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*Pleaded* in a reclaiming bill: It is the constant practice before the Sheriff courts, to grant warrant to cite, and thereupon to arrest; and it is not denied the citation was given before execution of the arrestment.

*Answered*: The warrant for arrestment on a dependence, ought to be issued after the dependence is created by the citation; and so the practice frequently is before the Sheriffs, and constantly before the Court of Session.

THE LORDS remitted, with an instruction to repel the objection.

A&C. *Boswell.*Alt. *Macqueen.*Clerk, *Pringle.**Fol. Dic. v. 3. p. 39. D. Falconer, v. 2. p. 150.*

\* \* \* Lord Kilkerran mentions the same case thus:

MRS FORBES, in whose hands several arrestments were laid by the creditors of William Sheills, pursued a multiplepoinding before the Sheriff of Edinburgh, wherein she called the two arresters, Elizabeth Oliphant and Archibald Campbell, and William Sheills the common debtor. In this process it was *objected* by Archibald Campbell to Elizabeth Oliphant's arrestment, That though prior in date, it was void, in respect it proceeded on a precept adjected to the will of the summons of constitution against her debtor Sheills; whereas precepts for arrestment on a dependence, can only be granted after a citation returned, as thereby the dependence is created. *2do*, He offered to improve the execution of the summons on which her extracted decree of constitution against Sheills had proceeded; both which the Sheriff repelled.

And he having complained by a bill of advocation, the ORDINARY before whom it came, 'Remitted to the Sheriff to sustain both objections.'

But she having reclaimed, the LORDS were of opinion with the Sheriff on both points. On the *first*, it being the common practice of inferior courts to issue the precept of arrestment in the summons for constitution, different from what is the form in processes before the Lords. On the *second*, because as Sheills had appeared in the process of constitution against him, and acknowledged the debt, and for which decree proceeded against him, it was not competent for Campbell, who neither was nor could be party in that process, to object to the execution of the summons on which the decree proceeded.

But a third objection being made in the answer to her petition, viz. That the arrestment was laid on eleven days before the summons of constitution was executed; the LORDS, for that reason, and that only, "passed the bill of advocation."

*Kilkerran, (ARRESTMENT.) No 18. p. 46.*

1772. *March 3.*WILLIAM RICHARDSON *against* MARTIN FENWICK.

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A bill being  
duly protest-

THESE parties, severally, became creditors in recourse, in consequence of two bills drawn by John Bedford and son, in Leeds, upon E. Porter of London, both

which he accepted, but failing to pay, his circumstances having gone into disorder, they were protested for non-payment and recourse, and returned; one of them upon Richardson, as an indorser, and the other upon Fenwick, to whom it was drawn payable. But the parties having followed a different method of operating payment from the drawer's effects in this country, this gave rise to a competition between them.

On the one hand, Fenwick had used an arrestment, 10th January 1771, in the hands of Gibson and Balfour merchants in Edinburgh, as debtors to Bedford and Son, *jurisdictionis fundandæ causa*, and a second arrestment, 12th January 1771, in the hands of the same persons, upon the dependence of an action raised at his instance, and wherein he afterwards obtained decree against Bedford and Son for payment and recourse. And he likewise had laid an arrestment, 6th July 1771, in the hands of one M'Laren.

Richardson the competitor had, upon the registered protest of his bill, also taken out letters of arrestment *ad fundandam jurisdictionem*, and, upon the 4th, 7th, and 10th January 1771, executed the same against the aforesaid Gibson and Balfour, and M'Laren and others, as debtors to Bedford and Son, *ad fundandam jurisdictionem*. And, upon the same 4th January, he also obtained second letters of arrestment, proceeding on the narrative of the aforesaid bill and protest, registered in the books of Council and Session, and submitting, that, 'albeit he had obtained desired payment of the above sum from the drawers, in virtue of the recourse competent to him upon them, yet they refuse so to do,' &c. In virtue of which letters, arrestments were used in the hands of the same persons, upon the several respective dates of the former arrestment, in common form, to remain under fence and arrestment, ay and while payment; and, upon the 17th January, a summons of furthcoming and payment was executed at Richardson's instance, against Gibson and Balfour, and the other arresters, and against Bedford and Son, common debtors, concluding against the arrestees to make furthcoming, and likewise against the common debtors to make payment.

