1795. *June* 17.

MANSFIELD, RAMSAY, and Company, and BAILLIE, POCOCK, and Company, *against* SMITH, WRIGHT, and GRAY.

No 44.
The clerk of a Company, which was insolvent, but not legally bankrupt, having sold their effects and put the price into the hands of a banker, in consequence of a previous concert with him, on an account in his own name, 'for the creditors of the Company,' the banker was found entitled to retain, for a debt due to himself, such a portion of the fund *in medio* as would have fallen to his share, if it had been divided among the whole creditors of the Company, in proportion to the amount of their debts; but other creditors were preferred according to the priority of their diligences.

JAMES KING, Joseph King, and Anthony Charleton, were engaged in a pottery at Newcastle, under the firm of James King and Company. They had likewise a warehouse at Leith, which was managed by a clerk.

In 1786 the Company became insolvent; and commissions of bankruptcy were issued against the Messrs Kings as individuals, but none against Charleton, or against the Company.

Upon this their manager at Leith, finding it impossible to carry on the business of the Company, applied for advice to Mansfield, Ramsay, and Company, bankers in Edinburgh, who were creditors of the Company to a large amount. By their advice he sold the goods on hand, and lodged the price, (amounting to above L. 200) with them, upon an account, in his own name, 'for the creditors of James King, and Company.'

In 1789, some English creditors of the Company raised a multiplepoinding, in the name of Mansfield, Ramsay, and Company, for the distribution of the sum in their hands. Appearance was made for the assignee under the commission of bankruptcy, and for various other creditors.

Smith, Wright, and Gray, Bankers in London, were creditors of the Company, in a bill for L. 120. In September 1790 they executed a summons for payment of this bill; and, upon its dependence, used an arrestment in the hands of Mansfield, Ramsay, and Company. They then produced the summons and arrestment as an interest in the multiplepoinding.

The summons of constitution was never called in Court.

In January 1791 they obtained an interlocutor of the Lord Ordinary, preferring them on the fund *in medio*. Some further litigation ensued; but a decree of preference, in their favour, was extracted in 1792.

Having then applied for payment to Mansfield, Ramsay, and Company, for whom no claim had been entered in the multiplepoinding, the latter brought a suspension and reduction of the decree of preference. Upon which Baillie, Pocock, and Company, likewise creditors of James King and Company, for whom no appearance had been made in the multiplepoinding, after using an arrestment *jurisdictionis fundandæ gratia*, executed a summons of constitution, (which was called in Court, and a decree in absence was obtained on it within a year from its date;) and upon its dependence an arrestment in the hands of the pursuers of reduction; and upon this interest claimed to be preferred on the fund *in medio*.

In support of this claim, they, along with Mansfield, Ramsay and Company,

No 44.

Pleaded, 1*mo*, James King and Company, having neither residence nor landed property in Scotland, the summons of constitution executed against them as out of the kingdom, by Smith, Wright, and Gray, and the interest founded on it, are void, as no arrestment *jurisdictionis fundandæ gratia* was previously executed against them.

2*do*, The sole object of an arrestment upon a depending action, is to keep the subject *in medio* until it can be attached by diligence on the decree afterwards obtained in the action, upon dependence of which it was founded. As however, the summons in the present case was not called in Court within year and day from its execution, no decree can ever be pronounced on it; and consequently, the arrestment of the defenders is ineffectual. And although an arrestment is competent upon a liquid ground of debt, without a depending action, the arrester is in no case entitled to a decree of preference or of forthcoming, until his document of debt be supported either by a previous decree of constitution, or at least of registration; Stair, b. 3. tit. 1. § 36.

Mansfield, Ramsay, and Company

Pleaded, 3*tio*, If the fund *in medio* had been deposited with the pursuers, without any qualification as to the terms on which they were to hold it, they would have been entitled to retain the whole in extinction of the debt due to themselves. The Company, though insolvent, were not made legally bankrupt; and the transaction would not have been impeachable on the acts 1621 and 1696; and still less on the head of actual fraud. Since, therefore, the qualification, in the terms of depositation, is the circumstance which gives the other creditors of the Company any right to claim at all, they must allow it to be carried into full effect; and the pursuers, if not entitled to hold the money in their hands, as trustees for the whole creditors, must at least be entitled to retain, for their own debt, the sum which would have fallen to their share, had all parties concerned been in the field. Their not being allowed to do so would be unreasonable, as they could not attach, by diligence, a fund in their own possession.

Answered, 1*mo*, The sole object of an arrestment *jurisdictionis fundandæ gratia*, is to insure, that the judgment pronounced in the subsequent action shall not be nugatory. It is, therefore, never required where the defender has a landed estate in Scotland. For the same reason, it was unnecessary in the present case, where the multiplepoinding, by placing the fund *in medio* under the jurisdiction of the Court, had anticipated its effect.

2*do*, Where the purpose of executing a summons is merely to produce it as an interest in a ranking of creditors, the production of it in the ranking is equivalent to its being called in Court. Besides, the arrestment might have proceeded on the bill itself, without a previous action; and it would be hard that a precaution, which was not essential, should be fatal to the diligence.

It is a mistake to suppose, that a decree of constitution was at all necessary in the present case. The production of an executed summons and arrestment

No 44. gives a legal title to compete in a multiplepoinding. There all parties interested are in the field, and have an opportunity of canvassing the justice of the claims produced. The decree of preference is, therefore, to be considered as a general decree of constitution for all concerned. To oblige each creditor to constitute his debt apart, would be multiplying judicial procedure to no purpose.

