

1676. July 25.

WRIGHT *against* SHEILL.

No 102.
Compensation not receiveable against a decree in absence, unless where made null and turned into a libel.

WILLIAM WRIGHT, as assignee by John Sheill in Carlourie, to several bonds addebted to John Sheill in Leith, obtained decret before the Sheriff of Edinburgh in *anno* 1662, against George Sheill, brother and heir to John Sheill, wherein he appriseth certain tenements in Leith, and now pursues for mails and duties thereof. The defender *alleged*, That he had raised reduction of the Sheriff's decret upon compensation, by a debt due by John Sheill in Carlourie, the pursuer's cedent, to John Sheill in Leith, and takes the same away by compensation, so that the ground of the apprising being extinct, it falls in consequence; likeas, shortly after the apprising decret is obtained, establishing the debt both *active* and *passive*, whereupon compensation is founded, albeit the very concurrence of the two sums *ab initio inter easdem personas* was sufficient for compensation when proponed. The pursuer *answered*, That the allegiance of compensation ought to be repelled, because it was not proponed *ante sententiam*, conform to the act of Parliament 1592, cap. 143. It was *replied*, That that act was only to be understood of decreets *in foro*, against which, by the course of process then allowed, competent and omitted was not relevant against suspensions or reductions; but that whatever was omitted in the first instance, might have been proponed in the second by suspension or reduction, which the foresaid act only obviates as to compensation, that it shall not be received in the second instance, which doth import that compensation is only excluded against a decret *in foro*, unless it be proponed before sentence; but the decret in question is a decret in absence, and accordingly *de consuetudine* compensation hath been ordinarily admitted by way of suspension; and if it were otherways, great inconveniencies would arise, for parties might obtain decreets, stolen through clandestinely by citations at dwelling-houses, carrying away the copies, or against parties out of the country; and in this case, the defender offers to depone upon his oath, that he never knew of the citation whereupon this decret proceeded. The pursuer *duplied*, That he opponed the clear act of Parliament relating to all Judges within the realm, who are to admit compensation by way of exception, but the same is never to be admitted, after the decret is given, by suspension or reduction, nor is there any ground to limit the decret *in foro*, upon pretence of competent and omitted, whereof there is no mention in the statute; and if the decret itself had been *in foro*, nothing then competent was receiveable afterward by suspension or reduction, by law or custom ancient or recent; but when the defender was absent in the principal decret, if he compear in the second instance by suspension, and insisted on any reason, one or more, though he succumbed therein, yet he might raise a suspension on other reasons, and the decret of suspension *in foro* did not exclude the same in subsequent suspensions, as competent and omitted in the decret of suspension *in foro*; but if the principal decret was *in foro*, competent

and omitted was always sufficient against any suspension or reduction thereof; and therefore the common course was to be absent in the first decret, and to suspend as oft as particular reasons could be founded on, to the great vexation of the people, and delay of justice, which therefore is well remedied by the late act of regulation, declaring, That whatsoever was competent and omitted against any decret principal, or decret of suspension *in foro*, shall not be received thereafter; and therefore the excluding of compensation *post sententiam* by this statute, is chiefly in relation to decreets in absence, for if the decret was *in foro*, the common exception of competent and omitted, which was always in vigour against the first decret, would have excluded compensation, yea payment itself, and so the statute was needless, unless it had been to exclude compensation against decreets in absence.

THE LORDS found that compensation was not receivable against decreets in absence by the foresaid statute, unless the decret were made null, and turned into a libel by improbation of the executions, or by fraudulent and clandestine taking away of the executions, or any other nullity.

Fol. Dic. v. 1. p. 165. Stair, v. 2. p. 456.

1678. February 5.

LOGAN *against* COURTS.

COURTS having obtained decret before the Magistrates of Aberdeen against Logan, he suspends on compensation, *alleging*, though the decret bears compensation, it bears no mandate, and that the suspender was out of the country at that time.

THE LORDS found, That the compensation was not relevant *post sententiam*, though the decret had been in absence, unless the decret were annulled by improbation of the executions, or otherwise, in respect the act of Parliament anent compensation allows the same only *ante sententiam*, and not thereafter.

Fol. Dic. v. 1. p. 165. Stair, v. 2. p. 608.

1683. January.

NICOLAS BARCLAY *against* ALEXANDER CLERK.

A party, against whom a decret in absence in his minority, was recovered by an assignee, raised suspension and reduction upon a reason of compensation on a debt due by the cedent; it was *alleged*, That, by act of Parliament, compensation is not receivable after sentence, and the act making no exception of minors, the suspender's omission to propone compensation *debito tempore*, must cut him off from the benefit thereof; as the short prescriptions, where law doth not expressly except minors, such as possessory judgements, creditors not pursuing within three years after the debtor's death, run against minors.

VOL. VII.

15 L

No 102.

No 103.

Compensation not receivable against the decret of an inferior court.

No 104.

Compensation allowed even after decree, when the charger is *vergens ad inopiam*.