

It is ordered and adjudged, that the petition and appeal be dismissed, and that the said interlocutor, and affirmances thereof, therein complained of, be affirmed.

For Appellant, *Dun. Forbes. Will. Hamilton.*

Charlotta, Marchioness Dowager of Annandale, - - - *Appellant;* Case 106.

James, Marquis of Annandale, John Baillie, Francis Holliday, and many others, claiming to be Creditors of William, late Marquis of Annandale, deceased, - *Respondents.*

21st March 1723-4.

Forum competens—Jurisdiction.—The Marchioness of Annandale, residing in England, being appointed executrix for behoof of her children, proves the late Marquis's will in England: various personal creditors of the late Marquis, arrest in the tenants' hands, a jointure payable to the executrix out of the Scots estates: the Court of Session having ordered her to purge the arrestments, before she drew her jointure: the judgment is reversed, and it is ordered that the arrestments be loosed without caution or consignation.

AFTER the determination of the appeal relative to the jointure or life-rent of 1000*l.* sterling, between the appellant, and the respondent the marquis, on the 15th of December 1722, the appellant returned to the Court of Session to have that judgment of the House of Lords applied in her favour. What arose out of the proceedings had thereupon gave rise to the present appeal.

The late marquis, by a will executed on the 29th of December 1720, but a short time before his death, nominated the appellant his executrix and universal legatee in trust for the behoof of their son Lord George, then born, and of any other children that might be procreated between him and the appellant, with a proviso, that the appellant's right of administration should continue only during her widowhood, and after her marriage devolve upon such persons as he should appoint for the sole use of his said children; and it was also declared, that the executrix should be bound to pay all his lawful executry and personal debts, in which Lord Johnstone, his eldest son, was not bound, and which were contracted since the 1st of April 1690, the date of his tailzie. The appellant proved this will in the prerogative court of Canterbury, and possessed herself of the testator's personal estate to a considerable amount. Several of the respondents, stating themselves to be creditors of the testator for debts contracted in Scotland, since April 1690, exhibited their bill in the Court of Chancery against the appellant for discovery of assets, and satisfaction of their claims. To this bill the appellant put in her answer; and afterwards filed a cross bill against the present

H h 2 marquis

marquis and the plaintiffs in the original bill, for a discovery of the reality of their debts.

In this state matters were when the appellant, in terms of the said judgment of the House of Lords, 15th December 1722, applied by petition to the Court of Session, to have proper diligences directed for payment of the arrears of her annuity of 1000*l.* with interest, and of the future payments, yearly and termly as they should fall due. This petition was remitted to the Lord Ordinary, to hear parties thereupon; and before him the counsel for the present marquis, stated, that the arrears of the life rent were arrested in his hands by several persons claiming to be creditors of the appellant, as executrix of her late husband for large sums of money. The Lord Ordinary gave a decree for poinding of the ground, until the appellant should be paid off her life-rent annuity in terms of the order and decree of the House of Lords; but “superfeded extract until the said arrestments were purged.”

The appellant reclaimed to the Court, stating, that she had proved the will in England only, and possessed the assets in that country, and never intromitted with any of the effects of the late marquis in Scotland, where the present marquis had been confirmed executor to his father, and had taken possession of the personal estate; and insisting that she was not liable to account in Scotland for the English assets; and that her life-rent annuity ought not to be stopped by these arrestments; and therefore praying that the arrestments might be loosed without caution or consignation. The marquis and the creditors made answer, and the Court, on the 13th of February 1722-3, “adhered to the interlocutor of the Lord Ordinary, and refused the desire of the petition.”

The appellant afterwards brought an action before the Court of Session against the said arrestors, and all the other creditors of her late husband whom she could discover, for reducing the arrestments, and concluding that it should be declared, that her said life-rent annuity was not arrestable at the suit of any creditor of the late marquis, nor the appellant as executrix in trust for her children liable to be sued, or to account in any court in Scotland for the personal estate come to her hands in England. To this action the creditors made defences; and the Court, upon hearing the cause, on the 26th of December 1723, “sustained the defences made for the defenders, and found the arrestments on the dependance sufficiently warranted.”

The appeal was brought from “two interlocutors of the Lords of Session of the 13th of February 1722-3, and 26th of December thereafter.”

Heads of the Appellant's Argument.

All executors, especially those in trust, ought to be sued, either in the country where they reside, or where the estate, which is the subject of their administration, lies, and where the will is proved. The appellant has no residence in Scotland; she only proved the will and possessed the estate in England; she ought

not therefore to be sued to account for that estate in any court of Scotland.

