

No 104.

THE LORDS, in respect the cedent was now absolutely bankrupt, sustained the reason of compensation, proponed after sentence by the minor. *See* The case following.

*Fol. Dic. v. 1. p. 165. Harscase, (COMPENSATION.) No 255. p. 60.*

No 105.

A party in a suspension of a decree *in foro*, proponed compensation, which had emerged after the decree; so that here it was not industriously omitted to be proponed *prima instantia, animo protelandi litem*. The Lords, nevertheless, found the statute general, and repelled the compensation.

1697. July 9. JOHN GORDON elder of Fechil *against* CAPTAIN MELVIL.

IN a suspension given in by John Gordon elder of Fechil, against Captain Melvil, of a decret *in foro*; one of the reasons was founded on a compensation emergent after the decret; it was acknowledged that any ground of debt standing in his person before the decret could not be obruded by way of compensation, because it was competent and omitted, and presumed to have been omitted purposely to procure a new delay by suspension; but this was a debt Fechil had purchased an assignation to after the decret, and was not fraudulently omitted and kept up. *Answered*. The act of Parliament discharging compensations to be received in the second instance, makes no distinction when it was acquired; and the buying in of debts is no very favourable thing; and the LORDS have found even compensation unreceivable in the second instance, though the decret was in absence, Wright *contra* Sheill, No 102. p. 2640. THE LORDS repelled the compensation, reserving his action thereon against Melvil, as accords; whereby Fechil was at this disadvantage, that he was forced to pay, and Melvil was *vergens ad inopiam*, and so had little hopes of recovering what he now claimed to compensate him with.

*Fol. Dic. v. 1. p. 165. Fountainball, v. 1. p. 784.*

1707. March 20.

HUGH CORBET of Hardgray *against* WILLIAM HAMILTON of Wishaw.

No 106.

Compensation being proponed after a decree in absence, the decree being against the party among many others, the Lords found, that a decree in absence against debtors excludes not compensation.

HARDGRAY, as assignee to a decret of the Commissaries of Glasgow, against Wishaw for 400 merks, contained in a ticket granted by him to the deceast William Anderson, Provost of Glasgow, pursued Wishaw for payment.

*Alleged* for the defender; Absolvitor, because, *imo*, The decret was in absence, and intrinsically null for being pronounced in vacation time without a dispensation, by a commissary who is not competent to judge in actions above L. 40 Scots, except where the libel is referred to oath, and the ticket was prescribed. *2do*, Compensation upon a bill drawn by Patrick Murray, clerk to the Fishery company upon Provost Anderson for 1200 merks payable to Wishaw, which the Provost, by a letter under his hand to Wishaw, acknowledged and promised to pay.

*Replied* for the pursuer; Compensation upon the bill and letters cannot be sustained, because both being holograph were prescribed by the elapsing of 20