

The question came before the Court by an advocacion by Mr Hog, of a judgment of the Stewart of Kirkcudbright, who had found that the 'error in the date of the execution in question may be amended by the messenger and witnesses.'

No 27.

THE LORD ORDINARY having taken the cause to report, the COURT, by a great majority, found, 'That the error in the date of the execution in question cannot be rectified so as to entitle David Maclellan and William Lowden to be conjoined in the poinding with Walter Hog; but found, that the present action having been brought within four months of the date of the poinding, they are entitled to a proportional part of the goods poinded, or value thereof, after deduction of 10 *per cent.* and the expence of the poinding.'

Lord Ordinary, *Armadale.* For Hog, *D. Catcart.* Alt. *G. J. Bell.* Clerk, *Sinclair.*  
*R. D.* *Fac. Col. No 32. p. 74.*

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 DIVISION II.

## Litigious by Arrestment.

1620. June 24. AIIKEN against ANDERSON.

No 28.

THE LORDS found that an arrestment made upon goods, could not hinder the lieges to buy in public market.

*Fol. Dic. v. 1. p. 554. Kerse, MS p. 235.*

1623. December 10. DOUGLASS and Others against BELSHES.

No 29.

IN an action betwixt Douglas and others against Belshes, wherein diverse creditors contending with the assignee, made by the donatar, to the escheat of him who was their common debtor, the creditors were preferred to the donatar's assignee, albeit the donatar's assignee was also a creditor; because the creditors proponed an alleigeance of simulation, offering to prove that the gift of escheat and declarator were taken upon the rebels own moyen and expenses, &c. and so the assignation being of an escheat null for the cause of the simulation, cannot prejudice the creditors, who before the assignation had affected the goods controverted, with arrestments at their instances, at which time of the arrestments making, there was no assignation; and so the cause ought to be respected, as it was at the time of the arrestment, which being then disputed betwixt them and the donatar, the simulation would have been found relevant, and albeit sinsyne, the assignee being a creditor, had received as

A subsequent assignation by a donatar of escheat, found not to prejudice prior arrestments by creditors of the common debtor.

No 28.

signation; and so replieth, that whatever fraud or collusion betwixt the rebel and the donatar hath been used, yet cannot be obtruded to him who is true creditor, as they are, and be not partakers of the fraud; and so that he ought to be preferred, having lawfully purchased the King's right; notwithstanding of which reply the exception was admitted; for the Lords found the subsequent assignation could not prejudge the preceding lawful diligence used by the creditors before the assignation, but, that the cause behoved to be considered and disputed now as it might have been betwixt the creditors and the donatar's self, at the time of the arrestment; at which time the allegiance would then have been admitted against the donatar, and so ought to be so discount against the assignee.

Act. *Nicolson* younger.Alt. *Laurie*.Clerk, *Gibson*.*Durie*, p. 90.

\* \* \* Haddington reports this case :

JOHN BELSHES being addebted to William Douglas of Tofts, in the sum of L. 5000 merks, and pursued to make the sum forthcoming to Mr William Douglas, David Mitchel and others creditors to Tofts, according to their arrestments; William Barclay, and John Erskine of Bagaine, assignees to the gift of Tofts' escheat, were admitted, and alleged that they should be pursued as assignees to Tofts his escheat, and to the particular declarator thereof, the horning and gift being long anterior to the arrestment. It was *answered*, that the gift was simulate, purchased by the rebel upon his charges, together with the declarator, which was offered to be proven, according to the order prescribed by the act of parliament. It was *replied*, that the assignees were true creditors to Tofts, and were not partakers of the simulation, and so had good right; but because Mr William Douglas and David Mitchel had used their arrestments, intended action, and prosecute it long before the assignation produced, their allegiance was found relevant against the assignees.

*Haddington, MS. No 2948.*1625. *January 26.* SIR ANDREW COWPER *against* LADY HALTON.

No 29.

SIR ANDREW COWPER pursued Lady Halton younger as executrix to her husband, to make some arrested goods forthcoming. She excepted, that all was exhausted by lawful decreets obtained against her. *Replied*, That he could not be prejudged, who had arrested long before these decreets in her own hands, and that therefore she was *in pessima fide* to pay any other with that gear; and where she alleges a necessity inforced upon her. *Answered*, she could have had recourse to a double pouding, whereby she might have freed