

No 150. stituent himself; and accordingly, a docquet is adjected to the accompt, with a reservation of these articles, which were not liquidated till about ten years thereafter; the factor now insisting for payment of a bond due to him by his constituent, it was found, that the fitted accompt, bearing the foresaid reservation, was not a liquid ground of debt upon which compensation could be sustained; seeing reserved articles, some of which were sustained, fell to have entered into that accompt to diminish the balance, and therefore sustained compensation from the date of the total clearance only. See APPENDIX.

*Fol. Dic. v. 1. p. 168*

1753. July 31.

PATRICK HALDANE, ESQ. *against* ARCHIBALD Duke of Douglas.

No 151.  
A debtor having lent money to his creditor on bond, and continued to pay the annualrents of debts which he owed without deducting the interest of the sum he had lent, found, notwithstanding, entitled to plead compensation upon that sum, in a competition with creditors.

THE Duke of Douglas was debtor to his sister Lady Jean Douglas, in the sum of 20,000 merks Scots, due by a bond of provision bearing annualrent, granted to Lady Jean by James Marquis of Douglas, her father.

The Duke, in March 1718, gave Lady Jean a further provision, by a bond for 30,000 merks Scots bearing annualrent, but revocable at pleasure.

In 1728 and 1731, Lady Jean borrowed from the Duke two sums, amounting to L. 750 Sterling, for which she granted bonds in the usual form, bearing annualrent and penalty.

Notwithstanding of these bonds, the Duke continued to pay to Lady Jean the full annualrent of the said 20,000 and 30,000 merks Scots, and an additional annuity of L. 161 Sterling, provided to her, as marked in the case betwixt Mr Haldane and the Duke, 15th February last, (*voce Quod Potuit non Fecit.*) to Whitsunday 1749, when he stopped payment.

Lady Jean being debtor to Mr Haldane in the sum of L. 500 Sterling, she assigned him to as much of the 20,000 merks bond as would pay that sum and annualrents thereof; and Mr Haldane brought an action against the Duke for payment.

*Pleaded* for the Duke; That Lady Jean was debtor to him in the sum of L. 750 Sterling and annualrents thereof since 1731, which extinguished the said bond of 20,000 merks, and made a balance due by Lady Jean to the Duke.

*Answered* for Mr Haldane; That, both by the civil and Scots law, compensation operates *ipso jure* from the date of the concurrence, at whatever time it be proponed; and therefore Lady Jean being first creditor to the Duke in 20,000 merks Scots, and in the 1731, becoming debtor to him in L. 750 Sterling, she from that period remained creditor to him only in L. 361 : 2 : 2 $\frac{2}{3}$  Sterling, with the annualrent thereof. That such was the effect of compensation by the civil law, is certain from *L. 21. ff. de compensationibus*; and *L. 4. cod. eod.* which precisely determines the present question. The words are, 'Si constat pecuni- am invicem deberi, ipso jure pro soluto compensationem haberi oportet, ex

‘ eo tempore ex quo ab utraque parte debetur, utique quoad concurrentes quantitates, ejusque solius quod amplius apud alterum est usurae debentur.’ It is true that the defender must propone compensation, otherwise the Judge cannot know it; and so far it is *facti*: yet being proponed, the law determines the effect of it, which is altogether *juris*. See *Perezius ad codicem, tit. de compensat. n. 5. et Voet. Dict. tit. ff. n. 2.* And that compensation has the same effect by the law of Scotland, is the opinion of Sir George Mackenzie, Inst. b. 3. tit. 4. and of Lord Stair, b. 1. tit. 18. § 6. His Lordship says, ‘ Compensation is a kind of liberation, as being equivalent to payment; for thereby two liquid obligations do extinguish each other, *ipso jure*, and not only *ope exceptionis*; for albeit compensation cannot operate if it be not prepared, as neither can payment; yet both *perimunt obligationem ipso jure*, and therefore are not arbitrary to either party to propone or not propone as they please; but any third party having interest may propone the same, which they cannot hinder.’ The law so standing, the payments made by the Duke to his sister *ex gratia* beyond what he was debtor for, cannot alter the case, nor can he now demand back, or plead upon these payments which he gave her, as they must be considered as gifted; but the pursuer, in her right, is entitled to demand from the Duke the L. 361 Sterling which, in 1731, his Grace owed to his sister Lady Jean, above the sum compensated by Lady Jean’s bonds, and the annualrent thereof since Whitsunday 1749, when the Duke stopped payment.

*Replied* for the Duke; That by the law of Scotland, as appears from act 143d Parl. 1592, compensation is a defence on exception, which a defender may propone or not as he thinks proper; and when he propones it, it must be sustained in the manner he pleads it, and not according as the pursuer finds it most convenient for him. The concurrence of the debt due by Lady Jean to the Duke had no effect upon the bond of provision; both these debts subsisted; the Duke was debtor to her in 20,000 merks Scots, and she to him in L. 750 Sterling, and the Duke might have assigned away the L. 750; in which case he could not have pleaded compensation, but behaved to have paid the full 20,000 merks, after which Lady Jean behaved to have paid the L. 750 to the assignee. And seeing the Duke did not, till the commencement of this action, plead the compensation, but paid the full annualrent of the 20,000 merks, notwithstanding of Lady Jean’s being debtor to him in L. 750 Sterling, she and her assignee cannot now refuse to pay the sum in her bond and annualrents thereof, or to admit the compensation founded thereon.

‘ THE LORDS sustained the compensation proponed by the Duke of Douglas, upon the two bonds granted by Lady Jean to his Grace, both as to principal and interest due on the said bonds, to extinguish the bond in question for 20,000 merks and interest thereof.’

Act. *Advocatus.*

Alt. *R. Craigie.*

Clerk, *Kirkpatrick.*

B.

*Fol. Dic. v. 3. p. 151. Fac. Col. No 85. p. 128.*