

benefit of the creditor, not for the conveniency of debtors. I do not see that the statute has made a difference when the estates are vested in trustees.

PRESIDENT. I differ totally from what I have heard: Creditors may give a *supersedere*,—the bankrupt may suspend. There is no word in this statute which gives the Court a power of granting personal protections after trustees are once named. If the creditors incline to have affairs conducted by trustees, every thing returns into the course of the common law.

JUSTICE-CLERK. It shall not be the interpretation of a doubtful clause in the statute, which will make me hold that a personal protection may be granted in opposition to the Act, 5th Geo. III.

On the 10th March 1773, “The Lords found that the Court is not empowered, by Act of Parliament, to grant the personal protection; and therefore refused the petition.

For the petitioner, A. Lockhart. *Alt.* J. M'Laurin.

1773. June 16. MESSRS ASHTON, HODGSON, and COMPANY, *against* SARAH MACKRILL.

FOREIGN.

Arrestment, *jurisdictionis fundandæ causa*, of effects, in this country, belonging to a Foreigner at the time of his death, used by another Foreigner, his creditor, whereon he brought an action of constitution and payment against the defunct's widow and daughter as his representatives, founds a jurisdiction to this Court to pronounce decree of constitution against the widow, executrix appointed in her husband's will, who, in pursuance thereof, had taken letters of administration, and, though not confirmed according to the Scots form, was maintaining actions against the debtors to the executry in this country, and likewise a party in multiplepointings brought by them.

[*Fac. Coll.*, VI. 171; *Dictionary*, 7669 and 4835.]

GARDENSTON. The single question is as to jurisdiction. I do not think the objection solid. The effects of a stranger, debtor in this country, while he is alive, may be affected by arrestment *jurisdictionis fundandæ causa*. The question is, Whether the same form ought not to be observed when the debtor is dead? I see no reason or authority for making a difference. The executor nominate is *eadem persona cum defuncto*. Sarah Mackrill has appeared in a multiplepointing, whereby she has acknowledged the authority of this Court.

HAILES. Sarah Mackrill, as administratrix, has received powers from the Ecclesiastical Judge to act in that capacity, and has found security. She acts for Messrs Ashton and Company as much as for any other creditor; and, if there is any dividend due and payable to Messrs Ashton and Company, she must pay it. This action, therefore, is not to obtain a legal right by the law of England: *that* is already secured; but it tends, by a new form, to invert

the order of English preferences ; and *this*, I think, the Court ought not to encourage.

COALSTON. Approved of Lord Gardenston's principles : The *arrestum jurisdictionis fundandæ causa*, or rather *explicandæ causa*, may be a modern invention ; yet it is founded on this plain principle, " that every Judge must have jurisdiction over every subject in his own territory." It is the situation of the effects which gives a jurisdiction. As, during the life of Mackrill, the effects were subject to this form of diligence, so also must they after his death. Real estates, in Scotland, belonging to Englishmen, may be directly affected by diligence. Suppose the Englishman dies, is it not competent to charge his heir ? It is of no consequence what this question is : we must judge between foreigner and foreigner, as between foreigner and native, or native and native. Besides, Mackrill, by appearing in the multiplepointing, has acknowledged the jurisdiction of this Court, and must be subject to it.

KAIMES. An Englishman, having an estate in this country, is, in effect, a Scotchman : he is the King's vassal ; so no difficulty as to him, whether dead or alive. Moveable effects are liable to the jurisdiction of this Court : the arrestment is only necessary to fix the goods in the hands of the party. If the proprietor is not subject to the jurisdiction, the arrestment will not subject him ; but still the goods are subject.

PRESIDENT. I doubt whether arrestment, by an Englishman, of goods belonging to an Englishman, is competent at all. I doubt whether this would be good although Mackrill was still alive. After Mackrill's death, the Englishman cannot take them out of the *hereditas jacens* by any form hitherto known in law.

JUSTICE-CLERK. The jurisdiction does not arise from the *arrestum* but from the situation of the goods. This case is singular. Here the goods, strictly speaking, have no proprietor at all : they are *in hereditate jacente* : but still they are not *res nullius*, and the Court may have a jurisdiction to make the goods recoverable. I think that the jurisdiction can take place in so far as to allow the creditor of Mackrill to constitute his debt. This *arrestum* is introduced for doing justice : if it is used in order to disappoint the course of payment, according to the foreigner's own law, I should greatly hesitate.

ELLIOCK. I have no doubt of the competency of the arrestment, : the Justice-Clerk's objection is premature.

MONBODDO. The widow cannot repudiate the jurisdiction of the Court, from the necessity of the thing.

KENNET. Ashton and Company could not confirm, because their debt was not constituted. Their arrestment is in order to constitute.

On the 16th June 1773, " The Lords repelled the objection to the jurisdiction over the widow."

Act. J. M'Laurin. Alt. A. Wight. Reporter, Monboddo.

No vote, but President, Hailes, &c. against the judgment.
