1746. *December* 24. MRS MARGARET BALFOUR of Burleigh *against* LAZINI.

No 35.
A person who became cautioner in a confirmation, upon condition of receiving the fund in loan, found entitled to retain till relieved.

MRS MARGARET BALFOUR being charged at the instance of Jean Lazini and her husband, to make payment of L. 320 Sterling contained in an heritable bond granted by her to the chargers, suspended on this ground, That she was cautioner for the charger Jean Lazini in the confirmation of her brother Andrew Lazini's testament, as his nearest of kin, and that she had right to retain the sum charged for till she was relieved of her cautionry.

At discussing, the Ordinary ordained 'the suspender to depone *de calumnia*, Whether she had reason to allege that there are any debts owing by the defunct Andrew Lazini, which may yet emerge?' And upon her refusing to depone in these terms, *That there are debts*, and contending that it was enough for her to say, that such debts might be, 'found the letters orderly proceeded.'

The suspender reclaimed, and specially set forth this fact, that the money had originally belonged to the deceast Mrs Violante, and was by her conveyed to her son Andrew Lazini, and by his death fell to his sister Jean Lazini the charger; that they being all foreigners and persons of circumstances unknown, Jean Lazini could find no person who would be cautioner for her in the confirmation of her brother's testament, till the suspender, who had occasion to borrow the like sum, agreed to become her cautioner, upon condition that the money should be lent to her, and for which she granted the heritable bond charged on.

THE LORDS were of opinion, That if it should appear that the suspender had become cautioner on that condition that the money should be lent to her, she could not be obliged to pay till she were relieved of her cautionry; and 'remitted to the Ordinary to enquire what evidence she could give that she had become cautioner in the view of borrowing the money.' And the Ordinary having, upon examining the agents concerned for either party, reported the fact to be as set forth for the suspender, the LORDS found, 'she had right to retain the sum ay and while caution were found to relieve her.'

On this occasion it occurred to be taken notice of, that it was a hardship that there was no method by which an exoneration could be obtained by an executor *qua* nearest of kin, whereby his cautioner might be relieved.

Fol. Dic. v. 3. *p.* 143. *Kilkerran*, (COMPENSATION.) *No* 1. *p.* 135.

1774. *November* 29.

WILLIAM MACKIE *against* JOHN M'DOWAL, and Others.

No 36.
In an action for payment of copartner-

MACKIE, as factor appointed by the Court upon the sequestrated estate of Ebenezer M'Culloch and Company, brought an action against John M'Dowal

No 36.
ship-debts, due from one company to another, compensation or retention is not pleadable on account of debts owing by the company suing, to a partner in the company sued.

merchant in Glasgow, as an individual, for payment of the balance of an account current with M'Culloch and Company; and against William Donald and Company merchants in Greenock, and Donald and M'Dowal merchants in Glasgow, for payment of the price of goods furnished by M'Culloch and Company to these companies respectively; in which he obtained decree for the sums due by each of them; and upon this decree they were charged.

Mr M'Dowal being a partner in the two companies above named, a suspension of the charge was brought in their names and in his own, founding chiefly upon Mr M'Dowal's right to retain, not only the sum due by himself to M'Culloch and Company, but also the sums due by William Donald and Company, and Donald and M'Dowal, of both which companies he was a partner, until he should be fully paid and relieved of an engagement which he, and Alexander Gray writer to the signet, were under for Ebenezer M'Culloch and Company, in a letter of guarantee to Malcolm Hamilton and Company merchants in London, for L. 5000 Sterling, as well as paid of the debt due by Ebenezer M'Culloch and Company to himself.

Objected for the factor; It is admitted that neither William Donald and Company, nor Donald and M'Dowal, have any defence against payment, in their own names, or on their own accounts, but a defence is raised up in the name, or on the account of one of their partners, Mr M'Dowal, as an individual, upon a transaction with which these companies have no manner of concern; which cannot be sustained in law.

