

Robert Maxwell, the trustee, effecting to the debt due by Dickson to Ebenezer Hepburn. No 84.

Lord Ordinary, *Gardenston*.

For Ramsay, *Crosbie, Corbet*.

For Grierison, *Ilay Campbell, Alex. Fergusson*.

*Eql. Dic. v. 3. p. 41. Fac. Col. No 108. p. 203.*

Stewart.

1784. December 11. ROBERT DAVIDSON against DANIEL MURRAY.

DUNCAN MACFARLANE sublet a house, of which he was the tenant, to Peter Wilkie, for a definite period; and, along with the house, he let the greatest part of the furniture, which was his own property. On Macfarlane's removal, accordingly, Wilkie entered into the sole and exclusive possession of the house and of the furniture.

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Not competent to attach by arrestment, household furniture in the occupation of a third party.

Davidson, a creditor of Macfarlane's, arrested the furniture as in Wilkie's possession; and a sequestration of Macfarlane's effects was likewise awarded; but this happened more than thirty days posterior to the arrestment. A competition, however, ensued between Davidson and Murray, factor under the sequestration, which depended on this point, Whether or not the above arrestment was a habile and effectual diligence.

THE LORD ORDINARY found, That arrestment in this case was an improper and inept diligence; and therefore preferred the factor.

In a reclaiming petition it was *pleaded*, All moveable effects of a debtor must be subject to the diligence either of arrestment or of pouding. The operation of the last is an immediate and complete transference of property; and, by consequence, the proprietor's right of possession is here presupposed. The forms, too, by which this diligence is executed, indicate the same idea; there being essential to these, the assuming of possession, and the carrying of the goods to the market-cross. For to deprive, either during a longer or a shorter period, of a possession which he holds by legal right, any one man for the debt of another, whether the proprietor or not, would be a violation of justice. As this arrestee, then, had such a title to the exclusive possession of the subjects in question, it follows, that here pouding could not take place.—Arrestment, on the other hand, is undoubtedly the proper diligence to attach moveable effects, whether fungibles, as money, or *ipsa corpora*, while in the possession of third parties. It has indeed been questioned, whether they could be arrested in the hands of a mere depositary, since he might not be deemed to hold the proper possession; but, even in that case, this diligence was found competent; 10th December 1760, Creditors of Appin, No 79. p. 749. An incongruity has been figured to arise in the arrestment of household-furniture, from the embarrassment to which the temporary occupier of a room in another person's house might be thus exposed; and it has been likewise said, that,

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on the same principle, a traveller might be made the arrestee of his post-chaise. But it was not perceived, that, in those instances, the possession, not transferred to the temporary occupier, would still be held by him in the right of the owner.

The Court were of opinion, That pointing was the only proper diligence in this case, though it could not have its full effect before the right of possession expired; but that the temporary infringement of that right, being essential to the form of execution, was to be submitted to.

THE LORDS therefore refused the petition without answers.

Lord Ordinary, *Gardenston.*

For Petitioner, *W. Stewart.*

Alt. *A. Burnet.*

*Fol. Dic. v. 3. p. 42. Fac. Col. No 182. p. 286.*

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Arrestment used in the hands of the owner of an estate under judicial sale, competent to attach the money due to the agent employed in bringing that process.

1784. *December 24.* ROBERT DUNDAS against ALEXANDER ALIFON.

JOHN IRVING was employed by the pursuer as agent in a process of ranking and sale of the estate of David Blair; another person was named factor under the sequestration; and a third appointed common agent in the ranking.

Dundas and Alifon were both creditors of Irving. In order to attach the debt contained in Irving's account, Mr Alifon laid arrestments in the hands of Mr Blair, the proprietor of the estate, and likewise in those of the common agent. Afterwards, Mr Dundas, for the same purpose, used an arrestment against the factor under the sequestration, and obtained an assignation from the common debtor. A competition thus ensued between these two creditors, Mr Alifon claiming preference from his prior arrestments, while Mr Dundas contended, that they were inept, not having been directed against the proper parties; but that his arrestment, as well as his assignation, was effectual, a judicial factor being vested with more ample powers than an ordinary factor or commissioner.

The case was reported to the Court, who considered the proprietor of the estate under sale as the debtor to the agent, and consequently that the arrestment in his hands was the only effectual one. It was observed too, that no distinction could be made between the case of a common, and that of a judicial factor.

THE LORDS therefore preferred Mr Alifon to the sum *in medio.*

Reporter, *Lord Braxfield.*

For Dundas, *Solicitor General.*

For Alifon, *Corbet.*

Clerk, *Orme.*

*Fol. Dic. v. 3. p. 43. Fac. Col. No 191. p. 301.*

*Stewart.*