

No. 11.

hand, for which he granted bond, with a quality, That neither principal nor interest should be paid till certain incumbrances were purged, particularly Doctor Hay's adjudication. Sir William Cockburn acquiring right to this adjudication, insisted in a declarator against Thomas Calderwood's heirs and executors for having it found, that he had a right to a share of Martin's infertment, in proportion to the extent of his adjudication, and ought to be paid at least *pari passu* with Thomas Calderwood; and in respect that Mortonhall got the lands affected by Martin's infertment, made over to him by Thomas Calderwood, and had the price thereof still in his hands, therefore he should be decreed to make part thereof forthcoming to Sir William, that price being a *surrogatum* come in place of the land itself, and being still *in medio*, not divided amongst those who had an interest in the land. Against this declarator it was objected, That Calderwood having purchased the lands of Ryslaw at a public roup, these lands were thereby disburdened of all the bankrupt's debts, and consequently of Sir William's claim; and that, although Calderwood had not made any actual payment of the price, yet, he being himself sole creditor, and likewise sole purchaser, there was an extinction *confusione*, which is equivalent to payment; and that therefore Sir William Cockburn had only a personal action of repetition against Thomas Calderwood, and could not affect the price of the lands in Mortonhall's hands, otherwise than by arrestment, or confirmation as creditor to Thomas Calderwood, the effect of which would be, That Sir William would be entirely cut out by Thomas Calderwood's creditors, who have done diligence, or got assignments for security of their debts. The Lords repelled the objection against the declarator, and found that Sir William has right by progress to part of the sums in Mortonhall's bond effeiring to Sir William and Thomas Calderwood's rights in Martin's debt, and that the sums in the said bond are to be considered as part of the price of the lands of Ryslaw, due at the sale thereof.

Fol. Dic. v. 2. p. 414.

* * * See a case between the same parties, No. 18. p. 5182. *voce* GROUNDS AND WARRANTS.

1744. January 4.

SIR JOHN BAIRD *against* The Other CREDITORS of MR. HUGH MURRAY.

No. 12.

Mr. Hugh Murray, executor nominate, having confirmed Sir James Rothead's moveables, appointed a factor to uplift the moveable debts. Accounts were settled betwixt them in September 1740, and a bill was granted by the factor for the balance, and Mr. Murray gave him a discharge, both of which proceeded on a fitted account. Mr. Murray dying a year or two after, his executors confirmed the bill as *in bonis* of him. On the other hand, the nearest of kin of Sir James Rothead claimed it as coming in place of the proceeds of Sir James Rothead's

executry. The Lords found, That there is sufficient evidence that the sum contained in the bill was part of the proceeds of Sir James Rothead's executry, and that therefore Sir James' nearest of kin are preferable for the sum in the said bill to the other creditors of Mr. Murray.

No. 12.

Fol. Dic. v. 4. p. 318. Rem. Dec.

* * This case is No. 15. p. 7737. *voce* JUS QUÆSITUM TERTIO.

1750. June 12.

RAMSAY *against* BLAIR.

No. 13.

Ramsay of Drumlochrie being attainted for rebellion, in order to save something for his children, assigned to Blair, his brother-in-law, a bond due by the Earl Northesk. Blair granted discharge of this bond to the Earl, on the latter's granting him a new bond for the sum, and this new bond was assigned by Blair to Alexander Alison under backbond, declaring the assignation to be in trust for Ramsay's children. Alison recovering payment from the Earl, granted a bond of corroboration to Blair for behoof of the said children, of which bond Blair received payment from Alison. One of the children of Ramsay pursuing for her share of this money, the crown-officers receiving intelligence of the transaction, entered a claim for the whole sum in the bond. Blair urged in defence, That he could not be obliged to pay the same sum to both. The Lords decerned Blair to pay to the pursuer, notwithstanding of his being still liable to pay the whole sum to the crown.

Fol. Dic. v. 4. p. 319. D. Falconer. Sel. Dec.

* * This case is No. 62. p. 4969. *voce* FRAUD.

1752. February 14.

DUKE of NORFOLK *against* TRUSTEES of The YORK BUILDINGS COMPANY.

No. 14.

The York Buildings Company having purchased from the public several of the forfeited estates in Scotland, granted bonds of annuities, during the lives of certain persons mentioned in the bonds. The annuities having run in arrear, the Company entered into an indenture with the annuitants, binding themselves to obtain infestments on the estates, and then to grant infestments to certain persons as trustees for security of the annuitants, whose names were contained in a schedule annexed to the indenture. The Company was accordingly infest, and the Trustees in consequence; but neither the indenture, schedule, nor disposition to the Trustees, mentioned the original bonds, nor the lives, inserted in the bonds. Several of the annuitants disposed their annuities, and, from ignorance of the law of Scotland, the purchasers were in use to give up the old bonds to the Company, and obtain from them new bonds, in which sometimes the names of the lives were changed. The Duke of Norfolk, a creditor of the Company, adjudged the