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In order to secure regularity of publication, it is occasionally necessary to insert the Reports of Cases slightly out of the order of dates on which they have been decided.

COURT OF SESSION.

Tuesday, February 5.

OUTER HOUSE.

[Lord Kinnear.

PARNELL *v.* WALTER AND ANOTHER.

Jurisdiction—Arrestment ad fundandam jurisdictionem—Debt Due to English Copartnery.

In an action for slander against a domiciled Englishman it was established that arrestments had been used against him in Scotland to found jurisdiction which had attached debts due to an English copartnery of which he was a member. It was proved that by the law of England while the assets of the copartnery belong to the partners jointly, the share of each partner is his proportion of the partnership assets after realisation and payment of debts and liabilities. *Held* that the arrestment was not valid to found jurisdiction.

Jurisdiction—Slander—Publication.

Held that publication of a slander in Scotland is not of itself sufficient to found jurisdiction in an action of damages for the slander.

This was an action at the instance of Charles Stewart Parnell of Avondale, County Wicklow, Ireland, Member of Parliament, against John Walter, proprietor of *The Times* newspaper, and residing at No. 40 Upper Grosvenor Street, London, W., and George Edward Wright, printer and publisher of the said *Times* newspaper, Printing-House Square, Blackfriars, London, E.C., concluding against the defenders conjunctly and severally for the sum of £50,000 in name of damages for slander alleged to be contained in certain letters and articles published in the numbers of *The Times* newspaper for 18th April 1887 and 3rd, 4th, 5th, 6th, and 7th July 1888.

The defenders pleaded—"(1) No jurisdiction against either defender."

The pursuer's averments relative to the question of jurisdiction, and the defenders' answers thereto, were as follows:—"(Cond. 1) . . . The defender John Walter is the registered proprietor of *The Times* newspaper, under the Act 44 and 45 Vict. cap. 60, and the other defender George Edward Wright is the printer and publisher thereof. As the registered proprietor of the said newspaper Mr Walter is entitled to sue and liable to be sued in all actions relative thereto, and in that capacity he defended the action at the instance of Hugh Frank O'Donnell, hereinafter referred to, and other actions against the said newspaper. Mr Walter has also right as proprietor to recover and discharge debts due in respect of the said newspaper." "(Ans. 1) . . . Admitted that the defender Wright is the printer and publisher of *The Times* newspaper, published in London. Explained that he is not a proprietor of *The Times*, but is only a salaried servant of the proprietors thereof. Admitted that the defender is the person who, in terms of the Act 44 and 45 Vict. cap. 60, is registered as a proprietor on behalf of himself and others of

The Times newspaper as defined by and for the purposes of the said Act. *Quoad ultra* denied, and explained that *The Times* is not the exclusive property of the defender Walter, and that he is not the proprietor thereof, but that it belongs to a partnership of which he is a member, along with Sir Henry Fraser Walter, Sir Edward Walter, and other persons, and that he is not entitled to sue nor liable to be sued in actions relative to the said newspaper." "(Cond. 8) The defenders not being resident in this country, the pursuer used arrestments *ad fundandam jurisdictionem*, conform to executions herewith produced. By the said arrestments funds have been attached in the hands of the arrestees, to which the defender Mr Walter has right as proprietor of the said newspaper. It is denied that the said newspaper is only published in London. For many years prior to and in the months of April, May, and June 1887, and July 1888, copies thereof, and particularly of the issues of the several dates libelled, containing the foresaid facsimile letter, report, and articles, were sent by post by the defenders from their publishing office in London to many persons resident in Scotland, and to clubs and reading-rooms there, and were sent in parcels by rail to numerous newsagents throughout Scotland for sale and distribution to and among the general public there, and were by them so sold and distributed. The said newspaper thus was and is published by the defenders in Scotland." "(Ans. 8) Admitted that the defenders are not resident in Scotland. Explained further, that neither of the defenders is subject to the jurisdiction of the Scottish Courts. Denied that any jurisdiction has been founded against the defenders. The execution of the letters of arrestment are referred to. No sum whatever was due by the arrestees to either of the defenders, and nothing was consequently attached by said arrestments. *The Times* newspaper is only published in London. *Quoad ultra* denied."