Retention, as well as compensation, does certainly require that the same person should be both debtor and creditor. One party can neither plead compensation nor retention for another party's debt. Mr M'Dowal is not the same party with Donald and M'Dowal, nor with William Donald and Company, though he may be an individual in these companies. The charge is not against him, but against the companies, and the sum charged for will be paid not by him, but out of the company funds, which are not in his possession, but in the possession of the company; and, therefore, he cannot plead compensation or retention against payment of their debts; and as little can these companies plead compensation or retention in his name, when they themselves have no ground of compensation. This point received a solemn decision last session, in the case of Galdie against Gray, (June 16.) which renders more argument upon the general point unnecessary in the present case. (*voce* SOCIETY.)

More especially would this plea of retention be dangerous where the company creditor is bankrupt; for there it is evident that the sole effect and intention of it is to give a preference to every individual of the company-debtor who may happen, *privato nomine*, to be creditor to the bankrupt.

Lastly: Neither is there room for a plea, that Mr M'Dowal ought at least to be entitled to retain what effeirs to his share of interest in the companies, because each partner of a company is liable, *in solidum*, for all the debts of the company, and that these companies might have happened to be bankrupt. The two companies in question are going on, and they will fall to make payment out of the

company's funds, not out of the estate of Mr M'Dowal; and what precise amount of the company's effects may in the end belong to Mr M'Dowal, it is impossible to ascertain till the company itself is dissolved. No 36.

THE COURT, by two consecutive interlocutors, 'adhered to the Lord Ordinary's, which had found, That the suspenders Donald and Company merchants in Greenock, and Donald and M'Dowal merchants in Glasgow, cannot plead compensation or retention of the sums due by them to Ebenezer M'Culloch and Company, on account of any debt which Ebenezer M'Culloch and Company may be due the suspender John M'Dowal, or which the said Ebenezer M'Culloch may be due to him; and, therefore, repels the reasons of suspension pleaded for the respective companies, and found the letters orderly proceeded against them.'

Act. *Ilay Campbell.* Alt. *Wight.* Clerk, *Tait.*

Fol. Dic. v. 3. *p.* 143. *Fac. Col. No* 142. *p.* 372.

1775. *February* 22.

HERRIES and Company, of London, merchants *against* ANDREW CROSBIE.

No 37.
Found that the accepter of bills indorsed by the drawer before the the term of payment to his creditors' factor, upon a receipt bearing that the value, when paid, should be remitted to his constituents, on account of the debt owing them, could not propone compensation upon a relative bill of the same date, granted to himself as creditor in a balance due upon former transactions, and, *quoad ultra*, as the only consideration received for his own acceptances, from the drawer and

UPON the 2d December 1773, Mr Crosbie granted two acceptances to Alexander Sheriff for L. 150 each, the one payable three months, and the other six months, after date; and Mr Sherriff, on the other hand, granted his acceptance to Mr Crosbie for L. 700.

The above two bills accepted by Mr Crosbie, were soon after indorsed by Mr Sherriff to Sir William Forbes, James Hunter and Co., who granted the following receipt: 'Received, Edinburgh, 8th December 1773, from Mr Alexander 'Sherriff, his two bills on and accepted by Andrew Crosbie, Esq; L. 150 each, 'which, when paid, we shall remit the value to Herries and Company, on account of the debt owing them by Messrs Sherriff and Guthrie.'

Mr Sherriff failed in February thereafter; and, upon the 1st of March, a protest was taken against Sir William Forbes and Company, stating in substance, that Mr Crosbie had only accepted these two bills in order to enable Mr Sherriff to raise L. 300, by discounting them, to pay a bill which he owed to Mansfield, Hunter and Company, for which he and another gentleman were bound; and being a creditor to Mr Sherriff himself in L. 400, had got a bill of the same date with the two L. 150 bills from Mr Sherriff, for L. 700, as the amount of these two bills, and the balance due to Mr Crosbie upon former transactions, and therefore that he was entitled to compensate the two L. 150 bills with the L. 700 bill, as the two coeval bills had not been purchased in the way of commerce, but indorsed in security of a preceding debt.

Mr Crosbie, in order to take the opinion of the Court upon his plea of compensation, presented a bill of suspension of the two bills which had been accepted by him.