

APPENDIX.

PART I.

ARRESTMENT.

1770. *March 8.*

THOMAS SCOTT, Linen-draper in London, and his Attorney, *against* SIR
THOMAS FLUYDER & Co. Merchants in London.

WILLIAM HARRIS, merchant in Air, being committed to prison upon a charge of forgery, had remitted to him by Robert Tait & Co. in Philadelphia, his correspondent there, a draught on Wardrop, Greenshield, & Co. of Glasgow, for £100. This bill was indorsed by Harris to James Marshall, writer to the signet, his agent; by whom it was indorsed to Johnston & Smith, who paid value for the same; it being intended that the contents should be applied to defray the expence of Harris's approaching trial.

Sir Thomas Fluyder and Company, creditors to Harris, had obtained decree against him before the Admiral; and having got intelligence of this remittance from Tait, they, upon the 17th January 1769, arrested in the hands of Greenshield and Wardrop as debtors to Harris; and upon the 2d July 1769, they used the like arrestments in the hands of James Marshall and of Johnston & Smith.

This gave rise to a question between Harris and Fluyder & Co. Harris contending, that as the sum in this bill had been remitted him for the special purpose of defraying the expence of his defence, and was accordingly impressed into Marshall's hands to be so applied, it was not attachable by arrestment for his extraneous debts; but upon advising a petition and answers, Fluyder was preferred upon his arrestment.

This question being disposed of, another competition ensued upon the same fund between Fluyder & Co. upon these arrestments, and Thomas Scott, linen-draper in London; who having obtained letters of arrestment against Harris's debtors, had, upon 14th September 1768, executed the same at the market

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An arrestment used in the hands of the common debtor's debtor in this country, preferred to a prior arrestment at the market cross of Edinburgh, pier and shore of Leith, against the common debtor's debtor, a Scotsman, and in a foreign country; such arrestment, though held to be a habile mode of attachment, having been rendered ineffectual by the foreign debtor's having *bona fide* remitted the

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common debtors effects to him, which being therefore no longer *in medio*, became liable to the ordinary diligence of other creditors.

cross of Edinburgh, pier and shore of Leith, against Robert Tait, designed in the execution son of George Tait, shoemaker in Dumfries, now in Philadelphia.

Upon this diligence, which was long prior to Fluyder's, Scott insisted that he was preferable; and that as Tait of Philadelphia was truly debtor to Harris, the effect of his arrestment could not be defeated by the voluntary remittance of the said bill by him to Harris. Fluyder & Co. also stated a variety of objections to Scott's interest. The Lord Ordinary, on 15th December 1769, pronounced an interlocutor, "Dismissing the interest produced for the said Thomas Scott; finding, that Sir Thomas Fluyder & Co. have the preferable right in virtue of their arrestments to the sums of money owing to William Harris by James Marshall, in whose hands said arrestment was used."

Scott gave in a reclaiming petition; upon advising which with answers, memorials were ordered; when the following argument was maintained by the respective parties.

Pleaded for Fluyder and Company:

1mo, An arrestment was a prohibitory diligence, by which the arrestee was prohibited from parting with any money or effects belonging to the common debtor till the arrester's debt was satisfied. If the arrester disobeyed this order, he was liable to pay the money over again, and to be punished for contempt of authority. The arrester must of course necessarily be one who was subject to the commands of the court issuing the interdiction; and as in the present instance Tait was abroad *animo remanendi*, he ceased to be subject to the jurisdiction of the courts of this country, so that the arrestment in his hands was good for nothing.

The principle founded on by Scott, that the natives of Scotland were *ratione originis* subject to the jurisdiction of this Court, and that arrestments might therefore be used in their hands, was without foundation: There was no such *forum*; and it was established, that a Scotsman residing abroad *animo remanendi* was not amenable to the Courts of this country, March 23, 1689, Colonel Brog's Heir, No. 28. p. 4816. The arrestment might, in the present instance, prove ineffectual; and it was an absurdity for one to ask, and for a Court to pronounce, a judgment which could be of no use.

