

*remanendi* or not : But upon the other point they were a good deal divided. Though it was agreed that an arrestment was in some measure a *nexus realis*, as it gave a preference to follow out the proper consequent diligence, yet it was not admitted to be so to the extent contended for, and to authorise the arrester to follow the subject wherever it might go. The majority, however, thought, that though Scott's arrestment was good, his diligence was defective in other respects ; that the proper action of furthcoming would have been against Tait ; but that as Tait had paid *bona fide*, not having any knowledge of the arrestment, the subject was not *in medio* ; and having afterward been found in Marshall's hands, had been properly attached by Fluyder's diligence.

No. 1.

The Court accordingly adhered to the Ordinary's interlocutor, and preferred Fluyder and Company.

Lord Ordinary, *Elliot*.  
Clerk, *Pringle*.

For Scott, *Lockhart*.  
For Fluyder and Co. *P. Murray, H. Dundas*.

R. H.

*Fac. Coll. No. 30. p. 80.*1771. *February 5.*

WILLIAM REID, Eldest Son of the deceased Robert Reid, his TUTORs and CURATORS, and the ACCEDING CREDITORS of the deceased Robert Reid, *against* STEPHEN RONALDSON and WILLIAM CUNINGHAME, Creditors of the deceased Robert Reid.

ROBERT REID died in 1766, possessed of sundry heritable subjects, having, before his death, made a nomination of tutors and curators to his children, but no other settlement. His affairs being in confusion, the tutors served the heir *cum beneficio inventarii*, and thereafter brought a process into Court, in order that they might be authorised to sell the heritable subjects for payment of the debts. The Court found the expediency and necessity of a sale sufficiently instructed, and accordingly authorised it. The subjects were sold ; but before the price was paid, Stephen Ronaldson and William Cuninghame raised actions of constitution against the heir and Mrs. Reid the executrix ; and having used arrestments in the hands of the purchasers, claimed a preference to the other creditors. The heir, his tutors and curators, alongst with the purchasers, brought a process of multiple-pounding, in which they called all the creditors to debate their preference. The Lord Ordinary, upon advising memorials for all the parties, on the 21st July 1770, found " the said Stephen Ronaldson and " William Cuninghame, the arresting creditors, preferable on the price of the " subjects which belonged to the said Robert Reid."

The pursuers, in a reclaiming petition, pleaded :

An heir entering *cum beneficio* was in a very different situation from another heir ; he was liable only for the value of the succession, and was accordingly

No. 2.

The estate of a debtor, a minor, having been sold *auctore pretore*, the arresters of the price, in the hands of the purchasers, preferred upon their diligence to the other creditors.

No. 2. considered, in the eye of law, as a trustee for the creditors. He was regarded as holding the estate chiefly and primarily in trust for their behoof; and on that idea had been found obliged to communicate cases and other advantages acquired to the other creditors. Aikenhead *contra* Rusel, No. 10. p. 5342. and No. 11. p. 5344. An heir standing in this character, must be accountable precisely in the same manner as an ordinary trustee was to the creditors for whose behoof he held the estate in trust, who could only claim a rateable proportion of the trust-funds effeiring to the extent of their debts. Though an heir *cum beneficio* might no doubt pay *primo venienti*, so that those who did not come forward were, by their supine negligence, cut out; yet when this was not the case, and the subjects still continued *in medio*, the creditors who appeared and insisted for payment would all be intitled to draw a rateable proportion; and of consequence, when the funds were not sufficient, the same rule of distribution must be observed.

The case here was similar to that of an executor confirmed, who was truly a trustee for the creditors, who could have no preference upon the funds by arrestment or other diligence; and there was the same reason why this rule should hold in the case of heirs *cum beneficio*, particularly as it seemed to be pointed out by the statute 1695, that both were to stand upon the same footing. In the present case, as the sale was expressly made under authority of the Court, for the special purpose of paying the creditors, there were still stronger grounds than usual for holding the heir to be a trustee for their behoof, and only therefore accountable to all and each of them for a rateable proportion of the funds, similar to a sale brought by an apparent heir upon the act 1695, where that rule of equality was observed.

