

[Heard, *July* 13, 1840. — Judgment, *Oct.* 26, 1841.]

(No. 19.)

JAMES LAIDLAW, Writer in Edinburgh, Appellant.

[*Knight Bruce — James Anderson.*]

JOHN SMITH, Trustee on the Sequestrated Estate of
H. W. GARDEN, Respondent.

[*Lord Advocate — Pemberton.*]

Arrestment. — If facts shew, that an arrestee could not, when he paid his creditor, have been cognizant of the arrestment having been used in his hands, he will not be liable to make second payment to the arrestor.

Process. — If a party allow judgment to be made upon statements not contradicted by him, he cannot, upon appeal, ask issue as to their truth.

2d DIVISION.

—
Lord Ordinary
Moncreiff.

—
Statement.

SMITH, the respondent, a builder, residing in Glasgow, was trustee on the sequestrated estate of Garden. Messrs M'Gregor and Murray, writers in Glasgow, were his agents in that city, and Messrs Dundas and Wilson, W.S. were his agents in Edinburgh.

Smith, in his character of trustee, required from Dunlop, who was a writer to the signet, residing in Edinburgh, the delivery of certain title-deeds of the bankrupt, Garden's, property. Dunlop refused on a plea of lien. This claim of lien became the subject of negotiation between Dunlop and Smith, through the

Glasgow and Edinburgh agents of Smith. In the course of this negotiation, money was, on the 14th of May, remitted by Smith to Dundas and Wilson, with instructions to arrange the claim, and obtain delivery of the deeds.

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On the 19th of May, 1831, Laidlaw, the appellant, on the dependence of an action by him against Dunlop, used arrestments against Dunlop, in the hands of Smith, to the extent of L.2000. The arrestment was used by the messenger leaving a copy at the dwelling-house of Smith. Smith had left Glasgow on business previous to the 19th, and was not returned at the time the execution of arrestment was left at his house.

On the same day, viz. the 19th May, Dundas and Wilson wrote M'Gregor and Murray, stating, that they thought Dunlop's claim ought to be admitted to the extent of 210. On the 20th of May, M'Gregor and Murray wrote Dundas and Wilson, approving of their opinion, and authorizing them to settle the matter accordingly.

On the 21st of May, Dundas and Wilson wrote M'Gregor and Murray, that two days previously, Dunlop had said something of arrestments having been used against him, and desiring to be informed upon the subject in course of post. After this letter had been despatched, and on the same day, the wife of Dunlop called at the chambers of Dundas and Wilson, and exhibited to them a letter from her husband, in which he stated, that he had been to Smith, and M'Gregor and Murray, on the 20th, to inquire of these gentlemen, whether any arrestments had been used against him, and found none.

No mention, of arrestments having been used, occurring in M'Gregor and Murray's letter to Dundas and

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Wilson, written on the 20th, Dundas and Wilson did not wait for an answer to their letter, written on the 21st; but in the course of that day, paid the wife of Dunlop L.130.

On the evening of the 21st, Smith returned home for the first time after the arrestment had been used, and found the execution lying at his house, without any intimation of its existence, so far as appeared, having been made in his absence by the members of his family either to M'Gregor and Murray, or to Dundas and Wilson. On the evening of the 21st, M'Gregor and Murray wrote Dundas and Wilson, informing them of the arrestment, and that no farther payment ought to be made.

On 28th February, 1833, Laidlaw obtained decree in his action against Dunlop for the sum of L.450, 3s. 6d. In June following, he brought action of forthcoming against Smith, libelling that he had paid Dunlop the sum of L.140, in breach of the arrestments used on the dependence of his (Laidlaw's) action against him, and concluding for payment of the amount contained in his decree, or of whatever sum might have been paid to Dunlop after the date of the arrestment.

A record was made up on the summons and defences, and condescence and answers, in which the pleas of the appellant, so far as they became the subject of decision in the Court below, or in the appeal, were, — 1st, That Smith was indebted to Dunlop in L.130 at the date of the arrestment having been used, and ought, therefore, to make that sum forthcoming; 2d, That it was not necessary to the validity of an arrestment that it should have come to the personal knowledge of the arrestee; 3d, That the money, though actually in the hands of Dundas and Wilson, was constructively, for

the purposes of this action in the hands of Smith, until it was paid over to Dunlop.

