

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-

ing of the *cessio bonorum* sent to her and she paid honestly; and in 1750 she commissioned a third which they sent to her; but on its arrival at Leith Andrew Forbes arrested it for a debt prior to the *cessio*; and in the process before the Admiral compearance was made for the Mains, and they insisted in a reduction of the sale of the wines upon fraud, because Mrs Rolland was bankrupt and had obtained a *cessio* before she commissioned it, of which they were ignorant, and therefore the wines were still theirs and they ought to be preferred to the arrester. The Judge-Admiral found that the fraud impeded the transmission of the property, and preferred Mains and Company. Forbes pursued reduction of the decret, and on report by Lord Kames, we repelled the reasons of reduction and assolzied.

No. 28. 1752, June 17. RANKING of BURD'S CREDITORS, &c.

IN the competition which was between the parish of Cranston, Mrs Seaton, and William Robertson, we found, that Edward Burd's disposition of his lands to Mrs Seaton 15th September 1739, and sasine following on it the same day, and which was qualified by her back-bond dated 24th September 1739, that the same was for security of certain former debts and of a bond then granted, (that is the said 24th September) for L.70 sterling then lent by Mrs Seaton, and of another bond of the same date to John Young of L.106 sterling bearing to be the balance of accounts,—could not be sustained as a security for the L.70 sterling in terms of the act 1696, in respect the debt was contracted after the date of the sasine, and was void and null as to the L.106 and other anterior debts, in respect that he was notour bankrupt in terms of the said act within 60 days.

No. 29. 1752, June 26. EARL of SELKIRK, &c. *against* CREDITORS of LIDDERDALE.

IN a ranking and sale where the estate was more than exhausted by real debts, the last preferable at last discovered a defect in the bankrupts own titles or infestment which would void all the infestments of the creditors as *a non habente*, upon which they entered into a compromise. They completed the bankrupts titles to make them accresce. They dropped the process, and sold the lands upon a commission from him. Now two personal creditors who had not compeared in the process adjudged and wakened it, and objected to the real creditors that their infestments were null till they completed the common debtors titles, which ought to be reduced as done after his bankruptcy, and after the process of ranking and sale; but Drummore repelled the objection, and this day we adhered.

No. 30. 1753, Feb. 6. CHATTO'S CASE.

CHATTO being accused of forging a writing as granted by the last Duke of Roxburgh in favours in general of the feuars of Kelso, which does not now appear, and which Chatto on his examination said that he burned,—the pursuer's petition and complaint being answered, the pursuer craved a diligence for proving. Lockhart alleged, that as the writing was not in Court, we could not proceed to try the forgery, which he said never was done except in Captain Barclay's case in 1669 mentioned by Sir George M'Kenzie, for that there