

payment and satisfaction of Ruscoe's principal sum, at each term as they fell due by the tack, to defalk *pro tanto*; for where one intromits with a *corpus* or a fungible, the liquidation *ex post facto* must retract and draw back to the time it fell due, especially if there was a *mora* in paying it *debito tempore*; for then *obligatio crescit ratione moræ*. Answered, The value can only be imputed from the time of the liquidation of the price of the butter and widders, conform to the probation, and the Lords' interlocutor thereon; for money can never be compensated with a *species* till it be estimate, and so converted into money; and it was so found, 4th December 1675, Watson *contra* Cunningham, No 144. p. 2684. And Stair, *tit. LIBERATION FROM OBLIGATIONS*, is express, that farms and services can only compensate clear bonds from the date of their liquidation, and no sooner, unless it were money-rent. Put the case, a master is owing his tenant 1,000 merks by bond, the tenant is again debtor to him in a year's rent, (of ten chalders of victual), the tenant requires his money, will any lawyer say, the master will get immediate compensation to stop execution on his bond because his tenant owes him? For a *corpus* and a liquid sum are not compensable, being of different kinds; and therefore the master must first obtain the sentence of a Judge, liquidating the victual to a certain price, and then only, and not till then, will the compensation meet. THE LORDS found, the widders and butter could only compensate and impute from the time of the liquidation, and not yearly, when they fell due. This imputation makes a great difference in the way of counting; for, as Brughton pleaded, it would have extinguished every year so much of the principal *sors*; but by this interlocutor, it only diminishes from the time of advising the liquidation; whereas in 21 years time (which was the currency of the tack), an annual imputation would have absorbed much of the sum, which an application now from this date leaves yet entire.

No 148.

Fountainhall, v. 2. p. 676.

1729. *June.* MARQUIS of Clidsdale *against* COCHRAN of Ochiltree.

No 149.

A debtor, who stood also bound for his creditor in greater sums, refused to pay, unless he were relieved of his whole engagements; THE LORDS found the defender liable to apply the sum wherein he was debtor for payment of the debts for which he stood bound, but gave him his option to pay one or other, as he thought proper, so far as the sum in question would extend, and that at the sight of the Lord Ordinary. See APPENDIX.

Fol. Dic. v. 1. p. 168.

1733. *January.* GRAHAM *against* DUKE of MONTROSE.

No 150.

A nobleman's commissioners having compted with his factor, struck a balance upon the whole save as to six articles, which were kept open to be adjusted by the con-

No 150. stituent himself; and accordingly, a docquet is adjected to the accompt, with a reservation of these articles, which were not liquidated till about ten years thereafter; the factor now insisting for payment of a bond due to him by his constituent, it was found, that the fitted accompt, bearing the foresaid reservation, was not a liquid ground of debt upon which compensation could be sustained; seeing reserved articles, some of which were sustained, fell to have entered into that accompt to diminish the balance, and therefore sustained compensation from the date of the total clearance only. See APPENDIX.

Fol. Dic. v. 1. p. 168

1753. July 31.

PATRICK HALDANE, ESQ. *against* ARCHIBALD Duke of Douglas.

No 151.

A debtor having lent money to his creditor on bond, and continued to pay the annualrents of debts which he owed without deducting the interest of the sum he had lent, found, notwithstanding, entitled to plead compensation upon that sum, in a competition with creditors.

THE Duke of Douglas was debtor to his sister Lady Jean Douglas, in the sum of 20,000 merks Scots, due by a bond of provision bearing annualrent, granted to Lady Jean by James Marquis of Douglas, her father.

The Duke, in March 1718, gave Lady Jean a further provision, by a bond for 30,000 merks Scots bearing annualrent, but revocable at pleasure.

In 1728 and 1731, Lady Jean borrowed from the Duke two sums, amounting to L. 750 Sterling, for which she granted bonds in the usual form, bearing annualrent and penalty.

Notwithstanding of these bonds, the Duke continued to pay to Lady Jean the full annualrent of the said 20,000 and 30,000 merks Scots, and an additional annuity of L. 161 Sterling, provided to her, as marked in the case betwixt Mr Haldane and the Duke, 15th February last, (*voce Quod Potuit non Fecit.*) to Whitsunday 1749, when he stopped payment.

Lady Jean being debtor to Mr Haldane in the sum of L. 500 Sterling, she assigned him to as much of the 20,000 merks bond as would pay that sum and annualrents thereof; and Mr Haldane brought an action against the Duke for payment.

Pleaded for the Duke; That Lady Jean was debtor to him in the sum of L. 750 Sterling and annualrents thereof since 1731, which extinguished the said bond of 20,000 merks, and made a balance due by Lady Jean to the Duke.

Answered for Mr Haldane; That, both by the civil and Scots law, compensation operates *ipso jure* from the date of the concurrence, at whatever time it be proponed; and therefore Lady Jean being first creditor to the Duke in 20,000 merks Scots, and in the 1731, becoming debtor to him in L. 750 Sterling, she from that period remained creditor to him only in L. 361 : 2 : 2 $\frac{2}{3}$ Sterling, with the annualrent thereof. That such was the effect of compensation by the civil law, is certain from *L. 21. ff. de compensationibus*; and *L. 4. cod. eod.* which precisely determines the present question. The words are, 'Si constat pecuni- am invicem deberi, ipso jure pro soluto compensationem haberi oportet, ex