realis ; but, if a creditor intervene and poind *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 mala fide* to do any voluntary deed to the prejudice of the adjudger, who is *in cursu diligentiæ,* and nowise to stop legal diligences by arrestment or otherwise. And was so decided *1st February* 1684, *Anderson* against *Creighton,* marked by President Newton ; and siclike, an arrestment before the term of payment was preferred to an apprising before the same term, *2d July* 1667, *Litster* against *Aiton.*

The Lords considered, that, by the 51st Act of Parliament 1661, heritable sums, before infeftment 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 decreet of adjudication, being also prior to Torrence's decreet for making forthcoming,—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 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 infeftment 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 apprisers ; and therefore brought them all in *pari passu,* who had apprised within year and day of the first. *Vol. II. Page 278.*

1705. *June* 28. GEORGE SUTTY *against* BARBARA ROSS.

LORD Minto, probationer, (in the place of Lord Phesdo, deceased,) resumed the case debated in presence, betwixt George Sutty and Barbara Ross ; being a competition betwixt two arresters, both laid on in one day ; and the one pursued his forthcoming before the Lords of Session, and the other before the commissaries. Sutty craved preference ; because he offered to prove his copy of arrestment was given some hours before the other ; and he had tabled his action before an unquestionable jurisdiction ; whereas Mrs Ross had pursued before the commissaries, who were nowise competent to such actions on arrestments.

ANSWERED,—Where there was a concourse of diligences in one day, striving

for preference, and the executions did not mention the particular hours on which they were done, the Lords were in use to bring them in *pari passu*: for the distance of time lying in the lubricity of the memory of witnesses, they might very readily either forget or mistake the hour of the day: and so Lord Stair, *b.* 1, *tit.* 1, requires the difference of three hours at least. And, as to the competency of the commissaries, the same was not yet decided, but appointed to be heard in presence.

The Lords brought the two arresters in *pari passu*.

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1705. *July* 20. GEORGE MONRO of NEWMORE *against* OUCHTERLONY and OTHERS.

NEWMORE having sold a bargain of victual to Ouchterlony, Kid, David Alexander, and Maul, he gets their bond for 3000 merks, as the price, dated in 1701. Thereafter David Alexander and he make a new bargain in 1703, for which David alone gives him a bond for 2700 merks. There are many partial payments made by David to Newmore, some of them betwixt the date of the first and second bond, and some of them after the second bond; and these again, partly before the term of payment of the second bond, and partly after it. Newmore charges the four obligants in the first bond for payment of the 3000 merks therein contained. They SUSPEND, That the sum charged for is near satisfied and paid by David Alexander; and produce the receipts; and, in so far as they fall short, they offer present payment of the balance.

ANSWERED for Newmore, the charger,—The four obligants contained in the first bond are not bound conjunctly and severally, but only for their own shares; so it is not to be presumed that David Alexander would pay any more than his own fourth part: And, in so far as he has paid more, it must be ascribed and imputed in satisfaction of this second bond, as to all payments posterior thereto. And, *quoad* the prior payments, Newmore became debtor to David *receptione indebiti*; and now compenses the same by the sum which David alone owes him in the second bond; and the payments being indefinite, it is very lawful for Newmore to ascribe them to the debt for which he has the least security, *viz.* David's own bond, rather than to extinguish a debt where he has three sufficient persons bound with him.

REPLIED, 1*mo*,—Any payments which David made prior to the term of payment of his second bond, can neither in sense nor reason be imputed to that debt which was not then in being, but only to the first. 2*do*, He was manager of the society, and trusted with the victual; and, as the price came in, so was he ordained to pay Newmore's bond; which he accordingly did, and so must first extinguish that bond. 3*tio*, David, by a declaration under his hand, has imputed all his payments towards the first bond; and to ascribe the superplus above his own fourth, to constitute Newmore his debtor, and so when he is pursued, *condictione indebiti*, for repetition, to afford him a ground of retention and compensation on the second bond, is a mere notion and subtilty, never dreamed of by David Alexander or Newmore; but, *ex post facto*, invented by his lawyers.

DUPLIED for Newmore,—Law does not presume that any man pays more than what he really owes; and so David being only debtor in a fourth share of the first