

* * * Stair reports this case.

No 4.

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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No 5.

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.