The pursuer pleaded—"(1) The defenders are subject to the jurisdiction of this Court, 1st, in respect of the publication of the said newspaper in Scotland; and 2nd, in respect of the foresaid arrestments."

The Newspaper Libel and Registration Act 1881 (44 and 45 Vict. cap. 60), sec. 1, enacts, *inter alia*—"The word 'proprietor' shall mean, and include as well, the sole proprietor of any newspaper, as also, in the case of a divided proprietorship, the persons who, as partners or otherwise, represent and are responsible for any share or interest in the newspaper as between themselves, and the persons in like manner representing or responsible for the other shares or interests therein." Section 7 enacts—"Where in the opinion of the Board of Trade inconvenience would arise or be caused in any case from the registry of the names of all the proprietors of the newspaper (either owing to minority, coverture, absence from the United Kingdom, minute sub-division of shares, or other special circumstances), it shall be lawful for the Board of Trade to authorise the registration of such newspaper in the name or names of some one or more responsible 'representative proprietors.'" Section 8 enacts—"A register of the proprietors of newspapers as defined by this Act shall be established under the superintendence of the registrar." Section 9 enacts—"It shall be the duty of the printers and publishers for the time being of every newspaper to make or cause to be made to the Registry Office on or before the thirty-first day of July 1881, and thereafter annually in the month of July in every year, the following particulars according to the Schedule A hereunto annexed—that is to say, *(a)* the title of a newspaper, *(b)* the names of all the proprietors of such newspaper, together with their respective occupations, places of business (if any), and places of residence." Section 19 enacts—"This Act shall not apply to Scotland."

The defenders objected to the relevancy of the averments upon which the pursuer sought to found jurisdiction, on the ground (1) that publication was not *per se* a sufficient foundation for jurisdiction, and (2) that the arrestments were inept, in respect it was not averred that the defender Walter was sole proprietor. It was only averred that he was registered proprietor in the sense of the Act 44 and 45 Vict. cap. 60, which was quite consistent with his only having a beneficial interest along with other partners.

The Lord Ordinary on 6th November 1888 allowed parties a proof of their averments on the question of jurisdiction.

"*Opinion.* — There are two separate grounds of jurisdiction upon which it is maintained that jurisdiction is founded. In the first place, the execution of arrestments for that purpose; and in the second place, the publication of the slander complained of in Scotland. I think it impossible to determine the questions raised upon the first of these two pleas until the facts have been ascertained. I think it quite indispensable to know what debt has been arrested, and what relation of debtor and creditor exists between the arrestees and the defender, if any such relation exists. As to the other ground of jurisdiction—publication in Scotland—I am not aware of any authority or precedent for sustaining an action of this kind against an Englishman domiciled and resident in England without either arrestment or personal service upon the defender; and if I were disposing of that point now, I should think it is probable that it might be disposed of upon the averments upon record alone; but I think it is not expedient to pronounce any formal judgment upon that point until the whole question of jurisdiction can be determined by one interlocutor. Therefore I shall allow parties a proof of their averments bearing upon the question of jurisdiction."

The defenders reclaimed.

At advising—

LORD PRESIDENT—The most important question which the Lord Ordinary had before him here was, whether arrestments

had been used which had the effect of founding jurisdiction against the defender Walter, and his Lordship came to be of opinion that he could not dispose of that question without proof. I entirely agree with his Lordship. I think it would be a very rash thing indeed to say upon the face of this record as it stands that it shows that there was no good arrestment to found jurisdiction, or that the averments of such an arrestment having been made are irrelevant.

They do not appear to me to be irrelevant, and if the averments as made be established in point of fact the averment will probably be found to be good for its purpose. But it is not necessary to anticipate what may be the result of this proof; it is enough, I think, for the present purpose to say, quoting from the Lord Ordinary's interlocutor, "that without proof it is quite impossible to dispose of these questions satisfactorily." Therefore I think the interlocutor of the Lord Ordinary so far is open to no objections.

But the Lord Ordinary has declined in the meantime to dispose of another objection to the jurisdiction of the Court urged on behalf of the printer and publisher of that newspaper, Mr Wright, and it may be that this ground of jurisdiction is quite separable from the other and may be disposed of separately, but when we come to that it is really a matter dealing entirely with the course of procedure in the Court, and we are always exceedingly unwilling to interfere with the discretion of the Lord Ordinary in a matter of this kind. That question of jurisdiction will come to be determined along with the other, and I do not see any such overwhelming expediency or necessity for disposing of that question separately as to lead me to interfere with the discretion of the Lord Ordinary. I am therefore for adhering to the interlocutor.

