

lity could have no retrospect as to these. Nevertheless, the retrospect was approved as to these also; now, says Sir Robert, the effect of that cannot be to subject me to a second payment, and for the like reason says, as little can the effect of it be to subject me to the teinds of lands which yielded none; that, therefore, it must still remain entire for your Lordships to determine who is the person that is liable, the patron himself or Sir Robert.

“That it may be true the patron does not insist for this; but he is just as well entitled to insist for the teinds of Stanwood as he is for the teinds of Rosile.

“*Query*, What if Sir Robert had made no objections to the retrospect, would it not have been competent to plead as he now does? and if it would, what worse is he for having pled it before the commission?”

“*January 13, 1756.*—Found it not competent to review the judgment of the commission.”

1756. *January 23.* PATRICK SOUPER *against* J. FORREST, JOHN INGLIS, and OTHERS, Creditors of ALEXANDER SMITH.

ALEXANDER SMITH, having become insolvent, called a meeting of his creditors, and with the approbation of those who attended the meeting, addressed the following letter to John Watson, writer in Edinburgh:—“I hereby empower you to cause roup and sell the furniture of my house, and liquors in my cellars, for the behoof of my creditors.”

The agent of John Inglis, above mentioned, one of the creditors, was present at the meeting.

After Mr. Watson had taken possession of the goods and sold a part of them, arrestments were used in his hands by Souper, a creditor who had not been present at the meeting.

On the same day on which the arrestments were used, another arrestment was used by Mr. Inglis. The execution of Souper’s arrestment bore that it had been used betwixt the hours of two and three, and Mr. Inglis’ arrestment was between the hours of three and four.

Mr. Inglis further proceeded to poind the liquors remaining in Mr. Watson’s possession.

In this situation Mr. Watson brought a multiplepoinding.

*Pleaded* for Inglis and the general creditors, *primo*, That the money received by Mr. Watson as the price of that part of the goods which he had sold, was not arrestable by Souper as a creditor of Smith, because Watson was trustee for the creditors, and having sold the goods for their behoof, was accountable to them only, and not to Smith. And farther, that supposing that Mr. Watson was not by this commission trustee for the creditors, but was factor for Mr. Smith only; still, in this view the arrestment was equally an inept diligence; for Mr. Watson was on that supposition factor for Smith, and his possession was Smith’s possession, and an arrestment, in Smith the debtor’s hands, can get no preference by the established rules of law; and the only diligence competent in such case was

by pointing the moveables in the common debtor or his factor's hands ; and, accordingly Mr. Inglis, in the present case, pointed the wines in Mr. Watson's possession, in payment of the debt due to him, and it cannot be pretended, that the arrestment used in Watson's hands, was any bar to the pointing, supposing the possession and property not having been conveyed to the creditors. At the same time Mr. Inglis, if it shall be found that the conveyance to Mr. Watson for the behoof of the creditors shall stand good, is willing to give the benefit of his pointing to Mr. Souper and the other creditors.

*Secundo*, That supposing Mr. Souper's arrestment to be good, Mr. Inglis was entitled to be preferred, *pari passu*, in virtue of his arrestment of the same date. And further, that in this competition, although Mr. Inglis had already obtained a partial payment of his debt by means of the pointing executed by him subsequent to his arrestment, yet he was entitled to be ranked on the fund, *in medio*, upon his whole debt, as was held in the case of an adjudging creditor in the case of the *Earl of Loudon* against *Lord Ross*, 16th February, 1734, (*Mor.* 14,114.)

ANSWERED for Mr. Souper,—Upon the first point, that Mr. Watson derived his powers from Smith, and not from the creditors, and that the mandate was revocable by Smith ; and in regard to the argument used by the creditors, that, supposing Watson to be the mandatory of Smith only, then his possession was Smith's possession, and the arrestment was still inept, being in this view used in the debtor's own hands. It was answered, that the creditors did not properly distinguish between an arrestment in the hands of a factor, as debtor to his constituent, the common debtor, and an arrestment used against the factor of the debtor to the common debtor. Such was the case of *Donaldson*, 18th January, 1709 ; but there was no ground for maintaining, that if Mr. Watson was debtor to Smith to the extent of the money or effects in his hands, that money or those effects could not be arrested by the creditors of Smith.

