

No 371. pended, he obtained decret against him, finding the letters orderly proceeded; and thereafter, Westraw being charged upon the said decret of suspension, he did suspend *de novo*, and, after litigious debates, the letters were found orderly proceeded; after which, George Glendinning having right by progress to the contract whereby the Earl of Nithsdale was obliged to make payment of the half of the lands of Dolphington, with a transferring of the first action against the deceased Earl of Nithsdale, as being heir to him; in which transferring, Westraw compeared, and *alleged*, That Glendinning could have no right to the foresaid minute by the assignation made to him by his brother Alexander, because he had assigned the right of the said minute to Robert Glendinning long before any right made to the pursuer's authors, which was transferred by Robert to Westraw, and for verifying whereof, produced an extract of the assignation registered *in anno* 1673, dated in the year 1665. It was *alleged*, That Westraw could not be admitted to propone the foresaid defence, because it was competent and omitted in the decret obtained against him *in anno* 1618, and in two decreets of suspension long thereafter; *2do*, That pretended assignation being so long kept up and never intimated, nor any pursuit raised thereupon until 60 years after the death of the writer and witnesses, was most suspicious of falsehood. It was *answered*, That competent and omitted could not be sustained to exclude Westraw, because the first decret *in anno* 1618 was for null defence; and the two subsequent being decreets of suspension, competent and omitted was never therein sustained, but parties were always admitted upon new titles and rights, whereupon there was never any reason of suspension formerly founded, to suspend *de novo*, or compear in any other process for their interest. THE LORDS did consider this case as being of difficulty, because of the constant practice then, that competent and omitted in suspensions was not receiveable; but, notwithstanding thereof, they refuse to admit Westraw in this process upon this title, and upon these reasons, *1mo*, That the right was most suspicious as said is; *2do*, That the reason of the former practise was only sustained where parties, being decerned, did immediately, or within a short time, upon new titles, suspend *de novo*; but were not received when they had never offered the same by the space of 30 years; *3tio*, In this action against Nithsdale, there being litiscontestation, or a personal contract, it were not just to admit Westraw in this instance to stop process which were long since prescribed; and therefore they ordained the decret against Nithsdale to be extracted, reserving action to Westraw upon his assignation, as accords.

Gosford, MS. No 731. p. 448.

No 372.
A defence
competent
and omitted

1677. February 13.

BAGGAT against CALDWALL.

JOSEPH BAGGAT having arrested the mails and duties of a tenement, as due to his debtor, in the hands of John Caldwell, possessor of the tenement, before

the Bailies of Ayr; Caldwell compeared but refused to depone, and therefore was holden as confessed, and decerned. He suspends on these reasons; *1mo*, That he was most willing to depone, and produced an instrument of his offer to depone; *2do*, That he had a tack granted by Janet Caldwell by a factory from her husband, heritor of the tenement, which would defend him. It was *answered* to the *first*, That the instrument of a notary, not being clerk of the Court, could prove nothing against the express tenor of a decret, but only the oaths of the members of Court; and as to the tack alleged upon, it is null without a tack-duty, and it was competent and omitted in the first instance; and, albeit competent and omitted be not sustained as to decreets of inferior courts, where the defence is *in apicibus juris*, and is not obvious to the procurators of these courts; yet, in obvious defences, such as the suspender's own tack, it cannot be construed but *dolose* omitted to suspend upon, and therefore it is not receiveable in the second instance.

THE LORDS repelled the reason founded upon the instrument, being contrary to the tenor of the decret, which could only be controuled by the oath of the Judge and Clerk; and repelled the reason upon the tacks, as being obvious, and therefore presumed to be *dolose* omitted.

Fol. Dic. v. 2. p. 209. Stair, v. 2. p. 504.

No 372.
in an inferior court, having been obvious to the procurators, was found not receiveable in the second instance.

1679. February 5. GRANT of Dalvey against BALLANDALLOCH.

THE LORDS allowed payment by discharges yet to be proponed and instantly verified, though it was omitted in a former decret, he giving his oath that the discharges were emergent since.

Fol. Dic. v. 2. p. 208. Fountainhall, MS.

No 373.

1681. June 22. PATON against STIRLING.

UMQUHILE Dr Paton having a right of wadset of the lands of Panholls from Graham of Panholls, disponed the same to umquhile Sir Harry Stirling of Airdoch, his wife's brother, who, by several back-bonds in favours of the Doctor and his children, obliged himself "to denude, upon payment of the sums due to him, and specially in favours of William Paton, the Doctor's eldest son, by Airdoch's sister," William obliged himself to give a discharge and renunciation of all reversions and back-bonds, and any right he had to the wadset, upon express provision "that Airdoch should give a back-bond for denuding himself in favours of William, upon the terms therein expressed." After which, William gave a general discharge and renunciation of all right to that wadset; and after all, Airdoch upon his death-bed declared, "that his rights to that

No 374.
Competent and omitted affects only defenders or supendders, not pursuers; and therefore excludes not different processes *super diversis mediis concludendi in facto.*