in this country and are here as litigants, the Court will not have more difficulty in finding ways and means of enforcing any orders they may pronounce against them, and therefore in this case I am for granting the prayer of the liquidator's note and restraining these proceedings.

LORD SHAND and LORD ADAM concurred.

The Court granted the prayer of the note.

Counsel for Liquidator — Gloag — Lorimer. Agents—Davidson & Syme, W.S.

Counsel for Respondents—Comrie Thomson—Dickson. Agents—Henry & Scott, S.S.C.

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*Friday, March* 19.

## SECOND DIVISION.

### HASTIE *v.* STEEL.

*Jurisdiction—Jurisdiction in respect of Property of Heritage within Scotland—Reparation—Slander*

The defender in an action of damages for slander was domiciled abroad, and the jurisdiction was alleged to be founded by his ownership of heritage in Scotland. He pleaded "no jurisdiction." It appeared that at the date of the service of the summons the title to a house in Glasgow in which he had no beneficial interest stood in his name for convenience in carrying out a family arrangement, the need for which had terminated at the raising of the action, and of which title he was in process of divesting himself when the action was raised. The Court (*rev.* judgment of Lord Fraser) *sustained* the plea of no jurisdiction.

On 26th October 1885 an action was raised in the Court of Session by the Rev. William Hastie, B.D., an ordained minister of the Church of Scotland, residing in Edinburgh, against Octavius Steel, merchant, of 34 Old Broad Street, London, and 14 Old Court-House Street, Calcutta, and as heritable proprietor of subjects in Scotland subject to the jurisdiction of the Supreme Courts of Scotland." The summons was served edictally, and by sending a copy to the defender at an address in London where he was residing when the action was raised. The action concluded for payment of £5000 sterling as damages for slander.

The pursuer was sent to Calcutta in May 1878 as Principal of the Institution there of the General Assembly of the Church of Scotland, and also as Superintendent of the Church of Scotland's Mission. The defender was interested in the progress of the Church of Scotland in Calcutta, and had been engaged in endeavouring to promote its success. An action of damages for slander was brought against the pursuer in the High Court of Calcutta by a Miss Pigot, who was connected with the mission of the Church of Scotland there. In this action he was eventually found liable in damages, and he was on 6th November 1883 removed from his position by the Foreign Mission Committee.

The pursuer alleged that during the course of this action the defender had secretly, maliciously, and falsely misrepresented the conduct of the pursuer, and had circulated charges against him in connection with his conduct of this action; that the alleged libels complained of were contained in letters written both from Calcutta and from London, and addressed to clergymen and others in Scotland connected with the mission in Calcutta; that as the result of these libels he had been deposed from his position; and that he had sustained great loss and injury, patrimonial and otherwise, by the libels complained of.

He averred that the defender "is proprietor of heritable property in Scotland, and is thus subject to the jurisdiction of the Supreme Courts of Scotland. At and subsequent to the service of the summons in this case upon the defender, he was owner of subjects in Saint Vincent Street, Glasgow, conform to disposition in his favour, and in that of John Steel, shipowner in Glasgow, dated 13th, and registered 15th March 1871. Since the summons was served the defender has attempted to divest himself of the said property. The explanations in answer are denied."

The defender answered—"Denied that the defender is proprietor of heritable property in Scotland, or that he is subject to the jurisdiction of the Supreme Court of Scotland. *Quoad ultra* denied. Explained that the property in St Vincent Street did not belong to the defender, but to his mother's trust-estate; that the defender only acquired the same in trust for the trustees under his mother's settlement, and that he along with certain of his brothers renounced all interest in his mother's trust-estate by writings executed in the year 1871. The defender in the ordinary course of the administration of his mother's estate, was called on to divest himself of the trust title, and he did so."

The defender pleaded "no jurisdiction."

The Lord Ordinary allowed the parties a proof of their averments regarding the defender's plea of no jurisdiction.

It appeared from the proof that the house in Glasgow in respect of which jurisdiction was alleged to exist was bought on 18th February 1871 on the instructions of John Steel, the defender's brother, at a price of £2000. It was intended as a residence for Mrs Steel and John Steel. She died suddenly on 19th February 1871, the day after the purchase was arranged, and thus never occupied the house. From that time onward John Steel lived in it, was entered in the valuation roll as proprietor, and paid the taxes, &c., but paid no rent. Mrs Steel left a settlement dated in 1868 conveying her whole estate to trustees, directing them to convey the residue of it among her children equally. Mrs Steel's moveables consisted partly of furniture, &c., in Scotland, and partly of shares in an Indian tea company. The inventory amounted to £2400. She left no heritage.

