

January 27. 1747.

## ANSWERS for ROBERT RAE of Little-Govan,

To the PETITION of John Jamieson Merchant in Glasgow.

**T**HE Respondent *Robert Rae*, being Creditor to *Robert* and *James Robertsons* of *Glasgow*, by Bond, of Date in *November* 1737, for the principal Sum of *L. 500 Sterling*, in *May* 1740 arrested in the Hands of *George Bogle* and this Petitioner *John Jamieson*, who were Copartners with the *Robertsons* in an Adventure of Trade to *Jamaica*; and, having insisted in a Forthcoming before your Lordships, the Defender *George Bogle* deponed, "That he had in his Hands, at the Time of the Arrestment, of the Effects of the *Robertsons*, arising from their Share of the Adventure to *Jamaica*, the Sum of *L. 414 : 8 : 9½ Sterling*." And *John Jamieson*, the other Defender, depones "conform to *George Bogle* in omnibus, with respect to the *Jamaica* Trade and Adventure; and that the Balance stated in the Books, as falling to the Share of the *Robertsons*, amounts to *L. 767 : 11 : 11¼ Sterling*; of which Balance he (*John Jamieson*) is stated Debitor by the said Ledger in the Sum of *L. 353 : 3 : 1¼ Sterling*."

So far the Proof is clear and precise as to the common Debitor's Interest in the *Jamaica* Adventure. But the Petitioner *Mr. Jamieson* being further interrogated, If he was not also in Company with the *Robertsons* in a Trade to *Virginia*? he acknowledges he was; but, as to the Result of that Adventure, gives a very indistinct and uncertain account, as follows. "Depones, That, in the Year 1741 or 1742, the Deponent and Company's Effects in said *Virginia* Concern, and Shipping belonging thereto, were attached in *Maryland* at the Instance of *James Johnston* Merchant in *Glasgow*, for a Debt due by the common Debtors the *Robertsons* to him; and that *James Johnston* brought an Action before the Court of Chancery at *Annapolis*, against the Deponent and Company's Agents and Factors; for recovering his Payment out of the Goods and Effects so attached; and in which Action the Deponent, or his Agents and Factors by his Order, defended themselves and Effects for about the Space of eighteen Months; but were at length cast in the Process: And there was a Decree recovered against them, in said Court of Chancery, by the said *James Johnston*, for the Sum of *L. 264 : 5 : 9 Sterling*, as due by the *Robertsons* to him; and, in Payment and Satisfaction of which Decree, *James Scot*, one of the Partners and Agents for the *Virginia* Company, by his Bill, dated the 11th *November* 1742, valued upon the Deponent for the above Sum of *L. 264 : 5 : 9 Sterling* in favour of *Leven Gale*, Esquire, payable at ninety Days Sight; and which Bill was indorsed by the said *Leven Gale* to the said *James Johnston*, and by him in favours of Mess. *Archibald Govan* and *James Neilson* in Company, for his Behoof; and was presented to the Deponent for Acceptance on the 5th *February* 1742, and suffered by the Deponent to be protested for Not-acceptance; but, upon taking Advice thereanent, was afterwards paid by him under Protest, conform to *James Neilson's* Receipt on said Bill, dated 5th *May* 1743. Depones further, That the said *James Scot*, the Company's Factor, died sometime after drawing the above Bill; and that the Company's Effects, Books, and Debts in *Maryland* fell into the Hands of *Robert Whitebill*, his Assistant, Agent for the Company; and who, ever since *James Scot's* Death, has kept up the Company's Books and Debts, and refuses to come home, and clear with the Company: So that the Deponent cannot form a Judgment, how that *Virginia* Adventure will come out, so as to bring to a Balance the *Robertsons* Share of Profit and Loss in said Adventure: But as the Amount of the Stock in said Adventure extends to *L. 6000 Sterling*, and upwards, and that the *Robertsons* have advanced only 240 odd Pounds *Sterling* or thereby towards purchasing Cargoes of the said *Virginia* or *Maryland* Adventure, and that the Deponent and Company will be great Losers by said Adventure; and believes there will be nothing in *Whitebill's* Hands, belonging to the *Robertsons*, to be drawn by them, but that they will be considerable Debtors to the Company: So that the Deponent computes the Balance in his Hands, owing by him to the *Robertsons* after Deduction of the said *L. 264 : 5 : 9 Sterling*, is *L. 88 : 17 : 4¾ Sterling*."

