

1623. November 20.

Sir GEORGE HAMILTON *against* Mr ROBERT RAMSAY.

No 61.

THE LORDS found an assignation made by a rebel, lawful, being made to a creditor, and not quarrelled by a donatar, but another creditor.

Fol. Dic. v. 1. p. 523. Kerse, MS. fol. 220.

. Durie reports this case :

November 19.—SIR GEORGE HAMILTON of Blaikburn, for debt owing to him by one Ramsay, is made assignee by the said debtor, in and to the duties of certain lands, addebted to him by one Dick, tenant and possessor of the same lands of the crop 1621; and, upon that assignation, pursues Dick tenant for payment thereof. In the which process, compares one Bruce, who was heritor of the same lands, and produces his heritable right, and *alleges*, that conform thereto, he should be paid by the tenant of the duties of the lands, and not Ramsay, nor the pursuer his assignee, seeing Ramsay had never any right to the lands, and so could not have the duties thereof; and he not having right, he could not make any effectual right to the pursuer, nor to any other. THE LORDS repelled the allegiance; and found, that the duties of the lands of the crop 1621 controverted, should be paid to the pursuer, assignee constitute thereto by Ramsay, albeit Ramsay had no right to the land, but that the right remained in the person of Bruce the excipient, because Ramsay was in possession and use of uplifting of the duties of the said lands, by the space of nine or ten years preceding this year controverted, from this same tenant defender; and so his possession could not be interrupted, but by a warning, or some other such lawful deed; which not being done, the tenant ought to pay him or his assignee the year libelled, as he was in use to pay the years preceding, and the excipient who was heritor, might interrupt the said possession when he found time; but, until that time, Ramsay's possession ought to be continued. This was found by the LORDS, notwithstanding that Bruce the heritor *alleged*, That one who had no right could not be answered; and, where it was obruded, that the possession uninterrupted ought to be continued, he *answered*, That that might militate in favours of Ramsay against the tenant, if the question were betwixt them; but now, the heritor claiming the tenement and land to be his, and proponing this allegiance, it was competent to oppone the want of a right to Ramsay and to his assignee, which was repelled, and Ramsay's possession uninterrupted was continued.

November 20.—IN the foresaid cause of Sir George Hamilton, mentioned 19th November 1623, the LORDS found, that a rebel, albeit standing at the horn, might make one of his creditors assignee to a debt owing to him, for satisfaction of a debt owing to the assignee, and for payment whereof he had been

denounced rebel before the assignation, and that such assignations made by persons, albeit rebels at the making thereof, was not null, albeit this nullity was alleged by Bruce defender in this cause, and another creditor to the rebel; in respect that the horning alleged and produced, to verify that the maker of the assignation was rebel at the making thereof, was not execute at the instance of the proposer of this nullity, but at the instance of a third person, who was not party nor compeared in this process, and that he was not then denounced at the instance of that excipient. Likeas, they found, that the making of the foresaid assignation, being done and made to that creditor who had denounced him before the making thereof, came not under the statute of dyvoury, as if thereby the cedent, who was a common debtor, both to the assignee and to the excipient, had made election and preferred the one creditor to the other, and so that thereby the assignation should be found null, as was desired by the excipient; which was repelled by the Lords, seeing they found that this assignation, being made for satisfaction of a preceding just debt, for the which execution was used before, was not a voluntary election of the common debtor, but ought to be reputed as a deed done of necessity, and so was sustained against the excipient.

No 61.

Act. Hope.

Alt. Aiton.

Clerk, Hay.

Durie, p. 80, & 81.

* * This case is also mentioned by Haddington :

In an action pursued by Sir George Hamilton of Blaikburn, against William Dick in Bush, there was an pratique produced by Mr Andrew Aiton, bearing, that in an action betwixt Mr Robert Durie in Dunfermline, and one Brown and ———, the LORDS had found, by interlocutor, that an assignation made by a rebel might be quarrelled by way of exception by a party who was neither creditor to the rebel nor donatar to his escheat.

Haddington, MS. No 2927.

1626. December 13.

EARL OF GALLOWAY against M'CUCCLOCH.

In a reduction of a sub-tack pursued by the Earl of Galloway *contra* M'Cuclloch, who was sub-tacksman to another, principal tacksman to the pursuer, and which sub-tack was also consented to, and subscribed by the pursuer, setter of the said principal tack; the reason of reduction was, because the principal tack was reduced, where-through the sub-tack depending thereon behaved to fall; likeas, the said sub-tack had a clause irritant therein inserted, that if the sub-tacksman fail in paying of his tack-duty at the terms appointed therein, that the sub-tack should be null; so it was subsumed that he had failed. THE LORDS assoilzied from these reasons, because albeit the principal tack was

No 62.

In a reduction of a sub-tack, in which the tack-duty was payable to the principal tacksman, found *jus tertii* to the intermediate tenant to plead the irritancy of: