

tor. The decision Pearson against Murray doth not meet the case, for whatever retention, &c. a Chamberlain may have against his constituent, that cannot hinder the debtor of a defunct to make payment to his executor creditor: And whatever my Lord Wintoun might plead, it is *jus tertii* to the suspenders to obstruct the charger's payment.

The Lords found, That the victual was not Mr. Christopher's, and that therefore the price was not *in bonis defuncti*, nor could be claimed by Bailie Hay as his executor creditor.

Fol. Dic. v. 2. p. 412. Forbes, p. 150.

No. 9.

1731. December. LORD STRATHNAVER against M^cBEATH.

John Mathison, drover, bound for England with a drove of cattle belonging to himself, took the trust of another drove belonging to James M^cBeath, which he undertook to sell upon his own account. Mathison dying in England, while a part of this drove remained on hand unsold, Robert Gordon, his fellow drover, disposed of the cattle, took up what money belonged to the defunct, and, after paying his funeral charges, &c. returned to Scotland with £.130, ready to be delivered to those having best right. In a competition betwixt an executor-creditor of the defunct's and the said James M^cBeath, the Lords found the money lying by Mathison at his death, and intromitted with by Robert Gordon, and also the price of the cattle sold and received by Robert Gordon after Mathison's death, was presumed to be the price of M^cBeath's cattle so far as extended to the value of the same, and not *in bonis* of Mathison; and therefore preferred M^cBeath to the executors-creditors of Mathison. See APPENDIX.

Fol. Dic. v. 2. p. 412.

No. 10.

1725. December 16.

SIR WILLIAM COCKBURN against CREDITORS of THOMAS CALDERWOOD.

Alexander Martin being creditor upon the estate of Ryslaw by infeftment for upwards of £.30,000 Scots, the right after his death was adjudged by Doctor Hay and Thomas Calderwood, two of his creditors, in the year 1695. Thomas Calderwood, upon the title of Martin's infeftment, carried on a sale of the estate of Ryslaw, and got himself in effect ranked sole creditor, and at the same time became a purchaser; in which process Doctor Hay was at first called, but he died during the dependence, and there was no transference against his heirs, nor appearance made for them. Thomas Calderwood, immediately after the purchase, without being infeft, sold the lands to Mortonhall, and made over his decret of sale. Mortonhall paid some part of the price, retaining the remainder in his

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hand, for which he granted bond, with a quality, That neither principal nor interest should be paid till certain incumbrances were purged, particularly Doctor Hay's adjudication. Sir William Cockburn acquiring right to this adjudication, insisted in a declarator against Thomas Calderwood's heirs and executors for having it found, that he had a right to a share of Martin's infertment, in proportion to the extent of his adjudication, and ought to be paid at least *pari passu* with Thomas Calderwood; and in respect that Mortonhall got the lands affected by Martin's infertment, made over to him by Thomas Calderwood, and had the price thereof still in his hands, therefore he should be decreed to make part thereof forthcoming to Sir William, that price being a *surrogatum* come in place of the land itself, and being still *in medio*, not divided amongst those who had an interest in the land. Against this declarator it was objected, That Calderwood having purchased the lands of Ryslaw at a public roup, these lands were thereby disburdened of all the bankrupt's debts, and consequently of Sir William's claim; and that, although Calderwood had not made any actual payment of the price, yet, he being himself sole creditor, and likewise sole purchaser, there was an extinction *confusione*, which is equivalent to payment; and that therefore Sir William Cockburn had only a personal action of repetition against Thomas Calderwood, and could not affect the price of the lands in Mortonhall's hands, otherwise than by arrestment, or confirmation as creditor to Thomas Calderwood, the effect of which would be, That Sir William would be entirely cut out by Thomas Calderwood's creditors, who have done diligence, or got assignments for security of their debts. The Lords repelled the objection against the declarator, and found that Sir William has right by progress to part of the sums in Mortonhall's bond effeiring to Sir William and Thomas Calderwood's rights in Martin's debt, and that the sums in the said bond are to be considered as part of the price of the lands of Ryslaw, due at the sale thereof.

Fol. Dic. v. 2. p. 414.

* * * See a case between the same parties, No. 18. p. 5182. *voce* GROUNDS AND WARRANTS.

1744. January 4.

SIR JOHN BAIRD *against* The Other CREDITORS of MR. HUGH MURRAY.

No. 12.

Mr. Hugh Murray, executor nominate, having confirmed Sir James Rothead's moveables, appointed a factor to uplift the moveable debts. Accounts were settled betwixt them in September 1740, and a bill was granted by the factor for the balance, and Mr. Murray gave him a discharge, both of which proceeded on a fitted account. Mr. Murray dying a year or two after, his executors confirmed the bill as *in bonis* of him. On the other hand, the nearest of kin of Sir James Rothead claimed it as coming in place of the proceeds of Sir James Rothead's