FEBRUARY 23, 1858.

The LONDON and NORTH WESTERN RAILWAY COMPANY, *Appellants*, v. JAMES LINDSAY, *Respondent.*

Jurisdiction—Arrestment Jurisdictionis Fundandæ Causâ—Foreign—Summons—Competency—HELD (affirming judgment), *That a domiciled Englishman, living in England, may competently be convened in an action for damages in Scotland, by arresting, previous to the action, any debts or sums of money due to him in Scotland*, jurisdictionis fundandæ causâ.[1]

The question disposed of by this appeal was, whether parties domiciled and living in England could competently be convened in an action before the Courts in Scotland, by arresting, in Scotland, prior to the institution of the action, debts or sums of money due to them, with the view of founding jurisdiction in the Court to entertain the action.

The circumstances in which the question arose, were shortly these:—The respondent, who is a fruit merchant residing in Edinburgh, averring that the appellants, who are an English company, owners of the railway from London to Lancaster and Liverpool and many traffic connections with the lines to the north, had refused to carry his goods from Liverpool to Edinburgh, except on terms which were unwarranted, particularly by various railway statutes, *inter alia*, the 17th and 18th Vict. cap. 31, and that in consequence of certain placards which they had put up in the railway station at Liverpool, he had sustained injury in character, and also pecuniarily, brought an action (summons dated 23d December 1854) in the Court of Session, to have it declared, that they were bound to carry his fruit at usual and legal rates.

Prior to the date of the summons, (viz., 20th Dec. 1854,) the pursuer had obtained letters of arrestment against the appellants; which, after setting forth the circumstances above alluded to, concluded that the defenders were a foreign company, but it had debts and effects belonging to them in Scotland, and that letters of arrestment were necessary *jurisdictionis fundandæ causâ*. Accordingly a sum of £500 then being in the hands of the Caledonian R. Co., and belonging to the defenders, was arrested.

The execution of the letters of arrestment was in the following form:—"Upon the 21st day of December 1854, by virtue of the within letters of arrestment *ad fundandam jurisdictionem*, dated and signeted the 20th day of December current, raised at the instance of James Lindsay, fruit merchant, Physic Gardens, Edinburgh, complainer, against the London and North Western Railway Company, I, John Robertson, messenger at arms, passed, and, in Her Majesty's name and authority, lawfully fenced and arrested in the hands of the Caledonian Railway Company the sum of £500 sterling, more or less, due and addebted by them to the said London and North Western Railway Company; together also with all goods and gear, debts, sums of money, or any other effects whatever, lying in their hands, custody, and keeping, pertaining, or any manner of way belonging, to the said London and North Western Railway Company, or to any person or persons for their use and behoof, all to remain under sure fence and arrestment *jurisdictionis fundandæ causâ*, conform to said letters. A just copy of arrestment, to the effect foresaid, addressed to and for behoof of the said Caledonian Railway Company, I delivered to Archibald Gibson, their secretary, personally apprehended, within their principal office in Renfield Street, Glasgow; which copy of arrestment was signed by me, did bear the date hereof, and contained the date and signeting of said letters, with the name and designation of Martin Hutton, residing in Glasgow, witness present at the premises, and hereto with me subscribing on this and the preceding page.

(Signed) "JNO. ROBERTSON.

(Signed) "Martin Hutton, *witness.*"

The Lord Ordinary and the Inner House found that the Court of Session had jurisdiction to entertain the action.

The Railway Company appealed, contending that there was no jurisdiction in the Court of Session over them in such an action.

Before the commencement of the argument—

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[1] See previous report 18 D. 62; 28 Sc. Jur. 17; 29 Sc. Jur. 18. S. C. 3 Macq. Ap. 99: 30 Sc. Jur. 336.

LORD WENSLEYDALE stated that he was a shareholder in the appellants' company, and therefore he proposed to retire and take no part in the judgment.

The LORD CHANCELLOR said that this seemed scarcely necessary, for the judgment was not the judgment of individual peers, but the judgment of the House. If the matter came to be closely viewed, there would be few cases, where one or other of the members of the House were not more or less interested.

Sir R. Bethell said, that, as far as he was concerned, he had no objection; but, since *Dimes' case*, 3 H. L. Cas. 759, it was better to avoid the difficulty that might arise.

LORD WENSLEYDALE accordingly retired.

Attorney-General (Bethell), and *Anderson* Q.C., for the appellants.—The interlocutor in this case was wrong on two grounds—1. There was no such jurisdiction in the Court of Session as that claimed; 2. If there was, it did not extend to a case like the present, which was a case of illiquid damages, but was confined to cases of liquid debt.

