

Nor is there any *res judicata* in this case: Whatever may have been found in competition with other creditors, cannot affect such as were no parties to that competition. Indeed, all that has been found is, that the assignees are entitled to compare and compete; in other words, that, though deriving their powers from judicial proceedings in a foreign country, they have *personam standi* here, and may operate preference by diligence, or object to the diligence of other creditors; but they cannot be considered in a more favourable view than trustees for behoof of creditors, who, though named by the bankrupt, with the concurrence of the bulk of his creditors, are in no shape preferable to such as refuse to accede, unless in so far as they have acquired a preference by diligence.

*Answered:* Though a bill protested for not-acceptance may be considered in the light of an intimated assignation, where the person drawn upon has effects of the drawer in his hands, the case is different where he has no more than bills. And it was upon that ground that the arrestments in Cuming's hands were found to be ineffectual. A writing, in the form of a bill, requiring Cuming to indorse those bills to the holder, would have been good for nothing; and the virtual assignation, supposed to be implied in the drafts in favour of Pewtreffs and Roberts, can have no stronger effect.

*2do,* The assignees, by judgment of the Court, have been found entitled to compete; and, though they have been postponed to those creditors who had used valid arrestments prior to the competition, they are preferable to arrestments executed after it. The sums *in medio* became litigious by that competition, which must, at any rate, be considered as a sufficient intimation of the assignment in their favour.

'THE LORDS preferred Messrs Pewtreffs and Roberts to the sums in William Cuming's hands, to the extent of the draughts in their hands.' (See FOREIGN.)\*

For the Assignees, *Macqueen, Blair.*  
*G. Ferguson:*

*Alt. Solicitor Dundas, &c.*

Reporter, *Pitfour.*

*Fol. Dic. v. 3. p. 41. Fac. Col. No 72. p. 315.*

1775. February 21.

CROSS and BOGLE, against JOHN MOIR, Factor for the Trustee and Creditors of DAVID LOCH.

ARTHUR MILLER, merchant in Edinburgh, having become bankrupt, and applied for the benefit of the *Cessio*, a sequestration was awarded upon an application of his creditors, and, among others, David Loch, merchant in Leith; and

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Arrestment used in the hands of a judicial factor, appointed in conse-

\* Although not particularly mentioned in this report, or in No 81.; the first arrestment used in Cuming's hands had been found ineffectual. Bills blank indorsed lodged with him, and bills drawn payable to him, in order to recover payment, were arrested in his hands, before he had obtained payment. This found inept; he being accounted a mere factor or agent. The arrestment used by Pewtreffs and Roberts, was *after* Cuming had recovered payment; which was sustained. In a case from Bremen, in Summer Session 1776, (see FOREIGN.) the Court disapproved of the above preference given to the prejudice of assignees of the bankrupt estate of a foreigner, and departed from the principle on which that preference is founded.

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 quence of a sequestration awarded pending a process of *cessio*, and prior to the bankrupt-act, 1772, found effectual.

David Cross, merchant in Glasgow, and George Young and William Cheap, merchants in Edinburgh, were appointed factors by the Court in 1767; but Messrs Cross and Young, with the concurrence of the creditors, afterwards granted a commission to William Cheap, empowering him to act as sole factor.

Thereafter, a submission was entered into by Miller and his creditors, and David Loch among the rest, to Mr Ludovick Grant, for the purpose of determining all disputes, ranking the creditors upon the funds, and dividing the same. Mr Cheap, however, was still continued factor.

In the course of the submission, David Loch produced sundry vouchers of debt due to him by Arthur Miller; and Messrs Cross and Bogle produced the vouchers of a debt due to them by David Loch, with an arrestment used at their instance, 21st September 1770, in the hands of Mr Cheap, the factor for the creditors; and,

Upon the 29th October 1773, Mr Grant pronounced his decree-arbitral, by which he found that the share of Arthur Miller's effects, belonging to David Loch, was L. 82 : 14 : 9 Sterling; which sum he decreed the factor to pay, with legal interest from Whitsunday 1773; but found that the said David Loch must purge the foresaid arrestment before drawing the dividend, and reserved to Messrs Cross and Bogle to insist for making the sum forthcoming to them, as accords.

