

No 42.

reduction, by the act of Parliament 1584, cap 135, yet that cannot be extended to the dishabilitation of their children, so that the Parliament doing nothing prejudicial to any party's right, but restoring John Stewart to his just right, *eo ipso*, the Earl of Hume's right fell in consequence, as founded upon John Stewart's dishabilitation, and with it the defender's tack.

THE LORDS repelled the defence upon the tack, in respect of the reply, for albeit the act of Parliament 1633 be much larger than the act *salvo* 1621, so that thereby the LORDS might have cognosced upon John Stewart's rehabilitation as without citation, if it had wronged any other person's right; but finding that it was an act of justice, wronging no person's right, they found the same relevant.

Fol. Dic. v. 2. p. 350. Stair, v. 1. p. 276.

1665. June 24.

IRVINE against STRACHAN.

No 43.
Compensation liquidated against the principal debtor sustained against the cautioner, whose right was accessory, altho' not called in the decreet of liquidation.

ALEXANDER STRACHAN, as assignee by Patrick Gordon, charges John Irvine to make payment of a bond of 500 merks, which being suspended on this reason, that the cedent was debtor to the suspender in a greater sum, being obliged for the growth of certain lands of the crop 1633, and certain bolls of meal, as the duty thereof; the charger *answered*, That this was not liquidated against him, nor against his cedent, before his assignation. The suspender *answered*, That it was liquidated before in so far as there was a decreet of liquidation obtained against the principal party for whom the cedent was cautioner in the contract, which must be sufficient against the cautioner, albeit he was not called, because his obligation was but accessory; unless he could instruct collusion; and this decreet of liquidation proceeds upon probation of witnesses.

THE LORDS sustained the compensation, and found the liquidation sufficient, being against the cautioner, though he was not called against this assignee, seeing the decreet was before the assignation.

Fol. Dic. v. 2. p. 351. Stair, v. 1. p. 287.

. Newbyth reports this case:

IN a pursuit at Alexander Strachan's instance against John Irvine, for payment of a debt, there being an exception of compensation proponed, whereof the ground was payment of bolls of victual; and it being *alleged*, that the bolls not being liquidated, there could be no compensation, albeit there was no decreet of liquidation obtained, in regard the ground thereof, viz. the payment of bolls, was existant before; and found, that the liquidation might be proved at any time, but, in this case, it was a decreet of liquidation already which made it much more clear.

Newbyth, MS. p. 29.