

No 164. collusive, Seton shewing himself evidently partial in delivering up the goods, being put *in mala fide* by Wightman's arrestment and decret. Neither does it import, that he was a naked *custos*, the goods being only in his hand as collector, and not as debtor; for he could not gratify one creditor to the prejudice of the other. And though Durie, p. 760. observes, 11th March 1635, Dick *contra* Spence, *voce* COMPETITION, that a party in whose hands arrestment was laid on, might suffer another to point the goods, yet there was no decret of furthcoming in that case; and if there be any partiality or collusion, the Lords use to reject such diligences, 20th January 1672, Bell *contra* Fleeming, Stair, v. 2. p. 52. *voce* PROOF.—THE LORDS found, Wightman being the first arrester, it made such an *onus reale* on the goods, he not having been negligent, that it gave him preference to Cockburn, notwithstanding he had the first possession of the goods.

Fol. Dic. v. 1. p. 61. Fountainball, v. 1. p. 755.

1705. June 28. GEORGE SUTIE *against* BARBARA ROSS.

No 165.

Two arrestments used on one day, the hour not expressed, ranked *pari passu*. The one not permitted to prove by witnesses, (who might mistake or forget,) that his was some hours prior.

GEORGE SUTIE and BARBARA ROSS having arrested in one day, and the latter having pursued her furthcoming before the Commissaries, and the former before the Lords; Sutie craved preference in respect he offered to prove his copy of arrestment was given some hours before the others, and he tabled his arrestment before an unquestionable jurisdiction; whereas Mrs Ross had pursued before the Commissaries, who were not judges competent in actions of furthcoming.

Answered for Barbara Ross: Where there is a concurrence of diligences in one day, and the executions mention not the particular hours when they were made, they are usually brought in *pari passu*: For witnesses may be apt to mistake or forget the hour; and therefore my Lord Stair requires the difference of three hours at least. As to the competency of the Commissaries, the same is *sub judice* not yet decided.

THE LORDS brought in the two arresters *pari passu*.

Fol. Dic. v. 1. p. 61. Forbes, p. 18.

No 166.

An arrestment upon a dependence, was preferred to a posterior arrestment upon a registered bond, the dependence being finished by a decree;

1710. June 14.

CAPTAIN BRODIE *against* JEAN M'LELLAN, Relict of James Bowden late Bailie of Edinburgh.

IN a competition of the creditors of the Earl of Sutherland, who had arrested in the hands of the Earl of Murray, as debtor to him; Captain Brodie claimed preference to Mrs Bowden, because his arrestment was anterior to hers.

Alleged for Mrs Bowden, She must be preferred, because her arrestment, though posterior in date to the Captain's, was laid on by virtue of letters of horning upon

the common debtor's registered bond; whereas his arrestment was used upon a simple dependence. And arrestments upon decreets, that afford *paratam executionem*, are ever preferred to anterior arrestments upon depending actions: As arrestment upon bonds, whereof the terms of payment are past, is preferable to arrestment used upon bonds, *currente termino*, Lord Pitmedden *contra* Paterfons, No 160. p. 813.; Charters *contra* Neilson, No 157. p. 811. For albeit arrestment upon a dependence, or for debt before the term of payment, might be effectual against the debtor, to hinder him to dispoise the subject arrested, it can never compete with arrestment upon decreets, whereby the debtor's goods might be poynded and taken away, before the event of the constitution of the other debt.

Answered for Captain Brodie, He ought to be preferred; because his first arrestment, though upon a dependence, was a legal and ready execution for his debt, that was constituted by a decret before the present competition. So that he is not in the case of the Practiques betwixt the Lord Pitmedden and Paterfons, and betwixt Charters and Neilson, where prior arresters were postponed; because, at the time of the first competition, their terms of payment were not come; and creditors having *paratam executionem* for their payment, could not be obliged to stop their diligence, till others come up equal with them, by getting their debts constituted, which perhaps may never be done, through the common debtor's having grounds to exclude it. For Captain Brodie has now as ready execution competent to him for his debt, as Mrs Bowden has for hers: And, *ceteris paribus*, he is preferable according to the rule *prior tempore, potior jure*. So 9th February 1704, Drummond of Megginsh *contra* Lord Prestonhall, and other creditors of Balcaskie, Fount. v. 2. p. 221. *voce* CAUTIONER; an arrestment at Megginsh's instance upon a depending process for relief, was sustained preferable to posterior arrestments upon registered bonds; because, before the competition ended, Megginsh had got a decret upon his dependence.

THE LORDS preferred Captain Brodie's prior arrestment upon the dependence.

Fol. Dic. v. 1. p. 60. Forbes, p. 408.

1714. January 26.

JOHN KING, late Bailie of Glasgow, *against* JAMES and MARION DONALDSONS, and their Curators.

IN a competition of the creditors of Mr John King, late minister of Slamannan, the LORDS preferred Bailie King, the first arrester, upon his liquid bond, whereof the term of payment was past, albeit the term of payment of the debt arrested was not come to the Donaldfons' posterior arrestment, laid on upon their liquid bond after the term of payment of the debt arrested was elapsed.

Albeit, it was *alleged* for the Donaldfons, That though arrestments of debts, *currente termino*, render the subject litigious, with respect to the creditor who

No 166.
so that there
was *parata*
executio, at
the competi-
tion.

No 167.
Arrestment
laid on before
the term of
payment of
the debt ar-
rested, prefer-
red to an ar-
restment laid
on after the
term of pay-
ment. *See*