

Answered, From the elapse of the term for redemption, Ferguson's claim was only for the balance of the value. No 17.

No objection was made to the arrestments in the hands of Duke and Brown after the sale, but against the arrestments in the hands of Agnew.

Objected, That Agnew was not debtor to Ferguson, but to Duke and Brown; and though Ferguson might have been entitled to insist in a declarator against Agnew, that the surplus price belonged to him in preference to his trustees; yet this was not so direct a claim, as to found an arrestment; nor could arrestment be competent in the hands of distinct persons to attach the same subject.

Answered, That by the accustomed style of arrestments, all moveable subjects are attached, not only due directly to the principal debtor, but 'to any other person or persons for his use and behoof, by bond, bill, &c.' And there can be no dispute, that Agnew owed the surplus price in this case to Duke and Brown, for the use and behoof of Ferguson.

'THE LORDS found, That the adjudications were the only proper diligence to carry Cairoch's interest in the lands, and the price thereof; reserving the consideration of the competency of the arrestment in the hands of Nathaniel Duke and Patrick Brown, and those in the hands of David Agnew the purchaser.'

For the Arresters, *Montgomery*. Alt. *Lockhart*. Clerk, *Kirkpatrick*.
W. J. *Fol. Dic. v. 3. p. 152.* *Fac. Col. No 125. p. 229.*

S E C T. III.

Arresters with Assignees.

1618. June 16.

A. against B.

FOUND that an arrestment upon an action depending, with sentence following, should be preferred to an assignation, which was not intimate before the arrestment, albeit intimate an half year before sentence.

No 18.

Fol. Dic. v. 1. p. 178. *Kerse, MS. fol. 234.*

1623. February 21. CRAW against IRVINE, and Others.

ONE CRAW arrests in the hands of certain persons some sums and corns addebted by them to one Mr James Irvine, who was addebted to CRAW in some money; for satisfaction whereof they being pursued to make the same furthcom-

No 19.
 A prior assignee found obliged to

No 19.
show onerosi-
ty, in compe-
tition with an
arrester who
had charged,
but not de-
nounced.

ing, compeared a person who was made assignee to the particulars arrested by the said Irvine, and *alleged*, That the goods should be decerned to pertain to him, in respect of the assignation made to him before the arrestment, and that the same was also intimate before the arrestment; in fortification whereof the said assignee condescended on the onerous cause, for making of the said assignation, and offered him to prove, that Irvine his cedent being debtor to sundry persons his creditors, in certain sums of money, this assignee at his desire promised to the saids creditors payment of their debts: Likeas, he had truly made payment to them, for satisfaction whereof, and relief of the said payment, the said assignee got the said assignation, and so depending upon that onerous cause, he ought to be preferred to the arrester; and the foresaid cause he offered to prove it by the oaths of the saids Irvine's creditors, to whom he had made payment. It was *answered* for the arrester, That that assignation ought not to be respected in prejudice of him who was a lawful creditor, and who had a registrate obligation, which was a sentence against the common debtor, long before the said assignation; before the which assignation he had also charged his debtor, and who becoming bankrupt and fugitive out of the country since, could not make an assignation to another of his creditors in prejudice of his debt and sentence, and charge preceding, thereby to prefer one creditor at his pleasure to another doing more timely diligence; and so *alleged* that that assignation came under the statute of dyvours, specially seeing there was no writ extant to prove the preceding debt, for which the alleged assignation was made. It was *answered* for the assignee, That there was no necessity for him to shew any preceding debt in writ; for, what was betwixt Irvine and his creditor, it was neither pertinent nor possible for him to know, but it was certain, that he, at Irvine's desire, having promised to pay them, and having according thereto made payment, and receiving this assignation for his relief or warrant, he therefore hath a just cause of his debt, whereupon he offered to give his own oath of verity, which is the manner of probation prescribed by the act; and so he ought not to be urged to any further probation, and yet he also offered to prove the whole cause of the assignation by the oaths and depositions of the saids persons creditors of the said Mr James Irvine, who were persons *omni exceptione majores*, viz. the one being the bishop of Dunkell, and the other the minister at . THE LORDS astricted the assignee to prove by writ, that Irvine was debtor to these two persons paid by the assignee, and would not sustain the same to be proven by the parties' oaths, neither would sustain the said allegiance of the cause of the assignation to be proven by the assignee's own oath, notwithstanding of the statute; but that part anent the debt owing by Irvine to the creditors, being proven by writ, they found the rest of the allegiance, anent the promise and payment made by the assignee, might be proven by the saids two creditors their declarations, otherwise the LORDS would prefer the arrester, whose diligence they found sufficient, consisting of the foresaid

obligation registrate, and preceding charge of horning, albeit the denunciation was not execute, nor followed thereupon.

No 19.

Act. Nicolson, jun. et sen.

Alt. Hope et Person.

Clerk, Gibson.

Durie, p. 48.

1629. *January 30:* DAVIDSON *against* BALCANQUAL.

A debtor having made his creditor assignee to a debt, owing to him, the term of payment of the which debt owing by the common debtor to the assignee his creditor, was not come by the space of three or four months after the date of the assignation; and this assignation being intimate that same day after the date thereof, that same very day another creditor arrests the same, whose term of payment was past the time of the arrestment; and summons to make the same furthcoming, being pursued by them both, the difference of days of compareance, and citations, was in four or five days, whereof the arrester had the advantage of priority; likeas his arrestment bore the hour of his execution; as also the intimation bore the hour of the making of the same for the assignee, which hour in the arrestment proported a time, which conferred with the hour of the intimation, preceded the same by the space of two hours. THE LORDS preferred the arrester; the reason specially was, because of the priority of the hour, which the LORDS found in this case to be material; for after that moment of arrestment, neither could the common debtor do any thing in prejudice thereof, neither could the intimation, made any space thereafter, affect the debt to the assignee, it being affected of before to the arrester; and the intimation and arrestment bearing these hours, it was found, there needed no other probation to prove the priority.

Act. Stuart.

Alt. ———.

Clerk, Hay.

Fol. Dic. v. 1. p. 178. Durie, p. 429.

1630. *January 28:* INGLIS *against* EDWARD.

MR CORNELIUS INGLIS and Nicol Edward, two creditors to John Mackuby, the former having arrested a sum owing to the common debtor by Mr Thomas Ramsay, 13th November, and the other having intimate an assignation made to him by the debtor upon the same day, and they striving for preference; THE LORDS, in respect of both their diligence concurring, would not prefer the one to the other, but divided the sum betwixt them.

Fol. Dic. v. 1. p. 178. Spottiswood, (CREDITORS.) p. 76.

No 20:

In a competition betwixt an assignee and an arrester, the Lords preferred the arrester, whose execution bore to be two hours before what the intimation bore.

No 21:

An arrestment and the intimation of an assignation being made in one day, the Lords brought them in *pari passu*, and divided the sum betwixt them.