No 71.

1740. *January* 15. GORDON *against* INNES.

ARRESTMENT in the hands of a truſtee will carry the ſum in a bill indorſed in truſt, for behoof of the common debtor. *See* No 51. p. 715.

1742. *June* 22.

Competition ROBERT CARMICHAEL, with ANNA MOSMAN, relict of William Hardie.

No 72.
Is an arreſtment good in the hands of an aſſignee before he receive payment, for the ſuperplus over paying himſelf? Arreſtment in the hands of the treaſurer of a bank is a competent mode.

THE deceaſed William Hardie being creditor by bill to M'Kenzie of Roſend in the ſum of L. 44 Sterling, he conveyed the ſame to George Moſman and John Paton, for relief of certain engagements they had come under for him. And being relieved, they, with Hardie's conſent, aſſigned the debt to the Bank of Scotland, to whom Hardie had become debtor in the ſum of L. 30: 5s. Sterling. Mr Carmichael, a creditor of Hardie's in the ſum of L. 20 Sterling, uſed arreſtment in the hands of Mr David Drummond treaſurer of the Bank, upon the firſt of April 1732. In February 1736, Hardie died, and in Auguſt thereafter, Carmichael brought an action of furthcoming againſt the Governor and Company of the ſaid Bank. The Bank received payment of Roſend's debt on the 8th June 1739, with the intereſt due thereon, and on the 17th July thereafter, Mrs Hardie confirmed, as executor-creditor to her huſband, the ſuperplus money in the Bank's hands, after paying their own debt; and objected to Carmichael's arreſtment, that it could not be carried into execution by a proceſs brought after the death of the principal debtor. 2*do*, That the arreſtment in the hands of the Bank was inept; for that, at the time of the arreſtment, it was not debtor to Mr Hardie. It is true, that it became debtor thereafter in a liquid ſum; but as the arreſtment did not affect *acquirenda*, this after-debt could not be affected by the prior arreſtment. Suppoſe the Bank had by the aſſignation been bound, betwixt and a day certain, to do diligence upon the debt aſſigned, or to denude; yet ſuch an obligation could not be arreſted, nor be made the ſubject of a furthcoming, becauſe it was not commenſurable with a liquid ſum of money.

Answered: That Roſend's debt was conveyed to the Governor and Company of the Bank, and to Drummond their treaſurer, for their uſe and behoof; ſo that Hardie was fully denuded: and though Drummond might be accountable to him for the contents of this bill, after the payment of the debt due by Hardie to the Bank, yet the right was fully eſtabliſhed in Drummond. The queſtion therefore muſt be conſidered in the ſame light, as if Drummond had given his obligation to Hardie, to account and pay over to him ſo much of Roſend's debt as he ſhould recover, more than would ſatisfy what was due by Hardie to the Bank; which obligation, however uncertain *quoad* the extent, or as depending upon an uncertain condition, muſt have conſtituted a *jus crediti* in favours of Hardie, which his creditors might affect; and as no other method is known in law, whereby the

same could have been reached, but by an arreſtment, it is believed the arreſter falls to be preferred. No 72.

It is believed the LORDS found the arreſtment did not fall by the death of the common debtor, and that they preferred the executor confirmed to the arreſter*.

Fol. Dic. v. 3. *p.* 43. *C. Home, No* 197. *p.* 329.

1752. *February* 21. DUNLOP *againſt* JAP, and OTHERS.

No 73.
A debtor employed a third perſon to ſell goods for him. The purchaſer granted bill to that third party. An arreſtment in the hands of the purchaſer preferred to one in the hands of the holder of the bill.—There are ſpecial circumſtances in this caſe.

JAMES JAP merchant was a creditor of William Forbes merchant, and was alſo his ordinary agent, and knew all his affairs. When Forbes became inſolvent, he formed, with the privity of Jap, a ſcheme to commiſſion goods from abroad on credit before his bankruptcy ſhould be public, and to lodge them in Jap's hands, that he might diſpoſe of them, and ſatisfy with the price the debt due to himſelf. In purſuance of this ſcheme, he commiſſioned a parcel of goods from Dunlop, merchant in Holland, on a pretended joint credit, and took care that they ſhould come into the hands of Jap; who ſold them accordingly. But the LORDS, on the 18th January 1752, 'found the property of the goods was not transferred from, 'but remained with, Dunlop; and therefore preferred him to the price.'

The ſecond part of that caſe is as follows.

A few days after Forbes had commiſſioned the ſaid goods, he went over to Holland, and bought from the ſame Dunlop, on his own credit, a ſecond parcel of goods, which, in like manner, came to the hands of Jap. He, at the deſire of Forbes, employed one Spark, a common porter, to diſpoſe of the goods to Robert Napier. Spark, without ever mentioning the name of Forbes, ſold and delivered the goods, and took Napier's receipt for them. Jap, diſſatisfied with this, and deſirous to have a bill for the price payable to himſelf, ordered Spark to go back to Napier, and get ſuch a bill. Napier refuſed to grant it ſo, but gave one payable to Spark. Jap arreſts in the hands of Spark the porter; other creditors after him do the like; and, laſt of all, Dunlop arreſts in the hands of Napier the purchaſer.

Argued for Dunlop, That Spark was only employed, by the order of Forbes, as a hand to receive the goods from the ſhip, and diſpoſe of them for his behoof. Spark was never proprietor of the goods, nor debtor for the price. The price was not attachable for his debt. All he had to do was to deliver up the bill; and, by ſo doing, he was acquitted from any demand. Therefore an arreſtment in his hands was of no avail.

Pleaded for Jap, and the other arreſters in Spark's hands, That as Spark had ſold the goods, and taken a bill for the price payable to himſelf, he was to be conſidered as creditor for the price, and Napier was to be conſidered as debtor to him alone. That though Spark might be accountable to Forbes for the bill, yet that did not alter the caſe. Therefore the arreſtments in Spark's hands, as being the firſt, were preferable.

* *See* this caſe as reported by Kilkerran, p. 137. *voce* COMPETITION of this Dictionary.