

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 reversion 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.*

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wadset were in trust, and obliged him and his heirs to denude in favours of William, upon satisfaction of the sums due to him by William and his father ;” whereupon William raised a declarator of redemption, and count and reckoning against Sir William Stirling, now of Airdoch ; who having *alleged* that his father’s declaration being upon death-bed, could not prejudice him the heir ; whereupon the LORDS assoilzied from that declarator ; William doth now pursue a new accopt and a declarator, and a reduction of the former absolvitor, upon this reason, that William had now found his bond granted to umquhile Airdoch, wherein he was obliged to give a discharge and renunciation of all right to the lands of Panholls, upon express condition that Airdoch should give a new declaration that he should denude in favours of William, upon satisfaction of the sums due to him ; which provision being in an obligation accepted by Airdoch, is as effectual as if Airdoch had granted the new back-bond, and which bond was suppressed, and not produced by Airdoch in the former process, knowing that the provision therein would oblige ; but if it had been then produced, it would have adminiculated his father’s declaration upon death-bed and made it effectual, as being a necessary and onerous deed, not only to exoner Airdoch’s conscience, but which he might have been legally compelled to grant ; *2do*, This provision, without consideration of the former process, is sufficient to found this new declarator, without consideration of the declaration on death-bed, but *super diverso medio*. The defender *alleged* absolvitor from this declarator and reduction, because he produces a general discharge and renunciation by the pursuer long after the bond, containing the provision now founded on, and without any reservation of that provision, which therefore must renounce the provision itself ; and Airdoch could devise nor desire no more to secure him against William, but a general discharge and renunciation ; *2do*, This allegiance was competent and omitted in the former declarator, and cannot be pretended to be newly come to knowledge, because there was an inhibition served against William, and registered upon the same bond, repeating expressly the provision founded upon, and within a short time after William gave the general discharge. It was *answered* for the pursuer, to the *first*, That the general discharge and renunciation cannot reach this provision, because by the bond William was obliged “to grant a general discharge and renunciation,” so that this discharge, though after the bond, was in implement thereof, but could not take away the provision of the bond itself, unless the general discharge had particularly related it, and discharged the same ; for the design being evident, that Airdoch should be understood to be in the full right, and there should only remain a trust to denude in favours of William by a private back-bond, it was not consistent therewith for William to reserve that provision in his general discharge, but if it had been intended to discharge that provision, Airdoch, who is a most cautelous man, and who in the general discharge has particularly expressed his prior obligations to denude, would certainly have expressed this provision, which is further evidenced because Airdoch

doth not discharge William of the sums for which he had his right, nor deliver to him any of the bonds granted by his father and himself; so that he might both enjoy the wadset and distress William for these bonds, which neither were expressed in, nor did relate to the wadset. And as to the allegiance that this provision was competent and omitted in the former declarator, it is not relevant whether William knew the provision or not; for competent and omitted doth only exclude a defender or suspender, whom law does not allow to keep up any defence till a new process; but this was never pretended against pursuers, that they must include all *media concludendi* in one libel; but unquestionably they may pursue the same conclusion *super diversis mediis in facto*, which *res judicata* will not exclude, albeit it will exclude new reasons, urging the points of fact or rights proponed in the former sentence.

“ THE LORDS found the pursuer’s general discharge and renunciation, being conform to his obligation, did not take away the provision contained in the same obligation, unless it had been specially discharged, or that Airdoch had given up to the pursuer his father’s bonds or his own, or a discharge thereof, which they found relevant to be proved by William’s oath or writ; and found competent and omitted to be only valid against defenders or suspenders, but not to exclude diverse processes for the same conclusion *super diversis mediis concludendi in facto*. The defender further *alleged*, That this wadset being holden of the late Marquis of Argyle, the same fell under forfeiture, not being confirmed; likeas, Airdoch had obtained right thereto from this Earl of Argyle as donatar to his father’s forfeiture; *2do*, Argyle had right from Graham the reverser, and had disposed that right to the defender. The pursuer *answered, 1mo*, That Airdoch having accepted from him an irredeemable right, and entered thereby in possession, he must denude himself upon satisfaction and restore the possession, and cannot cloath himself with any supervenient right; *2do*, It is evident by the foresaid provision, that Airdoch was in trust for William, without a registerable reversion, but by a provision to give a private back-bond, and therefore any right acquired by him must accresce to William, upon payment of what he truly paid for it, according to the nature of all trusts, especially betwixt uncle and nephew; and as to the reversion acquired from Graham, it cannot hinder this redemption, albeit it did not accresce by the trust, but is only a ground whereupon Airdoch may use an order of redemption, and thereupon declare.

THE LORDS found, That the defender’s right from Argyle upon the forfeiture, whether there were trust or not, did but resolve in a distress and eviction of Airdoch’s right, which he could extend no further than what he truly paid out; but as to the right of the reversion from Graham, they found it not relevant to exclude this redemption, but reserved as accords.