

No 126. acknowledged it would have excluded the compensation; but being from a father-in-law to his goodson, it does not prove its own narrative, but is presumed gratuitous, unless the onerous cause were *aliunde* instructed, and so is reducible on the act of Parl. 1621; and as such rights *inter conjunctos* do not debar from the cedent's oath, so neither can they exclude compensation against the cedent, no more than if the assignation had been in trust upon a backbond, as was found, 28th January 1676, Crocket *contra* Ramsay, No 120. p. 2652. *Duplicated, Non refert*, what be the cause of the assignation; for *esto* it were a donation, and duly intimated, before you acquire in a debt of the cedent's, you are no more his debtor but the assignee's, and can never obtrude the cedent's debt purchased in *ex post facto* against him; for that were to elude my assignation; whereas, *factum cuique suum non adversario nocere debet*; and an executor, taking assignation to some of the defunct's debts after his own confirmation, will neither get retention nor compensation thereon against the defunct's other creditors. Next, the assignation, *esto* it were gratuitous, can never be quarrelled, unless they prove the granter was insolvent at the time he gave it, as has been found, 6th March 1632, Garthland *contra* Ker, No 45. p. 915.; 30th June 1675, Clark *contra* Stewart, No 46. p. 917.; 11th December 1679, Creditors of Mouswell, No 60. p. 934.; and 10th November 1680, M. Kell *contra* Jamieson and Wilson, No 47. p. 920. Though some thought it hard to put creditors to expiscate their debtor's means and effects, and whether solvent or not, it was more reasonable that the debtor's relations should lose than they. However, in this cause, the Lords found the compensation did not meet the assignee, but prejudice of reducing the assignation on the act of Parliament 1621, as accords.

Fol. Dic. v. 1. p. 167. Fountainhall, v. 2. p. 629.

No 127.

Compensation of a bond for money borrowed was refused to be sustained to the granters, upon a debt due by the creditor to their pupil, which they had no right to; although they offered to prove, by his oath, that they borrowed the money from him, up-

1711. June 29.

ADAM ELLIOT, Eldest Son to Walter Elliot of Arkletoun, *against* WILLIAM and NICOL ELLIOTS, his Younger Sons.

WILLIAM and NICOL ELLIOTS being charged, at the instance of Adam Elliot, to pay L. 70 Sterling, and annualrent thereof, contained in their bond granted to William Elliot their father, and assigned by him to the charger, they suspended, upon this reason, that they offered to prove, by the charger's oath of knowledge, that they truly borrowed the money charged for upon the account of Margaret Elliot their pupil, and that the cedent was debtor to the pupil in more, which she, now major, was content to apply towards the extinction of that debt.—THE LORDS repelled the allegiance of compensation, in respect no debt due to Margaret Elliot, by the charger's cedent, can meet the suspender's bond, having no relation to Margaret; seeing they have no assignation thereto

from her. The charger is not concerned whose use the money was applied to ; but the suspenders must satisfy their bond to the charger, and seek relief from their pupil as accords.

Fol. Dic. v. 1. p. 167. Forbes, p. 514.

1711. December 28.

WILLIAM FERGUSON of Auchinblain *against* HUGH MUIR of Auchindrain.

HUGH MUIR of Auchindrain being debtor to William Ferguson of Auchinblain in 300 merks by bond, and being charged to pay, he suspends, and craves compensation, on a tack set by him to the charger, of the lands of Craigskean, the tack-duty whereof is owing, and so must compensate. *Answered*, If the suspender had been heritor of the lands set in tack, then the compensation would have met, but you set it only as factor for Robert Bailie, (as the tack itself proves), and so the tack-duty is your constituent's and not yours, which makes that there can be no *concursum debiti et crediti* betwixt you and me; it being absurd to extinguish my debt with one you have no proper right to. *Replied*, The tack-duty is payable to me *nominatim*, and not to my constituent; and as I have the sole power to uplift and discharge, so I may compensate; and as he could charge me to maintain him in the peaceable possession, if he were disturbed, and make me liable for his damages, so *a pari*, as I have the *jus exigendi*, so likewise the *jus compensandi*: All mutual contracts being equally obligatory on both parties; and therefore *cui competit actio ei multo magis exceptio competit, cum partes rei semper sint favorabiliores*.—THE LORDS considered, that factors and chamberlains have not the property of their constituent's rents, but only the custody thereof as servants; and that it made no difference in law that he had taken the rent payable to himself, and not to his constituent, seeing his very title of setting it is *qua* factor, and not *proprio jure*; therefore the LORDS repelled the compensation. See the 9th of November 1672, Pearson *contra* Murray *alias* Creighton, No 80. p. 2625. where a chamberlain may not acquire a debt of his master's to found compensation on; which is stronger, and farther than this present decision goes.

Fol. Dic. v. 1. p. 166. Fountainball, v. 2. p. 695.

* * * Forbes reports the same case :

HUGH MUIR having, as factor to Robert Bailie, indweller in Glasgow, set a tack of the lands of Craigskean, to William Ferguson, for a certain tack-duty payable to the said Hugh Muir; and William Ferguson having charged Hugh Muir for payment of 300 merks of principal, with annual rent and penalty, contained in a bond granted by the latter to the former; compensation was not

No 127.

on the pupil's account, who, now major, was willing to apply her debt to extinguish the bond.

No 128.

A debtor was charged for payment of a liquid sum. He suspended, pleading compensation, upon rents due by the charger for subjects over which the suspender was factor. The debt not being due to him *proprio nomine*, compensation found not proportionable.