The disposition to the house, dated 15th March 1871, acknowledged receipt of the price from "John Steel, merchant in Glasgow, and Octavius Steel [defender], merchant in Calcutta," and conveyed it "to them and the survivor, and the heirs of the longest liver."

On 14th March 1871 there was granted over the house, by John Steel, and the defender, "presently resident in Glasgow," a bond and disposition in security for £1500, which was borrowed

towards payment of the price. The balance of £500 was paid by John Steel.

On 14th March 1871 John Steel and the defender executed a declaration of trust on the narrative of Mrs Steel's death, the purchase of the house, "in which it was intended that she should reside along with me the said John Steel, and any of her sons temporarily home from foreign parts," and the alteration of arrangements rendered necessary by her death, "and whereas the price of the said house is to be provided by our borrowing the sum of one thousand five hundred pounds from Alexander M'Kellar, shipowner in Glasgow, for which sum we have granted, or are about to grant, a bond and disposition in security, and the balance of the price will in the meantime be advanced by me the said John Steel until funds belonging to the estate of our said mother are realised, it being intended that ultimately the whole price shall be paid for out of the funds of her estate And now seeing that it is proper that we should declare the purpose for which we are to hold the said house, Therefore we do hereby confess and declare that we shall hold the said house, the title to which is to be taken to us and the survivor of us, and the heirs of the survivor as aforesaid, in trust, in the first place, to secure to the said John Steel repayment of the portion of the price to be advanced by him as aforesaid, and all expenses incurred and to be incurred in the purchase and borrowing, which he has agreed to advance; and in the second place, to secure repayment or relief from said sum of one thousand five hundred pounds about to be borrowed on the security of the property; and in the third place, for the use and behoof of the whole children of the said deceased Mary Heron or Steel, in the same way and to the same effect as if the said house had formed part of her trust-estate, and had been carried by her trust-disposition and settlement, which is dated the thirty-first day of October eighteen hundred and sixty-eight."

It appeared from the evidence of John Steel and Mr Galloway, the agent for the Steel family, that the intention expressed in this deed that the whole price of the house should ultimately come out of the funds of Mrs Steel's estate was abandoned. The declaration of trust was never recorded.

On 15th March 1871 the defender granted a letter, for himself, and as taking burden for his brother Donald, who was abroad, each being entitled to one-seventh of the residue of their late father's estate, whereby the defender gave up to his brothers John and Robert his own and Donald's share as their absolute property; further, for himself and Donald, who were each entitled to one-sixth of their mother's estate, he declared that her estate consisted of the items above stated.

On 15th March 1871 he also granted a similar letter on behalf of himself and another brother also abroad. These letters were confirmed by these brothers from abroad by letters stating that they approved of the family arrangements made.

It was explained in the evidence for the defender that these letters were executed because John Steel had paid the money for the house, although there had been communings with the brothers abroad with a view to its being bought for the mother, and it was therefore thought desirable that they should be consulted and kept acquainted with what was done.

In 1876, the defender being then in Glasgow and about to return to Calcutta, granted a factory and commission in favour of the Rev. Mungo Reid, his cousin, giving him power to uplift debts, &c., and particularly "with full power to make up titles in my person to all lands and other heritages or shares of lands and other heritages now belonging or which shall belong to me, or to which I have succeeded or may succeed, as well as to all personal estate now belonging to me or to which I may succeed, and to sell all lands or shares of lands and other heritages, stock, shares, or other effects now belonging or which shall belong to me, or to which I have succeeded or may succeed, or acquire right either by public roup or private sale, and at such price or prices as he may deem suitable, and to grant dispositions and transfers and all other writings and deeds necessary, to grant leases, output and input tenants, and take all proceedings at law for recovery of rents or otherwise as he may find necessary, and particularly and without prejudice to the foresaid generality, with full power to the said Mungo Reid, whom failing to the said John Steel as aforesaid, to transact for me with the same powers and privileges as I myself possess, all matters relating to the dwelling-house number two hundred and thirty-nine Saint Vincent Street, Glasgow, with the pertinents, purchased by my mother Mrs Mary Heron or Steel from William Blackburn Craig, drysalter and oil merchant in Glasgow, the title to which house having been taken or about to be taken in favour of the said John Steel and myself, and the survivor and the heirs of the survivor, to borrow money on the security thereof, and grant bonds and dispositions in security over the same for the sum or sums borrowed, to sell or concur with the other proprietor in selling either by public roup or private bargain, and for that purpose to enter into missives of sale or articles of roup, and grant dispositions or other requisite deeds to the purchaser: And also, and without prejudice to the foresaid generality, with full power, warrant, and authority to the said Mungo Reid, whom failing as aforesaid to the said John Steel, for me and in my name, to ask, demand, uplift, receive, and discharge, assign, or convey all and sundry debts, sums of money, and others whatsoever due and addebted, or which shall become due and addebted to me from the estate of my mother, with the whole interests, profits, and produce thereof, to act therein with the fullest powers and privileges above specified."

