

1808. *January 26.*

TOPHAM, DAVIES, and MISSES JARRATS, and JOHN WHITE, their Mandatory,
against THOMAS HAY MARSHALL.

ON the 2d June 1796, Mr. Thomas Hay Marshall raised letters of inhibition against Mrs. Rose Anderson, his wife, which were duly published, and executed against her on the 22d of the same month at the market-cross of Perth, the head burgh of the sheriffdom within which she then, and for many years before and after, resided. Previous to this date, a process of divorce had depended between these parties; an aliment of £100 Sterling had been modified to Mrs. Rose Anderson, and she had lived in a state of separation from her husband, but the marriage was not dissolved by sentence of divorce till the year 1804. Thus separated from and inhibited by the defender, Mrs. Rose Anderson incurred with the pursuers, who were hatters in London, an account amounting to £30. 8s. 6d. commencing in February 1799, terminating in October 1800, and contracted when she resided in London.

Mrs. Rose Anderson, while living in family with the defender, had been in the custom of employing the pursuers in their line of business.

The defender declined to pay this account; and the pursuers raised an action concluding against him for payment of it.

The cause was discussed before Lord Meadowbank, Ordinary, who called upon the defender to prove, *1st*, That intimation of the inhibition and separate aliment of his wife had been made to the pursuers; or, *2dly*, That the account was extravagant. But neither of these points could be established.

The Lord Ordinary pronounced the following interlocutor, 15th February 1805: "In respect the inhibition used by the defender was not executed so as to operate against persons forth of the kingdom, and that no proof is offered of special notice having been given to the pursuers not to trust Mrs. Marshall, and that the charge of extravagance in these articles furnished does not appear to the Ordinary well founded,—Decerns against the defender for the amount of the account libelled, finds expenses due, and allows an account therefor to be put in; and dispenses with any representation."

The case came before the Court by petition and answers.

Argument for the defender.

The inhibition was regularly published and executed according to the forms prescribed by the law of Scotland. These forms are regulated entirely by the situation of the inhibited person, and not by the situation of those with whom such person may possibly contract, and who therefore may eventually be affected by the diligence. If the diligence be regularly executed against the person inhibited, it must be effectual against the whole world. The form of inhibition against a wife is the same with that against any other person; so like-

No. 2.

An inhibition executed and published at the market-cross of the head burgh where the person inhibited resides, is effectual against foreigners.

No. 2. wise must be the effect. The act of Parliament (1597, ch. 268.) which dictates the form of executing inhibition, makes no distinction in this respect; and therein no regard is had but to the situation of the person inhibited. To have executed and published at the market-cross of Edinburgh, pier and shore of Leith, an inhibition against a person residing in Perth, would have been absurd; and, at any rate, would not have more effectually warned foreigners. The maxim of law, "*Quicumque debet scire conditionem ejus cum quo contrahit,*" is of general application, but more particularly regards those cases wherein parties contract with married women. The slightest inquiry would have satisfied the pursuers that Mrs. Rose Anderson lived apart from her husband, was inhibited by him, and had a separate aliment. The law applicable to this case is accurately stated in an early decision (6th July 1677, Allan against the Earl and Countess of Southesk, No. 213, p. 6005.) On the supposition that an inhibition duly executed and published, according to Scotch forms, is insufficient, there would be no other remedy but to follow the party inhibited, wherever caprice might lead him, and there to take the steps dictated by the peculiar laws of his casual residence: Such a proceeding, it is believed, is not required by the jurisprudence of any independent state where law is a science.

Argument for the pursuers.

I. Inhibition is directed not only against the party who is the object of it, but also the lieges in general. In the present case, Mrs. Rose Anderson is inhibited from delapidating her husband's effects; but, secondly, the lieges in general are inhibited from dealing with her to her husband's prejudice; and it is by the prohibition against themselves only that they are barred. The execution and publication at the market-cross of Perth might be sufficient against the Scotch lieges; but to render the diligence effectual against foreigners, that publication, at least, ought to have been made, which the law requires as equivalent to intimation against natives being without the territory of Scotland. This kind of diligence is subjected to the utmost strictness of interpretation; because, whatever the presumption of law may be, it is necessarily unknown to many who, *optima fide*, may contract with the person against whom it is used. — 26th Feb. 1695, Watson against Baird, No. 34. p. 6963; 2d Dec. 1748, Creditors of Kinminnity, No. 50. p. 6982.

But, farther, the diligence of inhibition can have no operation beyond the territory of Scotland. Thus, as an inhibition directed against a person in Scotland to prevent the alienation of his heritage, could not prevent him from disposing of an estate situated in England; on the same ground, an inhibition executed for the purpose of preventing the disposal of personal effects, and the contraction of personal debts, ought to have no effect in a foreign territory. No diligence, writ, or decree, is effectual, unless it is executed according to the forms of the country within which it is to have operation. Voet, B. 42. Tit. 1. § 39. See likewise B. 23. Tit. 2. § 60.

II. During the subsistence of the marriage, and while the parties lived together, the pursuers had been employed by Mrs. Anderson. To their accounts the defender had never objected, and they had been regularly paid. The defender was therefore bound to have intimated to them his altered situation, and that he no longer was liable for his wife's debt. Besides, at the date of this account, the marriage was not dissolved; and Mrs. Anderson was entitled to contract such debts as were necessary and suitable to her situation. Grant against Sir William Jardine, 23d June 1796, (not reported.)

The Court differed in opinion from the Lord Ordinary.

It was observed, that every one is bound to inquire and satisfy himself with regard to the condition of the person with whom he contracts; and if he fails in this, he must suffer the penalty of his own credulity. The party with whom the pursuer contracted was a native of Scotland, and her *status* was determined by the laws of that country. In the execution and publication of the diligence of inhibition, regard is only had to the domicil of the person who is the object of it; and in the present case, the diligence, being regular according to the law of Scotland, must be effectual against all mankind.

The following interlocutor was pronounced, (11th Dec. 1807.)

“ Find the inhibition a valid and subsisting diligence; and therefore alter
“ the interlocutor reclaimed against, and assoilzie the defender from the con-
“ clusions of the libel.”

And on advising a petition, without answers, the Lords adhered, 26th January 1808.

Lord Ordinary, *Meadowbank.*

Act. *Ja. Fergusson.*

Alt. *Adam Gillies.*

John Whyte and James Fraser, W. S. Agents.

W. Clerk.