

1628. March 13. SOMERVEL against HERRIOT.

SOMERVEL *contra* HERRIOT, relict of Robert Kincaid, pursuing to make arrested goods furthcoming, Robert Kincaid being debtor in some moneys to the pursuer, conform to a contract registrate against him, whereupon arrestment being executed in the Provost and Bailies of Edinburgh's hands, of some moneys addebted by them to the said umquhile Robert; after the making of the arrestment the said Robert dies, and now the pursuer in this action pursues the relict of the said umquhile Robert, and Marion Kincaid his only bairn, and the said Town of Edinburgh, to make the saids goods furthcoming; and it being controverted and alleged by the relict, that this action to make arrested goods furthcoming could not be sustained, while the registrate contract, which was the sentence against the defunct, were first transferred in some person to represent him, and then this action was competent, being the execution of a sentence; and the pursuer *contending*, that he needed no sentence of transferring, because Mr Alexander Lockhart, who was executor confirmed to the defunct, was that only person in whom of law he ought only to transfer, and he needed not to transfer in him, seeing he compeared, and declared (as he did indeed) that he would not propone that exception, but that he was content that this process should be sustained against the defenders, sikklike as if transferring had been obtained and decerned against him. THE LORDS, notwithstanding of this compearance of the executor, and his consent foresaid, found, that no process could be granted in this cause, to make arrested goods furthcoming, while first the sentence was transferred in some person of law, to represent the defunct, who was debtor, and after that sentence, action to make arrested goods furthcoming might be pursued.

Clerk, Scot.

*Eol. Dic. v. 1. p. 58. Durie, p. 360.*

1666. December 6.

LESLEY against BAIN.

In a pursuit to make furthcoming, after serious deliberation and debate amongst the Lords, as in a case daily occurring, and wherein the decision would be a preparative and practice, it was found; That a pursuit to make furthcoming a sum of money due to a debtor, is in effect execution, and equivalent to a poinding; seeing money being *in nominibus*, and not in specie, could not otherways be affected and poinded; and therefore could not follow, but upon a decret, and not upon a bond not registrate. *2do*, It was found, That an arrestment is but an inchoate and incomplete diligence; and, notwithstanding thereof, the sum arrested remaineth *in bonis* of the debtor; seeing, notwithstanding thereof, goods belonging to a debtor may be poinded: As also arrestment being a negative diligence,

No 110.

Found that, even where the debt was liquid against the defunct, transference was necessary against his representatives. See Spittle against Scott, No 107. p. 779.

No 111.

It was once understood, that, arrestment being only an inchoate and incomplete diligence, furthcoming could not proceed after the common debtor's decease; but the sums arrested being *in bonis defuncti*, ought to be confirmed.