The Protest mentioned in this Deposition to have been taken by the Petitioner, when he paid the Bill drawn by *James Scot*, the Partner managing in *Maryland* for the Company, upon him the Petitioner, in order to make Satisfaction for the Sums decreed in that Country

try to be paid to *James Johnston*, does not proceed upon any Caveat or Reservation of a Claim, for seeking Redress in a regular Way, by Appeal to the King in Council, against the Decree obtained by *James Johnston* in *Maryland*; but singly proceeds upon the Allegation, that *James Johnston* was in the wrong, to bring any Action whatever in *Maryland*, after he had once appeared in this Court of Session in *Scotland*, viz. in the Forthcoming pursued by this Respondent, and insisted for Preference there: And upon this Ground the Protest is taken against *James Johnston*, that he may be liable to the said *John Jamieson* and Company, for all Costs, Damages, and Expences.

The Answer to this Protest is furnished by the Petitioner himself; who tells your Lordships, in stating the Case, "That *Robert* and *James Robertsons*, Merchants in *Glasgow*, having become bankrupt, their Effects were arrested by several of their Creditors; particularly their Interest in a Company-adventure to *Jamaica*, and in another Company-adventure to *Virginia*. This brought on a Competition betwixt the Arresters and the other Creditors, whether the Arrestments were a habile Diligence to affect a Partner's Stock in a trading Company? This Point went for the Arresters. But, while the Competition depended, *James Johnston* the first Arrester, apprehensive that the Point might go against him, being upon a Voyage to the *West-Indies*, borrowed up his Bill and Protest out of the Process, and got the same exemplified and authenticated by the Magistrates of *Glasgow*, with a View to attach the *Robertsons* Effects in *Virginia*, if he found any there. He arrived in that Country; and, having found the Cargo belonging to the *Virginia* Company, of which the *Robertsons* had a Share, applied to the Court of *Annapolis*, setting forth his Claim, and obtained a Decree, against the Company's Supercargoes there, for *L. 264 Sterling*; which was the Amount of his Debt and Charges." Now, where was the Crime of this Procedure of *James Johnston*, if, when he set out to the *West-Indies*, he had Reason to apprehend, that it was a doubtful Question, whether, by the Law of *Scotland*, his Debitor's Interest in a trading Company could be affected by his Arrestment? Was there any Fault in his resolving to attempt recovering of his Payment out of the Effects of his Debitor, or of the Company, in another foreign Country to which he was then going, and where accordingly he recovered a Decree for the Amount of his Debt, with Costs?

On the 29th *June* last, the Lord *Kilkerran* Ordinary, having advised the Oaths of *George Bogle* and *John Jamieson*, finds proven, by the Defenders separate Oaths and Acknowledgments, and by the Ledger of the Company's Books in their Trade to the *West-Indies*, that the said *George Bogle* hath in his Hands, and is Debitor to the said *Robert* and *James Robertsons* in the Sum of *L. 414 : 8 : 9½ Sterling*; and that the said *John Jamieson* is Debitor to them in *L. 353 : 3 : 1¼ Sterling*; and finds the Quality in *John Jamieson's* Oath with respect to the *Virginia* Trade extrinick: and therefore prefers *Robert Rae*; and decerns in the Forthcoming against *George Bogle* and *John Jamieson*, for the Sums respectively due by them."

The Quality in *John Jamieson's* Oath, as above recited, was extrinick with a witness: For he labours to make up to himself and Company a counter Claim against the *Robertsons*, in respect of the *Virginia* Adventure, in order to extinguish *pro tanto* their Share in the *Jamaica* Adventure; which was clear and liquid. But this counter Claim, besides its being absolutely inconsistent with the Decree obtained by *James Johnston* against the Company in *Maryland*, was extremely uncertain and illiquid, by the Petitioner's own Showing in his Oath above recited: For, after confessing his Ignorance, and giving very good Reasons for it, of the true State of the *Virginia* Adventure, he computes, as he calls it, that is, he conjectures at random, the supposed Loss upon that Adventure to a Farthing.

Against this Interlocutor of the Lord Ordinary, a Representation was offered of a very uncommon Nature, not only in name of the now Petitioner *John Jamieson*, Defender in the Forthcoming pursued by this Respondent; but also in the Name of *James Johnston*, who had indeed used the first Arrestment of the *Jamaica* Balance; but yet in this Representation sets forth, that he had actually received Payment, and had in his Pocket the full Contents of his Claim against the *Robertsons*, in virtue of a Decree by him recovered at *Annapolis Royal*, against another Company in which the *Robertsons* were engaged; and yet the Representation modestly prays the Lord Ordinary to alter his Interlocutor, and to prefer *James Johnston* *primo loco* upon the *Jamaica* Balance; who, at the same time, was admitting, that he was already possessed of full Payment out of the other Subject of the common Debitor's Effects in *Maryland*. Upon this Representation, and Answers, the Lord Ordinary, on the 12th *November* last, pronounced the Interlocutor in the Petition recited, finding, That *James Johnston*, the first Arrester, having recovered Payment of his Debt out of the common Debitor's other Effects, in consequence of the Decree of a competent Court at *Annapolis*,



Annapolis, be cannot be heard to insist for a Preference in the Subject in question for another Payment of the same Debt; and therefore adhered."

