

1708. June 11.

BUNDIE *against* KENNEDY.

JOHN KENNEDY younger of Collain, grants a note, or ticket, to David Crawford of Drumsuy at London, in May 1706, for L. 35: 11s. Sterling, which Drumsuy indorses for onerous causes to Mr Robert Bundie merchant in London, who pursues Collain for payment. He finds on compensation, that he has a note for the equivalent sum from Drumsuy. *Alleged*, This can never meet the pursuer, a singular successor, whatever it might operate against Drumsuy, if the note were still in his person; for it is of the nature of a bill of exchange, against which compensation cannot be obtruded. *2do*, Collain, by a letter, intreats forbearance, and promises to pay interest, though it bore none; and his giving a note in these terms was a tacit renouncing of any compensation upon private transactions between Drumsuy and him; else it can bear no other construction but a design of defrauding any who took right to his note, which is not to be presumed in a gentleman of honour; and that it may be so renounced, appears by two decisions, 28th June 1672, Murray *contra* Spalding, *voce* VIS ET METUS; and Henderson *contra* Birney, No 2. p. 1653; and we had no compensation in Scotland before the 1592, and so is not *ex natura rei*, but only *vi statuti*; and David Spence's debts would not compensate bank-notes, though they be all made payable to him. *3tio*, In all personal writs, the custom of the place where they are made must regulate their form, either as to constitution or extinction, as is evident from many practices, 11th December 1627, Falconer *contra* Beaty, No 52. p. 4501.; 15th February 1630, Harper *contra* Jaffray, No 3. p. 4431.; 7th March, and 27th July 1633, Gordon *contra* Worley, No 23. p. 4460.; and 28th June 1666, M'Moreland *contra* Melvil, No 14. p. 4447. Now, to subsume, it is notour that by the law of England, no compensation is admitted against notes of this tenor, but they pass currently *de manu in manum*, like bank-notes; else all commerce would be retarded; and this counter-note by Drumsuy to Collain has been a mere contrivance, being only dated the-day before the note pursued on; whereas if honesty had been meant, the first note should have been given up. *Answered* for Collain, He knows no such custom, that compensation cannot be obtruded to such notes, *et qui consuetudinem allegat eam debet probare*; and all he meant by the letter, was to tell Mr Bundie, that Drumsuy would pay him annualrent from the date; but, that he never intended to oblige himself, being *tutus exceptione compensationis*, on the preceding note of Drumsuy, which is an ordinary practice; and the reason of taking it was, he had not that ticket upon him to give it up; and the law of Scotland must regulate this case being between two Scotsmen, though in England, and compensation can never be excluded. THE LORDS looked upon this as a plain collusion betwixt Collain and Drumsuy, considering the nearness of time betwixt the two notes, and their jumping in the

VOL. XII.

27 T

No 30.

A note being indorsed for an onerous cause; in an action at the instance of the indorsee, the debtor pleaded compensation, he having a note for the like sum from the indorser dated the day before the note pursued for. The Lords looked upon this as a contrivance between the defender and indorser to furnish credit to the latter, and therefore repelled the plea of compensation.

No 30.

sum, with Collain's letter offering annualrent ; and therefore repelled the compensation in this case.<sup>1</sup>

*Fol. Dic. v. 1. p. 333. Fountainball, v. 2. p. 442.*

\*.\* Forbes reports the same case :

