No 99. principal ſum, or conſigned the ſame; or elſe he could not be freed of the annual-rent, being ſubject thereto by his bond. This cauſe was ordained thereafter to be further heard, and this interlocutor was ſtayed.—Here it may be queſtioned, if ſums debtful by heritable bonds be arreſtable, which has not been here diſputed; for anſwer whereto, *see* K. Charles' Parliament, v. 2. p. 250.

Durie, p. 93.

1633. *February* 26. RUTHERFORD and TURNBULL *againſt* their CREDITORS.

No 100.
Arreſtment, uſed after the debtor's death, is not a habile diligence for affecting his goods; and gives no preference in competition with creditors who proceed by confirmation, or by purſuing the executors.

ONE Turnbull, relict of Rutherford, being confirmed executrix to her huſband, purſuing exoneration againſt her huſband's creditors, by offering of the goods in the teſtament, to be divided amongſt them: The bairns of John Pringle of Cockle-ferrie deſiring to be preferred to other creditors compearing, ſeeing they *alleged*, they had obtained ſentence againſt the relict, for the debt owing to them by the defunct, and that they had arreſted in the hands of certain debtors, ſums owing by them, to the defunct their debtor, whereby they claimed to be preferred to other creditors, who had done no diligence at all; notwithſtanding whereof, the LORDS refuſed to give preference to this creditor, and reſpected not his diligence; but found that all the reſt of his creditors, albeit they had done no diligence, ſhould come in equally with him, in partaking of the goods of the teſtament, according to the proportion of the debts, ſeeing the diligence was not reſpected in this caſe, where the defunct had died within theſe nine months, or thereby, laſt by-paſt, and where the relict was only confirmed executrix, within theſe ſix or ſeven weeks laſt by-paſt; ſo that for the ſhortneſs of time, there could be no great negligence nor omiſſion imputed to the other creditors.

Act. *Craig & Gibſon.* Alt. *Sandilands.* Clerk, *Gibſon.*

Fol. Dic. v. 1. *p.* 58. *Durie, p.* 678.

1738. *December* 22.

No 101.
Arreſtment found not to fall by the death of the perſon in whoſe hands it is laid.

EARL of ABERDEEN *againſt* The other CREDITORS of SCOT of Blair.

THE LORDS, after a hearing in preſence, found, That an arreſtment does not fall by the death of the perſon in whoſe hands it was laid, but may be made effectual againſt his heir by a furthcoming, where the ſubject is *in medio*; and therefore the ſubject in this caſe being *in medio*, preferred the Earl's arreſtment laid in the hands of the defunct, to an arreſtment uſed by his competitors againſt the heir.

This was new, and till it ſhall be followed by another judgment, cannot be called a ſettled point.

Fol. Dic. v. 1. *p.* 58. *Kilkerran*, (ARRESTMENT.) *No* 1. *p.* 35.

*** C. Home reports this caſe more at large thus :

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THE Earl being creditor to Scot of Blair, uſed arreſtment in the hands of William Blair his ſon, and thereupon brought a furthcoming againſt him, in which ſome procedure was had; thereafter, William died, who being ſucceeded by Hamilton Blair his brother, the Earl *insisted* in a transference againſt him; in which compearance was made for the creditors of Mr Scot, who produced an arreſtment uſed for them, in the hands of Hamilton Blair, after he ſucceeded to his brother; and *objected*, That the Earl's arreſtment periſhed by the death of William; ſo that no decreet of furthcoming could now follow thereon.

