

1733. *January 19.*HUNTER *against* LEES.

No 66.

A person let a part of his cellar. He had tobacco in his own distinct part of it. The tenant sometimes kept the key : Found, that an arrestment of the tobacco in the hands of the tenant, while he had the key, was inept.

A MERCHANT, proprietor of a cellar in which he had hogsheds of tobacco, let out the half of the cellar to a neighbouring merchant ; and they had a common key, which sometimes the one and sometimes the other kept, as their purposes required. At a time when the key happened to be in the tenant's possession, an arrestment was laid in his hands by a creditor of the proprietor of the cellar, who had his own tobacco in that half of the cellar which was not let. In a competition betwixt the arrester and a voluntary assignee, whose right was posterior to the arrestment, the LORDS found the arrestment an inept diligence, because the arrestee was not custodiar of the tobacco, or in any proper sense a possessor, so as to be liable to any action for delivery or making furthcoming.

Fol. Dic. v. 1. p. 56.

1738. *February 21.*JOHN BINNING *against* MACDOUAL of Logan and his Curators.

No 67.

Arrestment in the hands of a minor, is sufficient, without serving it likewise against his tutors and curators.

IN this process of furthcoming, it was *objected* to the arrestment, That the same was void, and could not be the foundation of any diligence following thereon, seeing it was only served against the minor, and not executed at the market-cross of the head burgh of the shire where he lived, against his tutors and curators in general, nor against them in particular.

THE LORDS repelled the objection.

C. Home, No 89. p. 142.

1738. *July 4.*

Competition, RICHARD LOCKWOOD, &c. with WILLIAM WILSON.

No 68.

An arrestment, in the hands of a consignee, upon a lawful consignation, found preferable to a posterior one executed against the assigner.

SIR JAMES CAMPBELL of Auchinbrek, having purchased several adjudications affecting the lands of Kirnan, did, in virtue thereof, insist in a sale of that estate ; during the course of which, it was found, That Sir James was bound to communicate the eases he had got from the creditors ; whereupon a count and reckoning ensued, from which it appeared there was a balance due to Sir James ; and which balance Kirnan, by a doquet at the foot of an account, obliged himself to pay, betwixt and Martinmas then next : This sum he offered to Sir James ; but upon his refusal, Kirnan applied to the Lord Ordinary, craving, That he would authorise him to consign the money, which was accordingly granted, reserving the consideration of what effect it should have. In consequence of this interlocutor, Kirnan, on the 11th of November 1736, consigned the money in the clerk's

hands; and, on the 19th, the Lord Ordinary, after hearing both parties, sustained the consignation: Likeas, on the 12th and 13th of the said month, Richard Lockwood, &c. as creditors to Sir James, laid on an arrestment in the clerk's hands; and, on the 18th, William Wilson, another creditor of Sir James's, arrested the said sum in the hands of Kirnan; whereupon a competition ensued betwixt them.

Pleaded for Richard Lockwood: That his arrestment, on the 12th, in the clerk's hands, ought to be preferable, in so far as the consignation was lawfully made and sustained by the Ordinary; whereby Kirnan was liberated from his obligation, which became void, in the same manner as if actual payment had been made to Sir James: That, as the debt was extinguished, so all collateral securities of course; as also, that the money consigned was not on the peril of the debtor, but of Sir James the creditor; and that a lawful consignation stopt the running of annualrents, and freed cautioners, even though by mutual consent, it should be passed from. Now, if this doctrine hold true, That the debt was extinguished by the consignation, it was not tenable, that Wilson's arrestment, in Kirnan's hands, after the consignation was lawfully made, could be effectual; since his obligation was extinguished at the date of Wilson's arrestment. Neither could it make any alteration in the argument, That, at the date of the arrestments of both competitors, Kirnan could have passed from his consignation and uplifted the money; because, *imo*, That would have been contracting a new debt, which could not have been affected by the prior arrestment. But *2do*, Whatever be in this, it was sufficient for the present purpose, that Kirnan never made use of this option, which he is now precluded from by the foresaid interlocutor of the 19th of November; after which, it is impossible he could be decerned to make the sum consigned furthcoming.

Pleaded for William Wilson, who arrested in Kirnan's hands: That an offer can transfer no right to the thing offered, till it is accepted: Now, consigning the money was only following out the offer, and securing the subject in the hands of a consignatory, that it might be instantly furthcoming to the creditor, upon his acceptance, or that thereon the debtor might judicially get his obligation declared extinct, and the money adjudged to the creditor, in satisfaction of the same; wherefore, in case of consignation, upon the creditor's refusal to accept payment, there must either be an acceptance on the part of the creditor, or a judicial sentence in favour of the debtor, before the money consigned can become the creditor's property; and, consequently, the arrestment in the hands of the consignatory, before either of these intervened, was null, the money, till then, remaining the consigner's; which is further evident from this consideration, That, until one of these two things happened, the consigner had it in his power to uplift the sums at pleasure; as is established by *L. 19. C. De usuris, in fine*, and by a variety of decisions. Neither can it vary the argument that Kirnan did not make use of this option; seeing the only question here is, Whether the money was Sir James's the time of Lockwood's arrestment, or if Kirnan was debtor to

No 68. Sir James the time of Wilfon's; for, if the money was Sir James's, it is duly arrested, and must be made furthcoming to Lockwood; but, if it was not, then his arrestment could not affect it.

THE LORDS found the arrestment, laid on in the clerk's hands by Richard Lockwood, upon the 12th and 13th of November 1736, preferable to the arrestment laid on by William Wilfon in Kirnan's hands, upon the 18th November 1736.

C. Home, No 97. p. 154.

1739. *January 10.*

No 69.

Arrestment in the hands of the treasurer of an incorporation, is a competent mode of affecting a fund in the possession of an incorporation.

JOHN KEIR, Treasurer to the Trades Maiden Hospital, *against* the CREDITORS of MENZIES of Lethem.

IN a competition between the several arresters and assignees, to a debt due by the Maiden Hospital to Menzies of Lethem; the LORDS, after inquiry made into the practice of arrestments of corporation debts, and of intimation of assignations thereto; ' Found arrestment in the hands of, and intimation of an assignation to the treasurer of the incorporation, a proper arrestment and intimation.

Fol. Dic. v. 3. p. 42. Kilkerran, (ARRESTMENT.) No 3. p. 36.

1739. *June 29. & November 20.*

No 70.

Whether arrestment may be effectually used in the hands of an apparent heir? Found; but doubted.

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

THE Earl of Aberdeen being creditor in a bond of L. 600 Sterling to Mr William Scot, husband to Magdalen Blair, proprietrix of the estate of Blair, did, in August 1729, after the death of Magdalen, raise horning on his bond, and arrest in the hands of William Blair, son of Mr Scot and Magdalen, and at that time apparent heir to his mother in the estate of Blair; and afterwards, in October 1733, the said William Blair being then served heir to his mother, the Earl used a new arrestment in his hands.

The state of the debt due by William Blair to Mr Scot his father, the Earl's debtor, was this. Mr Scot, who liferented the estate of Blair by the courtesy, had also acquired a right to certain of the family debts, for which William Blair was liable as representing Magdalen his mother, and William Blair of that ilk his grandfather. But then, as already said, William Blair the arreteer had not made up titles, and so was only heir apparent to his mother at the date of the Earl's first arrestment in 1729.

In the furthcoming pursued by the Earl upon his said first arrestment, but in which he had also produced his second arrestment, two questions occurred. The *first* was on this point in form, How far, supposing the first arrestment, which was that on which the furthcoming was pursued, to be ineffectual, and to carry no-