1. As to the jurisdiction created by arrestment, it is contrary to principle, and leads to inconvenient and absurd results. There was nothing in England analogous to such a jurisdiction. The general rule in the jurisprudence of every country was, that the pursuer must go into the defendant's Court (*actor sequitur forum rei*). It may be true, that, in Scotland the practice had long been to arrest personal property of an alleged debtor, which was within the jurisdiction, but the real object of this was merely to compel the debtor to give caution, *judicio sisti*, and no greater effect ought to be given to the practice. To say that a party in Scotland could, by merely arresting a chattel within the jurisdiction of the Scotch Court, which belonged to a person residing out of its jurisdiction, acquire a universal jurisdiction over the owner of it, for every cause of action, though such cause might have arisen in Italy or America, was absurd. What augmented the absurdity was, that in Scotland it was not necessary, that a person, who was out of the jurisdiction, should be served personally with process, for all that was required was to cite him edictally, by leaving a notice at the Register House, which was no notice at all. The result was, that in a case like the present, if the defendant did not appear, even though he had never heard of the action, judgment would go against him. This would always lead to injustice.

[LORD CHANCELLOR.—You say, that the object of arrestment is merely to bring the defendant into Court.]

Yes. It amounts merely to this: "I will keep your property, until you, the owner, come within my jurisdiction to claim it." It conferred no jurisdiction over the owner so long as he was out of the country. Any judgment founded on mere arrestment, and obtained without notice to the owner, was incompetent and a mere nullity. A judgment of this kind, or decree in absence, as it is called, was of no use or effect, because it was contrary to the first principles of justice. A universal principle was laid down on this subject in *Buchanan* v. *Rucker*, 9 East, 192; 1 Camp. 65, where it was held, that no action could be maintained in England on a colonial judgment, unless it appeared that the defendant had been personally served with process, and had an opportunity of defending the suit. It was quite immaterial, whether the Court in which the suit is brought makes it a practice to dispense with personal service.

In *Buchanan* v. *Rucker*, a copy of the declaration had been nailed up at the Court house door in Tobago, and there was nothing to shew, that the defendant had ever heard of it or was otherwise subject to the jurisdiction.

[LORD BROUGHAM.—And Lord Ellenborough held, that the Court of Queen's Bench would not be bound by any such absurd and ridiculous process, for the best of all reasons, that it was trying a man behind his back!]

Quite so. Lord Ellenborough said, the Provost Marshal of Tobago might pass a law to bind the whole world if he liked, but would the world submit to such assumed jurisdiction? It was the same thing in this case. If a foreigner should go to a hotel in Edinburgh, and leave an old hat or umbrella, or, as Lord Hailes said, "a tooth pick at a penny the dozen," behind him, he would be liable to be sued in the Court of Session for any cause of action the creditor who arrests it alleged, and to have decree given against him, though he might never hear of the proceedings. Such was the doctrine of this interlocutor; but such a practice as this was a mere usurpation, and ought at once to be put an end to. There was no clear authority in the law of Scotland to justify the principle. The earliest case reported is *Young* v. *Arnold*, M. 4833. The sole question, however, there was, whether the Court of Session or the Sheriff should grant the warrant, and all the Court did was to restrain the defender from removing the goods till he found caution. (See the report in Fountainhall.) All that the practice amounted to at that time, if a practice at all, was to make the owner of the goods appear and give caution in the cause *de judicio sisti*. The next case was *Scruton* v. *Gray*, M. 4822; Hailes 499, where an Irish student had left an old desk behind him in his lodgings, and a young woman arrested it, and brought an action of declarator of marriage against him, while he was in Ireland. The Court, however, held such an action did not lie, and the Judges then said that the jurisdiction in such cases was confined to debt, and was merely a mercantile remedy, and a barbarous thing at most. Then comes the case of *Ashton* v. *Mackrill*, M. 4835, but that only proved, that if a person goes to

Scotland and chooses to administer the goods of his testator, he will become amenable to the jurisdiction. (See the reasons of the judgment in Hailes, 526.) The chief authority relied on for the respondent is Voet, 2, 1, 46; but he is a foreign writer, and not to be regarded. Erskine (1, 2, 18) is the first Scotch writer, who notices such a jurisdiction, but he never contemplated that an action could be founded on the mere arrestment, until the owner appeared or found caution *judicio sisti*, for the edictal citation could give none.

[LORD BROUGHAM.—Is it understood that I may arrest a debt as well as a chattel? Suppose a debt is due to me, the arrester, can I create a jurisdiction against the debtor by arresting the debt in my own hand?]

