

prisers, and therefore brought them all in *pari passu*, who had apprised within year and day of the first. (See No 14. p. 140. See COMPETITION.)

No 41.

*Fount. v. 2. p. 278.*

1706. February 20.

STEWART of Torrence *against* The CREDITORS of GEORGE DUNDAS.

TORRENCE, as a creditor to George Dundas, arrests in the hands of Bonhard, who was debtor to the said George in L. 10,000 or thereby, by an heritable bond.

Compearance is made for other creditors of the said George, who adjudged the same, as being heritable; and *alleged* the same was not arrestable, because infestment was taken thereon before the arrestment.

It was *answered*: The infestment was null as to Torrence, a third party, because not duly registrate; for the act of Parliament bears, that sines not registrate make no faith in prejudice of a third party.

It was *replied*: Sines not registrate are not simply null, being good against the granter; and even as to third parties, the full clause in the act of Parliament is not repeated, which provides that the same shall make no faith in prejudice of a third party who hath acquired a perfect and lawful right to the said lands and heritages: which cannot be subsumed in Torrence's case; and 24th March 1626, Gray *contra* Graham, No 1. p. 565. in a competition betwixt an arrester and a party infest, where the saine was not registrate, the infestment was preferred upon this very allegiance, that the arrester had not lawfully affected the lands, whereof he craved the mails and duties. *2do*, This arrestment was within the 60 days allowed for the registration of sines; so that, at the time of the arrestment, there was no defect or ground of objection against the same, and being once preferable, no posterior neglect could give the arrestment a preference.

It was *duplicated*: The saine unregistrate can never make faith in competition with the arrester, because he has lawfully affected the subject of the competition, viz. the principal sum due by Bonhard to Dundas his debtor; for if there had been no infestment, then the principal sum was affected, and the property transferred by the arrestment, in the same way as if Dundas had voluntarily assigned the same with the precept of saine, and that Torrence as assignee had taken infestment; in which case the former unregistrate saine could not compete, no more can the same be effectual against the arrester, who is a legal assignee. From whence the difference betwixt this case and that remarked by Durie is clear; for there the subject of the competition was only the mails and duties of lands, which lands were not affected with arrestment: Besides, there were many other grounds in that practice which might have influenced the decision, for the purchaser had a disposition and possession, and the tenants enacted to pay him the rents in controversy. *2do*, It imports nothing that the arrestment was within the

No 42.

An heritable bond, on which infestment had followed, but not registered in terms of act 1617, was found arrestable, and the arrester preferred to a posterior adjudger of the bond, though the sixty days allowed for registration were not run, so that the arrestment might have been evacuated by registration thereafter.

No 42. 60 days ; for without registration, it is never compleat ; but registration in due time is drawn back to the date of the infestment.

THE LORDS ' preferred the arrester.

*Fol. Dic. v. 1. p. 55. Dalrymple, No 74. p. 94.*

\* \* \* The same case is thus reported by Forbes :

In the competition betwixt Alexander Stewart of Torrence, and Walter Stewart of Pardovan, as creditors to Bonhard and George Dundas, THE LORDS, 26th June 1705, having found Pardovan's adjudication of an heritable bond granted by Walter Cornwal of Bonhard, to George Dundas merchant in Leith, preferable to Torrence's arrestment thereof ; in respect the citation in the adjudication was prior to the arrestment, though the decret was posterior : Torrence did thereafter insist for preference upon the priority of his arrestment against the other adjudgers, who could not plead the circumstance of an anterior citation.

*Alleged* for the adjudgers : Torrence's arrestment was not to be respected, because infestment had followed upon the heritable bond, which rendered the subject not arrestable.

*Answered* for Torrence : That the instrument of sasine was null as to him, as a third party, through not being registered conform to the act of Parliament 1617.

