

No 114.
alleged the factor had goods of his in his hands beyond the amount. This plea was repelled, unless he would allege that the goods were sold, and the price in the hands of the factor.

thereto, that the said cedent being the defender's factor, was full-handed with as many wares pertaining to the excipient, as would in price extend to far more than would pay this sum libelled, with which he was content to compensate the sum; THE LORDS repelled the allegiance, and found the same had no relevant ground of compensation, because the defender alleged not, that the factor had sold the goods, and had the prices thereof in his own hand, *quo casu* it being so, the compensation was receivable; but the factor having only the goods to be sold, as occasion might offer, he was only obliged to the defender to compt; so that if the goods were not sold, he could be no further obliged, but to deliver the same to the pursuer again, and that could not compensate the defender's ticket of a liquid sum, to be paid at a precise time contained in the bond.

Clerk, Hay.

Fol. Dic. v. 1. p. 167. Durie, p. 592.

1632. November 27. LAIRD AITKEN'S Daughter against HOME.

No 115.
A sum due to a pupil was not allowed to be compensated by the debtor, with a sum due to him by her father, her administrator.

LAIRD AITKEN'S daughter, who had a certain sum of money left to her by her good-dame, and the sum lent to Mr James Home, minister of , with consent of her father, as lawful administrator to her, charges the said Mr James for the sum. He suspends, *alleging*, That her father, who was lawful administrator, was addebted to him in as much as he was charged for; and, since she was a pupil, and could give no discharge, but her father, who was lawful administrator, must receive the money and give discharge for her, and seeing he has as much in his own hands already as might pay his daughter, the suspender ought to have compensation. To which it was *replied* by the pursuer, That the money charged for was the minor's proper money, and not given to her by her father, but by her good-dame; no debt owing by her father could compensate that her debt, which was neither liquid nor *inter easdem personas*. THE LORDS repelled the reason of suspension, and found no compensation.

Auchinleck, MS. p. 30.

1639. March 16. FORSYTH'S Assignee against Captain COUPLAND.

No 116.
Compensation proponed by a debtor against an assignee, was found relevant, upon a debt of the cedent's, purchased by the debtor before the date of assignee's

CAPTAIN COUPLAND being debtor to William Forsyth in 1000 merks, and being charged by William Forsyth's assignee for payment; he suspends upon this reason, that Forsyth was debtor by two bonds to William Ogston in 1000 merks, and 500 merks; the right of which bonds and sums was devolved in the person of the suspender, and he was content to compensate this debt, for which he was charged, with so much of the sums foresaid *pro tanto*, owing by the charger's cedent, against whom, as the compensation would have been relevant to have met himself, so must it be against this assignee. THE LORDS

found this reason of compensation relevant to be received against the assignee, as well as it would have been against the cedent; neither was it respected, that the charger alleged, that the compensation ought not to be admitted, in respect that the suspender was made assignee a year before the obligation libelled, whereby he borrowed this sum, now acclaimed, from the charger's cedent, at which time, if the cedent had been the suspender's true debtor, by no probability would he have granted him a bond of borrowed money, if he then had been debtor of these sums, with which he compenses; for, with what probability can it be supposed, that a creditor will borrow sums from his debtor, before he be paid of the debt owing by him, from whom he borrows. Likeas, the bond bears, 'That the Captain renounces all exceptions of not numerate money, and all other exceptions whatsoever, competent in the contrary;' and this right being then in the Captain's person, when he borrowed the sum libelled, it must be presumed to have been paid. Likeas, before any intimation made by the Captain of his right to these bonds, wherewith he compenses, Forsyth's assignee raised inhibition against the suspender, upon the bond libelled; which allegiance the LORDS repelled, and notwithstanding of the same, sustained the reason of compensation, and suspended the letters *simpliciter*.

Fol. Dic. v. 1. p. 166. Durie, p. 885.

No 116.
right, but not intimated to the cedent until after the assignee had used inhibition against the debtor.

1663. January 22.

WALLACE against EDGAR.

IN this case, recorded *voce* ASSIGNATION, No 26. p. 837. the decision was the reverse of that of Forsyth against Coupland (*supra*). See No 119. p. 2652. and No 121. p. 2653.

No 117.

1664. February 13.

HODGE against BROWN.

MR ROBERT HODGE pursues Robert Brown, merchant, for certain duties of land in Leith, possessed by the defender belonging to the pursuer. It was *alleged*, That the defender ought to have allowance of certain profitable expenses, wared out by him upon the house. It was *answered*, That the defender possessed the house as succeeding in the vice and place of Andrew Brysson, to whom the pursuer by tack set the houses for a duty simply, without respect to any charges to be wared out by the tacksman; so that what the tacksman built or repaired, it was on his own hazard and charge, there being nothing conditioned therefor. It was *replied*, That the defender was only convened as possessor; and, as possessor, he ought to have allowance of what he profitably bestowed. It was *duplied*, That what he bestowed without warrant of the master, and being in vice of the tacksman, he can be in no better case than the tacks-

No 118.
Compensation upon a debt due by a tacksman to his sub-tenant, was found competent to be proponed against the master; compensation being payment in law.