

No 1. there is neither compensation nor retention competent ; *3tio*, There can be here no compensation, because the debt is not liquid. The defender *answered*, His defence stands most relevant, which he founds not upon compensation, but upon the exception of retention, which is competent in all mandates and trusts, by which, as there is a direct action in favour of the mandant against the mandatar, or person intrusted ; so there is a contrary action in favours of the mandatar, for satisfying of all that he hath expended by reason of the trust, and which he may make use of by way of exception of retention, if he be pursued ; and whatsoever be in relation to compensation, *in deposito*, by the civil law, or of the difference of action and exception, yet, thereby they, and by our uncontroverted custom, whatever is competent by way of action, is competent by exception ; and if this be not receivable by exception, it is utterly lost, because there is none to represent Sommerset.

THE LORDS considering that Balmerino's estate was disposed and appraised by his uncle, the Lord Couper, and William Purves, the reversion whereof was shortly to expire, which they would not lengthen ; and that by an account running to the expiration of these reversions, the pursuer, being a stranger, might be frustrated ; therefore they repelled the defence ; but declared that estate, or benefit that Bedford should make thereby, should be liable to Balmerino for what debt he should instruct to be due by Sommerset ; and withal superseded the extract for a time ; that if, in the mean time, Balmerino should cause Couper and Purves restrict their rights to as much rents as would pay their annualrents, and secure Bedford in the rest of his estate, and in a certain bond produced, for what should be found due ; they would sustain the defence by exception, and ordain count and reckoning.

*Fol. Dic. v. I. p. 594. Stair, v. I. p. 101.*

No 2. 1664. July 20. PETRIE against PAUL.

PETRIE pursues a removing against Paul, who *alleged absolvitor*, Because she possessed, by virtue of her infestment. It was *replied*, The infestment was null by exception, as following : upon a contract of marriage, which marriage was dissolved within year and day. It was *duplied*, That the infestment behaved to stand valid, being in recompence of her tocher, until her tocher was repaid.

Which the LORDS found relevant, unless it were alleged, that the tocher was not paid to the husband, but in her own hands, or her debtor's.

*Fol. Dic. v. I. p. 595. Stair, v. I. p. 220.*