

herself from all danger. This being hotly reasoned, and many thinking that an arrestment did so really affect the goods, that it could be never frustrated by any decret obtained by a third person, the arrester not being called there-to; nevertheless, the exception was admitted, because it was thought, that in a donble pointing the other creditors who had used greatest diligence, would be preferred before the arrester.

No 29.

● Spottiswood, (ARRESTMENT) p. 16.

\*\*\* See Durie's report of this case No 52. p. 3865. voce EXECUTOR.

1628. July 26.

REULL against L. AITON.

IN an action to make arrested goods forthcoming, Reull *contra* L. Aiton and his tenants, who were convened to make the farms addebted by them to their master, forthcoming to him, as arrested in their hands at his instance, for satisfaction of a sum contained in a decret, obtained by him against their said master, and one who was made assignee to the L. Aiton's liferent, by the donatar thereto, and in and to the decret of general declarator obtained by the donatar thereupon, compearing and admitted in this process, for his interest, and which assignee having raised a special declarator against these same defenders, for payment to him of their same farms libelled, in respect whereof, he *alleged*, that he ought to be preferred to the creditor pursuer; and the pursuer proponing sundry arguments of simulation against the said gift, and the assignee *answering*, that they could not be received against him the assignee, albeit they might be received against the donatar's self, if he had not been denuded, seeing any simulation betwixt the donatar and the rebel, whereof the assignee was not partner, could not be now obruded to the said assignee; the LORDS found, seeing the pursuer had arrested the said farms libelled, before the donatar was denuded thereof by this assignation excepted upon, that whatsoever allegiance of simulation could have excluded the donatar's self, after the laying on of the arrestment by the pursuer, if the donatar's self were compearing, and not denuded, the same ought to be received now in the like manner, against the assignee constitute, after the arrestment.

No 30.

Found in conformity with Douglas against Belshes No 29. p. 8347.

Act. ———

Alt. Belshes. Clerk Hay.

Fol. Dic. v. I. p. 554. Durie, p. 394.

1665. November 23. MR JAMES CAMPBELL against DR BEATON.

DR BEATON being infest in certain lands, wadset by the Laird of Balgillo, does thereafter, by a minute, take an absolute disposition thereof, for a price expres-

No 31.

After a sale of lands, arrestment was

No. 31.  
laid in the hands of the purchaser. There was afterwards a new transaction for the purpose of disappointing the arrestment. The arrestment found effectual.

sed in the minute, whereupon Mr James Campbell arrests in Dr Beaton's hands all sums due by him to Balgillo, for payment of a debt due by Balgillo to Mr James, and likewise inhibits Balgillo; after which there is a tripartite contract, betwixt Balgillo on the first part, the Doctor on the second, and John Smith, who bought the lands, on the third; the Doctor and Balgillo dispone with mutual consent, and the Doctor particularly assigns the minute to Smith; Balgillo renounces the minute as to the price, and Smith is obliged to pay the wadset to the Doctor; the debtor being before convened for making arrested goods forthcoming, and having deponed that he was owing no sums to Balgillo the time of the arrestment, but by the minute, which was an inchoat bargain never perfected, but was passed from thereafter, and that he was not disponer to Smith, but only consenter, whereupon he was assoilzied; but Mr James Campbell, having now found the tripartite contract, pursues the Doctor again thereupon, *et super dolo*, that by passing from the bargain, and yet assigning the minute, and not destroying it, he had *dolose* evacuated Mr James's inhibition and arrestment, seeing Smith would defend himself against the inhibition upon the minute, which was anterior to the inhibition disposing the land. It was *alleged*, for the Doctor, That he was *tutus exceptione rei judicatae*, because he was already assoilzied; having deponed upon the arrestment, and the pursuer could not make use of any writ in that which he had referred to the defender's oath. *2do*, Albeit the matter were entire, there was nothing to enforce him to perfect a minute of the sale of lands, but that he might pass from it before it was extended, or might assign it to any other, which could import no fraud, seeing he was not obliged to know, or it cannot be presumed that he knew the inhibition used against Balgillo. The pursuer *answered*, That for the defender's oath, he did not now insist upon it, nor did the writ produced contradict it; for when a party depones upon the tenor of a writ which is not his own writ, it can but be understood according to his memory; but if thereafter, by the writ itself, it do appear to be otherwise, it does not infer perjury, nor can it justly exclude the pursuer to make use of that writ.

