

estate in her hand already as will pay her, she can justly demand no more. *2do.* The Parliament of Scotland, by their Act, can determine the interest of all Scotchmen, as to their interest at home or abroad; and, though a stranger pretending right, as representing the Earl, could not be ruled by an Act of Scotland, yet Scotsmen having estates in Scotland must submit thereto: And there is none pretends right to the Earl's estate abroad but the Earl's daughters and their husbands, who all reside and have estates in Scotland. *3tio.* Compensation extinguishes the mutual obligation, which is compensible *ipso jure*, and may be proponed by those who have no right to the sum with which they would compensate, nor can discharge the same: but the sentence of a judge, founded upon law, will declare both debts extinct by obligations; which is equivalent to a discharge: for instance, if an heir be pursued for a sum due by a defunct, he may propone compensation upon a liquid sum due to the defunct by the same party: and it will not be a good answer, that the debt due to the defunct was not moveable, and so belonged not to his heir, but executor; and therefore the heir cannot discharge the same, but the executor: yet the compensation would hold good, that the creditor having, in his own hand, a liquid debt due by the same debtor, both are extinct from the time of their concurrence; and neither can be demanded from either party, or any representing them. *4to.* Debts which have *paratam executionem* by decret, cannot be suspended but by compensations, unless instantly verified: but the Countess hath no decret, but is pursuing an action for affecting the estate of her husband; in which action, a time ought to be granted for liquidating her intromission, which, becoming liquid before sentence, would become sufficient, though it were a formal compensation, as it is only an action to affect the estate, whereof she has as much in her hand as will satisfy what she doth demand.

The Lords sustained the Countess's bond of provision since the death of her husband; and found, That the Earl's estate, conveyed to his oye, was with the burden of it and his other debts: and found, That Edward had interest, by the Act of Parliament, to propone compensation; and so granted a term and commission to prove the Countess's intromission, and to liquidate the same.

*Vol. II, Page 446.*

1676. *July 13.* The EARL of MARISCHAL *against* His VASSALS.

THE Earl of Marischal pursues reduction and improbation against his vassals.

It was ALLEGED for one of them, That he produced charter and seisine from the pursuer's predecessor to the defender's predecessor; which, therefore, excludeth him from reduction or improbation of the defender's rights, unless he first improve this right produced.

The PURSUER ANSWERED, *Non relevat*, unless the defender produce a progress of infeftments from his predecessor to himself; seeing the pursuer has good interest to reduce or improve any right by progress, whereby he may have the casualty of the superiority, if they were removed.

The Lords found, That the charter and seisine of the vassal's immediate predecessor were sufficient, albeit the heir-apparent was not infeft, if it were notour that he was immediate heir, unless the infeftment produced were im-

proven; but granted certification against any right of the vassal to the superiority.

But it was not condescended, whether this apparent heir was immediate, or if there intervened any person that was, or might be heir; for certification might have been craved against their infeftments.

*Vol. II, Page 448.*

1676. *July 14.* JEAN LOCKHART and Her HUSBAND *against* JAMES BONNER.

By contract of marriage betwixt umquhile John Bonner and Jean Lockhart, there is contracted, in name of tocher, 2000 merks by Cleghorn, her father, and she assigns a bond of 6000 merks granted to her by Allan Lockhart, her uncle. And it is provided, that if the said John Bonner should die without children of that or the former marriage surviving, that 4000 merks shall revert and return, and should be forthcoming to the said Jean Lockhart. Whereupon she pursues James Bonner, as representing the said John, his brother, for payment of the 4000 merks.

The defender ALLEGED, Absolvitor; because his brother was not liable to pay 4000 merks, but that the same should revert and return; which, therefore, could not oblige him, unless he had received the sums: which he denies.

It was ANSWERED for the pursuers, That all provisions in favours of wives are effectual, though the tocher be not paid; for the wife, being *sub potestate viri*, and not obliging to pay any tocher, the failing thereof cannot make her liferent fail, as *causa data non secuta*; because the marriage is the cause of the wife's provision.

It was REPLIED for the defender, That, though the allegiance may hold in jointures, yet there is in this contract a large jointure of £100 sterling, which is not quarrelled. But this clause pursued on is not to pay, but is conceived *passivè*, that 4000 merks shall revert and return, and be forthcoming, not expressing by whom: so that the pursuer can only have access against those representing her father and uncle, unless she prove that her husband received the tocher; for he was obliged to do no diligence to recover it; and, although he had, it could be no more than such diligence as was used for himself: so that all he can do is, to assign her 4000 merks of that which is due by her uncle; which he is willing to do; and, though he had received her father's part, he ought to repay no part of it, being less than the husband's half.

It was DUPLIED for the pursuers, That the wife, having a joint interest, and being *sub potestate viri*, the husband was obliged to do such diligence for her as provident men used to do; and, after so long time, when the contractors are dead, it must be presumed that he obtained payment.

The Lords found, That the husband was obliged to do such diligence as provident men used, and that he was liable for 4000 merks, unless he prove that he used diligence, and instruct the reason of not recovering the sum.

The defender then ALLEGED, That he had done diligence against Allan Lockhart, the uncle.

Which the Lords sustained relevant to be proven as to Allan's sum; but, seeing no diligence was alleged against Cleghorn, they decerned the defender liable for the half thereof.

*Vol. II, Page 449.*