

This cause was not determined by reason of the death of Captain Campbell ; but the Lords had much reasoning upon it. Arniston and Elchies were both for the whole children, but upon different principles. Elchies thought a service necessary ; as to which Arniston was very doubtful, but he thought that the subject being provided to the children conjunctly, if they all concur, then *partes concursu faciunt*,—if one fails then the rest take his portion *jure non decrescendi ; veluti si res duobus conjunctim legata sit, uno defuncto, alter, jure non decrescendi, capit ejus portionem*.

1742. June 22. ANNE MOSMAN *against* ROBERT CARMICHAEL.

[Kilk., No. 3, *Competition* ; C. Home, No. 197.]

IN this case there were several questions ; 1^{mo}, Whether an arrestment of a debt due by the Bank of Scotland could be used in the hands of the treasurer ? The Lords found it might, in respect the treasurer was mentioned in the obligation, and payments were made to and by him.

2^{do}, Whether, upon an arrestment laid on during the life of the principal debtor, a decret of forthcoming could be obtained after his death. It was argued that an arrestment was but an inchoate diligence, which fell by the death of the principal debtor, in the same manner as a process of adjudication, begun against a debtor, cannot be transferred against his heir if he should die during the dependence, but must be begun *de novo* against the heir ; that an arrestment certainly did not take the subject *ex bonis defuncti*, as was evident from a posterior pouding being preferable ; therefore the subject, being *in bonis defuncti*, at the time of his death, could not be carried by an arrestment but by a confirmation *qua* executor-creditor ; and for this there was an express decision observed by Dirleton, 6th December 1666, *Leslie against Bayne*. The Lords found, that the forthcoming might be pursued after the death of the principal debtor ; in respect that arrestment attached the subject, and the decisions since the 1666 had run otherwise.

3^{tio}, A creditor, having arrested a debt due to his debtor, pursued a forthcoming after his death ; compeared, another creditor, who had confirmed the same debt as executor-creditor, and claimed to be preferred, as having used the first complete diligence. The Lords preferred the executor-creditor without a division, though the contrary has been more than once found. See Dict., Vol. I., p. 179 and 180.

N.B. It was not alleged here that the arrester was *in mora*.

4^{to}, One Hardie, being creditor to Colin Mackenzie by bill, did assign that debt to the bank in security of a debt which he owed the bank, and the assignation contained this provision, “That, in case the bank should receive more than was due to them, they should be accountable to Mr Hardie.” The ques-

tion was, In whose hands this debt could be properly arrested by a creditor of Hardie's; whether in the hands of Colin Mackenzie, or of the bank?

N.B. The arrestment was before the bank had operated payment from Mackenzie. This case was a little debated, but it was not found necessary to determine it; however, the most of the Lords seemed to be of opinion that the arrestment in the hands of the bank was not sufficient, nor were they moved with the similitude of this case to the case of *Ludovic Gordon*, decided *Feb. 14, 1740*.

1742. *June 28.* CAPTAIN LUMSDEN *against* ———.

[Elch., No. 4, *Apprentice*, and No. 1, *Soldier*; C. Home, No. 200.]

THE Captain having enlisted an apprentice, the Justices of the Peace, upon application of the master, discharged him. The Captain brought a suspension before the Lords, wherein he alleged, *1mo*, That the Justices of Peace were no competent judges; for though a Justice of Peace may refuse to attest a man, yet after he is attested he cannot liberate him. *2do*, That, supposing the Justices were competent judges, yet they could not be so in this case, because they were not the justices of the county where the man lived, or was enlisted. *3tio*, An apprentice may be enlisted; *1mo*, Because there is no positive law against it; and, by the common principles of law, the service of the king and country is preferable to any other, and an engagement in that service annuls any prior engagement. *2do*, It is expressly provided by a clause in the mutiny-act, that any person legally enlisted shall not be attached or detained from the service for any other cause than an action, or suit of law, to the avail of ten pounds; now in this case the indenture bore no penalty. *3tio*, It is the practice in England.

The Lords took up this cause upon the last point, and found that an apprentice cannot be enlisted; because, during his apprenticeship, he is no more *sui juris* than a salter or collier. As to the clause of the statute, it supposes the person legally enlisted; which, in this case, is denied. And as to the practice of England, whatever it may now be, it does not appear always to have been law there, that apprentices could be enlisted; for, in Lord Clarendon's history, we see a manifesto set forth by the Parliament, wherein they declare it lawful to enlist apprentices, "considering the extraordinary danger the state was in;" and at the same time indemnify the cautioners: *et exceptio firmat regulam in casu non excepto*.

By Act 14, Sess. 2, Par. 2, Chas. I., *anno* 1645, neither the servants, apprentices, nor regular workmen of manufacturers, could be enlisted.