

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 Kilkenzie 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.