

1707. July 31.

ROBERT M'DOWAL of Logan, *against* ANDREW AGNEW of Sheuchan.

No 26.

Compensation was proponed upon a bond produced by the charger's father, which the suspender offered instantly to liquidate, by referring to the charger's oath, that he represented his father. The Lords found this relevant.

IN a cause at the instance of M'Dowal of Logan, against Agnew of Sheuchan, the LORDS upon the 12th of June last, having found that Logan had right to uplift 2500 merks contained in Sheuchan's bond: He, the debtor, proponed compensation, upon this ground, that Logan was debtor to him, as representing Patrick M'Dowal of Logan his father, in the proportionable relief of a debt paid upon distress by Sheuchan, for which the said Patrick M'Dowal was bound conjunctly and severally with him; and offered instantly to prove payment to the creditor by his discharge, and to prove by Logan's oath, that he represents his father.

Alleged for Logan, That the compensation was not liquid, the compensing debt not being constituted against him as representing his father, by a decret anterior to the allegiance of compensation, in which it would be competent to Logan to make his defences. So compensation upon a bargain of victual, offered to be liquidated by the pursuer's oath, was repelled for the like reason, December 1. 1626, Lady Ballegerno against the Laird of Lauriston, No 20. p. 2564.

Answered for Sheuchan, To liquidate a debt, is only to make appear, *quid, quale, quantum*; and compensation opponed to an heir who is *una persona cum defuncto*, is *inter eosdem*. Compensation operates *ipso jure retro*, if proponed before extract of the decret upon the debt to be compensated, though there be no decret for the compensing debt; for, if the other party have any objections against it, he may presently propone them, Keith *contra* Heriot, *infra b. t.*; Forsyth *contra* Coupland, *infra b. t.* But the imaginary possibility of having objections against the compensing debt, cannot stop the real effect thereof. As to the decision cited for Logan, it doth not meet; for there the compensing subject being victual, and not money, and so *alterius generis*, did not compensate *retro* from the time of the concurrence to stop the annual rent of a liquid bond.

THE LORDS sustained Sheuchan's compensation, he proving by the charger's oath, that he is heir served and retoured to his father.

Fol. Dic. v. 1. p. 160. Forbes, p. 195.

1711. February 13.

ROSS *against* MAGISTRATES of TAYNE.

No 27.

THE act 143d, Parl. 1592, introducing compensation, gives it place only *de liquido de liquido*, and therefore regularly, compensation cannot have place in debts not yet liquid, however soon liquidable by oath or otherwise. But, in later practice, the LORDS have got over this rigorous interpretation, adopting the maxim, *Quod statim liquidari potest pro jam liquido habetur*; thus, in this case, of which see the particulars, No 7. p. 2499.; a claim was received by way of compensation, though illiquid, offered instantly to be liquidated by oath.

Fol. Dic. v. 1. p. 160.