

of the effects out of Scotland; Thomas Young opposed it. 'THE LORDS found, after a great debate, that before he can remove his money, he behoved to find Thomas Young caution *judicio sisti et judicatum solvi* in Scotland, for what *ex eventu* he and Scouler his conjunct should be found debtors to him.' Though in strict law, *actor sequitur forum rei*, and Young if he had ought to crave of Arnaud should pursue him in France.—But *tutius est incumbere rei quam personæ*.

Fountainball, v. 1. p. 274.

No 46.

1733. July 26.

COURTS against MILN.

AN arrestment at the market-cross of Edinburgh, pier and shore of Leith, of effects belonging to the common debtor, in the hands of an English merchant, residing at Bristol, and who had no *forum* in Scotland, was found null and inept. See APPENDIX.

Fol. Dic. v. 1. p. 330.

No 47.

1758. November 21. WILLIAM FORD Merchant in Berwick, Supplicant.

FORD, a merchant residing in Berwick, intended to apply to the Sheriff of the Merse, for a border warrant to arrest the goods of Tabor and Thomson, two merchants in London, his debtors; but was advised that the Sheriff might have a difficulty in granting this warrant, as in other cases, because Ford was himself an Englishman, and resident in England. A petition was therefore given in to the Lord Ordinary on the bills; who reported the case to the Lords.

THE COURT was unanimously of opinion, that the Lord Ordinary should grant the warrant for arrestment *jurisdictionis fundandæ causa*; and approved of this method of applying to the Court, seeing a petition to the whole Lords was unnecessary, as there was no need of intimation to the defenders.

Reporter, Lord Justice-Clerk.

W. J.

Fol. Dic. v. 3. p. 240. Fac. Col. No 136. p. 252.

No 48.

A stranger is entitled to apply to this Court by a petition to the Lord Ordinary on the bills, for a warrant to arrest *jurisdictionis fundandæ causa*.

1773. June 17.

MESSRS ASHTON, HODGSON, and Co. of London, Merchants, and their Attorney, against SARAH MACKRILL Widow, and CATHARINE MACKRILL, Daughter of the deceased John Mackrill of London, Woolstapler, and their Attorney.

THE pursuers being creditors upon certain receipts, or notes, granted to them by John Mackrill of London, which were due at the time of his death; and

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of effects in this country, belonging to a foreigner, at the time of his death, used by another foreigner, his creditor, on which he brought an action of constitution and payment against the defunct's widow and daughter, as his representatives, held to found a jurisdiction to the Court of Session, to pronounce decree of constitution against the widow, executrix appointed in her husband's will, who, in pursuance of it had taken out 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 was a party in multiple-pendings brought by them.

finding that there were sundry sums due to him by different persons in Scotland; in order to affect this fund, they used in the hands of these debtors an arrestment *jurisdictionis fundandæ causa*. The letters of arrestment narrated their grounds of debt; and that they were about to bring an action before the Court of Session against Sarah Mackrill, the widow, and Catharine, the daughter of the said John Mackrill, as being his executors, or otherwise representing him; but, as Sarah and Catharine Mackrills were not natives of this country, and not subject to the jurisdiction of the courts here, therefore it was necessary to have letters of arrestment *jurisdictionis fundandæ causa, &c.*

Thereafter, the pursuers brought their action against the said Sarah and Catharine Mackrills, and again arrested on the dependence. The action concluded, that it should be found and declared, that the debts therein narrated are just and lawful debts due to the pursuers; and also, that the defenders ought to be decerned to pay them: But, when the pursuers came to insist, they stated, that their debt, though ascertained by writing, needed however, a constitution by decree; till which were obtained, they could not confirm, nor get a preference in any way established upon the goods in question; and they confined their demand at present to such decree of constitution, *cognitionis causa contra hereditatem jacentem*.

Objected by the defenders; Although arrestments *jurisdictionis fundandæ causa*, for the purpose of entitling the user of such arrestments to bring an action against the owner of the goods so arrested, are authorised by the practice of this country; yet, as this form of arrestment was an innovation, introduced on grounds of expediency, it ought not to be extended further than it can be shown to be supported by practice and precedent; *Peckius, de jure sistendi, cap. 2. § 7.* No instance has occurred of an arrestment of that kind being used after the death of the person to whom the goods arrested belonged, in order to found an action against his representatives; and the defenders do maintain, that such arrestments can have no manner of effect until, at least, the goods so arrested shall be taken out of the *hereditas jacens* of the defunct, and the property of them be legally and completely vested in the said representatives, against whom the action is intended to be brought; for it is the right of property in the goods arrested that alone determines against whom an action may be brought in consequence of such arrestment.

