

1715. *June 16.* GEORGE HILLOW *against* MAXWEL of Munches.

HILLOW being tenant to Sir George Maxwel of Orchardtoun, who constituted Munches his factor,—at counting, the tenant craved allowance of L300 Scots, advanced and furnished by the factor's verbal orders to third parties; and, upon his refusal to allow the same, commenced a process, (after the factory was ended,) wherein he offered to prove the orders by the defender's oath, and by the third party's writ or oath, that he actually paid and delivered victual, &c. to them.

ALLEGED for Munches,—That the pursuit was not now relevant, the factory being recalled. For, allowing that such orders were given, yet it was only as Sir George, his factor or servant; and therefore he cannot now be liable, more than he had been really his servant or tutor. *2do*, That the libel was not relevant, unless the pursuer offered to prove resting owing by Munches his oath, conform to the 9th Act Parl. 2. Sess. 1. Charles II. the five years therein mentioned being long since expired in the present case.

ANSWERED for the pursuer to the first,—That it was never before pled, that a factor's clearing accounts with his constituent, should liberate the factor of obligations contracted with third parties by him, during the factory. For, although the payments had not been made during the continuance of the factory, yet these payments must still be binding upon him whose faith was followed. And the simile of tutors, &c. does not meet: for many cases may occur where the pupil is free, and yet the tutor bound; as in case of minority and lesion, when money is advanced to tutors, and by them misapplied; for in that case, action will be competent against the tutor, receiver, and misapplier, although it be not demanded within the years of the tutory. To the second, answered,—That there was no necessity of proving resting owing by the defender's oath; for although that took place in the case of merchant-accounts, servants' fees, &c. which, by a special Act of Parliament, prescribe in three years, *quoad modum probandi*; yet, in the case of contracts, (such as a mandate,) the order or mandate is probable *juramento*, during the mandant's lifetime.

The Lords, before answer, ordained Munches, the defender, to depone, Whether he gave the orders libelled, to make the payments founded on by the pursuer. As also, ordained the persons alleged to have received these payments, to depone, Whether they received them from the pursuer, or any, for his behoof.

*Act.* Elphingston. *Alt.* Isla. Sir James Justice, *Clerk.*

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1715. *June 17.* AGNES NICOLSON *against* SIR JAMES SHARP of Stoniehill.

[*See page 121.*]

By interlocutor of the 17th February last, (which is marked among the Decisions of that Session, and there the case is also stated,) the Lords found that the defender must count for such of the debts in the disposition, whereof the instructions came to his father's or his own hands, to extinguish his adjudication.

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