Some time previously to this, David Loch did also become bankrupt; and, in August 1773, a sequestration, in terms of the late statute, was awarded upon the application of his creditors; John Moir, writer to the signet, being appointed factor; and Mr John Hay being afterwards appointed trustee, he granted a factory in favour of Mr Moir.

Soon after Mr Grant had pronounced his decree-arbitral, a multiplepinding was brought in the name of Cheap, the factor on Miller's sequestrate effects, in which Mr Loch, and the trustee for his creditors, Cross and Bogle, were called as defenders.

The argument maintained on the part of Mr Moir the factor, was, That the arrestment founded on by Cross and Bogle is inept, as having been used not in the hands of Arthur Miller, the debtor to the common debtor, but in the hands of Mr Cheap, the factor; and, consequently, could not be sustained in a competition of this nature.

*Answered* upon the part of Cross and Bogle:—They have no occasion to maintain that an arrestment in the hands of a factor, properly so called; that is, of a servant or other person, employed to collect the rents of a particular estate, or to receive the proceeds of a particular subject, is to every purpose equally effectual with an arrestment used in the hands of the constituent. The case here is, that, during the dependence of the *cessio bonorum*, the creditors applied to the Court, and obtained a sequestration of the effects of Arthur Miller. In consequence of this, he was totally denuded of the whole moveables in his possession; every debt due, and every claim competent to him, were effectually vested in the person of the factor suggested by the creditors, and appointed by the Court. The effects were scarcely sufficient to pay half a crown in the pound to the cre-

ditors. Arthur Miller had no claim upon the effects; and it will not be said that he could have dismissed the factor, taken the management from him, vested it in another, or assumed it himself. An arrestment, therefore, in the hands of the bankrupt himself, were totally inept, and can answer no manner of purpose. Unless, therefore, it can be maintained, that there is no method known in law by which the dividend due to a creditor can be affected, it must be admitted, that an arrestment is effectually used in the hands of the judicial factor named by the Court, as the only other person in whose hands an arrestment can be laid.

The pursuer here of the multiplepointing is not a factor, or steward, or trustee, with powers limited to the rents of a particular estate, as in the case of *Campbell contra Faichney*, which is that quoted by Mr Erskine, B. 3. t. 6. 34. from Faculty Collection, l. 44. No. 74. p. 742. but he is a general commissioner named by this Court, with powers of the most comprehensive kind, extending to the whole effects of the bankrupt. And if, by the rules of law, as admitted on the other side, an arrestment be sustained in the hands of a commissioner named by a private person in contradistinction to a mere factor, it seems to be a clear point, that an arrestment must be equally effectual, when used in the hands of a factor named by the Court, with powers as comprehensive as those of any commissioner. Thus, in a case observed by Home, 4th July 1738, *Lockwood contra Willon*, No 68. p. 736. an arrestment in the hands of the clerk of Court, with whom money had been consigned, was not only sustained, but it was preferred to an arrestment used in the hands of the consigner.

'The Court adhered to the Lord Ordinary's interlocutor preferring Cross and Bogle, upon their interest produced, to the sums in the hands of the raiser of the multiplepointing.'

Aff. G. Fergusson.

Alt. Al. Abercrombie.

Clerk, Campbell.

Wallace, No 161. p. 41.

1780. February 25.

JOHN GRIERSON against JOHN RAMSAY.

JOHN DICKSON, for behoof of his creditors, conveyed his heritable estate to a trustee; and in a deed of accession to this conveyance all his creditors concurred. But the trust-right did not specify the debts, nor was the trustee infest.

One of these creditors was Ebenezer Hepburn; to whom, again, Grierson was a creditor.

After the trust-conveyance, but before the trustee had proceeded to sell those subjects, Grierson laid an arrestment in his hands; and, when the sale was over, insisted in a process of furthcoming. In this action he was opposed by Ramsay, in the character of trustee for the creditors of Hepburn, who had likewise become bankrupt; Ramsay objecting that the arrestment was inept, *first*, because it had not been used in the hands of the common debtor himself, but only of his trustee; and, *2dly*, because no moveable effects remained at the time in the trustee's pos-

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Arrestment, the habile diligence for affecting the price of heritable subjects in the hands of a trustee for creditors.