IN the action at the instance of Mr Robert Bundie, against Culzean, for payment of L. 35 : 11s. Sterling, contained in a note granted by the defender to David Crawford of Drumsuy, and indorsed by progress to Mr Bundie ; The LORDS, 12th February last,\* having found the sum compensable by the equivalent sum contained in another note granted by Drumsuy to Culzean : the pursuer reclaimed upon these grounds, *imo*, Culzean had renounced compensation by a letter to Drumsuy, desiring him to put off the man with the bill to a day, by promising to pay him interest, and not to neglect that concern of his ; unless we suppose Culzean guilty of a design to insnare people advancing money upon the faith of his note to Drumsuy an insolvent person, which bore date only a day after Drumsuy's note to him, and could have no other meaning than to furnish credit to Drumsuy ; consequently the defence of compensation ought to be repelled. *2do*, *Compensatio non perimit obligationem ipso jure, sed ope exceptionis* ; and at the proponing this exception, there are no habile terms of compensation existing between Culzean and the pursuer, who is not *eadem persona* with Drumsuy ; nor did ever that ground of compensation exist even betwixt Drumsuy and Culzean, seeing *quod in diem debetur, non compensabitur antequam dies venerit, L. 7. ff. de compensationibus* ; and the defender cannot pretend that Drumsuy had the note unindorsed in his person at the term of payment. Therefore the pursuer cannot be prejudiced by his debt, more than payment of a bank-bill could be evited by a debt due by David Spence to the Bank before the date of their bill. And by the civil law, compensation is not to be admitted in dubious cases, *L. ult. § 1. C. de compensationibus*. *3tio*, Writs and transactions made abroad, are regulated, as to the constitution and extinction, by the law or custom of the place where made ; because otherwise persons would get no credit in a strange country ; and so it is that no compensation by the law of England, where the note pursued was made, is sustained against the like, which negative proves itself till a contrary custom be instructed.

*Answered*, for the defender ; *imo*, By his letter to Drumsuy, he doth not pass from his compensation, but on the contrary expressly desires Drumsuy to pay the note, because he stood indebted to him for the like sum. Nor can Culzean's design to compensate his own note with Drumsuy's, admit of any construction of fraud ; seeing he was not to suppose in the least that his note would ever have been indorsed to any person, by a man who knew himself to be debtor to Culzean in the equivalent. *2do*, Albeit neither compensation nor payment operate without being proponed, yet both extinguish the obligation *ipso jure*, not only from the time they are proponed, but from the time that both

\* *Vocce PROMISSORY NOTE.*

debts concurred. And the *L. 7. ff. de compensationibus, loquitur de die incerto, qui habetur pro conditione.* For in other cases *dies cedit, quamvis nondum venit*; and compensation takes place, so soon as mutual obligations are granted. The instance of bank-notes, is nowise parallel; for David Spence is only insert in these *nomine tenus*, the bearer being understood to be proprietor. 3<sup>tho</sup>, This note being granted to a Scotsman at London, after the Scottish form, by a Scotsman accidentally there, and ignorant of the laws of the place; what can hinder him from any legal defence competent by our law in a process for payment here? But *esto* the custom of England were to regulate the matter, the pursuer *qui allegat consuetudinem debet eam probare.*

No 30.

THE LORDS repelled the compensation; because, the two notes being granted for the same sum within a day of one another, it seemed a contrivance in Culzean to furnish Drumsuy with credit.

*Forbes, p. 250.*

---

S E C T. V.

Latent deeds are presumed to be fraudulent in order to protect against Creditors.

1669. *January 21.* THE CREDITORS OF JOHN POLLOCK *against* POLLOCK.

THE Relict and Creditors of John Pollock having intended a reduction upon the act of Parliament 1621, of a bond of 5000 merks granted by the defunct John, to his son; it being *alleged* for the son, That the pursuers were only constituted Creditors by decreets recovered against the Relict and executors after the death of John; the LORDS found, that where by the decreets the debt was proven to have been prior to the bond in question, they might reduce upon the act of Parliament; but where the debt was posterior to the bond, they found that they had no interest to pursue a reduction thereupon; but prejudice to the Creditors to reduce or declare the same null upon any special reasons, as that the bond was latent, and never made known, or not delivered, or was *donatio mortis causa.*

No 31.

In a reduction of a bond of provision, in favour of a son at the instance of a creditor, whose debt was posterior to the delivery, the Lords refused to sustain the reasons of reduction upon the act 1621, but ordained the pursuer to condescend, if he had any particular ground of challenge on the head of

1669. *February 12.*—THE foresaid reduction, mentioned 21<sup>st</sup> January last, being again called, the pursuer did insist for reducing of the said bond granted to the son of the first marriage, upon this reason, That it was a latent deed