

this case, where the conjunct person was only related by affinity, that *talis qualis probatio* was sufficient; but where the condescence did bear, giving to the disponent money when he was in prison and in distress, which she confessed was after the disposition, they refused to sustain the same as a part of the onerous cause, and reduced *pro tanto*.

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1673. July 9. NICOLL HARDIE *against* THOMAS WILSON.

IN a removing from a brewery, within Edinburgh, pursued at the said Nicoll's instance, against Thomas Wilson, who had obliged himself, by a minute, to remove himself at Whitsunday, notwithstanding of a comprising and infetment;—It was ALLEGED, That the minute, wherein he was obliged, was conditional,—the pursuer paying a part of the sums of money contained in the comprising, which was not yet satisfied; and albeit he were now ready to satisfy the same, yet it being within the term, he could not be decerned to remove until Martinmas next.

It was REPLIED, That he being warned fourteen days before the term upon payment of that sum, which was the condition in the bond, he ought presently to remove.

The Lords found, that the condition, not being offered to be performed before the term, the defender was not obliged to remove until a new warning; but, in respect of his consent, they decerned him to remove at Martinmas next, he being paid.

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1673. July 19. The LAIRD of UDNEY *against* AYTOUN and PLENDERGAST.

IN a summons, to make arrested goods forthcoming, at Udney's instance, against the Laird of Aytoun, who was debtor to Plendergast for the price of some lands disponent to him by Plendergast, against whom the Laird of Udney had obtained decret for a great sum of money:—

It was ALLEGED for Aytoun, That he could not be decerned to make forthcoming, because he was conjunct-cautioner, with Plendergast, for the Lord Mordington, and they were mutually bound to relieve others; and he being distressed, ought to be relieved, or otherways might detain whatsoever sum is due by Plendergast, by way of compensation.

It was REPLIED, That the pursuer having used arrestment long before any distress, he did thereby affect the sums arrested, and his right acquired thereby cannot be taken away by any subsequent distress; seeing, if he had pursued to make forthcoming before the distress, Aytoun could never have defended himself upon a naked obligation of relief.

The Lords did find the allegiance relevant to assoilyie the defender from making forthcoming the sums arrested, seeing he was actually distressed during the dependence, and that the dependence was drawn back to the obligation of