

James's custody till after the arrestment. As to the *second*, found the sums in it were still arrestable for Sir James M'Donald's debt, to whom it was delivered, at any time before the filling up Pitcairly's was intimated by a charge of horning, or otherways; and this the LORDS declared they would make a rule for time coming in all such cases. Then other creditors compeared for their interest, and *alleged*, Pitcairly's oath being only an oath of credulity, it was compatible with a contrary probation, and they positively offered them to prove by witnesses who saw and read the said bond in Sir James M'Donald's hands blank, after the subscribing, yea after the arrestment. THE LORDS considering Pitcairly's oath was not positive, therefore they admitted the foresaid allegiance relevant to be proved by witnesses who saw and read it blank after the arrestments. Pitcairly *alleged* they could not be received *in hoc statu processus* now in double poinding, because they had been called in the suspension whereon it proceeded, and did not compear by the third act, Parl. 9th, James VI., and 19th act, Parl. 10th, James VI.; but this was not noticed, because, *imo*, He condescended on a necessary cause of absence; *2do*, He was content to insist only against Pitcairly, who uplifted the money, which is a case excepted in the said acts.

No 4.

Fountainhall, MS.

. The case following is the sequel of the above.

1679. November 29. BAIN against M'MILLAN, &c.

PITCAIRLY having charged M'Millan, drover, upon a bond of 3700 merks, he suspends on double-poinding, as being troubled by several arresters arresting the sum, as belonging to Sir James M'Donald their debtor, who *alleged*, that the bond was granted by M'Millan to Sir James for the price of cattle bought from him, and that it was granted blank in the creditor's name, so that being arrested by them before Pitcairly's name was inserted and intimated, it cannot belong to Pitcairly, but to the arresters, which being referred to Pitcairly's oath, he deponed, that he believed it was filled up in his name *ab initio*, and so his oath proved not the arvester's allegiance, and therefore Pitcairly was preferred, and recovered payment of 1400 merks from M'Millan, upon the LORDS' decret; but there was raised a second suspension of multiplepoinding by M'Millan against Cunningham and Hamilton, who were in the first suspension, but did not compear; and in this suspension, it was found relevant, that Pitcairly's oath was but an oath of credulity, that he believed his name was filled up *ab initio*, expressing the reason of his belief, because Sir James had written to him, which letter he did not produce; and now they offer to prove positively that this bond was blank *ab initio*, and so delivered to Sir James M'Donald, whereby he was the true creditor, and therefore the sum being ar-

No 5.

A creditor preferred in a multiple-poinding getting payment, was decerned to repeat to a preferable creditor who was not called, nor compeared in that process.

No 5. rested in the debtor's hand for payment of Sir James's debt, the arresters must be preferred to Pitcairly. This being sustained for these arresters, though omitted by the arresters who compeared in the former double-poinding, they, for probation, adduced the principal bond, which, by ocular inspection, was filled up with Pitcairly's name, by another hand than the writer of the body of it, and did not bear before the subscription by whose hand it was filled up; and having produced a letter by Sir James M'Donald to M'Millan, desiring him to give a blank bond to shun arrestment, before and near the date of this bond, and that the bond was marked on the back, 'Bond by M'Millan to Sir James M'Donald' and M'Millan deponed, that he delivered the bond to Sir James M'Donald's servant, blank, in the creditor's name; "THE LORDS found, that thereby it was proved that the bond was blank when it was delivered to Sir James, and therefore preferred Sir James's creditors arresters, unless Pitcairly could instruct that his name was filled up, and intimated to M'Millan before the arrestment." Whereupon it was *alleged* for Pitcairly, that by virtue of the LORDS' decret, he had recovered *bona fide* payment from M'Millan of 1400 merks of the sum; and as to that he was secure, and could not be decerned to repeat it, especially seeing by the act of Parliamenti anent double poindings, Parl. 10. King James VI, cap. 19, It is declared, That where parties called in double poindings are preferred, whatsoever they recover thereby shall not be repeated. It was *answered*, That payment made *bona fide* secures only the debtor payer, but not a creditor recovering payment, because in the debtor it is *actus necessarius*, which he cannot shun; and as to the act of Parliament, it is only in relation to mails and duties of lands recovered by parties preferred against others who were lawfully cited in the double-poinding, and compeared not, which cannot be extended to this case, not being as to profits of lands, or the like, which use to be consumed, but a principal sum; but specially seeing there was no citation of the parties now in the field; for though their names were contained in the suspension whereupon the former decret proceeded; yet they were never cited, nor is there any execution against them, and the very reason of the act is, that parties being cited, and contumacious, shall only be heard as to what is extant, but not as to others, as to what they have recovered by anterior decreets on double poinding.

THE LORDS found, that the parties in this double-poinding, who were not cited in the former double-poinding, nor compeared therein, were preferable, and therefore decerned Pitcairly to restore what he had recovered from M'Millan by virtue of the former double-poinding. See No 4.

Fol. Dic. v. 1. p. 594. Stair, v. 2. p. 711.