

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*.

No 75.

I have some scruples. There is such a thing as an imperfect right to a personal debt, as well as to land. A disposition to land without infeftment, is only one step to a transmission of property. An assignation of a bond without intimation, is in like manner but one step to the transmission of a *jus crediti*: The cedent is not divested before intimation. The debt may be arrested by his creditor, and therefore not by the creditor of the assignee. After intimation, the debt is only arrestable by the creditor of the assignee. Applying this to the present case, it appears to me that Lord Cranston's right to the rents, by virtue of his heritable bond, even before the sale, was incomplete, and required a decret of mails and duties to complete the transmission; and therefore, before such decret is obtained, an arrestment in the tenant's hands, by Lord Cranston's creditor, would not be effectual. It would be the same with an arrestment laid in the debtor's hands, by the creditor of an assignee before intimation. But the price being a *surrogation* in place of the land, an arrestment laid in the hands of the purchaser can never have a better effect, than an arrestment laid in the hands of a tenant before the sale. *2do*, The transaction betwixt the creditors and purchaser, is in effect a mutual contract, which requires mutual performances. The purchaser is indeed debtor for the price; but then he is not bound to pay to any single creditor, till he obtain from that creditor a conveyance of his debt and diligence. For this reason, the price cannot be affected by an arrestment. It becomes not a pure debt, till this conveyance be made, and the arrester cannot convey. A general disposition *mortis causa*, carries all the defunct's moveable bonds. But confirmation being necessary to complete the transmission, an arrestment before confirmation, is an inhabile diligence. The debtor, in whose hands the arrestment is laid, is not bound to make the sum furthcoming to the arrester, till the debt is confirmed, which cannot be done by the arrester. In this view, it alters not the case, that the purchaser granted bond to pay the price to the apparent heir and to the creditors. For still this obligation is under an implied proviso, that the creditors must convey their debts and diligences to the purchaser; for he is not bound to pay without purging incumbrances.

The only proper method to attach the bygone interest due upon an infeftment of annualrent, is to adjudge the heritable bond, which will entitle the adjudger to take a decret of mails and duties against the tenants before the sale, and to convey the debt and diligence to the purchaser after the sale.

*Sel. Dec. No 57. p. 75.*

1756. January 23.

PATRICK SOUPER against The CREDITORS of ALEXANDER SMITH.

No 76.

A person insolvent, at a meeting of creditors, by a missive, empowered a

ALEXANDER SMITH being insolvent, did, at a meeting of his creditors, write the following letter, directed to John Watson: 'I hereby empower you to cause roup and sell the furniture of my house, and liquors in my cellars, for the behoof of my creditors.'