

1650. *January 11.* SIR WILLIAM DICKE *against* KEIR.

[*See page 434.*]

IN the suspension by Sir William Dicke against Keir, the Lords adhered to their interlocutor, finding the reason of compensation not relevant, not being *de liquido in liquidum*: notwithstanding of the letters of acceptance by umquhile James Houstoun, to the said Sir William, produced, bearing a liquid sum; and notwithstanding of a decreet, at Major Lumsdene's instance, against the said Sir William, for a liquid sum: because umquhile Patrick Keir was never constituted debtor by an action, and decreet thereon, of count, reckoning, and payment; as it is in the last law, *Cod. de Compen.* and the third law, *ff. Tutel. et ration. distra.* Neither would they give retention while the action of count and reckoning might be discussed: but found the letters orderly proceeded; the said Patrick Keir, charger, and person substituted in the father's bond, finding caution to make the sum charged for forthcoming to the said Sir William, *prout de jure.* And my mind was, that if it had been disputed, that bond could not be liable to any sentence given against the father, suppose he had the uplifting of the sum during his lifetime; because that sum was provided, by the substitution, to umquhile Patrick Keir his child, many years before the said Patrick married umquhile James Houstoune's sister, and long before the said James died, and his said sister fell to be heir-portioner to him;—the said umquhile Patrick, after his first wife's death, providing their child, who is now charged, to the sum charged for, as lawful administrator to him; wherein could be no presumption of fraud,—this alleged debt proceeding upon the count and reckoning not being *in rerum natura* many years thereafter, as if the father had taken bond for a sum to himself in liferent, and to his son in fee: Neither could Sir William be ignorant how he had given this bond.

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1650. *January 11.* WILLIAM SCOT *against* JAMES BROWN.

WILLIAM Scot, having right to the escheat of Robert Andersone, as also being executor-creditor to him, pursues James Brown, merchant, upon intromission with some tuns of wine taken out of this Robert's cellar. Where it was excepted, That he cannot be liable to the pursuit, seeing he offers to prove that these wines were his own, and bought from him by the said Robert, but, not being paid for, might be well meddled with by him, especially seeing he had the provost's warrant. To the which it was replied, That the said Robert being dead, who coft the wine and transported them to his own cellar, the said James should have been executor-creditor to him, or should have obtained some sentence, that he might intromit legally, seeing *venditor sequitur fidem emptoris quoad pretium persolvendum, nec habet ullam in rebus venditis hypothecam.*

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