

No 175.

by Lord Bankton, b. 3. tit. 1. § 42. The Lord Ordinary, by his first interlocutor, found, that Isobel Wright was preferable upon her execution of arrestment, which bears the hours of five and six, to John Anderfon, &c. whose executions bear the hours of five and seven. But, upon representation and answers, the Ordinary pronounced a contrary interlocutor in the following terms: 'In respect of the special circumstances of this case; and particularly, that the arrestments founded on by both parties, were executed by the same messenger, some of them at Edinburgh, and others of them at Leith: Finds sufficient ground to presume, that the arrestments in Leith were first executed, and that they were all executed at the same time, viz. betwixt the hours of five and six of the 4th of October; and, therefore, alters the former interlocutor, and prefers the parties *pari passu*, on the sums in the hands of Bryce.'

Upon a reclaiming petition and answers, 'the Court adhered to the Ordinary's judgment;' being of opinion, that here there was no evidence of a priority, and moved chiefly by the circumstance, that, in this case, one messenger had executed all the arrestments, and before the same witnesses; and in whom it had been a gross breach of duty, having the diligence of different creditors in his custody, to have given any one of them a preference to the other.

Act. R. Blair.

Alt. D. Armstrong.

Clerk, Pringle.

Fol. Dic. v. 3. p. 45. Wallace, No 103. p. 272.

No 176.

1779. February 26. GOLDIE against GIBSON & BALFOUR.

AN arrestment betwixt the hours of four and six, preferred to one betwixt six and nine.

Fol. Dic. v. 3. p. 45.

No 177.

A prior arrester, who entered his claim before a decree of furthcoming was extracted, preferred to a posterior arrester, who brought the process, although the former, after arresting, had not proceeded in his diligence for three years.

1787. July 25. JAMES LISTER against JOHN RAMSAY.

JAMES LISTER, being creditor to Lillias Dewar, used arrestment in the hands of one of her debtors in 1785. He immediately after brought an action of furthcoming, which was conjoined with an action of multiplepounding raised by the arrestee; and he obtained a decret of preference.

Before this decret was extracted, a claim was entered for John Ramsay, in virtue of an arrestment which had been used by him three years before. But the LORD ORDINARY, 'on account of the *mora* on the part of the claimant, of new decerned in the preference.'

In support of this judgment, which was afterwards brought under review of the Court, James Lister

Pleaded: Anciently the only effect of arrestment was to prevent voluntary payments to the debtor himself. In a competition of creditors, it was not the person whose arrestment was first executed, but he who first obtained a decret of furthcoming; to whom the preference was given: And hence it sometimes happened, that a prior arrefter, who had brought his action in the Court of Session, was postponed to one, who, having commenced the same action in an inferior court, had, from the shortness of the *induciae* there allowed, been able more speedily to complete his diligence. In modern times, it is true, this strictness has been considerably relaxed; but still any unreasonable delay will be fatal to the preference otherwise given to priority in date. A second arrefter, therefore, who, without loss of time, has brought his action, and who has obtained a decret, ought certainly to be preferred to one, who for years has neglected to follow out his diligence in a proper manner. Spottiswood, *Harcarse, v. Arreftment*; Stair, b. 4. tit. 35. § 6.; Bankton; b. 3. tit. 1. § 43.; Erskine, b. 3. tit. 6. § 18.

Answered: Since the enactment of 1669, limiting the duration of arrestments to five years, it does not appear that any other restraint ought to be imposed on the users of this mode of diligence. At any rate, the preference here awarded seems unsupported by any precedent. Whatever may have been the effect of arrestment in the most ancient periods of our law, it has now, for a long while, been considered, not only to prohibit payments to the debtor, but also to create a certain *lien* or *nexus* in favour of the arrefter, which nothing but an extracted decret of preference obtained by another creditor can effectually disappoint. In the present case, as an action of multiplepinding had been commenced, to which the first arrefter was a party, an extracted decret in that process would also have been necessary, to put the arrestee in safety to pay to any other person.

The Lords altered the interlocutor of the Lord Ordinary, and found the first arrefter to be preferable.

Lord Ordinary, *Alqa.* For John Ramsay, *M'Cormick.* For James Lister, *Patison.*
Clerk, *Orme.*

Craigie.

Fol. Dic. v. 3. p. 46. Fac. Col. No 343. p. 537.

Expences of Arrestment.

1740. January 4.

INNES against FORBES.

In a competition between Innes as arrefter in the hands of Peter Crawford, on a debt due by him to Robert Gordon by a promissory note, and Forbes as indorsee by Robert Gordon to the said promissory note, Innes had formerly been preferred upon his arrestment; and now Forbes having insisted that Innes should

No 178.
A party
found entitled
to retain the
expences of
arrestment