

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, &amp; 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:

No 62.  
failure of pay-  
ment. Al-  
though he  
had raised  
inhibition, he  
did not come  
in the place  
of the princi-  
pal.

reduced, (it being reduced for not production, and in absence of the party, and this sub-tacksman not being called to that reduction) that was found no ground wherefore the sub-tack should fall, seeing it was subscribed, and consented to by the pursuer, and so who could not be prejudged by that decret, whereto he was not called, and who could not be mis-known by the pursuer, if he had intended that the sub-tack should fall, having consented thereto; and sicklike the failzie of the clause irritant, contained in the sub-tack, was not any reason competent to this pursuer, who had consented to the sub-tack, wherein he was astricted to pay his duty to the setter of the sub-tack, and not to the pursuer, which setter quarrelled not the defender upon the said failzie; and this was so found, albeit the pursuer *replied*, in fortification of the reason, That by the reduction of the principal tack, and by serving of inhibition since, at the pursuer's instance, upon the teinds contained in the tack, the pursuer was become in the place of the principal tacksman, whose right was taken away by the said reduction, and the pursuer thereby had devolved in his person all the right to the teinds, which the principal tacksman had, and that consequently the right to the duty addebted by the tacksman belonged to the pursuer, and the defender ought to have paid the same to him, especially seeing the inhibition foresaid, served at the pursuer's instance, was intimated to this same defender, in so far as he had intended thereupon action of spuilzie of these same teinds against the excipient; from the which albeit the defender obtained absolvitor, in respect of an exception proponed by him, founded upon this sub-tack then standing, yet the same was of that force to make it known to the defender, that the pursuer had right to the duty of the sub-tack, and that he ought to have paid the same to him, for eschewing of the clause irritant; it being of verity, that at no time sincesyne, nor since the intending of this action (there being diverse terms past since the raising thereof) the defender hath never offered, nor paid his duty of his sub-tack to the pursuer; all which was repelled, and absolvitor given, as said is; for the LORDS found, that the pursuer could not seek declarator upon the failzie of the sub-tack, except first that the pursuer had obtained it declared, that the right of the duty thereof was established in his person, as succeeding in the place of the principal tacksman, and that the defender ought to pay the same to him. See: RES INTER ALIOS.

Act. *Stuart & Neilson.*

Alt. *Scot.*

Clerk, *Scot.*

*Fol. Dic. v. 1. p. 522. Durie, p. 245.*

1630. March 24. MURRAY *against* the COMMISSARY OF DUNKELD.

No 63.

In a special declarator of the Commissary of Dunkeld's escheat, pursued by Mr Patrick Murray, the defender proponed an allegiance upon the ordinary back-bond given to the treasurer by the donatar, which bore, that he should