3tio, It is admitted, that the Company was notoriously insolvent, and even that commissions of bankruptcy had been issued against two of the partners, before the fund *in medio* was lodged with the pursuers. It was therefore the duty of the Company to have kept their property in their own possession, subject to the diligence of their creditors, leaving it to them to acquire preferences, according to their activity. No trust-right granted by the Company would have been effectual against non-acceding creditors; and the powers of their clerk were still more limited. If he found it necessary to dispose of the goods on hand, he ought to have lodged the price with a neutral banker. Since his acting otherwise was owing to the advice of Mansfield, Ramsay, and Company, they are not entitled, without having done any diligence to attach the subject, to retain any part of it for their own debt; and still less, by considering themselves as trustees for all concerned, to put the most supine on a footing with the most active creditor. If there is any hardship in their situation, they have themselves to blame for it. If it was incompetent for them to have arrested the funds in their own name, they might have assigned their grounds of debt to a friend, who might have done so for their behoof.

THE LORD ORDINARY found the expense of raising the original process, and extracting the decree in it, a preferable burden on the fund *in medio*; 'preferred Messrs Smith, Wright, and Gray, *secundo loco*, upon the funds *in medio*, for payment to them of the two sums of L. 120, and L. 25 Sterling *, with interest, in terms of the decree charged upon: Preferred William Crumlington and Company, Mrssrs Walkers, Fishwick, and Company, *tertio loco*, upon the funds *in medio*, for payment to them of the sums contained in the accounts produced for them †. And preferred Bailie, Pocock, and Company, *quarto loco*, for payment to them of the sums contained in the decreet produced for them.'

Upon advising a reclaiming petition, with answers,

The COURT were unanimously of opinion, that the process of multiplepoinding superseded the necessity of an arrestment *jurisdictionis fundandæ gratia*, and that the decree of preference, produced by the defenders, rendered it unnecessary either to call the summons in Court, or to take a decree of constitution upon it; but the Company not having been legally bankrupt at the time the money was lodged, and the transaction being fair and reasonable, it was thought that Messrs Mansfield, Ramsay, and Company, were entitled to a rateable proportion of the fund *in medio*.

* This last sum was the amount of the expenses awarded them in the original action.

† These two Companies were ranked in the same order in the decree of multiplepoinding, upon production of accounts against the Company; but they had done no diligence against the subject.

No 44.

THE LORDS found, 'That Messrs Mansfield, Ramsay, and Company, are entitled to retain, out of the fund in their hands, a proportion thereof, corresponding to their own debt, *in computo* with the debts due to the whole other creditors of the bankrupts: preferred Bailie, Pocock, and Company, *tertio loco*, according to the date of the arrestments: Found Messrs Crumlington and Company, and Messrs Walkers, Fishwick, and Company, are only entitled to be ranked on the remainder of the funds *pari passu* with Mansfield, Ramsay, and Company, for the balance of their debt, and any other creditors of the bankrupt who have used no arrestments: And, with these variations, adhered to the interlocutor reclaimed against, and refused the desire of the petition; and remitted to the Lord Justice-Clerk Ordinary to apply this interlocutor, so far as to ascertain the amount of the proper debts due to Messrs Mansfield, Ramsay, and Company, and the amount of the debts due to the whole other creditors of the bankrupts.' *See* FORUM COMPETENS.—PROCESS.

Lord Ordinary, *Justice-Clerk.* Act. *Dean of Faculty Erskine.* Alt. *Solicitor-General Blair, D. Douglas.* Clerk, *Gordon.*

D. D. *Fol. Dic. v. 3. p. 146.* *Fac. Col. No 177. p. 419.*

1796. *May* 13.

ALEXANDER NAIRNE, Trustee on the Sequestrated Estate of Peter and Francis Forrester and Company, *against* THOMAS CRANSTOUN, Trustee for the Creditors of Alexander Laidlaw.

No 45.

A. and B. granted accommodation-bills to each other nearly of the same value. A. indorsed the bills accepted by B. for value; but B. retained in his own hands those granted by A. A. and B. having afterwards become bankrupt, the indorsees of B.'s bills ranked for payment of them, both upon his estate as accepter, and upon A.'s as drawer; from the the former they drew 10s. in the

ALEXANDER LAIDLAW accepted bills drawn by Peter and Francis Forrester and Company to the amount of L. 831 : 3 : 6; and, on the other hand, they at the same time granted promissory-notes to Laidlaw for L. 833 : 9 : 7. Both sets of bills were payable either five or six months after date.

Peter and Francis Forrester and Company indorsed the bills accepted by Laidlaw, and received their value; but before they were payable the Company became bankrupt.

About the same time Laidlaw also stopped payment, while possessed of the promissory-notes of Forrester and Company.

The holders of Laidlaw's bills drew 10s. in the pound of their amount from his estate. They also ranked for them upon the estate of Forrester and Company, from which it was supposed they would draw 5s. more.

Mr Cranstoun, trustee for Laidlaw's creditors, having claimed to be ranked on Forrester and Company's estate for the promissory-notes granted to Laidlaw by them, Mr Nairne, the trustee upon it,

Objected; The granting of the promissory-notes did not create a debt against Forrester and Company, distinct from that due by them in consequence of the accommodation-bills which they received from Laidlaw, and got discounted. These bills were the only value which they received for granting them; and, had Forrester and Company paid them, Laidlaw would have had no claim for