LORD MURE concurred.

LORD SHAND—It is a salutary rule of the Court which has been long in observance and which has often prevented a great deal of litigation in the initiatory stages of a case that in matters of procedure we should not interfere with what has been done by the Lord Ordinary unless it is established that injustice has been done or that some miscarriage of justice will follow from the course which the Lord Ordinary has chosen to adopt. In this case it appears to me that the whole argument which we have heard to-day will be quite open to the defenders after this proof has been taken, and it is upon that footing that I understand the Lord Ordinary has pronounced his judgment. Whether it can be shown that these arrestments have or have not attached funds which belong to the defender Mr Walter so as to make him liable to the jurisdiction of the Court is, as it appears to me, attended with some difficulty, and I certainly must reserve my opinion upon it until we have the proof before us, and I think it is desirable that there should be a proof in this case in order that we may reach a sound judgment upon this point.

The only matter which causes any doubt in my mind as to whether this interlocutor should be simply adhered to, arises from what Mr Murray has urged as to the effect of the averment in support of the statement in article 8—"By said arrestments funds have been attached in the hands of the arrestees to which the defender Mr Walter has right as the registered proprietor of the said newspaper." It is said that under this averment the pursuers may possibly propose to lead evidence as to English law. Well, I am not prepared to say that that is not competent. If the defenders in such a case are taken by surprise by anything of this kind, no doubt the Lord Ordinary has the remedy by saying—"This is a matter of which no notice has been given, and I shall not close the proof without giving the defenders an opportunity of meeting it." That would be the utmost inconvenience which could arise, but it would be met by the pursuers giving some notice of what they proposed if they did propose to lead evidence of English law in support of the statement I have just quoted. That is the consideration which has weighed on my mind on the question of whether this interlocutor should be adhered to without some further averment, but on the whole I think any additional averment on the subject is not necessary.

As to the position of the other defender, Mr Wright, the Lord Ordinary has indicated that he thinks there is no ground of jurisdiction against that defender, but still he thinks it is desirable to keep the case entirely together and to dispose of it ultimately upon the whole facts. I entirely agree with the course which the Lord Ordinary has taken, I think it is desirable in this case to get the facts before us and not to decide upon any narrow question of relevancy or upon any such questions as have been argued on the part of the defender to-day.

LORD ADAM concurred.

A proof was thereafter led. The evidence was to the following effect:—(1) On the question of publication it was proved that the *Times* was sold and circulated in Scotland. The manner in which it was sent or delivered by the proprietors of the newspaper to persons resident in Scotland, and the only manner, was by delivering copies at a post office or railway station in London to persons who had prepaid the price. (2) On the question of arrestment, it was proved that the subject arrested consisted of sums amounting in all to about £15 due by Edinburgh advertising agents for advertisements inserted in the *Times*, and that no part of the sums so arrested were due to the defender Wright. The defender Walter was not the sole proprietor of the *Times*. The property in that newspaper was subdivided into a number of shares. The subdivision had arisen in this way. John Walter, the grandfather of the defender

Walter, established the newspaper in 1785. In his lifetime he gave off certain shares by deed *inter vivos*, and bequeathed the remainder on his death. By a similar subdivision in the next generation the property had become still further sub-divided. The defender Walter was owner of certain of these shares. He was also proprietor of the printing premises and plant connected with the newspaper, and had been appointed manager by the other proprietors by deed of indenture dated 5th November 1846, and joint-manager along with his son Arthur Fraser Walter by deed of 22d June 1885. He was entered as proprietor in the returns made under the Newspaper Registration Act 1881 till 1888. Thereafter the entry was "John Walter, on behalf of himself and all others, the proprietors of such paper." This entry was by authority of the Board of Trade under section 7 of that Act. The skilled evidence of members of the English bar was led upon the English Law of Partnership relative to those circumstances. The evidence was to the effect that the subjects arrested did not belong to the defender Walter as an individual, but to a firm of copartners of which he was a member along with others. It was further established that by the English law the assets of a copartnery belong to the partners jointly, each having an undivided interest in the whole. The share of a partner is the proportion of the assets to which he is entitled after realisation and payment of debts. Debts due to the copartnery cannot be taken in execution for the debt of one of the partners.

