

No 51. ing any clause of annualrent, ought to compensate the other bond, albeit heritable, and bearing infeftment and premonition, which the said debtor was astricted to make to the said creditor before he loosed the sum; and so thereby the defender *alleged*, that he could not compensate, seeing he could not pay the sum, but upon requisition first made to the creditor to receive the same upon 40 days, and which not being done, far less was this compensation by pursuit now receivable, where the party was not charging this pursuer for that sum, which was repelled.

Act. *Mowat.*Alt. *Burnet.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 161. Durie, p. 672.*

1662. February. RELICT of INGLIS *against* The EARL of MURRAY.

No 52.

A relict, executrix of her husband, pursued a debtor of her husband. His plea of compensation founded on a debt due by the defunct, assigned, but not intimated, before the pursuit, was repelled.

THE Relict of umquhile Robert Inglis merchant, being creditrix by her contract of marriage, confirmed executrix to her husband; and, in the inventory, having given up a debt owing to him by the Earl of Murray, she gives power to ——— Crawford to pursue the Earl for payment. It was *excepted*, That the defender ought to have compensation; because, before the intending of this pursuit, the defunct was debtor to the defender in a sum of money assigned to him by Dr Leighton, now bishop in Dumblane. It was *answered, 1mo, Non relevat*, unless the assignation had been intimate, before the intending of the cause, to the executors or nearest of kin to the said Robert Inglis. *2do*, Though it had been intimate, yet it could give no ground of compensation; because the relict, by her contract, was a privileged creditrix before any other; and, in prejudice of her privilege, no assignation could be granted or received, to take away that preference from her which the law gave her.

THE LORDS repelled the allegiance.

Gilmour, No 28. p. 22.

1674. November 11. HAMILTON *against* The EARL of KINGHORN.

No 53.

A party having used expressions inducing an assignee to a debt due by him, to suppose he meant to hold himself to be the assignee's debtor, without mention-

JAMES MAULD of Melgum having assigned to James Hamilton two bonds, and he having intimate his assignation to the E. of Kinghorn, granter of the same, did thereafter write to the said Earl, shewing him that he had use for the sums contained in the said bouds; and that he desired a course might be taken to pay the same: And, in answer to his letter, the said Earl did write and subscribe a postscript upon a letter written to him by the said James Mauld to that purpose, that the said James Mauld had assured him, that he had made the assignation foresaid upon assurance that my Lord should not be troubled to pay

the said debt, and that he was about to take a course to that effect; but that, notwithstanding, if he must be his debtor, he should take a course to pay the annualrent; but as for the principal sum, it was not foreseen by him, that he should be put to pay it at that time, and he desired forbearance. And thereafter being charged, the said Earl suspended, upon that reason, that the said bonds were granted by him to Melgum, for the price of lands disposed by him to the Earl; and, by a back-bond, of the date of the said bonds, Melgum was obliged to warrant the rental of the said lands for two years: and *quatenus* the tenants should be short in payment of their duties the time foresaid, he should pay wherein they should be wanting, and that the Earl might retain in the first end of the foresaid sums. And that the said Earl had got a decret against the tenants of the said lands, for payment of the sums therein contained; and, therefore, that he had ground of retention and compensation upon the foresaid bond granted by Melgum, effecting to the sums resting by the said tenants. Whereunto it was *answered*, That though compensation, competent against the cedent, is competent against the assignee, yet where there is not only an assignation, which is the deed of the cedent, but a delegation, and the debtor doth accept and consent and becomes debtor, as in this case, as appears by the foresaid letter written to the charger, compensation is not receivable. It was *replied* for the suspender, That the letter is not positive that the suspender should become debtor, but only in these terms, *if he must be debtor* to the charger; and that, upon the matter, he is not debtor to him, in so far as he has a ground of compensation. Whereunto it was *answered*, That these words, *if he should be debtor*, are to be understood only in relation to the complement and assurance contained in Melgum's letter, viz. if he should not take course himself with the said debt; and that the letter is positive, that the Earl should pay the annualrent, and also the principal sum, which he could not do presently; and, if the Earl had intended to compensate, he should have told the charger that he had a ground of compensation, in which the charger would have had recourse against the cedent, and would not have relied upon the suspender's letter.

THE LORDS found the letters orderly proceeded, in respect of the said answer and letter.

Dirleton, No 191. p. 81.

1676. July 4.

A. against B.

In a suspension against an assignee, upon a reason of compensation, viz. that the suspender had right to the equivalent sum due by the cedent, by an assignation prior to the assignation granted by the cedent to the charger;

It was *answered*, That the assignation, granted to the charger, was intimate, before the intimation of the assignation granted to the suspender: Whereunto it was *replied*, That *ipso momento*, that the suspender got the assignation fore-

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No 53.
ing grounds
of compensa-
tion against
the cedent,
was held to
be no longer
entitled to
plead compen-
sation.

No 54.
An assigna-
tion not inti-
mated, not
received as a
ground of
compensa-
tion.