The plea of the respondent in defence was, that he was not liable in second payment, inasmuch as he had, prior to the arrestment, remitted funds to his agents, at the place of the creditors' residence, specifically to be appropriated to his payment; and the payment had been made in ignorance of the arrestment both by him and his agents, without any blame being imputable to them in respect of such ignorance.

On considering the record, the Lord Ordinary, Moncrieff, on 12th May, 1836, pronounced this interlocutor, and added the note subjoined¹:—

“ The Lord Ordinary having considered the closed
“ record, and heard parties' procurators thereon, and
“ made avizandum, Sustains the defence set forth in

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¹ “ *Note.*— This case appears to the Lord Ordinary to be much more nice
“ than the counsel on either side were willing to admit; and though he
“ thinks it, on the whole, a special case, in which the defence must prevail,
“ care must be taken that the general principles of the law shall not be sup-
“ posed to be trenched upon, or loosened.

“ Mr Erskine, in a passage not referred to in the debate— 3, 16, 14 —
“ speaking of the arrestee's liability for the civil consequences of breach of
“ arrestment, under the statute 1581, cap. 18, says expressly, ‘ This doctrine
“ ‘ holds also in the case of arrestment served against the arrestee only at his
“ ‘ dwelling-house, though in fact the execution should not have been notified
“ ‘ to him; for the admitting pretences of ignorance might evacuate the lawful
“ ‘ diligence of creditors.’ The Lord Ordinary does not find, that any other
“ institutional writer has laid down precisely the same doctrine, or that there
“ is any reported decision to this effect; and, if it were taken, in its broadest
“ sense, as importing, that wherever an arrestment had been duly executed
“ at the dwelling-house, breach of arrestment must be incurred, simply by
“ the fact of payment being made after the time of the execution, without
“ regard to the circumstances of ignorance under which the payment might
“ be made, the Lord Ordinary should entertain great doubt of the soundness
“ of it in its application to many cases which may easily be figured. For
“ example, a merchant leaves his dwelling-house in the morning, and, at his
“ counting-house, pays a debt at 12 or 1 o'clock, and it turns out that,
“ unknown to him, an execution of arrestment had been left at his house soon
“ after he had quitted it. A farmer leaves his house to attend at a distance,
“ meets with his creditor, and pays the debt; and finds, on returning home,

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“ the first plea in law for the defender, assoilzies the
“ defender, and decerns: Finds expenses due, and
“ remits the account, when lodged, to the auditor to
“ be taxed.”

“ that an arrestment had been used before he made the payment. A trader
“ empowers his traveller to pay a debt to a creditor at a distance, and the
“ instruction is obeyed ; while, in the meantime, an arrestment had been laid
“ in the interval at the trader’s domicile. In such cases, it would be a very
“ hard law, which would say, that the debtor, so in bona fide paying his
“ lawful debt, must be answerable, as for breach of arrestment, to pay it a
“ second time ; and it would be peculiarly severe so to construe a statute like
“ that of 1581, seeing that, under the very same enacting words, the party
“ might have been prosecuted criminally, and have suffered escheat of goods,
“ and even corporal pains. This could never be held ; and, therefore, Mr
“ Erskine’s position must be understood with considerable modification.

“ Nevertheless, the authority is of weight ; and the Lord Ordinary does
“ not doubt, that thus far the doctrine may be well founded, that the mere
“ fact of the debtor having no personal notice or knowledge of the arrestment
“ will not liberate him from the civil consequences of paying in the face of it,
“ if, before he paid, he was in such circumstances that he ought to have
“ known of it, and so must be presumed to have known it. Any other rule
“ would certainly give occasion to pretences for evacuating the diligence of
“ creditors.

