

mother's father, whereas he is pursued as representing his father, and not his mother's father.

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*Stair, v. 2. p. 662.*

\* \* \* Fountainhall reports the same case :

FOUND a debtor of a rebel taking assignation, and intimating before his escheat is gifted and declared, may compensate against the donatar, but not after it.

*Fol. Dic. v. 1. p. 166. Fountainhall, MS.*

1683. November 22.

MACKBRAIR of Netherwood *against* SIR ROBERT CRICHTON, and ———  
ROMES his Assignees..

MACKBRAIR of Netherwood having inteded against Sir Robert Crichton, and ——— Romes, his assignees, a reduction of a decret recovered against him, as lawfully charged to enter heir to his father, grandfather, and grandsire, for certain debts resting by each of them ; as also, of the apprising following upon the said decret ; the reason of reduction was minority and lesion, in so far as might be extended to the father's or grandfather's debts, whom he noways represented ; and that, as to the grandsire's debts, he offered to prove paid, partly by Sir Robert and his assignees intromission with the mails and duties of the lands of Netherwood, wherein his grandsire died last vest and seased, before the deducing of the foresaid comprising of the said lands. It was *alleged*, That the mails and duties could not compensate the debts of the grandsire, because they were *in bonis* of the grandfather and father, who were apparent heirs to the grandsire ; and they were not *in hereditate jacente* ; and that the defender had ground of recompensation upon debts due by the father and grandfather, which would elide and compensate all the mails and duties intromitted with ; and that, by an interlocutor in the same cause, it was found, that the mails and duties uplifted belonged to the executors of the apparent heir, and that they might be compensated with his debt. It was *duplied* for the pursuer, That he opponed a decret recovered at his instance, as heir to his grandsire, against Sir Robert, for payment of the mails and duties ; and that recompensation was not receivable after sentence.—THE LORDS found, that although the mails and duties were *in bonis* of the intermediate heir, yet the grandsire's debt being stated against the last apparent heir, by the foresaid sentence recovered against Sir Robert, and the comprising subsisting in so far as concerned that debt, they found, that the mails and duties ought to be *primo loco* ascribed in satisfaction of the debt due by the grandsire, who died last infeft in the estate, it being *sors durior*, as being the ground of an apprising, whereas the other, due by the grandfather or father, were only personal debts. It was further *alleged*, That Sir Robert's intromis-

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A claim not liquidated by sentence before apprising, was found not to compensate, to the prejudice of the appriser.

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sion could not compensate to the prejudice of the assignee, who had deduced the apprising, in regard Sir Robert's intromission was not liquidate by a sentence at the time. It was *answered*, That, before assignation, there was process intended at the pursuer's instance against Sir Robert for mails and duties, so that *res fuit litigiosa*, after which, Sir Robert could not assign his debt to the pursuer's prejudice.—THE LORDS sustained the reply, and found, that it being *res litigiosa* by a citation at the pursuer's instance, whereupon followed the decret for mails and duties, the assignation after the citation, before the sentence, could not prejudice the pursuer. See HEIR APPARENT—INDEFINITE INTROMISSION—LITIGIOUS. *Fol. Dic. v. 1. p. 166. Pres. Falconer, No 68. p. 45.*

1697. November 6.

THE CREDITORS OF MR WILLIAM CLARK, Advocate, and JOHN KEITH, their Factor, *against* MR DAVID DEWAR, Advocate.

No 124.

An adjudger infest pursued for mails and duties. Compensation was not sustained to a tenant upon a debt due to him by his master, against whom the adjudication was led.

THE Creditors of Mr William Clark, advocate, and John Keith their factor, pursue Mr David Dewar, advocate, for the sum of 400 merks, as some years rent of a dwelling-house, pertaining to the said Mr William and his creditors, and possessed by the said Mr David; and the libel being referred to his oath, he deponed in these terms, acknowledging the possession and the quota of the mail; but adjected this quality, that he had become cautioner for the said Mr William, to the Faculty of Advocates, for 600 merks he had borrowed from them on bond, and on distress had paid it, and so craved compensation. It was *alleged*, The defence of compensation could not be received, neither by way of quality, nor otherwise; because the creditors standing infest in this tenement on their adjudications, no debt due by Mr William Clark, their debtor, who is denuded in manner foresaid, can compensate, or meet their right to the mails and duties of their own lands. *Answered* for Mr David, That he seeing Mr Clark in possession, was not obliged to know whether he was denuded or not; nor is a tenant bound to go and seek the registers for a creditor's infestment, unless they be interpellated and put *in mala fide* by a citation of mails and duties, or a pointing of the ground, or by an arrestment at the creditor's instance; and compensation is as favourable as *bona fide* payment, which would have liberate and exonerated Mr David if he had paid to Mr William Clark. THE LORDS considered in this case there was a great difference between *bona fide* payment and compensation; for, in the first case, both the favour of tenants and solution sustains the payment, though made to the wrong hand, if there was a probable ground of mistake; but, in compensation, there must be a true creditor as well as a debtor before it can take place; but here Mr William Clark being denuded by the creditor's diligence, perfected by infestment, (though no process was thereon raised against the tenants), Mr Clark ceased to be a true creditor to Mr Dewar for the house rent, and consequently Mr Clark's debt cannot compensate