

1679. *January 1.*DICKSON *against* EDGAR.

No 122.

The debtor of a rebel taking assignation, and intimating before his escheat be gifted and declared, may compensate against the donatary, but not afterwards.

UMQUHILE Mr Robert Dickson having obtained decret against Wedderly, as assignee by Bruntfield of Nethermains, and as having apprised from him for the sums therein; the decret was turned into a libel, and Mr George Dickson, as heir to his brother, having transferred the process, did insist upon his brother's apprising, which was found only to extend to the principal sum, and annualrents after the apprising, but not to the annualrents prior to the apprising; for supply whereof, Mr George hath taken a gift of Nethermains his escheat, and hath obtained general declarator, and insists thereupon, as having right thereby to the annualrent of the apprising. As to which, the LORDS, by their interlocutor the 19th of June 1677, 'Sustained compensation against Mr George, insisting upon his brother's assignation, and upon bonds wherein his name was filled up unwarrantably upon Nethermains's debts, to whom the blank bonds did belong.' But now Mr George insists as donatar to Nethermains's escheat, and *alleges*, that compensation was not competent against him as donatar, especially when it is not founded upon a debt due by the rebel to his debtor before the rebellion; for the compensation formerly sustained, and now repeated, was not upon a debt due by the rebel, to the defender's father, who was the rebel's debtor, but upon a debt due by the rebel to the defender's mother's father, so that there was no concurrence *debiti et crediti* in the same persons before the rebellion; and therefore this compensation is no better founded, than if the defender had taken assignation after the rebellion to a debt of the rebel's, therewith to compensate and exclude the donatar, which, if it were sustained, would make gifts of escheat of no effect, nor needed any back-bond to be taken by the exchequer, in favours of the rebel's creditors, who had a far easier way, by agreeing with the rebel's debtors, that thereupon they might compensate the donatar. It is true, if the assignation to the rebel's debt had been intimate before the rebellion, there was there *concursum crediti et debiti, quæ se mutuo tollunt ipso jure*; but, after the rebellion, it could have no effect. It was *answered*, That the donatar was but a legal assignee; and therefore, before intimation or assignation to any debt due by the rebel, might found compensation against the donatar, as well as against another assignee; for all the rebel's creditors, arresting the debts due to the rebel before declarator, and using diligence thereupon, are preferable to the donatar; and it is to the same effect, that a creditor of the rebel's gets payment from the rebel's debtor, and assigns the rebel's debtor to his debt.

THE LORDS found this compensation not competent against the donatar, seeing there was never a concurrence of debit and credit, betwixt the rebel's debtors, and the rebel before the rebellion, but only betwixt the rebel's heir and the rebel, upon a debt not due to his father, who was the rebel's debtor, but to his

mother's father, whereas he is pursued as representing his father, and not his mother's father.

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Stair, v. 2. p. 662.

* * * Fountainhall reports the same case :

FOUND a debtor of a rebel taking assignation, and intimating before his escheat is gifted and declared, may compensate against the donatar, but not after it.

Fol. Dic. v. 1. p. 166. Fountainhall, MS.

1683. November 22.

MACKBRAIR of Netherwood *against* SIR ROBERT CRICHTON, and ———
ROMES his Assignees..

MACKBRAIR of Netherwood having inteded against Sir Robert Crichton, and ——— Romes, his assignees, a reduction of a decret recovered against him, as lawfully charged to enter heir to his father, grandfather, and grandsire, for certain debts resting by each of them ; as also, of the apprising following upon the said decret ; the reason of reduction was minority and lesion, in so far as might be extended to the father's or grandfather's debts, whom he noways represented ; and that, as to the grandsire's debts, he offered to prove paid, partly by Sir Robert and his assignees intromission with the mails and duties of the lands of Netherwood, wherein his grandsire died last vest and seased, before the deducing of the foresaid comprising of the said lands. It was *alleged*, That the mails and duties could not compensate the debts of the grandsire, because they were *in bonis* of the grandfather and father, who were apparent heirs to the grandsire ; and they were not *in hereditate jacente* ; and that the defender had ground of recompensation upon debts due by the father and grandfather, which would elide and compensate all the mails and duties intromitted with ; and that, by an interlocutor in the same cause, it was found, that the mails and duties uplifted belonged to the executors of the apparent heir, and that they might be compensated with his debt. It was *duplied* for the pursuer, That he opposed a decret recovered at his instance, as heir to his grandsire, against Sir Robert, for payment of the mails and duties ; and that recompensation was not receivable after sentence.—THE LORDS found, that although the mails and duties were *in bonis* of the intermediate heir, yet the grandsire's debt being stated against the last apparent heir, by the foresaid sentence recovered against Sir Robert, and the comprising subsisting in so far as concerned that debt, they found, that the mails and duties ought to be *primo loco* ascribed in satisfaction of the debt due by the grandsire, who died last infeft in the estate, it being *sors durior*, as being the ground of an apprising, whereas the other, due by the grandfather or father, were only personal debts. It was further *alleged*, That Sir Robert's intromis-

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A claim not liquidated by sentence before apprising, was found not to compensate, to the prejudice of the appriser.