*2dly*, There is not only a different matter of probation here, but a different medium from the former process, viz. *damnum et dolos*, at least *lata culpa dolo æquiparata*, in so far as the Doctor did assign the minute, and exclude the pursuer's inhibition; which is the more clear, that in the said contract the Doctor secures himself by Balgillo's obligation, to warrant the Doctor from any hazard, by assigning the minute, *ubi nimia cautio arguit dolum*; neither can the defender pretend ignorance, not only by the publication and registration of the inhibition, but upon that very inhibition, the arrestment being executed against the Doctor.

THE LORDS having read and considered the tripartite contract, they found that after the arrestment was laid on, the price of the land was affected, and no discharge nor renunciation by the debtor could take the price arrested away from the arrester; and therefore found the libel relevant and proven by the tri-

partite contract, produced and decerned, notwithstanding of the former absolver upon the Doctor's oath.

No 31.

*Fol. Dic. v. 1. p. 553. Stair, v. 1. p. 311.*

\* \* \* Gilmour reports this case :

1665. *December.*—DR BEATON having got from William Blair of Balgillo, a wadset of the lands of Camno, redeemable upon L. 8000, thereafter they subscribe a minute for the irredeemable right, for which the Doctor was obliged to pay 35,200 merks, including the L. 8000. Balgillo, as cautioner for the Master of Gray, being debtor to Mr James Campbell in 2400 merks, Mr James serves inhibition against Balgillo in August 1658, and in September thereafter, arrests, in Dr Beaton's hands, all sums due by him to Balgillo. In February 1660, there was a tripartite contract betwixt Balgillo, Doctor Beaton, and Mr John Smith, whereby the said lands are irredeemably sold to the said Mr John Smith, and the minute is assigned by Dr Beaton to him. Upon the arrestment used in the Doctor's hands, there was a pursuit moved against the Doctor, to make forthcoming, and referred to the Doctor's oath; who having deponed, That he was not debtor to Balgillo, in respect the minute was passed from, he is assoilzied in respect of his oath. And thereafter Mr James intents a process against the Doctor, *ex capite doli*, bearing, That the Doctor, by the minute, was debtor to Balgillo, and that notwithstanding thereof, he had disposed the minute to Mr John Smith, not only to make void the arrestments, but also to make his inhibition served against Balgillo ineffectual; whereas if he had not assigned the minute, but discharged it in favour of Balgillo, then Balgillo could not have sold the lands but with the hazard of the inhibition; and consequently the Doctor has *dolo malo* frustrated the said Mr James' diligence; and to make it the more clear, he offers to prove, that the Doctor took security by bond and cautioners from Balgillo for warranting him from hazard of the said inhibition and arrestment. It was *answered*, That by the tripartite contract, the Doctor was not an irredeemable disponent, but only in effect consentor with Balgillo, the irredeemable right never being in the Doctor's person, but only by the minute, whereupon nothing followed; and the only reason why he assigned the minute was, because he had the redeemable right which he was to assign to Mr John Smith, and for which he only received the sums contained in the wadset, wherein there was no dole; seeing the inhibition could not affect his wadset, nor hinder him to resile from the minute; and the pursuer may make use of his inhibition against the said Mr John Smith. *Replied*, That the inhibition indeed could not hinder the defender to resile, but he was *in dolo et culpa* to assign it, to render the pursuer's diligence ineffectual, and the pursuer is not obliged to pursue Mr John Smith *ex capite inhibitionis*; but the defender may pursue his warrantice against Balgillo and his cautioners.

THE LORDS sustained the summons.

*Gilmour, No 170. p. 121.*