

No 9. that no good reason can be assigned why the one privilege should be more available in competition with creditors than the other.

*Answered* for the pursuer; It cannot be known with certainty before the sale, whether an estate be bankrupt or not. In the present case there is reason to expect a reversion; but, supposing the estate to be certainly bankrupt, yet the heir is entitled to bring it to a sale, by the express words of the statute. The interpretation of the other part of the statute seems rather to support the pursuer's plea; for if, in the one case, the creditors may bring the estate to a sale, notwithstanding the entry upon inventory, to try if they can make more of it; so the apparent heir, for whose benefit this privilege of a judicial sale was introduced, ought not to be hindered from using it, in order to try whether he can make any thing of the estate, without being obliged previously to shew, that, in the event, this will certainly be the case. With regard to the expenses, it appears an established point, that they must be paid out of the estate or price, whether the process of sale be brought at the instance of creditors or apparent heirs. The action of sale was by this statute introduced in favour of apparent heirs; but, were the heir to run the hazard of bearing the expense himself, the intention of the law would be in a good measure defeated; for, as he could never be sure whether there might not be latent debts upon the estate, he would not chuse to expose himself to that hazard. All the writers upon the law agree in this interpretation of the statute, and the point has been expressly decided; Nicolson *contra* his Father's Creditors, No 7. p. 4028.

THE LORDS repelled the objection, and found that the expenses must come off the whole head.

Act. *Sir Adam Ferguson.* Alt. *Lockhart.* Clerk, *Gibson.*  
A. W. Fol. Dic. v. 3. p. 198. Fac. Col. No 31. p. 60.

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## S E C T. II.

### Expenses of Exoneration;—of Multiplepounding.

1687. February. SMITH of Giblistoun *against* CREDITORS of INNERGELLY.

No 10.  
A factor, appointed by the Court of Session, is entitled to his

IN an action of count and reckoning, at the instance of Robert Smith of Giblistoun, factor appointed for uplifting of the rents of the estate of Innergelly, against the Creditors of Innergelly, the LORDS sustained that article of the factor's discharge of the victual sold to ——— Steedman, notwithstanding of the

objection that he was now bankrupt, in respect that the time that the victual was sold Steedman was holden and repute to be a responsal man, and likeways allowed the L. 40 of incident charges, the factor deponing upon the same: As also sustained the articles of the reparation of the houses, the factor likeways deponing upon the same; and sustained and allowed him his expenses of plea in fitting of his accounts, and obtaining his decret of exoneration, at the modification of the Lord Reporter.

*Fol. Dic. v. 1. p. 287. Sir P. Home, MS. v. 2. No 896.*

No 10.  
expenses of  
process of fit-  
ting accounts,  
and obtaining  
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oneration.

1703. June 19. ANDERSON against GORDON, and his CREDITORS.

WILLIAM ANDERSON being tenant to one Gordon in Kinghorn, the several creditors of the said Gordon arrest in the tenants hands; whereupon he is necessitated to suspend, and likewise raised a multiplepinding, wherein he called all the competitors; and they being ranked according to their preferable diligence by arrestment, he now gives in a bill, representing, he had been at L. 5 Sterling of expenses in securing himself against double payment; and craved he might have retention of it out of the first end. of the sums decerned. It was *alleged* for the creditors, That they were seeking no more than their own, *et qui suum recipit et sibi vigilavit*, he could have no retention against them; but that debate fell only betwixt him and his master. It was *contended* for the master, That when tenants are unwilling to pay, they go and stir up any pretending to be their master's creditors to arrest in their hands, that they may have a specious ground of retention of the rent, and so the stop being by their own invitation and procurement, they ought to have no benefit thereby.—THE LORDS considered this general point of importance; for, if expenses were indefinitely given to all debtors who suspend upon arrestments frequently procured by themselves, it would make a great confusion, and has never hitherto been granted; but the case of a poor tenant seems more favourable than other ordinary debtors, and it were hard to make him lose all his expenses, when he is put under an absolute necessity of suspending, by the concurrence and competition of his master's creditors on an incumbered estate; and to take it off the creditors, were unreasonable; and *quoad* the master, it may be said, that his tenant might suspend on consignation, and then plead for his expenses; otherwise not.—THE LORDS refused the bill, reserving him action or retention against his master in the subsequent year's tack-duty.—But if he be removed out of the ground, retention will signify nothing to him; and consignation is not in every tenant's power.

*Fol. Dic. v. 1. p. 287. Fountainhall v. 2. p. 184.*

No 11.  
The Lords  
refused a te-  
nant his ex-  
penses in sus-  
pending on  
multiple-  
pinding a-  
gainst his  
landlord's cre-  
ditors, but  
reserved him  
action against  
his landlord,  
or retention  
of the next  
year's tack-  
duty.