*Replied* for the other creditors : That an unregistered infestment is not simply null, but valid as to some effects, and is good against the granter and his representatives ; and therefore the subject was thereby rendered incapable of arrestment. Yea, the heritable bond not being arrestable the time of the arrestment, by reason of the sasine ; the inhabile diligence could not thereafter revive through the neglect of registering the sasine within 60 days, which were but half run at the time of using arrestment. Nay further, that the sum was heritable and not arrestable, appears from hence, That it could not have been transmitted by George Dundas, the creditor's death, to his heirs, without a special service, or precept of *clare constat*. Nor can the nullity of an infestment in lands be objected by any who have not a real right themselves, 24th March 1626, Gray against Graham, No 1. p. 565.

*Duplied* for Torrence : The sasine is as much null *quoad* him, as if declared null to all intents and purposes ; he not being in the case of those against whom it can be effectual. And there is no necessity for Torrence to plead, That his arrestment revived by neglect of the registration within 60 days ; for his arrestment was certainly good *ab initio*. True, the due registration of the sasine, within 60 days after arrestment was used, would have evacuated the arrestment ; but the sasine unregistered was never a legal compleat deed whereupon to compete with a third party. *2do*, 'Tis owned that the sum, null as the sasine is, is heritable, and would not have passed to the heirs of George Dundas, without a service ; but then the same is still arrestable *quoad* Torrence, a third party ; for a

null saine, and no saine, are much the same. And since the act of Parliament 1617, declares an unregistrate saine to make no faith in judgment; this is as strong as any certification in an improbation would be. To pretend that the saine is good against the arrestment, because it was valid when the arrestment was used, and might have been registrate at any time within a month after the arrestment, is but to cavil; for we are not to regard what might have been done, and was not done.

THE LORDS found the bond arrestable, and preferred the arrester.

*Forbes, p. 105.*

1707. *March 18.*

ALEXANDER ALISON, Writer, *against* the DIRECTORS of the African and India Company.

MR JAMES ERSKINE, Lord Grange, as probationer, reported Alexander Alison, writer, against the Directors of the African and India Company. Hary Crawford in Dundee having paid in L. 200 Sterling as an adventurer in that company, Alexander Alison, as creditor to him, arrests it in the directors, &c. their hands; and then pursues a furthcoming, and likewise repeats a declarator, that the money stands affected by his diligence, and must belong to him.—*Alleged, imo,* That the directors can never be personally liable, but only *ratione officii*. *2do,* By the act of Parliament establishing the company, (act 8th 1695,) the capital stock is declared free of all confiscations, seizures, arrests, &c. except only as to the profits; and the patentees are empowered to prescribe rules for conveying and transmitting the shares of the proprietors; and they having ordained it to be by real diligence, and transfers, it cannot be reached by arrestment.—*Answered,* So long as the company stood, the stock could not be affected; but now *res devenit in alium casum*, this present Parliament has declared the said company dissolved and at an end, upon paying in the stock out of the equivalent, which was a *casus incogitatus* at the time of erecting the company; and therefore, on a supposition that it would be perpetual, the stock was declared not attachable; but now when every proprietor is to draw out his share, what more habile and proper diligence than an arrestment, which is a *nexus realis*, and so answers the terms of the act of Parliament; and *esto* it were heritable, yet even such debts, by the 51st act, 1661, are affectable either by arrestment or adjudication, if infestment has not followed thereupon; and it were a most tedious and expensive way to put them to an adjudication; and lately, in the case of Alexander Stevenfon, merchant in Paris, a share in the Newmills cloth-manufactory was found moveable and arrestable; and by a declarator, the arrester was surrogate in place of the proprietor: And Dirleton, *voce* Arrestment of Conditional Debts, says, a creditor arresting a sum due upon a wadset before redemption, (when it is certainly not arrestable) if afterwards there be a redemption it accretes and is preferable to a second arrester after redemption, though this last seems more formal, being then

No 42.

No 43.

A share of the African Company, which, while the company subsisted, was by act of Parliament not arrestable, found arrestable, the company being dissolved.