

No 111. whereby a sum arrested is secured, so that the debtor cannot uplift; and the person, in whose hands the arrestment is made, cannot pay or give away the same in prejudice of the arrester; and as, *in immobilibus*, inhibition doth not establish a right in the person of the creditor, unless he deduce a comprising, but doth affect the same, so that the debtor cannot prejudice the creditor, and his diligence if he comprise: there is *eadem ratio* in arrestments *in mobilibus*. Upon these grounds it was found, That the debtor deceasing, the sums arrested being *in ejus bonis*, ought to be confirmed; and that the creditor could not have action against the person in whose hands the arrestment was made; and the apparent heir of the debtor called for his interest; but should confirm himself executor-creditor. (See LEGAL DILIGENCE.

Fol. Dic. v. 1. p. 58. Dirleton, No 53. p. 21.

1679. *January 16.*

THE EARL OF WEMYSS *against* THE LAIRDS OF MAY and APLECORSE.

No 112.
Found, that
action of
furthcoming
might proceed,
notwithstanding
of the death
of the common
debtor.
A circumstance
of the case.

THE Earl of Weems having arrested in the Laird of May's hands, all sums due by him to the tutor of Lovat, for payment of a debt due by the tutor to the Earl, he did insist in a process for making furthcoming, wherein May deponed that he was no ways debtor to the tutor, but by a bond, whereof he produced the double, bearing 8000 merks to have been borrowed from him by the tutor and his Lady; which he became obliged to pay to the longest liver of them two, in conjunct-fee and liferent allenary; and, in case the same was not paid to them in their life, to Isobel Frazer, their daughter; and failzieing of her, to the Lady's children of her prior marriage with M'Leod, that she should nominate; but deponed, that the arrestment being loosed, he had recovered his bond from the tutor, and given a bond to Lochslin for the same sum; after this oath, the process sisted for several years, and the Earl hath wakened the same, and adjoined a declarator, that Lochslin having, that same day he received the bond from May, given an assignation to the same effect with the first bond, whereby it was evident that the sum yet remained in May's hand; and that the bond granted to Lochslin, and assigned by him, came in place thereof; that, therefore, it ought to be made furthcoming to the Earl for payment of the tutor's debt, in respect the tutor was fiar in the first bond; and the second bond was procured, not upon payment of the first, but upon renovation of the security in name of Lochslin, an interposed conjunct person being the Lady's brother, as is evident by the assignation by Lochslin, of the same date with the bond renewed to him, and of the discharge of the first bond. Compearance was made for Aplecorse, who had married the said Isobel Frazer, and *alleged, 1mo*, That the sum could not be made furthcoming, because the tutor, who was the principal party, was dead, and the debt was not established in any representing him. *2do*, That the tutor had in his

own time suspended; till which was discussed, he could have no sentence for making furthcoming. 3^{to}, By the late act of Parliament, all arrestments prescribe within five years, and those which were before the act, within five years from the date of the act, and the rest within five years from their own date. 4^{to}, This sum did never belong to the tutor, for the first bond being in conjunct-fee to the tutor and his lady, and the termination being upon the children of the other marriage, she is understood to be fiar, and her husband but liferenter. 5^{to}, Aplecorse is a singular successor, having right from Isobel as her tocher, who, in contemplation thereof, infect his son in his estate, and her in a liferent; so that he was *in bona fide*, neither knowing the arrestment, nor any fraud.—The pursuer answered to the first, That he had cited the tutors apparent heir, who might propose what defence he pleased; but seeing he had affected a sum due to the tutor in his life, and none was entered to represent him therein, and did not insist for any sum established in the person of the tutor's heirs, he was no further obliged. To the second: The pursuer's debt being once established by a liquid bond, the suspension against the same was only a general suspension against all the tutor's creditors by the English act, without any special reason against the debt, but only to suspend personal execution, the same was now void with that act, and needed not be discussed, nor did it impede the effect of arrestment, which is a real execution. To the third: Though arrestments prescribe within five years, if there be no citation, the action thereupon prescribes not till ten, being wakened every fifth year; and here there was an action before the act of Parliament. To the fourth: In all conjunct-fees between man and wife, the man is always fiar, unless the right appear to have been originally the wife's, and not the husband's *jure mariti*; so it is always presumed, that the means was the husband's. To the fifth: Arrestment being *nexus tenis*, it is effectual against all singular successors.

THE LORDS repelled all these defences, except the fourth, and before answer thereto, for clearing whether the sum lent did belong to the man or wife, they allowed either party to adduce what evidence they could, and especially if the tutor's lady had any heritable rights disposed of about the time of this bond; or if she had in her hands any means of her first husband's. (See HUSBAND and WIFE.)

Fol. Dic, v. 1, p. 58. Stair, v. 2. p. 674.

1681. January. 20.

RIDDEL against MAXWELL.

JAMES RIDDEL being creditor to John Riddell in Leith, arrests all sums due to him, in the hands of Mr. Patrick Bell; but, before intending action, to make furthcoming, Riddell dies, and now James Riddell pursues Mr. Patrick Bell to make furthcoming, and cites therein the heir of John Riddell, his debtor; Bell raiseth a double poinding against James Riddell, and Mr. William Maxwell, who had confirmed himself executor-creditor to John Riddell, in the sums due by

No 113.

Arrestment found effectual, although no process of furthcoming was raised till after the common debtor's death, and the arrester