

No 63.

ing no diligence used thereupon within the five years, and there was no speciality in arrestments of this nature, from ordinary arrestments in a debtor's hands, and the act of Parliament anent prescription was general, as to all arrestments without exception, and there was as much, if not more reason, that this should prescribe, than the other, in regard there was no record of arrestments, by which the lieges could come to the knowledge thereof, and it would utterly stop all commerce, if the buyer, or receiver of moveables arrested, should be liable for the price thereof forty years.—THE LORDS found, That the act of Parliament anent arrestments, being general, did extend to this arrestment, which was in the debtor's hands; but thereafter, interruption being offered to be proven, by diligence done upon the arrestment within the five years, the same was found relevant. (See PRESCRIPTION.)

Fol. Dic. v. 1. p. 57. President Falconer, No 100. p. 70.

* * Lord Fountainhall mentions the same case thus :

BETWEEN Shaw and Macilwraith the Lords reversed a former interlocutor, and now found, that an arrestment laid on in a debtor's own hands, expired and prescribed in five years, as any other arrestment. *Queritur*, What effect this arrestment in the debtor's own hands has, except his being liable in the penal confiscation if he contravene? Some extend it even against singular successors, who could by no register know the said arrestment; which would straiten commerce too much. Yet, *see* Durie, 10th January 1624, Innerwick *contra* Wilkie, No 61. p. 733.; and Stair's Instit. tit. of ARRESTMENTS.

Fountainhall, v. 1. p. 373.

1706. July 18.

HOME *against* PRINGLE.

No 64.

A man had given a factory to his own wife; arrestment in her hands found competent.

GEORGE RUTHERFORD, in Dunbar, being debtor to James Home of Gammalshiels, for the price of some victual, and having given a factory to Jean Pringle his wife, who, by virtue thereof, uplifted sundry debts owing to her husband, Home arrests both in her hands and her husband's. And the husband being since dead, he transfers the debt against his heirs *passive*, and pursues a furthcoming against the wife and children.—She *alleged*, A wife cannot be debtor to her husband, unless she were *factrix* or *præposita*, and so no arrestment can be validly laid on in her hands, seeing factors are not debtors, but only their constituents; and therefore Stair, tit. ASSIGNATION, § 30. page 373 *, calls such arrestments ineffectual. *2do*, Arrestment of goods in a party's own hands, was never sustained but once; 10th January 1624, Wilkie *contra* Lady Innerwick, No 61. p. 733.; but was found such a clog to commerce, that it never had a second *3tio*, The debtor died *medio tempore*, and so the arrestment fell, unless it had been renewed. Likeas, goods or sums in her hands, *stante matrimonio* were the husband's, and

* Page 390 in edition 1759.

no arrestment laid on in the wife's hands, could stop his disposal of the same for the use of his family; and, if they be, since the dissolution of the marriage, she has a preferable right to them, in virtue of her contract of marriage, as executrix-creditor.—*Answered*, If wives, made factors, were accountable for their husband's debts to his creditors, by their intromissions, it were a compendious way of frustrating all his debts; and for wives to enhance their means, to the prejudice of the legal embargo by arrestments. And Stair's words are misapplied; for, though he asserts arrestments laid on in factor's hands, to be useless, yet he says it is otherwise if it be also laid on in the constituent's hands, which is Gammalshiehl's case; neither doth it alter the case that the principal debtor is dead *medio tempore*, for the calling his representatives supplies that; See 19th February 1667, Glen *contra* Home, (Stair, v. I. p. 443. *voce* ESCHEAT.) It is true, if my debtor's debtor, in whose hands I lay an arrestment, die, then the arrestment perishes with him, and must be renewed in his successor's hands, being personal; but that is not the present case. And as to her retention as executrix-creditor, the Lords have preferred an arrester to an executor creditor, albeit the furthcoming was raised after the debtor's death.—THE LORDS repelled the defences, and sustained the arrestment, and ordained her to depone what was in her hands at the time, reserving her to be heard upon any title, by which she may crave preference to him, but found the debt behoved to be first constitute.

Fol. Dic. v. I. p. 57. Fount. v. 2. p. 343.

1709. January 18.

JAMES DONALDSON, Merchant in Edinburgh, *against* ARCHIBALD COCKBURN, Merchant, and late Baillie there.

IN a competition betwixt Baillie Cockburn and Mr Donaldson, creditors of Patrick Haliburton, merchant in Edinburgh—THE LORDS refused to sustain an arrestment used by Donaldson, in the hands of Mrs Helen Swyntoun, spouse to Captain Francis Charteris, when her husband was out of the kingdom, to affect a debt owing by the Captain to Haliburton. Albeit the Lady had an ample faculty and commission at the time to uplift, receive, assign, discharge and dispose of all sums, goods, gear, and others whatsoever, belonging to her husband, and, if needful, to pursue therefor. Because, if a decret of furthcoming against a factor, without calling his constituent, were sustained, the constituent's whole estate might, without his knowledge, be evicted out of his factor's hands, and perhaps for debts not truly due.

Fol. Dic. v. I. p. 57. Forbes, p. 300.

No 64.

No 65.

Arrestment in the hands of a factor, of a debt due by the constituent to the arrester's debtor, not a competent foundation of a process of furthcoming, the constituent not being called.