Upon the second point, it was ANSWERED that Mr. Inglis could only be ranked for the balance of his debt ; that an arrestment, although it disabled the arrestee from disposing of the subject, yet is merely an inchoat diligence, which does not give the arrester any right to the subject ; and that there was no analogy between this case and the case of Lord Loudon, where the question was whether a real security, such as an adjudication, being once established, that security could be restricted by partial payments. The case would have been different if Mr. Inglis had brought a furthcoming before he pointed the effects.

The Lord Ordinary found “ that the property and possession of the goods to which the said letter relates remained with the said Alexander Smith, the common debtor, and lay open to the diligence of his creditors by arrestments, in so far as by a sale of the goods John Watson had money in his hands, and what was unsold were only affectable by pointing : Finds, that the arrestments laid on by Messieurs Souper and Inglis, in the hands of John Watson, affected what money he had received for goods sold in consequence of the said letter, prior to the foresaid diligence ; and, in regard, by the executions of arrestment produced, it appears that the several messengers returned their diligence as executed, only at the distance of an hour the one from the other, prefers the said Mr. Inglis, for so much as remained due to him after the pointing, and the said Patrick Souper *pari passu* upon the money affected as above by their several diligences, and decerns accordingly.”

*January 23, 1756.*—On advising a petition and answers against this interlocutor, the Lords found the price of the goods sold and delivered, not arrestable by Souper.

Lord KILKERRAN has the following note of what passed on the Bench.

“ Upon moving this petition, Elchies observed that the second point was rightly determined, because an adjudication in the case of the *Earl of Loudon and Galston* vested the right ; whereas an arrestment is only an inchoat diligence to be followed out, but vests nothing in the arrester.

“ But as to the first point, he thought that after the factor had sold the effects, the price was in the creditors, which no particular creditor could acquire a preference on by any diligence.

“ There are here two questions, 1st, whether the money in the hands of Watson, by sale of the goods, was affectable by Souper's arrestment.

“ 2dly, If it was, how far Inglis, who arrested at the same time with Souper, but who afterwards recovered a great part of his debt by pointing, is, when he draws *pari passu* with Souper, upon their arrestments, to be allowed to state himself creditor on his whole debt, as if he had not pointed, or if he is only to state himself creditor, in what remains due to him after the pointing.

“ But if the first of these questions be determined in the negative, that the arrestment of Souper did not affect the money got in by Watson, as the price of the goods, there is no occasion for the second question. And I am of opinion, that Souper's arrestment did not affect the money in Watson's hands, because I think how soon the goods were sold, the price was generally in the creditors ; and that therefore no particular creditor could acquire a preference thereon by any after diligence.

“ But if it should be supposed that this money was affectable, then I think Inglis can only state himself creditor in the balance remaining due after his pointing ; and that the case, *Earl of Loudon and Lord Ross*, does not apply, because in the *Earl of Loudon's* case, the estate was vested in him by his adjudication, before he got his partial payments.

“ *January 23, 1756.*—Price of the goods sold and delivered, not arrestable by Souper.”

This case is reported in the *Faculty Collection*, (*Mor.* p. 744.)

1756. *January 27.* SIR HENRY MUNRO of Fowlis, *against* COLIN MACKENZIE and OTHERS, adjudgers of the estate of BAIN of Tulloch.

THE question involved in this case, was reported to the Court by Lord KILKERRAN in the following terms :—

“ I am to report to the Lords a very short, but a general point of law, in the ranking of the creditors of Bayne of Tulloch.

“ There was an adjudication led of this estate in 1736, which came, by progress, in the person of Kenneth Mackenzie of Seaforth, who expedite charter and seasine thereon in February 1744 ; and this is admitted to be the preferable adjudication