1738. *December* 12. EARL of ABERDEEN *against* CREDITORS of SCOT of BLAIR.

[Elch. No. 9, *Arrestment*; Kilk. No. 1, *ibid.*; C. Home, No. 110.]

THE single point here in issue was, Whether an arrestment died with the person in whose hands it was used? It is true there was a specialty, that not only arrestment had been used, but likewise a forthcoming raised against the deceased debtor. But as this was little insisted on, and the Lords seemed to be of opinion that it did not vary the case,—in reporting the decision we shall only give the arguments on the general point.

Against the arrestment laid on in the predecessor's hands, and now followed out against the heir, it was argued, 1*mo*, That an arrestment was merely a prohibitory diligence, and, by the nature of the thing, behoved to die with the person prohibited: that it was nothing else but an inhibition *in mobilibus*, which gave no right to the subject, but only prohibited the debtor to alienate or pay: that it was the decreet of forthcoming which affected the subject, and which for that reason may be compared to an adjudication in heritage. 2*do*, That an arrestment gives no right to the subject further appears from this, that a posterior poinding carries off the subject arrested; which could not be if the arrestment gave any real right, such as that of a hypothec, for then it would pass *cum suo onere*. 3*tio*, The opinion of our ablest lawyers is clear in this point: both Mackenzie and Stair affirm, in so many words, that an arrestment dies with the person in whose hands it is used.

For the arrestment it was argued, 1*mo*, That an arrestment being the only way known, by the law of Scotland, of affecting the debts or *nomina debitoris*, which can neither be adjudged nor poinded, it would be extremely hard if a creditor, after having done all he could do to secure his debt, should be cut out by the accidental death of the person in whose hands he has arrested, and another creditor preferred, who, taking advantage of his situation, had first arrested in the hands of the successor, and that perhaps, in the case, where, by the nature of things, it was impossible for the creditor first arresting to complete his diligence by a decreet of forthcoming. 2*do*, The comparison betwixt an arrestment and an inhibition will not hold: 1*mo*, An inhibition gives no right to the subject, nor produces any action, till it is counteracted and the prohibition incurred; which shows it to be merely a prohibitory diligence; but an arrestment produces an action of forthcoming before any thing is done contrary to the prohibition, and so cannot be merely a prohibitory diligence, but must give a right which is the foundation of the action of forthcoming: 2*do*, A first inhibition is no better than a second, things remaining *in statu quo*; and indeed an inhibition, being merely prohibitory, there can be no reason assigned why a second prohibition should not be as good as the first: but it is not so in arrestments; a prior arrestment is preferred to a posterior, though later only by an hour, which shows that the first arrestment must affect the subject, and thereby exclude the second. 3*tio*, What further demonstrates that an arrestment must give a right to the subject arrested, and

is not a mere prohibition, is, that a posterior arrestment is preferable to a prior assignation not intimated. If the arrestment were merely prohibitory, there is no reason can be assigned why the assignee should not be able to complete his right by intimation, even after the arrestment, since the intimation is no deed either of the principal debtor or the person in whose hands the arrestment is laid, and so does not contravene the prohibition in the arrestment. And upon these principles it is, that, when one dispones his estates, and afterwards his creditor inhibits him, the disponee, notwithstanding the inhibition, can complete his right by infeftment, because that is no deed of the person inhibited, and so cannot be affected by the inhibition.

4to, But what seems to put the matter beyond dispute, is, that a prior arrester is preferable to an executor-creditor confirming the same debt, and obtaining decreet thereon, as was decided in the case of *Riddell* contra *Maxwell*, *January* 20, 1681. If the arrestment give no right, it is evident that the subsequent confirmation and decreet thereupon would denude the *hæreditas jacens*, and as effectually transfer the right as an assignation intimated in the debtor's lifetime would have done. Let us suppose that the debt for which the executor-creditor confirms was anterior to the debt for which the arrestment was laid on; in this case the arrestment would be still preferable. But this is impossible, if you suppose that an arrestment is like an inhibition, no more than a prohibitory diligence, for an inhibition can never affect any diligence that is done upon a ground of debt prior to the inhibition.

