

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.

No 12. the article is liquid ; and, as payment within the legal will annul an apprising, so will compensation, which is equiparate in law, though the case would not be alike in a wadset against a singular successor.—THE LORDS found the defences against this article relevant, viz. that the article was not liquid by a sum, constitute expressly for a price ; and that it being *alleged*, that, in the decret, this allegiance was past from, and an express reservation that it might be made use of against any other just debt than that which was in the decret, whereupon the apprising proceeded.—THE LORDS had also consideration, that the legal of the apprising was not yet expired.

*Fol. Dic. v. 1. p. 160. Stair, v. 1. p. 202.*

No 13.  
Compensation on a claim of relief, was rejected.

1665. *January.* CUNNINGHAM *against* DENNISTON.

JAMES CUNNINGHAM charges Henry Denniston for payment of a certain sum due to him by bond, who suspends upon this reason, That the said James being curator to the children of the deceased William Wilson, the suspender stands cautioner for him in the act of curatory ; and true it is, that by the charger's mal-administration the suspender is under hazard, the children having intended an action, at least being ready to intent an action against him, for removing him as suspect ; and therefore the suspender ought to have retention.—It was *answered*, That the suspender is not distressed ; and there is no such action intended, neither is there any reason for it ; and the money charged for, was borrowed after the suspender became cautioner, and bound himself to repay it faithfully.

THE LORDS found the letters orderly proceeded, reserving to the suspender action as accords in the law against the charger, for finding new caution, or for removing him as suspect.

*Gilmour, No 122. p. 90.*

No 14.  
Liquidation by witnesses rejected.

1676. *February 9.* A. *against* B.

IN a suspension, a reason of reduction is libelled, viz. that the charger was debtor to the suspender upon account of a freight ; and it was offered to be proven by the charger's oath, that he was so debtor, and by witnesses what the freight extended to.

THE LORDS found the letters orderly proceeded ; and that compensation was *de liquido in liquidum*, and not *de liquidando* by witnesses.

*Dirleton, No 326. p. 157.*