

same could have been reached, but by an arrestment, it is believed the arrester falls to be preferred.

It is believed the LORDS found the arrestment did not fall by the death of the common debtor, and that they preferred the executor confirmed to the arrester*.

Fol. Dic. v. 3. p. 43. C. Home, No 197. p. 329.

1752. February 21. DUNLOP against JAP, and OTHERS.

JAMES JAP merchant was a creditor of William Forbes merchant, and was also his ordinary agent, and knew all his affairs. When Forbes became insolvent, he formed, with the privity of Jap, a scheme to commission goods from abroad on credit before his bankruptcy should be public, and to lodge them in Jap's hands, that he might dispose of them, and satisfy with the price the debt due to himself. In pursuance of this scheme, he commissioned a parcel of goods from Dunlop, merchant in Holland, on a pretended joint credit, and took care that they should come into the hands of Jap; who sold them accordingly. But the LORDS, on the 18th January 1752, 'found the property of the goods was not transferred from, but remained with, Dunlop; and therefore preferred him to the price.'

The second part of that case is as follows.

A few days after Forbes had commissioned the said goods, he went over to Holland, and bought from the same Dunlop, on his own credit, a second parcel of goods, which, in like manner, came to the hands of Jap. He, at the desire of Forbes, employed one Spark, a common porter, to dispose of the goods to Robert Napier. Spark, without ever mentioning the name of Forbes, sold and delivered the goods, and took Napier's receipt for them. Jap, dissatisfied with this, and desirous to have a bill for the price payable to himself, ordered Spark to go back to Napier, and get such a bill. Napier refused to grant it so, but gave one payable to Spark. Jap arrests in the hands of Spark the porter; other creditors after him do the like; and, last of all, Dunlop arrests in the hands of Napier the purchaser.

Argued for Dunlop, That Spark was only employed, by the order of Forbes, as a hand to receive the goods from the ship, and dispose of them for his behoof. Spark was never proprietor of the goods, nor debtor for the price. The price was not attachable for his debt. All he had to do was to deliver up the bill; and, by so doing, he was acquitted from any demand. Therefore an arrestment in his hands was of no avail.

Pleaded for Jap, and the other arresters in Spark's hands, That as Spark had sold the goods, and taken a bill for the price payable to himself, he was to be considered as creditor for the price, and Napier was to be considered as debtor to him alone. That though Spark might be accountable to Forbes for the bill, yet that did not alter the case. Therefore the arrestments in Spark's hands, as being the first, were preferable.

* See this case as reported by Kilkerran, p. 137. *vide* COMPETITION of this Dictionary.

No 72.

No 73.

A debtor employed a third person to sell goods for him. The purchaser granted bill to that third party. An arrestment in the hands of the purchaser preferred to one in the hands of the holder of the bill.—There are special circumstances in this case.

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