

the same.—THE LORDS repelled the compensation, and preferred the creditors; else bankrupts might easily disappoint their creditors by granting bonds to their tenants, or obligations that they retain their rents till they be paid of such a sum; which ought not to militate against singular successors: Then Mr Dewar's procurators craved the creditors might assign him to their diligences *pro tanto* for his relief.—THE LORDS thought this unreasonable, unless to come in after their whole debts were satisfied and paid, but not to bring him in *pari passu* with themselves.

*Fol. Dic. v. 1. p. 166. Fountainball, v. 1. p. 790.*

1709. February 26. BOWHILL against JACKSON.

AN assignee to a tack pursued the tenant for the rent. The tenant proponed compensation, 1st, That his master owed him a sum *per bond*; 2dly, That he was cautioner for him in another sum, and had engaged himself in hopes of retaining his rent in relief.—THE LORDS found, that the intimation of the assignation interrupted the compensation for the rents which fell due after the intimation, but that there was *concursum debiti et crediti* for the prior years, and compensation applied.

*Fol. Dic. v. 1. p. 166.*

\* \* \* See The particulars No 61. p. 2612.

1711. January 23. WILLIAM ALISON against JOHN DUNCAN.

JOHN DUNCAN, late Provost in Dundee, being debtor to Robert Christie by bond, Christie assigns it to William Alison, his son-in-law, who charging Duncan, he suspends, and craves compensation, on this ground, that Christie the cedent was owing to Hunter of Baldivie a greater sum, whereunto he has right as executor-creditor confirmed to Hunter. *Answered*, The compensation never met nor concurred betwixt the two, because Christie was denuded by the assignation, and the same duly intimate to Duncan, before he had established the right of the debt due by Christie to Hunter in his person as executor-creditor; so there was never a *concursum debiti et crediti* betwixt Christie and Duncan. It is confessed, if Duncan had purchased the debt due by Christie to Hunter in his person, before Christie assigned Duncan's bond to Alison, or even before it was intimated, then the compensation would have met; but Christie being totally denuded by an intimated assignation before ever Duncan had right by his confirmation to Christie's bond to Hunter, it is impossible that can be a ground of compensation, but only for an action against Christie, and cannot meet his assignee. *Replied*, If the assignation had been for an onerous cause, then it is

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A party assigned a debt to his son-in-law. The debtor suspended on compensation, having acquired right to a debt due by the cedent. The cedent had been denuded, and the assignation intimated, before the suspender acquired right to the ground of compensation. Found, the compensation could not meet the assignee, but without prejudice to reduction on the act. 1621.

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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.*

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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