

No 73.

On the part of Jap and the others, were referred to the case of Boyleston against Robertson and Fleming, 24th January 1672, Stair, v. 2. p. 54. *voce* SURROGATUM; and the case of Sir Harry Innes against the Creditors of Ludovick Gordon, No 51. p. 715. On the part of Dunlop, were cited the competition of the Creditors of Andrew Thomson, No 70. p. 738.; and the case of Carmichael against Mosman, No 72. p. 740.

THE LORDS found Dunlop preferable upon his arrestment in Napier's hands.

It is to be observed in this case, That Dunlop insisted greatly to have the sale reduced which was made by him of this second parcel of goods, in like manner as the sale of the first parcel had been, on account of Forbes's fraud, and Jap's accession thereto: and the Court seemed to be of opinion, that, had the goods been extant, there was sufficient evidence of the fraud to have annulled the sale; but as the goods were disposed of to a *bona fide* purchaser, some of the Judges made a doubt how far the price was a *surrogatum*, or upon what *medium* Dunlop could be preferred to it, otherwise than according to his diligence. They therefore waved determining the general point.

A&. *A. Lockhart.*

Alt. ———

Clerk, *Pringle.**Fol. Dic. v. 3. p. 41. Fac. Col. No 5. p. 7.**Wal. Stewart.*

1752. December 12.

JOHN CAMPBELL against JOSEPH FAIKNEY.

No 74.

Arrestment used in the hands of the trustees of the debtor to the common debtor, upon which decree of furthcoming was taken against the constituent, found not good.

JOSEPH AUSTIN of Killspindy granted a promissory-note, dated at London, for L. 50, payable to David Graham merchant in London. Austin, having put his estate into the hands of trustees, went abroad. John Campbell, cashier of the Royal Bank of Scotland, raised a process against David Graham for payment of certain debts; and upon the dependence arrested, not in the hands of Austin, the debtor of Graham, but in those of Austin's trustees. Thereafter Campbell having obtained a decret of constitution against Graham his debtor, raised a furthcoming against Austin's trustees, and also against Austin himself, who, by this time, had returned to Scotland; but he took the decret of furthcoming against Austin only, not against the trustees.

The promissory note in question had been indorsed by a blank indorsation to Andrew Pringle merchant in London; but whether before or after the arrestment, did not appear. Andrew Pringle sold the note, as it stood, without indorsing his own name upon it, to Joseph Faikney merchant in London: this was after the date of the arrestment. In a multiple-pounding, at the instance of Austin, Faikney, the indorsee, *objected* to Campbell's arrestment, that it was null and void, because used not in the hands of Austin, the debtor to Graham, but in the hands of Austin's trustees; for that such an arrestment was no better than if used

in the hands of Aultin's factor: the trustees might be debtors to Aultin, but were not so to Graham.

2do, The decret of furthcoming was informal, in so far as it was obtained, not against the trustees in whose hands the arrestment was laid, but against Aultin, in whose hands no arrestment was laid.

Answered for the arrester, That the trustees and Aultin were *eadem persona*; and the trustees being debtors to Aultin, must be considered as debtors to Graham: This will also account for the taking the decret against Aultin himself, who acknowledged his having granted the note.

There were also other points *argued*; particularly this, viz. Whether the promissory note in question, because granted in England, where promissory notes have the like privileges as bills of exchange, should therefore be considered as if it had been a bill? Many of the judges gave their opinion in the affirmative; but it being moved by one of the judges, to put the question only upon the objection to the arrestment,

THE LORDS sustained the objection to John Campbell's arrestment, and therefore preferred Joseph Faikney, the indorsee.

For the arrester, *Ja. Ferguson.*

For the indorsee, *H. Home.*

Clerk, *Gibson.*

Fac. Col. No 44. p. 64.

Wal. Stewart.

1753. November 24. Competition, CREDITORS of Benjedward.

THE estate of Benjedward having been publicly sold, upon a process at the instance of the apparent heir, the Lord Cranston was preferred for the principal sum of L. 2400 Sterling, contained in an heritable bond granted to him by George Douglas late of Benjedward, dated 30th April 1739; and for the interest due thereon, extending at Whitsunday 1751 to L. 860 Sterling: These annual rents were arrested in the purchaser's hands by some of Lord Cranston's personal creditors; and afterward his Lordship disposed the heritable bond, with the by-gone interest, to the Master of Ros, for security of a prior debt. In a competition of the creditors it was *objected* against the arresters, That an arrestment in the purchaser's hands is not a habile diligence for carrying the by-gone interest; for this plain reason; that the purchaser is not debtor in this sum, but only in the price of the land; and, as this price is a *surrogatum* in place of the land, the creditors who have affected the land must be paid *primo loco*; and in particular the Master of Ros is not bound to quit his real security till the last penny be paid him, not only of the principal sum, but also of the interest. It was *answered*, That the purchaser had granted bond to pay the price to the apparent heir and to the creditors, which made the price a pure debt, and affectable by arrestment.

The Court gave this point for the arresters.

No 74.

No 75.

Arrestment by the creditor of a bankrupt in the hands of the purchaser of his estate found *effectual*.