

by charter and sasine having followed thereupon, and the disposition containing no clause whereby the farms controverted were assigned to him; likeas, notwithstanding thereof, the L. of Grange remained in possession of the lands, and uplifted the farms and duties thereof continually, whereby this year controverted, the farms arrested by him, ought to be paid to him, as pertaining to his debtor, and cannot be claimed by the Lord Forrester, by this disposition, which remained *in nudis finibus obligationis* without sasine, and he having done no legal diligence to recover payment thereby. THE LORDS repelled the Lord Forrester's allegiance, and preferred Castlelaw's allegiance, and admitted the same to his probation, that the debtor retained the real possession of the said lands, and that the Lord Forrester had no real possession of the lands, nor real right, and repelled the allegiance of anteriority; neither did they respect that part concerning his possession, qualified by holding of courts.

No 32.
sasine, without possession (unless by holding of courts,) and without being assigned to mails and duties.

Act. Herriot.

Fol. Dic. v. 1. p. 179. Durie, p. 896.

SECT. VI.

Arresters with Executors-Creditors.

1623. March 9. MUIRHEAD *against* MUIRHEAD'S CREDITORS.

JAMES MUIRHEAD in Hamilton, debtor to umquhile William Muirhead burghess of Edinburgh, in a sum of money, suspends upon double pointing, as being charged by two creditors of the said William Muirhead, viz. on the one part by James Hope, and Mr William his assignee, who for the debt owing to the said James Hope, by the said umquhile William, had convened the nearest of kin of the said umquhile William, who by the law would be his executors, and upon whose renouncing to be executors, he had obtained decret against them *cognitionis causa*, decerning the bonds to be registrated, that execution might pass thereupon *contra bona jacentia*; and thereafter he had obtained himself decerned executor to the said William Muirhead, to the effect he might be paid off his debt in the first place, which was sustained by the Commissaries, and thereupon he intents action against this suspender. And sicklike the suspender was charged by William Dick burghess of Edinburgh, another creditor of the said umquhile William Muirhead, who was anterior in debt and term of payment to the said James Hope; likeas his bond was registrated against the said William Muirhead, in his own time, and before his decease; and the same sum

No 33.
An arrestment used in the lifetime of the debtor, but not followed out, postponed to the posterior right of an executor-creditor.

- No 33. controverted, was arrested at his instance in this suspender's hands, and sensyne the registrate obligation transferred in the person of Hope, executor decerned to the said umquhile William, whereby he alleged that he ought to be preferred, both in respect of the anteriority of his debt, and greater diligence, to Hope.—THE LORDS preferred Hope to Dick, in respect that Hope had recovered the first sentence against the persons, who of the law represented Muirhead, their common debtor, and that he had done diligence also, by obtaining himself decerned executor to him, which gave him *jus praelationis* for his debt, seeing the decret and arrestment used against Muirhead in his own time by Dick ceased, nothing being done thereupon before his decease; and so the decret of registration, obtained while he lived, not being transferred, while after Hope's decret of registration, and that Hope was decerned executor, made Hope's diligence to be greater than his, and so to be preferred to Dick.

Act. Hope.

Alt. Stuart.

Clerk, Scot.

Durie, p. 58.

- No 34. 1681. *January 21.* RIDDELL *against* MAXWELL.

AN arrester pursuing furthcoming, after the common debtor's decease, was preferred to an executor-creditor of the defunct, who had confirmed the debt arrested, as *in bonis defuncti*, and had even gone so far as to obtain decret against the debtor in whose hands the arrestment was laid.

Fol. Dic. v. 1. p. 179.

* * * See The particulars of the case, No 113. p. 783.

- No 35. 1688. *February.* HUME *against* HAY.

Decided in conformity with Riddell against Maxwell, *supra*.

A DEBTOR having died after one of his creditors had arrested, another creditor confirmed the sum arrested, and competed in the furthcoming; but the LORDS preferred the arrester, the arrestment being a *nexus realis*, which could not be prejudged by the debtor's death, more than real rights of poinding the ground, &c. by virtue whereof goods might be poinded after the debtor's death, in prejudice of both an executor and donatar, (as was found in a pursuit before the Council, betwixt the Lady Hume and John Hay.)

Fol. Dic. v. 1. p. 179. Harcarse, (ARRESTMENT.) No 94. p. 18.