

though after 100 years silence, because I considered it as compensate with my ticket; and it is a rule in law, *quod est temporale*, and prescribeable when pursued, *per viam actionis*, the same is *in exceptione perpetuum*; and was so found in 1703, in the cases betwixt Sir John Gordon of Park and Hay of Ranis; and Hay of Lochcoat *contra* Bonhard, (*see* PROCESS.)—THE LORDS found, it being only founded on by way of defence, it was not prescribed.

Fountainball, v. 2. p. 363.

No 106.

1710. December 5. MR. ANDREW NAISMITH *against* ALISON BOWMAN.

By contract of marriage betwixt Mr Andrew Naismith, student of divinity, and Euphame Gilmour, in 1708, Alison Bowman, mother to the said Euphame, engages for L. 80 Scots yearly during her lifetime *ad sustinenda onera matrimonii*. The marriage dissolving by the said Euphame's death, within 15 months, she dying in childbed, he charges Bowman, his mother-in-law, for the said L. 80; who suspends, that she was circumvented and abused, the contract never being read to her; but she was made believe that her obligation was only to subsist during the standing of the marriage. To this, the clause of the contract, being so precise and positive, was opposed; and she offering neither qualifications nor proof to cancel the contract, the letters were found orderly proceeded against her; and she being charged on the decret, suspended of new on this reason, That she had buried her daughter, and debursed all the funeral charges, which exceeded the sum in the decret, and so she behoved to have compensation, it not being presumeable that it was *ex pietate materna*, *imo*, Because a husband is bound to funerate his wife; *2do*, *debitor non præsumitur donare*.—*Answered*, This allegiance is *in terminis* contrary to the 143d act, 1592, ordaining compensation *de liquido in liquidum* not to be receiveable after sentence; and so this being competent and omitted, cannot be now proponed; which is founded on that excellent reason, that if debtors were allowed to parcel out their defences, there would never be an end of pleas; *2do*, *esto* the debursments were liquidate and proven, (as they are not) he might crave compensation, she being paid by his wife's goods, effects, and cloaths which she intronitted with; but that is not *hujus loci*; *3tio*, If it were never so just a claim, she can never lose it in case she live another year; for though it cannot be obruded against the sum in the decret, yet it will meet when she comes to pay subsequent terms, and then she will get compensation and allowance of it in so far as she instructs.—THE LORDS repelled this compensation now proponed in the second instance, as competent and omitted in the first, but reserved it as accords. There were other allegiances made against him, which the Lords did not regard *hoc loco*, which were, that he had forefaulted any benefit he could claim by his wife's death, in so far as his barbarous and inhuman usage gave occasion thereto, and it was a just rule and principle of the common law, that he who was accessory to his

No 104.
Again found,
that compensation in not
receiveable
after sentence.

No 107.

author's death, *vel causam necis dedit*, or when done by another, and did not prosecute the same, he lost the inheritance; for *nemo debet lucrari ex proprio delicto, et iniquum est ex sceleris ditari, cum non debent lucrum consequi ex eo quod pœnam potius meretur*.—*Answered*, The accusation is false and calumnious, and if any were unnatural to her, it was her own friends; and it is neither extraordinary nor unusual for a woman to die in childbed; but when they attack him in a criminal process, he will clear and vindicate his innocence.—But the LORDS thought these recriminations wholly extraneous to the present question, and so waved them at this time. *Fol. Dic. v. 1. p. 165. Fountainball, v. 2. p. 603.*

1736. February 18. M'LARENS *against* BISSET.

No 108.

A DECREE had been obtained before the Bailie of the Regality of Balhousie, against James Bisset, at the instance of the representatives of Edward M'Laren, deceased, for the amount of a bill.

Bisset had counter claims against the deceased, who had died insolvent; and in an advocacy *pleaded*, That they might still be proponed in compensation, on account of the bankruptcy of M'Laren, and that the decree was only of a regality, which ought not to preclude compensation.

Effect was given to the decree, only upon condition of the puruer finding caution to be law-biding for the counter claims. *See APPENDIX.*

Fol. Dic. v. 1. p. 165. Session Papers in Advocates' Library.

1739. July 20. ANDERSON *against* SCHAW.

No 109.

Found in conformity with
No 105. p.
2642.

COMPENSATION not admitted after decree, though this ground of compensation was not in the suspender's person at the time of obtaining the decree, but acquired by him posterior thereto, in respect of the generality of the terms of the statute.

The like was again found, 9th December 1742, William Hogg merchant in Edinburgh, and the other creditors of Robert Paterson merchant in Saltcoats, against Patrick M'Calla merchant in Saltcoats, (*infra*.)

Fol. Dic. v. 1. p. 165. Kilkerran, (COMPENSATION.) No 2. p. 134.

1742. December 9.

CREDITORS of ROBERT PATERSON *against* PATRICK M'AULAY.

No 110.

Compensation is not competent

ROBERT PATERTSON having obtained a decret against M'Aulay for L. 400 Scots, some of his creditors arrested the same in M'Aulay's hands, who, in or-