

1624. *January 10.* L. INNERWEEK *against* WILKIE.

IN an action pursued by the L. Innerweek *contra* John Wilkie and the Lady Bothwell, wherein John Wilkie being called for delivery to the Laird of Innerweek of a certain quantity of wool, which was arrested by him in the Lady Bothwell's hands, being her wool, and to be made furthcoming by her to him, for satisfaction of a debt, which was owing by her to him, and whereof the term of payment was not come at the time of the arrestment; after the which arrestment, the said John Wilkie had bought the said wool from the Lady Bothwell, and received the same from her, and therefore he was desired to render the same, or the prices thereof, as it was worth at the time of his buying and receiving thereof.—THE LORDS found, That this arrestment, albeit it was only made in the Lady Bothwell's own hands, and noways known to the buyer, nor intimate to him, yet did so affect the wool really at the instance, and to the behoof of the arrester, that after the laying on of the same, none could profitably bargain, or do any deed which might frustrate the effect of the arrestment, and prejudice him of execution thereupon; and therefore sustained the action against John Wilkie, albeit he was a third person, to whom the arrestment was never known, and albeit he was in *bona fide et probabili ignorantia*, to have contracted with the Lady Bothwell for that wool, which they found could not derogate from the pursuer's arrestment; and also sustained the action, for the prices which that wool was then worth, at the defender's buying thereof, and would not restrict the pursuit to such prices, for the which the defender bought the wool, but permitted the pursuer to prove the prices according to the worth thereof. Thereafter the pursuer past from all greater prices, except such as were agreed upon by the defender, to be paid for the wool at the time of the buying thereof.

Aft. Stuart.

Alt. Belshes.

Clerk, Scot.

Fol. Dic. v. 1. p. 57. Durie, p. 96.

1685. *November 10.* SCHAWS *against* M'CHUROCH.

IN the competition betwixt Alexander and John Schaws, who had right, by disposition from John Schaw, to certain sheep belonging to the said John, and which were also sold to John M'Churoch on the one part, and Thomas M'Neiles, who had arrested in the said John Schaw, the common debtor, his hands, on the other part:—It was *alleged* for M'Neiles the arrester, That he ought to be preferred, because, before the sheep were disposed to the saids Schaws, he had arrested in the said John Schaw, the common author, his own hands; after which, the saids arrested goods were so hypothecated, and really affected, that they could not be disposed by his debtor, in favours of the Schaws.—It was *answered*, That the foreaid arrestment, albeit in the debtor's own hands, was prescribed, there be-

No 62.

Found, that by an arrestment in a debtor's own hand, his whole goods were so hypothecated, that they could not be disposed in prejudice of the arrester.

No 63.

Found as above.

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 *3^o*, 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.