

No 10.
tained, tho'
the decree
on which it
depended,
pronounced
by the En-
glish Judges,
was under
review.

ed by progress to Mr Mark Ker of Moriston; upon this comprising, Carden uses an order of redemption against Mr Mark, and pursues a declarator.—It was *alleged*, no declarator, because no consignment was really made, but simulately by money taken up again, and now at last the money should be consigned in the clerk's hands to be given up by the defender.—It was *answered*, The money was truly consigned, and whether taken up or not, it was nothing to the defender, seeing the pursuer must be answerable for it; and now he offers the equivalent, viz. to compensate that money with a greater sum *pro tanto* resting to the pursuer by virtue of a right in his person, from the children of Wolmet, who have a sentence standing at their instance, against the defender for a greater sum.—It was *replied*, That the foresaid sentence could be no ground of compensation, because it lyes under question and review, as pronounced by the English Judges unjustly.

THE LORDS, before answer, ordained the defender to repeat his reasons of review against the reply of compensation or retention. *In præsentia*.

Gilmour, No 56. p. 41.

1663. January 8.

COLONEL JOHN FULLERTON *against* VISCOUNT OF KINGSTON.

No 11.
An article of
compensation
was rejected
as illiquid,
being found-
ed upon a
process at the
instance of an
executor hav-
ing only a li-
cence to pur-
sue, without
confirmation,
and no sen-
tence reco-
vered, nor so
much as proof
led.

COLONEL JOHN FULLERTON having charged the Viscount of Kingston upon a bond of borrowed money, he suspends, on these reasons, That the Colonel granted assignation, to umquhile Sir Alexander Douglas, to a sum due by Sir William Thomson; and, notwithstanding of the assignation, he uplifted the sum himself, at least his brother by his order; whereupon the Lady Kingston, daughter and heir to the said Sir Alexander, having license to pursue, hath pursued the Colonel upon the warrandice for repayment; which action being seen and returned, and ready to be discust, the suspender craves compensation thereon. The charger *answered*, That the reason of compensation is not relevant, because it is not liquid, the foresaid sum not being confirmed by any executor, nor sentence thereupon; neither can it be instantly verified, because it must abide probation, that the Colonel, or his brother by his order, uplifted the sum, and there being only a license to pursue, the debt cannot be established till a confirmation. *2dly*, Albeit the compensation were receivable, yet the reason ought to be repelled; because, that any such assignation was granted, it was in trust, to the Colonel's own behoof, as is instructed by a missive letter to the charger, produced. It was *answered* for the suspender, That the answers founded upon the missive letter ought to be repelled, because it was null, neither being holograph nor having witnesses. *2dly*, It is most suspect, being written upon old blacked paper. The charger *answered*, That letters amongst merchants, though not holograph, are sustained, and ought much more among soldiers,

especially between the charger and Sir Alexander, who then was his Lieutenant Colonel; which is the more clear, that there was never a question of it these 20 years, neither was it contained in the inventory of Sir Alexander's papers, though there were insert papers of less moment, but that it was gotten from one White for L. 40 or L. 50.

THE LORDS repelled the compensation as not being liquid, and found the letters orderly proceeded, superceding execution till Whitsunday 1663; but, upon the other process against the charger, the LORDS considering the matter was old and dubious, before answer, they ordained witnesses to be examined *hinc inde*, upon all adminicles that could be adduced for or against the trust.

Fol. Dtc. v. 1. p. 160. Stair, v. 1. p. 152.

1664. June 17. LAIRDS OF TULLIALLAN AND CONDIE against CRAWFORD.

THE Lairds of Tulliallan and Condie, as having right from him, pursue declarator of the expiration of an apprising, led at the instance of ——— Crawford, to which Margaret Crawford his daughter has now right, and condescend, that the sum appraised for was satisfied within the legal by compensation, in so far as Tulliallan had right to a contract, whereby Crawford, the appriser, was obliged to deliver so many chalders of coal weekly; or, in case of failzie, four pounds for each chalder. It was *alleged* for the defender, That this article of compensation ought to be repelled, *1st*, Because the said contract is prescribed; *2dly*, The apprising proceeded upon a decret of count and reckoning, wherein an allegiance, being founded upon the same contract, was past from *pro loco et tempore*, and so can never now be made use of to take away that decret, much less the apprising, against a singular successor, who seeing the same past, *in tuto*, to take right without the hazard thereof; *3dly*, The defender cannot be obliged, after forty or fifty years time, to prove the delivery of an yearly duty of coal; *4thly*, The compensation is not *de liquido in liquidum*, because the one is a personal contract, the other is an apprising and infestment; the one hath not a liquid price constitute, but bears expressly, such a sum in case of failzie, and not as the price, which being much more than the ordinary price then, is but a personal failzie, which cannot be liquidate till declarator and modification of a Judge. The pursuer *answered*, That he was evicting the rigour of an apprising *in causa maxime favorabili*. And as to the *first* allegiance anent the prescription, offers to prove interruption by arrestments, &c. To the *second*, not relevant; according to the custom, before the years 1649, competent and omitted, was not relevant against decreets of suspension; but suspenders might either omit, or pass from their reasons, and suspend upon them again, which could not but be as well effectual against the assignee as the cedent. As to the *third*, this article being instructed by writ, no presumption, nor less time than prescription, could take it way: To the which, the coals having a liquid sum in lieu thereof,

No 11.

No 12.

A debtor being obliged to deliver a certain quantity of coals weekly, or, in case of failzie, four pounds for each chalder; this sum was not found liquid, to be the foundation of compensation, not being constituted expressly as a price, but being a personal failzie beyond the ordinary price, which could not be liquidated till declarator and modification of a Judge.