

DECISIONS
OF THE
LORDS OF COUNCIL AND SESSION,
COLLECTED BY THE REPORTERS FOR THE FACULTY OF
ADVOCATES.

1767. *June 27.* HELEN STEVENSON *against* COLQUHOUN GRANT.

HELEN Stevenson arrested, in the hands of Charles Stewart, some household furniture belonging to James Stewart his father, the common debtor, and Charles Stewart deponed that there was some household furniture in his hands, which belonged to the common debtor.

The Lord Pitfour, before whom the forthcoming depended, granted warrant, authorising the Judge-ordinary to dispose of the furniture arrested, by way of public roup, he always making intimation thereof eight days before the roup, and the sale to be reported to his Lordship; but, before the sale could be made, Colquhoun Grant executed a pouncing, and carried off the whole goods.

A process was raised by Helen Stevenson, founded upon her diligence above narrated, against Grant, for having him found liable for the value of the goods, as they should be proved to have been worth at the time of the pouncing. The Lord Ordinary "sustained the defence upon the execution of pouncing, and assolied the defender."

In a reclaiming petition for Helen Stevenson, in which, from the dates of the different steps of procedure, it appeared she had not been *in mora*, it was PLEADED, That an order by a Judge to roup arrested goods ought to be held equivalent to a decret of forthcoming, when a sum of money is arrested; and therefore, unless a *mora* had intervened, which could not be alleged, that the furniture could not be carried off by a pouncing, while she was *in cursu diligentie*. It was also argued, that, as the order for the sale of goods, when arrested, was the method chalked out by law for making them effectual to the ar-

rester, it followed of course, that, after a decret for selling such goods was pronounced, the property of the former owner, as to the *ipsa corpora*, was at an end, nothing remaining in him but a claim against the person authorised to sell the goods, to pay him any balance that remained after satisfying the arrester; and therefore a poinding of these goods was totally inept, the property of them not being in the common debtor: and, in support of the above doctrine, Lord Stair, p. 392, § 38, and p. 394, § 42, was appealed to, as also the decisions, *November 8th 1680, Stevenson contra Paul; February 19th 1717, Stark contra Ramsay; and February 13th 1735, Muirhead contra Corry*; in the last of which cases it was said that the precise point in issue had been determined.

ANSWERED for the defender.—It is a principle firmly established in law, that, in competitions, it is the first complete diligence that gives the preferable right; and more particularly, that, as arrestment is but an inchoate diligence, it does not stop a poinding of the goods arrested; and so it is particularly laid down by Stair, *lib. 3, tit. 1, § 37 and 42*, and Bankton, Vol. II. fol. 264, § 64. And, if that principle was just, it was impossible that the warrant to sell the goods arrested could possibly be deemed equivalent to a decret of forthcoming, as that order was but a preparatory step towards obtaining such decret. Therefore it was a mistake to say that the property of the *ipsa corpora* of the moveables was transferred from the common debtor to the arrestee, by obtaining the warrant authorising the sale of the furniture: it might as well be said, that the execution of the summons of forthcoming had that effect, which it was impossible to maintain; and, even supposing the goods had actually been sold, without any poinding having intervened, it was pleaded, that it would have been necessary for the petitioner to have obtained a decret of forthcoming, to transfer the price to her in right of her arrestment, as come in place of the goods themselves; which plainly showed that the diligence was not completed, and therefore that the defender's poinding ought to be preferred. And as to the decision in the cases of *Stark* against *Ramsay*, and *Muirhead* contra *Corry*, it was answered, that they were not similar to the present question. In the first case, the goods were carried off *in manibus curiæ*, and in the very instant they were appreciating; and, in the second case, the competition ensued betwixt two diligences that were both incomplete, no actual poinding having ever been executed.

“ The Lords altered the Lord Ordinary's interlocutor, repelled the defence founded on the execution of poinding, and remitted to the Ordinary to proceed accordingly.”

Fac. Col. Vol. 4, No. 63, p. 109.

1785. *January 25.* JAMES and WILLIAM STEWART and HIS MAJESTY'S ADVOCATE against GEORGE STORY.

GEORGE STORY was brought to trial by the son and father of the deceased William Stewart, surgeon in Paisley, and by the King's Advocate for the public interest.