

1775. December 6. WILLIAM SCOTT *against* JOHN CARMICHAEL.

CAUTIO JUDICIO SISTI ET JUDICATUM SOLVI.

A summary warrant cannot be issued at the instance of one foreigner against another, when transiently in this country, to the effect of obliging him to find caution *judicio sisti* in relation to a foreign debt.

[*Faculty Collection, VII. p. 143; Dictionary, 2057.*]

COALSTON. The pursuer is a native of Scotland. He cannot lose his right of a native by a temporary residence in England: but it matters not whether he is a Scotsman or an Englishman. The 4th article of the treaty of Union provides, that there shall be a communication of all rights, privileges, and advantages between the two nations; and it would be strange if the rights of Englishmen should be regulated by our law, and those of Scotsmen by another. Still the question comes to the legality of the warrant. It may be justified on two grounds, *1st*, As being against a stranger having no domicile; *2d*, As being against one *in meditatione fugæ*. No judge has power beyond his territory; but every judge has power over persons and things within his territory. Lands found a jurisdiction, because they are fixed: moveables also found a jurisdiction *ab initio*,—the arrestment of them is only to make that jurisdiction effectual. When the person of a foreigner is found in this country, that very circumstance subjects him to the law of this country. He may be tried for a crime; he may be compelled to give witness; his person also may be arrested. Voet, and indeed all the commentators agree, that arrest of persons, as well as on goods, may be used in order to make jurisdiction effectual. It is true that, in Scotland, a man cannot, in general, be apprehended without a decree and a charge; but there is an exception whenever there is a hazard of the debtor going out of the jurisdiction: on this the Border warrants and the practice in the Admiralty Court are founded. Necessity renders this lawful. To begin with apprehending the person, there is always a presumption that a stranger means to leave this country: here the presumption is strengthened by legal evidence,—the oath of the creditor and of his attorney.

MONBODDO. It matters not whether the creditor is a foreigner or not, providing that the debtor is subjected to our jurisdiction. Every stranger is subject to the jurisdiction of the law of the country where he is; but it will not follow that he is liable to answer for debts. He must perform every part of public service, such as paying taxes, giving evidence, &c.; but it does not follow that he is subject to the jurisdiction of this Court. In matters of debt, the commentators, who have divided *fora* into so many different kinds, never imagined that wherever a man was found, *there* he had a *forum*: that rule would have rendered their divisions in a great measure superfluous. The inconveniency

would be dreadful if an imprisonment, such as the present, were to be found regular.

COVINGTON. It is an absurd idea, that a foreigner may not have action in this country. The law makes no distinction of parties. I would remark particularly the nature of the caution here required; it is to attend all the diets of the Court. Were the debtor to go anywhere else, the creditor might insist to have the same caution. If that is law, *durum*; but I hope that it is not the law either of this or of any other country. All forms of diligence are municipal, and vary in different nations; but this principle still prevails, that he who is attached has his plea entire that he is not liable in the jurisdiction of the Court. This is plain from Voet, *tit. De Judiciis*. If this arrestment is good, the whole creditors of Carmichael may follow the same course, and thus transfer their pursuits for debts from the English to the Scots courts.

KAIMES. Here is an affidavit from one confessedly a creditor, concerning the elopement of a debtor, who is found in very suspicious circumstances. There is also the oath of the attorney on most probable grounds. I think that there was good foundation for the warrant. I distinguish between delinquencies and civil debts. As to civil debts, a foreigner must not be molested; not so as to delinquencies: *here* we must take the delinquency for granted, as the evidence now stands. In the course of the trial it will appear whether the oath was well founded or not.

ALEMORE. There is great latitude of argument on either side of the question. All this dispute about jurisdictions took its rise in times when nations had little commercial intercourse, and considered each other in a light little better than that of enemies. Our notions of foreigners are taken from the Roman law; but I should be sorry to think that we should follow the Roman law in all its niceties. The *forum rei sitæ* is acknowledged. An arrestment renders that jurisdiction effectual. I never could see the distinction between *res sita* and a person: 40 days, it is admitted, would give a domicile: this surely is a narrow notion, for it is merely municipal, and I believe peculiar to ourselves. There is an extraordinary jurisdiction arising from necessity, when by delay the subject might be carried off. If a foreigner is a fair man, he runs no risk. In the first place, it is not probable that any one will attack him; and if he should be attacked, he will have no difficulty to find caution *judicio sisti*. If caution is exacted on the one side, it ought to be exacted on the other, and this will prevent all danger of oppression.

GARDENSTON. I think that we have no jurisdiction here. If Carmichael had a ground of compensation, or evidence of payment, he would be deprived of the means of bringing it here. No man regards the Union more than I do; yet I think it clear that, as to law, the English and we are perfectly distinct, notwithstanding the Union; and so it has been determined in cases respecting the bankrupt laws. A jurisdiction *ratione personæ* is new to me: the Border law is founded on expediency, and reaches not beyond the Border; but if Carmichael is justly detained, there will be no distinction, and the Border law will reach to Inverness. *Mobilia* may be arrested, but then that arrest goes no farther than the value of the subject. Here, the consequence of the arrest goes much farther. At first the caution is *judicio sisti*: but then a decree is taken, and the debtor must either find caution *judicatum solvi*, or go to jail and rot

there. [He attempted an illustration from the case of our own jurisdictions, and he supposed that a Sheriff had no jurisdiction to arrest the person of one subject to the jurisdiction of another Sheriff, when passing transiently through his territory.]

PRESIDENT. Any stranger may sue for justice in Scotland. Every person coming into our jurisdiction is subject to it, and owes a local obedience: but *that* will not resolve the point, for there may be a declinature to prevent the jurisdiction being followed out the length of a decree. A man passing transiently through our jurisdiction is not subject to it the length of execution. This is well expressed, *L. 19, § 2, D. de Judiciis*: A caution *judicio sisti* is in the event *judicatum solvi*. I am therefore clearly of opinion as to the general point. I think, however, that what is said as to one Sheriff not having power to aid another, is erroneous: they ought to aid each other, because they are judges of the same state, and are equally under the Court of Session, who will try the cause in the event. I have some difficulty as to this particular case: there may be a jurisdiction where there is any fraud alleged; but, upon the whole, fraud is not brought home to the prisoner.

ELLIOCK. If the goods may be arrested, why may not the person be arrested? This is the law over all Europe, and no bad consequences arise from it.

On the 6th December 1775, "The Lords suspended the letters, and ordained Carmichael to be set at liberty."

For Carmichael, J. Boswell, A. Crosbie. For Scott, J. M'Laurin, Ilay Campbell.

Diss. Kaimes, Coalston, Alemore, Ellick, Stonefield.

1775. *December 15.* MARY WITHERSPOON and OTHERS, *Petitioners.*

JURISDICTION—TUTOR.

The original trustees named in a settlement had been removed by the act of the Court. Found that the Court could not name new trustees; but they appointed a factor with the ordinary powers, and also with power to bring an action for compelling the trustees to denude.

[*Folio Dict. VII. 153; Dict. 16,372.*]

COALSTON. I doubt how far a factor, with the ordinary powers, can discharge the trust. The trustees, in so far as they were tutors and curators, have been removed as suspect; but they are still vested in the right to the subject. They must be denuded of the right in them, and that can only be done by an action against the trustees for denuding in favour of the constitu-