[*Lord Advocate Moncreiff.*—A debtor cannot arrest in his own hands.]

Except in a few cases under the recent Mercantile Law Amendment Act of 1856. There was another case, viz., that of *Cameron* v. *Chapman*, 16 S. 907; 10 Sc. Jur. 343, where the Judges refused to sustain the jurisdiction, and agreed that the principle ought not to be extended. None of those cases are cases of illiquid damages, but merely questions of debt. The only case of illiquid damages is *Bertram* v. *Barry*, 6th March 1821, F.C.; and all that could be said against us was, that if what we contend for be tenable, the point would have been raised there, but was not; that is no argument. The authorities, therefore, are not at all clear, and the House will lean against a practice which is contrary to principle and highly inexpedient. The inexpediency is this, that the Court of Session takes upon itself gratuitously to decide questions of foreign law. In the present case, it would have to decide the general liability of a carrier under the law of England, which may, or may not, be identical with the law of Scotland on that head. Besides, the decision in the Court below gives in effect a universal jurisdiction to the Court of Session over all English railway and mercantile companies. Few of these at any time have not debts owing to them from persons or companies in Scotland, and any creditor whatever may go to Scotland and arrest these debts, and bring an action against the company, or they may do it perhaps without going to Scotland. The Courts of England claim no such jurisdiction over Scotch companies or persons residing in Scotland. In England, no action could be brought against a person residing out of the jurisdiction, until the Common Law Procedure Act of 1852 introduced a change; but even now, there must be personal service, and the cause of action must have arisen in England. Even the Court of Chancery required an express statute to enable it to serve a person out of the jurisdiction with process. This is not a case where the Court of one country will assist a party suing in another country, by making its jurisdiction ancillary to the original jurisdiction, as in *Hawkins* v. *Wedderburn*, 4 D. 924; *Fordyce* v. *Bridges*, *ibid.* 1334. Here the Court of Session assumes entire and original jurisdiction.

[LORD CHANCELLOR.—Supposing that there is jurisdiction in this case, *quoad* the money arrested, does the interlocutor go beyond that?]

The interlocutor goes the length of entertaining the whole demand. There is no limit to the area over which it may operate. The interlocutor ought to be reversed, and a final blow given to this barbarous usurpation.

Lord Advocate Moncreiff, and *Rolt* Q.C., for the respondent.—The argument of the appellants is more fit to be used to the legislature than to a court of justice, for however anomalous, unjust, or inexpedient the exercise of jurisdiction over foreigners by means of arrestment *jurisdictionis fundandæ causâ* may be, it has been long established in Scotland, and can be traced back for a century and a half. The question is, Whether there is jurisdiction here, and it is not necessary to inquire, whether that jurisdiction goes beyond the money or goods arrested. The law of Scotland on this subject has been represented in ridiculous lights, but so may the law of England on similar cases. Thus, if a Frenchman or American is accidentally in England visiting an exhibition, any person may sue him there in most personal actions, though he may have no property in England, and though the cause of action arose in any other part of the world. So, according to the English Common Law Procedure Act of 1852, a foreigner, who has never been in England, and has no property there, may now be sued in the English Courts, provided the cause of action arose in England. There is no jurisdiction in the Scotch Courts corresponding to the latter in England. So, in the city of London, there is a process of foreign attachment, which is founded exactly on the same principles as the Scotch law of arrestment, and in the Court of Admiralty the same thing exists. It is said, this practice violates the general rule, that *actor sequitur forum rei;* but there are many other exceptions already to that rule both in England and Scotland. Besides the cases already mentioned, it is well settled in Scotland, that, if a person has heritable property there, he is amenable to the jurisdiction of the Scotch Courts, wherever he may reside. But we deny, that there is anything unreasonable in the present practice of the Courts in Scotland. It is not more absurd to arrest a foreigner's property, and thus acquire jurisdiction over him, than to serve him with process when accidentally found in an English hotel, without any of his property being there, and so acquiring jurisdiction. It was said, that the smallest amount of property arrested would suffice to create the jurisdiction in Scotland, but some of the Judges say that the amount must not be elusory. There must be *bonâ*

fide property within the jurisdiction. Hence, the case put of an old hat or umbrella left by mistake at a hotel would not be sufficient.

[LORD CHANCELLOR.—Suppose I buy an umbrella in Edinburgh, and direct it to be sent to me here by railway, what then?]

