

No 104.

THE LORDS, in respect the cedent was now absolutely bankrupt, sustained the reason of compensation, proponed after sentence by the minor. *See* The case following.

*Fol. Dic. v. 1. p. 165. Harscase, (COMPENSATION.) No 255. p. 60.*

No 105.

A party in a suspension of a decree *in foro*, proponed compensation, which had emerged after the decree; so that here it was not industriously omitted to be proponed *prima instantia, animo protelandi litem*. The Lords, nevertheless, found the statute general, and repelled the compensation.

1697. July 9. JOHN GORDON elder of Fechil *against* CAPTAIN MELVIL.

IN a suspension given in by John Gordon elder of Fechil, against Captain Melvil, of a decret *in foro*; one of the reasons was founded on a compensation emergent after the decret; it was acknowledged that any ground of debt standing in his person before the decret could not be obruded by way of compensation, because it was competent and omitted, and presumed to have been omitted purposely to procure a new delay by suspension; but this was a debt Fechil had purchased an assignation to after the decret, and was not fraudulently omitted and kept up. *Answered*. The act of Parliament discharging compensations to be received in the second instance, makes no distinction when it was acquired; and the buying in of debts is no very favourable thing; and the LORDS have found even compensation unreceivable in the second instance, though the decret was in absence, Wright *contra* Sheill, No 102. p. 2640. THE LORDS repelled the compensation, reserving his action thereon against Melvil, as accords; whereby Fechil was at this disadvantage, that he was forced to pay, and Melvil was *vergens ad inopiam*, and so had little hopes of recovering what he now claimed to compensate him with.

*Fol. Dic. v. 1. p. 165. Fountainball, v. 1. p. 784.*

1707. March 20.

HUGH CORBET of Hardgray *against* WILLIAM HAMILTON of Wishaw.

No 106.

Compensation being proponed after a decree in absence, the decree being against the party among many others, the Lords found, that a decree in absence against debtors excludes not compensation.

HARDGRAY, as assignee to a decret of the Commissaries of Glasgow, against Wishaw for 400 merks, contained in a ticket granted by him to the deceast William Anderson, Provost of Glasgow, pursued Wishaw for payment.

*Alleged* for the defender; Absolvitor, because, *imo*, The decret was in absence, and intrinsically null for being pronounced in vacation time without a dispensation, by a commissary who is not competent to judge in actions above L. 40 Scots, except where the libel is referred to oath, and the ticket was prescribed. *2do*, Compensation upon a bill drawn by Patrick Murray, clerk to the Fishery company upon Provost Anderson for 1200 merks payable to Wishaw, which the Provost, by a letter under his hand to Wishaw, acknowledged and promised to pay.

*Replied* for the pursuer; Compensation upon the bill and letters cannot be sustained, because both being holograph were prescribed by the elapsing of 20

years before any diligence done thereon. *2do*, A decret having followed upon the ticket; no compensation can be sustained thereafter. *3tio*, There is no compensation in this case, because the bill on Provost Anderson was to have been allowed to him upon producing the possessor's receipt of payment in the first end of what he owed to the company: And Wishaw having neglected for 20 years to present the bill, or to offer a receipt in the terms thereof, Provost Anderson neither did nor could get allowance of the sum in the bill from the company.

*Duplied* for the defender; The bill and missive letter could not prescribe, because *eo momento* that they did exist, they *ipso jure* extinguished Wishaw's obligation; it being the nature and effect of compensation, to extinguish the concurring debts; and after extinction, it is absurd to talk of prescription by course of time; *2do*, Wishaw had no reason to pursue them upon the accepted bill, for that he knew it compensated by his ticket; but now that he is pursued upon the ticket, he cannot be debarred from proponing compensation upon the bill; because, *quod est temporale in actione, in exceptione est perpetuum*; and in conformity with this brocard, the Lords decided in the cases of Gordon of Park *contra* Hay of Ranis, 1702; and Hay of Lochcoat *contra* Bonhard, 1703, *see* PROCESS; *3tio*, The act of Parliament excluding compensation after sentence, is only to be understood of decreets *in foro*, whereas the decret founded on was in absence, pronounced by a Commissary, who was not a competent judge. Now Wishaw cannot be blamed for not compearing to propone his compensation, where he was not bound to appear; besides, the Lords have sometimes sustained compensation in a suspension, or by way of defence, even after a decret *in foro*, where there was any probable cause for not proponing the same *in prima instantia*, as in the case of Earl of Marshall *contra* Brag, No 101. p. 2639. observed by Gilmour; *4to*, Suppose Provost Anderson had never got allowance of the sum due by him to the Company, what is that to Wishaw, who hath his liquid acceptance and obligation to pay the bill, which, at the very date thereof, did concur with, and extinguish Wishaw's ticket for the equivalent sum? And if the Provost neglected to ask a receipt, (which Wishaw never refused) *sibi imputet*.

