

*Eastly*, Supposing arrestment in the hands of a servant were incompetent, the millers, in the present case, cannot, with any propriety, be considered as the servants of each particular member, during his turn, although, to avoid confusion, they are paid a certain quantity out of each parcel grinded; for they are hired by the corporation annually; the care of the mill is committed to them by the deacon and box-master, in name of the corporation; and, upon any emergency, they are entitled to give orders to the servants of the mill, not to grind for any particular member, preferable to the orders of the member whose turn it is to grind.

THE LORDS found the arrestment not competent.

*Act. Johnstone.*

*Alt. Montgomery.*

*Fol. Dic. v. 3. p. 42. Fac. Col. No. 148. p. 452.*

1760. December 10.

Competition of APPINE'S CREDITORS.

DOUGAL STEWART of Appine, perceiving his affairs to be in disorder, left Scotland in April 1756, in order to be out of the reach of his creditors; and, before his departure, he put the keys of his house in Edinburgh, together with an inventory of his plate, household-furniture and books, into the hands of a friend, Thomas Frazer, writer in Edinburgh; who, at the same time was creditor to him in a bond for L. 131 Sterling, bearing date the 3d April 1756.

Thomas Frazer soon after removed the plate, and a part of the furniture from Appine's house, and lodged them in a ware-room belonging to Francis Brodie, wright in Edinburgh. Brodie gave his receipt, obliging himself to restore the goods to Frazer; and Frazer, on the other hand, promised to pay him the cellar-rent; and paid it accordingly.

Upon the 26th of May thereafter, Alexander Stewart of Edinglassie, one of Appine's creditors, used arrestment in the hands of Francis Brodie; and in June following, John Campbell of Barcaldine, another of the creditors, laid on an arrestment in Frazer's hands; who raised a process of multiplepoinding, containing a conclusion to have it found, That the goods were pledged in his hands in security of a debt owing him by Appine; or at least, that he had a right of retention of these goods, until he should operate his payment. And in evidence of the impignoration, he produced a letter from Appine, of date 31st July 1756, in these terms: 'Dear Thomas, I am surpris'd that any body should give you any trouble concerning my furniture, especially as the same was left in your hands in further security of a debt I owe you above its value.'

*Pleaded* for Thomas Frazer: The intention of the common debtor, in putting the goods into his possession, was, that they might remain with him as a pledge in security of the debt which he owed him. And although this was not expressed by any written document, at the time of putting the goods into his hands, the

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A creditor intrusted with the key of his debtor's house, and an inventory of his furniture, &c. found not to have any right, either of impignoration or retention in these effects.

A competition took place between an arrestment in the hands of such depository, and an arrestment in the hands of another, to whom he had transferred the natural possession of the furniture. Both found competent, and preferred according to date.

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presumption is, that such was the meaning of parties. Possession of moveables presumes right in them; and therefore it is not incumbent upon Frazer to bring any evidence of the actual impignoration. At the same time, there is positive evidence of it from the letter in process. And it is plain, that Frazer had all along acted upon the full belief, that he had a right of pledge on the goods; otherwise it might have been an easy matter for him, to have assigned Appine's bond to a trustee; and to have pointed or arrested in his own hands.

*2do*, As he has the effects of the common debtor *bona fide* in his hands, he is entitled to retain them until he get payment of his debt. This right of retention he certainly could have used against Appine himself; and as an arrestment does not transfer the property, nor is a *cessio in jure*, the creditor who arrests, and pursues a furthcoming, must insist in the right of the debtor; and consequently must be liable to every exception that is competent against the common debtor. Upon these principles the Lords have decided in sundry cases; 10th December 1707, Lees *contra* Dinwiddie, Fount. v. 2. p. 402. *voce* COMPENSATION and RETENTION;—and 8th June 1745, Creditors of Glendinning, Rem. Dec. v. 2. p. 102. *voce* COMPENSATION and RETENTION.

