wise probable than *scripto vel juramento*, to take away her written obligement in her contract of marriage; but we prevailed this far, that she should be ordained to depone in presence of the debtors condescended upon by us, who paid in to her the third part of the heritable sums they were owing; but declared, that if Marshall, the defender, had them not ready to confront with her at the day assigned to her for deponing, (to which purpose they allowed him an act for citing them,) their not compearing should be no hinderance to her from deponing. So that, when the day came, and she offered to depone, we could not get it stopt on the production of a diligence executed against them, and in seeking a farther diligence by caption; because the Lords supposed it was *animo protelandi*, and that he kept them back, and might have had that influence and moyen to have brought them in upon the first citation. See the informations.

On the 10th of November, 1677, her oath being advised, the Lords found it did not prove the defence that she had got the full third; and therefore decerned, but declared, what she got more of the moveables than is proven before the Sheriff in that decreet, they will allow them to compense *pro tanto;* for she affirmed, in her oath, these sums were given her for alimenting the bairns, and not in satisfaction of the conquest.

Advocates' MS. No. 518, *folio* 269.

1676. *December* 13. FRANCIS MONTGOMERY *against* LORD MELVILLE.

THIS day was Mr Francis Montgomery, brother to Eglinton, and my Lord Melville's interlocutor about his *jus mariti*, and that the assignation was sufficient to purge vitious intromission, and that he was liable in *quantum locupletior factus erat*, &c. The case must be inquired into.

Advocates' MS. No. 521, *folio* 270.

1676. *December* 13. DR HALIBURTON *against* LORD BALMERINO.

DR HALIBURTON, one of the creditors of the last Lord Coupar, had a favourable interlocutor against the Lord Balmerino, who had got that estate. The Lords found, where an apparent heir, (such as Balmerino was to Coupar,) caused comprise the predecessor's estate for a debt owing by the said apparent heir himself before his interest exists by his predecessor's decease, it shall infer *gestionem pro hærede*, (as in the Earl of Nithsdale and Glendyning's case was determined by act of sederunt in 1662;) if the apparent heir enter in possession by that comprising, either by communicating it to others, who bruik by it and have no other better right, or by uplifting the maills and duties, or by entering vassals. And Haliburton was very clear he could fasten some of thir qualifications on Balmerino. But their re-

fuge was that he was insolvent, denuded of all, and *in familia* with his son. See the information of it. *Vide supra*, No. 453, in December, 1675, Kello.

Advocates' MS. No. 522, *folio* 270.

1676. *June, and December* 20. WILLIAM WRIGHT *against* SHEILL.

June.—WILLIAM WRIGHT in Portsburgh, having charged one Sheill upon a decreet, he suspends upon a reason of compensation.

ANSWERED,—*Primo*, That the ground of the compensation being against his cedent, it could not meet him, the assignee. *Secundo*, It could not be obtruded to him, because he had no right to the sums with which he craved to compense, being only apparent heir to the creditor in these bonds. *Tertio*, Since comprising and infeftment had followed on his decreet, compensation could not meet it.

REPLIED to the first, That compensation in law is equivalent to a discharge, and so must operate against assignees, as is constantly decided by the Lords; especially in thir two cases:—Where the ground of the compensation is liquid, and before the assignation; and, *secundo*, If the assignation be not for an onerous cause, even suppose it be after the same. See this prosecuted at large in other papers beside me, out of Dynus *ad Regulas Juris Canonici*, of Schotanus *in Examine Juridico*, and out of Durie's Practiques. To the second, REPLIED,—Payment on a discharge may be proponed by one not having a formal established right, but compensation is of the nature of payment. But, *secundo*, he has confirmed this sum. As to the third, Compensation upon comprising does not hinder but compensation may be proponed against the same upon a personal debt, for the law does not precisely require the two debts compensed one with another to be wholly of one kind; as was lately decided in the case of Blacktoun Forbes against the Laird of Leyes. Yet compensation being only equivalent to a discharge, a simple discharge is found to be the *habilis modus* to annul some real rights that require registrate renunciations, such as wadsets, &c.* But, *secundo*, the infeftment on the comprising is null, being granted by the Bishop of Edinburgh; whereas the true superiors of the apprised tenement lying in Leith, are the ministers and kirk-session of Leith, as preceptors of St Antonie's Chapel, of which that house holds, and of whom Sir Jo. Young of Leny (who compears for his interest,) has taken his infeftment and right. But, *3tio*, Leny offers to prove that Wright's comprising is satisfied by his intromission within the years of the legal. This point is reserved to him to prove as accords.

ANSWERED,—The infeftment cannot be annulled by way of exception. *Secundo*, Lennie's comprising cannot be respected, because offers to prove, by his own oath, he is paid, and that he now retains it to the behoof of the common debtor.

The term is circumduced and extracted against Sir John, for not compearing, and deponing anent the trust.

* See the contrary of this in Stair's Practiques, tit. 11, Solution of Obligations, § 6; and in his Decisions, 29*th November*, 1662, *Ogilby and Dumbar*.