

to make arrested goods forthcoming, intended before the term of payment of that debt come, which is desired to be made forthcoming, albeit it desire the payment to be made only after the term of payment be past, is not a just and lawful diligence; but that another using diligence, and pursuing immediately after the term of payment, will be preferred to him.

No 45.

Act. Aiton.

Alt. Dunlop.

Clerk, Gibson.

Durie, p. 326.

1633. March 20.

SIMSON against WHITE.

In a competition betwixt two arresters of a sum that was liferented, to which there was no access till after the liferenter's death, the first arrestment being founded upon a bond bearing annualrent, was found to be a security for the subsequent annualrents, as well as those due before the arrestment.

No 46.

*Fol. Dic. v. I. p. 539. Durie.**** This case is No. 34. p. 698, *voce* ARRESTMENT.

1675. February 4.

HALL and GALBRAITH against GRAHAM.

THE ship called the Wine-grape, mentioned in the case 17th December 1674, Gordon and Ludquhairn against —. *voce* PRIZE, being found by a decret of the Admiral not to be a prize; and thereafter the said decret being reduced upon a contentious debate *in foro*, a bill of suspension was given in, making mention, that the Lords having thought fit, during the dependence, the value of the ship being liquidated, the price thereof should be sequestrated in the complainer's hands, upon a bond to pay the sum therein contained to the captor and his owners, if they should prevail in the reduction foresaid; and that he was charged to pay the said sum, the process being now at a period by the said decret reductive, at the instance of an assignee; and that he could not pay the same until an arrestment made in his hands, at the instance of the Swedes the former owners of the said ship, should be purged; which arrestment was upon the dependence of a reduction, intended at the stranger's instance, for reducing of the said decret reductive; it was debated upon the bill, and amongst the LORDS, that the said decret being *in foro contradictorio*, was of that nature, that it could not be reduced; and it were of a dangerous consequence, that after decreets *in foro*, the people should not be secure, but upon pretence of the dependence of reductions of the same, that which was found to belong to them by such decreets, should be again liable to arrestment and to question.

No 47.

The Lords refused an arrestment on a dependence before themselves, the dependence being a reduction of a decret *in foro*.

No 47. ing ; and, upon the other hand, it was *considered* and *alleged*, That there being arrestment and warrant for the same upon the dependence, the debtor was not concerned to dispute what the issue of the same may be, but there being *de facto* an arrestment, the same ought to be purged, which could not be in form, but either by loosing the arrestment, or by refusing the bill upon the reason of arrestment ; the defender in this reduction finding caution to make furthcoming, if the pursuer should prevail.

THE LORDS, notwithstanding found, That in respect the matter was already decided by a decret *in foro*, that the bill should be refused, notwithstanding of the said arrestment upon the dependence foresaid ; which was hard as to the debtor, who could not be formally secured, but in manner foresaid ; and likewise hard as to the strangers, seeing by the said deliverance, the Lords did in effect predetermine the reduction now depending ; and upon the matter did find, that the pursuer could not have interest to pursue, before the pursuer was heard in the said reduction.

Fol. Dic. v. 1. p. 541. Dirleton, No 237. p. 113.

* * Stair reports this case :

THE ship called the Wine-grape being brought up by Captain Gordon, was assolzied by the Admiral ; but immediately the privateer raised reduction, and arrested the ship and goods, which were sold to John Hall and George Galbraith, who gave bond for L. 2000 Sterling, to be paid to Ludquhairn, owner of the privateer, if he prevailed in the reduction ; there is a charge at the instance of Inchbraco, assignee by Ludquhairn, whereupon John Hall and George Galbraith gave in a bill of suspension. THE LORDS having ordained the cause to be discussed upon the bill, the suspenders *insist* upon this reason, that the strangers having raised reduction of the Lords' decret against Ludquhairn, containing therein a conclusion for repetition of the value of the ship and loading, there is thereupon an arrestment of the sum charged for, in the suspender's hands, and therefore the letters must be suspended till that be purged. It was *answered*, That this arrestment being only for arresting all sums in the suspender's hands belonging to Ludquhairn, could be no ground of suspension against Inchbraco his assignee, seeing his assignation was intimated long before the arrestment. It was *replied*, That the assignation was granted by Ludquhairn, *pendente processu*, and so was *super re litigiosa*, viz. the price and value of the ship and loading then in question, *et innovata pendente processu sunt nulla*. It was *duplicated*, That the process having been determined by a decret *in fora*, an assignation during the dependence is effectual, and could only be quarrelable upon the dependence, which ceased by a solemn decret *in foro*. It was *triplicated* for the suspenders, That they being but debtors, ought to be fully secured, cannot be without loosing the arrestment, for the strangers not being in this process, no decret thereupon will be secure against them, being *inter alios ac-*

tum, for they, if they were called, may allege that this bond being the price of the loading, comes in place thereof, *et sapit naturam surrogati*, but if the loading were extant, and disposed by the privateer, an arrestment upon the reduction would affect the same, and so it must be the price thereof even against an assignee; for if the Lords' decret be reduced, the assignation by the Privateer to the process, and suspenders' bond would fall in consequence, and the assignee would be obliged to repeat. *2do*, The arrestment must be purged by loosening, because it is offered to be proved by the assignee's oath, that the assignation is to the behoof of Ludquhairn, whose sums are arrested, at least is without an onerous cause, and so could not prejudge the strangers. It was *quadruplied*, That the debtors will be secure, they paying upon the Lords' sentence, whoever be called; and seeing there is a decret *in foro*, if arrestments upon a dependence shall stop the effect of the decret, and put the assignee to a necessity to find caution, it would render all decreets *in foro* ineffectual, for a summons of reduction with an arrestment, would be as good as a suspension; and whereas the suspender should find caution, will necessitate the charger to find caution. It was *quintuplied*, That if the price of the loading be thus carried away from the strangers, though they should reduce, it would be to no purpose, seeing neither the Privateer nor his owners are in that condition, that the strangers will be able to recover their money.

THE LORDS in consideration of this inconvenience that might befall the strangers, that they would not have ready recovery of their money, allowed them to compare in this process, and to repeat their reasons of reduction, that if they should prevail they might have access to call for the money contained in these bonds; but their procurators refusing to compare or insist in the reduction, the LORDS found that the arrestment against the cedent had no effect against the assignee, whose assignation was intimated before the arrestment, albeit the assignation was granted *pendente processu*, seeing the process is determined by a decret *in foro*; but found that allegiance relevant, that the charge was to the behoof of the cedent, or without an cause onerous, to suspend the letters, ay and while the cedent loosed the arrestment, and found caution.

Stair, v. 2. p. 316.

1678. July 17.

LORD PITMEDDEN *against* PATERSONS.

ARRESTMENT will not be sustained, laid on before the term of payment of the debt which is the foundation of the arrestment, unless in security, where the debtor is *vergens ad inopiam*.

Fol. Dic. v. 1. p. 539. Stair.