

No 3. ous, her marrying during the dependence cannot exclude him from his oath, but must work against her husband, who is only *juri mariti* a legal assignee.

THE LORDS found this relevant.

*Fol. Dic. v. I. p. 552. Stair, v. I. p. 164.*

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Found, that in regard *pendente lite nihil est innovandum*, the defender could not put the pursuer in a worse condition, by assigning his right *pendente processu*, to a person against whom a reply was not competent, which would have been competent against the cedent.

1666. July 14. WILLIAM SHARP against ANDREW BROWN.

WILLIAM SHARP having apprised from Robert Halyburton certain tenements in the Canongate, whereof the said Robert had a right of wadset redeemable for 1600 merks from Andrew Brown, from whom the right of wadset did flow, and who had right to the said tenements by virtue of an apprising led at his instance against David Glen, in *anno* 1649, for payment of 1600 merks, addebted by the said David to him; the said William Sharp being infeft in the said lands, obtains decret of mails and duties against the tenants; which being suspended, and compearance was made for Alexander Barns, as heir to James Barns, who stood infeft in the said tenement long before the said Andrew Brown his apprising, who thereupon craved to be preferred, against which right, several allegiances were formerly proponed, but in respect of the surcease of justice, no decret followed, but several parts of the process were lost, and thereby the pursuer was necessitated to pursue a new pursuit against the present possessor; which being advocated, and compearance made for the same Alexander Barns, it was *alleged*, no respect could be had thereto; but the pursuer ought to be preferred, because it was offered to be proved by Alexander Barns's oath, that the sums of money for which he had the infeftment of the said tenements were satisfied by the common debtor; to which it was *answered*, that compearance is now made for the children of James Wright, in whose favours the said Alexander Barns is denuded by disposition, and consequently his oath cannot prejudice him. To which it was *replied*, that this pursuit being intented long ago, and compearance being made for the said Alexander Barns, and exception of payment being referred to his oath, and that the same was made by the common debtor, for evicting whereof, Glen, the common debtor, had obtained a blank assignation from the said Barns, and filled up the children of James Wright, their names, of purpose to prejudice the pursuer of his allegiance, which the said Alexander Barns could not do, and *pendente lite* innovate the state of the process. THE LORDS found, that *lite pendente nihil erat innovandum*, and that the cedent, Alexander Barns, could not put the pursuer in a worse condition, by assigning his right to the bairns of James Wright.

*Fol. Dic. v. I. p. 551. Newbyth, MS. p. 74.*

\* \* \* Stair reports this case.

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IN a competition between two comprisers, it was *alleged*, that the pursuer, who insisted for the mails and duties, his apprising was extinct by intromission within the legal, which was offered to be proved by his pursuer's author, his oath. It was *answered*, that his author's oath could not be received against a singular successor standing infest; for as the cedent's oath is not receivable against the assignee in personal rights, much less is the author's oath against the singular successor in real right.

It was *answered*, that before the pursuer's right, *res fuit litigiosa*, in so far as the pursuer's author having before pursued mails and duties in that process, the defender offered to prove by his oath, that the apprising was satisfied, whereupon litiscontestation was made, whereby *res fuit litigiosa*, and no posterior right could prejudice the defender.

Which the LORDS found relevant, and ordained the author's oath to be taken.

*Stair, . I. p. 396.*

\* \* \* A similar decision was pronounced 22d November 1683, M'Brair against Crichton, No 123. p. 2655, *voce* COMPENSATION; and No 13. p. 5245, *voce* HEIR APPARENT.

1673. June 20. NICOL SOMMERVILLE *against* ———.

THERE being a point of form reported from the Outer-house to this effect: An assignee having charged the debtor, he suspended upon a reason of compensation, which was found relevant to be proved by the cedent's oath, because the cause was litigious before the assignation, and a diligence was granted to the debtor against the cedent to depone; but he not having compeared, the question was, Whether the debtor should proceed in further diligence by horning and caption, to force the cedent to compear, as if he had been a witness to prove his exception; or if that the debtor might cite him personally, or at the market-cross of Edinburgh, if out of the country, and thereupon might obtain him holden as confessed upon the verity of his reason, and if his being holden as confessed would prove against the assignee, or if the assignee was obliged to produce him.

THE LORDS found, that the assignation being taken after the cause was litigious, it could not prejudice the debtor, but that if the cedent was personally apprehended, or at the market-cross of Edinburgh, if out of the country, it would prove against the assignee.

*Fol. Dic. v. 1. p. 552. Stair, v. 2. p. 191.*

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Where the matter is litigious before assignation, the cedent's oath is good against the assignee, not as a witness, but as a party, and he may therefore be holden as confest.