

ing the question was betwixt the Kirk-session and Drumkinton, and the Town's right was only brought in *incidenter*, as a defence to Drumkinton; therefore unanimously found no expenses due on account of that process. The appeal was likewise only in the name of Drumkinton, who, by the decree of the House of Lords, was put in quiet and peaceable possession of the church. Therefore found no expenses due for the appeal neither.

1739. July 6. ——— against ———.

THIS was a petition craving letters of loosing an arrestment laid on during a dependance which affected the petitioner's whole substance and hindered him from uplifting any of his effects.

The Lords ordained the arrestment to be loosed upon his finding caution for a limited sum, which, in this case, was not one fifth of the claim.

1739. July 10. HEIRS of SIR JAMES ROCHEAD *against* EXECUTORS.

THE question here was, Whether a moveable bond to heirs and executors compensates a bond secluding executors?

The Lords found, That it did, upon this specialty, that the money lent upon the moveable bond appeared evidently to be given in payment of the heritable bond, though there was a bond taken rather than a discharge, for certain reasons of expediency. As to the general point, some of the Lords were not clear.

1739. July 10. DAVID KINLOCH *against* FULLERTON.

[C. Home, No. 125.]

By the law of England, bills, promissory notes, and merchants' accounts only burden the executry, but do not affect the heir. The question here was, Whether such bills, &c. granted in England, could affect the heritage in Scotland?

The Lords found they did: because, being deeds, which, of their own nature, were valid by the law of Scotland, there was no reason for refusing them the full extent that law had given them. The *locus contractus* regulates the form of any deed or obligation, but never the subject which it affects; thus the law of England will regulate the form of a testament there, but will never extend it to heritage here in Scotland. However, Drummore was of

opinion that this decision would hardly tally with some other decisions of their Lordships. See *infra*, January 25, 1743, *Creditors of Sir James Wood against Heir*; and 19th June 1746, *Marshall against Yeaman*. The *locus contractus* will not affect the substantials of any deed; for example, a nuncupative testament, made in England, will convey nothing in Scotland; January 19, 1665, *Shaw against Lewens*, reported by Lord Stair.

1739. July 13. ANGELY against ARBUTHNOTT.

[Elch., No. 20, *Bill of Exchange*; Kilk., No. 2, *Factor*.]

ANGELY, merchant at Bordeaux, gave a factory of some lands he had bought in Scotland to his correspondent, Arbuthnott, merchant in Edinburgh. This factory continued several years, till the year 1737, when Mr Cave, to whom Arbuthnott had sold the victual of Angely's lands, gave way. Mr Arbuthnott having taken the bills from Mr Cave in his own name, without any mention of their being for Angely's victual, Angely brought a process of count and reckoning against his correspondent, wherein he contended that he should be liable for the value of these bills which he had taken in his own name, and so was supposed to have subjected himself to the risk of them; especially considering that, if Mr Arbuthnott had given way, these bills could not have been distinguished from his proper effects, and so would have been affectable by his creditors, by which Mr Angely would have run a double risk both of Arbuthnott's insolvency and Cave's.

The Lords, first, upon petition and answer, found that Arbuthnott was liable; but afterwards, upon advising a reclaiming petition and answer, they found, *nemine contradicente*, Arbuthnott not liable; because, 1^{mo}, It was the ordinary custom of merchants to take bills in their own name for the effects of their correspondents which they had sold; and this had been the practice between these two gentlemen for several years past.

2^{do}, There was no appearance of fraud in Mr Arbuthnott.

3^{tio}, Upon production of Arbuthnott's books it appeared that these bills were so stated there, that, in case of a competition between Angely and Arbuthnott's creditors, they might have been distinguished from Arbuthnott's effects.

4^{to}, Supposing they could not have been distinguished, yet so exuberant is the trust among merchants that an employer is supposed to take his risk of any losses he may sustain by the insolvency of his correspondent.

Reversed above.