Upon this, both *James Johnston* and the now Petitioner reclaimed to your Lordships; who, upon the 27th November last, adhered to the Lord Ordinary's Interlocutor; reserving to the Petitioner *James Johnston*, that, in case the Decree of the Court of Annapolis Royal shall be reversed, and thereby he shall be obliged to repeat the Money he recovered in that Court, he may age as accords, in virtue of his prior Arrestment, against the other Arresters who shall draw their Money by the Petitioner's being otherwise satisfied.

This Interlocutor of your Lordships contains and expresses the proper Remedies competent to this Petitioner, if it be true, that he has been aggrieved by the Decree that has been obtained by *James Johnston* in the Court of *Annapolis Royal*, namely, That he must bring his Appeal against that Decree to the proper Court, in order to have the same reversed; and, in case of such Reversal, your Lordships have reserved to *James Johnston*, who must be the Respondent in such Appeal, his Remedy, by bringing his Action, as accords, against the Arresters who shall now be preferred, and draw their Money upon the Supposition of *Johnston's* being already paid.

It is not easy for a common Eye to discern any thing in these Interlocutors that is justly to be complained of. And *James Johnston*, it appears, now acquiesces, and departs from his very extraordinary Compareance in the Representation above recited; but the Defender in the Forthcoming, *John Jamieson*, has been pleased again to reclaim to your Lordships; and you have appointed the Bill to be answered. And in doing this, otherwise than by setting forth the plain State of the Case, which the Respondent has already done, he must confess himself at a Loss, and under Difficulty, how to go about it, being still uncertain, after attentive Perusal, whether he rightly apprehends the Meaning or Force of the Arguments in this Petition, or the Objections it contains against the Interlocutors. The Reasons of deciding are obvious to common Sense, That a Creditor, who has already recovered full Payment from the common Debtor, in virtue of a competent Decree, cannot, whilst that Decree is yet standing, seek or obtain Payment a second Time out of another Subject, in virtue of a Decree to be obtained in another Court. And, 2dly, That the Decree which produced the Payment already made, and has thereby received full and final Execution, must stand good to protect the Obtainer of that Decree in Possession of the Money by him received in virtue thereof, at least until that Decree itself shall be reversed by a proper Authority; that is, of a Court to which there lies an Appeal from the Judge who pronounced that Decree. These are the Principles on which your Lordships Interlocutors proceed; and they seem to the Respondent to be obvious, as well as true Propositions: But the Objections in this Petition, though possibly they may be ingenious, learned, or subtle, are yet far from being obvious, at least to this Respondent's humble Apprehension; who shall proceed to answer them the best Way he is able.

The Petitioner begins his Argument with saying, "That there was a Wrong done by the *Annapolis* Decree, is agreed on all Hands. The only Doubt is as to the Remedy, whether it is competent at Common Law before your Lordships? or if it must be followed out by the extraordinary Method of applying to the King and Council?" But the Respondent cannot agree to any of these Propositions. And, first, The Averment in Fact is not true, "That it is agreed on all Hands there was wrong done by that Decree." This Respondent never admitted any such Thing, nor knows any Reason sufficient for his making such Admission. And, if there be a Wrong done, the Respondent thinks there is no Doubt as to the Remedy, namely, by appealing to the King and Council; which the Petitioner calls the extraordinary Method, but is in reality the ordinary one, and a known beaten Path. And what he calls a Remedy at Common Law before your Lordships in such Case, would be indeed very uncommon and extraordinary, that your Lordships should take upon you to review, reverse, or amend, the Decree of a Court of Justice in the *British* Plantations; which is not subject, so far as the Respondent could ever learn, to any ordinary Court of Law or Equity in *Great Britain*, and most certainly not to any Court in *Scotland*.

The Petitioner proceeds to argue his Case, upon the Supposition, that *Mr. Johnston* were seeking to be preferred upon his Arrestment in the Hands of the *Jamaica* Company; and tells your Lordships what would be his Defence against *Johnston*. But what has this Respondent to do with that fictitious Case? for *Johnston* has now withdrawn the absurd Appearance which he was prevailed with to make in seeking to be preferred upon his Arrestment of the *Jamaica* Cargo.

