

No 131.

Mr Burroughs's life : Found the pursuer Mrs Burroughs, who administrated the effects of the deceased Mr Burroughs her husband, in England, is not bound to account here for her intromissions, in virtue of that administration ; but to the end Sir Archibald Grant may have a competent time to constitute the debts owing him by Mr Burroughs, and bring the pursuer to account for her deceased husband's effects in a proper Court in England, stopt procedure in this action, both for principal and interest, to the 12th November 1754.'

And after hearing a reclaiming petition and answers, wherein the arguments above-mentioned were handled at great length ; and after hearing the Lord Ordinary's report touching certain facts relative to Sir Archibald Grant's accounts with Captain Burroughs, and Captain Burroughs's accounts with Mr Cartwright ;

THE LORDS, *inter alia*,¹ Found, that there is no sufficient evidence, that the sum covenanted by the marriage-articles was satisfied in whole or in part by Cartwright's intromissions with Burroughs's effects, further than to the extent of L. 1040 Sterling, applied to the purchase of L. 1000 capital in South-Sea stock ; and found it competent to the defender to plead retention against the bond pursued on to the extent of the annualrents during Mr Burroughs's life ; but found it not competent to the defender to plead retention on account of Mrs Burroughs's being administrator of her husband's effects in England, and of the defender's counter-action against her before this Court, for recovery or allowance of his claim against her deceased husband. *See FORUM COMPETENS.*

Act. R. Craigie, A. Lockhart.

Alt. Lord Advocate, J. Ferguson, A. Macdowal.
Clerk, Forbes.

Fac. Col. No III. p. 163.

* * * This case was appealed :

The House of Lords ORDERED, That the interlocutors, and parts of interlocutors, complained of by the original appeal (*viz.* those which found Sir Archibald entitled to plead compensation to the extent of the annualrents which fell due during Mr Burroughs's life) be reversed, and those complained of by the cross-appeal be affirmed.

1773. August 6. JAMES CLARK *against* ISOBEL BUCHANAN.

No 132.
Compensation found not pleadable upon an open account, against which

CLARK brought an action, in 1771, against Isobel Buchanan, as representing her husband, James Muir, surgeon in Glasgow, for payment of a bill of L. 20 Sterling, granted by him to the pursuer, 22d November 1757, payable one month after date.

Against Clark's demand upon this bill, the defender *pleaded* compensation upon an account of medicines and attendance, due to her deceased husband, by Clark and his mother. Clark admitted this account, in so far as respected himself; but in so far as it regarded his mother, whom he represented, he *pleaded*, That it was cut off by the triennial prescription. This account alleged due by the mother, commenced in the 1744, and ended in the 1750.

Observed on the Bench; That it was plainly prescribed before there was a mutual concurrence.

THE COURT 'sustained the objection of prescription to the account due by the mother;' and upon a reclaiming bill and answers, 'adhered.'

Act. D. Armstrong.

Alt. Ro. Cullen.

Clerk, Ross.

Fol. Dic. v. 3. p. 150. Fac. Col. No 88. p. 223.

No 132.
the triennial
prescription
had been run,
before the
date of the
bill with
which it was
sought to be
compensated.

1781. December 11.

ROBERT CAMPBELL of Downie, *against* JAMES CAMPBELL of Silvercraigs.

CAMPBELL of Asknish, and Campbell of Silvercraigs, as trustees for Archibald Campbell of Danna, sold the estate of the last, which was burdened with the payment of certain annuities.

Silvercraigs was himself a creditor of Danna, and prevailed upon the purchaser to pay him, and Asknish, the other trustee, that part of the price which he might have retained as the stock corresponding to the annuities. For this, without mention of their character as trustees, they granted to him a bond, obliging themselves and their heirs to indemnify him for these annuities.

On the death of one of the annuitants, Robert Campbell of Downie, likewise a creditor of Danna, laid arrestments in the hands of Asknish and Silvercraigs, the trustees. In a process of multiplepointing which followed, a competition arose betwixt this arresting creditor and Silvercraigs, who acknowledged, that he was possessed of the whole sum paid to him and Asknish; but *insisted*, That he was entitled to retain the stock of the annuity which had fallen for payment of the debt due to himself; and, in support of this claim,

Pleaded; It is a point *triti juris*, That an arrestee who is likewise a creditor, is entitled to retain payment of his own debt. This privilege obtains in every case; wherein, as in the present, the sum arrested has been lawfully and *bona fide* acquired; Bankton, b. 1. tit. 24. § 35. Nor, on this occasion, can it be precluded by the character of trustee. *Officium nemini debet esse damnosum*. A factor is entitled to a more extensive retention; Erskine, b. 3. tit. 4. § 21.

Answered for the arrester; The sum in question being a deposit in the hands of the trustees, is not a subject of retention; Erskine, b. 3. tit. 4. § 17.

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No 133.
A trustee is
not entitled
to retention
for a debt
due to him-
self.