

Now the defender alleges, that if this hold, it must conclude, that wherever a bond, ticket, or accmpt, is assigned in security, and the instruction of debt delivered, the assignee must count: which would seem contrary to the current of decisions: as particularly *27th December, 1709*, betwixt *Smith* and *Vint*, where such an assignee was not found bound to count for a sum so assigned to him, though the debtors had become insolvent, and the debts prescribed, while the instructions were in the creditors' hands. Nor, *2do*, will young Sir William's accepting of the disposition, using it, and uplifting sums by it, be relevant to infer the conclusion in the pursuer's libel: for though the defender should count for intrusions, yet by the nature of the right, he is still excoemed from diligence, as was lately found betwixt *Home of Kaims*, and *Home of Renton*; and again, *22d July, 1709*, *Duncan contra Graham*. It is true, the common debtor, or any in his right, may oblige the receiver of a right for security or in relief, to denude, or give up instructions upon payment; but it can be no sooner done, without overturning our known laws: and therefore, even before the defender can be decerned to exhibit, the pursuer must offer payment or security.

ANSWERED for the pursuer,—That she barely craves the defender should be found liable either to hold count for the sums, or produce the instructions, and say they are yet unpaid and undischarged; so that *esto in eventu*, he should be exonerated from doing diligence, yet nothing can ever cover him from being liable either to produce the writs, or hold count for the sums: And this, because, though the assignation may give the defender preference for his relief, yet the pursuer ought to be allowed to affect the same in her due place: nor can the use of them be denied her, for making them effectual for her payment, after the defender's.

REPLIED for the defender,—That his father's right for relief and security, having still a preference, so long as the disposition is not offered to be reduced, the pursuer cannot pretend to have any interest in the subject, before the defender be relieved and paid.

The Lords found the defender ought to exhibit such instructions of the particulars disposed, as came to his father's or his own hands, or to hold count therefor; reserving all his defences as to the application of the sums for which he should hold count, whether to the grounds of his adjudication, or other debts: And, also, how far his father or he are bound for diligence, the right being granted for security and relief.

*Act. Hay. Alt. Nasmith. Mackenzie, Clerk.*

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1715. *June 23.* WILLIAM MUIRHEAD *against* The LORD COLVIL.

THE Lord Colvil, as heritable bailie of the regality of Culross, having installed William Muirhead as clerk of court during life, for which his Lordship got 1200 merks; he continued in the exercise of that office for six years or thereby, till my Lord having failed to take the abjuration imposed by the government, the court became vacant for want of a judge: whereupon Muirhead raises a process against my Lord, for repayment of the money, annual-rent, damages, &c. upon

this head,—that by his Lordship's fault the office was rendered useless, and therefore he was liable in repayment and damages.

ANSWERED for the defender,—That though a seller be generally liable in case of eviction, yet where it falls out through an unforeseen accident falling out after the sale, he cannot be liable, the contract being *uberrimæ fidei*; and, therefore, nothing can be understood to come unto it, but what both parties had probably in their view at contracting. Now, the imposing of new engagements by the government, could never be in their view at making the bargain. And this is plainly exprest in that famous *L. II. ff. De Evictione*, where this general rule is laid down, that *Venditor non tenetur præstare (futuros casus) evictionis*. And is also the opinion of Cujace, *Consultation 38*. where, in a case parallel to the present one, he plainly asserts, and that from the authority of the above cited law, that *inopinati casus evictionis post venditionem et traditionem ad venditorem non pertinent*.

REPLIED for the pursuer,—That the nature of the thing implied that my Lord should keep courts by himself or his deputed; for *concessa alicui jurisdictione, cuncta ea, &c.* the pursuer could not exercise his office without a court, nor can a court be without a judge; and, by the defender's fault, there was neither court nor judge. And the not taking the abjuration is of itself a fault, since the law enjoins it. However, by the nature of the clerk's commission, which was upon an onerous cause, it is implied that my Lord is obliged to have a court there.

DUPLIED for the defender,—*Imo*, That whatever obligation he might stand under to the government, yet he was under none to the pursuer, to give an active obedience to all laws that should, after this contract, be imposed. For it could never enter into the minds of contractors, that either party should be obliged, with respect to one another, to take all the engagements that a government should come afterwards to lay upon either of them; seeing this were in effect to oblige themselves to do a thing which perhaps they might come to think not agreeable to conscience. *2do*, That the not taking the abjuration, was not a *culpa*, even with respect to the government, because the law here has had its force, by my Lord's ceasing to act; and to impose a greater penalty, by condemning him to the pursuer for not acting, were to extend the law beyond intention.

The Lords sustained the defence, and assoilyied.

*Act.* Boswel. *Alt.* Jo. Falconer. Gibson, *Clerk.*

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1715. *July 22.* ELIZABETH HOME and her Husband, *against* TROTTER and SIR ROBERT HOME.

THE deceased Sir John Home of Renton, in anno 1671, sets a tack to Mr. Patrick Home, his second son, of his whole estate, for payment of his debts; only allocating an aliment of 2000 merks yearly to Sir Alexander Home, his eldest son, for payment whereof he obtained a locality of the Mains and Parks of Renton. Thereafter, in anno 1694, there is a contract betwixt Sir Alexander and his said brother, Mr. (now Sir) Patrick, whereby the property of the estate is disposed to him, he renouncing the tack, and undertaking the burden of the debts, and as-