

either admit it to his probation, or except upon an agreement, and refer it to the pursuer's oath.

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1676. *July 13.* The COUNTESS of BRAMFOORD *against* EDWARD RUTHVEN.

THE Countess of Bramfoord, having a provision granted to her, by her husband, of 2000 merks yearly, during her life, did thereupon arrest all sums of money in the hands of the Earl of Callander, due to the successors of the late Earl of Bramfoord, to be made forthcoming for her payment. Callander having suspended upon double poinding against the Countess and Edward Ruthven, to whom, by Act of Parliament, the estate of his grandfather, the Earl of Bramfoord, his goodsire, was established; whereby the Parliament declared, "That their meaning and intention in rescinding the forefaulture of the late Earl of Bramfoord, was to establish his estate in the person of Edward Baillie, his grandchild, procreated betwixt the Lord Forrester and the Earl's daughter, Lady Jean; whom they ordained to assume the name and arms of Ruthven, to preserve the Earl's memory; and who, accordingly, since has been designed Edward Ruthven: who ALLEGED, That the Countess could have no interest in this provision of annualrent; because, by the Act of Parliament whereby the Earl of Bramfoord's estate is conveyed to him, there is only reserved to the Countess the provision in her contract of marriage, or terce; and this bond is neither. *2do.* It could only take effect from the Act of Parliament. *3tio.* The Countess is satisfied in her own hand; in so far as she has intromitted with the rents and prices of the Earl's estate in Germany and Sweden, which, by the Act of Parliament, belongs to the said Edward:—

It was ANSWERED for the Countess, That her provision of 2000 merks yearly is effectual from her husband's death, and must affect his estate. And Edward Ruthven having a right, from the Parliament, to his estate, which is *nomen universitatis*, the meaning of the Parliament must be understood, according to equity and justice, that the Earl's estate is with the burden of his debt; which the Lords have accordingly sustained in the case of Patrick Ker, as being a creditor of the Earl's: and the Countess is a more favourable creditor, having no other provision but this bond, which bears to be in place of her terce; and so quadrates with the reservation of Parliament, which is in the Countess's favour, and does not exclude her from the common interest of a creditor, by which, and by the reservation, this bond stands valid. And, as to the allegiance of her satisfaction by the prices and profits of the Earl's estate abroad, it resolves, in effect, in a compensation, and is not liquid; and so not receivable. *2do.* Edward Ruthven can have no right, by the Act of Parliament of Scotland, to the price or profits of lands in other dominions; and so cannot compensate therewith, nor discharge the same.

It was REPLIED for Edward Ruthven, That the Countess having, in her own hand, satisfaction by the Earl's estate, she cannot seek satisfaction or payment again out of his estate; for here there is none represents the Earl, but the estate is craved to be affected: and, therefore, if the Countess have so much of the

estate in her hand already as will pay her, she can justly demand no more. *2do.* The Parliament of Scotland, by their Act, can determine the interest of all Scotchmen, as to their interest at home or abroad; and, though a stranger pretending right, as representing the Earl, could not be ruled by an Act of Scotland, yet Scotsmen having estates in Scotland must submit thereto: And there is none pretends right to the Earl's estate abroad but the Earl's daughters and their husbands, who all reside and have estates in Scotland. *3tio.* Compensation extinguishes the mutual obligation, which is compensible *ipso jure*, and may be proponed by those who have no right to the sum with which they would compensate, nor can discharge the same: but the sentence of a judge, founded upon law, will declare both debts extinct by obligations; which is equivalent to a discharge: for instance, if an heir be pursued for a sum due by a defunct, he may propone compensation upon a liquid sum due to the defunct by the same party: and it will not be a good answer, that the debt due to the defunct was not moveable, and so belonged not to his heir, but executor; and therefore the heir cannot discharge the same, but the executor: yet the compensation would hold good, that the creditor having, in his own hand, a liquid debt due by the same debtor, both are extinct from the time of their concurrence; and neither can be demanded from either party, or any representing them. *4to.* Debts which have *paratam executionem* by decret, cannot be suspended but by compensations, unless instantly verified: but the Countess hath no decret, but is pursuing an action for affecting the estate of her husband; in which action, a time ought to be granted for liquidating her intromission, which, becoming liquid before sentence, would become sufficient, though it were a formal compensation, as it is only an action to affect the estate, whereof she has as much in her hand as will satisfy what she doth demand.

The Lords sustained the Countess's bond of provision since the death of her husband; and found, That the Earl's estate, conveyed to his oye, was with the burden of it and his other debts: and found, That Edward had interest, by the Act of Parliament, to propone compensation; and so granted a term and commission to prove the Countess's intromission, and to liquidate the same.

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1676. *July 13.* The EARL of MARISCHAL *against* His VASSALS.

THE Earl of Marischal pursues reduction and improbation against his vassals.

It was ALLEGED for one of them, That he produced charter and seisine from the pursuer's predecessor to the defender's predecessor; which, therefore, excludeth him from reduction or improbation of the defender's rights, unless he first improve this right produced.

The PURSUER ANSWERED, *Non relevat*, unless the defender produce a progress of infeftments from his predecessor to himself; seeing the pursuer has good interest to reduce or improve any right by progress, whereby he may have the casualty of the superiority, if they were removed.

The Lords found, That the charter and seisine of the vassal's immediate predecessor were sufficient, albeit the heir-apparent was not infeft, if it were notour that he was immediate heir, unless the infeftment produced were im-