

interest to propone compensation of a debt due by the defunct, with a debt due by that same creditor to the defunct; for, by the concurrence of these two debts *inter easdem partes, primo momento* of the concurrence both were extinct; which might not only be proponed by those who had right to the sum whereupon compensation was founded, but to all others having interest, who might allege compensation as well as payment; and, therefore, an heir might propone compensation of an heritable debt, due by a defunct, upon a moveable debt due by the defunct to that same creditor, though he could not otherwise discharge a moveable debt; but the decret would import a discharge: and so a cautioner may compensate upon the debt of the principal; and a relict, bairns, or nearest of kin, may compensate upon any debt due by, and to a defunct, which were liquid: which liquidation required no decret; but that *debitum* and *creditum* were clear and commensurating in the defunct's time.

The Lords sustained the compensation against the party filled up unwarrantably in a blank right, upon the debt of him who had the said blank right in his power and possession as his own, upon a debt of the first creditor, being liquid, though no sentence followed in his time: And found, That any of his nearest of kin might propone that compensation, though having but a right only to the debts with which it was compensated: but found the compensation not receivable *post sententiam*, though in absence, unless the sheriff's decret were found null; but sustained several allegiances of nullity against the same.

*Vol. II, Page 525.*

1677. June 21.

DOWIE *against* ELISON.

JANET Dowie, by her contract of marriage with Robert Elison, being provided to her liferent of all sums, goods, and gear, conquest during the marriage; and, if in case of children, to the fee of the half: pursues a declarator of her right of the said contract against her husband's executors: who alleged, Absolvitor; because the defunct, by his testament, had provided the pursuer in the annual-rent of 5000 merks, in satisfaction of what she could claim at his death; whereby there was *jus quæsitum* to her, inconsistent with the contract of marriage; and, except she refused the provision in the testament, and continued her right, it did extinguish the provision of the contract.

It was ANSWERED, That the provision of the testament became not her right till she accepted it; and she was not clear yet whether to accept it or not, till she found, by the event, which of the provisions were most effectual.

The Lords found the pursuer obliged either to reject the provision in the testament, being now shown and produced to her; or otherwise they sustained the defence thereupon, to exclude her from the contract.

*Vol. II, Page 526.*

1677. June 26.

GRAHAME and BOYD *against* MALLOCH.

IN a count and reckoning at the instance of Grahame and Boyd, against