In the process of furthcoming, comparance was made for Fenwick, who produced the several steps of diligence at his instance above recited; and it was contended, That, as Fenwick's second arrestment had been used on a depending action, now closed by a decree, which was the regular and proper form of procedure, no summary diligence being competent for recourse against the drawer, in the case of a protest for non-payment, and, as Richardson's second arrestment used on the bill and protest, without any depending action, was, for the same reason, incompetent and irregular, Mr Fenwick fell to be preferred to the sums in the hands of the arrestees.—And the LORD ORDINARY 'did accordingly prefer him.'

*Pleaded by Richardson in a reclaiming petition:* It is true the construction generally put upon the act 1681 is, that summary diligence against the drawers and indorsers is only competent in the case of a protest for non-acceptance, though the reason of the distinction between non-acceptance and non-payment is not

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ed for non-payment; found, that the registered protest was not a sufficient ground for arrestment of the drawer's effects, without a depending action; and, in consequence, a posterior arrestment upon a dependence was preferred. See the note under this case.

No 9. very obvious; and accordingly, by the custom of all other countries, summary recourse is allowed equally in both cases, as is observed in the late Institute, (Wallace's.) B. 1. tit. 13. § 23.

But, whatever may be the case with regard to summary diligence, by which is meant ultimate personal diligence by horning and caption, and seizing the debtor's effects by pointing, the diligence of arrestment stands upon a very different foundation. Arrestment is similar to inhibition; it is only a prohibitory diligence, ordaining the goods or debts arrested to remain in the same state till payment, or caution is found to the arrester. It is a diligence of a most innocent nature, which never can be abused, and therefore ought to pass upon any liquid ground of debt. Accordingly, arrestments in the same way with inhibitions, are every day obtained upon grounds of debt, which cannot be the foundation of summary execution; for example, letters of arrestment can be procured on an unregistered bond; and, in the same way, it is established by practice, founded on evident utility, that letters of arrestment can be taken out and executed upon a bill not protested, and which perhaps cannot be protested, the term of payment not being come, and consequently, where there is no registration which can be held equivalent to a decree. It is laid down in the law books, Inst. b. 3. tit. 1. § 34. That arrestment may proceed on an unregistered bond, and that this is equal to an arrestment on a dependence; and in the case of Ewart's Creditors, *anno* 1766\*, an objection was repelled to an arrestment laid on by virtue of letters of arrestment issuing from this Court, the ground of which was an unregistered bond of relief.

That the arrestment in question would have been good against the acceptor of the bill, if laid on in the hands of any of his debtors, will hardly be disputed, even supposing there had been no registered protest, or supposing the term of payment had not been elapsed; because such is the fixed and uniform practice both here and elsewhere. That it would likewise have been good against the drawers and indorsers, if the bill had not been accepted, is likewise very clear; and, if so, it will be a little difficult to assign a reason why it should be otherwise in the case which has happened. The protesting and returning the bill for non-payment, furnishes as clear and liquid a ground of debt against Bedford and Son, the drawers, as if it had been returned without being accepted; and, as the practice, with regard to arrestments, makes no distinction between the one case and the other, so it is hoped the Court will not see the least ground for any distinction.

*Answered:* It is readily allowed, that, had Richardson's bill never been accepted, summary recourse, or such an arrestment as he founds upon, would have been competent against the original drawer, or intermediate indorsers. But it is contended, that acceptance was a *medium impedimentum*, which warded off summary diligence against the drawer or indorsers; and that thence forward they could only be proceeded against upon a formal citation, and by way of ordinary action.

\* Not found.—Examine General List of Names.

And this proposition is clearly founded in the Stat. 1681, cap. 20. Prior thereto, the drawer and indorsers and acceptor of a bill could, no doubt, be convened by way of ordinary action; but, for the flourishing of trade, as mentioned in the preamble, the legislature here enacts, that, upon a protest duly registered, summary diligence, by horning, and executorials necessary, (under which expression arrestment is certainly implied), should pass against the drawer, in case of non-acceptance, or against the acceptor, in case of non-payment; so that, after acceptance, summary diligence, by horning and executorials necessary, was only competent against the acceptor; while, if recourse against the drawer was also necessary, this was only to be pursued by way of ordinary action, as accords; and, as the proposition seems clearly founded in the express enactment of the legislature, so it is subscribed to by Lord Bankton, in the following words, B. 1. tit. 13. § 23: 'No summary recourse is granted with us against the drawer or indorsers, on a protest against the acceptor for non-payment, as it is by statute on a protest for non-acceptance; but the creditor must insist against them by ordinary action.'