If arrestments of this nature were established, it would be impossible for any person born in Scotland to carry on trade. As the natives of this country abroad could not hear of such diligence being used, they could not avoid being guilty of breach of arrestment, and would hence be obliged to pay their debts over again, and if they happened accidentally to be in the country, to be punished besides. As this doctrine therefore would be productive of such absurd and iniquitous consequences, it could not be regarded.

2do, Though the diligence in the present instance was competent, it could not affect the money in question, which had been paid away by the arrestee, and, after passing through several hands, had at length landed with Marshall.

Arrestment was only a prohibitory diligence, but did not establish a *nexus realis* upon the subject till decree of forthcoming was obtained. If the arrester broke the arrestment, he would be obliged to pay the money over again ; but the arrester would not be entitled to follow the money, and to force it away from those to whom it was paid, or who had legally attached it for onerous causes. The person guilty of breach of arrestment was liable in payment of the arrester's debt, for no other reason but because the law understood the arrester to be thereby deprived of his diligence ; a notion adverse to the doctrine of his having a *nexus realis* over the subject.

The idea of this money being still *in medio*, or under the power of Tait in Philadelphia, and under the influence of Scott's diligence, was repugnant to every circumstance of the case. In the competition betwixt Fluyder and Harris, it had been determined that this money was a debt due by Marshall to Harris ; and as upon that ground the validity of Fluyder's arrestments in Marshall's hands had been sustained, it was impossible to say that the money was still under the power of Tait, or *in medio*. If instead of a bill of exchange Tait had transmitted the money itself in payment to Harris, it could not have been maintained that it was *in medio*, or under the power of Tait after it had come into Harris's hands, and was either spent or lent out by him ; which was almost literally the fact, having been impressed into Marshall's hands to reimburse what he had expended on Harris's account, and to answer further outlays.

3tio, The arrestments of the parties in the present case being clearly not *ad idem*, could not be brought into competition. The money in question was in the hands and under the power of Marshall as debtor to Harris. Fluyder accordingly prohibited Marshall to make payment of this debt ; by which means it was secured. Scott, on the other hand, gave no prohibition to Marshall but to Tait ; and having arrested in the hands of Tait, demanded a decree against Marshall. This was contrary to the most obvious rules of form. If his arrestment was a good one, it might entitle him to a decree against Tait ; but it would be a strange procedure if his arrestment in the hands of one person should entitle him to a decree against another.

Pleaded for Scott :

1mo, It was an established rule of law, that whenever a person was amenable to the courts of this country, whether *ratione originis*, or upon whatever other ground, arrestment might be used in his hands, either to attach the sums due by him to the common debtor, or the common debtor's effects in his hands. Robert Tait had a *forum competens* here *ratione originis* ; and as he was therefore amenable to the courts here, the arrestment that had been used, executed at the market cross of Edinburgh, pier and shore of Leith, was a legal attachment of whatever money or effects he had in his hands at the time belonging to Harris. These letters made no distinction whether the arrestee was abroad *animo remanendi* or not ; which being an act of the mind, was not easily discovered : and the form of the letters expressly authorised this diligence to be used

No. 1. against persons out of the country, without taking any notice of the distinction. The same principle governed every other species of diligence; summonses of every kind, letters of general and special charge, executed against persons abroad, were effectual; and hence there was no reason why the diligence of arrestment should not have equal force. So this point was decided, 22d July 1701, and 16th Dec. 1703, Blackwood *contra* Earl of Sutherland, No. 25. p. 1793.

2do, The diligence of arrestment had not only the effect of a personal prohibition against the arrestee, but gave a *nexus realis* upon the effects arrested, which entitled the arrester to follow them into whose hands soever they might come. If the law was otherwise, the consequences to trade would be fatal; if, after arrestment of the bankrupt's goods in foreign parts, the effect thereof should be disappointed by the arrester's sending them to this country consigned to the bankrupt himself: And it was not a good answer, that as it was still competent for him to recur against the arrestee, he was not thereby prejudiced, as recourse might, by the supervening bankruptcy of the arrestee, become ineffectual. It would besides be a great hardship to oblige the arrester to go abroad for that purpose, when he had found and had attached the arrestee's subject at home.

