

fuge was that he was insolvent, denuded of all, and *in familia* with his son. See the information of it. *Vide supra*, No. 453, in December, 1675, Kello.

Advocates' MS. No. 522, folio 270.

1676. *June, and December 20.* WILLIAM WRIGHT *against* SHEILL.

June.—WILLIAM WRIGHT in Portsburgh, having charged one Sheill upon a decret, he suspends upon a reason of compensation.

ANSWERED,—*Primo*, That the ground of the compensation being against his cedent, it could not meet him, the assignee. *Secundo*, It could not be obruded to him, because he had no right to the sums with which he craved to compense, being only apparent heir to the creditor in these bonds. *Tertio*, Since comprising and infetment had followed on his decret, compensation could not meet it.

REPLIED to the first, That compensation in law is equivalent to a discharge, and so must operate against assignees, as is constantly decided by the Lords; especially in thir two cases:—Where the ground of the compensation is liquid, and before the assignation; and, *secundo*, If the assignation be not for an onerous cause, even suppose it be after the same. See this prosecuted at large in other papers beside me, out of Dynus *ad Regulas Juris Canonici*, of Schotanus *in Examine Juridico*, and out of Durie's Practiques. To the second, REPLIED,—Payment on a discharge may be proponed by one not having a formal established right, but compensation is of the nature of payment. But, *secundo*, he has confirmed this sum. As to the third, Compensation upon comprising does not hinder but compensation may be proponed against the same upon a personal debt, for the law does not precisely require the two debts compensated one with another to be wholly of one kind; as was lately decided in the case of Blacktoun Forbes against the Laird of Leyes. Yet compensation being only equivalent to a discharge, a simple discharge is found to be the *habilis modus* to annul some real rights that require registrate renunciations, such as wadsets, &c.* But, *secundo*, the infetment on the comprising is null, being granted by the Bishop of Edinburgh; whereas the true superiors of the apprised tenement lying in Leith, are the ministers and kirk-session of Leith, as preceptors of St Antonie's Chapel, of which that house holds, and of whom Sir Jo. Young of Leny (who compears for his interest,) has taken his infetment and right. But, *3tio*, Leny offers to prove that Wright's comprising is satisfied by his intromission within the years of the legal. This point is reserved to him to prove as accords.

ANSWERED,—The infetment cannot be annulled by way of exception. *Secundo*, Lennie's comprising cannot be respected, because offers to prove, by his own oath, he is paid, and that he now retains it to the behoof of the common debtor.

The term is circumduced and extracted against Sir John, for not compearing, and deponing anent the trust.

* See the contrary of this in Stair's Practiques, tit. 11, Solution of Obligations, § 6; and in his Decisions, 29th November, 1662, *Ogilby and Dumbar*.

Then the charger ANSWERED to the reason of compensation, that the same was not receivable now, because competent and omitted in the first instance against his decreet; and so not being proponed there, by the 141st act in 1592, it could not be received now in the suspension.

REPLIED,—*Primo*, The said act of Parliament was in manifest and notour desuetude, and the Lords, in a constant tract, determined in the contrary. *Secundo*, It made nothing against the suspender, but might admit a very favourable and rational interpretation, viz. of decreets wherein there is compearance, that, against such, compensation shall not be admitted in the second instance; but where the decreet was given in absence, *parte non comparente*, and no defence proponed at all, but merely for contumacy, it were absurd to seclude the allegeance of compensation against such decreets, or to wrest and extend the meaning of the act of Parliament to such a case. And we had a clear instance that compensation was receivable, notwithstanding of a decreet in absence, in the example of registrate bonds; the registration is a decreet, not merely in absence, but of consent of both parties, and so in a manner *in foro*; and yet no lawyer ever pretended that compensation could not be objected against a registrate bond.

DUPLIED,—The act of Parliament spoke in indefinite universal terms of decreets and sentences, and made no distinction whether they were upon compearance or no; *et ubi lex non distinguit, &c. et indefinita locutio æquipollet universali*; and that the case of registration was not alike, because there was no previous citation of the debtor to that, as is used in other decreets. Likeas, the Lords have decided conform to the said act of Parliament, and refused compensation in the second instance: as Dury observes, 1st December, 1662, Viscount of Stormont *contra* Mr Harry Cheap's man, and the citations of laws and authors in margin there; yet he confesses this was the first time he had seen the Lords follow that act of Parliament, which was not *in inviridi observantia*. Halton ordained practiques to be adduced on both sides, but he was over scrupulous and tender of that act of Parliament, (I wish he had been so in all :) for it seems just that compensation may still be received against a decreet where the decreet is in absence; for though it was then competent, yet nothing else was proposed to evince *animum dolosum*, in keeping up the exception of compensation.

Yet see compensation refused against a decreet in absence;—Stairs, 27th January, 1662, *Stevinson and Thomson*; *item*, 5th February, 1678, *Logan and Coutts*, it is page 15.

Vide supra, No. 190. See a little of this concern, January, 1680.

Advocates' MS. No. 484, folio 250.

1676. December 20.—On the 20th of December, 1676, this being reported by Halton, the Lords repelled the allegeance of compensation, because not proponed *in prima instantia* against the first decreet, though it was only in absence; unless Lenie or Sheills will reduce the said decreet upon some nullity or informality in the executions of the summons whereupon the said decreet in absence proceeded; or that the said decreet be turned in a libel, for then they will admit the compensation.

Advocates' MS. No. 484, margin, folio 250.