

\* \* \* Fountainhall reports the same case.

No 13.

A recourse upon the absolute warrandice of an assignation, in case payment were not obtained, THE LORDS found this relevant to assoilzie, that Harry did no diligence to recover payment of this debt; for they thought the clause implied a necessity to do diligence, unless the executors would prove the debtor was bankrupt and insolvent the time of granting the assignation; and found this relevant to the defender, that he had then a visible estate. *Nota*, If it had only been absolute warrandice, without these words, 'in case payment be not obtained,' there had been no recourse, though the debtor had been insolvent.

*Fountainhall, MS.*

1682. February.

HOME against HOME.

SIR Alexander Home of Rentoun having granted a bond of corroboration to George Home of Keams, his uncle, for his payment and relief of certain sums of money that were due to him, and wherein he stood engaged as cautioner for the deceased Lord Rentoun, his brother; and for his farther security, Sir Alexander having disposed to him his hail stock of horse, noul, sheep, and other moveables, upon which there being an instrument of possession by a symbolical tradition, and Keams having disposed and sold a great part of the goods, Sir Alexander pursues Mr Harry Home, to whom Keams had disposed his estate, with the burden of his debts, for count, reckoning, and payment to him of the price of the hail moveables contained in the instrument of possession. *Alleged* for the defender; that the goods being disposed to him only in corroboration, and for his further security for payment of his debts, he cannot be farther liable to count but only for his actual intromissions, in so far as he has actually sold and disposed of the goods. *Answered*, That the disposition being of the hail moveables, and the instrument of possession containing a particular condescence of the number and prices of the moveables, the defender ought to be accountable for all that is contained in the instrument of possession, unless what he can make appear Sir Alexander intromitted with, or that Keams was otherways debarred from the intromission. And albeit Keams's right to the moveables was but a corroborative security, yet seeing it was a simple and absolute disposition as to Sir Alexander, and Keams having actually taken possession of the moveables, and having disposed of a great part of them, he ought to be countable for the hail goods contained in the inventory, unless he can condescend upon a relevant ground why he did not dispose of the hail moveables disposed, as well as of a part. *Replied*, that the disposition being only but a corroborative right, by the very nature of the security, Keams was not farther liable to account but accord-

No 14.

A disposition to moveables, with symbolical possession, being granted in security of a debt, and the creditor intromitting with a part only, the rest remaining in the debtor's possession, he was found liable only for his actual intromissions.

No 14. ing to his intromission; and albeit there was a symbolical tradition, yet the goods still remained upon the ground, and were kept by Sir Alexander's own herds and servants; so that unless Keams, conform to the disposition, had actually taken away the goods, he cannot be further liable to count but for his actual intromission. THE LORDS found the defender only liable to count for Keams's actual intromission.

*Fol. Dic. v. I. p. 238. Sir Patrick Home, MS. v. I. No 158.*

No 15. 1706. June 27. M' MICKEN against KENNEDY.

AN assignation in security taken by a creditor from his debtor to mails and duties, and intimated to the tenants, was found not to oblige the assignee to account for these rents, unless he had debarred the cedent or his creditors from uplifting.

*Fol. Dic. v. I. p. 237. Forbes.*

\* \* See this case, No 62. p. 524.

1709. July 22.  
ALEXANDER DUNCAN of Strathmartin against MR ALEXANDER GRAHAM  
of Methie.

No 16.  
An assignation to a tack, in security of a debt established by an infestment of annual-rent, was found not to make the assignee possessing by virtue thereof liable to intromit beyond his annual-rent, or accountable for more.

IN the ranking of the Creditors of Wintoun of Strathmartin, Alexander Duncan, who had a disposition of the lands from the debtor's heir, objected against an interest produced by Mr Alexander Graham, viz. two heritable bonds with infestment granted to his author by Wintoun, that the same must be understood satisfied and paid, in so far as he, the common debtor, assigned Alexander Graham's author, for the more secure payment of his money, to a tack of lands paying more duty than his annual-rent amounted to, by virtue whereof he entered to the possession, and ought, or is presumed to have continued to uplift the whole rents; unless he can make appear, that he was debarred by another creditor.

*Answered* for Alexander Graham; His author intromitted with no more than satisfied the annual-rent of his money, nor was obliged to intromit with, or count for more of the rents; seeing he debarred no other creditor from access thereto.

THE LORDS found, that the assignee was not liable to intromit beyond his annual-rent, nor countable for more. For they distinguished betwixt a voluntary right in security, and a legal right by diligence of apprising or the like.

*Fol. Dic. v. p. 238. Forbes, p. 350.*