

No. 1.

710. The defender had intimated his assignation long before the intending of this cause, and before any intimation made by the pursuer of his assignation; so that, as in double poindings, agitated upon two assignations, the first lawfully intimated will be preferred, although posterior; so this last assignation first intimated cannot be quarrelled or reduced by one not intimated. *Answered*, Notwithstanding the first assignation must be preferred, because *res sunt adhuc integra*, the lands not being yet redeemed; and the cedent could not grant a new assignation to any, being denuded before. Probation in this allegiance too.

Then it was *replied* to this last exception by the pursuer, That he had recovered by virtue of his assignation the most part of the reversions contained therein, which assignations were made to his cedent before his said first assignation to the defender, and that upon alienations made before the pursuer's sasine libelled. *Duplied* by the defender, Not relevant, because general, not condescending on the number of the reversions recovered, and the time when. Find the reply relevant for so many of the reversions as are in the pursuer's hands, he being special upon them.

The pursuer produced eight reversions, whereon he grounds his reply. Further *alleged* by the defender, The pursuer should condescend on the time of the recovery, and from whom; for albeit the cedent could not be heard to propone this, yet the defender, being a third person, who did intimate first assignation, has good right to try how they came into the pursuer's hands, and to say against them. Find the pursuer needs not to condescend on the time or manner of the recovery of these reversions, in respect they are in his own hands.

Spottiswood, (REDUCTION.) p. 266.

1542. *March 9.* JOHN HALIBURTOUN *against* HELENE RUTHERFURD.

No 2.

Found that a depending reduction of a decree cannot stop execution thereupon.

GIF ane decrete of ejectioun or spuilzie be gevin aganis ony persoun, he may call and persew for reducioun thairof, albeit he has not fulfillit nor obeyit the samin, nor zit maid restitutioun, conform thairto, of the gudis and geir spuilzeit be him, to the obtenar of the decrete; because the commoun rule, spoliatus ante omnia est restituendus, stoppis him not to seik reducioun of the said decrete, and has onlie place, quando agitur super proprietate rei spoliatae, vel de alia re, agendo principaliter; et non quando agitur per viam reductionis, ad retractandam sententiam, super spolio contra aliquem latam: And zit nevertheless, the intending or dependence of the said reducioun sould not

stop the obtener of the said decreet, to put the samin to farder executioun, during the time of the said dependence.

No 2.

Fol. Dic. v. 2. p. 326. Balfour, (OF SPUIZIE AND EJECTION) No 41. p. 475.

* * * Sinclair reports this case :

1541. *March 9.*

IN the cause of John Haliburton against Helen Rutherford, the LORDS, by interlocutor, decerned that exception, quod spoliatus ante omnia est restituendus, proponed by Mr Hew Rig, procurator for the said Helen. *Alleged*, That the said Helen had not yet gotten restitution of the spuilzie committed against her by the said John's father, as the decreet of the Lords for reduction of the quhilk the said John's now intended action, bore therefore unto the time, that she was plene restituta ad omnia contenta in dicto decreto ; that the said John should not be admitted nor heard ad agendum contra eandem Helenam super reductionem ejusdem decreti. THE LORDS repelled the said exception and decerned.

1541. *March 22.*—IN John Haliburton's cause against John Rutherford, for production of a decreet of spuilzie, obtained by her against the said John's father *ut recordatur*, because the time of the alleged spuilzie, *et continuo multis annis ante*, that *ipse reus* was in possession of the same lands as she alleged her spuilzied of, as a part and pertinent of his mailing of Murehouse *ut memini* ; and that at the time of the alleged spuilzie she put her plough therein, he being then in possession, and how soon that he got wot thereof, he came and put her furth again *incontinenter* ; and so did no wrong therein, for he defended but his own possession, quhilk was lawful to him, and therefore, in his summons of reduction of the said decreet of spuilzie, given *contra suum predecessorem citatum* and *non comparentem*, he asked it to be reduced. THE LORDS decerned the said exception relevant, because this is the second instance, *in qua non allegata allegare non producta producere licebat* ; and also because the same reason would have been admitted *in prima instantia*, and stopped the said decreet giving, and so ought to be reduced.

1542. *May 12.*—IN the cause of John Haliburton against Dominam Rutherford, penes reductionem decreti cujusdam spoliationis per dominos consilii lati pro dicta dominia contra eundem, the LORDS admitted the Abbot of Melrose' tenants to prove the said John's possession of a piece land that the said Lady alleged her spuilzied of by him, as part and pertinents of the lands of M. pertaining to the said John in mailing, holden of the said Abbot and convent of Melrose, because the question was here but upon the said John's possession of the lands, and

- No 2. not upon the property thereof, and so the Abbot and convent could not get hurt nor yet profit of this cause, however it go; and so the witnesses were admitted, albeit the other party's procurator, Mr Hew Rig, alleged, that they should have been repelled, quia erant tenentes dicti Abbötis, et agebatur super partes, et pertinen. predictarum terrarum ad eundem, ut prædictum est speciatim.

Sinclair, MS. p. 15, 20, 24.

1542.

LIVINGSTON *against* WOOD.

- No 3. THE Laird of Livingston intented action of reduction of a decret given against his father, at the instance of David Wood, comptroller, which decret was given by virtue of an obligation produced by the said David, which obligation the pursuer in this reduction craved to be produced, that he might improve the same. THE LORDS would not sustain the reason of reduction, quia procurator actoris in prima instantia non excipiendo de falsitate, imo proponendo aliam exceptionem, tacite visus est illam approbare: And as the pursuer's father, if he were alive, would not be heard to improve the same which he has once approved, as said is, no more could his son and heir, at least his successor who is in his place and right. Et de jure, exceptio falsitatis post sententiam non potest opponi.

Spottiswood, (REDUCTION.) p. 269.

1542. June 20.

Lord OGILVIE *against* JOHN CAMPBELL.

- No 4. ALBEIT ane man intent summondis for reduction of ony decrete or sentence gevin and pronouncit aganis him, the dependance of the said summondis, or cause of reducioun, sould not stop or delay the executioun of the decrete. *Fol. Dic. v. 2. p. 326. Balfour, (OF REDUCTION OF SENTENCE.) No 4. p. 406.*

. Sinclair reports this case :

In the cause of the Ld Ogilvie against Sir John Campbell of Lundie; there were certain lands of the said Lord's as pledge and surety for the Laird of Dunoon comprised to a woman called M; and these lands being apprised to her, she caused assign to the said Sir John for money, who, by reason thereof, obtained infeftment thereof by the Earl of Crawford, superior of the same. Thereafter the said Lord got a decret of the Lords of Council, upon which these lands were apprised, reduced, the said Sir John not called thereto; and