“ The case here is, 1st, That before any arrestment had been used, the
“ money, or all but a trifle, had been actually remitted to Messrs Dundas and
“ Wilson in Edinburgh, and they had been, without any limitation, autho-
“ rized to settle and pay the debt. 2d, That after having so remitted and
“ instructed them, Mr Smith, still before any arrestment, had left his house
“ in Glasgow, and gone to a distance in the country. 3d, That on the 19th
“ May, 1828, while he was still absent, the arrestment was executed at his
“ dwelling-house in Glasgow. 4th, That on the 21st, the debt was paid by
“ Messrs Dundas and Wilson in Edinburgh, they being then in ignorance
“ that any arrestment existed, and so paying in bona fide. There are some
“ intermediate facts, of some importance, which are founded on by the pur-
“ suer as making a special case against the defence. But in so far as there
“ is any general question of law raised, the facts above enumerated seem to
“ constitute the case.

“ In this view of it, it appears to the Lord Ordinary, 1st, That the arrest-
“ ment was competently laid on, notwithstanding the remittance to Dundas and
“ Wilson ; and that the case of Ballandene, 12 S. D. and B. 402. February 6,
“ 1834, was decided essentially on the fact that the proper debtor stood actually
“ discharged. But 2d, That the remittance having been made, and unlimited
“ instructions given, before arrestment, the payment made in bona fide by the
“ Edinburgh agents, before notice of any arrestment, does not constitute a
“ breach of arrestment to render Mr Smith liable in second payment to the
“ arrester, unless it appeared, which it does not on this record, that Mr
“ Smith had returned to his dwelling-house, or at least to Glasgow, in such

The appellant presented a reclaiming note to the second division of the Court. On considering this note, the Court appointed the parties to give in minutes of debate. And thereafter, on 25th January, 1838, the

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“ time that he might have stopt the payment. The important specialty is, “ that before the arrestment, the debt, and the discretion in paying it, were, “ in fact, out of his hands, and committed to Dundas and Wilson; and “ therefore it appears to the Lord Ordinary, that as Mr Smith did nothing “ after the arrestment, that is no ground for any presumption against him to “ infer liability for second payment, unless a special case of negligence by “ him or others can be made out.

“ The precise state of the other facts requires attention. Messrs Dundas “ and Wilson having made up their minds as to the sum which should be “ paid to Dunlop, wrote to this effect, to Messrs M'Gregor and Murray, on “ the 19th May. On the 20th, M'Gregor and Murray wrote a short letter, “ distinctly authorizing the settlement to be made on the footing stated. “ But it is very material to observe, that in that letter, there was no notice “ of the circumstance of which Dundas and Wilson were afterwards informed, “ that Mr Dunlop had been with Messrs M'Gregor and Murray at the time, “ or recently before it was written. Messrs Dundas and Wilson, getting the “ letter on the 21st, write their letter of that date, Saturday, in which they “ mention, that, two days before, Mr Dunlop had spoken of arrestment “ having been raised against him, and seemed to think it possible that it “ might be for the purpose of arresting the fund in question, and asked for “ an answer by Monday morning. But, on the same day after that letter “ had been written and despatched, Mrs Dunlop came to Messrs Dundas and “ Wilson, bringing a letter from Dunlop himself, dated the 20th May, the “ words of which are quoted in Mr Wilson's letter of 24th May. From that “ it appeared, that Mr Dunlop had been with Mr Murray, specially inquiring “ whether there was an arrestment at the time when the letter of Messrs “ M'Gregor and Murray, of the same date, the 20th, was dictated. It is not “ surprising, that, on receiving this, Messrs Dundas and Wilson did not “ hesitate to pay the money to Mrs Dunlop on the Saturday, without waiting “ for an answer to their letter of that date, seeing that their only ground of “ apprehension about an arrestment derived from Dunlop himself, was “ removed by his letter, joined with that of Messrs M'Gregor and Murray, “ written at the same time, and making no mention of such a thing. There “ can be no doubt of their bona fides in so doing. But even in the strictest “ legal view, there was really nothing before them to make them refuse “ payment.

