord Minto upon the 6th January 1762, restricting the adjudication to a security for the sums adjudged for ; and remit to the Lord Ordinary to proceed accordingly.

Lord Ordinary, *Hales*.
Clerk, *Ross*.

For Hill. *J. Douglas*.
For Yeaman and Hogg, *J. Maclaurin*.

Fac. Coll. No. 9. p. 23.

1771. February 26.

CHARLES INGLIS *against* SIR ROBERT ANSTRUTHER of Balcaskie, and the REPRESENTATIVES of DAVID ANSTRUTHER.

In the year 1747, Sir Philip Anstruther of Balcaskie, Sir Robert's father, and David Anstruther, principal clerks to the bills, granted a commission to the pursuer, appointing him, during all the days of his life, to be their depute clerk, to uplift the ordinary dues of office, and " generally to act under the said Sir Philip and David Anstruthers, and their successors, in the office of depute clerkship, in all and every thing as fully and freely as Charles Inglis elder, his father, or any other former deputes was in use to do."

This commission contained the following clause of warrandice: And this our commission, we declare, is to stand good and effectual to the said Charles Inglis, during all the days of his life ; to which we oblige us jointly and severally, and our heirs and successors."

No. 88.

No. 89.

Warrandice incurred only by eviction.

No. 89. In the year 1762, Robert Waddel acquired David Anstruther's share of the office ; and a new commission was issued from the Crown, appointing Sir Robert Anstruther and Mr. Waddel to be conjunct principal clerks to the bills. In the year 1764 Sir Robert and Mr. Waddel intimated to the pursuer, that Waddel was to transact the business himself, and to draw and receive the fees of office ; and thereafter they presented a petition to the Court to that import, which was refused as incompetent.

Mr. Waddel then brought an action in his own name against the pursuer, for reducing the commission granted by Sir Philip and David Anstruther, in respect they had no power to grant a deputation to endure after their own lives ; at least to have it found, that he had a right to exercise the office by himself, independent of a depute, and to levy the fees and perquisites in use to be paid to the acting officer. Having been served with this summons, the pursuer immediately brought an action against Sir Robert Anstruther as representing his father and the other defenders, founding upon the warrantice in the commission in 1747, and concluding that they should be ordained to defend him against the action at Waddel's instance, and should pay him all damages and costs he had incurred, or might thereafter sustain by the action ; and in the event of Waddel's prevailing, that they should be found liable in £2000, as a recompence for the value of the office.

The reduction and declarator at Waddel's instance, after a great deal of litigation, was finally determined in the pursuer's (Inglis') favour ; and an appeal having been taken to the House of Lords, the decree of the Court of Session was affirmed, with £100 costs.

As this was a very inadequate sum to what had been expended in the suit, the pursuer insisted in his action against the defenders, that they should reimburse him of the expense incurred. And the question having been reported on informations,

The pursuer pleaded :

When a pursuer's right was attacked, and intimation of his distress made to his author bound in absolute warrantice of that right, it was incumbent upon the author to defend the grantee against the action brought for evicting the subject. L. 74. § 2. D. De. Evictionibus. Stair, B. 2. T. 3. § 46. Erskine, B. 2. T. 3. § 26. Upon the commencement of Mr Waddel's action, the pursuer made a solemn intimation of his distress to the defenders ; after which it was their duty to defend the right granted by their predecessors : And if, in place of doing so, they left the pursuer to defend, and to lay out the whole expense necessary for that end, he had a claim against them, to be reimbursed of what ought to have been laid out by themselves.

If the the pursuer, after intimating his distress, had left the action to be maintained by the defenders, he could not have been blamed. If, after having done so, and by the defenders neglecting to attend to it, judgment had passed against the pursuer, he would have been entitled to recover from them, not only the

damages sustained by the eviction, but whatever expense he had laid out in his defence; and that being the case, it was impossible to assign a reason why he should not be indemnified of the expense he had incurred, when, in place of deserting the defence, he had successfully maintained it.

The defenders pleaded :

By the express words of the commission on which the present action was founded, the granters were only bound that the same should stand good and effectual to the pursuer during all the days of his natural life. It had been found accordingly, that the commission must stand good and be effectual; so that there was no contravention of the obligation by which only the present action could be justified.

When one person conveyed a subject to another for an onerous cause, the nature of the warrantice was only *ut emptori liceat rem habere*. L. 57. D. De Evictionibus. In the present, the pursuer continued in possession of his office; so that *rem habet*; and it was absurd that any person should be obliged to warrant against a groundless challenge of a right granted by him, brought by a third party. The challenge, in the present instance, was groundless and vexatious; and though the pursuer did not recover from Mr. Waddel the whole costs of suit, it was not reasonable that the defenders should, on that account, be loaded with them.

According to the doctrine of the civil law, the pursuer's demand was without foundation. The very name proved the proposition; an action of warrantice was there called an action of *eviction*; and hence, unless eviction actually took place, there was no room whatever for the action. L. 102, D. De Verborum Obligationibus. L. 18. Cod. De Evictionibus. Cujacius ad Leg. 102. D. De Verb, Oblig. Vcet. in tit. De Evictionibus, § 25. The same doctrine was recognised by the lawyers of our own country. Lord Stair, B. 2. T. 3. § 46. Bankton, v. 1. p. 578.

The Court was decidedly of opinion that there was no foundation for an action of warrantice, unless there had been an eviction; and in illustration of the present point, it was observed, that though an heir, pursued for a moveable debt, had relief against the executor, yet if he was assoilzied, he would not recover from the executor the expense he had incurred in the action. Their Lordships accordingly "Sustained the defences, and found the pursuer liable in the expense of extract."

Lord Ordinary, *Kennet*.
Clerk, *Kirkpatrick*.

For Inglis, *Macqueen, Oliver*.
For Anstrather, &c. *D. Graeme*.

Fac. Coll. No. 83. p. 243.