

by the accidental and very uncommon situation and circumstances in which the parties are now placed, in consequence of those creditors of the defenders, who held the Doctor bound in relief to them, claiming upon his funds, and drawing dividends therefrom before they made any demand upon the defender, who continued solvent; therefore the LORD ORDINARY approved of the second view reported by Mr Keith.'

Miss M'Dowal having reclaimed against this judgment, the COURT, (24th January 1798,) upon the first point, 'found the petitioner James-Ann M'Dowal, and her factor *loco tutoris*, bound to pay the respondent, (Mr Cranstoun,) as trustee for the creditors of Dr John M'Farlane, the dividends received out of that estate by the proper creditors of James M'Dowal elder and younger; but, (upon the second point) assolized the petitioner, and her factor, from the claim for any part of the dividends received out of that estate, upon debts for which Dr M'Farlane was jointly bound, in respect these dividends do not exceed the proportion of those debts for which the Doctor was liable.'

A reclaiming petition for Mr Cranstoun against this judgment, (27th February 1798,) upon the second point, was refused without answers. But one for the defender Miss M'Dowal, upon the other branch of the cause, was appointed to be answered. And, on advising this last-mentioned petition, with the answers, it was

*Observed on the Bench.* When the case was formerly before the Court, it was taken upon the supposition, that the giving effect to the defender's claim of compensation, would be to allow the debt to rank twice on the same estate. It appears, however, on further consideration, that there is no double ranking in the case, nor any injustice done; and that the defender's plea is grounded on the necessary operation of mutual claims of relief, and consequently of compensation or retention, which are entitled to their legal effects wherever they occur.

THE LORDS accordingly, with only one dissenting voice, 'altered the interlocutor reclaimed against, and sustained the petitioner's defences to the extent of L. 1234: 13: 9 $\frac{2}{12}$  Sterling.'

A reclaiming petition for Mr Cranstoun was refused, (8th June 1798,) without answers.

Lord Ordinary, *Monboddo.*

Act. Mat. *Ross, J. W. Murray, Macfarlane.*

Alt. Geo. *Fergusson, Jo. Clerk.*

Clerk, *Pringle.*

R. D.

*Fac. Col. No 75. p. 174.*

## SECT. II.

### What understood to be a Liquid Claim.

1662. December. CHILDREN of WOLMET *against* KER.

PATRICK EDMISTON of Carden having comprised, from the Laird of Wolmet, the reversion of a wadset granted to James Loch, which the said James dispon-

No 10.

The plea of compensation was sus-

No 10.  
tained, tho'  
the decree  
on which it  
depended,  
pronounced  
by the En-  
glish Judges,  
was under  
review.

ed by progress to Mr Mark Ker of Moriston; upon this comprising, Carden uses an order of redemption against Mr Mark, and pursues a declarator.—It was *alleged*, no declarator, because no consignment was really made, but simulately by money taken up again, and now at last the money should be consigned in the clerk's hands to be given up by the defender.—It was *answered*, The money was truly consigned, and whether taken up or not, it was nothing to the defender, seeing the pursuer must be answerable for it; and now he offers the equivalent, viz. to compensate that money with a greater sum *pro tanto* resting to the pursuer by virtue of a right in his person, from the children of Wolmet, who have a sentence standing at their instance, against the defender for a greater sum.—It was *replied*, That the foresaid sentence could be no ground of compensation, because it lyes under question and review, as pronounced by the English Judges unjustly.

THE LORDS, before answer, ordained the defender to repeat his reasons of review against the reply of compensation or retention. *In præsentia*.

*Gilmour, No 56. p. 41.*

1663. January 8.

COLONEL JOHN FULLERTON *against* VISCOUNT OF KINGSTON.

No 11.  
An article of  
compensation  
was rejected  
as illiquid,  
being found-  
ed upon a  
process at the  
instance of an  
executor hav-  
ing only a li-  
cence to pur-  
sue, without  
confirmation,  
and no sen-  
tence reco-  
vered, nor so  
much as proof  
led.

COLONEL JOHN FULLERTON having charged the Viscount of Kingston upon a bond of borrowed money, he suspends, on these reasons, That the Colonel granted assignation, to umquhile Sir Alexander Douglas, to a sum due by Sir William Thomson; and, notwithstanding of the assignation, he uplifted the sum himself, at least his brother by his order; whereupon the Lady Kingston, daughter and heir to the said Sir Alexander, having license to pursue, hath pursued the Colonel upon the warrandice for repayment; which action being seen and returned, and ready to be discust, the suspender craves compensation thereon. The charger *answered*, That the reason of compensation is not relevant, because it is not liquid, the foresaid sum not being confirmed by any executor, nor sentence thereupon; neither can it be instantly verified, because it must abide probation, that the Colonel, or his brother by his order, uplifted the sum, and there being only a license to pursue, the debt cannot be established till a confirmation. *2dly*, Albeit the compensation were receivable, yet the reason ought to be repelled; because, that any such assignation was granted, it was in trust, to the Colonel's own behoof, as is instructed by a missive letter to the charger, produced. It was *answered* for the suspender, That the answers founded upon the missive letter ought to be repelled, because it was null, neither being holograph nor having witnesses. *2dly*, It is most suspect, being written upon old blacked paper. The charger *answered*, That letters amongst merchants, though not holograph, are sustained, and ought much more among soldiers,