

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.

No 54. said, being thereby creditor to the cedent, he had a ground of compensation against the cedent, and consequently against the charger as assignee: And an assignation, without intimation, is a sufficient right and ground of compensation; unless there were another assignee to the same sum, competing upon that ground, that he had a better right by an assignation intimate.

THE LORDS notwithstanding did not allow compensation, and found the letters orderly proceeded. See Rollo against Brownley, *infra*, b. t.

Reporter, *Newbyth*.

Clerk, *Hay*.

Dirleton, No 366. p. 180.

1678. December 6. CLELAND against LOCKHART and CUNNINGHAM.

No 55.
Compensation, capable of proof *scripto*, and not dependent on the cedent's oath, found good against an onerous assignee.

JAMES CLELAND, merchant in Edinburgh, as assignee constitute by Sir John Whiteford of Milton, pursues Lockhart of Heids and Cunningham of Middleseats, on the passive titles, for payment of a debt contained in their father's bond. Their defence was, we cannot make payment, because Adam Whiteford, father to Sir John the cedent, and to whom Sir John is heir served and retoured, being debtor to the defender's father in a greater sum, at least in a sum equivalent to the sum now pursued for, *hoc ipso*, that the right of the foresaid bond now pursued on was once in the person of the said Sir John, there was thereby *mutua debiti et crediti contributio*, and the bond pursued on became extinct by compensation, which exists *ipso jure*; Sir John, as heir to his father Adam, being *ipso momento* debtor to them in the equivalent sum in manner foresaid. *Replied*, Cleland the pursuer being an assignee for onerous causes, though compensation could be proponed against Sir John his cedent, it cannot meet the pursuer his assignee, since the defenders did no diligence to put him in *mala fide* to take that assignation. *2do*, The compensation against Sir John is not liquid, nor is it instructed that he represents his father as heir. *Duplied* to the first, Whatever is competent against the cedent, is also competent against the assignee, where the ground of the compensation is offered to be otherwise proven than by the cedent's oath, but here the compensation is offered to be proven *scripto*. To the second, The compensation is most liquid, being a clear bond of Adam's; and he offered to prove *scripto*, by the extract of the retour, that Sir John Whiteford is heir to the said Adam his father, and the debtor. The Lord Newbyth sustained the defence and duply to elide the summons and reply. It might be doubted, if this would be a good reply against the foresaid defence that compensation *ipso jure tollit et peremit*, that these defenders, who were creditors to Adam Whiteford, were likewise intromitting tutors or curators to Sir John; and so it must be presumed, that they paid and satisfied themselves out of the first and readiest of their intromissions; or, if we must positively offer to prove that they paid themselves of this sum, or that it was allowed to them in their compts.

Fol. Dic. v. 3. p. 148. Fountainball, v. 1. p. 27.