

the depositions in Carpew's hands, to be kept by him for the use of all concerned.

“ THE LORDS found, that the pursuer, who was fiar and maker of the tailzie, had right to call for delivery of the tailzie to him as his own proper evident, notwithstanding of the prohibitory and irritant clauses above mentioned.

Fol. Dic. v. 1. p. 512. Dalrymple, No 123. p. 171.

No 13.

1732. November. CREDITORS OF AUCHTERLONY Competing.

No 14.

AUCHTERLONY, before absconding for debt, made a list of his bills, which he indorsed blank, and sent the whole in a letter to Spence his father-in-law, bearing, that he had sent the bills to him for the use of his creditors. After the bills came into Spence's hand, but before any meeting with the creditors, several of these creditors, taking the start, laid arrestments in the hands of the accepters of these bills. In a competition, the other creditors craved to be preferred, as the bills were delivered to Spence, their trustee, before the date of the arrestments. The arresters yielded, that a bill indorsed blank, delivered to a man for his own behoof, becomes his property; because, by such delivery, he is empowered to fill up the indorsation in his own name. But they contended, that Spence was trustee for Auchterlony, not for his creditors; that the bills remained still under the power of Auchterlony, since they were not delivered to his creditors, or to a trustee for his creditors; see *l. 14. § ult. D. De furtis*; and therefore, that the bills, as Auchterlony's property, were regularly affected by the arrestments.

“ The arresters were preferred.”

Rem. Dec. v. 2. No 5. p. 11.

1744. January 4.

SIR JOHN BAIRD *against* CREDITORS OF MR HUGH MURRAY.

IN the year 1737, Sir James Rothead made a settlement of his estate, heritable and moveable, upon certain persons, as trustees for behoof of his heirs therein named. Hugh Murray, the only accepting trustee, did, in December 1737, confirm the moveables; and, not having leisure to execute the office of executor, he granted a factory to George Gordon writer in Edinburgh, to uplift the moveable debts, grant discharges, and to accompt to him for his intromissions. In September 1740, Mr Murray and George Gordon instituted an accompt upon the subject of the factory, by which George Gordon came to be debtor to his constituent in the sum of L. 286 Sterling, for which George Gordon granted bill of even date with the fitted accompt, payable to Mr Murray.

No 15.

A sum of money was put into the hands of a party, with a declaration that it was to be paid to the nearest of kin of a certain person. It was found the person who deposited it, might have re-claimed it.

No 15.
so that the
nearest of kin
acquired no
preferable
right.

or order, and bearing value received; and, of the same date, got a full discharge from Mr Murray of his factory, and all obligations arising therefrom. In March 1741, Mr Murray being about to leave the town, and apprehending that a demand might be made upon him by the next of kin of Sir James Rothead for the balance in his hands, for which they had obtained a decree against him as Sir James's executor, he lodged in the hands of Andrew Chalmer, his first clerk and ordinary doer, George Gordon's bill indorsed blank, with a further sum in money, to answer the said demand, and took from him a declaration in the following terms: ' I Andrew Chalmer writer in Edinburgh, grant that Mr Hugh Murray advocate, has indorsed to me George Gordon's bill to him for L. 286 Sterling, and given me in cash L. 123 Sterling, with which two sums I am to pay the sum he is decerned to pay to the nearest of kin of Sir James Rothead, and to report him their discharge.' Sir James Rothead's next of kin not having made a demand, the money and bill remained with Mr Chalmer till Mr Murray died in the state of bankruptcy, when his creditors proceeded to diligence, took out a confirmation, and, among other moveables, gave up in inventory the bill and cash in the hands of Mr Chalmer.

Sir James Rothead's next of kin appeared for their interest, and claimed preference before Mr Murray's Creditors, upon this medium, that the bill and cash in the hands of Mr Chalmer were subjects especially destined by Mr Murray for their payment.

" Found, That notwithstanding the money was lodged by Mr Murray in the hands of Mr Chalmer, under the declaration granted by him, it remained under the power of Mr Murray, and might have been called for by him until actual application, and applied to what use he pleased; and therefore that the same remained *in bonis* of Mr Murray, and that Sir James Rothead's next of kin have no preference."

HUGH MURRAY, executor nominated, having confirmed Sir James Rothead's moveables, granted a factory to George Gordon to levy the moveable debts. Mr Murray and George Gordon instituted an accompt upon the subject of the factory, by which George Gordon came to be debtor to his constituent in the sum of L. 286 Sterling, for which George Gordon granted bill of even date with the fitted accompt, payable to Mr Murray or order, and bearing value received; and, of the same date, got a full discharge from Murray of his factory. After Murray's death, the sum in this bill being confirmed by his Creditors, a competition arose betwixt them and Sir James Rothead's next of kin, to whom Mr Murray never had accompted for his intromissions with Sir James's moveables. It was admitted for Murray's Creditors, that an executor, being but a factor or trustee, can have no ground of competing with the Creditors, or next of kin of the deceased, upon any subject which belonged to the deceased; and therefore, though an executor take a decree in his own name, or a bond of cor-

roboration in place of a decree, the next of kin are still preferable upon the subject *in medio*. But if an executor levy a sum due to the deceased, and grant a discharge, the money which he receives becomes his property; or, if in place of money, he take a private bond without relation to the executry, the case is the same. The discharge granted to the debtors of the deceased, binds the sum upon the executor; the money is understood to be in his pocket, and the next of kin have no concern what he makes of the money, whether he pay his own debts with it, or employ it upon a private loan. The present case is in effect the same; the bill granted by Gordon was Murray's property, and had Gordon proved insolvent, Murray alone would have suffered, and not the Representatives of Sir James Rothead. It was *answered* for the next of kin, That the transaction betwixt the executor and his factor, proves that the bill was the produce of the executry; and the plain consequence is, that the bill ought to be adjudged to them, and not to Murray or his Creditors. For, from the very nature of a trust, it is evident, that a trustee cannot compete with his constituent, either upon the *ipsa corpora* of the constituent's effects, or upon their produce; and it is a case adjudged, that if a trustee sell his constituent's goods, and take a bond for the price in his own name, the constituent will be preferable upon the bond before the trustee's creditors. Nor ought it to weigh that Murray run the hazard of his factor's bankruptcy; for this hazard he submitted to by naming a factor, which an executor is not entitled to do. If an executor take a bond of corroboration from a debtor of the deceased when payment is offered him in money, this circumstance will subject him to the hazard of the debtor's insolvency; and yet, unquestionably the next of kin will be preferable upon this bond before the creditors of the executor. Or if the executor dispose of the *ipsa corpora* of the moveables, and take a bond for the price instead of ready money, it is very consistent that the next of kin be preferred upon this bond, and the executor at the same time be liable to make it good.

“ Found, That there is sufficient evidence that the sum contained in George Gordon's bill, was part of the proceeds of Sir James Rothead's executry; and therefore, that Sir James Rothead's next of kin are preferable for the sum in the said bill before the other creditors of Murray.”—*See SURROGATUM.*

Fol. Dic. v. 3. p. 365. Rem. Dec. v. 2. No 50. & 51. p. 77.