It might perhaps merit a different consideration, if any third party had *bona fide* purchased the effects arrested either from the arrester or the bankrupt himself, into whose hands they had thus unduly come; but when the question was either with the common debtor himself, or with other creditors who had used arrestments after the effects had come home to this country, the effects themselves or the price being still *in medio*, justice would not permit that, by such collusive proceedings, the prior arrester should lose the effect of his diligence. This was precisely the case here; the subject had not been received either by the one party or the other, so that it was still *in medio*; and having been legally attached, must of course be carried by Scott's prior diligence.

3tio, The objection of the arrestments not being *ad idem*, was in a great measure already answered. The arrestment in Tait's hands attached what was then due to Harris; Tait, in breach of that arrestment, had made a remittance to Harris; but the bills and money being still *in medio*, Scott's arrestment neither was nor could be disappointed by an attempt which never had been carried into complete effect. The doctrine maintained by Fluyder would lead to the most dangerous consequences. A factor abroad had effects belonging to a merchant in this country; they were arrested in his hands by a creditor of the merchant; but before a forthcoming could be procured, the factor, in order to disappoint the arrestment, sent the money or goods home to the common debtor: It could not be maintained that the arresting creditor would thereby be cut out of the preferable right he had acquired by his diligence, leaving him to seek his recourse against the factor as he best could.

All the Judges were of opinion that an arrestment used at the market cross, pier and shore, was good against a native of Scotland abroad, whether *animo*

remanendi or not : But upon the other point they were a good deal divided. Though it was agreed that an arrestment was in some measure a *nexus realis*, as it gave a preference to follow out the proper consequent diligence, yet it was not admitted to be so to the extent contended for, and to authorise the arrester to follow the subject wherever it might go. The majority, however, thought, that though Scott's arrestment was good, his diligence was defective in other respects ; that the proper action of furthcoming would have been against Tait ; but that as Tait had paid *bona fide*, not having any knowledge of the arrestment, the subject was not *in medio* ; and having afterward been found in Marshall's hands, had been properly attached by Fluyder's diligence.

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The Court accordingly adhered to the Ordinary's interlocutor, and preferred Fluyder and Company.

Lord Ordinary, *Elliot*.
Clerk, *Pringle*.

For Scott, *Lockhart*.
For Fluyder and Co. *P. Murray, H. Dundas*.

R. H.

Fac. Coll. No. 30. p. 80.

1771. *February 5.*

WILLIAM REID, Eldest Son of the deceased Robert Reid, his TUTORs and CURATORS, and the ACCEDING CREDITORS of the deceased Robert Reid, *against* STEPHEN RONALDSON and WILLIAM CUNINGHAME, Creditors of the deceased Robert Reid.

ROBERT REID died in 1766, possessed of sundry heritable subjects, having, before his death, made a nomination of tutors and curators to his children, but no other settlement. His affairs being in confusion, the tutors served the heir *cum beneficio inventarii*, and thereafter brought a process into Court, in order that they might be authorised to sell the heritable subjects for payment of the debts. The Court found the expediency and necessity of a sale sufficiently instructed, and accordingly authorised it. The subjects were sold ; but before the price was paid, Stephen Ronaldson and William Cuninghame raised actions of constitution against the heir and Mrs. Reid the executrix ; and having used arrestments in the hands of the purchasers, claimed a preference to the other creditors. The heir, his tutors and curators, alongst with the purchasers, brought a process of multiple-pounding, in which they called all the creditors to debate their preference. The Lord Ordinary, upon advising memorials for all the parties, on the 21st July 1770, found " the said Stephen Ronaldson and " William Cuninghame, the arresting creditors, preferable on the price of the " subjects which belonged to the said Robert Reid."

The pursuers, in a reclaiming petition, pleaded :

An heir entering *cum beneficio* was in a very different situation from another heir ; he was liable only for the value of the succession, and was accordingly

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The estate of a debtor, a minor, having been sold *auctore pretore*, the arresters of the price, in the hands of the purchasers, preferred upon their diligence to the other creditors.