

1737. *January* 14. TRUSTEES for the CREDITORS of the EARL of ROSEBERRY *against* ROBERT GEDDES of Scotstown.

LORD ROSEBERRY having contracted large debts, executed a disposition of his whole property to trustees, for behoof of his creditors, (16th Nov. 1733.)

On 22d November, 1733, notice was given, by advertisement in the Edinburgh newspapers, of a meeting of the Earl's creditors, to be held on 14th December, that they might accede to, or repudiate the trust-deed. The creditors, and agents of creditors, present at this meeting, agreed to accede to the trust; and, among others, James Armour and David Spence, the ordinary doers for Mr. Geddes above mentioned, were present, and made no objection to the trust.

For some years before this trust-deed was granted, the rents of Lord Roseberry's estate had been from time to time arrested by his creditors, and sequestrated by the Court; and, in particular, in July 1728, they were sequestrated for crop 1729, and four subsequent crops. Mr. Geddes had been a party to these sequestrations, and had drawn considerable sums from the factor, in virtue of his diligence.

After the trust-deed was granted, and had been, as the trustees understood, acceded to by all the creditors present, by themselves or their agents, at the meeting of 14th December, 1733, the trustees applied to the Court by petition, craving that the previous sequestration might be removed, in respect of the trust-deed, and the accession of the creditors thereto. This petition was intimated in the Outer-House in common form; and no answers having been given in by any party, the desire thereof was granted.

Relying upon the rights thus vested in them, the trustees used no farther diligence to attach the rents. But in August, 1734, Mr. Geddes, pretending that he was not bound by the trust, used arrestments in the hands of the tenants, and endeavoured to carry off the rents, in prejudice of the other creditors. Upon this a multiplepoinding was brought in name of the other tenants, in order to try the rights of the parties.

The Lord Ordinary, before answer, allowed the trustees to adduce what evidence they could, of any circumstances that might infer Mr. Geddes's accession to the trust-right, by himself or his doers.

Besides other evidence, the trustees examined Mr. Armour above mentioned, who deponed, that the trust-right having been communicated to him in November, 1733, he had occasion thereafter to meet with Mr. Geddes, whom he informed of the tenor of the trust-deed, and that a meeting of the creditors was called, in order to their acceding thereto: That Mr. Geddes gave Mr. Armour a verbal commission to appear at the meeting, and to declare his acquiescence in the trust-deed; and that accordingly he did appear at the meeting, and declared that he was empowered by Mr. Geddes to appear, and to signify to the meeting, and to the trustees, Mr. Geddes's acquiescence in the deed: And he further depones, that he was ordinary doer for Mr. Geddes, except that of late, as to his law affairs, Mr. Spence was employed as his agent; but that he was still advised with by Mr. Geddes in his law affairs, and in his other concerns; and that David Spence, Mr. Geddes's agent, was present at the meeting, and appeared to ac-

quiesce in what Mr. Armour said ; and that the whole creditors present, and the doers of those that were absent, acquiesced in the trust-right, conform to a sederunt marked in the trustee's books.

The Lord Ordinary reported the cause to the Court. Lord Kilkerran has the following note of what was said upon the question, whether Mr. Geddes, in consequence of the proceedings above detailed, was barred *personali exceptione*, from claiming any preference in virtue of the diligence used by him subsequent to the date of the trust-deed.

“ On advising the information, and additional informations, I gave my opinion, that Geddes having been in the knowledge of what Mr. Armour had said in the meeting, which I thought was presumed from what we had in the former proof, and is now proved, and not remonstrating against it, either to the trustees, or when the sequestration was removed, whereby he had laid the other creditors asleep, he could not take any advantage from their neglecting to do diligence ; and that therefore he could have no preference upon the diligence used by himself.

“ DUN spoke next, and seemed to argue the point so high, as that from the proof he should be found to have acceded to the disposition.

