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The opinion of Lord Stair, in a point whert he is single, cannot be sufficient to establish a doctrine, which is an inlet to so much injustice; and as he carries it so far as to give a preference to debts acquired never so short while before confirmation, it would put it in the power of an executor to prefer any creditor he pleased, by taking assignations to their bonds, giving his own in their place, and then confirming; and here he might make his own profit, by preferring those that offered him the largest compositions. In the case Olivestob and Baillie against the Creditors of Menzies, there was this particularity, that Mr Menzies being served heir to his father, was obliged to pay his debts, for which he had relief of the executry; and he being also confirmed executor, the Lords sustained these payments to exhaust the inventory against negligent creditors; but here they have put in their claims *quamprimum*, and no good reason can be given to prefer an executor more than an heir *cum beneficio*, who must do diligence, if he has a mind to compete on his debt.

Laying aside this general topick, the petitioner ought to have no preference, because he is named with the burden of the defunct's debts, and gets a subject assigned him for that purpose. In this trust he must deal equally, he cannot prefer one creditor to another, nor himself to them all. Suppose the testament had contained a particular list of debts, he could have paid them without decreet; but he must have paid all alike, as the purchaser of an estate, bound to pay creditors in a particular list, must do, if the debts exceed the value, 20th July 1714, Blair against Graham, No 22. p. 7744. By accepting the testament, he becomes bound to pay all his father's debts, if not universally, at least as far as the subject will go; the obligation is equally to all, and this bars all preference, except in so far as a creditor forces it by diligence.

The Lords found, That the petitioner being confirmed executor-testamentar to his father, was preferable to the other creditors of the defunct, for payment of the debts whereon he stood creditor to him at his death, for relief or otherwise; and also found, that the petitioner, as executor foresaid, was preferable to the other creditors for the debts paid by him, and to which he obtained assignation before the date of the confirmation.

Act. *H. Home.* Alt. *Lockhart.* Clerk, *Murray.*

D. Falconer, v. 1. *p.* 33.

1745. *June* 7. The Lady Crowdieknows *against* The Creditors.

No 26.

If a trustee of an adjudication recover payment out of a collateral security for the same debt, though

William Crichton of Crawfurtown left several children, amongst whom were John his eldest son, and Anna a daughter, married to John Bell of Crowdieknows; and having died in bad circumstances, several adjudications were led against his son, which, upon his death also, were purchased in by Crowdieknows, and an adjudication led by him besides for his Lady's portion. This

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he has not been assigned to it, this will impute in extinction of the adjudication.

A disponee to an adjudication having recovered part of his debtor's effects, in virtue of his wife being executor to him, found obliged to impute them in payment.

process was against herself, as having then become apparent heir to her father.

Crowdieknows's affairs having also gone wrong, his estate was adjudged, and as part of it, the estate of Crawfurdtown; and the whole being, after his death, brought to a judicial sale, compearance was therein made by William Veitch, writer to the signet, adjudger in trust from his Lady, the apparent heir of Crawfurdton, and several objections made to his adjudications thereon.

Objected to an adjudication led by the Duke of Queensberry, and transferred to Crowdieknows; That Coupland of Collieston being debtor to Crawfurdtown in 2000 merks, he assigned it to Douglas of Fingland, for the behoof of the Duke of Queensberry, in part of a greater sum due by him to the Duke, which sum, with an adjudication thereon, was by his Grace made over to Crowdieknows, and Collieston's bond delivered up to him without any transference thereof; but of which he had since received payment; and by this means had got payment *pro tanto* of the adjudication.

Answered; The receiving this money did operate no extinction; for, 1*st*, there could be none in the person of the Duke, as the bond was never in him, but stood vested in his factor, though as an additional security for his behoof;

2*dly*, In Crowdieknows there was none; for, by receiving the money, he became debtor to the executry, as he was creditor to the *hæreditas jacens*;

3*dly*, Supposing his lady both heir and executor to her father, neither of which she then was, as she had not made up titles, and had a sister; yet compensation does not operate till it be proponed, and the pursuers of the sale are singular successors, adjudgers from Crowdieknows of the adjudications standing in his person.

