respect of Weems's arrestment, which as *nexus realis* affected the sum in May's hands, who yet continued debtor. No. 7.

Stair, *v.* 2. *p.* 843.

*** Fountainhall reports this case:

The tutor of Lovat's Lady having lent out *stante matrimonio* 8,000 merks, payable to her daughter, the Earl of Weems being a creditor to the tutor, on the presumption of law, that it was the tutor's money, arrests it, and now pursues a declarator that the money was truly the tutor's, and so must be effectable for his debt, and the settlement of the fee on his daughter was fraudulent and reducible on the act of Parliament 1621. Answered, The money was truly the daughter's, gifted her by M'Leod her brother uterine, and why might it not have been the mother's, by heritable bonds due to her before her marriage with the tutor, and which, though she had uplifted *stante matrimonio*, it was lawful for her to re-employ for what use she pleased, seeing the uplifting makes not the sum fall under the *jus mariti*. The Lords, by their interlocutor of the 16th January, 1678, before answer, ordained the communers and witnesses in the bond to be adduced, to clear whether the money did belong to M'Leod or not; and the probation being advised, the Lords found it fell under the tutor's *jus mariti*, and was affectable with the Earl of Weems's diligence, as the tutor's creditor; and whereas, Weems' arrestment was quarrelled, because no action was raised thereon within five years, as the act in the year 1669, prescribes; the Lords repelled this, because the arrestment was before that act, and the Earl's declarator, (which was intented within five years of the arrestment) was in place of a forthcoming.

Fountainhall MS. p. 308.

1687. *February.* DAVID STERLY *against* DAVID SPENCE. No. 8.

A person having granted a commission in writ to the supercargo of a ship and loading, to export some goods belonging to the granter of the commission, and to sell them in Holland, and with the prices to buy some other species of goods for his behoof, which being accordingly done, and the commissioned goods returned, the trustee acquainted his constituent by a letter, that they were put in a cellar for his behoof. Thereafter a creditor of the trustee's poinded these goods as belonging to his debtor; whereupon he to whom the letter was written raised a process of spuilzie upon this ground, that the goods poinded belonged to the pursuer.

Alleged for the defender: That possession presumes property in moveables, and the pursuer had no bill of loading of the goods poinded, as belonging to him, nor was he bound to have owned them to be his had they been cast away; so that till delivery, they were to be reputed the supercargo's goods.

No. 8. The Lords found the property of the goods belonged to the pursuer, and decerned the defender to make restitution, but assoilzied him *a spolio*.

Fol. Dic. v. 2. p. 413. Harcarse, No. 864. p. 245.

1707. *March* 15.

BAILIE JOHN HAY, Merchant in Edinburgh, *against* CHARLES HAY, DAVID MITCHEL, and JOHN YORSTOUN, Bakers in Edinburgh.

No. 9.
A person who sold some victual of the growth of lands, whereof he had taken upon him the management in absence of the heritor, taking the price payable to himself, having died before the term of payment, the Lords found that the victual was not the defunct's, and that therefore the price was not *in bonis ejus*, nor could be claimed by his executor-creditor.

Charles Hay, David Mitchel, and John Yorstoun, bakers in Edinburgh, having 21st December, 1704, entered into a contract with the deceased Mr. Christopher Seton, who had, after his father's death, in his brother the present Earl of Wintoun's absence, taken upon him the management of the estate of Wintoun; "By the which contract he stood obliged to deliver to them at their granaries, in the Water of Leith, 400 bolls of wheat of the growth of the Earldom of Wintoun, crop 1704, with the ordinary measure that the Earl's tenants were in use to deliver him his farm; and they on the other hand became bound to pay to him or his order, eight pounds for each delivered boll;—Bailie John Hay, as executor creditor to the said Mr. Christopher, who died before payment of the price, confirmed in his testament 2000 merks, as due to him upon the said contract by the Bakers, registered the contract and charged them with horning. They suspended upon this ground, That the price of the said victual was not *in bonis* of the said Mr. Christopher the time of his decease, nor confirmable by his creditor; but appears from the tenor of the contract to have been the Earl's own victual, whereof the price could only belong to him or his creditor; Mr Christopher being but a *negotiorum gestor*, a trustee and manager, and in the case of a factor who had the simple *jus exigendi*, that upon his death fell to the heritor for whose behoof he acted. Yea, the Earl upon his return could have divested him of his trust, and recovered the price of the victual from the suspenders: For betwixt Pearson and Murray, No. 80. p. 2625. it was found, That rents uplifted by a chamberlain were the Master's property, which the Chamberlain could not retain or compense by debts of the constituent he was assigned to; and *multo minus* can the creditor of a factor affect the constituent's rents for the factor's own debt. And *ita est*, that the creditors of the Earl of Wintoun had arrested in the suspender's hand, and are called in a multiple-poinding.

Answered for the charger. The suspenders being expressly obliged by the contract to pay the price of the victual to Mr. Christopher or his order, the money was as much *in bonis defuncti*, as they granted bond for it to his heirs and assignees. And as no objection could have been made against payment to Mr. Christopher's assignee, far less can payment be refused to the charger, who by his confirmation is come in place of Mr. Christopher. Nor doth it alter the case, That the wheat contracted for was of the growth of Wintoun; because Mr. Christopher might have been master of the product of that estate by singular titles; and the suspenders have bargained with him, not *factorio nomine*, but as a proprie-