In August 1876, after the defender went abroad, the £1500 bond was discharged, and John Steel and the Rev. Mungo Reid, as the defender's factor and commissioner, and empowered to borrow money on the security of the house, borrowed from a new creditor, on the security of the house, £4000, which sum John Steel bound himself to repay, and Mr Reid bound his constituent, the defender, to repay.

In the action now reported John Steel deponed that he got and used this money for his own purposes, and did not account for it or any of it to the defender, who had never claimed any of it; further, that the defender was never even consulted about the matter, though his attorney signed the bond, because the title was for-

mally in the name of the defender as well as of John Steel. In this he was corroborated by Mr Galloway.

In December 1884 the defender came to Britain on a visit, and remained till December 1885, when he returned to Calcutta. In June 1885 he was in London, and in correspondence with John Steel. At that time he was thinking of returning to India, and John Steel instructed the law-agent of the family to prepare a disposition such as would vest him in the title to the house. Both brothers knew at that time that proceedings were being threatened by the pursuer against the defender. The deed was sent ready for signature to the defender by the agent on 13th June 1883, but lay aside unsigned till 29th October, when it was signed after the summons in this action was executed.

This deed consisted of a disposition by "John Steel, merchant in Glasgow, and Octavius Steel, merchant in Calcutta, presently in London," heritable proprietors of the subjects hereinafter disponed, and proceeded on this narrative, viz. —"Considering that I, the said Octavius Steel, desire to be rid of my interest in the subjects after disponed, which I am satisfied are at present of no value, over and above the bond and disposition in security after-mentioned, and I, the said John Steel, have agreed to take over the whole of the said subjects, and take upon myself the liability for the said bond and disposition in security, Therefore, we, for our rights and interests, in consideration of me, the said John Steel, agreeing to free and relieve me, the said Octavius Steel, of a bond and disposition in security for the sum of four thousand pounds, dated twenty-fourth and recorded in the Division of the General Register of Sasines applicable to the county of the barony and regality of Glasgow, twenty-ninth August eighteen hundred and seventy-six, granted by me, the said John Steel, and by the Reverend Mungo Reid, minister of the parish of Mearns, factor, commissioner, and attorney for me, the said Octavius Steel, as therein mentioned, in favour of" the creditor in that loan, and "which sum of four thousand pounds contained in the said bond and disposition in security, interest due or to become due thereon, and penalties, I, the said John Steel, shall be bound, as by acceptance hereof I bind myself and my heirs, executors, and representatives whomsoever to pay and so free and relieve me, the said Octavius Steel thereof, and which bond and disposition in security, with the personal obligation therein contained, and interest and penalties as aforesaid shall transmit against me, the said John Steel, in terms of the forty-seventh section of the Conveyancing (Scotland) Act 1874."

On this narrative they—John Steel and the defender—disponed the house to John Steel, and the conveyance was subsequently to 30th October 1885 duly recorded. There were also executed at the same time various other deeds connected with family matters, which Mr Galloway had prepared and extended in June in obedience to instructions, but had been allowed also to lie aside unexecuted till October. One of these was an assignation by the defender in favour of the firm of James Steel & Son, of his interest in his mother's estate.

Meantime, however, this summons had been signeted on 26th, and served (edictally and by letter to the defender in London) on 27th October 1885.

The Lord Ordinary (Fraser), after a proof in which the foregoing facts were disclosed, repelled the plea of no jurisdiction.

"*Opinion.*—The pursuer claims damages from the defender upon the ground that the latter has spread abroad a series of libels against him, contained in letters, sent principally to persons of influence in Edinburgh having the control of the Calcutta Mission of the Church of Scotland. The pursuer was appointed in the year 1878 by the General Assembly to the office of Principal of the General Assembly's Institution, and Superintendent of the Church's Mission at Calcutta. He was dismissed from these offices in the year 1883, chiefly in consequence of the alleged libels by the defender. He now claims damages for the injury he has thus sustained. Edinburgh was the place to which almost the whole of the letters containing the libels were sent, and were there delivered to various clergymen. There is a manifest convenience in trying such an action at the place where the alleged wrong was done, but such reason of convenience must yield to the requirements of the law if there be no jurisdiction in the Court of Session to try the case. The preliminary defence on which a proof has been led must now be disposed of.