Answered for the Earl: There is no other legal method known by which a moveable debt can be taken in execution of a decreet, or applied in payment of a creditor, but by an arreſtment and proceſs of furthcoming founded thereon; and, if an arreſtment did import no more but a perſonal prohibition upon the debtor, it is not eaſily conceived how the perſonal prohibition, while it is not contemned, ſhould eſtabliſh a right in the arreſter. It is certain, an inhibition, which is but a perſonal prohibition, gives no action to the inhibitor, while it is not counteracted; conſequently, an arreſtment is not a ſimple prohibition upon the party, in whoſe hands it is uſed, to pay; but it muſt further give ſome right to the arreſter, which is the foundation of a furthcoming. With reſpect to the particular effects whereof, it was obſerved, That, as an arreſtment of a debt (which is the ſubject of the preſent queſtion,) gives the arreſter an action for payment; ſo it is equally certain, that a creditor cannot attain that end, without the intervention thereof: Hence it would ſeem to follow, That the arreſtment is not a ſimple prohibition, which may be the foundation of a reduction, if it is contemned, but that it gives a right, ſince there is no inſtance in law where a petitory action is competent, but where there is a right upon which it is founded. 2*do*, It is equally eſtabliſhed, an arreſtment gives a preferable right upon the debt arreſted by its priority, which is inconſiſtent with the ſuppoſition that it is only a perſonal prohibition, and eſtabliſhes no right in the arreſter: A perſonal prohibition, while it is ſubmitted to, can be no ſtronger than another perſonal prohibiton made by the ſame authority at any after period; *e. g.* An inhibition uſed to-day, and one uſed ten years hence, if the debtor in the mean time neither ſells his lands nor incumbers them, will have the ſame effect againſt an alienation made after both. This demonſtrates that an arreſtment, which, from the moment it is laid on, gives an action, and a preference, is not a ſimple perſonal prohibition, but eſtabliſhes a right in the arreſter. But, 3*tio*, What puts the point beyond doubt, is, That, ſuppoſe a debt be aſſigned, and the aſſignation not intimated, a creditor of the cedent's arreſting, will be preferred to the aſſignee, afterwards intimating his aſſignation. Now, if the arreſtment was but a prohibition, What colour could be aſſigned for this preference? 4*to*, It is upon the ſame principles, That, if the debtor, for payment of whoſe debt the arreſtment was uſed, happen to die, and another creditor of his ſhould confirm the debt as

No 101. executor-creditor, whereby, if the arreſtment were not in the caſe, he would denude the *hæreditas jacens*, and eſtabliſh the right in his perſon as effectually as if the debt had been aſſigned, and intimated in the defunct's lifetime; yet the arreſter is preferable, which it is impoſſible can be ſupported, if an arreſtment were but a perſonal prohibition; for the confirmation is no contempt, 'tis no deed, neither of the principal debtor, nor of him in whoſe hands the arreſtment was laid; 'tis but a ſtep of diligence allowed by the law to the co-creditor; but, when an arreſtment is conſidered as giving right and a preference, it follows, that the after-diligence of the executor-creditor cannot exclude it. And, if this is the caſe, That an arreſtment creates a right in the arreſter, 'tis not eaſy to be conceived upon what principles this right, and the action thence ariſing, ſhould become void by the death of the defender. 'Tis an eſtabliſhed rule, That penal actions do not tranſmit, unleſs after litiſcontеſtation; but 'tis equally eſtabliſhed, That an action *rei persecutoria*, is as competent againſt the heir as againſt his predeceſſor, and an action of furthcoming is in no ſenſe penal.

Replied for the creditors of Mr Scot, The doctrine, that an arreſtment falls by the death of the perſon in whoſe hands it is uſed, is a point clearly eſtabliſhed by all our lawyers; particularly Lord Stair, *lib* 3. *tit.* 1. lays it down as a principle, 'That arreſtment being a perſonal prohibition, uſed againſt him in whoſe hands 'the arreſtment was made, if he die, it is not extended to his ſucceſſors; but they 'may diſpoſe of the goods or ſums arreſted, unleſs it be renewed in their hands 'in the ſame manner as an inhibition, which is alſo a legal prohibition extending 'to heritable rights, as arreſtment doth to moveables; but, though the debtor, 'whoſe goods or ſums were arreſted, die, the arreſtment ceaſeth not, &c.' Where the learned author juſtly diſtinguiſhes betwixt the death of the common debtor, and the death of the perſon in whoſe hands the arreſtment was uſed, the arreſtment does not periſh by the death of the one, becauſe it is not directed againſt him, but againſt the other, who is inhibited to pay what is in his hands, until the arreſter be ſatisfied; and ſo far it agrees with an inhibition, that it is a perſonal prohibition, but it differs in this, that the effect thereof does not ceaſe by the death of the common debtor; a diſtinction which ſeems to have been eſtabliſhed the 20th of Jan. 1681, Riddell, No 113. p. 783. Both of them are only perſonal diligences, but neither gives properly a right to the ſubjects belonging to the common debtors. Heritages are only carried by adjudication, and inhibition is calculated ſolely for preventing alienation: in the ſame manner, arreſtment is allowed to prevent the common debtor from running off with his effects, before they can be decerned to belong to his creditors; ſo that the furthcoming is nothing elſe but an adjudication *in mobilibus*, and the arreſtment, the *interim* remedy, anſwering the end in moveables, that an inhibition does in heritage; nor is there any reaſon for giving it a ſtronger effect than what is allowed to the other. This doctrine is likewiſe laid down by ſeveral other lawyers, and not a little confirmed from this conſideration, That it does not appear ever the point was ſo much as debated. As to the argument urged for the Earl, That an arreſtment muſt be ſomething

