

1680. January 7.

M'BRIDE *against* The LORD MELVILL.

THE Countess of Leven being debtor by bond to Lauchlan Leslie in L. 7000, he assigns the same to James M'Bride, writer in Edinburgh, whereupon he pursues a declarator, that this was a just debt, and that he might affect the estate of Leven therewith by apprising or arrestment. The defender *alleged* compensation, because the pursuer's cedent was chamberlain to the Countess of Leven his debtor, and hath made no account, and therefore, by his office, he being obliged to do diligence for the rental of that estate, he is debtor therefor, either as intromitting, or who ought to have intromitted, which is offered to be proven by writ, viz. the factory granted by the Countess to Lauchlan, so that compensation against the cedent being relevant against the assignee, the same must be sustained against this pursuer, being instructed by writ prior to the assignation. The pursuer *answered, 1mo*, That the defender could not propone compensation upon the Countess's rents, because he hath no right thereto, and so, by proponing thereof, cannot liberate the factor. *2do*, The compensation is not liquidate until the factor's intromission be proven, which must be instantly verified, though the debate were against the factor himself, much more when against his assignee. The defender *replied*, That compensation is equivalent to a discharge, and therefore may be proponed by any party who hath interest to exclude the debt compensated; for sums compensing each other, do, from the time of their concurrence, extinguish both debts; so that if a creditor be insisting against an heir, it is competent to him to allege compensation, though upon moveable sums due to the defunct, which would belong to the executors, and not to the heir. To the *second*, The factory is in the cedent's own hand, which ought to be produced, and it will instantly verify and liquidate the compensation; for thereby it will appear, that the factor being liable for diligence, is not only liable for his intromission, but for his omission, according to the Countess' rental, of which one year will far exceed this sum, as is notourly known.

THE LORDS found the compensation competent to this defender, although he hath no right to the moveable estate of the Countess, in the same way as if the Countess had been discharged; and found the compensation upon the cedent's factory in writ relevant against the assignee, if the factory contained a salary, albeit it mentioned no obligation to do diligence, which is implied in the nature of a factory, unless the factory be restricted, that the factor shall be countable always for his intromission; in which case the Lords found the compensation not liquid, and instantly verified; but sustained the same, if the factory did either express an obligation to do diligence, or contained a salary without restriction; and ordained the pursuer to produce the factory, it being presumed to be in his cedent's hand. It was also *alleged*, That the factor or his cedent could not pursue his constituent or her representative, *ante redditas rationes*, in

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Compensation was proponed upon a factor's intromissions, to elide a debt due by him, now assigned. The compensation found liquid, if the factory bore an obligation to do diligence, otherwise not.

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the same way as a tutor or curator, which the LORDS sustained not, these being special privileges of pupils and minors against their tutors or curators only.

Fol. Dic. v. 1. p. 160. Stair, v. 2. p. 733.

1706. January 16.

ALEXANDER AITKEN of Middlegrange, *against* JAMES GOODLET of Abbots-
haugh.

No 16.

Annualrent
of a child's
portion, com-
pensated with
her aliment
while she
lived in her
father's fa-
mily.

IN the action at the instance of Alexander Aitken of Middlegrange, against James Goodlet of Abbotshaugh, his wife's father, for the annualrent of her portion from the sixteenth year of her age till her death;

Alleged for the defender, Absolvitor from any annualrent till his daughter's marriage; because, till then he had alimeted her *in familia*, which compensated the annualrent for so long; and as to annualrents during the marriage, compensation by the expenses of her funeral debursed by the defender conform to a stated account.

Duplied for the pursuer, *imo*, Had the defender's daughter assigned the annualrents of her portion for an onerous cause, or her creditor arrested them, the defender could not have compensated upon the aliment not liquidated before the arrestment, or intimation of the assignation; therefore, *a pari*, the pursuer being assignee *jure mariti*, and his assignation intimated by the marriage, he cannot be put off with compensation upon a debt neither liquidated nor constituted to this day, especially such a general debt as aliment, which differs so vastly in different cases, as to the manner, quantity, and quality; *2do*, If the compensation be sustained, the pursuer takes it off by recompensation upon the principal sum yet resting to his deceased wife; *3tio*, No compensation can be obruded to the pursuer upon his wife's funeral expenses, which must burden her executors to whom she has left means sufficient to defray the same.

Duplied for the defender, It is certain that the annualrent before the marriage was in place of the aliment; and the pursuer, by his *jus mariti*, could be in no better case than his wife, if she had pursued for annualrent after her age of sixteen.

THE LORDS found, That so long as the pursuer's wife was unmarried, and *in familia* with her father, her aliment compensated the annualrent; but that the funeral expenses affect her executors. *See HUSBAND and WIFE.*

Forbes, p. 72.

1715. February 9. GORDON of Badinscoth *against* GORDON of Inverebry.

No 17.

A relict, exe-
cutrix to her
husband, and
tutrix testa-

My Lady Kinnaird having been executrix to the late Earl of Aboyne, her first husband, and tutrix-testamentar to the present Earl, and by virtue thereof