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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.

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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

the same.—THE LORDS repelled the compensation, and preferred the creditors; else bankrupts might easily disappoint their creditors by granting bonds to their tenants, or obligations that they retain their rents till they be paid of such a sum; which ought not to militate against singular successors: Then Mr Dewar's procurators craved the creditors might assign him to their diligences *pro tanto* for his relief.—THE LORDS thought this unreasonable, unless to come in after their whole debts were satisfied and paid, but not to bring him in *pari passu* with themselves.

Fol. Dic. v. 1. p. 166. Fountainball, v. 1. p. 790.

1709. February 26. BOWHILL against JACKSON.

AN assignee to a tack pursued the tenant for the rent. The tenant proponed compensation, 1st, That his master owed him a sum *per bond*; 2dly, That he was cautioner for him in another sum, and had engaged himself in hopes of retaining his rent in relief.—THE LORDS found, that the intimation of the assignation interrupted the compensation for the rents which fell due after the intimation, but that there was *concursum debiti et crediti* for the prior years, and compensation applied.

Fol. Dic. v. 1. p. 166.

* * * See The particulars No 61. p. 2612.

1711. January 23. WILLIAM ALISON against JOHN DUNCAN.

JOHN DUNCAN, late Provost in Dundee, being debtor to Robert Christie by bond, Christie assigns it to William Alison, his son-in-law, who charging Duncan, he suspends, and craves compensation, on this ground, that Christie the cedent was owing to Hunter of Baldivie a greater sum, whereunto he has right as executor-creditor confirmed to Hunter. *Answered*, The compensation never met nor concurred betwixt the two, because Christie was denuded by the assignation, and the same duly intimate to Duncan, before he had established the right of the debt due by Christie to Hunter in his person as executor-creditor; so there was never a *concursum debiti et crediti* betwixt Christie and Duncan. It is confessed, if Duncan had purchased the debt due by Christie to Hunter in his person, before Christie assigned Duncan's bond to Alison, or even before it was intimated, then the compensation would have met; but Christie being totally denuded by an intimated assignation before ever Duncan had right by his confirmation to Christie's bond to Hunter, it is impossible that can be a ground of compensation, but only for an action against Christie, and cannot meet his assignee. *Replied*, If the assignation had been for an onerous cause, then it is

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A party assigned a debt to his son-in-law. The debtor suspended on compensation, having acquired right to a debt due by the cedent. The cedent had been denuded, and the assignation intimated, before the suspender acquired right to the ground of compensation. Found, the compensation could not meet the assignee, but without prejudice to reduction on the act. 1621.