*Duplied* for the pursuer; The act of Parliament doth not distinguish betwixt decreets in absence and decreets *in foro*, in the matter of repelling compensation after sentence; and it had been needless to make any such act concerning decreets *in foro*, which were sufficiently secured by the regulation act concerning competent and omitted; therefore the statute excluding compensation after sentence, should only be understood to relate to decreets in absence, as was decided 25th July 1676, Wright *contra* Shiell, No 102. p. 2640.

THE LORDS repelled the reasons of prescription of the ticket pursued on, in respect of the decret; but found, That the decret being in absence, and against debtors, it doth not exclude the defence of compensation in the second

No 106. instance ; and found, That the compensation being proponed by exception, doth not prescribe ; and therefore sustained the compensation founded on the precept and letter produced, and assoilzied.

*Fol. Dic. v. 1. p. 165. Forbes, p. 158.*

\* \* \* Fountainhall reports the same case :

HARDGRAY, as having right by progress, pursues Wishaw for payment of 400 merks contained in his ticket to William Anderson in 1673.—*Alleged, imo*, It is prescribed by the act of Parliament 1669, being holograph, wanting witnesses, and not pursued for within 20 years after its date.—*Answered*, No prescription, because interrupted by a decret obtained against you before the Commissary of Glasgow within that time.—*Replied*, The decret was null, being *supra vires*, the instructions given to the Commissaries in 1666, limiting their jurisdiction to L. 40 Scots, except where referred to oath.—THE LORDS found this a sufficient interruption to stop prescription.—Then Wishaw *alleged* on compensation, because William Anderson, Hardgray's author, was debtor to him in the like sum of 400 merks, by an accepted precept drawn upon him by Patrick Murray, clerk to the Royal Company of the Fishery, in 1683 ; so at that moment there was *concursus debiti et crediti*, and his 400 merk ticket was extinct.—*Answered*, No compensation can be received now, because it is *post sententiam*, contrary to the act of Parliament 1592, ordaining it to be receiveable only before sentence ; but so it is, there is a decret against Wishaw for his ticket, and though it be in absence, yet even such decreets were found to seclude compensation in the second instance by way of suspension, Wright *contra* Shiell, No 102. p. 2640. ; for *quoad* decreets *in foro* upon compearance, by the articles of regulations 1672, compensation could not be proponed against them, because it was debarred by being competent and omitted.—*Replied*, Where decreets in absence are recovered against one defender, and no others called, there was ground to seclude them from proponing compensation in the second instance ; and yet even in that case, it was admitted, as Gilmour observes, Earl Marshall *contra* Brag. No 101. p. 2639. But there it was in a suspension of a decret in a Baron Court ; whereas, here Wishaw is called among many other debtors, and so might easily be ignorant of it ; and the citations never came to his hand ; and in such a case it were *durissimum* to reject his compensation ; for if he got it not allowed here, he loses the debt for ever, Anderson being dead and broke.—THE LORDS found against such a decret as this, That the compensation was yet receiveable.—Then Hardgray *contended*, This precept by Murray on Anderson, was extinct by the vicennial prescription, being holograph, and without witnesses, and never insisted on within the 20 years.—*Answered*, If Wishaw were pursuing on this accepted precept, Anderson or his assignee might very well reply, it is prescribed ; but when it is proponed by way of exception, to elide their pursuit on this 400 merk ticket, no prescription can be intruded against it,

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.