

1701. July 22.

MR ROBERT BLACKWOOD *against* The EARL of SUTHERLAND.

MR ROBERT BLACKWOOD pursuing a furthcoming against the Lord Strathnaver and John Watson for his interest, *alleged* the arrestment was executed against him when he was in his Majesty's service in Flanders with the army, and never came to his knowledge, and he paid the debt before the raising of the furthcoming.—*Answered*, Our law knew no other form to certiorate Scotsmen abroad, either as to arrestments or citations of summonses, but only by executing them at the market-cross of Edinburgh, and pier and shore of Leith; and it was never pretended for an excuse that he never heard of it; for if that were sufficient, then persons abroad could never be pursued, and all edictal citations would be ineffectual and null, and would cut off a branch of our law.—THE LORDS repelled the defence, and sustained the arrestment.

December 16. 1703.

JOHN WATSON being debtor to Mr Robert Blackwood in considerable sums, and the said Mr Robert being informed, that the Lord Strathnaver, now Earl of Sutherland, owed some money to the said John Watson, and my Lord being then abroad with his regiment in Flanders during the late war, Mr Robert, by an edictal arrestment at the market-cross of Edinburgh, and pier and shore of Leith, on sixty days, arrests all sums due by him to John Watson, and thereon pursues a summons of forthcoming on letters of supplement, and obtains a decret against him, he being still abroad; whereupon the Earl being charged, he suspends, on this reason, That the said edictal arrestment never came to his knowledge, nor was it intimated to him; but since he came home he has made payment of what he owed to John Watson, which must exoner him, that never being sufficient to put him in *mala fide*, which he could not possibly know; and Mr Blackwood ought either to have sent a procuratory and commission to the magistrate of the place where he staid, to certiorate him of the said diligence, (as is the practice of England, *quoad* any going out of that kingdom,) or intimate the same to him immediately on his return; which he having neglected to do, *sibi imputet*: And whatever effect such an arrestment may have in a competition with other arresters, it were most unreasonable to make the party liable, where the subject arrested is not extant, but he has *bona fide* made payment, knowing nothing of the arrestment; neither can any be holden as confessed, upon such citations, as is marked by Dirleton, 21st June 1672,\* 5th February 1675,† and 4th July 1676, Buchanan and Logie‡; which last decision is also marked by Stair, who observes they will be more easily reponed to their oaths, as to what was in their hands the time of laying on the arrestment, if they crave it; and there is neither law nor custom giving an edictal arrestment that force to put me in *mala fide* to pay when it never came to my knowledge.—*Answered*,

No 25.  
An arrestment being laid in a person's hands, in the common edictal way, when he was beyond seas in his Majesty's service; and he having paid the debt before the furthcoming was raised, the arrestment never having come to his knowledge; yet this defence was repelled, and the arrestment sustained.

\* Dirleton. p. 69. Ferguson, *voce* EXECUTION.† Dirleton, p. 117. (A. against B.) *voce*

EXECUTION.

‡ Dirleton, p. 181; Stair, v. 2. p. 437. *voce* PROCESS.

No 26.

Where parties are out of the country, our law and practice hitherto knows no other way of summoning them, but by edictal citations at the market-cross of Edinburgh, as the *communis patria* for all Scotsmen, and the pier and shore of Leith; and thus hornings, inhibitions, adjudications, arrestments, and all other diligences, have been executed against parties out of the kingdom, and our law knows no other remedy; neither did any Scots lawyer ever advise his client to direct letters to the magistrates of the place where he stays abroad, to certiorate them, being both a novelty and uncertainty where to find them, besides the vast expence. And foreign lawyers are clear in the point: Berlichius, in his *Conclusiones*, cap. 11. says, ‘ Si nesciatur ubi reus degit, vel citationem ad se pervenire impediatur, vel alias ex justa causa absit, tunc impune ad edictalem citationem pervenitur.’ And Gayl, lib. 1. observ. 56. num. 3. et observ. 57. num. 12. determines ‘ quod effectus hujus edictalis citationis perinde citatum ad comparandum arctet, atque personalis citatio, et non comparentem reddit contumacem; et processus qui fieri potest contra personaliter citatum, procedit æque contra citatum per edictum.’ And this is likewise our law, as appears from Stair, b. 4. tit. 3. tit. 38. and tit. 47.; and parties going out of the country, ought to establish a factor and fix a domicil where they may be convened; and if they do not, they must take their hazard of that general citation, law obliging creditors to no more. And George Dallas of St Martin’s, in his book of Styles, gives us the form of the letters of supplement on such edictal arrestments; and if there be inconveniencies to parties who ignorantly may pay, this can be regulated by an act of sederunt for the future; but as to this case, it must be judged by the constant by-gone practice; and if this were found insufficient by the Lords, hundreds of diligences of that kind, against parties out of the kingdom, would fall in consequence, and be subverted. Some proposed that my Lord Sutherland should first depone, what he had in his hand when the arrestment was made, and when he paid Watson, whether by his factors, when he was abroad himself, or after his return, and how soon after, to find out if he was in *mala fide* or not; but though all agreed to repon him to his oath, yet the LORDS thought fit to determine the general point of law for ascertaining the lieges, as to the import of such diligences, and, by a plurality, found these edictal arrestments orderly and legal. See LEGAL DILIGENCE.

