

hands, is reported by Harcarse; and the Lords prefer Mr William Lauder, as having the first citation, out-giving, enrolling, and decreet, in respect of his prior diligence, though the other creditors arrestments were prior in date, but their summonses for making furthcoming were some weeks posterior to his; for though of old, in such a case, they used to bring in arresters, who were not *in mora, pari passu*; yet now the Lords consider the arrestment only as an inchoate and incomplete diligence, and like an assignation unintimate; so that if a posterior arrester get the first decreet, (which answers to an intimation) they now prefer him.

*Fel. Dic. v. 1. p. 61. Fountainhall, v. 1. p. 355.*

1685. November. HAMILTON against THOMAS CRAWFURD.

ONE Hamilton having died two or three months after he had arrested, without having raised a furthcoming; and thereafter Thomas Crawford having arrested the same debt, and pursued a furthcoming before the Commissaries, wherein Hamilton's brother compeared for his interest; but Crawford was preferred, in respect the other was not then confirmed executor to his brother. Hamilton advocated the cause, and after the same was remitted, confirmed himself executor to his brother; upon which active title he obtained a decreet of furthcoming before the Lords, some months before Crawford got a decreet before the Commissaries. In a multiplepointing the Lords found, That Hamilton having done the first step of diligence by arrestment, and the last by obtaining decreet before Crawford, he ought to be preferred, although in the intermediate step he had been something negligent; Crawford, after the remit, having been guilty of supine negligence.

*Harcarse, (ARRESTMENT.) No 90. p. 17.*

1697. January 15. WIGHTMAN against SETON and COCKBURN.

CROGERIG reported Wightman, merchant in Edinburgh, against Alexander Seton, collector at Prestonpans, and Cockburn; being a competition between two arresters of some goods in Seton's hands, belonging to Gray their common debtor. Wightman's arrestment was two days prior to Cockburn's. Their decreets for making furthcoming were both in one day. Cockburn charges Seton to deliver them up before Wightman charges. Seton obeys the charge, without suspending on double pointing. Cockburn, for his further security, causes likewise point and apprise the goods after they are in his own possession, and upon all this diligence he craves to be preferred.—Wightman contended, he laid on the first arrestment, which was a *nexus realis*, and had obtained a decreet as soon as the other, and not being *in mora* thereafter, this transmitted the property of the goods to him. And for Cockburn's diligence, it was affected and

No 162.

No 163.

An arrester postponed on account of *mora* in carrying on his furthcoming.

No 164.

One party arrested two days before another. Both obtained decree on the same day. The goods were delivered to the second, and he caused point in his own hands. The first, notwithstanding, preferred.

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