

1733. *January.* M^CINTOSH *against* FARQUHARSON of Achreachin.

A first arrester, who forbore to proceed in diligence, because he obtained from the common debtor assignation to the debt arrested, was not excluded upon the pretence of *mora*, but preferred to a posterior arrester who had done exact diligence. See No 159. p. 812.

Fol. Dic. v. 1. p. 61.

No 172.

1738. *November 8.* LAIRD OF DUNDAS *against* ANTHONY MURRAY.

WHERE the executions of different arrestments are on the same day, and at the distance of little time, it is usual to bring them in *pari passu*, and not to allow a proof by witnesses to determine the priority. Yet, where any strong circumstance is expressed in the executions that may be a clear mark to the witnesses, such proof may be allowed.

Thus, where two executions were on the same day in the month of December, one whereof bore to have been at three o'clock afternoon, which was such a time of the day as must have been in full light, and the other to have been at five o'clock, which was such a time as day-light must have been gone, a proof, before answer, was granted.

Fol. Dic. v. 3. p. 45. Kilkerran, (ARRESTMENT.) No 2. p. 36.

No 173.

A proof by witnesses of the hour of arresting allowed, where some clear mark of distinction is condescended on.

1772. *February 28.* JEAN CAMERON *against* THOMAS BOSWELL.

THESE parties being severally creditors to Nisbet, used arrestments on the same day, viz. 20th February 1771; Miss Cameron in the hands of Alexander Hart singly, and Mr Boswell in the hands of Hart, and of several other persons as debtors to Nisbet.

Hart brought a multiple poinding, wherein Miss Cameron claimed a preference upon her execution of arrestment, which bore, that it was laid on between the hours of six and seven, whereas the execution of her competitor's arrestment bore, that all the arrestments at his instance were laid on between the hours of seven and eight afternoon.

Mr Boswell, on the other hand, contended for a *pari passu* preference; for, that there was not a sufficient interval between the two arrestments to ascertain the priority of Miss Cameron's.

THE LORD ORDINARY at first preferred Miss Cameron, but afterwards gave this interlocutor: 'December 11. 1771. Finds that there is not a sufficient distance of time mentioned in the executions of arrestments, for showing, with precision,

No 174.

In a competition between two arrestments used on the same day, one execution bearing, that the arrestment was laid on between the hours of six and seven; the other execution, that the arrestment was laid on between the hours of seven and eight afternoon; the priority found sufficiently ascertained to decide the preference.

No 174.

which of the two executions were first laid on, and therefore prefers them *pari passu*, &c.

Cameron reclaimed, founding upon the general rule of law, *prior tempore potior jure*, and the *jus quasitum* to the arrester from the moment the arrestment is executed, as appears both by decisions and authorities; Durie, p. 420. 30th January 1629, Davidson, *voce* COMPETITION; Bankton, B. 3. tit. 1. p. 42.; and Erskine, B. 3. tit. 6. § 9. establishing the general proposition, that the priority is to be the rule, provided the priority, with any degree of certainty, appear; and which, in the case of two executions within the same hour, may be as well ascertained as if they had been in different hours. In the present case, however, there was no occasion to carry the matter so high. For that, as the executions bear, that the arrestments were executed in different hours, the one between six and seven, and the other between seven and eight, upon a fair and equal construction of the two, the one must be understood to have been a full hour prior to the other. But, at any rate, if any faith is due to these executions, it must be allowed that the one is prior to the other; and therefore must be preferable.

The doctrine pleaded on the other side would lead to very extraordinary consequences. Suppose one execution bears the arrestment to have been executed between six and seven, another between seven and eight, a third between eight and nine, and so on to the number of six, as might very well have happened in this case, Mr Nisbet having had such a number of creditors in this town; according to the competitor's doctrine, the one between eleven and twelve would be preferred *pari passu* with the one between ten and eleven; that with the one immediately preceding, and so on through the whole six, till the last should be brought in *pari passu* with the first, though prior to it by six hours.

