

1688. June 29.

ROBERT RUSSEL *against* LADY BALINCRIEFF, and the TENANTS of Carnock.

IN the multiplepointing betwixt Robert Russel, who had obtained a decret of furthcoming against the Tenants of Carnock, of some rents arrested in their hands, as belonging to Balincrief *jure mariti*, and the debtor's relict,

Alleged for the Relict, That she, as executrix-creditrix, ought to be preferred to Russel, who should have confirmed the debt arrested after her husband's death, and her confirmation was before the decret of furthcoming.

Answered, Arrestment is *nexus realis*, and cannot be evacuated by the debtor's death; *2do*, The subject arrested was not at first confirmed in the principal testament, but only eiked; and the decret of furthcoming is prior to the confirmation of the eik, and there was no protestation to eik.

THE LORDS found the decret of furthcoming to be prior and preferable complete diligence. But if the confirmation of the rents had been anterior to the decret, they would probably have decerned in favour of the relict; yet an executor not *qua* creditor, could not compete with one arresting, before the debtor's decease, though his decret of furthcoming were posterior to the confirmation.

Fol. Dic. v. I. p. 180. Harcarse, (ARRESTMENT.) No 95. p. 18.

No 36.

An arrestment, laid on before the common debtor's death, with a decree of furthcoming obtained after his death, preferred to the claim of an executor-creditor, who was confirmed before the decree of furthcoming, but had not eiked the subject in controversy till after.

1732. July 20.

CRAWEORD *against* SIMSON.

IN a competition betwixt an arrester [upon a dependence, and another creditor; who, after the common debtor's death, confirmed the arrested subject as executor-creditor; the LORDS preferred the executor-creditor *hoc statu*, he finding caution to make the sums furthcoming to the arrester, in case the arrester's claim should be purified. *See APPENDIX.*

Fol. Dic. v. I. p. 180.

No 37.

1742. June 22.

CARMICHAEL *against* ANNA MOSMAN, Relict of HARDY.

HARDY assigned to the Treasurer of the Bank, a debt due to him by M'Kenzie of Rosend, in security of a debt he owed the Bank.

Robert Carmichael; another creditor of Hardy's, arrested in the hands of the Treasurer, and pursued a furthcoming; wherein the Treasurer declared that the Bank was noways debtor to Hardy, but was creditor to him in the sum of L. 30 : 5s. Sterling per bill, in security whereof he had assigned to them a debt due to him by M'Kenzie of Rosend, which assignation bore this quality, That in case the Bank should recover more than what was due to them, they should

No 38.

The confirmation by an executor-creditor, completed before decree of furthcoming be obtained on a prior arrestment, is preferable to the arrestment.

No 38. be accountable to him for the same; and that no payment was yet recovered: After which the furthcoming lay over.

Meantime the Bank recovered payment of the debt due by Rosend, whereby they became debtors to the heirs of Hardy, now dead, in a balance, whereof the relict of Hardy getting notice, confirmed the same as executrix-creditrrix to him, and brought her action against the Bank for payment; whereupon Carmichael wakened his furthcoming, and insisted upon preference upon his arrestment. It was *argued* for the executrix-creditrrix, That the arrestment in the hands of the Bank could carry nothing, because the Bank was not debtor in any sort to Hardy at the date of the arrestment.

But the LORDS found no occasion to give any judgment upon that point, having, upon the report, taken up the question upon a point that had not been pleaded for the party, viz. they found, 'That the confirmation by the executrix-creditrrix being completed before the decree of furthcoming, the executrix-creditrrix was preferable; and preferred her accordingly.'

It is likely, that the executrix would also have been preferred upon the above point pleaded for her, had the Lords proceeded on it, agreeably to what is to be seen *supra*, *voce* ARRESTMENT, Creditors of Gordon *contra* Sir Harry Innes, No 51. p. 715. And as to the points upon which the Lords took up the case, the judgment now given was contrary to the former reported decisions, viz. Riddel *contra* Maxwell, No 34. p. 2790. and No 35. same page, both observed by Harcarse; for which reason, probably, it had not in this case been pleaded by the lawyers for the executrix. Yet the LORDS, in a full Bench, were so unanimous that the other party did not reclaim.

Kilkerran, (COMPETITION.) No 3. p. 137.

SECT. VII.

Assignees with Executors-Creditors.

1669. July 27.

EXECUTORS OF MR THOMAS RIDPETH *against* JOHN HUME.

No 39.
An assignee having neglected to intimate during the cedent's life, an executor-creditor of the defunct

IN a competition betwixt the executors-creditors of Mr Thomas Ridpeth, about a sum due to Mr Thomas by bond, and by him assigned to John Hume, who not having intimate it in Mr Thomas's lifetime, did thereafter get payment of a part of the same, and a bond of corroboration for the rest thereafter;—Torwoodlie, for a debt due to him by Mr Thomas Ridpeth, confirms himself execu-