

other heritable subjects belonging to him ; and therefore reduced the rights in the person of Elizabeth Ross ;” adhering to Lord Kennet’s interlocutor.

*Act.* A. Lockhart. *Alt.* D. Rae.

1771. *April* 10, 11. Affirmed on appeal.

1770. *March* 8. THOMAS SCOTT *against* SIR THOMAS FLUDYER and COMPANY.

#### ARRESTMENT.

An arrestment at the Market-cross of Edinburgh, Pier and Shore of Leith, against the common debtor’s debtor, a Scotsman, living abroad, found ineffectual, as the money had been afterwards, *bona fide*, remitted to the common debtor, in ignorance of the arrestment.

[*Faculty Collection, V. p. 80 ; Dictionary, App. I. Arrestment I.*]

MONBODDO. I understand that arrestment gives a *nexus realis* : It was so determined in the case of *The Earl of Aberdeen*, 1738. An argument there used was thought conclusive—that an arrestment in the hands of the defunct was preferable to a confirmation by the heir. Suppose a *corpus*, such as a quantity of tobacco, arrested in the hands of Tait, and that the *corpus* should come into the hands of Marshall, agent for the creditors, and be there arrested, the arrestment in the hands of Tait would be preferable. If you once hold that there is a *nexus realis*, suppose the agent to convert the *corpus* into money, the case would be the same, if there is such a thing as a *surrogatum* in law. The only difference between the supposed and the real case is, that a bill was sent instead of goods.

JUSTICE-CLERK. An arrestment at market-cross, pier, and shore, is a valid diligence against all Scotsmen, and may be made effectual ; but I would be sorry that it should have any effect before it came to his knowledge. Here Tait knew nothing of the arrestment, and, therefore, cannot be liable in second payment. If Tait had sent cash, and Herries had given it to his agent upon bond or note, would not this have discharged Tait and constituted an obligation against the agent ? Such is the case here. The two arrestments are not *ad idem*. Scott’s arrestment in the hands of Tait will not carry money in the hands of Marshall.

PITFOUR. If arrestment at pier and shore is good, then all Lord Monboddo’s argument is demonstration. Here the subject is still extant : action lies against Tait for breach of arrestment. Tait’s defence is, I sent the money home *bona fide*, not knowing of the arrestment. The arrester may answer, All this is well ; but you have an action of forthcoming against Marshall : the debt is still *in medio*. I can force you to assign to me that I may chase the money, into whose

hands soever it comes. I must hold the subject assigned ; because the party in whose hands it is, is in process, possessed of the subject.

COALSTON. This seems to carry the effect of arrestment farther than ever carried. Arrestment at pier and shore has the same effect in competitions as arrestment in the hands of the debtor. Arrestment obliges to make forthcoming : it gives a *nexus realis* while in the hands of the arrestee. In the *Earl of Aberdeen's* case, arrestment was found effectual even against the heirs of the arrestee. If we go farther, where shall we stop ? If arrestment gives any further *nexus realis*, it will follow that, had Tait sold the subject, it might have been repeated from the buyer. The moment that the money comes into the creditor's hands, the arrestment will be ineffectual : Here the same thing occurs ; for the money was put by Herries, the creditor, into the hands of Marshall. Suppose this money had been paid to a creditor, will it be said that it might still have been repeated ? This would be to introduce a new and unknown hypothec into the law.

PITFOUR. The money coming out of Herries's hands would not disappoint the arrestment.

AUCHINLECK. Had the goods remained in Tait's hands, the arrestment would have been good ; but Tait paid, and there is an end of the arrestment. My brother talked of a *nexus realis* : are we to examine a bag of money like an heritable estate, and trace the progress of it through fifty hands ?

PITFOUR. The error of the argument lies in this, that it is supposed that a debtor pays by giving an order to pay.

PRESIDENT. I should be diffident of my opinion, when one of my brethren (Pitfour,) delivers a contrary opinion with so much perspicuity, and another (Monboddo,) with so much positiveness. The arrestment in Tait's hands is good, from considerations of expediency to commerce : an arrestment, in a person's hands, prohibits him from alienating to the prejudice of the arrester, under the penalty of breach of arrestment. In the case of *Lord Aberdeen*, the subject was considered either to be *in hæreditate jacente* of the trustee, or *in medio* in the hands of the heir, the representative of the dead arrestee. This was found to be an effectual *nexus*, in order to preserve the effect of legal diligence. The argument is erroneously stated in the Dictionary, for there was no mention of *nexus realis* in the argument. It was the first cause that I ever argued ; and, being young and keen, I was much interested in the decision, and remember its circumstances. After Tait had paid *bona fide*, how can a *nexus* subsist ? This would be establishing a *jus hypothecæ*.

PITFOUR. Though Tait paid *bona fide*, he still had action against Marshall not to put the money away.

GARDENSTON. My idea of the effect of an arrestment is this, that it gives a right to make forthcoming wherever the subject is to be found.

JUSTICE-CLERK. But here is a *medium impedimentum*,—the arrestment by Sir Thomas Fludyer in the hands of Marshall.

On the 8th March 1779, " The Lords preferred Sir Thomas Fludyer in the arrestment in the hands of Marshall ;" adhering to Lord Elliock's interlocutor.

*Act.* A. Lockhart. *Alt.* H. Dundas.

*Diss.* Pitfour, Gardenston, Monboddo.

Pitfour was uncommonly earnest in this case, replying upon every body ; and yet the more I reflect upon the decision, the more I am convinced of the justice of the decision. Monboddo told me, that the subject was not *in medio* while in the hands of Herries, but became *in medio* as soon as Herries put it in the hands of Marshall.

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1770. *January 25, February 13, and March 8.* MANSFIELD, HUNTER, &c. *against* DONALD MACILMUN.

BILL OF EXCHANGE.

Privilege of an Onerous Indorsee.

[*Faculty Collect. V. 85 ; Dictionary, Appendix I. ; Bill of Exchange, No. 2.*]

COALSTON. The remedy proposed by the chargers is worse than the disease. To rest upon the oath of the holder is too much,—an oath *ex parte* where the creditors are not parties. I do not see how the holder, deponing *negative* as to the whole, could afterwards be examined upon special interrogatories. Were caution offered to account with the creditors, the bill might be refused.

PITFOUR. This matter of discounting bills is of great moment to trade, and necessary for its existence. When there is no bankruptcy of any intermediate person, there can be no occasion for suspension ; for, unless in case of such bankruptcy, arrestment can have no effect. Here the bill was indorsed seventy days before the bankruptcy ; and, consequently, no pretence of the Act of Parliament 1696.

ELLIOCK. If we were to lay down rules as to the discounting of bills, &c. it would be *altioris indaginis*. Here is a notour bankruptcy. A bill is indorsed by the bankrupt before it is due. His creditors arrest. The acceptor can know nothing of the connexion between the bankrupt and the holder of the bill. He properly brings a multiplepinding, and suspends. The persons interested in the oath proposed to be taken by the holder, are the arresters. And they are not in the field until the multiplepinding is called.

AUCHINLECK. I am no favourer of this kind of security. If all dealers in bills were like Mansfield and Hunter, there would be no danger. This, however, is not the case. And, as matters now stand, a bankrupt, according to the charger's argument, has nothing to do but to get a good swearer to hold his bills ; and thus one dishonest man colluding with another may cheat the whole nation.

PRESIDENT. I am always afraid of determining upon general questions of commerce, where one has a natural bias. The benefit of defence against payment to the holder must accrue to the arrester. There is no *mora* here on the