

No. 256.

THE LORDS dismissed the claim of the arresting creditor, and found him liable in expences.

Lord Ordinary, *Halles.*For Hutchifon, *Maconochie, Wauchope.*  
Clerk, *Colquhoun.*Alt. *Stewart.**Stewart.**Fol. Dic. v. 3. p. 66. Fac. Col. No 193. p. 401.*1798. *March 10.*

JAMES THOMSON, Common Agent for the Creditors of NEIL CAMPBELL, *against*  
HENRY BUTTER and Others.

No 257.

A revocable trust-settlement, by which a person conveyed his whole property, at his death, to certain confidential friends, for payment of debts, and other residuary purposes, found insufficient to prevent his creditors from obtaining preferences by legal diligence.

By 35d Geo. III. c. 74. § 3. an arrestment may be used upon an unexecuted summons, although the debtor be not bankrupt, in terms of the act 1696, c. 5.

CAPTAIN NEIL CAMPBELL executed a revocable trust-deed, by which, in the event of his going abroad with his regiment, he conveyed his whole property to his wife, and certain confidential friends, for payment of his debts, and other purposes, the trust to subsist after his death, if the objects of it were not previously accomplished.

He afterwards executed a second deed, likewise containing a power of revocation, conveying his whole property, at his death, to the same and additional trustees, whom he named his executors. The purposes of this deed were declared to be, to enable them to pay, *1mo*, His deathbed and funeral charges, and the expences of management; *2do*, His other debts, and those due by open account, without decree, if the trustees were satisfied of their justice; *3tio*, The provisions to his wife; *4to*, The legacies and donations which should be left by him; and, *lastly*, The reversion to his heir.

Captain Campbell died insolvent, but not bankrupt, in terms of the act 1696, c. 5.

After the trustees had sold his estate, several creditors used arrestments in the hands of the purchaser. A multiplepointing was raised, and a common agent appointed, who stated, as a general objection to the preferences claimed by all the arresting creditors, that, by the trust-deeds, in which the whole creditors had acquiesced till the lands were sold, each creditor was entitled to a rateable proportion of the funds *in medio*, and no one could obtain a preference by arrestment; 13th November 1744, Snodgrafs, No 245. p. 1209.; 23d January 1756, Souper against the Creditors of Smith, No 76. p. 744.; 30th July 1766, Mackell against the Trustees of Maclurg, No 21. p. 894.; 24th February 1769, Watson against the Trustees of Tod, No 254. p. 1220.; 8th December 1791, Hutchifon against the Creditors of Gibson, No 256. p. 1221.

THE LORD ORDINARY " Found, that the trust-deeds executed by Mr Campbell, were not granted by him at the desire of his creditors, or for the behoof of his creditors: Found, that by these trust-deeds, Mr Campbell of Inverliver appointed his wife Mrs Campbell, and Mr George Andrew, his cousin and man of bu-

finés, and others of his friends as trustees: That, by the first of these deeds, Mr Campbell intended an interim management of his estate and affairs, in consequence of expected orders to go abroad with his regiment; and that, by the last trust-deed, executed a short time before his death, Mr Campbell conveyed to the former, and some additional trustees named by him, the whole real and personal estate which should belong to him at his death; and, *inter alia*, empowered the trustees to pay off such open accounts as they should think were justly owing, without requiring the creditors to constitute their debts by decree: Found, that both these trust-deeds contain a power of revocation by Mr Campbell, the granter, and that they do not prohibit or restrain the legal diligence of creditors: Found, that the legal effect of such trust-settlements, is not to tie up the hands of creditors from following the diligence of the law for recovering payment of their debts;” and therefore repelled the objection.

A reclaiming petition was (20th February 1798) refused, without answers.

The common agent further stated, as a special objection to the arrestment of Henry Butter, that it proceeded upon a summons of constitution against the trustees, which had passed the signet, but was not executed, contending, that the exception from the common law, introduced by 33d Geo. III. chap. 74. § 3,\* allowing letters of arrestment to be issued upon production of a libelled summons not yet executed, applies only where the debtor is bankrupt in terms of the act 1696, c. 5:

*Answered*: The statute, in this, as in several other clauses, (§ 4. 10.) introduced a general enactment, applicable to all cases, and so it has been understood in practice.

THE LORD ORDINARY repelled the objection, in respect, ‘That, by a clause of 33d Geo. III. chap. 74. it is, *inter alia*, enacted, That, in time coming, letters of arrestment may be granted upon production of the libelled summons, and that the general practice, since passing said act, is to use arrestments on libelled summonses before the summons is executed.’

Upon advising a petition, with answers, the Lords ‘adhered.’ See PROCESS.

Lord Ordinary, *Armadales*.

For the Common Agent, *Solicitor-General Blair. D. Douglas*.

Alt. *M. Ross, Neil Ferguson*,

Clerk, *Menzies*.

*Fac. Col. No 70. p. 160.*

*D. Douglas.*

\* Section 3. ‘And be it enacted by the authority aforesaid, that when a debtor is made bankrupt, in terms of the act made in the year 1696, as now extended, all arrestments which shall have been used for attaching any effects of such bankrupt, within sixty days prior to the bankruptcy, or within four calendar months thereafter, shall be ranked *pari passu*, in the same manner as if such arrestments had been of the same date; and that, in time coming, letters or precepts of arrestment, bearing to be upon a depending action, may be granted summarily, upon production of the libelled summons, and that it shall be no objection to the *pari passu* preference hereby established, that the summons upon which any arrestment proceeds, was not executed, or that the debt upon which it was founded, was not liquidated at the date of the arrestment: provided always, that these, and all other necessary steps are afterwards taken without any undue delay,’ &c.