Answered: That, in order to entitle an arrestment to any preference on account of priority in point of time, the law necessarily requires, that there shall be such a priority as excludes the chance or probability of any mistake. In the present case, all that necessarily appears *ex facie* of the arrestment, is a priority of minutes or seconds; but that a priority of minutes, which supposing the executions to have full faith given to them, is all that appears in the present case, does not entitle to any legal preference, is perfectly clear; Stair, b. 4. tit. 35. § 7.; Bankton, B. 3. tit. 1. § 42.; Erskine, B. 3. tit. 6. § 18.; the first of these authors delivering it as a fixed point, that three hours must necessarily intervene. But the respondent is unquestionably well founded, in maintaining, that there must at least be a priority of one hour appearing undoubtedly *ex facie* of the executions; because, if the time is less, it is impossible there can be any certainty. In the case from Durie, Davidson *contra* Balcanqual, (*mentioned above*), there was a priority of two full hours appearing upon the face of the arrestment; and there is not a single decision since that time, where the Court have ever found an arrestment preferable, upon a smaller, or even so small, a priority in point of time.

Observed on the Bench: That the three hours space mentioned by Stair is totally arbitrary. In the present case, there is evidence, from the language of the execution, that the one arrestment was prior to the other.—Must hold the execution *pro veritate*, and give legal effect to the diligence.

‘THE LORDS preferred Miss Cameron, in terms of the Lord Ordinary’s first judgment.’

A&S. Rolland.

Alt. M^cQueen.

Clerk, Kirkpatrick.

Fol. Dic. v. 3. p. 45. Wallace, No 11. p. 26.

1774. January 28.

ISOBEL WRIGHT *against* JOHN ANDERSON Stationer in London, and LAWRIE, LINDSAY, and THOMSON, Merchants there.

THE parties to this question were, severally, creditors to the deceased Archibald Arbuthnot, merchant in Edinburgh, and had caused arrestments to be used in the hands of sundry persons, his debtors, both in Edinburgh and Leith; particularly, upon the 4th day of October 1771.

The arrestment, at the instance of Isobel Wright, proceeded upon special letters of arrestment, issued by this Court, in consequence of a depending action against Archibald Arbuthnot’s eldest son and representative; and the execution, so far as respects the present question, (after narrating certain arrestments used upon the 3d day of October) is, *verbatim*, as follows: ‘In the hands of each of William Scot and James Craig, baxter in Edinburgh, betwixt the hours of three and four in the afternoon; and in the hands of Alexander Bryce, merchant in Leith, betwixt the hours of five and six in the afternoon; all upon the said 4th day of October.’

The execution of arrestment, at the instance of Messrs Lawrie, Lindsay, and Thomson, which was laid by virtue of an admiral precept, bore, that, upon the 4th day of October 1771, the same messenger arrested, in the hands of each of Samuel Mitchelson, William Anderson, James Craig, and Katharine and Anne Stephen, all in Edinburgh, and Alexander Bryce merchant in Leith, the sum of L. 1000 Sterling, less or more, &c. ‘That he left a copy of arrestment for Alexander Bryce, within his dwelling-house in Leith; and the like copy for James Craig, withing his dwelling-house in Edinburgh, and that betwixt the hours of five and seven in the afternoon;’ and betwixt the hours of seven and eight in the afternoon, he left the like copy for each of the said Samuel Mitchelson, &c. The execution for John Anderson was in the same terms.

To the sum in the hands of Alexander Bryce, who brought a multiple-pounding against the several arresters, Isobel Wright maintained a preference upon the ground of the priority of her diligence; and she cited the late decision, in the case of Cameron against Boswell (No 174. p. 821.), and the rule as laid down

No 174.

No 175.

Arrestments laid on the same day, at the instance of different parties; one execution bearing, between the hours of five and six, and another bearing, between the hours of five and seven; were preferred *pari passu*, on account of special circumstances; and particularly, that of one messenger having served the whole arrestments.