

No 94.

THE LORDS, unanimously, refused the petition without answers.

Lord Ordinary, *Ankeruille*.For the Petitioner, *D. Cathcart*.Clerk, *Menzies*.*Fol. Dic. v. 3. p. 44. Fac. Col. No 167. p. 394.**Douglas.*

Whether Arrestment reaches *Acquirenda*.

1711. *January 25.*ROBERT MENZIES in Tegermauch, *against* JAMES GRAHAM, Merchant in Anstruther.

No 95.

Arrestment of a defunct's effects, some months before the common debtor was decerned executor dative *qua* nearest of kin, was found not validated by the subsequent confirmation; so that an assignation, after the confirmation, was preferred to the arrestment.

ROBERT MENZIES, April 29, 1707, as creditor to Alexander Menzies, now of Shian, arrested in the hands of the commissioners of the equivalent, a sum due by them to the deceased James Menzies of Shian, as belonging to the arrester's debtor, as executor dative *qua* nearest of kin, decerned and confirmed to James Menzies, June 19, 1707, and insisted in a furthcoming. Compearance was made for James Graham, who craved to be preferred upon an assignation from Alexander Menzies to the said debt, of the same date with the cedent's confirmation. Because, *imo*, At the date of the arrestment (though prior to the assignation) no debt was established by confirmation in the person of Alexander Menzies, and arrestments affect not *acquirenda*. *2do*, The benefit of the confirmation, which was expedite in the person of the common debtor by Mr Graham, for supporting his assignation, cannot accrue to the arrester: Seeing *actus agentium non operantur ultra eorum intentionem*; January 16, 1663, Stair, v. 1. p. 156. *voce* VIRTUAL, Tenants of Kilchattan *contra* the Lady and Major Campbell; June 20, 1676, Brown *contra* Smith, Stair, v. 2. p. 428. *voce* COMPETITION.

Alleged for the pursuer:—His arrestment being prior to the others assignation, he ought to be preferred, though no confirmation had been expedite in the person of Alexander Menzies till some months after: Because, Alexander had, the time of the arrestment, a natural and radical right to the money *jure sanguinis*, as nearest of kin, act 120. Parl. 7. Ja. V.—act 14. Parl. 22. Ja. VI.: Which being affected by the arrestment, the supervening confirmation, as accessory thereto, must accrue to the arrester, and be drawn back *fictione juris* to the date of the arrestment: As a creditor arresting a conditional debt would be preferred to another arresting the same after the condition is purified; Dirleton's Doubts and Quest. page 8. *2do*, Albeit the confirmation might have accrued to him, had he confirmed in the terms of the act of Parliament 1695; it must have its full effect in favours of all the creditors, the common debtor being simply decerned dative *qua* nearest of kin, without any relation to the assignation; June 21, 1671, Neillon *contra* Menzies*. And it can hardly be supposed that the confirmation

* Stair, v. 1. p. 736. *voce* TACK.

was expedite to support the assignation, since both are of the same date, and the serving an edict on so many days, behoved to precede the confirmation.

Answered for the defender:—Whatever right the nearest of kin may have *jure sanguinis*, they could not, by virtue thereof, intromit with the goods. Nor doth this *jus sanguinis* in our law, afford action or exception without confirmation: Since, if the nearest of kin die before confirming, they transmit nothing of the executry to their nearest of kin. It might as well be pleaded, That a creditor of a defunct's creditor having arrested, would, upon his debtor's being afterwards confirmed executor-creditor to the defunct, be preferred to the executor-creditor's posterior assignee, which is absurd: As to pretend, That one's confirming executor dative *qua* nearest of kin, should be a ground to prefer his creditor who arrested the subject before the confirmation, to a person deriving right from the nearest of kin after the confirmation. The method to affect a defunct's moveables, for his nearest of kin's debt, is not by arrestment, but by requiring the Procurator-Fiscal to confirm and assign; or, by obtaining themselves decerned executors dative to the defunct, as if they were nearest of kin to him; act 41. Parl. K. William, v. 3. p. 508. ; which Robert Menzies could not do, Alexander, his debtor, not being nearest of kin to James Menzies, who hath a sister alive. So that Robert cannot pretend, that James Menzies's gear could be arrested for Alexander's debt before the confirmation.

Replied for the pursuer:—It doth not follow that an assignation granted by an executor dative *qua* nearest of kin, should be preferred to a prior arrestment used by his creditor; because an executor-creditor confirming, would exclude another creditor of the defunct's who arrested before. Seeing an executor-creditor confirms chiefly for security and payment of his own debt, which must be satisfied before the nearest of kin have any interest: Whereas an executor dative is *hæres fiduciarius*, and confirms for the behoof of all interested; and if he be nearest of kin, hath a proper interest in the executry affectable by his creditors, according their diligence. *Ido*, The defender cannot object any nullity in Alexander Menzies's right, on pretence of his not being nearest of kin; because, he derives right from the same author; and though Alexander had not been nearest of kin, his confirmation, while a nearer did not appear, entitled him to the office.

THE LORDS found, That the arrestment being used at Robert Menzies's instance, as creditor to Alexander Menzies, before Alexander's confirmation as executor to James, the confirmation doth not accrue, and the subject confirmed is not affected by the arrestment: And therefore preferred James Graham the assignee.

Fol. Dic. v. 1. p. 58. Forbes, p. 490.