No 24. being L. 285 : 12 : 0 Sterling, towards payment of their own and the other arrestments.

Upon this footing matters stood, the price of the tobaccos being still so far *in medio* as that it was not paid by Dunlop to the arresters, when Chrystie and Company got notice of a trick that had been put upon them by Anderson, in having got the son of Robert Drysdale, and of the same name with his father, to adhibit his subscription to the bill which he had transmitted to them, and upon the faith whereof, as the acceptance of Robert Drysdale, they had parted with their tobaccos. Upon discovery of this fraud, and that the price of the tobaccos was still in the hands of John Dunlop as aforesaid, Chrystie and Company brought an action against John Dunlop, and Thomas and Adam Fairholms, for making furthcoming to them the price of the tobaccos.

And, upon report, the Lords 'preferred Chrystie and Company to the price; notwithstanding its being argued for Fairholms, &c. 1*mo*, That, by the sale and delivery, the property of the tobaccos was effectually transferred to Anderson, and to which his fraud was no better objection than it would have been, had he laid down the price to them in false coin. And if the property was once transmitted, his creditors, who had affected it by their arrestments, were not concerned what personal action might lie to the pursuers against Anderson. 2*do*, Admitting, that had the defenders nothing to plead, but in the character of arresters, and that as such they may be thought subject to any personal exception competent against Anderson himself, were the tobaccos *in medio*, and he claiming them; yet they here plead in another character, viz. As transferrees of the property, by the voluntary deed of Anderson, in taking the bill of loading in their name, and the subsequent order to divide the price among the arresters, which they argued to be sufficient for their purpose, though no arrestment had ever been used.

But the Lords having considered those proceedings as only a prosecution of their arrestments, and that they did not put the defenders in the character of *bona fide* purchasers, found as above; the reporter and some others dissenting, who considered the property to be transferred by the voluntary acts of Anderson; and that the defenders were not to be looked on as in a worse case for having also used arrestments.

Kilkerran, (FRAUD) *No* 3. *p.* 216.

1749. *January* 18.

No 25. BLACKWOOD *against* The other CREDITORS of SIR GEORGE HAMILTON.

How far fraudulent to take a second right when in the knowledge of a former.

IN the reduction of the decree of ranking of the Creditors of Sir George Hamilton, upon the estate of Dudhope, the ground whereof *vide* 4th instant, *voce* PROCESS, this point *inter alia* occurred to be reasoned among the Lords; in what case the knowledge of a prior right did infer fraud in the acquirer of a

second right? Some of the Lords thought that it only held in the case of a second purchaser of an irredeemable right; for this reason, that double redeemable rights are compatible, as the debt due to the acquirer of the prior right may be *aliunde* paid, and that in the case of creditors, *vigilantibus jura subveniunt.* No 25.

Others doubted if that distinction would universally hold. Suppose, for example, the debt, for security whereof the prior right was granted, manifestly to exceed the value of the subject, and the debtor, granter, in no condition otherways to pay: And the maxim *vigilantibus, &c.* only applies to the case of legal diligence. But all agreed in this, that where the subject was at the time equal to both debts, and which happened to be the present case, as there was no fraud at the time in the acquirer of the second right, so it could not *ex post facto* become a fraudulent act by the eventual insufficiency of the subject, through its being drawn away by other creditors obtaining themselves infeft before the obtainer of the first right. *See* No 34. p. 904.

Kilkerran, (FRAUD.) *No* 4. *p.* 218.

1778. *August* 4. WILLIAM BOGLE *against* JOHN YULE.

No 26.
Effect of a precognition taken previous to a civil action; and of the examination of the defender on a charge of fraud.

JOHN BOGLE, a short time before his death, granted an heritable bond over the lands of Hamilton-farm to Yule, for L. 4850, on the narrative that he stood indebted to Yule in that sum, by bills, and other vouchers, delivered up when the bond was given. On the death of John, William Bogle, heir of provision to him in these lands, took an *ex parte* precognition before the Magistrates of Glasgow, relative to the manner in which this bond was granted; and, in this precognition, Yule himself was examined. The papers found in Bogle's repositories were, likewise, upon the application of the heir, taken into the custody of the Magistrates.

The heir afterwards brought a challenge of this heritable bond, as granted on death-bed, without any just or onerous cause; and insisted, that the defender should, in the *first* place, be personally examined on the value alleged to have been given for this bond, and all circumstances relative thereto.

The defender did not object to the examination, but *contended*, 1*mo*, That the precognition previous to the civil action, tending to prejudicate the witnesses, was illegal; and that, before being examined, he was entitled to see, not only his own declaration, but the whole precognition.—2*do*, He is likewise entitled previously to see the vouchers of debt, given up when the bond was granted, and the other papers found in Mr Bogle's repositories.

Answered for the pursuer; 1*mo*, The precognition was taken from a suspicion, at the time, that the deed was forged, in order to know whether there were grounds for a criminal prosecution. The defender is entitled to see the whole precognition before the proof goes out, but not before his examination; for that