

Answered for the pursuers: The obligation in a tack for payment of the rent, is more a conditional obligation, than an obligation *in diem*; seeing the tack-duty is only payable, on condition the master or setter perform his part; and conditional obligations never afford a ground of compensation. And as arrestment (though it affects all moveable sums due to the arrester's debtor), carries no more of a tack-duty than the current term; no more can be the subject of compensation.

THE LORDS sustained the compensation and retention only for the tack-duties that fell due before intimation of the pursuers' assignation; but preferred assignees to the subsequent rents.

Forbes, p. 328.

No 61.

S E C T. VII.

Effect Relative to Executors and Executors-creditors.

1628. November 12. GILBERT WILLIAMSON *against* ELISABETH TWEEDIE.

AN executor nominate having confirmed the defunct's testament, *eo ipso* becomes debtor to the legatars, to whom the defunct left in testament any legacies; so that if the executor convene any of the legatars for a debt owing by them to himself, the legatar may compensate that debt wherefore he is convened by the executor, with the legacy left to him by the defunct, and the executor will not be heard to say that there can be no compensation until the legatar obtain sentence against him; seeing it may be nothing will be due to him of his legacy, or at least not all, by reason the testament is exhausted.

Fol. Dic. v. 1. p. 162. Spottiswood, (EXECUTORS.) p. 118.

No 62.

A legatee may immediately plead compensation against an executor confirmed, to whom he is debtor.

1662. February 8. THOMAS CRAWFORD *against* EARL OF MURRAY.

THOMAS CRAWFORD, as executor-creditor, confirmed to umquhile Robert Inglis, as assignee by his relict, for satisfaction of her contract of marriage, pursues the Earl of Murray for payment of the sums confirmed, addebted by him to the said umquhile Robert.—The defender *alleged* compensation, because he had assignation to a debt due by the said umquhile Robert, which, as it would have been relevant against Robert himself, so must it be against his executor.—The pursuer *replied*; 1st, *non relevat*, unless the assignation had been

No 63.

Compensation against the executor, is not competent to a debtor of the defunct, taking assignation to one of the defunct's debts.

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