

No 63.
after his
death ; but
he will, in
competition
with other
creditors,
be in the
same situa-
tion with
his cedent,
as if no such
assignation
had been
made.

intimate before the confirmation ; but an executor-creditor having done diligence by confirmation, it is not in the power of any of the defunct's debtors, by taking assignation from any of his creditors, to prefer that creditor to any other creditor, which is nowise *legitimus modus preferendi* ; but the creditors must be preferred only according to their diligence ; *2dly*, this pursuit being for implement of the relict's contract of marriage, and pursued to their behoof, hath, by our law and custom, preference to all other personal creditors, though having done more diligence.

THE LORDS found either of these two replys relevant to elide the defence, albeit the assignation was before any pursuit, moved upon the pursuer's confirmation.

Fol. Dic. v. 1. p. 162. Stair, v. 1. p. 95.

1662. February 14.

CHILDREN of MOUSWELL against LAURIE of Maxwelton.

No 64.
Found as
above.

THE children of the Laird Mouswell, as executors to their father, pursue Laurie of Maxwelton for a sum due by him to the defunct, who *alleged* compensation, upon a debt due by the defunct, assigned to the defender by the defunct's creditor, after the defunct's death, and intimated before any citation or diligence at the instance of any other creditor.—The pursuer *replied*, That the debt compensated on cannot take away this debt pursued for *solidum* ; because the defender, as assignee, can be in no better case than his cedent ; and if he were now pursuing, he would not be preferred for his whole sum, but only in so far as the testament is not yet exhausted, or other prior diligence done ; for an executor having but an office, can prefer no creditor, but according to his diligence ; much less can any of the defunct's debtors, by taking assignation from any of the defunct's creditors, prefer that creditor whose intimation is no legal diligence.

THE LORDS found, That the defender could not be in better case than the cedent, and could have only compensation in so far as the inventory was not exhausted, or prior diligence used : They found also, That a decret against a defender for making arrested sums furthcoming, at the instance of any of the defunct's creditors, was null, because the executor-creditor was not called there-to, albeit decret was obtained at the instance of that creditor, against another executor in a former process. *See PROCESS.*

Fol. Dic. v. 1. p. 162. Stair, v. 1. p. 100.

* * * Gilmour reports the same case :

THE executors of — Douglas of Mouswell pursued Laurie of Maxwelton for payment of a debt ; against which it was *alleged*, That the defender should have compensation, because the defunct was resting him as much, by virtue of an assignation made to him of certain bonds owing to Alexander Douglas

writer, and others, his cedents.—It was *answered*, That the assignation being recovered after the defunct's death, it could not operate a total compensation, in prejudice of the rest of the creditors, to whom the executor is accountable; but all it could do, is to put the excipient in the condition of the cedent; that is, to come in *pro rata* with the rest of the creditors, to the exhausting the inventory.—It was *replied*, That the defender had made a lawful assignation or bargain with the cedent, before the rest of the creditors had done any diligence; by which he might as lawfully compensate, as if he had acquired the assignation in the defunct's life.—It was *duplicated*, That if it were lawful for a debtor to take an assignation, after this manner, after his creditor's death, then any debtor may defraud the most of the creditors by collusion with some, such as he pleased, and agreeing in what terms he thought fit.

No 64.

THE LORDS refused compensation, and ordained Maxwellton, by his assignation, to be only in the condition of the cedent, if he had not assigned.

Thereafter a bill being given in, to be heard *in presentia*, which was granted; and when it was debated, it was *alleged* for the executors, That Maxwellton and his cedents could never be heard to make use of the assignation to be preferred to the rest of the creditors; because long before the granting thereof, the executors had convened both the cedent and assignee for accepting the inventory amongst them *pro rata*; after which citation, none of the parties called could prejudge others *pendente lite*.

THE LORDS found this relevant.

Gilmour, No 38. p. 27.

1666. June 15. ALEXANDER STEVENSON *against* LAIRD of Hermishills.

No 65.

ALEXANDER STEVENSON, as assignee by his father, pursues Hermishills for payment of a bond, who *alleged* absolvitor, because the defender, as heir to his father, had right to a bond due by the pursuer's father before the assignation; after which the assignation was a deed *in fraudem creditorum*, and so null.—It was *answered, non relevat*, unless the cedent had been bankrupt, or at least *insolvendo*.

Compensation being proposed against one of four co-executors, it was alleged, that it could not take place but for the fourth part. It was found, that compensation being equivalent to a discharge, taking away the debt *ipso jure*, it might be proposed against any of the executors *in solidum*.

THE LORDS repelled the defence, in respect of the answer.

The defender further *alleged* compensation upon the said bond, which was relevant against the pursuer, both as heir to, and as assignee by his father.—It was *answered, non relevat* against the pursuer as executor, but for his fourth part, being one of four executors; *2dly*, The defender's father was tutor to the pursuer, *et nondum reddidit rationes*.

THE LORDS found, That compensation being equivalent to a discharge, taking away the debt *ipso facto*, it might be proposed against any of the executors *in solidum*; but in regard the tutors accmpts were depending, the LORDS sisted this process till the Tutors Compts proceeded.

Fol. Dic. v. I. p. 162. Stair, v. I. p. 378.