

No 54. said, being thereby creditor to the cedent, he had a ground of compensation against the cedent, and consequently against the charger as assignee: And an assignation, without intimation, is a sufficient right and ground of compensation; unless there were another assignee to the same sum, competing upon that ground, that he had a better right by an assignation intimate.

THE LORDS notwithstanding did not allow compensation, and found the letters orderly proceeded. See Rollo against Brownley, *infra*, *b. t.*

Reporter, *Newbyth.*

Clerk, *Hay.*

*Dirleton*, No 366. p. 180.

1678. December 6. CLELAND against LOCKHART and CUNNINGHAM.

No 55.  
Compensation, capable of proof *scripto*, and not dependent on the cedent's oath, found good against an onerous assignee.

JAMES CLELAND, merchant in Edinburgh, as assignee constitute by Sir John Whiteford of Milton, pursues Lockhart of Heids and Cunningham of Middleseats, on the passive titles, for payment of a debt contained in their father's bond. Their defence was, we cannot make payment, because Adam Whiteford, father to Sir John the cedent, and to whom Sir John is heir served and retoured, being debtor to the defender's father in a greater sum, at least in a sum equivalent to the sum now pursued for, *hoc ipso*, that the right of the foresaid bond now pursued on was once in the person of the said Sir John, there was thereby *mutua debiti et crediti contributio*, and the bond pursued on became extinct by compensation, which exists *ipso jure*; Sir John, as heir to his father Adam, being *ipso momento* debtor to them in the equivalent sum in manner foresaid. *Replied*, Cleland the pursuer being an assignee for onerous causes, though compensation could be proponed against Sir John his cedent, it cannot meet the pursuer his assignee, since the defenders did no diligence to put him in *mala fide* to take that assignation. *2do*, The compensation against Sir John is not liquid, nor is it instructed that he represents his father as heir. *Duplied* to the first, Whatever is competent against the cedent, is also competent against the assignee, where the ground of the compensation is offered to be otherwise proven than by the cedent's oath, but here the compensation is offered to be proven *scripto*. To the second, The compensation is most liquid, being a clear bond of Adam's; and he offered to prove *scripto*, by the extract of the retour, that Sir John Whiteford is heir to the said Adam his father, and the debtor. The Lord Newbyth sustained the defence and duply to elide the summons and reply. It might be doubted, if this would be a good reply against the foresaid defence that compensation *ipso jure tollit et peremit*, that these defenders, who were creditors to Adam Whiteford, were likewise intromitting tutors or curators to Sir John; and so it must be presumed, that they paid and satisfied themselves out of the first and readiest of their intromissions; or, if we must positively offer to prove that they paid themselves of this sum, or that it was allowed to them in their compts.

*Fol. Dic. v. 3. p. 148. Fountainball, v. 1. p. 27.*