"The pursuer's averment is that the defender 'is proprietor of heritable property in Scotland, and is thus subject to the jurisdiction of the Supreme Courts of Scotland. At and subsequent to the service of the summons in this case upon the defender, he was owner of subjects in St Vincent Street, Glasgow, conform to disposition in his favour, and in that of John Steel, shipowner in Glasgow, dated 13th and registered 15th March 1871. Since the summons was served the defender has attempted to divest himself of the said property.'

"This averment is met by the defender with a denial, and the defence, as amended, proceeds as follows:—'Explained that the property in St Vincent Street did not belong to the defender but to his mother's trust-estate; that the defender only acquired the same in trust for the trustees under his mother's settlement; and that he, along with certain of his brothers, renounced all interest in his mother's trust-estate by writings executed in the year 1871.'

"The defender's mother, for whose behoof it is said the property in St Vincent Street, Glasgow, was purchased, died on the 19th February 1871. The property in St Vincent Street was purchased, or at all events a title thereto only was obtained by disposition, which is dated on the 13th and registered on the 15th March 1871. It is said that the bargain for the purchase was entered into on the day before the mother's death. The disposition, however, was only executed after the death. This deed conveys over house property in St Vincent Street 'in consideration of the sum of £2000 sterling now paid to me by John Steel, shipowner in Glasgow, and Octavius Steel, merchant in Calcutta . . . as the price thereof, of which I hereby acknowledge the receipt, do hereby sell, alienate, and dispone to and in favour of the said John Steel and Octavius Steel, and the survivor of them, and the heirs of the longest liver, and the assignees whomsover of them, and

their foresaids.' The price was paid by *first*, John Steel and Octavius Steel granting a bond and disposition in security for £1500 over the property, which is dated the 14th and registered the 15th of March 1871; *second*, by payment of £500, which was made by John Steel.

"On the same 14th of March on which the two brothers signed the bond and disposition in security they executed a declaration of trust, which has this narrative:—'Considering that immediately before the death of our mother Mrs Mary Heron or Steel the self-contained dwelling-house, No. 239 St Vincent Street, Glasgow, with the pertinents, was purchased . . . in which house it was intended that she should reside along with me the said John Steel, and any of her sons home temporarily from foreign parts; and whereas her death has altered the arrangements contemplated by the family, and it has now been arranged that the title to the said house shall be taken in favour of us and the survivor of us, and the heirs of the survivor.' It is then set forth how the price was provided for by bond and disposition in security, 'and the balance of the price will in the meantime be advanced by me the said John Steel, until funds belonging to the estate of our said mother are realised, it being intended that ultimately the whole price shall be paid for out of the funds of her estate: And now seeing that it is proper that we should declare the purpose for which we are to hold the said house, therefore we do hereby confess and declare that we shall hold the said house, the title to which is to be taken to us and the survivor of us, and the heirs of the survivor as aforesaid in trust'—first, to secure repayment to John Steel of the £500 advanced by him, and the expense incurred in the purchase; second, to secure repayment or relief from the £1500 borrowed; third, 'for the use and behoof of the whole children of the said deceased Mary Heron or Steel, in the same way and to the same effect as if the said house had formed part of her trust-estate, and had been carried by her trust-disposition and settlement, which is dated the 31st day of October 1868.' In other words, after repayment of the price paid for the house, any value over such payment that might remain was to be claimable by the whole children in the proportions specified in the mother's settlement in regard to her own estate.

"On the 15th March 1871 the defender wrote another letter addressed to his brothers John Steel and Robert Heron Steel, in which for himself, and as taking burden on him for his other brother Donald Steel, then in Eastern Bengal, 'as each entitled to one-sixth of the residue of the estate of the late Mrs Mary Heron or Steel, our mother, do hereby declare that her estate consists of her household furniture and plenishing, and 202 fully paid-up shares of 100 rupees each in the Eastern Cachar Tea Company of India, Limited, any other sums to which she became entitled upon the death of my said father, or which she acquired under gift or discharge by her sons James and Thomas, having been to my knowledge transferred by her to you.' The defender also on the same 15th March wrote another letter addressed to the same brothers, and making the same declaration as to what his mother's estate consisted of at her death, and this he did as acting and taking burden for two other brothers who were in foreign parts, viz., William Heron Steel and Thomas Heron Steel. Letters have been produced from the three brothers, William, Thomas, and Donald, confirming what Octavius had done in their name, which, so far as regards the mother's estate, was simply to declare that she possessed the furniture and the shares in the Limited Tea Company specified. There is no renunciation of their rights under the mother's settlement.