elſe than a perſonal prohibition; it was *answered*, A ſecond arreſter is preferable to the firſt, if he obtain the firſt decreet of furthcoming, which is incompatible with the Earl's plea; and, if an arreſtment give any right, ſuch as a decreet of adjudication or furthcoming, there is no reaſon why it ſhould preſcribe ſooner than forty years: neither is it inconſiſtent with the notion of an arreſtment's being only a perſonal prohibition, that they are preferred according to their dates; for, ſuppoſe one is laid on to-day, and another half a year after, and both arreſters are inſiſting for a decreet of furthcoming, is it not agreeable that, in *pari casu*, he who uſed the firſt diligence ſhould be preferred? And there is this good ground for preferring the firſt arreſter, That it was his diligence which preſerved the ſubject *in medio*, otherwiſe the common debtor might have got payment from his debtor during the half year that intervened betwixt the date of the firſt and ſecond arreſtment: it is likewiſe conſiſtent with this doctrine, that arreſtments are preferred conform to their dates in a competition with aſſignees, according to the dates of the intimations of their aſſignation; for an aſſignation to a perſonal debt being only a perſonal right, the cedent's debtor is not obliged to know of any private aſſignation the cedent has made, until it be intimated to him; and therefore, until then, he may *bona fide* pay the old creditor, who, till the intimation, is conſidered as the proper creditor. An arreſtment has the ſame effect, namely, to put the common debtor's debtor in *mala fide* to pay him; but then, that an arreſter is preferred to a prior aſſignee, who only intimates his aſſignation after the arreſtment, ſeems to have been wiſely introduced by our law, to prevent the hazard that there was of antedating ſuch latent deeds. And, *laſtly*, As to the obſervation, That an arreſtment is preferred to an executor-creditor confirming the debt, it was *answered*, The preſent queſtion is only, whether it periſhes by the death of him in whoſe hands it was laid on, ſeeing it is admitted the common debtor's death does not alter the caſe? for, as he is only called for his intereſt, the calling his ſucceſſor is ſufficient; and, as the inchoat diligence againſt the perſon, in whoſe hands the arreſtment is uſed, may be thus carried on; the arreſter will be preferred to the other creditors of the common debtor, who ſhall confirm the ſubject; becauſe that is only a new ſtep of diligence for affecting their debtor's means; and, as his death does not alter the arreſter's diligence, the executor-creditors can be in no better caſe after their debtor's deceaſe, than they would have been in by uſing a ſecond arreſtment, in order to affect their debtor's means, in caſe he had been alive; for the ſums arreſted are indeed in *bonis defuncti*, but affected by a prior arreſtment that is not altered by the common debtor's death; whereas, from its nature as a perſonal prohibition, it periſhes with the perſon in whoſe hands the arreſtment was uſed, he alone being perſonally inhibited thereby.

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The Lords found, That the arreſtment does not die with the perſon in whoſe hands it was uſed, but may be made effectual againſt his heir by a furthcoming, the ſubject being *in medio*.

C. Home, No 110. *p.* 176.