It is in vain for Mr Richardson to affect to doubt if summary diligence is the proper denomination for the course he has pursued. Both the statute and authority above-mentioned, oppose to what is termed 'summary diligence,' an ordinary action at law; and, instead of insisting in such an action, which, after acceptance, was solely competent to him against the drawer, he has, in the face of every form of regular procedure, by an arrestment, destitute of every legal foundation, endeavoured, *brevi manu*, to appropriate to himself the original drawer's funds.

Again, the practice of granting summary diligence upon bonds, containing a clause of registration, whether registered or not, is nothing to the purpose. In these, and such like cases, the original debtor has interposed between himself and the claim, no third party, or delegated person, but expressly consents to summary diligence against himself personally, if the money is not paid against the stipulated day; but the drawer of a bill consents to no such summary diligence; and, after acceptance, is only subject to an ordinary action, if the acceptor has been unable to impliment the obligation which he undertook. Indeed, were it otherwise, and if, upon a protest for non-payment, taken, as in the present case, against an acceptor in London, the effects of a drawer residing in a distant corner of the kingdom, might be summarily arrested, and subjected to all the diligence of the law, consequences the most fatal to mercantile people would ensue. Before a drawer had any notification, either private or judicial, of any claim against him, the whole of his funds might be locked up, and placed *extra commercium*. The protest, in the present case, taken against Porter, the acceptor at London, could give no intimation of any kind to Bedford and Son, the drawers, residing at Leeds. Neither is arrestment a diligence similar to inhibition, 'of a most innocent nature which never can be abused.' Though it does not immediately transfer the subject, it immediately paves the way for a transference, and hence

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is defined by Bankton, *Lib. 3. tit. 1. § 54.* 'A preparatory diligence, in order to 'adjudge a subject to the arrefter;' while it creates upon the subject such a *nexus* as does not fall upon the death either of the arrefter or of the arrestee; whereas inhibition is simply a personal prohibition, and expires with the person against whom it is used.

'THE LORDS adhered.'

N. B. By a clause in the act 12th Geo. III. cap. 72. it is enacted, That, from and after the 15th day of May 1772, summary execution, by horning, or other diligence, shall pass upon bills, whether foreign or inland, and whether accepted or protested for non-acceptance, and upon all promissory-notes, duly negotiated, not only against the acceptors of such bills, or granters of such notes, but also against the drawers of such bills, and the whole indorsers of the said bills and notes, jointly and severally, excepting where the indorsation is qualified to be without recourse, saving and reserving to the drawers or indorsers, their respective claims of recourse against each other, and all defences against the same, according to law.

*Act. Ilay Campbell.*

*Alt. R. Sinclair.*

*Clerk, Campbell.*

*Wallace, No 12. p. 28.*

1773. December 16.

UNIVERSITY OF GLASGOW, against ARCHIBALD HAMILTON of Rosehall.

No 10.

Although a charger consent to the passing of a bill of suspension, and obtain a remit to discuss the reasons summarily; the charge, when turned into a libel, makes a dependence to found an arrestment at his instance, until caution be found in common form.

MR HAMILTON of Rosehall, having been served with a charge of horning, upon an old general decree, obtained at the instance of the University, as titulars, for payment of a large sum, as the amount of his bygone teinds, he presented a bill of suspension to the Court of Session. The University consented to the passing of this bill, and gave in a petition for a remit to the Lord Ordinary, to discuss the reasons summarily on the bill; which accordingly was granted.

Some proceedings ensued before the Ordinary, who turned the charge into a libel; and Mr Hamilton put in a condescence, which the University were allowed to see, and an order made upon parties to be ready to debate. Meanwhile, the University presented to the Lord Ordinary on the bills, a bill, setting forth the charge given to Mr Hamilton, for payment of his bygone teinds; the bill of suspension that had been passed of this charge; remit to the Ordinary to discuss the reasons summarily upon the bill; and then proceeding as follows:—  
'Since which time, the said process of suspension has been several times called, and insisted in before the Lord Ordinary; but, through the opposition of the suspender, is not yet come to a conclusion, as the said depending process of suspension here to shew will testify; and the said Archibald Hamilton knowing perfectly,' &c.; and, therefore, praying for letters of arrestment, until caution be found, &c.