Argued for the pursuer—(1) On the question of jurisdiction founded on arrestment, money had been arrested due to the *Times*. Whether the relationship between the different persons interested in that newspaper was that of co-owners or of partners made no difference. For a partnership in England was not a *persona*. The property of the partnership was just the property of the individual partners. It followed that by arresting a debt due to the *Times* the pursuer had arrested a debt due to the defender Walter, and had thus established jurisdiction. The fact, spoken to by defender's witnesses, that an execution creditor of a partner could not in equity carry off the partnership assets which he had attached in satisfaction of the debt due by the partner, but could only proceed by way of an accountiug, did not affect the validity of the arrestment. The property had been attached although there might be equities interfering with its realisation. An arrestment of a vessel owned by a number of individuals was good to found jurisdiction against any one of them—*Gibson* v. *Smith*, March 10, 1849, 11 D. 1024. But further, it was not open to the defender Walter to plead partnership. He was the registered responsible "representative proprietor" under the Newspaper Libel Act 1881. He had also during the whole time of publication of the libels registered himself as sole proprietor under section 9 of that Act, and so held himself out as such to the public; and, lastly, he held that position so far as the public were concerned by virtue of the deeds of indenture of 1846 and 1885. (2) The slander has been published in Scotland. That *per se* was a ground of jurisdiction.

Argued for the defenders—(1) The debt arrested did not belong to the defender Walter, but to a partnership of which he was a member. It was settled law in Scotland that arrestment of a partnership debt did not found jurisdiction against an individual partner. There was no difference between the English and Scots law of partnership such as to displace this rule. No doubt in English law the partnership was not regarded as a separate *persona*. But in English as in Scots law the beneficial interest of each partner was merely a right to division of the surplus assets upon realisation. In neither sytem of law could a debt due to the partnership be taken in satisfaction of a debt due by a partner. That being so, there was nothing in the registration of the defender Walter under the Newspaper Libel Act 1881 nor in his appointment as manager which could affect the question of jurisdiction. The Act did not extend to Scotland, and while it made the defender Walter the proper person to sue in the English Courts it did not alter his relation of partnership with the other proprietors, or give him any other right to the partnership debts than that of a partner. The same might be said of his appointment as manager. That gave him powers of management, but did not alter his partnership relation to the other proprietors. (2) Publication in Scotland was not *per se* a ground of jurisdiction—*Longworth* v. *Hope*, July 1, 1865, 3 Macph. 149, 37 Scot. Jur. 552.

The Lord Ordinary (KINNEAR) on 5th February 1889 pronounced the following interlocutor—"Sustains the first plea-in-law for the defenders, dismisses the action and decerns: Finds the defenders entitled to expenses, &c.

"*Note.*—The only question which I can determine at present in this action is the question of jurisdiction. It is a remarkable action in this respect, that neither of the parties is personally subject to the jurisdiction of the Scottish Court. The pursuer, who is not resident in Scotland, complains that he has been injured in his character and reputation by the publication of certain slanderous statements in *The Times* newspaper, and upon that ground he brings this action against the two defenders, as proprietor and printer of *The Times*, neither of these persons being resident in Scotland, but both of them being domiciled and resident in England. The defenders do not, as I understand, dispute that they are answerable for the statements which are published in *The Times* newspaper, but they maintain that they cannot be required to answer except in the courts of their domicile, and that they are not subject to the jurisdiction of the Courts of Scotland. The pursuer, on the other hand, maintains that this Court has jurisdiction upon two grounds—in the first place, because the newspaper which contained the slanderous statements of which he complains has been published in

