

1796. February 16.

ANNE and MARGARET BAYNES, Heirs-portioners of THOMAS RUTHVEN, and their HUSBANDS, for their interest, *against* COLONEL THOMAS GRAHAM.

No 105.

In a competition arising in a multiple-pounding between an arrestment on a depending action, in which the pursuer afterwards obtained decree, against which an appeal was in dependence, and two posterior arrestments, the one on a bill, and the other on a decree, the users of the two last found not entitled to a decree of preference over the funds arrested, which were ordered to remain *in medio* till the discussion of the appeal.

ANDREW STRAITON held a farm belonging to Colonel Graham, on a lease, by which an additional rent was stipulated for every acre the tenant should have in tillage beyond a certain number.

Colonel Graham brought an action against him for exceeding the given number; and, on its dependence, in January 1790, used an arrestment in the hands of David Kinloch, a debtor of Straiton.

In August 1790, Thomas Ruthven, a creditor of Straiton, by bill, likewise arrested in the hands of Kinloch; and in 1793, Anne and Margaret Baynes, heirs of Ruthven, constituted, by decree, another debt due to him by Straiton, and used a second arrestment in Kinloch's hands.

In the action at Colonel Graham's instance against Straiton, THE COURT, in May 1794, 'found the defender liable for the additional rents stipulated in the lease, and remitted to the Lord Ordinary to ascertain the extent thereof.'

Against this judgment Straiton appealed to the House of Lords.

Before the appeal was discussed, a multiple-pounding was brought in the name of Kinloch, in which Anne and Margaret Baynes contended, that the arrestments used at Ruthven's and their instance, although posterior to Colonel Graham's, were preferable to it, in respect that it proceeded on a depending action, on which a decree for a liquidated sum had not been obtained; and

Pleaded: An arrestment is of itself merely a prohibitory, and consequently an incomplete species of diligence. It is the decree of furthcoming which transfers the property to the arrester; Stair, b. 3. tit. 1. § 42. An action of furthcoming cannot, however, be brought on an arrestment which proceeds on a depending action, till an extracted decree for a liquidated sum be obtained in it. But Colonel Graham has obtained no such decree. On the contrary, even the general finding of the Court in his favour may be altered by the House of Peers, and cannot therefore prevent the complete diligence of other creditors from having immediate effect. As a posterior arrestment on a debt presently due, is preferable to a prior one proceeding on a debt *in diem*; Ersk. b. 3. tit. 6. § 18. and 21.; Watkins against Wilkie, No 170. p. 820.; Charters against Neilson, No 157. p. 811.; so, *a fortiori*, ought the arrestments of Mr Ruthven and his heirs to be preferred to that of Colonel Graham.

Before Colonel Graham appeared in the multiple-pounding, the Lord Ordinary had preferred Margaret and Anne Baynes to the funds *in medio*; but on the production of his interest, his Lordship found, 'That before Margaret and Anne Baynes, and their Husbands, can draw in consequence of the preference they have obtained in the multiple-pounding by the former interlocutor, they must find caution to make the money furthcoming to Colonel Graham, whene-

ver his claim against Andrew Straiton shall be ultimately ascertained in his favour.'

No 105.

On advising a reclaiming petition for Margaret and Anne Baynes, against this interlocutor, it was

Observed on the Bench : As the extent of Colonel Graham's debt would have been long since settled, had it not been for Straiton's appeal, it is that circumstance alone which prevents him from obtaining a decree of preference in the multiple-pounding. But, as the appeal unavoidably stops that action as to him, equity requires that his competitors should not be allowed to proceed in it. If they were, the precedent would be dangerous ; as, on many occasions, it would give rise to collusion and undue advantage.

THE LORDS found, that the funds arrested must remain *in medio* till the discussion of the appeal †.

Lord Ordinary, *Aukerville*.
R. D.

For the Petitioner, *Dickson*.

Clerk, *Sinclair*.

Fac. Col. No 203. p. 485.

1797. May 24.

JOHN BUCHAN, Trustee for the Creditors of ROBERT GORDON, *against* The Reverend ROBERT FARQUHARSON.

ROBERT GORDON, on the 28th June 1788, assigned a personal bond to the Reverend Robert Farquharson.

Gordon's estate was sequestrated on the 19th July following, and on the 4th August, the assignation was intimated by Mr Farquharson to the debtor in the bond, before the estate was vested in the trustee for the creditors, either by disposition from the bankrupt or an act of the Court.

John Buchan, the trustee, afterwards brought a reduction of the assignation ; *inter alia*, because, it was not intimated till after the sequestration.

Lord Dreghorn, Ordinary, reduced the assignation.

THE COURT, (9th December 1795,) ' repelled the objection to the want of intimation,' and remitted the cause to the Lord Ordinary.'

This interlocutor was pronounced, partly upon the ground that the trustee was bound to take the subject *tantum et tale*, as it stood in the person of the bankrupt, and consequently under burden of the assignation.

A petition having been presented against this interlocutor, doubts were expressed of its being well founded ; but the petition was, (15th January 1796,) refused, ' as incompetent, being without the reclaiming days.'

† The reporter understands this to have been the judgment of the Court ; but he has not been able to see the interlocutor in the record. See APPENDIX.

No 106.

A creditor, claiming on an assignation to a personal bond, granted before the sequestration of the cedent, but intimated after it, preferred to the trustee for his creditors, because the intimation was prior to the vesting of the estate of the bankrupt in the trustee.