

1739. February 2.

Competition, DANIEL FORBES with ALEXANDER INNES.

No 48.

A sum due by promissory note arrestable, though indorsed for value. This was before the act giving promissory notes the privileges of bills.

PATRICK CRAWFURD, merchant in Edinburgh, granted a promissory note to Robert Gordon, payable to him or his order, which came, by progress, in virtue of indorsations for value, into the hands of Daniel Forbes; and Mr Innes, being creditor to Gordon, arrested the same in Mr Crawford's hands, whereupon a competition ensued betwixt them.

It was *pleaded* for Daniel Forbes, That it was a privilege, amongst others, competent to bills of exchange, that sums due thereby could not be arrested for the debt of the person to whom they were payable, in prejudice of the indorsee, and which obtained with us, because the sums were not, by the form of the writing, payable simply to the original creditor, but to him, or his order; so that the debtor, by any such writing, could not, with certainty, know to whom he was debtor, until the bill did appear; and, consequently, till that time, no arrestment could affect the sums thereby due, without destroying the nature of these writings, and introducing confusion in trade. It is true, that the note in question (if the form is only to be considered) is not properly a bill of exchange, as indeed neither are our inland bills or precepts; yet, in reality, it is of the same import; it is an obligation payable to a creditor, or his order, which passes from hand to hand by indorsation; so that the debtor does not, the next moment after it is out of his hand, know who is his creditor, the last of twenty indorsees being the person, perhaps, who will make the first demand; and if it be granted, which cannot be denied, that such notes pass by indorsation, it must be a necessary consequence that the money therein contained is not arrestable for the debt of the person whose name stands in the note, no more than for the debt of any indorsee who may have purchased the same for value; and, as we have conformed ourselves to the law of nations, with respect to the indorsations of promissory notes, as well as bills of exchange, there is no reason why we should not allow the same privileges to the one as well as the other.

Answered for the arrester, It has always been understood, that the privileges of being exempted from compensation, arrestments, and, generally, every other clog, except what appeared upon the bill itself, was only the privilege of bills; and, in several decisions, these privileges have been denied to promissory notes, for this reason, that they are not bills of exchange; so that now the nature of promissory notes is generally believed to be settled on the same footing as any other obligation. And it is a mistake to say, That the course of trade requires the extending the privileges of promissory notes, seeing commerce, betwixt one nation and another, is not carried on by these. It is true, a great deal of inland business is carried on in that manner; yet consuetude, in the case of an inland trade, is not of the same force to overturn the standing law, as an universal custom in foreign dealings; for foreign trade must be regulated by the general practice which con-

stitutes what is called the law of nations, and to which the municipal law must conform; but, where subjects of the same country deal together, they being subject to the municipal law, ought not to be favoured in departing from the known established rules; hence it is, that bills are entitled to many privileges, which no other form of obligation in use amongst the subjects of this country are entitled to, but which ought not to be extended to any other writing.

THE LORDS preferred the arrester.

C. Home, No 113. p. 182.

No 48.

1739. *January 19.*

CREDITORS OF BERNARD CLUNIES *against* SINCLAIR and Her HUSBAND.

THE question occurred with the regard to a bond due to a married woman, the annualrents of which belonged to her husband, if an arrestment for his debt, laid on in the debtor's hands, did affect the *jus mariti*, or the annualrents only due at the date of the arrestment?—THE LORDS found that the arrestment carried no more than the annualrents that were fallen due, and the current term; and the reason given for it was, that arrestment can carry nothing but what is due to the common debtor, when it is laid on, not being of the nature of an inhibition to affect *adquirenda*; that the proper diligence in this case, is an adjudication against the husband, in whom the *jus mariti* subsists.

Fol. Dic. v. 1. p. 55.

No 49.

In what manner an arrestment affects the *jus mariti*. Decided in conformity with No 39. p. 702.

* * * The same case is thus reported by Lord Kilkerran.

It had been formerly determined between John Spruel, and the Laird of Grant, *anno* That a creditor of the husband's arresting in the hands of the wife's debtor by bond, carried not only the annualrents then due, and the current term, but that the arrestment carried the *ipsum jus mariti*. But the contrary was now determined and found, that it carried no more than the annualrents fallen due at the time of the arrestment, and the current term.

Arrestment affects not *acquirenda*; and the proper diligence to carry the *jus mariti*, is adjudication against the husband.

Kilkerran, (ARRESTMENT.) No 4. p. 36.

1739. *June 22.*

MACKENZIE of Dundonald, *against* JOHN TUACH.

TUACH having right to the reversion of some lands which he had wadset, assigned one moiety of the reversion-money (in terms of the back-bond) in the hands of Bailie Frazer, on the 11th March 1738; and, in November thereafter,

No 50.

Money assigned for the redemption of a wadset, found not to