Scotland; and secondly, because he has arrested funds in Scotland belonging to the defenders. As to the first of these grounds, I have seen no reason to alter the opinion which I indicated upon a former occasion. I do not think it at all doubtful that *The Times* is published in Scotland; but there is no authority for holding that publication alone will give jurisdiction against a foreigner who has not been personally cited. I am not prepared to assent to the argument which Mr Balfour maintained, that publication ought to give jurisdiction, for reasons which he represented as being reasons of expediency and necessity. I think his argument inconsistent with the general doctrine both of our own law and of the civil law, both of which recognise the maxim, *Actor sequitur forum rei;* and accordingly, in the only case in which publication alone appears to have been suggested as a ground of jurisdiction it was rejected by the Court—I mean the case of *Longworth* v. *Hope*, July 1, 1865, 3 Macph. 149, 37 Scot. Jur. 552. Lord Colonsay says nothing directly as to this ground of jurisdiction, but it is evident that he thought it insufficient, because he speaks of the arrestment as the only ground upon which the jurisdiction of the Court could be sustained. Lord Curriehill expressed the opinion which I think is implied in the judgment of Lord Colonsay. Lord Curriehill says—'I think we have no jurisdiction otherwise than in virtue of the arrestments. The circumstance of the alleged libel having been published by the defenders does not appear to me to be in itself sufficient; for if the defenders, who reside in England, have merely published the newspaper complained of, I do not see how that would subject them to the jurisdiction of the Scottish Court.'

"The other ground of jurisdiction is certainly anomalous, and probably it is as much opposed as the first to the general doctrine of law which I have mentioned. But it is a rule of the law of Scotland, too well established to be called in question, that the jurisdiction of this Court over foreigners may be created by the arrestment of their personal funds in this country; and it was decided in *Longworth* v. *Hope* that this mode of jurisdiction is applicable to actions of damages for slander. The jurisdiction therefore comes to depend upon its being established that funds belonging to the defenders, or either of them, have been effectually attached by the pursuer's arrestment. It is not now maintained that any fund belonging to the defender Mr Wright has been so attached, and therefore, so far as he is concerned, the case is necessarily at an end. But the question remains as to whether funds belonging to Mr Walter have been attached. Now, the arrestments upon which the pursuer founds are in ordinary form, and the execution bears to attach in the hands of certain arrestees, certain sums, more or less, due and addebted by them to the said John Walter, or to any other person or persons for his use and behoof. It appears from the evidence of the arrestees that they have incurred debts for the price of certain advertisements which they have inserted in *The Times* newspaper. The defender says that he is not the proper creditor in these debts, but that the true creditor is a copartnery or firm of which he is a member; and if that be so, it would follow that he has no direct right of action to recover debts contracted to this firm of which he is a member, and consequently that those debts could not be attached by arrestments in the terms I have mentioned.

Now, that raises two questions. In the first place, whether the debts in question are owing to Mr Walter as an individual or to the firm of which he says he is a member; and in the second place, if they are owing to the firm, whether the right of Mr Walter as an individual partner is such that the debts due to the firm can be effectually taken in execution of his separate debt. Both of these questions must be determined by the law of England, which I must take as matter of fact to be ascertained by the evidence of experts. I had the advantage of hearing from the learned counsel who were examined as witnesses a very able and interesting exposition of the law of England upon these two points; and I have the more satisfaction in considering their opinions, because I find that upon all points which are material to the present question they are substantially at one. I do not think it necessary to examine the evidence in detail. The result of it is to make it perfectly clear that the debts in question are not owing to Mr Walter as an individual, but that they are owing to a firm of copartners of which he and others are members. The fact of partnership being established, the next question is, whether, according to the law of England, the right of a partner of a trading firm in the assets of the copartnery is of such a character that the debts due to the firm may be taken in execution by the separate creditors of a partner for the satisfaction of his separate debts. I think it is established by the evidence that in that respect the law of England is precisely the same as the law of Scotland. The evidence shows that the assets of a copartnery belong to the partners jointly, each of them having an undivided interest in the whole; and what is meant by the share of a partner is thus explained by a very eminent writer, to whose work counsel referred—'What is meant by the share of a partner is his proportion of the partnership's assets after they have all been realised and converted into money, and all debts and liabilities have been paid and discharged.'—Lindley on Partnership (4th ed.) i. 661. That is the law of England, as it is proved in evidence; and I think it is a perfectly accurate statement of the law of Scotland also. It follows as a necessary consequence that debts due to the firm cannot be taken in execution by a separate creditor of a partner for debts due by him as an individual. It is said that the rule of our law by which the separate creditors of an individual partner cannot arrest debts due to the copartnery arises from a principle which is not recognised in England, inasmuch as the law of that country does

not treat the firm as a separate person distinct from its members. But it is not in my opinion because of the mere impersonation of the firm that its assets cannot be arrested by the creditors of a partner, but because the partner has no separate share in the assets which is capable of being attached by that diligence. The principle is that a partner has no right to claim any particular portion of the assets as belonging exclusively to him, and neither his assignees nor his separate creditors can have any higher right against the joint property than the debtor or cedent from whom they derive their interest. The true ground therefore is that which is stated in Lord Pitfour's note, quoted by Mr Bell, when he says that the creditors of the partner can only affect his share of the balance after payment of the copartnery debts.