Well, that might be a *bonâ fide* case, and the *dicta* would support the jurisdiction founded on it. But, at all events, it seems the property of the foreigner must not be elusory. It is said a decree might be got behind one's back in Scotland, by means of this process; but, in that case, the decree will be a decree in absence, which can be opened up at any time within 40 years afterwards. An action may, however, be brought in the English Courts on such a decree, *Douglas* v. *Forrest*, 4 Bing. 700; though, perhaps, there may be a distinction as to the effect given to it in some cases, where the party had had no opportunity of defending. The practice of acquiring jurisdiction by means of arrestment, is not peculiar to Scotland. It prevails in France, Holland, and America. (Story's Conflict, § 549; 3 Burge's Com. 1016.) The Courts in Scotland borrowed the practice in the first instance from the Dutch, about the end of the 17th century.—Voet, 2. 4. 22-25.

[LORD BROUGHAM.—According to Voet, you might bring an action of slander against the man whose goods you arrested. Suppose an action of *crim. con.* brought against an Englishman in Scotland, (such action being now abolished in England,) could you maintain it in Scotland?]

That might be doubtful. It might involve questions of *status*, and so be excluded from the operation of the rule; but, at all events, it is not necessary to decide that point here. The arrestment *jurisdictionis fundandæ causâ* was introduced for the convenience of merchants, and has long existed in Scotland. So far back as 1626, (*Blantyre* v. *Forsyth*, M. 4813,) the Court sustained jurisdiction against a foreigner who had goods within Scotland, though the practice does not seem to have been quite settled at that time. See *Brog's Heirs*, M. 4816, and *Broomley*, M. 4817. But from the manner in which Erskine alludes to the practice it was considered in his time no novelty. Besides *Young* v. *Arnold*, *supra*, and *Scruton* v. *Gray*, *supra*, there are two clear cases of *Anderson* v. *Wood*, Hume, 258; *Campbell* v. *Rucker*, *ibid.* There is no trace of any case before the House of Lords up to the present time, but Lord Eldon in *Grant* v. *Peddie*, 1 W. S. 722, incidentally recognised the practice. There are also many modern cases. *Oswald* v. *Patterson*, 5 S. 127; *Douglas* v. *Jones*, 9 S. 856; Shaw's Digest, tit. "Jurisdiction." In *Cameron* v. *Chapman*, *supra*, the Court held, that the jurisdiction was well founded in the first instance, but the only point was, that there was no second arrestment to found jurisdiction against the personal representative. There are still more modern cases, *Inverarity* v. *Gilmour*, 2 D. 813; *Parken* v. *Royal Exchange Assurance Company*, 8 D. 365.

[LORD CHANCELLOR.—I see in the latter case the defendants admitted the jurisdiction, but said it was a matter of discretion for the Court to entertain such jurisdiction, (*per* Lord Moncreiff, p. 373.)]

The latest case is *Gray* v. *Polhill*, 9 D. 1146. Thus there is a clear stream of authorities in favour of this kind of jurisdiction being exercised by the Court of Session. It is said, that though the jurisdiction may exist in cases of debt, yet it does not extend to cases of unliquidated damages like the present; but that objection is not raised by this appeal, and was not relied on in the Court below.

[LORD CHANCELLOR.—Still the appellants say there is no jurisdiction; they may only have given a bad reason for that conclusion.]

There is and can be no sound distinction between the two cases. If the Court can entertain a claim for a specific sum of money due under a contract, it can entertain a claim of damages for breach of a contract. Besides, the case of *Bertram* v. *Barry*, 6th March 1821, F.C., was an action of damages, and nothing else. Some objection was made in the Court below to the declaratory conclusions of this action; but these were, in fact, merely introductory and ancillary to the petitory conclusion, which is a course sometimes adopted. *Hamilton* v. *Anderson*, 18 D. 1003; *Ashton* v. *Mackrill*, M. 4835. Besides, we agreed expressly to limit the declaratory conclusions to that extent. The practice of arrestment *jurisdictionis fundandæ causâ* is, therefore, so clearly established in Scotland, that nothing but an act of parliament can put an end to it.

Anderson replied.—Notwithstanding a variety of cases in the reports, it is by no means clearly settled, what was the origin of this doctrine, and what are its limits. It did not exist in the civil law, and Balfour, Stair, and Bankton are all silent upon it. If it were clearly established, the House will no doubt support it; but if not clearly established, then the House will interfere and put a stop to so erroneous a doctrine. Many points of law have been considered settled in Scotland, which the House has nevertheless thought so repugnant to principle as to overrule them. Thus, nothing was held at one time more clear than that if a traveller's vehicle was upset by a stone on a turnpike road, he could recover damages against the trust funds, totally irrespective of whose fault or negligence caused the accident. The House thought that so "startling to English ears," that the decision was reversed. *Duncan* v. *Findlater*, M'L. & Rob. 911. So it was held settled, that a boy, who had been improperly refused admission

into an hospital, such as *Heriot's Hospital*, could recover damages out of the funds of the hospital for his loss; and the House reversed that decision—*Heriot's Hospital*, 5 Bell's Ap. 37. So it used to be held clear in Scotland, that a person born in Scotland was all his life subject to the jurisdiction of the Court of Session, in whatever part of the world he had settled; and the House reversed that decision—*Peddie* v. *Grant*, 1 W.S. 716.