In the present case, the defender, Catharine Mackrill, does in no shape represent her father, either *active* or *passive*; and, although the other defender, Sarah Mackrill, was appointed sole executrix of her husband, by his last will; and may, in consequence thereof, proceed to vest these effects in her own person; yet, until the necessary steps for that purpose are taken, it cannot be said that she is the proprietor of these effects; they still remain *in hereditate jacente* of the defunct; and, as it is not pretended that she can be brought before the courts of this country on any other medium, than that of her property being arrested *jurisdictionis fundandæ causa*, it is clear, that the present action, which

only proceeds on an arrestment of debts due to her husband, is totally incompetent. Though these debts might have been arrested prior to his death, for the purpose of bringing an action against himself, the arrestment subsequent to his death can have no effect to found an action against another person, whatever right that person may have to make up a title to them.

Answered ; In the *first* place, supposing the property not to be vested in the defender, as it is clear that, if Mr Mackrill himself were alive, the pursuers would have been entitled to use arrestment, and obtain decree against his goods found in this country, so they must be equally liable to such arrestment, and such decree, after his death ; as a man's effects must be equally liable to be affected by the diligence of his creditors after his death as well as before it. In the case of a native, no doubt, his death makes a variation as to the form of procedure, though his effects remain as much subject to his debts after his death as during his life. But, in the case of a foreigner, his goods, when found in this country, can only be attached by such an arrestment as the pursuers have used, whether he be dead or alive. After his death, and before his effects are taken up by his representatives, these goods are by no means *nullius* ; they are in his *hæreditas jacens*, and that, in the eye of law, *sustinet personam defuncti* ; the consequence of which is, that they must be affectable by his creditors ; and, as the only method of affecting them during his life was an arrestment, *jurisdictionis fundandæ gratia* ; so that must be the only method of affecting them after his death, while his representatives abstain from them, and at the instance of a creditor whose debt needs constitution. If such arrestment were not competent after death, the consequence would be, that no goods in this country belonging to foreigners deceased, could be attached by their creditors, which would manifestly be both inexpedient and unjust.

Again, supposing the defenders were not amenable to this Court, that would be no reason for refusing the decree which the pursuers now desire. In this case, the jurisdiction of the Court is founded by the arrest, or, to speak more properly, by the effects being in this country. The daughter and widow of the defunct have been called in the usual form, that they may have an opportunity to object to the debt ; as they have not done so, the pursuers ought to have a decree *cognitionis causa*, because the want of jurisdiction in this Court over the defenders, is no objection to such decree going out, as it will not contain any thing personal against them.

But, *2do*, Though the pursuers have hitherto argued on the supposition, that the property of the debts in question were not vested in the person of the defender, the widow, that is truly not the fact ; for she was appointed executrix by her husband's will, has proved that will in England, and administered in consequence of it. As, by her husband's will, the widow is appointed executrix and administrator of the whole estate, partly for behoof of her daughter, and partly for her own behoof, it is clear, that the property of the effects is vested in her, without the necessity of confirming here ; and so it has been

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found by this Court, particularly in the case of *Lawson contra Kello*, No 48. p. 4497; and that the defender herself is of that opinion, will appear from her own conduct.

3tio, The defender, the widow, is amenable to the jurisdiction of this Court, at the instance of the pursuers, and which she cannot be permitted to decline, on the principle of reconvention. She has brought actions in this Court against all the debtors her husband had in this country, and, among others, those in whose hands the pursuers have used arrestments; whereon, they have raised summonses of multiple-poining, in which they have called both her and the pursuers. As, therefore, the widow has brought actions as a pursuer, she cannot decline the jurisdiction of this Court, when actions are brought against her as a defender; at least, it is clear, she cannot decline it in the process of multiple-poining, at the instance of any of the debtors whom she herself has attacked; nor at the instance of the pursuers, against whom she has occasioned a process of multiple-poining, by bringing process against the debtors in whose hands they had arrested. In this multiple-poining, it is certain she cannot avoid to appear and compete; and it is a consequence, that this Court must have a jurisdiction over her in the pursuers' process of constitution against her; and that she cannot elude that decree, by pretending that she has no *forum* in this country.

Replied; This argument proceeds totally upon a mistake of the meaning of the *jus reconventionis*, which can never take place, except where the parties to both suits are the same. It may be safely admitted, that, if the persons against whom actions have been raised before this Court, in the name of the executrix, had any counter-claims against her husband, they may insist upon her answering to these claims before this Court; but the pursuers are in a very different situation: She has brought no action against them, nor has she chosen any Judge in this country to determine any questions between her and them. It is impossible, therefore, that they can establish any *forum* against her *ex jure reconventionis*; and it is of no consequence, that, in the character of executrix to her husband, and trustee for the purposes of his will, she has brought actions in this country to recover debts due to him by persons living here, whom she had not in her power to call to an account in her own country. That will by no means put it in the power of a third party to force her to appear before the courts of this part of the kingdom, unless it shall appear, that some other steps have been taken sufficient to subject her to the jurisdiction.

'THE LORDS repel the objection to the jurisdiction of this Court to pronounce the decree of constitution craved against Sarah Mackrill, the widow; and remit to the Ordinary to proceed accordingly.'

Reporter, *Monboddo*.Act. *Wight*.Alt. *M'Laurin*.Clerk, *Robertson*.*Fol. Dic. v. 3. p. 240. Fac. Col. No 71. p. 171.*