1772. *February 28th* and *March 3d.* WILLIAM RICHARDSON *against* MARTIN FENWICK.

ARRESTMENT.

A bill being duly protested for non-payment, found that the registered protest was not a sufficient ground for Arrestment of the drawer's effects, without a depending action; and, in consequence, a posterior Arrestment upon a dependance was preferred.

[*Faculty Collection, VI.* 28; *Dictionary*, 678.)

KAIMES. The arrestment founds a jurisdiction on the effects, so as the judge can proceed to adjudge them to the creditors.

PITFOUR. The only purpose of an *arrestum jurisdictionis fundandæ causa* is to create a jurisdiction on the effects. There must be a separate arrestment for the debt. So it was advised by eminent lawyers in the case of *Alexander M'Kenzie* and *The Swedish East India Company.*

PRESIDENT. After an *arrestum fundandæ gratia*, the party must proceed in the common form, and arrest upon the dependance.

PITFOUR. As to the second question, an arrestment may proceed upon a clear ground of debt; for the purpose of arrestment is to stop the fraud of the debtor.

ELLIOCK. This applies not to the present case. *Here* is an accepted bill. No liquid ground of debt against the drawer.

JUSTICE-CLERK. The question is, Whether a bill, duly accepted and protested for not-payment, can be the subject of arrestment against the drawer? The words in the statute are clear in the negative; and there is a reason for the difference between bills not accepted and bills not paid. When acceptance is refused, there is immediate recourse, because the drawer has drawn upon a person who had not his money; but, when a bill is once accepted, there may lie reasons against recourse, and therefore the law refuses summary executorials.

KAIMES. If the drawer has no objection to the negotiation, there is a clear ground of debt.

COALSTON. It is only from practice that arrestments are allowed upon liquid grounds of debt, without registration or dependance. If this is allowed, the same ought to be allowed here.

PRESIDENT. Practice is of much consequence. There is no practice authorising arrestment against the drawer when bills are accepted but not paid. After a bill is accepted, the drawer is only subsidiarily liable. In such circumstances a drawer may know nothing of the matter, when his whole effects are locked up at once by arrestment, and his credit interrupted, or perhaps ruined.

KAIMES. All diligence, prohibitory or executorial, implies a *mora* in the debtor. Nothing of this here.

On the 3d March, 1772, the Lords preferred Martin Fenwick's; adhering to Lord Hailes's interlocutor.

Act. Ilay Campbell. *Alt.* B. Sinclair.

1772. *March* 7. TRUSTEES Infeft in the Forfeited Estates of Lochiel and Callart, *against* ALEXANDER, DUKE of GORDON.

SUPERIOR AND VASSAL.

Lands held of a subject superior being forfeited and annexed to the Crown, the said superior is not entitled, upon an entry, to demand from the Crown's donatary, or trustee for the Crown's behoof, the composition of a year's rent.

[*Dictionary*, 15,050.]

1771. *December* 20. COALSTON.—It is a point established, that all purchasers must pay a year's rent, in name of entry, before they can claim an entry. What is the case when the king takes by a donatar, or bastardy, *ultimus hæres?* A year's rent is paid by the donatar. Why should not a donatar, on forfeiture, do the same? The analogy is strong. The argument from the case of singular successors is not conclusive; for the similitude of the cases of an adjudger and an appriser is very great; and yet, during a period of two hundred years, a year's rent was prestable by the one and not by the other.

HAILES. The decision 1680, *Lord Montgomery*, shows that at that time a year's rent was not prestable by the donatar of a forfeiture. There is no decision, or authority, either before or since that time, which says any thing to the contrary; from whence then comes the law to be altered? The suspender urges the analogy between this case and that of a donatar of bastardy, or *ultimus hæres;* but, instead of proving an unvaried and general practice, he refers to a few late instances. In establishing a principle by analogy, it is necessary that the principle referred to be constantly and invariably followed. It is bad logic to found a general analogy on single detached cases.

MONBODDO. I consider the Crown as proprietor of the estate by the forfeiture. I have always held that it is an established rule of the feudal law, wherever that law prevailed, that, in the choice of a vassal, there is a *delectus personæ*, and a *delectus familiæ:* hence the superior is not obliged to receive one for his vassal whom he does not like. This was universally the rule till the statute 1469. No privilege was thereby granted to the superior; but, on the contrary, an encroachment was made on his rights. When adjudications came in fashion, not long after 1669, the exception was extended to adjudgers: still the superior was not bound to receive any voluntary disponee. The circuit of an adjudication was necessary to compel him. The adjudication brought the case under the Acts 1469 and 1669. By the Act 20th Geo. II., an easier