*Answered* for Campbell and Stewart: Mr Frazer must prove the actual contract of pledge; for possession of moveables can never presume impignoration. The letter founded on by Mr Frazer can have no weight in the argument; because it was obtained *ex post facto*, after Appine had become notoriously bankrupt, and after the goods had been attached by arrestment. It is plain, that Frazer, at the time he received the inventory from his friend Appine, did not consider himself as having any right of pledge in the goods, otherwise he would have taken care to have had this expressed in a doquet subjoined to the inventory. And it appears from Brodie's oath in the furthcoming, that the goods were put into his custody, as goods belonging to Mr Stewart of Appine.

Neither can Frazer have any right of retention of these goods, in competition with the creditors-arresters. For, in the *first* place, He is not in the natural possession of them; and though it may be competent to arrest in his hands, because he is answerable for the goods to Appine; yet he has not such a possession as can entitle him to plead retention in his own hands, either against Appine himself, or his creditors-arresters. *2do*, Supposing the goods were in his natural possession, they were delivered to him upon the footing of a *depositum*; and it is *triti juris*, that a *depositum* must be restored, and that no right of compensation or retention can be pleaded against it.

'THE LORDS found, That there was no evidence of the impignoration in the hands of Thomas Frazer; and that he had no right of retention.'

Campbell then *insisted*, That his arrestment in the hands of Frazer, though posterior in time to that of Stewart in the hands of Francis Brodie, was preferable, in respect that the arrestment in Brodie's hands was an improper diligence.

*Pleaded* for Campbell, That Frazer was the proper custodier of the goods, and the person liable to Appine for re-delivery of them. Frazer was intrusted by Appine with the management of them; and it made no difference, whether he kept

them in his own natural possession, or committed the keeping of them to others. It is true, he lodged them for safety in a ware-room belonging to Brodie; but Brodie gave his receipt to Frazer for them, was bound to re-deliver them to him, and received his cellar-rent from him. It is plain, therefore, that Frazer is the person who is answerable to Appine for the safety of the goods; he is liable to him in a personal action for restitution of them; and, consequently, it was proper and competent to arrest in Frazer's hands: And this point being once established, it seems to follow, that the arrestment in Brodie's hands was an inept diligence; for an arrestment of the same subject cannot be effectually laid on in the hands of two different persons. If the person who is entrusted with the custody of goods, has transferred the natural possession of them to a servant or factor, he still remains the proper custodier of them, and the only person in whose hands arrestment can be used. Brodie had no connection with Appine; Frazer was his employer; and the prohibition in Stewart's arrestment could not hinder Frazer from taking up the goods from Brodie whenever he inclined. Upon these principles it has been decided, That an arrestment used in the hands of a trustee or factor of the debtor to the common debtor was inept; 12th December 1752, Campbell, No 74. p. 742.

*Pleaded* for Stewart, The arrestment in the hands of Frazer was inept; because the goods were not in his possession. All that appears, is, that he acted the part of a friend or servant in overseeing the carriage of them from Appine's house to that of Brodie, who from that time became custodier of them. In the next place, Supposing it to have been competent to use arrestment in Frazer's hands, yet there can be no doubt, that it was likewise competent to arrest in the hands of Brodie, who was in the actual possession of the goods; and the arrestment in Brodie's hands, being prior in date, must be preferred. Brodie cannot be considered merely as a servant of Frazer's; for if Appine had appeared, and claimed the goods from Brodie, he could not have refused to deliver them up; and in the same way he must deliver them up to a creditor of Appine's, who arrests in his hands.

'THE LORDS were of opinion, That both the arrestments were good; but preferred Alexander Stewart's arrestment in the hands of Francis Brodie, as being prior in time.'

N. B. Barcaldane did not insist for a *pari passu* preference upon the act of federunt 9th August 1754; because his execution of arrestment had not been recorded within the time prescribed by the act. (See COMPENSATION and RETENTION.)

Reporter, *Justice Clerk.*

For Frazer, *D. Dalrymple.*

For Stewart, *W. Stewart.*

For Campbell, *Ilay Campbell & Fergusson.*

Clerk, *Home.*

*Fol. Dic. v. 3. p. 42. Fac. Col. No 256. p. 471.*

*P. Murray.*