

- No. 2. to the defender to prove, that in the mean time he might proceed criminally, before the Justice, and instruct the defence by the sentence of the Justice, or whether they would receive the probation themselves, they resolved to hear the parties upon it.

Stair, v. 1. p. 138.

1664. June 24. DUKE and DUCHESS of HAMILTON *against* SCOTTS.

No. 3.
Effect of a
commission
appointed by
act of Par-
liament.

The Duke and Duchess of Hamilton being charged for payment of a sum due to umquhile Sir William Scott of Clerkington, and assigned by him to his four children, alleged, that by act of Parliament commission was granted for deducting so much of his creditor's annual-rents as should be found just, not exceeding eight years, and therefore there could be no sentence against him as to that till the commission had decided. The pursuers answered, That these annual-rents were not due for the years during the time the Duke was forefault by the English, which ended *in anno* 1656, and they insist but for the annual-rents since that year. It is answered for the Duke, That albeit he had paid many of these years annual-rents by force of law, then standing, yet that could not hinder the deduction, but that he would have repetition or deduction in subsequent years. The pursuers alleged he behoved to seek the heir for repetition, and could not deduct from them.

The Lords, in respect of the commission, would not decide nor discuss the allegiance anent the year's annual-rent, but superseded to give answer till the commission had determined, even till seven years after the forefaulture, to make up these that was paid before.

In this process compareance was made for Sir Lawrence Scott, the heir and executor-dative, who alleged that there were 2,000 merks of the sum belonged to him, because his father's assignation to the children contained an express division of their shares, which was so much less than the whole sum assigned. The children answered, They opposed their assignation, which bore expressly an assignation to the whole sum and bond itself; and albeit the division was short, it was but a mistake of the defunct, and cannot prejudice the assignees.

Which the Lords found relevant.

Stair, v. 1. p. 205.

1664. July 7. JOHN MILN *against* HOME.

No. 4.
Act 1661.
Cap. 62.

John Miln, mason, having charged Sir James Home of Eccles for payment of a sum of money due by bond, he suspended, and alleged that he had the benefit of the act betwixt debtor and creditor as to personal execution, seeing he had paid a year's annual-rent, and had consigned a bond of corroboration, joining the rest of the annual-rents to the principal. The charger answered, The suspender could