

February 3. JAMES MONTGOMERY against Earl of CASSILIS, &c.

JAMES MONTGOMERY of Lenshaw, clerk to the criminal court, having right to the teinds of the lands of Kirkmichael belonging to the Earl of Cassilis, he pursues him and my Lord Ruglen, his tutor, for payment; and to liquidate the quantity, he repeats a probation led of the value of these lands some years ago by my Lord Ruglen in another process, where the rental being proved, he craves the fifth part, conform to the stock there proved. *Answered*, No regard to that probation, because it was only adduced in a process of sale pursued by the Earl and his tutor, to get liberty to sell off some lands for payment of the debts, in which there was only a general view given of the estate, that, by comparing it with the debt, the necessity of selling off a part might appear; so the probation of the rental was far from exact; *2do*, This being led many years ago, the state of the fortune is much altered, for they have been forced to give down several chalders of victual of what it paid formerly, otherwise the tenants would have deserted it. And so that probation being far above the present rent, can never be a just or true rule; *3tio*, It is against all form to repeat a probation from one process to another; for it is *res inter alios acta quoad them, et deducta in uno judicio regulariter non probant in alio*; especially, if it be in such things as *per cursum temporis mutationem recipere possunt*; as in rents of lands, which rise or fall in a few years space; 16th July 1628, Finlayson *contra* Lookup, No 7. p. 14024; 25th January 1632, Kaidislie *contra* Lauder, No 12. p. 14027; 16th July 1629, Murray, No 58. p. 9707. THE LORDS refused to take in that probation here, but left him to prove the value of the teind as he thought fit, though the other way would have saved Lenshaw both a great deal of money and time.

Eol. Dic. v. 2. p. 348. Fountainhall, v. 2. p. 633

No 23.
The value of lands proved by a titular of teinds in a former action, found not to be proof in a subsequent action at the instance of a party suing to have his teinds valued.

1712. January 5.

MARGARET, ELIZABETH, ANNA, and ISOBEL ELIES, Daughters to the deceased Mr James Elies of Stenhousemills, against JAMES WATSON of Saughton and his CURATORS.

THE deceased Watson of Saughton having deponed in a furthcoming against him, at the instance of Mr Robert Blackwood, as executor-creditor to the deceased Mr James Elies, that oath was, in a count and reckoning at the instance of Margaret, Elizabeth, Anna, and Isobel Elies, (assigned by Mr James their father to what Saughton owed him) against James Watson his son and heir, found not to be *res jurata* as to the pursuer; in respect the oath was not emitted *in deferentibus*; albeit they compared in Blackwood's process, competed upon.

No 24.
An oath emitted by the defender in a process of furthcoming, found not to be *res jurata* as to the assignees of the arrester's debtor, in respect the oath was not taken *in deferentibus*, although they

No 24.
 compared
 in the pro-
 cess, compet-
 ed upon their
 interest, and
 opposed refer-
 ring to the
 defender's
 oath.

their interest, opposed the referring to the defender's oath what he owed to their cedent, and craved a term to search for the instruction of the debt.

Fol. Dic. v. 2. p. 347. Forbes, p. 138.

1722. February 2.

FERGUSSON of Auchinblain against Mr WILLIAM MAITLAND.

No 25.
 The oath of
 the debtor in
 a forthcoming,
 found good
 against the
 creditor, pur-
 suing for the
 debt as assign-
 nec.

FERGUSSON of Auchinblain being creditor to John Colvin, did arrest in the hands of Mr William Maitland, Colvin's debtor; and, in the forthcoming, having referred to Mr Maitland's oath, if he was debtor to Colvin the time of the arrestment; he deponed negative, specifying, that he had been owing by a bond and back-bond, but that these debts were satisfied and paid, though not retired. Some time after, Auchinblain procures from Colvin assignation to the said bond and back-bond, in security and payment of his debt;—upon which having charged Maitland; in the suspension of the charge, Maitland having objected his oath, the question arose, if he could now be liable to the arrester upon these writs, as instructions of debt, having already deponed negative, *deferente adversario*.

It was *urged* for the pursuer; That as an oath emitted by a debtor in a forthcoming, cannot hurt the common debtor, neither the common debtor's assignees; and as it had been competent for any other assignee to insist against Maitland upon the bond and back bond, it is equally competent to Auchinblain, who insists not here as arrester, but as assignee; for whatever might be alleged against him as arrester, it seems evident, that the oath can militate nothing against him as assignee. Nor can it make any difference, that the same person is both assignee and arrester, because the assignation was a superadded title in the arrester's person, after the oath was emitted; and all effects thence arising, equally competent to the arrester, as to the cedent, or any other assignee.

It was *answered*; That the superadded title is of no effect, nor does it any way alter the case; for it is really nothing else but the same person choosing a different way of proof, which the law does not allow, especially when there is a transaction upon an oath. That Auchinblain is here to be looked upon as *eadem persona* in law, though vested with a different right, appears from this, that had Mr Maitland been absolved from the pursuer's claim, as arrester, by a decret in his favour, the exception of *res judicata* would protect him, from the pursuer claiming as assignee, L. 5. D. De exceptione rei judicatæ. “De eadem re agere videtur, et qui non eadem actione agat, qua ab initio agebat; sed etiam si alia experiatur de eadem tamen re: Ut puta si quis mandati acturus, cum ei adversarius judicio sistendi causa promisisset, propter eandem rem agat negotiorum gestorum, vel condicat; de eadem re agit. Recteque ita definietur, eum demum