

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 compleated 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-

tor-creditor to Mr Thomas, and *alleges*, That he ought to be preferred, because the assignation made to John Hume was an incomplete right, wanting intimation; so that the sum remained *in bonis* of Mr Thomas Ridpeth, and that he had followed the only legal way to affect it, by confirming himself executor-creditor to Mr Thomas; and albeit the assignee may force any other executor to pay him, yet not an executor-creditor, who is executor to his own behoof for satisfying his debt.—It was *answered*, That the assignation, though not intimate, being a special assignation, albeit it cannot have execution by horning, yet it is the undoubted ground of an action, even after the defunct's death, against the debtor, and no executor-creditor can have right thereto.

Which the LORDS found relevant, and preferred the assignee.

Fol. Dic. v. I. p. 180. Stair, v. I. p. 647.

* * * Gosford reports the same case :

In a competition betwixt John Hume and Pringle of Torwoodlie, who should have best right to a bond of 2000 merks, due by Rentoun of Billie, Hume craved preference, as being assignee made to the bond by the creditors, and payment of a part thereof, made conform; and Pringle craved to be preferred, as being executor-creditor confirmed to the creditor, who, albeit he had given an assignation to Hume, yet the same was never intimate during his lifetime; and so it remained *in bonis defuncti*.—THE LORDS preferred the assignee, and found, That an assignation, albeit not intimate during the cedent's lifetime, was not null, but the assignee might pursue the debtor after the cedent's decree; yet as to the quot due to the Bishop, the assignee was liable; and this was found in this case, in respect the assignee had intimate, by getting payment of a part of the bond before the executor-creditor was confirmed; otherwise it would have been altered.

Gosford, MS. p. 78.

1726. July 5.

Competition betwixt SINCLAIR of Southdun, and SINCLAIR in Brabsterdoran.

SINCLAIR of Southdun, executor-creditor to the deceased James Sinclair, clerk to the bills, confirmed a debt due by James Murray merchant in Leith, and upon this title competed with Sinclair in Brabsterdoran, to whom James Murray's debt had been conveyed by the creditor James Sinclair, but never intimated.

For the executor creditor it was *pleaded*, That an assignation without intimation, is like a disposition without infestment; they import equally a personal action against the author, but are by no means a conveyance; the author is not denuded until intimation or infestment; in demonstration whereof, the author can again assign or dispo the subjects; and the first intimation or infestment

Vol. VII.

16 G

No 39.
confirmed the subject, as still *in bonis defuncti*.
The Lords preferred the assignee.

No 40.
An assignee neglecting to intimate during the cedent's life, an executor-creditor of the defunct confirmed the subject as still *in bonis defuncti*. It was found to be a valid confirmation, and preferable to the posterior intimation of the assignee.