Answered:—It was an established rule in law, that an heir by entry represented the defunct both *active* and *passive*; he became proper debtor to the creditor, and as such, every species of diligence was competent to be used against him by those creditors for recovery of their debts. Previous to the act 1695, the heir had no defence against payment, even after the succession was exhausted; but this was corrected by that statute which rendered the heir liable only *secundum vires inventarii*. This was the sole object of the statute; but as to the measures the creditors were entitled to use for recovery of their payments, the act made no alteration, but left the law as it formerly stood, giving a preference to priority of diligence.

This was agreeable to the civil law, from whence we had borrowed our own regulations. *L. 22. § 3. 4. et seq. Cod. De jure deliberandi*. Ever since the act 1695, it had been the invariable practice, that an heir *cum beneficio* might pay *primo venienti*; and if diligence was used by any of the creditors, the same rules of law, as to their preference over each other, took place in this as in any other common case. Lord Bankton, B. 3. T. 4. § 75. Erskine, B. 3. T. 8. § 68. Scott *contra* Burnet of Leys, No. 7. p. 5336. 28th Nov. 1738, Creditors of Crichton, No. 17. p. 5348.

There was no analogy betwixt an executor confirmed and an heir *cum beneficio*: The office of an executor inferred no representation; nor in that case was there at common law any *pari passu* preference among the creditors, which had only been introduced by the act of sederunt 1662. The estates being sold by authority of the Court could make no alteration; and as the sale confessedly was not brought according to the regulations of the statute 1695, it was absurd to suppose that the rules incident to that enactment could be held as applicable.

The Court unanimously adhered to the Lord Ordinary's interlocutor.

Lord Ordinary, *Kennet*.

For Reid, &c. *Macqueen*.

For Ronaldson, &c. *G. Ogilvie*.

R. H.

*Fac. Coll. No. 73. p. 213.*

1773. February 26.

JAMES NEIL, Writer in Air, *against* JOHN BROWN, Merchant in Glasgow, Trustee for JOHN and ABRAHAM CLEGG of Manchester, and THOMAS and GEORGE MALTBY of London.

NEIL being creditor to William Harris, merchant in Air, by an accepted bill, caused arrest, on the 17th October 1768, in virtue of a horning, in the hands of Mary White, as debtor to Harris, and afterward obtained decree of forthcoming against her, who suspended, and brought a multiple-pounding, on the ground of double distress.

Brown produced an interest, which consisted of a decree of forthcoming, obtained, at his instance, before the high-court of admiralty, against the said Mary White, and Harris, the common debtor, founded upon two small bills, drawn by John and Abraham Clegg, and Thomas and George Maltby, upon Harris, payable to Brown, but not accepted by Harris.

Neil objected to Brown's interest, on this medium, that his arrestment was *funditus* void and null, as being *filius ante patrem*, being an arrestment without a dependence; for, until the common debtor was cited, there could be no depending action; and as, in this case, the common debtor was not cited by Brown, till long after his arrestment on the admiral-precept, and after the arrestment, used by Neil, Brown's arrestment was good for nothing, and his fell to be preferred.

The Lord Stonefield Ordinary sustained the objection by several interlocutors: "In respect the arrestment used by Brown was executed before a dependence was created by citation of the common debtor, and that Neil's arrestment was regularly executed, previous to the citation at Brown's instance."

Against these judgments, Brown having reclaimed, the court, upon advising the petition, with answers, ordered memorials on the cause, and, particularly, as to the practice of the admiral-court, and how far such arrestments as Brown's had been sustained.

No. 2.

No. 3.

An arrestment, *debiti servandi causa*, upon an admiral precept, without previous citation of the common debtor, in a cause not maritime, found irregular, and also not founded in the practice of the admiral-court.