

No 107.

author's death, *vel causam necis dedit*, or when done by another, and did not prosecute the same, he lost the inheritance; for *nemo debet lucrari ex proprio delicto, et iniquum est ex sceleris ditari, cum non debent lucrum consequi ex eo quod pœnam potius meretur*.—*Answered*, The accusation is false and calumnious, and if any were unnatural to her, it was her own friends; and it is neither extraordinary nor unusual for a woman to die in childbed; but when they attack him in a criminal process, he will clear and vindicate his innocence.—But the LORDS thought these recriminations wholly extraneous to the present question, and so waved them at this time. *Fol. Dic. v. 1. p. 165. Fountainball, v. 2. p. 603.*

1736. February 18. M'LARENS against BISSET.

No 108.

A DECREE had been obtained before the Bailie of the Regality of Balhousie, against James Bisset, at the instance of the representatives of Edward M'Laren, deceased, for the amount of a bill.

Bisset had counter claims against the deceased, who had died insolvent; and in an advocacy *pleaded*, That they might still be proponed in compensation, on account of the bankruptcy of M'Laren, and that the decree was only of a regality, which ought not to preclude compensation.

Effect was given to the decree, only upon condition of the puruer finding caution to be law-biding for the counter claims. *See APPENDIX.*

Fol. Dic. v. 1. p. 165. Session Papers in Advocates' Library.

1739. July 20. ANDERSON against SCHAW.

No 109.

Found in conformity with
No 105. p.
2642.

COMPENSATION not admitted after decree, though this ground of compensation was not in the suspender's person at the time of obtaining the decree, but acquired by him posterior thereto, in respect of the generality of the terms of the statute.

The like was again found, 9th December 1742, William Hogg merchant in Edinburgh, and the other creditors of Robert Paterson merchant in Saltcoats, against Patrick M'Calla merchant in Saltcoats, (*infra*.)

Fol. Dic. v. 1. p. 165. Kilkerran, (COMPENSATION.) No 2. p. 134.

1742. December 9.

CREDITORS of ROBERT PATERSON against PATRICK M'AULAY.

No 110.

Compensation is not competent

ROBERT PATERTSON having obtained a decret against M'Aulay for L. 400 Scots, some of his creditors arrested the same in M'Aulay's hands, who, in or-

der to disappoint them, purchased several bills of Paterson's, due to other creditors of his; upon which M'Aulay raised a multiplepointing, and suspended the decret; and having produced several bills accepted by Paterson, and indorsed to him, he proponed compensation thereon, or at least that he should be allowed to retain the money arrested, in respect Paterson was bankrupt, or caution found that he shall be law-biding for the counter claim.

For Paterson's Creditors who had arrested, it was *pleaded*, That the debts now in M'Aulay's person were all purchased since the decret against him, on purpose to found this plea of compensation: That none of the bills had been duly negotiate, and all of them had lain over for upwards of three years, without any diligence done thereon, whereby they had lost all their privileges; nay, none of all the indorsations bear a date, therefore it should be presumed that M'Aulay had purchased these bills posterior to the arrestments. Were it otherwise, how easy would it be to disappoint creditors who have done legal diligence by arrestment? And one who finds he is cut out by prior diligence, has no more to do but to indorse his bill to the common debtor, who propones compensation upon it, by which the arresters are excluded. And it would be vain for the arresters to undertake a proof that the indorsation was posterior to the arrestments, since it is done in so private a way. None need be present but the parties, neither are witnesses or date required.

2dly, The decret against M'Aulay was a decret *in foro*; consequently he cannot now propone compensation in a suspension thereof. See 29th June 1739. Anderson, (*supra*.)

Lastly, With respect to the plea of retention, unless caution is found, it was *answered*, That supposing Paterson were bankrupt, there would be some reason for M'Aulay's retaining until caution were found, were Paterson himself charging for the debt; but in a competition with other creditors of Paterson, he cannot have any privilege, but must be looked on as a common creditor of Paterson's, and has it not in his power to exclude the prior diligence of the rest, by purchasing and requiring debts of the charger in order to defeat the arrestments.

Pleaded for Patrick M'Aulay, That blank indorsations are always presumed to be of the same date with the bills, as was determined No 90. p. 1501. Rossie; so that the presumption of law lies in his favours: And it is surely very affected in the creditors, to maintain that they can have no proof of the real dates of these indorsations, since none is more easy. The creditors are all alive who granted the indorsations. Their oaths are undoubtedly relevant, as is M'Aulay's oath, which the arresters may have if they insist upon it; so that there is really no danger to creditors, though this privilege is indulged to blank indorsations. Neither has the suspender any occasion to dispute the relevancy of the second point, *scil.* That he cannot propone compensation in the second instance, even where the ground of it emerged after the decret, because he offers instantly to

No 110.
against a
debt, after
decret has
passed for it,
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grounds of
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fore or after
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No 110. pay, upon the creditors finding caution, that Paterson will be law-biding for the counter claim.

It is acknowledged, he could not be bound to pay to Paterson himself (as he is a bankrupt) unless he found caution; and a creditor of his arresting, can be on no better footing. An arrester is in no better situation than an assignee; nay, he seems not to stand upon so good a one. Surely, an arrester is not such a singular successor, as to stand free from exceptions competent against his author. And this privilege competent to the suspender, of retaining the sum in his hands until Paterson the creditor should find caution, was competent against Paterson himself, before the arrestments were laid on; and therefore must be still competent; he cannot be deprived thereof by laying on of the arrestments.

THE LORDS found compensation not competent after decret, and that whether the debts on which it was pleaded, were in his person who pleads it, before the decret, or acquired after it; and remitted to the Lord Ordinary to hear parties on the retention.

Fol. Dic. v. 3. p. 149. C. Home, No 216. p. 358.

1747. February 25.

A. against B.

No 111.
Decided in
conformity
with No 106.
p. 2642.

ON a verbal report of an Ordinary, Whether compensation was competent after decree in absence, following on a summons against one of many debtors? THE LORDS demurred till precedents should be looked out; and a former case being condescended on, wherein the suspender had been admitted to plead compensation, in respect of that speciality that the decree had been taken against the defender called among many other debtors; the COURT judged accordingly, and 'allowed the suspender to propone compensation.'

*Fol. Dic. v. 3. p. 149. Kilkerran, (COMPENSATION & RETENTION.)
No 2. p. 136.*

SECT. XV.

Concursus Debiti et Crediti.

1629. January 20.

ROSS against BUTLER.

No 112.
The creditor
of a rebel,
cannot plead

N. Ross, donatar to the escheat of David Vauss, pursued Mr George Butler for the farms of the lands of Blawes, 1623, or prices thereof, belonging to the