[LORD CHANCELLOR.—I see that that doctrine of jurisdiction, *ratione originis*, was not unquestioned in Scotland, for Erskine and Kames doubted it.]

Still the best proof, that it was considered good law, is the decision itself in the Court of Session. The House, therefore, has before interfered, and will now interfere and put an end to an erroneous doctrine, which can only have arisen out of a misconception of law. The doctrine is contrary to the Common Law of Scotland, and was founded in usurpation. The authorities are all more or less vague and unsatisfactory. The case of *Blantyre* v. *Forsyth*, M. 4813, proceeded on the exploded theory, that a Scotchman, wherever he went, was always amenable to the Court of Session. In the two cases cited from Hume's Decisions, the point was not raised, and the jurisdiction was merely prorogated. So as to *Oswald* v. *Pattison* and *Peddie* v. *Grant*. In *Scruton's case* the Judges discountenanced the doctrine altogether, and in *Ashton* v. *Mackrill* they said mere arrestment was not enough to confer jurisdiction. The inconvenience of the jurisdiction is of weight in doubtful cases. When a decree in absence is obtained in Scotland, an action can be brought upon it in England, and all the English Court looks to is merely the fact, that a decree or judgment has been given. The decree could not be opened up in Scotland after judgment here in England. See *Brown* v. *Sinclair*, 2 Sh. & M'L. 103.

[LORD BROUGHAM.—If the judgment bears on its face that it is given "in absence," then it would come under the rule of *Buchanan* v. *Rucker*, where Lord Ellenborough said he would hold it to be no judgment at all.]

Cur. adv. vult.

LORD CHANCELLOR CRANWORTH.—My Lords, this case raises a very short though important point. The only question is, Whether or not the Court of Session has jurisdiction to determine this case? An action was brought by Mr. Lindsay, who is a fruit merchant in Edinburgh, against the London and North Western Railway Company, which I need not say is a company established in England; and the complaint he raised is this: that the defenders, being in the nature of common carriers from Liverpool to Edinburgh, their railway joining other railways at Liverpool, but contracting, as common carriers, to forward goods from Liverpool to Edinburgh, were guilty of misconduct in their dealing with Mr. Lindsay, in that they would not properly carry his fruit. It does not matter what the exact particular of the complaint is, either that they did not carry it properly, or that they refused to carry it except on certain terms, or that they otherwise conducted themselves as common carriers ought not to have done.

To that complaint several answers were made by the Railway Co. The only one which is now before your Lordships is this: By their answer embodied in their second plea, they say, that the defenders, being an English company, and their line of railway being wholly in England, and the act complained of by the plaintiff having occurred in England, and the action being an action of declarator of the defendants' obligations under the Common and Statute Law of England, the plaintiff is bound to pursue the defendants in the courts of England, and the arrestment used by him is inept to found a jurisdiction against the defendants.

In order to get a jurisdiction, the pursuer arrested certain funds or debts belonging to these present appellants, the defendants in Scotland, *jurisdictionis fundandæ causâ*. The only question which is now to be determined is, Whether that arrestment did or did not give jurisdiction? Now that must depend upon what are the authorities as to this point in the law of Scotland. The Court of Session held that they have jurisdiction. And I am prepared to state to your Lordships, that I think that that decision rests upon authority, which it would be quite impossible or improper for your Lordships to controvert, even if there were more difficulty in acting upon it than, in truth, I think there is.

It was urged against this principle, that the adoption of it leads to conclusions of very great inconvenience, not to say absurdity. And extreme cases were put by the Attorney-General in his argument, such as,—of a gentleman leaving his umbrella—or, as one of the Judges puts it, of a gentleman leaving a tooth pick, would that give jurisdiction? I think there are two answers to that. In the first place, one of the learned Judges, either in this case or in one of the other cases which has been referred to, says, that the property seized must not be so small as to make the thing illusory. There may be difficulty in dealing with that; but that is one answer. But another answer is this, that the decision of the present question does not determine how far the jurisdiction may go—whether it can go beyond the property seized or not. If, according to the opinion of some of the Judges, the only effect of the arrestment is to give jurisdiction, so as to take execution against that which is arrested, then the smallness of that which is arrested would only shew that, in such a case, only a small remedy can be obtained. In truth, however, we are not to examine too closely into what are the consequences, or into what was the origin, of this

jurisdiction, if we find, as I think we undoubtedly do find, that for at least a century, or more than a century, this jurisdiction has been exercised, and this arrestment has been considered to be a lawful foundation for the jurisdiction, and one which has been acted upon by the Court apparently as something that admitted of no doubt.

