

1628. March 13. SOMERVEL against HERRIOT.

SOMERVEL *contra* HERRIOT, relict of Robert Kincaid, pursuing to make arrested goods furthcoming, Robert Kincaid being debtor in some moneys to the pursuer, conform to a contract registrate against him, whereupon arrestment being executed in the Provost and Bailies of Edinburgh's hands, of some moneys addebted by them to the said umquhile Robert; after the making of the arrestment the said Robert dies, and now the pursuer in this action pursues the relict of the said umquhile Robert, and Marion Kincaid his only bairn, and the said Town of Edinburgh, to make the saids goods furthcoming; and it being controverted and alleged by the relict, that this action to make arrested goods furthcoming could not be sustained, while the registrate contract, which was the sentence against the defunct, were first transferred in some person to represent him, and then this action was competent, being the execution of a sentence; and the pursuer *contending*, that he needed no sentence of transferring, because Mr Alexander Lockhart, who was executor confirmed to the defunct, was that only person in whom of law he ought only to transfer, and he needed not to transfer in him, seeing he compeared, and declared (as he did indeed) that he would not propone that exception, but that he was content that this process should be sustained against the defenders, sikklike as if transferring had been obtained and decerned against him. THE LORDS, notwithstanding of this compearance of the executor, and his consent foresaid, found, that no process could be granted in this cause, to make arrested goods furthcoming, while first the sentence was transferred in some person of law, to represent the defunct, who was debtor, and after that sentence, action to make arrested goods furthcoming might be pursued.

Clerk, Scot.

Eol. Dic. v. 1. p. 58. Durie, p. 360.

1666. December 6.

LESLEY against BAIN.

In a pursuit to make furthcoming, after serious deliberation and debate amongst the Lords, as in a case daily occurring, and wherein the decision would be a preparative and practice, it was found, That a pursuit to make furthcoming a sum of money due to a debtor, is in effect execution, and equivalent to a poiding; seeing money being *in nominibus*, and not in specie, could not otherways be affected and poided; and therefore could not follow, but upon a decret, and not upon a bond not registrate. *2do*, It was found, That an arrestment is but an inchoate and incomplete diligence; and, notwithstanding thereof, the sum arrested remaineth *in bonis* of the debtor; seeing, notwithstanding thereof, goods belonging to a debtor may be poided: As also arrestment being a negative diligence,

No 110.

Found that, even where the debt was liquid against the defunct, transference was necessary against his representatives. See Spittle against Scott, No 107. p. 779.

No 111.

It was once understood, that, arrestment being only an inchoate and incomplete diligence, furthcoming could not proceed after the common debtor's decease; but the sums arrested being *in bonis defuncti*, ought to be confirmed.

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 lasted 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