

would be valid to exclude the arresters from any thing after the current term, unless he were instructed bankrupt, or that the assignation was contrary to the act of Parliament 1621.

Fol. Dic. v. 1. p. 55. Stair, v. 2. p. 223.

1674. January 15.

BAILLIE *against* NASMITH and the TENANTS of LETHAM.

WILLIAM BAILLIE of Torwoodhead, having arrested in the hands of the Tenants of Letham, any sums due by them to the Lord Forrester, for payment of a sum due by Forrester to him, pursues now the tenants for making furthcoming. Compearance is made for young Poffo, donatar to his father's liferent, who hath right to the rents of Letham, as husband to the Lady Letham, the Lord Forrester's mother, and for him and the tenants. It was *alleged*, That the only sum due by the tenants of Letham to the Lord Forrester, was, by decret of Council produced, whereby the tenants were decerned with the Lady Letham and her husband, to repair the house of Letham, liferented by the Lady, betwixt and Lamma's thereafter; or otherwise, to pay to the Lord Forrester, as heritor thereof, 3200 merks, to be employed for reparation of the house; which sum being, by the decret, destined for that particular use of reparation, was not arrestable, for the Lord Forrester's debt, or applicable to any other use; especially seeing not only the Lord Forrester himself was interested, but the Lady liferenter, and her husband, who had the benefit of the house when repaired; so that the tenants thought that they were in security to pay the sum to Forrester, even after the arrestment, and had paid a great part of it.

THE LORDS found, That this sum being decerned and destined for the particular use of reparation, which did not only concern the Lord Forrester, but others, that it was not arrestable for Forrester's debt.

Fol. Dic. v. 1. p. 56. Stair, v. 2. p. 253.

1705. June 26.

STEWART of Torrence *against* WALTER STEWART of Pardovan.

THE LORDS decided the competition betwixt Stewart of Torrence, and Walter Stewart of Pardovan, creditors to Cornwall of Bonhard. Pardovan raises an adjudication of an heritable bond for L. 10,600 Scots granted by Bonhard to George Dundas, and executes the same. Three days after this citation, Torrence arrests the said debt, but Pardovan obtains his decret of adjudication before Torrence gets his decret of furthcoming.—*Alleged* for Torrence, He ought to be preferred, because the term of payment of the sum arrested not being come at the time he laid it on, it was moveable, and consequently arrestable, and not the subject of

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Tenants were decreed to pay a sum to the heritor, to be employed in repairing a house liferented by a third party. Not arrestable, being destined for a certain purpose, in which a third party was concerned.

No 41.

Competition between an adjudication and an arrestment of an heritable bond.

No 41.

adjudication, which is only of heritable rights; and if the creditor in this bond had died before the term of payment, the sum would have belonged to his executors, and not to his heir, as was found, as was found, 29th June 1624, Smith *contra* Anderson's relict;* and if he had been denounced to the horn, it would have fallen under his single escheat, and so arrestment was the only habile and competent diligence to affect this subject, which is such a *nexus realis* as gives a right to the subject, and transmits the property.—Pardovan *alleged*, That the bond bearing an obligation to interest was a *feudum fixum*, and in its own nature heritable, and so only the proper subject of an adjudication, though the term of payment was not come; as was found 8th January 1624, Henderfons *contra* Murray, (Durie, p. 96. *voce* HERITABLE and MOVEABLE.); and 31st July 1666, Gray *contra* Gordon, (*voce* ESCHEAT.); observed by Dirleton, (p. 16.); and arrestment is not such a *nexus realis*, but if a creditor intervene and point *medio tempore*, he carries away the right of the arrested goods, and the arrestment evanishes; yea, if a posterior arrester do more timeous diligence, and the other be *in mora*, he will thereby come to be postponed, and the posterior arrester preferred.—*Answered* for Torrence, That citations upon blank summonses of adjudication can never affect the subject so as to exclude a posterior arrestment. It is true, the act of Parliament in 1672 declares a citation on an adjudication equivalent to a denunciation on a comprising; but that is only to put the debtor *in male fide*, to do any voluntary deed to the prejudice of the adjudger, who is *in cursu diligentiae*, and nowise to stop legal diligences by arrestment or otherwise; and was so decided 1st February 1684, Anderson *contra* Creighton, (No 6. p. 79. *voce* ADJUDICATION and APPRISING.); and sicklike, an arrestment before the term of payment was preferred to an apprising before the same term, 2d July 1667, Litster *contra* Aiton, (Stair, v. 1. p. 467. *voce* COMPETITION.)—THE LORDS considered, that, by the 51st act of Parliament 1661, heritable sums before interestment actually taken, were as well capable of arrestment as adjudication, and that it was the interest of creditors to have as many ways as law can allow to affect their debtors estates; therefore they found this heritable bond (though before the term of payment) adjudgeable as well as arrestable; and that Pardovan's inchoate diligence, by citing on his adjudication, being prior to Torrence's arrestment, and his consummate diligence, by obtaining a decret of adjudication, being also prior to Torrence's decret for making furthcoming, therefore they preferred Pardovan's adjudication to Torrence's arrestment, as being *prior tempore*, and so *potior jure*.—Then *alleged*, That Torrence's adjudication, being within year and the day of Pardovan's, must, by the 62d act 1661, anent debtor and creditor, come in *pari passu*.—*Answered*, You are nowise in the case of that act, which only relates to subjects adjudged, whereon interestment has followed.—*Replied*, Though that case be stated by way of example, yet the *ratio et anima legis* is the same, to introduce an equality among all the creditors, that one may not prevent another in diligence who lives at a great distance, and may not hear of his debtor's condition so soon as others do.—THE LORDS found the clause general, and comprehended all ap-