*Fol. Dic. v. 1. p. 113. Fountainball, v. 2. p. 121. & 201.*

\* \* The same case is reported by Dalrymple :

MR ROBERT BLACKWOOD, being a creditor to John Watson, raises hornings, containing arrestment; and the Earl of Sutherland being abroad, he also raises letters of supplement, and thereupon arrests in the Earl’s hands, by executions at the market-cross of Edinburgh, pier and shore of Leith, and pursues a forthcoming, wherein the Earl is holden as confest; but coming home before extract, he applies, and alleges, That what he owed to John Watson was *bona fide*

paid by him, not knowing of any such arrestment; and that, in law, no arrestment could be laid on, but personally, or at the parties dwelling-house; and that an arrestment by a supplement, at the market-cross of Edinburgh, and pier and shore of Leith, might subsist as a stop of diligence in competition with posterior arresters, but could never put the party, in whose hands the arrestment was laid on, in *mala fide*, in case of payment, before he was certiorate; and the Lords, upon the 5th day of February 1675, as is observed by my Lord Dirleton,\* 'found, That a warrant could not be granted to cite a party out of the country, at the market-cross of Edinburgh, with certification, that he should be holden as confest.' And the reason is, because no man being understood, or legally obliged to know of such citations, he cannot be held as contumacious for not answering; for a party is holden as confest upon his contumacy, in not comparing when legally certiorated; and, for the same reason, no arrestment executed against a party out of the country, can render him in *mala fide* to pay.

It was *answered*: There is a known style of letters in supplement, for arresting at the market-cross of Edinburgh, pier and shore of Leith, and for citation in summonses against parties out of the country, in the same way, *pro confesso*. And as to the other practick, 5th February 1675, observed by my Lord Dirleton, the same is not noticed by my Lord Stair, who observed the decisions at the same time: But there is a contrary practick marked both by my Lord Stair and Dirleton, the 4th of July 1676,\* where the Lords found, 'That a person out of the country, cited at the market-cross of Edinburgh, &c. and holden as confest, if he were living, and desired, might be reponed;' which imports, if not living, or not desiring to be reponed, the decreet stood good; and it is also marked, that a commission would be granted, if desired; and the reason is, that a party going out of the country is presumed and obliged to leave a procurator: And, if it were not so, creditors would be often mightily disappointed; for debtors breaking, do frequently withdraw out of the kingdom; and if executions at the market-cross, &c. were not allowed, their moveables could not be affected by arrestment, nor debts constituted by oath; and, for the same reason, hornings could not be executed at the market-cross, &c. nor any denunciation follow for contumacy. And, whereas it is alleged, that such execution might proceed as a step of diligence for ranking of creditors; it was answered, That supposing, as is pretended, that such executions were not legal certiorations to the parties, they could have no effect at all; for the ground of preferring such a creditor is the legal execution against the party, intimating and making known to him the creditor's diligence; for the law infers a presumption and obligation upon parties to know what is legally done, though the diligence never came actually to their knowledge, as it often happens in executions at their dwelling-houses, which are effectual in arrestments; and whatever is competent to be objected by the party against a prior arrester, is with greater favour competent to a posterior arrester competing.

\* See Note, p. 1793.

No 26.

Upon this debate, some of the LORDS proposed, That the Earl might depone before answer, what was in his hands the time of the arrestment, and when paid, that the whole matter of fact might be under their consideration ; but, in regard the case was of general concern, and that it was important for creditors to know how they might prosecute their diligences in such cases, which do frequently occur ; therefore the Lords thought more proper to determine the point in law.

THE LORDS repelled the defence of *bona fide* payment, after the arrestment at the market-cross of Edinburgh, &c. ; and found, That the arrestment did legally affect all sums that were then in the Earl's hands, and reponed him to his oath.

*Dalrymple, No 41. p. 52*

1713. June 12.

MR JOHN STUART of ASCOG, BAILLIE HOPE, and Other Creditors of the deceased James Muirhead of STEVENSON, *against* The EARL of ORKNEY, and WILLIAM HAMILTON of Wishaw.

No 27.

A person who had received money from a person holding English letters of administration, was found to have been paid *bona fide*, in competition with creditors regularly confirmed executors in Scotland, although the letters of administration had been improperly taken out.

ASCOG and others confirmed before the Commissaries of Edinburgh executors *qua* creditors to James Muirhead who died in Flanders, pursued the Earl of Orkney, as having intromitted with their debtor's money, and the Laird of Wishaw who received it from the Earl.

*Alleged* for the Laird of Wishaw : He cannot be obliged to repeat or pay back the money : Because, *1mo*, He, as creditor to James Muirhead, had, by virtue of letters of administration from the Prerogative Court of Canterbury, uplifted the money from the Earl of Orkney, residing in England, as Colonel of an English regiment, before the pursuer's confirmation in Scotland. And James Muirhead having died an officer in a regiment under English pay, in a foreign country, without having *larem & focum*, or any effects in Scotland, (whereby he had changed his *domicilium*), there was no other way to affect the money which he left behind him, but by administrating to him conform to the law of England. *2do*, An administration in England being a title of intromission, equal to a confirmation in Scotland, February 1687, Elliot of Dunlabyres *contra* Dryden \* ; and the defender being *prior tempore* in diligence, is *potior jure* : But again, *3tio*, Whatever might be said were the money still *in medio* unuplifted, yet after the defender, invested with a lawful and effectual title, hath *bona fide* uplifted the money, and got payment, it were strange to make him refund it, *qui suum recepit* ! And as, by our law, an executor, though not *qua* creditor, uplifting the defunct's money, may exhaust the same by debt due to himself before the confirmation, merely *exceptione compensationis*, Stair, Instit. tit. Exe-

\* See SERVICE and CONFIRMATION.—FOREIGN.