Now there are earlier cases on the subject, but the first that has been referred to which is important, is a case reported in 1758, which is now exactly 100 years ago. The case was this: *Ford*, M. 4835. "Ford, a merchant residing in Berwick, intended to apply to the Sheriff of 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 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 causâ*, and approved of this method of applying to the Court, seeing a petition to the whole Lords was unnecessary, as there was no intimation to the defenders."

That case was decided in 1758. When Mr. Erskine wrote his learned work a very few years afterwards, he treats the matter as clear, because he says: "When a foreigner, who is actually abroad, hath no other than moveable effects within this kingdom, he is accounted so little subject to the jurisdiction of its courts, that no action can be brought against him till those effects be attached by an arrestment called *arrestum jurisdictionis fundandæ causâ*."

Then, a few years afterwards, in 1772, the question was discussed in *Scruton's case*, 1 Hailes 499, in which it is true it was held that the jurisdiction did not prevail; but why? Not because the jurisdiction did not exist in ordinary cases, but because that was a case in which the question was as to the personal status of the individual pursuer—whether or not she was the lawful wife of the defender, having been married in Ireland, in some way the validity of which was doubted. And it was held, that for the purpose of an action of that nature, this jurisdiction did not exist. But ever since that case, this has been treated as the established law, and I cannot find that the least doubt was thrown upon it in the several cases which occurred intermediately between that case and the more modern cases, some very few only of which I will just refer to, which shew, as it appears to me, very clearly, that this has been from the first understood to be the law, and has been always acted upon as the law.

In the year 1831, there arose the case of *Douglas* v. *Jones*, 9 S. 856. That was an extremely strong case to shew the opinion of the Courts upon that subject. In that case, an Englishman of the name of Jones took a lease of a house in Glasgow for seven years, for the purpose of carrying on the business of a grocer there, in partnership with other persons. An action was brought against Jones in the Court of Session; and in order to give jurisdiction, they arrested certain debts due to Jones from the firm of grocers that were carrying on the business at Glasgow. It was contended, that the lease was, in truth, the possession of real property by Jones in Scotland, and that that undoubtedly gave jurisdiction. No doubt, if a person has heritable property in Scotland, that entitles the Court to exercise jurisdiction over him. But the matter being discussed, it was held that that was not so,—that the lease was not sufficient to give jurisdiction; but, on the other hand, that there certainly was jurisdiction by the seizure of the debt, though it was only an unliquidated debt, to be ascertained by taking the accounts between him and his partners. That appears to me an extremely strong case. But there was a still stronger case in the year 1846, the case of *Parkin* v. *The Royal Exchange Assurance Co.*, 8 D. 365. Parkin was an Englishman, resident in London. The Royal Exchange Assurance Co., I need not say, is an English Corporation. Lord Elibank having died, there was money due upon his policy, and, inasmuch as the Royal Exchange Assurance Co. had money deposited in a bank in Scotland, the pursuer proceeded, in the Scotch Courts, to recover the money due upon the policy, and founded his jurisdiction by arresting the money that was due to the company in the bank. Now, that was an extremely strong case, because there both parties were permanently resident in England. It was only the accident of there being money due to the Royal Exchange Assurance Co. in a bank in Scotland, which gave any jurisdiction to the Scotch Courts upon the subject. But, in that case, Lord Moncreiff says,—"I can have no doubt that this Court has jurisdiction in virtue of the arrestment of the funds of the defenders in Scotland *ad fundandam jurisdictionem*, to entertain and give judgment in the present action. That form of process has been long established in our law, and is in daily practice." Now, I need scarcely say, that a higher authority than Lord Moncreiff, I believe, does not exist; and that, when he treats that as a matter entirely clear, it must be on very strong grounds indeed, that your Lordships would feel warranted to depart from what is so laid down.

