

nee; and so the said assignation fell under the statute of dyvoury, seeing it is made in his fraud and prejudice, who is a true and lawful creditor, and done to a conjunct person, the cedent being the assignee's sister's son, and no writ being extant to qualify the cedent his debtor, and the cedent being otherways altogether unanswerable to pay the arrester's debt, being now fugitive, and the assignee having acquired, beside this assignation, all other means and estate, pertaining to the cedent his debtor. This allegiance was repelled, and the assignee was preferred to the arrester; because the arrester had not done any more diligence upon the arrestment, and the assignee had charged upon his assignation; albeit the arrester *alleged*, That he could do no more diligence, seeing, immediately after the arrestment, the Lord Kilsyth had drawn in the matter, by suspension and double pointing, the dependence whereof made all further process and charges to cease; which was not respected. And the LORDS found, that it was sufficient to the assignee, to qualify the cause of his assignation, viz. that it was made to him, for sums owing to him by the cedent, by the assignee's own oath; which oath of his the LORDS found sufficient to instruct the debt, and cause of the making of the assignation; and found, that it was noways necessary to instruct or qualify the same by any preceding writ, made by the cedent to him; but that it was enough and sufficient, if he should swear by his oath, that he was addebted to him at the time of the assignation in as great sums, as the sum whereto he was assigned; and repelled the allegiance proposed for the arrester, in respect thereof.

*Nota.*—This decision is contrary to that made betwixt Duff and Kellie, 23d March 1624 (see APPENDIX); and to another betwixt Young and Denniston, 12th February 1622 (*supra*), and to other cases; see APPENDIX.

Act. Per Se.

Alt. Nicolson, elder, & Primrose.

Clerk, Gibson.

Fol. Dic. v. 2. p. 250. Durie, p. 160.

1626. November 24.

GLEN against BINNIE, &c.

IN a double pointing raised at the instance of some tenants of burgh-land in who were distressed for their mails, at the instance of Glen on the one part, and by Binnie on the other part; Glen's right was a tack set to him by his own son, who shortly after the date of the tack became bankrupt; and which son, by his contract of marriage, was appointed to be infeft by his said father (who was also party-contractor in the said contract of marriage) in the same land, and according thereto was infeft therein. This tack bore, in the narrative thereof, that notwithstanding of the provision made to the son by the father, conform to the foresaid contract, yet, at the date and time of the said contract, it was convened verbally betwixt the father and the son, and the son promised that the father should retain the possession of the said lands, wherein he was appointed to be infeft, during all the days of his lifetime, not

No 437.

No 438.

A lucrative tack let by a bankrupt to his father, bearing to be in implement of a promise made when the lands were disposed to the bankrupt, in his contract of marriage, found not to prove its onerous cause against a creditor.

No 438. withstanding of the right to be given to the son heritably by virtue of the said contract, for fulfilling of the which promise and condition the said tack was set ; and in respect of the which tack, bearing the said promise, and that the father, now defender, *alleged*, That he had continued in real possession of the duties of the lands libelled continually, by virtue of the said promise, since the date of the said contract many years, to the time of the setting of this tack ; and that also he had uplifted a term's mail of the land since the date of the tack, and so the same was clad with possession ; therefore he *alleged*, That he ought, conform to his tack, to be answered of the rest of the terms controverted, viz. all the terms after that term whereof he had received payment, as said is ; especially seeing he needed not to prove any further of the promise, than by the narrative of the tack, and that conform to the act of Parliament anent dyvours, that he was content to give his oath upon the true cause, and that the promise was then truly made, so that there was no necessity of any other anterior writ. The other party Binnie *alleged*, That he ought to be preferred, in respect the tack was set to the father by the son, who was at the setting thereof *in meditatione fugæ*, and thereafter shortly became bankrupt, and he was his creditor who had registered the son's bond a day before the setting of the tack, and had comprised the lands, and was infest therein before any terms had passed, except that one alleged uplifted by the father, which one only term could not make the tack lawful against the compriser, there being nothing extant in writ to verify any anterior promise ; which promise made so fraudulently the time of the contract of marriage, ought not to be allowed, especially where there is nothing to qualify but the assertion of the son, done so long after the contract and made to his own father, and in prejudice of him a lawful creditor who had done all diligence ; for as that tack could not meet the son's wife, who had her conjunct-fee right of that land given to her, if her husband had been dead, no more now ought the same to meet the creditor. This allegiance of the creditor's was admitted, and the father's allegiance repelled and the creditor preferred, and decerned to be answered and obeyed.

Clerk, *Gibson*.

*Fol. Dic. v. 2. p. 252. Durie, p. 235.*

No 439.

An assignation by a bankrupt to his brother, bearing to be for security of debts owing him, found reducible, unless the assign-

1629. *January 29.*

AULD *against* SMITH.

ONE being made assignee to a debt owing to the cedent, and thereafter the same debt being arrested by another creditor to the cedent, the said cedent being bankrupt, and the dispute being betwixt the arrester and the assignee, the assignee craving preference as anterior to the arrester, and the assignation being made for debts owing by the cedent, and for satisfying some others of the cedent's true creditors ; it was found, That if the assignee could not instruct by