

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.*