

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-

signing the mails and duties of a roun called Presses, and others, to Sir Alexander during life: which he accordingly possessed. But the contract stands reduced at the instance of Sir Robert, son to Sir Alexander. And now the said Elizabeth Home being confirmed executrix to her father Sir Alexander, charges Trotter, the tenant in Presses, for payment of the rent of the said roun; and he having suspended, while the charger and suspender are in dispute, compearance is made for the said Sir Robert Home, heir of provision to Sir Alexander, who made the following exceptions against the charger's right:

*Imo*, That the foresaid contract, (which is the only title whereon the charger pretends that the mails and duties of the Presses did belong to Sir Alexander,) stands reduced at Sir Robert's instance. *2do*, That the charger as nearest of kin can have no interest therein, because the moveable debts of the defunct are a burden affecting the executry. And it does not yet appear that the moveable debts of Sir Alexander or Sir John, (whom he represented) are paid: for that can be only known upon the event of the count and reckoning betwixt Sir Robert and Sir Patrick. And Sir Robert, as heir of provision to his father, is concerned to prevent a misapplication of any part of the moveable estate which is subject to his relief, for the moveable debts of his father or grandfather.

ANSWERED for the charger,—*Imo*, That the tack 1671, was renounced by Sir Patrick in favours of Sir Alexander, by the contract 1694, and his liferent reserved, as said is. And though in the question betwixt the heir of provision and Sir Patrick, the said contract was so far reduced, as to stand for a security only for any onerous cause or valuable consideration paid by Sir Patrick; yet the same can nowise prejudice the executrix of her claim: for her father's liferent was nowise thereby reduced; nor was the renunciation in favours of Sir Alexander thereby reduced, nor in question. To the second, answered, that the executrix her claim, is nowise to be involved in the question betwixt the heir of provision and Sir Patrick; and that she is equally founded, whether the debts were paid or not: for, if not, then the disposition in the contract 1694 was to stand, though only as a security to Sir Patrick, who had undertaken the debts; and if paid, Sir Alexander had the full right to the lands.

The Lords preferred the executrix to the rents of the lands of Presses in question, reserving to Sir Robert his relief against the executrix, for the father or grandfather their moveable debts, at his father's decease, as accords.

*Act. Alex. Falconer. Alt. Hay. Robertson, Clerk. Vol. I. page 163.*

1715. *July 30.* JOHN DOUGLASS *against* COCHRAN of Ochiltrie.

IN this action, (wherein a decision is already marked, the 13th instant,) a new defence being this day proponed, viz. that the pursuer had not yet proven Ochiltrie's accepting a disposition, after contracting of the debt; the pursuer demanded that Ochiltrie should be obliged to deny or affirm the same, in the terms of the act of sederunt.