“ ROYSTON spoke next, and observed a great difference betwixt these two, the finding sufficient evidence of his accession to the disposition, and the other finding evidence of a fraudulent and insidious purpose, *ad effectum*, to bar him, *personali exceptione*, from claiming preference on his diligence : To which ELCHIES assented, adding, that though it was not the point before us, he did not know but that a good deal might be said even for finding his accession proven ; and put the case, he had been present in the meeting when Mr. Armour made his speech, he did not doubt but that his single silence, and not dissenting, would have been a sufficient accession ; and if so, the case was not much different, when after Mr. Armour's speech came to his knowledge, he had remained silent ; and upon the second ground also, that in every matter concerning the sequestration, (which he had consented to obtain,) he was in Court, and the not opposing the trustees when they craved the sequestration might be removed for this cause, that the creditors had consented to the trust-right, had the same effect, if not stronger, than his *non repugnantia* would have had, had he been in the meeting of the creditors ; but as this was not the question, we had no occasion to determine it, and that he thought the other point admitted of no doubt. And as we had, who spoke before him, argued the thing the rather that on account of Mr. Armour's known character for knowledge and probity, whereby the creditors were the rather led, whose fraud Geddes on that account was under the stronger tie to have undeceived the creditors ; he added, that if it could be supposed, as it could not, that Mr. Armour had been playing the rogue, with design to ensnare the creditors, the argument would have been as strong. The interlocutor is in these words :—

“ The Lords having considered, &c. find it proved, that James Armour's declaring in the meeting of the creditors, that he was empowered by Mr. Geddes to declare his acquiescence in, and accession to the trust-right, having been soon after notified to Mr. Geddes ; wherefore, and in respect that Mr. Geddes did not

thereafter notify his dissent and disapprobation thereof, find that he can claim no preference to the other creditors on his diligence."

N. B. This case is shortly reported by Lord Elchies, (Presumption, No. 8.) It was affirmed on appeal. Several other points were involved in the case, which were not decided at this time.—*Vide* Elchies, voce *Fraud*, No. 7, and *Inhibition*, No. 2.

1737. *January 19.*

MURRAY *against* COWAN.

MURRAY brought an action, upon the statute *9no Annæ*, for recovering of a sum of money gained at play by the defender Cowan from one Paterson.

The defence was, that the action being brought upon a penal statute, and for a penalty, *viz.* triple value, it was struck at by the English statute of limitation of the 31st of Elizabeth, Cap. 5, whereby it is enacted that no action shall be brought by any common informer, upon any penal statute made or to be made, unless such action is brought within one year of the offence committed.

The Lord Ordinary having advised with the Court, pronounced the following interlocutor:—"Having considered the debate, with the Act of Parliament, *9no Annæ*, and act of limitation founded on, and having advised with the Lords thereanent, repels the defence proponed for the defender, and founded on these acts."

In a petition against this interlocutor, the defender

PLEADED that the statute of Elizabeth must govern all penal statutes made after its date, unless where such subsequent statute contains a virtual or actual repeal of it. The statute of Queen Anne, however, neither expresses nor implies any repeal of the act of Elizabeth. Further, it cannot be doubted that any British statute made since the Union may have a reference to a statute made in England before the Union, so as to make the statute referred to binding on the whole United Kingdom; not, indeed, in virtue of the English act so referred to itself, which cannot, by its own force, be binding in Scotland, but in virtue of the British statute giving it effect over the whole kingdom. And there are many such references in the British statutes.

ANSWERED, *1mo*, No English statute has *per se* any force in Scotland, and the act of Queen Anne does not directly or indirectly extend the statute of 31st Elizabeth to Scotland. *2do*, Even if the 31st Elizabeth were in force here, it does not apply to this case. That act concerns merely penalties, of which, the whole, or a part, goes to the crown, which does not take place here. Moreover, this action is not purely penal. It is *actio mixta, partim rei persecutoria, partim pœnalis*, and such an action does not come under either the words or the spirit of the 31st Elizabeth.

The Court ADHERED—Lord Kilkerran observes.

"At pronouncing the interlocutor reclaimed against, several of the Lords were of opinion that the act of limitation of Elizabeth did not at all limit the act *9no Annæ* as to Scotland, supposing it to concern this case. I own I was not clear in that, but was of opinion that the act of limitation did not concern this case even in