

1683. November 22.

JOHN SETON against ———.

No 23.

In a pursuit on a liquid bond, compensation was pleaded on a charter party betwixt the pursuer and the defender's husband. The Lords decerned for payment of the bond, but superseded extract for 3 or 4 months, that the defender might have an opportunity to liquidate her ground of compensation, by proving, that her husband had performed the voyage.

JOHN SETON in Aberdeen, charges the relict of ———, on a clear bond; *alleged*, her husband, by a charter party with the said John, was creditor to him for the freight, because he had plied the voyages. *Answered*, This was not *compensatio de liquido in liquidum*, because his plying the voyages abode probation; which answer, the LORDS having sustained, they offered to prove the plying the voyages by the charger's oath, which is an instant verification; and the act being thus extracted, yet the LORDS on a new bill, allowed it to be proven *prout de jure*; seeing *quod mox potest liquidari habetur pro jam liquido*; they only decerned, superseding extract for three or four months, that if the debt be liquidate betwixt and that time, then the compensation was to be received; which was reversing the act, stopping a liquid debt upon an illiquid compensation; and allowing a term to liquidate it, which is *agere id indirecte quod directo fieri prohibetur*; and though it be materially just, yet it is a great relaxation of our antient form. See the contrary decided in Durie, 1st December 1626, Balbegno, No 20. p. 2564.; and 6th December 1622, Campbell, No 21. p. 2565.

Fol. Dic. v. 1. p. 160. Fountainball, v. 1. p. 244.

1686. January 14.

JAMES BROWN against Mr JOHN ELIES.

No 24.

Compensation being proponed against a charge of a liquid debt, on the pursuer's father's intromission with a sum of money belonging to the suspender, the Lords allowed the suspender 5 weeks to prove his ground of compensation.

MR JOHN being charged on a clear liquid bond granted by him to umquhile William Brown, and assigned by him to his son James; he craved compensation, because William Brown the cedent was debtor to him, in so far as Elieston entrusted his name in an assignation of a debt owing him by Gordon of Buckie, and Macintosh of Borlam, and which trust did appear from his own compt-books, and an oath he had given in another process; and it was offered to be proven, that by virtue of this trust he had uplifted and intromitted with sums of money equivalent to this charged for. *Answered*, That compensations by the 143d act, Parl. 1592, must be *de liquido in liquidum*, and instantly verified, which this was not; and therefore the letters behoved to be found orderly proceeded, and his compensation reserved to him as accords. *Replied*, That brocard of the instant verification of compensations is not to be understood *in rigore Judaico*, but *cum aliquo temperamento*; lawyers laying down this for a principle, that *quod statim vel intra breve tempus illiquidari potest habetur pro jam liquido*; as *cigendus pro cincto*; and *dies inchoatus pro completo in favorabilibus*; and that *Menochius, lib. 2. centur. 1. casu 14.* debating how long time ought to be granted for liquidating a debt whereon compensation is craved, tells, that *Bartolus ad l. 46. § 4. D. de jure fisci*, allows two months; but he places it *in arbitrio judicis*; and the Lords, in the case of Seton, No 23. *supra*, allowed three months; and though this pursuer be an assignee, yet the compensation must meet him, whe-

ther the assignation to his son be gratuitous, or onerous, for relief of cautionaries; it being undoubted law, that *exceptio quæ obstat cedenti obstat et cessionario*; the reason whereof is, *quia exceptio compensationis non cohæret personæ sed rei*, and so extinguishes the debt *pro tanto, et transit etiam in singulares successores*. THE LORDS, on this debate being reported, would not tie Elieston to prove instantly his ground of compensation, though it was his reason of suspension; but being *in facto*, allowed him till the first of February to liquidate the same. And on a bill they prorogated it to the 20th of March.

No 24.

November 20.—Mr John Elies, in his cause with Brown, mentioned 14th January 1686, gets a new diligence against M'Intosh of Borlam, to produce the writs for proving the compensation, though the day was elapsed, and that to the 10th of January; because lying in the Highlands, he did not obtemper the laws. I think it were a just certification to force witnesses to compare, and discover the truth, (which is a duty introduced in societies *jure gentium*) and for parties to produce writs; that if they do not, they shall be liable for the debt, and damages to the party.

Fol. Dic. v. 1. p. 160. Fountainball, v. 1. p. 391. & 429.

1697. December 8.

MUIR and MULLIKEN against KENNEDY.

KENNEDY of Kilkennie being pursued by Muir and Mulliken for a sum contained in his father's bond; this exception was proponed, that he being minor, and only the heir of a cautioner, he offered to prove payment made by the principal or cautioners, and a term is assigned him to that effect; now he craves compensation on an aliment, that Muir staid several years in his father's house. *Answered*, This is not liquid, as all compensations ought to be. *Replied*, By the 143d act 1592, compensations verified before giving of decret are allowed; *ita est*, he will liquidate this compensation before sentence; neither does this delay, because I have got a term however to prove payment; and Stair, I. 18. of liberation from obligations, is clear, that if a compensation be instructed, though by witnesses, before the other probation can be closed, that it ought to be received. THE LORDS, considering the favour of this case, being a minor and the heir of a cautioner, and the pursuer delayed however, they gave him a term to prove his compensations, seeing *quod statim potest liquidari habetur pro jam liquido*; yea, the LORDS have allowed this without these favourable circumstances.

Fol. Dic. v. 1. p. 161. Fountainball, v. 1. p. 800.

No 25.

A minor who was the heir of a cautioner, being pursued, and getting a day to prove payment, and then also proponing compensation of a sum not liquidated, the Lords in this favourable case, and because the pursuer was delayed however, allowed the minor a term to prove his compensation.