

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.

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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.

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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

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Competent and omitted affects only defenders or supendders, not pursuers; and therefore excludes not different processes *super diversis mediis concludendi in facto.*