DUPLIED,—This was to shake the foundations of our law, where these were undoubted principles, That compensation must be *inter eosdem*, and liquid, and instantly verified, and not proponable after sentence; and that the granting a blank bond is a tacit renouncing of the defence of compensation; as was expressly decided, *27th February* 1668, *Henderson* against *Birny*.

The Lords saw there was nothing but *res judicata* here that stood in Macintosh's way, and therefore allowed the parties to be heard upon what nullities they could allege for opening the said decreet of suspension; for, if that could be turned into a libel, the Lords thought Macintosh's compensation both relevant and proven; but all the difficulty was, how to enter on the decreet *in foro*, which stood in his way. *Vol. II. Page* 248.

1704. *December* 21. ANDREW BRUCE of EARLSHALL'S CREDITORS-ADJUDGERS *against* JOHN BAIRDY.

THE Earl of Southesk, Sir William Bruce, and other Creditors-adjudgers of the estate of Andrew Bruce of Earlshall, pursue a reduction and improbation of an apprising led by Mr John Bairdy, minister at Paisley, against Earlshall, as transacted by the debtor himself, and paid with his means. The case was,—Mr Robert Alexander, one of the principal clerks of session, having married Sophia Bairdy, daughter to the said Mr John, the said comprising is disponed to him, in his contract of marriage, *nomine dotis*. In 1691, Mr Robert dispones the same to Sir David Arnot of that ilk; but, of the same date, takes his backbond to relieve him of a blank disposition, consigned in Mr Monypenny's hand, under irritant clauses and conditions, that, if the sum agreed and transacted for was not paid at the term limited, the said disposition should be delivered back again. The Lords, before answer, did, *ex officio*, take the oath of Mr Robert Alexander; and it emerging, that Sir Robert Grierson of Lag was an interposed trustee in this case, for Earlshall, he was likewise examined. And their oaths, with Arnot's backbond, coming to be advised, it was ALLEGED for Arnot, That the bargain made by Mr Bairdy with Lag, bearing, if he did not pay in the 3500 merks betwixt and Whitsunday thereafter, then Lag should lose what he had already paid, and the disposition should be retired, and Mr Bairdy be in his own place; the rest of the money was never paid, and so the irritancy was incurred; and Arnot is not obliged to stand to the said transaction, but is fully reinstated in the right of the said expired apprising.

ANSWERED,—The irritancy being clearly penal, and never declared by any sentence, the same is still purgeable on payment of what remains.

REPLIED,—By the canon law, all lawful adjections to the pactions of parties must take effect in their precise terms; and so have the Lords declared, by their Act of Sederunt, 27th November 1592, even in clauses irritant. And though *pactum legis commissoriæ in pignoribus* be rejected as usurious, and found purgeable, yet in other cases the Lords have found such irritancies not purgeable; as *20th February* 1680, *Jameson* against *Waugh*; and lately in the case of the *Duke of Athol*, then Earl of Tillibairn, against *Campbell of Glenlyon*. Yea, where a thing was to be performed within nine score of days, the Lords found the purgation of the failyie could not be admitted; and here there were two years allowed for purging.

The Lords found, the irritancy not being declared, there was yet room for implementing the bargain, and purging the failyie, by paying what was resting *cum omni causa.*

2do, ALLEGED for Arnot,—That this apprising coming in the person of Earlshall, the ancient debtor, not by way of renunciation, but of a formal transmission, it was a *jus superveniens ;* and so could neither accresce to Sir William Bruce's apprising, which was led long before this acquisition, nor be carried thereby, not being in the debtor's person at the time.

ANSWERED,—Though the *jus accrescendi* takes rather place in voluntary rights than in legal judicial conveyances, yet the debtor can never obtrude this as a new purchase, and not affected by his creditors' anterior diligence ; and inhibitions reach *bona acquirenda* as well as *jam quæsita* ; and it were *contra bonam fidem* for a debtor to purchase in a comprising, and then tell his creditors he will exclude them because they had not specially adjudged or apprised that right.

The Lords found his transacting this right could not compete with his anterior creditors, who could not adjudge what he had not acquired at the time of their diligence against him ; and that it was not competent for him to object it, seeing it was purchased with his own money, and to his own behoof, as was cleared by the two oaths and Arnot's backbond.

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1704. *December* 30. Poor AGNES WATSON *against* JOHN WOOD'S HEIR.

Poor Agnes Watson against the Heir of Mr John Wood, late minister at St Andrew's. Mr John Wood being a creditor to Carstairs of Kilconquhar, and being about to lead an adjudication, several other creditors disponed their sums to him, on his backbond, that they might be all included in one diligence ; and, amongst the rest, Agnes Watson assigns him to 500 merks of principal owing to her, and takes his backbond to be countable and to denude, effeiring to her interest. Mr John finding the lands incumbered, and prior adjudications near expired, where he could not have the benefit of coming in *pari passu,* he sells a part of the lands ; and with the price transacts and acquires in these preferable adjudications ; and the other creditors, for whom he had done diligence, accept of a proportion of their sums, and agree with him ; only the said Agnes pursues him to implement his backbond, and denude. He offers a disposition to the remainder of the lands unsold, with the burden of the prior rights he had made, and excepting them from the warrandice.

She OBJECTS,—I am not bound to accept any such disposition now ; but you are simply liable for my sum, because you have violated your trust by alienating a part of the lands without my consent ; and *res* is no more *integra,* seeing I have a proportional share of the whole lands adjudged, which you, by your alienation, have put out of your power to give me. Therefore, *loco facti impræstabilis, succedit damnum et interesse,* which is to pay me my debt, *cum omni causa* ; as the Lords have oft found, 18*th July* 1672, *Watson* ; and in 1695, between *Christian Salton* and *Andrew Crawfurd ;* as also in the case of *Carmichael of Maulsley* and *Sir Charles Hay* ; and, 5*th January* 1675, the *Earl of Northesk* against *the L. of Pittarrow.*