He next proceeds to another fictitious Case, that he were now in a Process against *Mr. Johnston*

*Johnston* for Repetition of the Money, which he *Johnston* received in virtue of the *Annapolis* Decree; and is at great Pains to prove, that the Decree could afford no Defence to *Johnston* against such Repetition. But what, again, has the Respondent to do with that Question, unless the Petitioner had already prevailed in such Process of Repetition, and had actually recovered back the Money from *Johnston*, who would then have been no longer a Creditor paid out of *Robertson's* Effects? But, as that is not the Case, the Respondent has no Business to examine the Justice of these Notions with which the Petitioner entertains himself; who if he believes or is advised, that such Process of Repetition is competent against *Johnston* in this Court, the *Annapolis* Decree notwithstanding, the Petitioner may bring his Action when he thinks fit. Only, the Respondent is humbly confident, that your Lordships will not, in expectation of the Event of such Action, recal or stop the Decree of Forthcoming that has been given in his favours, or suffer the Balance of L. 353, which has lien in the Petitioner's Hands ever since the Year 1740, and that dead, or without carrying Interest, to be longer continued there, to the Detriment of the Credit of the *Robertsons*.

The Respondent shall only observe, not altogether to overlook the Petitioner's Reasoning on this Head, that his Mistake seems to lie, in not distinguishing betwixt the Effect of a foreign Decree, when founded on by way of Action, or by way of Exception: For, in the former Case, it may be true, that, if Execution were pursued or sought *extra territorium* of the Judge who pronounced the Decree, the second Judge, who is only *ex comitate* obliged to lend his Aid, may properly inquire into, and seek to be satisfied of the Justice of the foreign Decree condemnatory, before he shall interpose any new Act of his own for recovering Payment upon that Decree, within his Territory. But here there is no Place for such Interposition. *Johnston* has already got his Payment in virtue of this foreign Decree: And this Court cannot take it back from him, or reduce or alter that Decree, either directly or indirectly. It must be held as good and just, till it shall be reversed or altered by the Jurisdiction, which is its own immediate lawful Superior. Things must be taken as they presently stand: According to which *Johnston* is paid, and the Respondent, the next Arrester, justly preferred to the Subject *in medio*.

The Petitioner concludes his Argument against *Johnston*, hoping your Lordships will find that Mr. *Johnston* cannot avail himself of the *Annapolis* Decree; and then proceeds to say, "And if Mr. *Johnston* be barred from making use of this Decree, the Petitioner, in name of the Company, must have the Benefit of the Arrestment laid on by him in their Hands, to bar the second Arrester from drawing more from the *Jamaica* Company than the second Arrester is intitled to draw." But, in the first place, how can your Lordships find the antecedent Proposition against Mr. *Johnston*, who is no Party in this Process, and has no Occasion to use or found upon his *Annapolis* Decree? It has had its Effect; he has touched the Money. There is at present no Place for your Lordships barring him from making use of that Decree. And, till that be done, there is as little Place for the Petitioner's Consequences founded on that fictitious Supposition.

The Petitioner goes on to say, "That he has a legal Interest to found upon *Johnston's* Arrestment, who paid the Money." But this is quite incomprehensible to the Respondent. For what Money did the Petitioner pay to *Johnston*? Not one Farthing of the *Jamaica* Balance, which is now decreed to the Respondent; but other Monies, which the Judge at *Annapolis* found belonging to the *Robertsons* in his Territory. And how can his Payment of that Money to *Johnston* be a Reason for his not paying this Money to the Respondent? It is, on the contrary, the very Reason why he should and must; since he has not hitherto made *Johnston* refund that Money, by applying to a proper Authority for that Purpose, in case it be true, that the same was wrongfully decreed; of which this Respondent knows nothing, but that *res judicata pro veritate habenda est*, until it shall be altered or amended by a proper Authority. And in the mean time the Presumption is for the Justice and Stability of the Decree; and all other Proceedings must go on upon that Supposition.

In short, the Respondent is tired with pursuing even thus far the Conceits of this Petitioner; and therefore shall submit the Case to your Lordships, without further Argument, whether it be possible for your Lordships to give an Interlocutor or Decree in Terms of the Prayer of this Petition? which is in Effect, That your Lordships should find, that the Payment made on the *Annapolis* Decree of the *Robertsons* Effects on the Continent, must be held as Payment made to Mr. *Johnston* out of the *Jamaica* Effects now in question, and which, by the Interlocutor as it stands, are decreed to be made forthcoming to the Respondent, who is now the first Arrester of these Effects, who is not already satisfied and paid.

*In respect whereof, &c.*

WILL. GRANT.