“ Then the question is, Whether there was any negligence on the part of “ Mr Smith, or of persons for whom he might be answerable at Glasgow, in “ not warning Messrs Dundas and Wilson between the 19th and the 21st? “ Though Mr Dunlop speaks of calling on Mr Smith on the 20th, this must “ probably be understood to mean that he called at his counting-house, — for “ it is not averred in the record that Mr Smith himself was then in Glasgow. “ The question, therefore, is, Whether there was any neglect on the part of

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Court pronounced the following interlocutor: — “ The
“ Lords having heard counsel and advised the cause,
“ adhere to the interlocutor of the Lord Ordinary sub-
“ mitted to review, and refuse the desire of the reclaim-
“ ing note, and decern ; but find no additional expenses
“ due.”

Laidlaw appealed from the interlocutors of the Lord Ordinary and the Court.

Appellant's
Argument.

The Appellant.—The Lord Ordinary has made an extraordinary mistake in supposing that the civil and criminal consequences of breach of arrestment flow from

“ other persons for whom he may be answerable? The members of his
“ family might, no doubt, have made the arrestment known to his clerks, or
“ his agents. But here the peculiarity comes in, that the matter had been
“ previously committed to Messrs Dundas and Wilson, and that this could
“ not naturally be known to the family, who might reasonably suppose that
“ Mr Smith would only have to keep the money after he saw the arrestment.
“ The matter is then reduced to this narrow point, Whether it must be held
“ that there is breach of arrestment, because Messrs M'Gregor and Murray
“ did not inquire at the dwelling-house whether there was any arrestment
“ before writing the letter of the 20th May? The Lord Ordinary thinks,
“ that there is in this something to raise a doubt, whether the legal presump-
“ tion of knowledge may not take effect. But, on the whole, he is inclined
“ to think, that a mere negative of this kind, on the part of agents, acting
“ perfectly in bona fide, and having no actual knowledge, is not sufficient to
“ infer so serious a responsibility against a debtor who had, long before the
“ arrestment, authorized the payment of the debt in another place.

“ The Lord Ordinary is aware, that the pursuer has not exactly admitted
“ the fact averred by the defender, that he was absent from Glasgow on the
“ 19th, 20th, and till the evening of the 21st May, and did not come to the
“ knowledge of the arrestment till this last time. If the pursuer had asked
“ an issue upon that question of fact, the Lord Ordinary would probably
“ have thought it necessary to grant it. But seeing that he has not specifi-
“ cally denied the averment,— which he might have known by inquiry,—
“ and has not averred the contrary, and that the cause was pleaded as a case
“ of law, without any demand for such an inquiry, the Lord Ordinary has
“ thought that there are sufficient data on which to decide it.

“ The judgment on the first plea in law, renders it unnecessary to go into
“ the disputed matter regarding the debt of the arresting creditor.

“ J. W. M.”

the statute 1581. That statute did not introduce the law upon the subject; but was made to protect the law as it existed previously. *King v. Dingwall*, Mor. 785; *Thesaurare v. Kyle*, Ibid. The civil and the criminal consequences do not necessarily follow in every case. The one may take place without the other. The facts alone may be sufficient to produce the civil consequences, whereas an inquiry, as to the animus quo, may be necessary before the criminal consequences can ensue. *Wardlaw v. Gray*, Mor. 786.

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Appellant's
Argument.
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It was the respondent's duty to leave such instructions at his house, as might ensure the transmission of papers on business to his place of business. He cannot be heard, therefore, to say he did not know of the arrestment, or that it was not known to those acting for him, when he did not take means to make it known. But proof of personal knowledge of the arrestment was never necessary in order to affect the arrestee with the consequences of breach of arrestment. *Ersk. III. 6, 2, 11, and 14. Blackwood v. Sutherland*, Mor. 1793.

[*Lord Chancellor.* — Parties in that case did not proceed on the idea that the arrestee was present, but absent. Here the party was in Scotland.]

The question there was, as to personal knowledge, and the consequences would have been the same if Lord Sutherland had been in Scotland. If the arrestment have been executed according to the mode prescribed by the statute, that is all that is required to protect the arrester, — hardship to the arrestee cannot interfere to stop enforcement of the rule of law. To hold that personal knowledge by the arrestee is necessary, would be to alter entirely the law of arrestment as it has been hitherto received.

[*Lord Chancellor.* — Your argument would go to hold

LIDLAW v. SMITH. } arrestment good in all the cases put by the Lord Ordinary. In these cases the arrestment is supposed to be before the payment, and unexceptionable.]