I have stated that that was in 1846, prior to what happened two years later in the case of *Cameron* v. *Chapman*, 16 S. 907; because in that case it was held, that the jurisdiction did not exist. But why was that? In *Cameron* v. *Chapman* there had been an arrestment *ad fundandam jurisdictionem* against a person who, before the case came to an end, died; and the question was, Whether that arrestment was sufficient to warrant a transference to the personal represent-

ative of the defender? and, after a great discussion, it was held not to be sufficient, because, though the arrestment *fundandæ jurisdictionis causâ* was perfectly good to warrant a jurisdiction against the person whose goods were seized, yet it would be carrying the principle of the Scotch law a step further to hold, that that gave jurisdiction against the personal representative whose goods had not been seized; and, therefore, upon that distinction, and that distinction only, it was held that the jurisdiction did not prevail in that case.

These cases appear to me to put the matter entirely beyond any reasonable doubt. Several other cases were cited; but I should only be wearying your Lordships by referring to different cases to illustrate the same principle. And I shall content myself, therefore, with merely referring to what was said by Lord Eldon in *Grant* v. *Peddie*, 1 W.S. 716, where a different question arose,—a question as to whether there was jurisdiction *originis causâ* against a Scotchman, but who had quitted Scotland permanently, and become resident abroad. Lord Eldon, in that case, held that there was not jurisdiction; but, in the course of the discussion of that case, Lord Eldon said—"There is a law in Scotland under which, if the defender has real estate in Scotland, or if he has goods in Scotland, or if a contract upon which a party sues be a contract formed in Scotland, that particular, following from those circumstances, would undoubtedly give a jurisdiction to the Court of Session,"—of course, referring to this very jurisdiction.

When we find, therefore, that this jurisdiction has been recognized by text writers of the greatest eminence—by Mr. Erskine, and, I believe, in Bell's Commentaries, and that it has been clearly acted upon from 1758 downwards, and treated by Judges of the highest authority, (I need not name any other than Lord Moncreiff,) upon more than one occasion, as an undoubted source of jurisdiction possessed by the Courts in Scotland, and that it was clearly so acknowledged by Lord Eldon—it appears to me that your Lordships would act a very unwise part, if you were to raise any doubt upon such a question, by giving countenance to this appeal. Therefore, I move your Lordships that this appeal be dismissed, and the interlocutors be affirmed.

LORD BROUGHAM.—My Lords, I entirely agree with the view taken of this case by my noble and learned friend, that it is impossible for us to doubt the existence of this jurisdiction after the authorities to which we have been referred, and which we have fully considered, consisting not only of text writers, but of a decision upon the subject prior to them; because the decision to which my noble and learned friend referred was, as he observed, exactly 100 years ago, before Mr. Erskine's work was published, and before he wrote that passage, and that decision was in favour of this jurisdiction.

The cases which have been cited, in later times particularly, leave no manner of doubt as to what the prevailing—I would say the universal—opinion of the Scotch lawyers is upon the subject of this arrestment *jurisdictionis fundandæ causâ.* The case of *Douglas* v. *Jones* has been referred to by my noble and learned friend. That case was decided by the Court below in 1831. But I refer to the more recent case in 1846 of *Parkin* v. *the Royal Exchange Assurance Co.*, and I refer to it for the reason for which my noble and learned friend referred to it, namely, for the clear and unhesitating opinion, or rather, I should say, the clear and unhesitating judgment, there given upon this subject, by that most excellent lawyer, to whose authority this House has at all times been accustomed to pay the greatest respect,—I mean the late Lord Moncreiff. Nothing can be clearer or more unhesitating than the manner in which he states this, and treats it as a thing perfectly well known, acknowledged, and admitted on all hands to be the law of Scotland.

The dictum of Lord Eldon, in *Grant* v. *Peddie*, is said to have been so far *obiter*, that it was not necessary for him to rely upon it in deciding the case then before him; but, nevertheless, it is of some authority, because it shews that he, with all his great knowledge of Scotch law, and his long experience of Scotch practice, took for granted that this was a clear and settled point, and that there was no more doubt about it than about any other of the most certain points, and the plainest elements, of Scotch law.

Something has been said about this being a barbarous law. I think there was an old case quoted from Lord Hailes' Reports, in which it was said that this was a foreign and somewhat barbarous law. And, among other grounds of objection taken by Lord Monboddo, a most able and eminent classical scholar, he objected to the barbarous form of the word *arrestum.* We don't deny here that it is a barbarous word; but we, English lawyers, have no right, heaven knows, to quarrel with this form of expression, when we remember the barbarous Latin that is used, and used *in pari materiâ*, namely, to distinguish our process. How can any one object to the words *arrestum jurisdictionis fundandæ causâ* who is accustomed to hear of the writ "*de essendo quietum de theolonio?*" I believe Lord Monboddo, if he were to hear that, would rather consider "*arrestum*" to be comparatively a classical word.