Replied, The bond was assigned to the Duke's factor in part payment of the debt due to his constituent, and was never in Crawfordtown's executry; and so the money being received by the Duke, or by Crowdieknows in his right, must impute as payment, and this may be objected to singular successors.

The Lord Ordinary found, 'that the debt due by Collieston ought to impute *pro tanto*, to extinguish the Duke of Queensberry's adjudication;' and the Lords, on bill and answers, adhered.

1745. *July* 26.—In the cause between these parties, is was *objected* to the adjudications led, and purchased in by Crowdieknows, That there having been a bond of 2000 merks granted by Robert Maclellan of Barclay, and Samuel Maclellan his brother, to John Crichton of Crawfurdtown, this was confirmed by Crowdieknows, in name of his wife, as nearest of kin to her brother, and he had thereupon assigned it to a person who recovered payment thereof; and, therefore, he having intromitted with this sum belonging to his debtor, while the adjudications stood in his person, it behoved to impute in payment of them, at least he thereby became debtor in the sum received, as he was creditor in the sum adjudged for, and this introduced a compensation.

Answered; That there could be no compensation betwixt an adjudication and a personal claim; and, besides, there was no *concursus crediti et debiti* between the same persons, as the bond belonged to his lady, who, not making up titles to the estate, was never debtor in the sum adjudged for. No 26.

The Lord Ordinary found, 'That the debt due to John Crichton by the Maclellans was not to be imputed towards the extinction of the adjudications, reserving to the Lady to recover that debt as accorded.

At advising a bill and answers, it occurred to some of the Lords, that it might make a difference, whether his adjudication for his Lady's portion, led against herself as apparent heir to her father, proceeded on a renunciation or a decreet on the passive titles, for in that case she was debtor; but others thought if the decreet had passed without a renunciation, this could not have been made use of against her to subject her to the debt, because her husband ought to have taken care that she should have renounced; and therefore it could not be urged in her favours.

The Lords, 7th June, adhered.

Pleaded in a reclaiming bill; That Alexander Ferguson of Isle had, upon debts due to him by Alexander Crichton of Crawfurdtown, led an adjudication against John, his son and apparent heir, which proceeded on a decreet on the passive titles, he having in this case neglected to renounce, which was acquired by Crowdieknows; and the bond recovered by him being originally granted to John Crichton, he had recovered so much of his proper debtor's effects, which behoved to impute as payment.

Upon answers, the Lords, 12th July, found, that the debt due by the Maclellans to John Crichton was imputable in extinction of the debt due to Ferguson of Isle, and this day refused a bill, and adhered.

Alt. *W. Grant et Fergusson.* Act. *A. Macdoual.* Clerk, *Kilpatrick.*

D. Falconer, v. 1. *p.* 93, & 124.

1747. *June* 5. James Haliburton *against* Blackwood of Pitreavie.

No 27.
A person having lodged with his friend an accepted bill, as a fund for raising money, and having got it from him, and paid a bond which he owed, on an assignation to himself, it

Sir Robert Blackwood of Pitreavie, William and Robert Blackwoods merchants in Edinburgh, granted bond for L. 2000 Scots to Birny of Broomhill, and William and Robert granted to Pitreavie a bond of relief.

James Haliburton, writer to the signet, paid Broomhill upon an assignation, and thereupon pursued Mr Robert Blackwood of Pitreavie, son to the granter, who *pleaded*, That money had been imprest into Mr Haliburton's hand to make the payment, by Robert Blackwood, then collector of the cess for the city of Edinburgh, co-obligant with Pitreavie, and from whom he had a bond of relief; that, therefore, the debt being extinguished by the debtor's money, it was wrong in Mr Haliburton to take an assignation thereto.