

Carmichael having sued Peter for the stipulated rent, Peter insisted for a proportional deduction, unless the pursuer could establish the obligation on Cundel, as set forth in the assignation. At the same time, Peter brought an action against Cundel, that Carmichael might have an opportunity of establishing his bargain with him; but no proceedings were had in this action.

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Answered for Carmichael: The assignation is only warranted from fact and deed; and therefore, unless the defender shall shew, that, by the fact or deed of the pursuer, the sum in dispute has been withheld from him, he cannot prevail in his present claim. If the defender should prove, that the agreement with Cundel was as Cundel alleges, then he would be entitled to a proportional deduction; because then it would appear, that, by the fact or deed of the pursuer, part of the subject had been evicted.

Replied for Peter: It is essential to the contract *Locati*, that if the subject let do perish or fail, otherwise than by the fault of the lessee, then the lessee is no longer bound to pay the tack-duty, L. 15. pr. et. § 1. L. 33. D. Locati. Dict. v. PERICULUM. This is the case, though no warrantice at all be expressed. The pursuer is not only to be regarded in the light of cedent, but as lessor. The assignation to the agreement with Cundel, was really a lease of the profits arising from that agreement; for which he took the defender bound to pay a higher rent. By the contract, even the assignation to the written tack with Cundel, is warranted from fact and deed only; but, suppose the shops were burnt or become ruinous, could it be maintained that the defender was notwithstanding liable for the rent, because this did not happen by the fact or deed of the pursuer?

The Court was of opinion, That the pursuer was bound to make good his own averment; and therefore "found the defender entitled to retain the 10 *per cent.* in regard the pursuer had not proved his alleged agreement with James Cundel."

Act. *M'Queen.* Alt. *Rae.* Clerk, *Ross.*

Fac. Coll. No. 23. p. 38.

1769. December 19.

ALEXANDER HILL, *against* JAMES YEAMAN and WILLIAM HOGG.

In the year 1756, Yeaman sold to Hogg a tenement of lands, shops, and brew seat in Dundee, binding himself to deliver a valid and proper disposition to the subjects. Hogg made over the purchase to Hill upon the same terms and conditions, who entered to possession, and meliorated the subject by necessary repairs. Yeaman's title to the shops and brew-seat had, it seems, been a bad one; for in 1759 Elizabeth Reid brought a challenge of the adjudication, the ground of that title, as having been deduced against a wrong person as heir. Appearance was made, both for the pursuer and defenders, in the action at Elizabeth Reid's instance; the expence of which the defenders defrayed.

No. 88.

In an action of damages upon warrantice, for the eviction of an heritable subject, when is the eviction understood to have taken place? and at

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 what period
 is the value of
 the subject
 evicted to
 be regarded,
 so as to as-
 certain the
 amount of
 the pursuer's
 claim?

In August 1760 a sequestration was awarded of consent; and in January 1762 Lord Minto, the Ordinary in the cause, pronounced an interlocutor, sustaining the adjudication "as a security for the sums adjudged for;" thereby deciding that it no longer subsisted as a right of property. In this judgment the defenders, Yeaman and Hogg, acquiesced; but as Mrs. Reid did not, the interlocutor in that process was not finally settled till the 15th July 1766.

The pursuer, Hill, then brought an action against Yeaman and Hogg, his authors, for the value of the subjects evicted, and for the rents he had been obliged to pay to the judicial factor after the sequestration. In this action he maintained that he ought to be allowed the value of the subjects as at the date of the interlocutor 15th July 1766; while the defenders, on the other hand, contended they were liable for the value only as at the period when the action at Mrs Reid's instance was brought, or, at any rate, when the sequestration was awarded. The Lord Ordinary, by two several judgments, 28th February and 26th July 1769, found, "That the eviction of the shops and brew-seat is to be held as taking place at the date of the sequestration; and that the pursuer is entitled to the value thereof as at that period."

Pleaded by Hill in a reclaiming petition,

1mo, In all sales for an onerous price warrantice was implied; and as the sellers could not make the purchase good, they must make up to the purchaser *quod deest* to him by the eviction. Erskine, B. 2. T. 3. § 26. Bankton, B. 2. T. 3, § 124. says, "warrantice, in disposition of lands extends to the whole value of the subject as it is at the time of eviction:" and according to Lord Stair, "the whole worth of what is evicted, as it is the time of eviction is inferred."

2do, The time of eviction could mean no other than the date of the final judgment, by which the subject was carried off. Till decree was finally pronounced in the process, it was uncertain whether there could be any eviction at all; during the dependence of the process it was still doubtful who would prevail; and as the purchaser would be barred from having recourse upon the warrantice against his author till eviction actually happened, and of course an action for indemnification in these circumstances premature, the date of the decree seemed to be the only *terminus habilis* at which the value of the subjects evicted ought to be fixed.

3tio, The adopting of any other rule would be productive of inequality and injustice. If this was not fixed, the defender might with equal reason pitch upon any time that was most advantageous to himself; and, as the pursuer must admit, that if the value was to be diminished at the period of eviction, he could claim only the amount, he was equally entitled to the chance of an eventual rise.

Answered for the defenders.

1mo, The pursuer's argument proceeded upon the erroneous supposition, that the purchaser could not bring his action of eviction till eviction had actually taken place by a final decree; but instances occurred every day where the purchaser raised his action whenever the challenge was brought against himself, Dict. *h. t. supra*.

2do, It was in a purchaser's power, whenever a challenge was brought, immediately

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."

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Warrandice incurred only by eviction.