

annualrents thereof, the Court finally gave judgment *ut supra*, sustaining the prior arrestment, as effectual both for the sum arrested, and likewise the interest accruing thereon.

No 245.

*Fol. Dic. v. 4. p. 104. Fac. Col. No 128. p. 342.*

1802. July 9.

MACMATH *against* CAMPBELL.

By the decree of division (21st July 1780) among Neil Mackellar of Daill's creditors, Duncan and Peter Fisher were found entitled to draw a certain sum for a debt due to them. Donald Macmath, a creditor of Duncan Fisher, used arrestments on the 3d and 5th of September 1793, in the hands of Neil Macgibbon, the purchaser of Mackellar's estate, which, with the grounds of debt, were produced on 5th December 1798, in the multiplepointing which had been brought by Macgibbon in January 1798. Duncan Campbell of Ross also produced an assignation by Duncan Fisher to his share of the above debt, which was dated on the 3d, and intimated to Macgibbon on the 6th February 1795.

Macmath demanded a preference on the fund *in medio*, in virtue of his arrestments being of a date long prior to Campbell's assignation, who, on his part objected, that the preference of the arrestments was cut off by the quinquennial prescription.

The LORD ORDINARY found, (11th March 1801,) "That the price of the lands of Daill, in the hands of Mr Macgibbon, the raiser of the multiplepointing, falls to be considered as a personal subject, and as such affectable by the diligence of arrestment; but in respect it does not appear to the LORD ORDINARY, that an arrester being called in a multiplepointing, raised by the common debtor, can have the effect of interrupting the quinquennial prescription, unless the arresting creditor shall have shown an intention to insist on his arrestment by producing it in the multiplepointing, or at least shown an intention to do so, by taking the summons to see, or otherwise entering an appearance, and that in this case, Donald Macmath is not alleged to have either produced his arrestment, or entered appearance by taking the summons of multiplepointing to see, or otherwise, within the five years; finds, That his arrestment is cut off by the quinquennial prescription; that it can be no ground of competing with Mr Duncan Campbell, as claiming right to Duncan Fisher's share of the sum for which he and his brother Peter stand ranked on the price in Mr Macgibbon's hands, upon an assignation from him duly intimated to Macgibbon: Finds, That the said Duncan Campbell has, under that assignation, the preferable right thereto, and decerns in the preference accordingly."

On reclaiming, the arrester

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No 246.

Whether a multiplepointing raised by an arrester, interrupts the quinquennial prescription of arrestments, tho' production of the grounds of debt is not made in the action within five years from the date of the arrestment?

No 246.

*Pleaded*; The question depends upon the effect of the action of multiplepointing to interrupt the quinquennial prescription, to which the arrestments would be otherwise liable. The summons of multiplepointing brought by the arrestee, was executed as well against the arrester as the common debtor, prior to the lapse of the years of prescription; prior to which also, on 6th June 1798, the LORD ORDINARY found the pursuer only liable in once and single payment, and ordained the creditors called to produce their interests in the clerk's hands. The citation of the arrester, and the order pronounced in consequence of it, must have the same effect of interrupting prescription, as if he had cited the arrestee and the common debtor in an action of forthcoming, although the arrestments and grounds of debt were not produced in the process of multiplepointing till some months after the statutory prescription had elapsed. For an action of multiplepointing is a common process, not intended for the benefit of the person alone who brings it, but also for the benefit of all the competing parties; in short, for all the creditors of the common debtor, who must all be called in it. It is most commonly raised by the arrestee, who is harrassed by various claims, to have it ascertained to whom he can pay with safety; but it may also be brought by one of the creditors in the name of the arrestee, who cannot disclaim it, (as it is not for his sake, but theirs, that the action is intended.) Hence, in so far as concerns the interest of every competitor, the action must have the same legal effect, as if it were raised at his own instance. If the arrester had brought this process, the prescription unquestionably would have been interrupted, as the arrestments would thus have been pursued upon within the five years, in terms of statute 1669, c. 9. Now, the action, though not raised by himself, was confessedly raised for his behoof; and being so raised by another, prevented the arrester from bringing it himself; at a time too, when it was incompetent for him to bring an action of forthcoming. This prescription was found to be interrupted, when the process of multiplepointing had been seen and returned by the arrester's procurator; Crawford against Simpson, 20th July 1732, No 244. p. 11049.; Ainslie against Simpson, 28th July 1774, No 245. p. 11049.

*Answered*; The grounds of debt and arrestments were not produced in process till two months after the years of prescription had elapsed; and the statute expressly declared, that all arrestments, not pursued and insisted in within five years after the laying on thereof, shall prescribe; so that nothing short of an action raised and insisted in by the arresting creditors would be sufficient; and it was probably going as far as the Court were warranted, to make appearance in a multiplepointing within the five years equivalent; yet the plea of the arrester here involves a much wider deviation from strict law; when, though he was called on in usual form, no appearance was made, and no judicial step taken within the legal time to show his intention of not abandoning his claim. Although it was not competent to bring another multiplepointing in his own name, and it might have been expensive to have raised an action of

forthcoming after the arrestee had brought the present process, yet it was nevertheless competent for him to produce his grounds of debt there, as it always had been for the five previous years proper to insist in an action of forthcoming upon the arrestments. By bringing a process himself, the arrester shews, that he does not mean to abandon his diligence; but by being merely cited, which is the act of another, he does nothing indicative of intention; and till he appear, it is uncertain whether he intends to obey the citation or not, that being entirely optional. Upon the arrester's plea, if the multiplepounding were detained in Court for several years, he might still appear at the end of that period, and maintain, that he was preferable to all rights acquired since the intimation of the arrestment, although he had not till then insisted in it, because the prescription on his diligence was interrupted by the raising of the action, and citing him as a defender.

The Court (13th February 1802) altered the interlocutor of the LORD ORDINARY; and again, on advising a petition, with answers, they "adhered," by the narrowest majority.

It was remarked by one of the Judges in the minority, that if it was not necessary that the creditor should do something to defeat the presumption of dereliction of his claim, and if it was sufficient merely to be called in a multiplepounding, (which, no doubt, was a common process, and to the parties appearing, served the purpose of a mutual reduction,) the Legislature never would have enacted § 41. of the bankrupt statute, declaring the production of the grounds of debt in the sequestration to have the same effect as a legal interruption of prescription; but, on the other hand, it was observed, that this was necessary, as a sequestration was not a process; as it was not in Court, but under the direction of a trustee, on which account that clause was introduced.

Lord Ordinary, *Bannatyne.*

Alt. *A Campbell, jun.*

Act. *Fletcher.*

Agent. *Ar. Ferrier, W. S.*

Agent *R. Graham, W. S.*

Clerk, *Sinclair.*

*Fac. Col. No 56. p. 117.*

## SECT. II.

### Mails and Duties.

1688. *February.* ROBERTSON of Inches *against* M'INTOSH of Daviot.

No 247.

FOUND, That violent intrusion into possession, by virtue of a pretended right, was probable by witnesses, even five years after the intruder's removing.