interest to propone compensation of a debt due by the defunct, with a debt due by that same creditor to the defunct; for, by the concourse of these two debts *inter easdem partes, primo momento* of the concourse both were extinct; which might not only be proponed by those who had right to the sum whereupon compensation was founded, but to all others having interest, who might allege compensation as well as payment; and, therefore, an heir might propone compensation of an heritable debt, due by a defunct, upon a moveable debt due by the defunct to that same creditor, though he could not otherwise discharge a moveable debt; but the decreet would import a discharge: and so a cautioner may compense upon the debt of the principal; and a relict, bairns, or nearest of kin, may compense upon any debt due by, and to a defunct, which were liquid: which liquidation required no decreet; but that *debitum* and *creditum* were clear and commensurating in the defunct's time.

The Lords sustained the compensation against the party filled up unwarrantably in a blank right, upon the debt of him who had the said blank right in his power and possession as his own, upon a debt of the first creditor, being liquid, though no sentence followed in his time: And found, That any of his nearest of kin might propone that compensation, though having but a right only to the debts with which it was compensated: but found the compensation not receivable *post sententiam*, though in absence, unless the sheriff's decreet were found null; but sustained several allegeances of nullity against the same.

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1677. *June* 21. DOWIE *against* ELISON.

JANET Dowie, by her contract of marriage with Robert Elison, being provided to her liferent of all sums, goods, and gear, conquest during the marriage; and, if in case of children, to the fee of the half: pursues a declarator of her right of the said contract against her husband's executors: who alleged, Absolvitor; because the defunct, by his testament, had provided the pursuer in the annualrent of 5000 merks, in satisfaction of what she could claim at his death; whereby there was *jus quæsitum* to her, inconsistent with the contract of marriage; and, except she refused the provision in the testament, and continued her right, it did extinguish the provision of the contract.

It was ANSWERED, That the provision of the testament became not her right till she accepted it; and she was not clear yet whether to accept it or not, till she found, by the event, which of the provisions were most effectual.

The Lords found the pursuer obliged either to reject the provision in the testament, being now shown and produced to her; or otherwise they sustained the defence thereupon, to exclude her from the contract.

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1677. *June* 26. GRAHAME and BOYD *against* MALLOCH.

IN a count and reckoning at the instance of Grahame and Boyd, against

Malloch, for extinction of Malloch's apprising, by intromission within the legal; Malloch craved a defalcation out of his intromissions, for the expenses of a process of reduction at his instance, against a third party, who had an inhibition which would have excluded both parties' rights; and for the sum he paid out profitably for both parties, by transaction, for being free of that inhibition.

The Lords found, That no such defalcations of the appriser's intromissions were to be allowed; but only such as were real burdens upon the land: but, as to that conclusion of the account for repetition of Malloch's intromission, after he was satisfied, they found compensation competent to what he profitably expended for the behoof of both parties, to secure them against an inhibition which would have affected them both.

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1677. *July* 6. LOCKHART *against* LOCKHARTS.

THE deceased Stephen Lockhart of Wickedshaw, having communed a marriage for his eldest son, did, before the contract of marriage, take a bond from his son, bearing, That, albeit by his son's contract of marriage, he was to dispone to him his whole estate, with the burden of 4600 merks to his children, yet it should be leisom to him to burden the estate with 1400 merks more to his children; and making both sums, bearing annualrent after his death. The contract of marriage is subscribed three days thereafter. William, the son, having shortly deceased after the marriage, Stephen, the father, did divide the 6000 merks among his children, and died *in anno* 1663. William, son and heir to William, son to Stephen, *in anno* 1664, counted with Walter Lockhart, one of the children, and with Robert, another of them, *in anno* 1671, for their shares. William, the oy, having also died, the said Walter and Robert pursued his son and heir for their portions, who alleged, Absolvitor:—1*mo*. Because, as to the 1400 merks, and the additional annualrent, it was *contra pacta dotalia*, and so *contra bonos mores*, and thereby null; for, if the father had disponed his estate without mention of his children's provision, a bond by the son in their favours, being anterior, might have been effectual; but the contract of marriage bearing expressly a burden to the children of the 4600 merks, any further was not fair, but fraudulent, in prejudice of the wife and her relations, who would not have otherwise proceeded in the marriage. *2do*. This bond by a son to his father, being minor, is null; he not being authorised by his father, who was his lawful administrator, and could not authorise *in rem suam*.

It was ANSWERED, That these provisions being expressly to the behoof of the children, granted before the contract of marriage, were valid; for such provisions, contrary to contracts of marriage, can only be null *in quantum* there is a true prejudice and wrong to the parties-contractors; wherein their interest, not their humour, is to be considered: so that the addition of 1400 merks, (there being many children, and their whole provision being but 6000 merks, bearing annualrent after their father's death,) it was the discharge of a natural duty, and no wrong to the son or wife, who were put in the whole estate. And, as to the nullity, the bonds were homologated by the oy, after his majority, by