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Appellant's
Argument.

Ignorance is not enough to save the arrestee, not even bona fide ignorance, where knowledge might have been obtained. But even if proof of personal knowledge were necessary, Dundas and Wilson had intimation from Dunlop, so early as the 19th, of the probability of arrestment having been used; and inquiry had been made by Dunlop of M'Gregor and Murray on the 20th, as to the existence of any arrestment. Dundas and Wilson ought not to have been satisfied with the letter of Dunlop to his wife, but ought to have followed out the inquiry they had made of M'Gregor and Murray before paying; and M'Gregor and Murray, when Dunlop inquired of them, should have applied at Smith's house, or place of business. Dunlop had put both the agents of the respondent in a course of inquiry, and this was constructive notice to himself, — the omission of his agent was his omission.

[*Lord Chancellor.* — Is there any evidence where Smith was; or if those who were in charge of his house could have let the arrestment be known in time to stop payment?]

No.

Lord Advocate. — And the appellant did not ask any issue upon that point.

Lord Chancellor. — The appellant rests on the arrestment, and says it is for the respondent to make out a special case.

Respondent's
Argument.

The Respondent. — The appellant's argument goes the length, that the mere fact of the arrestment having been regularly made, is sufficient to determine the

arrestee's liability to make good the fund arrested, notwithstanding he may have paid to the common debtor, subsequently to the arrestment, under any circumstances whatever. The impracticability of such a state of the law is sufficiently pointed out in the note of the Lord Ordinary, to shew that there may be circumstances, beyond the mere fact of arrestment regularly used, requiring consideration, before the liability of the arrestee to make second payment can be determined.

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Argument.

I. The principle let in by the consideration of these circumstances is the bona fides of the payment made by the arrestee. Bona fides is recognized throughout the law of Scotland in regard to other questions between debtor and creditor, and third parties. Ersk. III. 4. 3, and III. 5, 7; Stair, I. 18, 3; and again, Stair, III. 1, 13, and III. 10, 1; Ersk. V. 5, 3, et seq.; and is to be found even in the bankrupt act, 54 Geo. III. cap. 137, sec. 30 and 38, in regard to the effect of sequestration, which is a congeries of arrestment and other diligences. And it is not excluded from the case of simple arrestment, but expressly applied to it. Stair, III. 1. 40.

II. Besides, it is impossible to make the respondent liable through any other medium than his conviction of a legal delinquency or wrong. Breach of arrestment is the sole medium concludendi of the appellant's summons, and that is nomen juris for a punishable offence. Stair, I. 9, 29, and IV. 50, 30; Ersk. IV. 4, 36, and 22. The statute 1581, cap. 118, likewise deals with the matter, as involving malus animus. But how can a party be guilty of the offence, if in ignorance of the arrestment?

Erskine, III. 6. 14, the most favourable authority for

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the appellant, puts the doctrine he lays down upon something done "in contempt of the diligence," and the reason he gives is the consequence of "admitting pretences of ignorance." But the respondent's defence is not a pretence or possibility of ignorance, but the actual and admitted fact of impossibility of knowledge, and how, then, can what was done be said to have been done in contempt of the diligence?

But any authority to be derived against the respondent from this passage in Erskine is done away by a unanimous decision of the Court subsequent to the publication of Mr Erskine's work. *Scott v. Fluyder & Co.* Mor. voce Arrestment, app. No. 1, in which the defence of bona fide payment by an arrestee, was distinctly recognized as relevant.

With regard to any thing done by the respondent's agents, there is not any averment on the record by the appellant, which could have entitled him to an issue, in regard to any laches by these parties, if he had asked for it. But the appellant neither put any statements on the record, nor asked any issue entitling him to go into any other question than the mere fact of arrestment, and payment subsequent to it; he allowed the facts to be taken as admitted according to the statement of the respondent, and the case to be treated as one purely of law.

Knight Bruce in Reply.—The onus is upon the respondent to make out a case justifying his payment. It is sufficient for the appellant to prove the regularity of his arrestment, and that the fund arrested was payable at the date of its being used. This was admitted by the respondent, and the matters in avoidance of his liability it lay upon the respondent to prove.

