

No 370.  
ble by witnesses before the commissaries. Reduction repelled, because the defender had acquiesced in the mode of proof.

Commissaries, as he who promised to see him paid thereof; in which process the Commissaries found the promise probable by witnesses. Whereupon William Wood pursues reduction, because the Commissaries had committed iniquity. It was *answered*, That this pursuer did not propone that allegiance, but, on the contrary, compeared at the diets for receiving the witnesses, without controverting this point; and though the LORDS have now found, that promises are not probable by witnesses, yet that being the ancient custom of the Commissaries, it cannot be thought *partis judicis*, not being proponed by the party.

THE LORDS found the allegiance relevant, that Wood compeared at the receiving of the witnesses, and never reclaimed, to infer his acquiescence.

*Fol. Dic. v. 2. p. 209. Stair, v. 2. p. 68.*

No 371.  
Competent and omitted in suspensions.

1675. January 6. GLENDINNING *against* The Earl of NITHSDALE.

By a minute of excambion *in anno* 1605, Glendinning of Parton did excamb his lands of Glendinning with Johnston of Westraw with his lands of Dolphington, which minute was assigned to Glendinning of Logan, and now is in the person of George Glendinning his son. Glendinning of Logan entered in a contract with the Earl of Nithsdale, and thereby disponed him the right of by the minute, for which the Earl of Nithsdale was obliged to do diligence for recovery of Dolphington, and to pay the price of the half thereof as the same should be determined by Sir Thomas Hope, and in the mean time to pay the half of the duties; whereupon the Earl of Nithsdale pursues the Laird of Westraw for perfecting the minute, and putting him in possession of Dolphington, and obtained decret *in anno* 1613 in absence; which being suspended by Westraw, he obtained two decreets of suspension against him, the last whereof was *in anno* 1638, wherein Westraw suspended upon obedience, and consigned the writs for extension and possession, which were given up to Nithsdale, who proceeded no further to attain possession; whereupon George Glendinning pursued Robert Earl of Nithsdale for the half rents of Dolphington, in which process there was litiscontestation and probation, and the cause concluded; and after Robert Earl of Nithsdale's death, he raised transference against this Earl as representing him; in which process, compearance was made for Johnston of Westraw, who produced an assignation to the minute of excambion by Glendinning of Parton to his eldest son Robert within three days date, and put in the register *in anno* 1673, and likewise a ratification by Robert, disponing all right of Dolphington to Westraw *in anno* 1613; whereupon it was *alleged* that there could be no transference or decret in the principal cause, because long before Parton's right to Logan, he had assigned the minute to his son Robert, who had assigned the same to Westraw, who

thereby was secure, and did exclude this pursuer having right by progress from Logan, and which did also liberate the Earl of Nithsdale, seeing thereby Logan's right was excluded. It was *answered* for the pursuer, That the allegiance upon these writs produced is noways competent in this state of the process; for, albeit the Lords use to receive defences instantly verified *post conclusionem in causa*, yet that is only where the writs are authentic and unsuspected, but this assignation to Robert is most suspicious, bearing date *in anno* 1605 and put in the register *in anno* 1673, and therefore being competent and omitted in all the processes at the instance of the Earl of Nithsdale against Westraw, and at the instance of the pursuer against the late Earl of Nithsdale, is not now receiveable. It was *replied*, That the first decret at the instance of the Earl of Nithsdale was in absence, and the subsequent decreets were decreets of suspension, against which competent and omitted was not relevant; and as to the act of litiscontestation against the late Earl of Nithsdale, these writs are come to knowledge since, and however being proponed, and instantly proponed before sentence, they are receiveable. It was *duplied*, That they ought not to be received in this state of the process, being most suspected of falsehood, and the principal assignation to Robert was lately in the hands of one Pringle a vintner, who offered it to the pursuer for a dollar, and offered to burn the same if he desired, so that it hath been a forged paper kept up of purpose tili the witnesses were dead; and Glendinning of Parton being a private person, his hand-writ cannot be found to redargue, after near the space of 70 years; and the Lord Nithsdale having been obliged to diligence, but being negligent since the year 1638, if he had then taken possession, the pursuer would have gotten the rents yearly, and been secured as *bona fide* possessor, until this pretended right was produced; he therefore cannot obtrude it to exclude the pursuer from the bygone duties.

THE LORDS refused to admit these suspected writs in this state of the process, but prejudice to Nithsdale or Westraw to make use thereof, as accords of the law.

*Fol. Dic. v. 2. p. 209. Stair, v. 2. p. 301.*

\*\*\* Gosford reports this case:

THERE being an excambion betwixt Alexander Glendinning of Parton and the Laird of Westraw, for a minute, whereby Parton was to dispone to Westraw certain lands of a great rent yearly, lying upon the borders, for which he was to dispone to him the half lands of Dolphington lying in Clydesdale; this minute being assigned to Parton by his son, who thereafter did transfer the right of the said minute to the Earl of Nithsdale against Westraw, upon condition that whensoever he should recover decret against Westraw, he should count to him for half of the lands of Dolphington; whereupon the Earl of Nithsdale did recover decret against Westraw *anno* 1616; which being sus-

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