Although by the course of proceedings in Scotland, a creditor suing his debtor for his own proper debt, may arrest such debtor's own effects: yet it cannot be maintained, that the proper effects of an executor, or what he has in his own right, can be arrested upon a pending suit for the debt of the testator; at least not till such debt can be established, and a judgment recovered, finding the executor has effects sufficient to answer the defunct's debt. Were this otherwise, an executor might by arrestments be deprived of the use of every part of his own estate, till he had accounted with every single creditor, and that possibly in successive suits for the effects of the deceased, which in the appellant's case would be almost endless.

The creditors themselves appear convinced that Lord George and Lord John Johnstone, the appellant's sons, ought to be made parties in any suit carried on against her for her accounting for her late husband's effects, and have named them accordingly as parties in the suits below: but since her sons have neither residence nor estate in Scotland, and cannot be sued in that country, no suit can be carried on there against the appellant, to which they must necessarily be parties (*a*).

Since the appellant cannot be lawfully sued to account in Scotland, her jointure cannot be arrested on pretence of any such pending suit, which never can be lawfully brought to an issue.

If such proceedings be allowed, and the said decrees be affirmed, the appellant may be sued by multitudes of creditors both in England and in Scotland, to answer to each of them the same sums, which might produce directly contrary decrees, not only the jurisdictions, but the rules of administering personal estates, being entirely different in the two kingdoms. By these means, the appellant might be decreed, without remedy, to pay the same assets and effects, to two different persons, and without a possibility of bringing the different claimants into a court having a jurisdiction over both parties; and in the mean time her jointure must remain perpetually arrested, or she must submit to pay the same sums twice over.

The appellant in the mean time has by these arrestments been kept out of her jointure above three years, been harassed with many suits, and left destitute of any means of subsistence. By her answer to the bill Chancery, it appears that the whole personal estate come to her hands amounts only to 4778*l.* 9*s.* 9*d.* Out of this she has paid 2316*l.* 18*s.* 10*d.* and she is sued for a debt on bond of 2000*l.* of principal besides interest.

Heads of the Respondents' Argument.

By the law of nations, wherever a person or his effects are found, they are subject to the laws of the country; and by the

(*a*) One of these sons became afterwards Marquis of Annandale, and in a decree pronounced by the Court of Chancery (in the important question with regard to his domicil) it was found that he was originally domiciliated in England.

undoubted law of Scotland, any creditor may arrest the effects of his debtor or of any one against whom he has commenced an action. If an executor apply assets towards paying the debts of his testator wheresoever they are due, it will be a discharge to him wheresoever he is to account. In Scotland actions are daily brought against persons living out of the kingdom, and their effects arrested upon such actions; but those arrestments are always loosed upon finding surety to answer to the value of the thing arrested, in case the defender be cast in the action: By the law of Scotland, all pleas and defences competent to the defender are entirely reserved to him against the action, in like manner as is practised in England, where a person is arrested before proof made of the debt.

It matters not, whether the appellant be executrix for her own benefit, or for that of the children, because the creditors are to be discharged before any legacies be paid; and in case she had applied any part of the assets to the use of her children before paying the debts, she would be obliged by the laws of all nations, as well as those of England and Scotland, to answer the same out of her own estate.

The creditors, who contracted with the late marquis in Scotland, are most solicitous to carry on their suits in their own country, where the forms are short and the expences small; and they demand no more than that the appellant account for what remains of the personal estate in her hands, not already applied to the payment of debts.

The condition of the creditors would be extremely hard, if they were to be disappointed of this fund of the personal estate which is allotted by the testator for their payment, for the creditors can have no recourse against the present marquis upon the real estate, which he possesses by virtue of an entail in 1690, prior to their debts, which therefore cannot be charged upon him, and which was the reason which moved the late marquis to make this express provision for them in his will out of his personal estate.

After hearing counsel, *It is ordered and adjudged, that so much of the said interlocutor of the 13th of February 1722-3, and of a former interlocutor thereby referred to, as supersedes extract of the decree for distress, till the arrestments be purged, and also the said interlocutor of the 26th of December 1723, be reversed; and it is further ordered that the decree for poinding of the ground be forthwith given out by the proper officer, and put to execution, and that the arrestments in question be loosed without caution or consignation, and that the Lords of Session do give such further directions as shall be just pursuant to this order.*

For Appellant,	<i>P. Yorke.</i>	<i>Ro. Dundas.</i>
For Respondents,	<i>G. Talbot.</i>	<i>Dun. Forbes.</i>

Judgment,
21 March,
1723-4.