[*Lord Chancellor.*—Is it any part of your case that

Smith was not at home; that was not raised below, for the Lord Ordinary and the Court raise no question about the facts, and Mr Bruce opened on letters as ascertaining facts; no question was raised upon them till I asked how the facts were proved. Shew me on record these facts disputed.]

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Onus not on appellant of admitting or of asking issue to displace averments. It was for other party.

LORD COTTENHAM. — My Lords, The first, and for the reasons I shall presently give, the only question in my opinion in the present case, is as to the proposition of law raised by the first plea of the respondent, which may be shortly stated to be, whether the arrestee of a debt, paying it bona fide to the common debtor after a regular arrestment, but in ignorance of it, can be compelled to pay it over again to the arrester.

Ld. Chancellor's
Speech.

In considering this question, I shall assume the facts to be as stated by the Lord Ordinary. Independently of authority, the proposition that the arrestee is subject to such liability, would be one which it would be impossible to support upon principle. The law of Scotland allows the power of arrestment of property belonging to the debtor, for the benefit and security of the creditor, and it would be most unjust to enforce that right to the prejudice of others. To the arrestee who owes the debt, or possesses the property arrested, it must be matter of indifference to whom he pays or renders it. If the dealing between his creditor and another give to that other the right to recover the debt, the law, in carrying that right into effect, ought carefully to protect the person owing it. In other transfers of debt, and liabilities, it does so, and imposes no responsibility upon him to the person becoming entitled,

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until he has distinct personal notice of such transfer. Many instances of this are mentioned in the respondent's case. What creates the liability in any case to pay the debt over again to a person originally a stranger to the party paying? Merely the having paid it to one person with knowledge that another was entitled to it, which amounts to this, that a payment *male fide* shall be considered as no payment at all. It was for the appellant to shew why this general principle of law and justice is not applicable to cases of arrestment. The statute of 1581 prescribes the mode of making arrestments, and following the directions of that act, the arrester is entitled to all the benefits of his arrestment, as against the property or debt in medio, that is, as against his debtor and other competitors, but there is nothing in that act making the prescribed service at the dwelling-house the ground, without more, of personal liability in the arrestee, who, in ignorance of the arrestment, pays the debt *bona fide* to his original creditor. The assignment of a debt gives to the assignee a title to the debt, but not to recover the amount from the debtor, who, without notice, has paid it *bona fide* to the assignor. If the arrestment give such right to the arrester, as against the arrestee, it must be by a positive rule of law, independent of the particular circumstances; and if so, it must operate in the cases put by the Lord Ordinary, in which no caution on the part of the debtor could possibly protect him. Such consequences may not prove what the law is, but in deciding between conflicting authorities, may be permitted to weigh powerfully against those from which they must flow.

If, then, this liability be inconsistent with this rule of law in other cases, and be not enacted by statute, and if it be contrary to the principles of justice, it can only be

supported by the weight of legal and judicial authority. Only two cases have been referred to in which the question has been discussed, that of Blackwood, in 1703, and that of Fluyder, in 1770. It is true, that the first is mentioned by Mr Erskine, book 3, title 6, section 14, and apparently with approbation, but the latter case was decided after Mr Erskine's death, in 1768, though before the first publication of his work, in 1783. It does not appear how the case of the offence referred to by Mr Erskine in the same passage could have arisen, as neither the arrestee nor the property were within the jurisdiction. It appears to me, however, that Blackwood's case is a very distinct authority in favour of the appellant's proposition, but it is of an old date, and does not appear to have been followed, for nothing can be more explicit than the opinion of all the judges who decided the case of Scott v. Fluyder, on the 8th of March, 1770.

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Ld. Chancellor's
Speech.

The appellant attempts to get rid of the weight of this case, by stating that the arrestment against Tait was clearly void, but all the judges concurred in considering it as regular and valid, but that it had ceased to have any operation by his bona fide payment before he had notice of the arrestment. This, then, is a much later decision than that of Blackwood, and is in conformity with the rule of law in all similar cases, and is consistent with the principles of justice, which the former decision was not. I cannot therefore hesitate to approve of the judgment of the Judges of the Court of Session, who preferred adhering to this decision, rather than to re-establish the rule as laid down in Blackwood's case.