* Durie, p. 132. *voce* HERITABLE and MOVEABLE.

prifers, and therefore brought them all in *pari passu*, who had apprised within year and day of the first. (See No 14. p. 140. See COMPETITION.)

No 41.

Fount. v. 2. p. 278.

1706. February 20.

STEWART of Torrence *against* The CREDITORS of GEORGE DUNDAS.

TORRENCE, as a creditor to George Dundas, arrests in the hands of Bonhard, who was debtor to the said George in L. 10,000 or thereby, by an heritable bond.

Compearance is made for other creditors of the said George, who adjudged the same, as being heritable; and *alleged* the same was not arrestable, because infestment was taken thereon before the arrestment.

It was *answered*: The infestment was null as to Torrence, a third party, because not duly regiftrate; for the act of Parliament bears, that sines not regiftrate make no faith in prejudice of a third party.

It was *replied*: Sines not regiftrate are not simply null, being good against the granter; and even as to third parties, the full clause in the act of Parliament is not repeated, which provides that the same shall make no faith in prejudice of a third party who hath acquired a perfect and lawful right to the said lands and heritages: which cannot be subsumed in Torrence's case; and 24th March 1626, Gray *contra* Graham, No 1. p. 565. in a competition betwixt an arrester and a party infest, where the saine was not regiftrate, the infestment was preferred upon this very allegiance, that the arrester had not lawfully affected the lands, whereof he craved the mails and duties. *2do*, This arrestment was within the 60 days allowed for the registration of sines; so that, at the time of the arrestment, there was no defect or ground of objection against the same, and being once preferable, no posterior neglect could give the arrestment a preference.

It was *duplicated*: The saine unregiftrate can never make faith in competition with the arrester, because he has lawfully affected the subject of the competition, viz. the principal sum due by Bonhard to Dundas his debtor; for if there had been no infestment, then the principal sum was affected, and the property transferred by the arrestment, in the same way as if Dundas had voluntarily assigned the same with the precept of saine, and that Torrence as assignee had taken infestment; in which case the former unregiftrate saine could not compete, no more can the same be effectual against the arrester, who is a legal assignee. From whence the difference betwixt this case and that remarked by Durie is clear; for there the subject of the competition was only the mails and duties of lands, which lands were not affected with arrestment: Besides, there were many other grounds in that practice which might have influenced the decision, for the purchaser had a disposition and possession, and the tenants enacted to pay him the rents in controversy. *2do*, It imports nothing that the arrestment was within the

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An heritable bond, on which infestment had followed, but not registered in terms of act 1617, was found arrestable, and the arrester preferred to a posterior adjudger of the bond, though the sixty days allowed for registration were not run, so that the arrestment might have been evacuated by registration thereafter.