"The proposition maintained for the pursuer is a very startling one, because it comes to this, that the separate creditor of any partner of an English trading firm may arrest funds belonging to the firm which he may find situated in Scotland, and carry them off for the satisfaction of his separate debt. There is no authority in the law of Scotland for that proposition. I think the principle upon which we should hold that the arrestments now in question were quite ineffectual to attach debts due to a Scottish copartnery is equally applicable to the case of debts due to a copartnery in England. Mr Balfour in his argument referred to the cases in which it has been held that ships may be arrested for the debts of a part-owner. There is no analogy between these cases and the present, because the right of a part-owner in a ship is altogether different in its legal character from the interest of a partner in the assets of a trading firm, and also because the arrestment of a ship is a diligence of a totally different kind from the arrestment of a debt. The arrestment of a ship is a diligence *in rem*. The ship itself is seized and detained in port. But the objection which the defender takes to the arrestments founded upon is, that they attach nothing. The arrestment of a debt either for founding jurisdiction or for execution operates in a totally different way from the seizure of a corporeal moveable. It operates *in personam*. It interpels the arrestee from paying his debt to his proper creditor, and ultimately compels him to make it forthcoming to the arresting creditor, and thereby discharges him of his debt to his own creditor. And since that is the mode in which the diligence operates, it follows of necessity that it cannot affect debts payable to anyone except the person designed in the arrestment. An arrestment of debts due to the defender personally will not prevent the arrestee from paying his debt to the firm, of which the defender is only a single member. It will give him no answer to the demands of the firm which is his true creditor. It would not compete with an arrestment by the firm's creditors of debts due to the firm; it attaches nothing.

"It is said that by reason of the defender's mandate as manager all the proprietors of *The Times* are responsible for a wrong done by him in the conduct of the newspaper, and therefore that the pursuer has his remedy against the property of them all. And Mr Balfour in the course of that argument said—and I think quite soundly—that it was a very good test of the validity of an arrestment for founding jurisdiction to consider whether a fund which is attached by that arrestment could be taken in execution by the decree sought for in the action. Now, I cannot assume that persons who are not called as defenders are responsible for the wrong of which the pursuer complains. But supposing that they could be made responsible, I think it very clear that no decree in this action could be pronounced against anyone except the individual defenders, and that no writ of execution founded upon the decree could be carried into effect against the property of anybody else. The proposed test therefore appears to me to be quite conclusive of the question. The debts arrested are debts which are due, not to the individual defender, but to him and a number of other persons jointly, and no decree in this action could be carried into execution by ordering payment of these debts to the separate creditor of the defender. There is no other ground of jurisdiction, I think, requiring consideration, and the judgment therefore must be to sustain the first plea-in-law for the defender, and to dismiss the action."

The pursuer reclaimed, but on the case being called for hearing intimated that he did not insist in his reclaiming-note.

The reclaiming-note was accordingly refused.

Counsel for the Pursuer—Balfour—Asher—Strachan. Agent—R. Ainslie Brown, S.S.C.

Counsel for the Defenders—D.-F. Mackintosh — Lord Adv. Robertson — Murray. Agents—J. & F. Anderson, W.S.

Monday, July 29.

OUTER HOUSE.

[Lord Wellwood.

BAILLIE *v.* PAROCHIAL BOARD OF SORN.

Poor — Assessment — Minister of Quoad Sacra Parish—Assessment in respect of Manse—Act 7 and 8 Vict. cap. 44, *sec.* 8.

The Act 7 and 8 Vict. cap. 44, sec. 8, which provides for the erection of *quoad sacra* parishes, enacts—"It shall and may be lawful for the minister and elders of such parish to have and enjoy the status and all the powers, rights, and privileges of a parish minister and elders of the Church of Scotland."