

THE LORDS, 8th June 1745, found, that in the circumstances of this case the payments made by the defender behaved to be admitted in exhausting the inventory ; and, on a bill and answers, adhered.

No 47.

Reporter, *Arniston*. Act. *Lockhart & Williamson*. Alt. *Balfour* Clerk, *Gibson*.
Fol. Dic. v. 3. p. 191. D. Falconer, v. 1. No 109, p. 129.

1748. December 19.

ELIZABETH and MARY ARBUTHNOTS *against* ARBUTHNOT.

No 48.

IN a process at the instance of Elizabeth and Mary Arbuthnots against their brother the executor, for payment of their bonds of provision, he offered to assign as many of the bonds contained in the inventory of the testament as would answer their provisions.

But THE LORDS found, ' that a creditor is not bound to accept of an assignation from an executor.'

Fol. Dic. v. 3. p. 191. Kilkerran, (EXECUTOR) No 10, p. 176.

1781. November 28. BENJAMIN BELL *against* WILLIAM CAMPBELL.

UPON the death of Bryce Blair, his relict was decerned executrix, for behoof of herself and the younger children. In that character, she brought an action against Richard Thomson, for payment of a debt due by his predecessor to her husband ; and afterwards assigned this claim to William Campbell, in payment of an account owing to him by George Blair, the eldest son and heir of Bryce ; and by William Blair, the second son, as representing his deceased brother.

Posterior to the date of this assignation, Benjamin Bell raised a process against the executrix for relief of certain debts in which his grandfather had been bound as cautioner for Bryce Blair, and for which he was now distressed ; and upon this dependence, laid an arrestment in the hands of Richard Thomson. In a multiple-poining at Thomson's instance,

Pleaded for the arrester ; An executor is no more than a trustee or administrator for those interested in the executry. Confirmation does not vest the property in his person. He cannot compete with a creditor of the defunct attaching any part of the estate ; neither can he, by assignation, give a preference to any particular creditor ; *Erskine, b. 3. tit 9. § 42.* Upon the same principle the executry estate, while *in medio*, cannot be attached for the debts of the executor, but remains open to the creditors of the defunct, who have been preferred, even without diligence, upon a simple statement of their interest ; 12th February 1779, John Tait *contra* David Kay, No 21, p. 3142.

No 49.

An executor cannot give a preference by assignation to any particular creditor.

No 49.

Answered for the assignee; In a competition between assignments and arrestments, they are generally understood to be preferable according to the dates of their intimation and execution. The assignment in question was intimated long before Mr Bell laid on his arrestment, and thereby the sum in Thomson's hands was carried beyond the reach of any future diligence.

That an executor has no power to make such an assignment, is a doctrine not founded in the law of Scotland. Formerly the heir was considered to be so much *eadem persona cum defuncto*, that the estate was *equally* subject to the debts of both. It is true, the act 1695, c. 41. made an alteration in the law with respect to moveables, as the act 1661, c. 24. had already done with respect to heritage, and introduced a preference in favour of the defunct's creditors. But this preference was limited to one year from his decease. After that period, the creditors of the representative have, as formerly, an *equal* access to the moveable estate with the creditors of the defunct. They are preferable, each according to the diligence he uses. If a creditor of the executor arrests at the distance of thirteen months from the death of the predecessor, he will be preferable to the defunct's creditor not arresting till afterwards. Whatever is equivalent to diligence, must have the same effect; and therefore an intimated assignment in favour of the executor's creditor, will be preferable to a posterior arrestment at the instance of the defunct's creditor, not used till after the year of statutory preference is elapsed.

The authority of Mr Erskine is not conclusive upon this point. He only follows the opinion of Lord Stair, founded on a misapprehension of the decision 16th December 1674, Kelhead *contra* Irvine, No 2. p. 3124. There the *ratio decidendi* went upon this ground, That there was no *anterior* onerous cause for the assignment, it being in security of a bond granted by a wife, *stante matrimonio*, without the consent of her husband, and therefore null by way of exception. This circumstance his Lordship had not sufficiently attended to; and Mr Erskine, misled by so respectable an authority, has considered the decision as giving the defunct's creditors a preference, which was then unknown, and which continued to be so, till introduced in a very limited manner by the statute 1695.

Upon what particular grounds the decision Tait *contra* Kay, proceeded, does not appear from the report. But that case was materially different from the present. There the executrix had made no application of the executry-funds; whereas here, Mrs Blair has, by an intimated assignment, transferred the debt in question as completely as if she herself had recovered it, and then paid it over to Mr Campbell.

Duplied for the arrester; Whether the act 1695 was intended to enlarge or to limit the right of the defunct's creditors, may be doubted. It is true the arrestment founded on was not executed within year and day of Bryce Blair's death. But the arrester is not now competing with a creditor of the nearest of

kin, confirmed in terms of that statute. The executry was vested in the person of Mrs Blair, as trustee, or as *hæritrix fduciaria*. The interest of the nearest of kin was only residuary; and their creditors had no title to interfere till all the creditors of the defunct had received payment.

No 49.

The Lord Ordinary had found the assignee preferable; but the Court *altered* his Lordship's interlocutor, and 'preferred the arrester to the subject *in medio*.'

Lord Ordinary, *Kennet*. For Mr Campbell, *Crosbie*. Alt. *D. Armstrong*. Clerk, *Home*.
Fol. Dic. v. 3. p. 191. Fac. Col. No 8. p. 16.

S E C T. VI.

Interpellation.

1621. March 28. SCUGALL *against* HORSEBURGH.

JOHN SCUGALL writer pursues John Horseburgh, son and executor confirmed to Alexander of that ilk, for registration of a bond of 1000 merks, granted by Alexander to the pursuer. *Alleged*, The free gear confirmed is exhausted by sentences and exoneration obtained before the intenting of the action. *Replied*, He cannot obtrude the exoneration, because he was in *mala fide* to have paid, and not intimate the creditors' pursuits to the pursuer, who was such a creditor as he could not misken, because he offers to prove that there was a testament testamentar wherein the defender was nominate executor; and the pursuer's debt was therein given up by the defunct in the defender's presence; likewise the defender, after the nomination before the confirming of a dative, intromitted with the defunct's goods, and so acknowledged the pursuer's debt, and so cannot obtrude an exoneration upon the dative.

Admit the reply and summons to the pursuer's probation, who protested for incident.

Act. *Nicolson*.

Alt. *King*.

Fol. Dic. v. 1. p. 275. Nicolson, MS. No 154. p. 109.

No 50.

Found that an executor cannot pay even upon lawful sentences, in prejudice of debts given up as due by the defunct in his testament; but that he must raise a multiple-pounding.