Upon the whole, I am clearly of opinion that there is no ground whatever for calling this decision in question. A point may arise, but that we are not called upon to deal with here; it may be mooted whether or not the arrestment goes beyond the detention of the goods arrested. In the case that has been put of the umbrella, the hat, and the tooth pick, that question might be got rid of by saying, that, in that case, no harm can be done by the jurisdiction being given,

because it is a jurisdiction only over those small parcels of personal property; but I do not enter upon that at all. It is wholly unnecessary for us to decide whether this goes beyond the goods arrested, or the debt arrested, if it happens to be a debt that is arrested; the only question for us to decide is, Does *arrestum jurisdictionis fundandæ causâ* exist in the law of Scotland? and, where it has been used, does it give jurisdiction? Beyond that it is wholly unnecessary for us to go. I am clearly of opinion that, upon the authorities, and above all, upon the authority of the cases to which we have been referred, it has been, for the last 100 years, on all hands acknowledged to be the law of Scotland. In my own recollection, I have often heard the question mooted among Scotch lawyers; certainly, when the subject has been mentioned since, some regret may have been expressed, and some doubt may have been expressed, whether it ought to have been the law, and whether, if it were a question now of introducing it, it would be a law that ought to be introduced; but I have no recollection of ever having heard it doubted, that the law has for a century existed.

Interlocutors affirmed, with costs.

Hope, Oliphant, and Mackay, W.S., *Appellants' Agents.*—Lindsay and Paterson, W.S., *Respondent's Agents.*

FEBRUARY 26, 1858.

FRANCIS EDMOND, (Nicol's Trustee in Bankruptcy,) *Appellant*, *v.* FRANCIS GORDON and Others, (Nicol's Marriage Trustees,) and the TOWN of ABERDEEN, *Respondents.*

Assignation—Intimation—Jus Crediti—Jus ad Rem—Superior and Vassal—Obligation—Bankrupt—*A party in possession of lands, which he held on a blundered title by progress, executed a bond and disposition in security in favour of his marriage trustees, who, after infeftment, had the seisin duly recorded. Thereafter, the granter of the bond having become bankrupt, his trustee brought an action against the superiors to compel them to grant to him, as vested in all the bankrupt's rights, a charter of the lands, in fulfilment of the personal obligation originally constituted in favour of the bankrupt. In a competition between the bankrupt's trustee and the marriage trustees:*

HELD (affirming judgment), *That the marriage trustees were preferable to the bankrupt's trustee in respect of their bond, which imported a conveyance of the personal right in the bankrupt, and which assignation was sufficiently intimated by the registration of the infeftment on the bond; and, consequently, that the superiors could not be compelled to grant a charter, except under burden of the right of the marriage trustees.*[1]

In the year 1768 the Town Council of the Burgh of Aberdeen appointed the lands of Sheddockslay to be feued, and for that purpose to be exposed to public roup in certain lots. Certain of the lots were knocked down to Robert Dyce, and a minute signed by him was annexed to the articles of roup, containing the conditions of the contract. In conformity to an act of the Town Council a feu charter was then executed, dated 16th December 1777, by William Duguid, then treasurer of the burgh, in his official capacity, in favour of Dyce. The *tenendas* of the charter was in these terms:—"To be holden of me, the said William Duguid, and my successors in office, treasurers of Aberdeen, for payment of the yearly feu duty above written, &c. &c."

Dyce was infeft on 27th January 1778, and the sasine was recorded in the "Particular Register of Sasines by Alexander Carnegy, town clerk of Aberdeen," although the lands were held by ordinary feudal tenure, and not *more burgi*. A portion of the lands were, in 1802, disponed to Alexander Hector, who, resigning upon the procuratory of Robert Dyce, obtained from the burgh a new charter of resignation and *novodamus*, dated September 1804, in which the holding was changed from feu to blench, and upon it he was infeft on the 11th September 1804. In this charter William Johnstone, then treasurer of the burgh, was set forth as the superior of the lands, and in the *tenendas* they are set forth as to be held of him, "as treasurer foresaid, and his successors in office, treasurers of the said burgh of Aberdeen, feoffees in trust, immediate lawful superiors thereof." Hector's sasine was also recorded in the Burgh Register. Upon Hector's death in 1823 his daughter Mrs. Richardson expede a general service, and took infeftment on the precept contained in the charter of resignation and *novodamus*, and her sasine was recorded in the Particular Register of Sasines at Aberdeen.

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[1] See previous report 18 D. 347; 28 Sc. Jur. 10; S. C. 3 Macq. Ap. 116: 30 Sc. Jur. 365.