5to, It is granted that a poinding gives a stronger right than an arrestment; but it does not follow from thence that an arrestment gives no right at all. A poinding is a more complete diligence, and gives a real right, a *jus in re*, whereas an arrestment gives only a *jus ad rem*, a personal right to the debt arrested, in the same manner as an adjudication without infeftment gives a right; though a posterior adjudication, on which infeftment hath followed, be preferable.

6to, As to the authorities brought for the contrary opinion, it is sufficient to observe, that these of themselves do not make law, unless supported by reason or precedent; and *2do*, The opinion of these lawyers may be explained in this manner, that the arrestment dies in the hands of the person with whom it is used, but only *quoad hunc effectum*, that the heir paying *bona fide* is neither liable for paying again nor for breach of arrestment.

To this it was replied, *1mo*, That an arrestment is not the foundation of the action of forthcoming; that it is only a medium which the creditor uses for securing his debtor's effects, and putting the person in whose hands it is laid *in mala fide* to pay, till by the decreet of forthcoming he affects the subject; that it is only that decreet which gives the right, in consequence whereof a second arrester obtaining the first decreet of forthcoming is preferable.

2do, That a first arrestment gave a preference, because, by the means of it, the subject was secured and kept *in medio* for the behoof of the creditors, and not upon account of any actual right it gave to the subject.

3tio, That a posterior arrestment is preferred to a prior assignation, but intimated after the arrestment, because such an assignation, till it is intimated, is reckoned a latent deed; which, in our law, is noways favourable. Thus a base infeftment, in its own nature, is as valid as a public; but, being looked upon

in the eye of the law as a latent deed, a public infeftment, though posterior, is preferred to it, if not clad with possession.

The Lords found, That, in respect of the effects of arrestment in our law, it must be something more than a prohibitory diligence; that it gives a right upon which is founded the action of forthcoming, which, as it is an *actio rei persecutoria*, cannot die with the debtor, but is competent against his heir; therefore found, that, upon an arrestment in the predecessor's hands, not only a process of forthcoming depending could be transferred against the heir, but likewise that it could be raised anew. But, as, in this case, it was said that the arrestment was laid on in the hands of an apparent heir, some Lords had a doubt how far such an arrestment could affect the subjects which he became afterwards debtor in by serving heir to his predecessor; and it was remitted to the Ordinary to inquire about that fact. See the sequel of this affair, *November* 20, 1739.

CREDITORS of MENZIES of LETHEM *contra* WILLIAM LAW.

[Elchies, No. 10, *Arrestment*; Kilk., No. 3, *ibid.*]

The question here was, which of two arrestments was preferable, both laid on for a debt due by the Maiden Hospital of Edinburgh,—the one in the hands of the whole managers and directors, the other in the hands only of the treasurer.

Against this last, it was argued, 1*mo*, That an arrestment could only be laid on in the hands of the debtor; that only the corporation, or its representatives, were debtors; that the representatives of a corporation were the managers and directors, and not the treasurer, who is but their servant and can do nothing without their particular mandate. 2*do*, That this is further evident from the tenor of bonds granted by societies or corporations, where, for the most part, the directors are the parties contracting; and where the treasurer grants the bond, (which was the case here,) he does it by order from the corporation, and does not bind himself in the bond, but the managers and directors; and, as a proof of this, letters of horning cannot be directed against him but against the managers.

For the arrestment in the hands of the treasurer, it was said, that the treasurer, being the person who kept the cash of the company, made and received their payments, he was certainly the fittest person in whose hands they could arrest: that, in as far as concerned these matters, he might be said to represent the corporation. 2*do*, That it was not true that bonds were generally granted by the whole directors: that they were often only signed by the treasurer; and that though, in these cases, he acted by express commission from the managers, yet he was almost always personally bound himself; and though, in this case, the bond was not extant, yet that was to be presumed from the practice in like cases. 3*tio*, Though it cannot be denied that arrestments are