

No 118. man, who, during his tack, if he had built never so much, it would have accresced to the heritor, without remedy or recovery of the expenses.

THE LORDS found no allowance should be granted.

In this same process, it was *alleged*, The defender ought to have compensation for such debts as were owing to him by the said Andrew Brysson, setter of the houses to him. It was *answered*, That the pursuer being heritor and master, ought to have his duty fully paid to him, without respect to any debt owing to the defender by Brysson. It was *replied*, That the tacksman being the setter of the houses to the defender, he was the defender's master, to whom, if the defender had made formal payment, he would have been assoilzied; now, compensation is payment by the law, or the equivalent.

THE LORDS allowed compensation, the debt being proven.

Fol. Dic. v. 1. p. 166. Gilmour, No 97. p. 74.

No 119.

Compensation pro-
posed by a debtor
against an assignee
was found not relevant
upon a debt of the
cedent's, purchased
by the debtor before
the date of the
assignee's right,
but not intimated
to the cedent until
he was denuded by
the assignee's
intimation to the
debtor.

1665. December 12.

FERGUSON *against* MORE.

IN the case, Ferguson *contra* More, the LORDS found, That compensation should not be granted against an assignee upon a debt of the cedent assigned to the suspender; unless intimation had been made to the cedent, before the charger's intimation of the assignation made to him by the cedent. See No 116. p. 2650.

Dirleton, No 3. p. 4.

1676. January 18.

CROKAT *against* RAMSAY.

No 120.

Compensation found
relevant against a
gratuitous assignee,
tho' the liquidation
was after intimation.

DONALD CROKAT, as assignee by John Donaldson to a bond of L. 400 granted to him by David Ramsay, charges thereon. He suspends on this reason, that the cedent was debtor to him for four years aliment. It was *answered*, *Non relevat*, unless the aliment had been liquidate before intimation of the charger's assignation, but it is now only liquidate by a subsequent decret, and is not receivable against the assignee. It was *replied* for the suspender, That whatever might be pretended of a subsequent liquidation against an assignee for causes onerous, yet this assignation is not for causes onerous, and the cedent, Donaldson, being good-brother to this assignee, the narrative of the assignation will not prove the cause onerous, unless it be proven *aliunde*, and the benefit of assignees their being in better case than the cedent, though he can only pursue as his procurator, is introduced by custom in favours of commerce, where the cause is onerous, but where the assignation is gratuitous, the assignee is in no better case than the cedent, and the cedent's oath will prove against him, and so must a posterior liquidation. *2do*, The assignation being fraudulent betwixt confident persons, to exclude this liquidation, the cedent having nothing, and the assignee knowing of the aliment before the assignation, the same ought to be received against him. *3tio*, The liquidation is only to modify the *quota* due for

the aliment, and is not an alteration of the species, as when victual is turned into money, and therefore is receivable against the assignee.

No 120.

THE LORDS proceeded only upon the first reason, and found, that if the assignation was gratuitous, compensation is competent against the assignee, though the liquidation was posterior to the intimation, and that the narrative of this assignation betwixt good-brothers, did not prove the cause onerous. See PROOF.

Fol. Dic. v. 1. p. 167. Stair, v. 2. p. 400.

1676. July 4.

ROLLO against BROWNLEY.

JOHN ROLLO as assignee by John Nicol to a bond granted by Alexander Brownley tailor, to Helen Craig, and now belonging to John Nicol her husband *jure mariti*, charges Brownley for payment, and he having presented a bill of suspension, the cause was ordained to be discussed upon the bill. It was *alleged* for Brownley the suspender, *imo*, That the letters ought to be suspended as to the principal sum charged for, because the bond bears annualrent, and so is heritable *quoad fiscum et relictam*, which by the act of Parliament 1661, is extended to the interest of husbands, as well as of relicts, by the Lords' decisions, finding that wives, as they get no benefit by that act, which makes sums bearing annualrent without a clause of infeftment to be so far moveable, that they fall within the executry, which before they did not, yet as to the fisk and relict, they are excluded from the benefit of that act, and as to them such sums remain heritable as before; and therefore, as they have no benefit, they have no detriment, so that sums bearing annualrent fall not under the communion of moveable goods with the husband, or under his *jus mariti*.

No 121.
Found in conformity with
No 117. p.
2651. and No
119. p. 2652.

Which the LORDS sustained, and found that the assignee could have only right to the annualrents. See HUSBAND and WIFE.

As to which the suspender *alleged* compensation, because he had obtained assignation to a debt due by Nicol, the charger's cedent, to Alexander Dalglish. The charger *answered, Non relevat*, unless the suspender's assignation had been intimate before the intimation of the charger's assignation.

Which the LORDS did also sustain.

Whereupon the suspender *alleged*, That his intimation, and the charger's intimation, though they be of one day, yet the suspender's intimation bears two of the clock in the afternoon, and the charger's intimation bears no hour, and so can instruct no hour prior to the last hour of the day.

Which the LORDS sustained, but allowed the parties to be heard, if the notary should give a new intimation of the charger's assignation, expressing a prior hour, or should instruct the same by the witnesses insert, whether the same was receivable after production of this assignation.

Fol. Dic. v. 1. p. 166. Stair, v. 2. p. 436.

* * * See No 54. p. 2603. which seems to be the same case by Dirleton, but without names.