

linquishing his right ; so, much more doth any act, by way of fact, or by way of instrument, for express impediment of that servitude. And, as ancient possession may presume anterior possession, so must ancient interruptions import prior interruptions. Neither is the immemorial possession proven ; for it is necessary, for immemorial possession, either to prove that it was holden and reputed to be immemorial, or to prove the possession so ancient, as, by the course of nature, witnesses cannot be had who can know a more ancient, and so cannot know the beginning of the possession : but fifty or sixty years' possession may admit of witnesses who may know for twenty years before ; and so might know the beginning of the possession.

The Lords found, That the parties had not adverted to the importance of immemorial possession ; which would not be elided by interruptions within forty years : And, therefore, they ordained one of their number to visit the ground, and to examine the most ancient witnesses adduced for either party, for clearing whether the beginning of this water course towards the house of Kirkland could be proven ; that thereby it might appear whether it be immemorial or not, or whether forty years before the first interruption or not.

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1677. June 19.

DICKSON *against* EDGAR.

IN a pursuit at the instance of Mr George Dickson against Edgar of Wedderly, wherein Mr George insisted, as heir to his brother, Mr Robert, for transferring of a decreet, at his brother's instance, against Edgar of Wedderly, which was pronounced, but not extracted, in his brother's time ; the defender ALLEGED Compensation ; because the pursuer's right was as heir to his brother, who was assignee by Nethermains, by whom his name was filled up in blank assignations and translations, which were Nethermains's rights, in his own hand ; and, therefore, were compensible by Nethermains's debt : and, therefore, Wedderly, as executor-creditor to old Wedderly, his mother's father, having confirmed a debt due by Nethermains's father to old Wedderly, had good interest to compensate a debt due by old Wedderly to Nethermains, against Nethermains's assignee ; it being an uncontroverted rule, that compensation is relevant against the assignee, upon the cedent's debt prior to the intimation.

It was ANSWERED, *1mo.* That the pursuer's brother did obtain decreet, against this Wedderly, before the Sheriff of Berwick ; and therefore, by the Act of Parliament anent compensation, it was not receivable *post sententiam* ; and the Lords had lately decided that they would not receive compensation after sentence, though in absence, and of an inferior court. *2do.* Compensation must be liquid *inter easdem partes* : but here, the time of the pursuer's brother's completing his right by assignation, both by apprising, that needs no intimation, and by intimation by citation ; the defender had then no right to the sums wherewith he would compensate, but was only executor-creditor ; which is but like to an assignation ; which will not found a compensation against an assignee, unless it had been intimated before the intimation of that assignee's assignation.

It was REPLIED, That the defender was not executor-creditor as a mere stranger, but was one of the nearest of kin to the defunct ; which gave him sufficient

interest to propone compensation of a debt due by the defunct, with a debt due by that same creditor to the defunct; for, by the concurrence of these two debts *inter easdem partes, primo momento* of the concurrence both were extinct; which might not only be proponed by those who had right to the sum whereupon compensation was founded, but to all others having interest, who might allege compensation as well as payment; and, therefore, an heir might propone compensation of an heritable debt, due by a defunct, upon a moveable debt due by the defunct to that same creditor, though he could not otherwise discharge a moveable debt; but the decret would import a discharge: and so a cautioner may compensate upon the debt of the principal; and a relict, bairns, or nearest of kin, may compensate upon any debt due by, and to a defunct, which were liquid: which liquidation required no decret; but that *debitum* and *creditum* were clear and commensurating in the defunct's time.

The Lords sustained the compensation against the party filled up unwarrantably in a blank right, upon the debt of him who had the said blank right in his power and possession as his own, upon a debt of the first creditor, being liquid, though no sentence followed in his time: And found, That any of his nearest of kin might propone that compensation, though having but a right only to the debts with which it was compensated: but found the compensation not receivable *post sententiam*, though in absence, unless the sheriff's decret were found null; but sustained several allegiances of nullity against the same.

*Vol. II, Page 525.*

1677. June 21.

DOWIE *against* ELISON.

JANET Dowie, by her contract of marriage with Robert Elison, being provided to her liferent of all sums, goods, and gear, conquest during the marriage; and, if in case of children, to the fee of the half: pursues a declarator of her right of the said contract against her husband's executors: who alleged, Absolvitor; because the defunct, by his testament, had provided the pursuer in the annual-rent of 5000 merks, in satisfaction of what she could claim at his death; whereby there was *jus quæsitum* to her, inconsistent with the contract of marriage; and, except she refused the provision in the testament, and continued her right, it did extinguish the provision of the contract.

It was ANSWERED, That the provision of the testament became not her right till she accepted it; and she was not clear yet whether to accept it or not, till she found, by the event, which of the provisions were most effectual.

The Lords found the pursuer obliged either to reject the provision in the testament, being now shown and produced to her; or otherwise they sustained the defence thereupon, to exclude her from the contract.

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1677. June 26.

GRAHAME and BOYD *against* MALLOCH.

IN a count and reckoning at the instance of Grahame and Boyd, against