

No. 26. 1752, Feb. 21. DUNLOP *against* FORBES, JOPP, &c.

WHILE Forbes (mentioned in the preceding case) was in Holland, he wrote to Dunlop for another parcel of spirits for ready money, to be sent by another ship which he named, but had left Holland before that ship sailed. However, Dunlop suspecting nothing sent the spirits with invoice and a bill of lading, and wrote Forbes to remit the price. Forbes arrived at Aberdeen before that ship, and being obliged by diligence to leave the town, committed the charge of them to Jopp, and desired him to employ one Spark, a common porter at Aberdeen, to receive and dispose of the spirits, which he received, and sold them to Robert Napier, junior, and took his receipt, which he gave Jopp, but Jopp was dissatisfied, and bid him take a bill in his name. Napier would give no bill in Jopp's name, because he bought none from him, but gave a bill in Spark's own name, which he once gave to Jopp but he returned it. Forbes's creditors, as said is, arrested in the hands both of Jopp and of Spark, particularly so did Dunlop, and Jopp arrested first in Spark's hands and also in the hands of Robert Napier the father, (I suppose by a mistake of the messenger) but Dunlop was the only person that arrested in the hands of Robert Napier the son. In the competition for the price of this parcel of spirits, most of us thought that there was fraud even *in consilio* on Forbes's part in the purchase of the spirits, and had they been extant, though the property was transferred, yet the sale might be reduced and the property brought back to Dunlop, notwithstanding any arrestment of Forbes's creditors, but as the property was transferred to Forbes, so they were bought *bona fide* by Napier, who could not be affected by Forbes's fraud,—the property could never be brought back, and the price never was Dunlop's, nor had he any hypothec in it, and therefore could only be preferred according to his diligence,—(of which opinion I was) but Justice-Clerk and others, thought he would still be preferable for the price while *in medio* as a *surrogatum*. But I observed, that had the spirits been bartered and sold and the goods got in barter again sold, that would still be a sort of *surrogatum*, and yet I imagined Dunlop could neither claim these bartered goods nor their price, but according to his diligence. We were greatly divided as to this point, and there was some difficulty even on the point of Forbes's fraud, on account of new facts alleged by the Bar and offered to be proved; therefore we did not decide this point, because we agreed pretty unanimously that Spark was not properly debtor in any money to Forbes though he was his trustee in Napier's bill, and that Napier though nominally debtor to Spark, yet really was debtor only to Forbes; and therefore we thought the arrestment in Napier's hands the most proper to affect the money, and as Dunlop had the first if not the only arrestment in his hands we preferred him.

No. 27. 1752, Feb. 25. ANDREW FORBES *against* MAINS and COMPANY.

WILLIAM ROLLAND, shipmaster in Anstruther, dealt for some years with the Mains, kept his credit with them and paid punctually. After his death his widow continued to trade and in 1748 broke and obtained a *cessio bonorum*. Thereafter she began a hidden trade, which to be sure must have been concealed from her creditors, and among others commissioned in 1749 two different parcels of wine from the Mains, which they not know-