It was, however, argued, that the facts of this case, as stated by the Lord Ordinary, did not raise this question, because, although Smith had no personal notice of the

LIDLAW arrestment, his agents, Mr Wilson and Mr Murray had,
v. and that all were guilty of so much negligence, that
SMITH. notice of the arrestment ought to be assumed, or rather,
 26th Oct. 1841. that Smith ought not to be at liberty to say that he had
 Ld. Chancellor's not notice. So far as affects Smith personally, the
Speech. alleged negligence is the having left home without
 appointing some person to act for him in the event of an
 arrestment being served in his absence. There is no
 attempt to shew that his absence was from any improper
 motive with respect to the arrester, or that he had any
 reason to expect that there would be any arrestment.
 The proposition, therefore, is, that every person owing
 money to another is bound, under the penalty of per-
 sonal liability, before he leaves his own house, to appoint
 some person who, in his absence, may deal with any
 arrestment of the debt which may be served. The
 general operation of this proposition would be alarming,
 when it is recollected how large a proportion of the
 inhabitants of Scotland must necessarily be liable to
 debts and obligations to others, none of whom, according
 to the proposition of the appellant, could safely, or
 without being guilty of a neglect of duty, leave their
 houses for any length of time whatever, without
 appointing an agent, and leaving orders to provide
 against the possible event of some arrestment of such
 debt or obligation being served during his absence.

But it was said that Wilson, the agent at Edinburgh,
 and Murray, the agent at Glasgow, had sufficient inti-
 mation of the arrestment, to make the payment of the
 debt on Monday the 21st an act of negligence, which
 ought to subject the principal, Smith, to this liability.
 To this the short but decisive answer is, that Wilson
 and Murray were not Smith's agents for this purpose.
 Wilson's authority was only to settle the amount of

Dunlop's debt, and to pay the sum agreed upon, which had been remitted to him for that purpose. If the money in Wilson's hands was not to be treated as still in the hands of Smith, then at the time of the arrestment the property was no longer in medio, and if it was to be so considered, then the agency of Wilson cannot be extended beyond the real nature and object of his employment, and notice to him of the arrestment would not be of any effect to subject Smith to responsibility. If, indeed, he had had any such notice, which he had not, he would properly have suspended the execution of his orders till he had communicated with Smith, but his not doing so would not have affected him. Such is the recognized rule of law in this country respecting principal and agent, and which the security of mankind requires; and the case of Campbell, referred to in Erskine, book 3, title 6, section 4, edition by Mr Ivory, and note 310 to section 14, proves that the same rule prevails in the law of Scotland, and is applicable to this particular subject of arrestment.

I therefore think that the judgment of the Court of Session upon the proposition of law raised by the plea of the respondent is correct. The principal difficulty I have had in this case is as to the facts, for although there seems to be no reason for doubting that the facts, as collected and stated by the Lord Ordinary, are the real facts of the case, I cannot find in the proceedings any admission that they are so; and it is in my opinion so essential to the due administration of justice, and so important to the science of the law, that the facts of a case should be clearly ascertained, by either admission or proof, before the rule of law is applied, that I have been anxious to discover, if possible, some judicial ground for assuming that the facts are as stated by the

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Lord Ordinary, and I was for some time disposed to advise your Lordships to send the case back to the Court of Session for that purpose; but looking to the provisions of the 6th George IV., chapter 120, and particularly the 14th section upon this subject, and the manner in which the appellant brought his case before the Inner House, in which I do not find any complaint made of the Lord Ordinary having proceeded to adjudicate upon the merits without a proper previous ascertainment of the facts, and that it formed no part of his application there, that directions might be given for that purpose, I think that the appellant cannot now object to the interlocutor upon that ground. I must assume that all parties were aware of what the facts really were, and were desirous of having the opinion of the Court upon an admitted state of facts. I therefore propose to your Lordships to affirm the interlocutors appealed from with costs.

Judgment.;

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors, so far as therein complained of, be affirmed with costs.

DEANS and DUNLOP — RICHARDSON and CONNELL.
 Agents.