

“ THE LORDS found Sir William could be in no better case than the Lady Marchioness.”—*See* RECOMPENCE. No 4

Fol. Dic. v. 2. p. 4. Rem. Dec. v. 1. No 84. p. 169.

*** Edgar's report of this case is No 3. p. 8486. *voce* MANDATE.

1772. June 19.

MESSRS GIBSON and BALFOUR, Merchants in Edinburgh, Trustees for MICHAEL BARSTOW of Dantzick, *against* JAMES HUTTON and Co.

THE ship Polly of Crail, belonging to Robert Cheyne, having been sold by authority of the Judge-Admiral, a competition ensued for the price, deposited with the clerk of court; Gibson and Balfour claiming a preference for behoof of their correspondent Barstow of Dantzick, founded upon an arrestment which they had caused to be made of said ship, upon the 16th January 1767, in virtue of an admiral-precept which they had taken out, and upon which Cheyne was cited the 12th January; and Hutton and Co. producing, as their interest, an arrestment of Cheyne's ship, dated 21st November 1767, and a decree recovered against them for payment of the debt due them.

Objected by the latter before the Admiral; That although Gibson and Balfour now appeared as trustees for Barstow; yet the diligence upon which they claimed a preference, proceeded entirely in their own name, no mention being made of Barstow, either in the arrestment, or in the execution of the precept upon which their decree proceeded; nor had they any authority from him to recover the money till after the date of the arrestment; and, it might give room to fraudulent and collusive practices, if a man, using diligence in his own name, might afterwards transfer it at pleasure to another. The arrestment, therefore, and all that followed thereon, must be disregarded, as totally null.

Answered; It was evident that Gibson and Balfour had acted all along avowedly as trustees for behoof of Barstow; and that, although this circumstance is not expressly taken notice of in the citation, or the execution of arrestment, yet, the libelled precept to which they refer, contains a particular narrative of the whole; and, although not filled up till some little time thereafter, according to the universal practice, must be drawn back to the date of the citation. And that, albeit Mr Barstow had given them no express orders, yet their connection with him was such as rendered it a duty incumbent upon them, as they were possessed of the documents of debt, to take this measure for his behoof, and that he afterwards ratified and approved of all that they had done.

No 5
Arrestment used by a *negotiorum gestor, proprio nomine*, upon a blank Admiral precept, found not available to the person in whose name it was afterwards libelled, in a competition with an intermediate ar-
rester.

No. 5.

The Judge-Admiral, November 28th 1769, pronounced an interlocutor in these terms; ' Finds it proved, that Messrs Gibson and Balfour did take out the precept on which their decree proceeded, for the use of Michael Barstow, and the other persons libelled in the said precept, and did execute the same, and use arrestments upon the said precept, for the use and behoof of the said Michael Barstow, &c. ; and finds it proved, that the said Michael Barstow, and others, did homologate and approve of their doing : and finds it proved, that the debts libelled had their being and existence before the date of the said precept, and before the using of the citation, and the arrestment upon it, and therefore adheres to his former interlocutor.' And, in consequence whereof, Gibson and Balfour, as Trustees for Barstow, were entitled to be ranked upon the residue of the price, for payment of the sums due to him, preferably to the whole competitors.

Hutton and Co. brought a reduction of these proceedings before this Court, wherein the LORD ORDINARY pronounced this interlocutor ; ' Sustains the following reasons of reduction of the Judge-Admiral's decret, in so far as concerns the debt due by Robert Cheyne to Michael Barstow, Henry Thomson, and Adam Elliot, viz. that the defenders Gibson and Balfour took out the Admiral precept in November 1766 ; and, in virtue thereof, in January 1767, summoned the said Robert Cheyne, and used an arrestment of Cheyne's ship, all in their own names, and without mentioning that they were factors or trustees for the said Messrs Barstow, &c. ; and that it is admitted, when they took out said precept, executed the same against Robert Cheyne, and arrested in virtue thereof, they had no authority from Messrs Barstow, &c. for so doing ; and that the libelled summons, in which the defenders Gibson and Balfour mentioned they were trustees for these gentlemen, was not called in the Admiral-court, till January 1768, which was posterior to the arrestments used by the pursuers ; and therefore reduces the said decret, so far as it gives a preference for the debts due by Robert Cheyne to Messrs Barstow &c. to the debts due by Cheyne to the pursuers, for the security of which, they had arrested his ship ; and decerns accordingly.'

On a reclaiming bill and answers, ' the LORDS adhered ;' chiefly on the circumstance of the diligence being in the name of Gibson and Balfour simply. For it was thought, that, if the arrestment had been laid on in the name of the foreign merchants, though without a mandate ; yet as the ratihabition came afterwards, it would have been valid.

Act. R. Blair.

Alt. Ilay Campbell.

Clerk, Tait.

Fol. Dic. v. 4. p. 19. Fac. Col. No 17. p. 44.