

No 3.
 comprising
 and got him-
 self infett, be-
 fore the sus-
 pension could
 be got dis-
 cussed, the
 said person
 having pro-
 cured the sus-
 pension by
 his own tra-
 vel and ex-
 penses.

finding caution, whereby he was *in dolo* to pass through his own comprising, whereby the defender's denunciation, which was first made, became extinct, so that he was forced, after the discussing of the suspension, to denounce of new, and so he was after the pursuer, *ejus dolo et culpa, quæ non debet sibi prodesse*; this allegiance was sustained in favours of the defender, the second compriser; but that the suspension was purchased by the pursuer *ut supra*, that was found ought to be proven by writ, or by this pursuer's oath.

Fol. Dic. v. I. p. 152. Durie, p. 401.

1631. *January 20.*

The CREDITORS of BROWN Competing.

No 4.
 In a competi-
 tion betwixt
 the creditors
 and executors
 of a defunct,
 the Lords re-
 fused to pre-
 fer one credi-
 tor to ano-
 ther, altho'
 their diligen-
 ces were not
 alike, some of
 them having
 obtained de-
 creets; and
 this because
 the executors
 had not oppo-
 sed them, but
 had defended
 against the
 others who
 otherwise had
 been as dili-
 gent as they;
 for thus it
 would be in
 the executor's
 power to pre-
 fer one credi-
 tor to another.

The Creditors of umquhile William Brown, contending which of them should be answered of their debts *primo loco*, wherein some had done greater diligence than others, and who had obtained sentences, claiming preference to others, who were not so far advanced; THE LORDS found, that in this, and the like actions, where the debtor's goods were not sufficient to pay the whole creditors, they would not give such preference to these, who had prevented others by diligence, as to make them thereby answered of their whole debts, and whereby the rest of the creditors might want all their debts; for, the one being as just debt as the other, it were against justice, that in these cases, which concern so many, that few should have all, and many more want, only because diligence has been done more by one than by another; for some creditors might sooner know the common debtor's decease, or might dwell in that same town with him; and it were hard, that therefore they should be preferred to those who knew not so soon, or who dwelt in a more remote place of the realm. In this process, the poor of the hospital of Biggar, for a debt owing to them, and the relict of of the debtor, for her conjunct-fee, were preferred to others of the rest of the creditors, as more privileged than they. And some creditors craving debts owing to them, having nothing to qualify the debt, but the confession contained in the debtor's compt-books, in some articles thereof, written by his own hand, but not subscribed by him; THE LORDS found these articles were not sufficient to constitute the party debtor, thereby to exhaust the gear, to the prejudice of others, the rest of the creditors, who had legal and formal securities perfected to them upon their debts; except that the saids creditors, claiming the said debt, will prove that the particulars contained in the said compt, were truly and really paid, and delivered to the defunct, who was the common debtor to them, and no otherwise.

Act. ———.

Alt. *Nicolson, Russel, & Others.*

Clerk, *Gibson.*

Fol. Dic. v. I. p. 153. Durie, p. 556.

* * * Spottiswod reports the same case :

In the action betwixt William Brown's Creditors and his Executors, the LORDS would not prefer one of the creditors to another, notwithstanding that their diligence was not all alike, and that some of them had obtained decreets, which were not respected, because the executor had not opposed them, whereas he had made opposition to others, that had done as great diligence as they, and hindered them ; otherwise it should have been in the executor's power to prefer one creditor before another.

No 4.

Ibid, There being more debt than the defunct's goods would extend to, so that of necessity there behoved to be a proportionable defalcation of every one of their debts, yet the LORDS preferred the poor of the kirk of Biggar, (unto whom the defunct was owing 600 merks) to have their whole sum without defalcation, as being a more privileged debt than the rest.

Sicklike, the defunct being obliged to his wife by contract of marriage, to infest her in an annualrent of 600 merks ; THE LORDS preferred her to all the rest of the Creditors.

Farther, the debts being some of them upon bond, and others upon accounts whereof some were subscribed by the defunct, and others were only written in his compt-book, but not subscribed by him ; THE LORDS made them in a like case, that had bonds and subscribed accounts ; but for them that were only founded upon unsubscribed accounts, they thought it hard to admit them equally with the others who had a lawful surety made them according to the laws of the country ; yet they proving the real delivery of the particulars contained in the said accounts unsubscribed, and giving their suppletory oath that they rested yet unpaid ; they found that they all should come in equally.

Sicklike, the defunct being only cautioner in some bonds for John Maxwell of Shaws ; THE LORDS found that the Creditors might seek their sums of the cautioner's executors, as well as any of his principal creditors, they always assigning to the remanent creditors their relief of the principal John Maxwell. See PRIVILEGED DEBT.

Spottiswood, p. 77.

1632. January 31.

FERGUSON against M'KENZIE.

Two comprisers being infest in their debtor's lands, and the tenant who was pursued by them both for the duties thereof, suspending upon double pointing, wherein the two comprisers being heard to dispute upon their rights, infestments and comprisings, and who of them should be preferred to the other ; THE LORDS preferred the first compriser, albeit last infest by the superior, to the last compriser, who was first infest, although he who was first infest, was by virtue of his right in possession of the lands ; in respect not only he, who was last infest, was the first compriser, but also by reason that before this other party's com-

No 5.

A compriser having charged the superior before another's comprising was led, and the superior having suspended the first, and freely entered the second without a charge,