

the common debtor's registered bond; whereas his arrestment was used upon a simple dependence. And arrestments upon decreets, that afford *paratam executionem*, are ever preferred to anterior arrestments upon depending actions: As arrestment upon bonds, whereof the terms of payment are past, is preferable to arrestment used upon bonds, *currente termino*, Lord Pitmedden *contra* Paterfons, No 160. p. 813.; Charters *contra* Neilson, No 157. p. 811. For albeit arrestment upon a dependence, or for debt before the term of payment, might be effectual against the debtor, to hinder him to dispoise the subject arrested, it can never compete with arrestment upon decreets, whereby the debtor's goods might be poynded and taken away, before the event of the constitution of the other debt.

Answered for Captain Brodie, He ought to be preferred; because his first arrestment, though upon a dependence, was a legal and ready execution for his debt, that was constituted by a decret before the present competition. So that he is not in the case of the Practiques betwixt the Lord Pitmedden and Paterfons, and betwixt Charters and Neilson, where prior arresters were postponed; because, at the time of the first competition, their terms of payment were not come; and creditors having *paratam executionem* for their payment, could not be obliged to stop their diligence, till others come up equal with them, by getting their debts constituted, which perhaps may never be done, through the common debtor's having grounds to exclude it. For Captain Brodie has now as ready execution competent to him for his debt, as Mrs Bowden has for hers: And, *ceteris paribus*, he is preferable according to the rule *prior tempore, potior jure*. So 9th February 1704, Drummond of Megginsh *contra* Lord Prestonhall, and other creditors of Balcaskie, Fount. v. 2. p. 221. *voce* CAUTIONER; an arrestment at Megginsh's instance upon a depending process for relief, was sustained preferable to posterior arrestments upon registered bonds; because, before the competition ended, Megginsh had got a decret upon his dependence.

THE LORDS preferred Captain Brodie's prior arrestment upon the dependence.

Fol. Dic. v. 1. p. 60. Forbes, p. 408.

1714. January 26.

JOHN KING, late Bailie of Glasgow, *against* JAMES and MARION DONALDSONS, and their Curators.

IN a competition of the creditors of Mr John King, late minister of Slamannan, the LORDS preferred Bailie King, the first arrester, upon his liquid bond, whereof the term of payment was past, albeit the term of payment of the debt arrested was not come to the Donaldfons' posterior arrestment, laid on upon their liquid bond after the term of payment of the debt arrested was elapsed.

Albeit, it was *alleged* for the Donaldfons, That though arrestments of debts, *currente termino*, render the subject litigious, with respect to the creditor who

No 166.
so that there was *parata executio*, at the competition.

No 167.
Arrestment laid on before the term of payment of the debt arrested, preferred to an arrestment laid on after the term of payment. *See*

No 167.
Watkin
against Wil-
kie, No 170.
p. 820. the
same; and
Mader against
Smith, No
158. p. 812.
the contrary.

cannot thereafter uplift, and the debtor who cannot safely pay, yet they can never compete with regular arresters after the term of payment, in relation to whom these are considered as *nimia et præmatura diligentia cui jus nostrum nunquam subvenit*. Therefore, it hath been several times decided, that arrestment, used after the term of payment of the debt arrested, is preferable to an anterior arrestment laid on before the term of payment of the said debt; Douglas and Acheson *contra* Gilbert, Durie, p. 326. *voce* LEGAL DILIGENCE; Charters *contra* Neilson, No 157. p. 811.; Lord Pitmedden *contra* Paterfons, No 160. p. 813.; and Mader *contra* Smith, No 158. p. 812.; which is agreeable to the concurring opinion of our lawyers, Stair, *insti. lib. 3. tit. 1. § 46.*; M'Kenzie, *insti. lib. 3. tit. 6.*

It was answered for Bailie King, Seeing the subject arrested was as truly a debt, the time of his arrestment, when *dies cessit licet non venerat*, it cannot be excluded by any posterior diligence, unless he had been in *mora* according to the rule *jura subveniunt vigilantibus*. Otherwise it were in the power of bankrupts to prefer one creditor to another, by discovering, to such as they favour, the terms of payment of debts due to them, to the prejudice of others who cannot be supposed to know such private terms. 'Tis true that law makes a distinction betwixt arrestment for a debt, whereof the term of payment is not come, and arrestment for a debt, whereof the term of payment is elapsed, preferring the latter to the former, which anticipating diligence by a creditor before his own term of payment, except the debtor be *lapsus* or *vergens ad inopiam*, is reckoned *diligentia nimia*, or *præmatura*, as being contrary to paction, which is the case betwixt Pitmedden and Paterfons in the 1678, and doth not meet this case, where the question is not as to the term of payment of the debt for which the arrestment was served, but the term of payment of the debt arrested. Nor yet is the case of Douglas and Acheson *contra* Gilbert to the purpose. For there it was only found, that an arrester of a minister's stipend was preferable to a posterior arrester, having raised the first summons of furthcoming, whereof the day of compearance was passed before the first arrester raised his summons. Besides, an arrestment of a minister's stipend, before the term of payment, is like arrestment of a conditional debt, seeing its being effectual depended on his surviving the term; and differs from this case of an arrestment of debt, whereof *dies cessit* though the term be not come. The Practique betwixt Mader and Smith is a single decision: And, farther, the first arrester there had not only arrested, but taken out a decret of furthcoming before the term of payment, which was irregular. My Lord Stair, in the place cited by the Donaldfons, doth not give his own opinion for them, but *narrative* sets down a decision, 5th July 1673, Birnie *contra* Mowat and Crawford, by a mistake. (No 159. p. 812.)

Fol. Dic. v. 1. p. 60. Forbes, MS. p. 17.