"Now, then, up to this stage the defender stood on record as a joint-owner with his brother John of house property in Glasgow. His business, however, took him abroad, and before leaving this country in 1871 he granted a factory and commission to the Rev. Mungo Reid, minister of the parish of Mearns, whom failing to his brother John, by which he gave his commissioner power to recover all moneys due to him, to raise and defend actions, and to settle accounts, to make up titles in his person to lands and other heritages, to grant dispositions and transfers—in short, very general powers—and also this special power, 'to transact for me, with the same powers and privileges as I myself possess, all matters relating to the dwelling-house No. 239 St Vincent Street, Glasgow, with the pertinents, purchased (by my mother Mrs Mary Heron or Steel) from William Blackburn Craig, drysalter and oil merchant in Glasgow, the title to which house having been taken or about to be taken in favour of the said John Steel and myself, and the survivor and the heirs of the survivor, to borrow money on the security thereof, and grant bonds and dispositions in security over the same,' &c. Acting under this factory and commission, the commissioner along with John Steel borrowed in the year 1876 the sum of £4000 over the property, and the obligation to repay this money was in the usual terms by John Steel, and as regards the defender his commissioner spoke as follows:—'And I, the said Mungo Reid, as factor, commissioner, and attorney foresaid, bind my said constituent, and his heirs, executors, and representatives whomsoever, without necessity of discussing them in their order, all jointly and severally, to repay to the said' lenders. This bond is dated 24th and registered 29th August 1876.

"No further deeds were executed in regard to this property till the 29th day of October 1885, when the defender executed a disposition in his brother John's favour (registered 31st October 1885), whereby on the narrative that the defender desired to be 'rid of my interest in the subjects after disponed, which I am satisfied are at present of no value over and above the bond and disposition in security after mentioned, and I the said John Steel have agreed to take over the whole of the said subjects, and take upon myself the liability for the said bond and disposition in security: Therefore we, for our rights and interests, in consideration of me the said John Steel agreeing to free and relieve me the said Octavius Steel of a bond and disposition in security for the sum of £4000, dated,' &c., disponed to John Steel the St Vincent Street house property.

"On the 27th October 1885 the summons in the present case was (according to law) duly posted by registered letter to the defender at London, and must have been delivered on the following or next day. Thus, then, at the time

when the summons was served the defender stood upon the record as joint-proprietor with his brother John of heritable property in Scotland, and he only divests himself of that property after being served with the summons in this action, and this upon the ground that he wanted to be rid of the property because he was satisfied that it was of no value over the sum contained in the bond of 1876 for £4000.

"It appears that there was a correspondence between the Glasgow agents of John Steel and the defender in the month of June 1885 relative to the execution of the deed of conveyance, which was only executed on 29th October. Still the fact remains that that deed was executed on 29th October, and only at that date was there a divestiture of the defender.

"The defender must therefore either be dealt with at the time when the summons was served as a joint *pro indiviso* proprietor with his brother John of the heritable property, or, assuming that the declaration of trust is to be held as tantamount to a conveyance in favour of the beneficiaries interested under the mother's settlement, in which case he will have right to a share of the St Vincent Street property according to the proportion of his mother's estate bequeathed to him. On referring to the mother's trust-disposition and settlement, we find that after directing that her furniture shall go to such party as she might name by any codicil she makes, a special bequest is made of her shares in the East Indian Tea Company, and then she directs the residue of her estate to be divided equally among her children. If the house in St Vincent Street by virtue of the declaration of trust is to be disposed of according to the terms of the mother's will, then it would come under this clause distributing the residue, and Octavius would have his own share of the property; for until he executed the deed in favour of John Steel, he never divested himself of the right of property. The execution of that disposition in 1885 shows, however, that there never was any intention to act upon this declaration of trust, otherwise the defender could not have conveyed to his brother John property that was intended to be divided equally amongst the whole children. The declaration of trust was in short ignored. No advance was ever made from the mother's estate in payment of the price, as the declaration of trust says would be done. It appears to have been altogether overlooked and forgotten till the exigencies of the defender's case brought it to light. The averment in the defences that the sons renounced their right under their mother's will is not borne out by any document produced. These children did renounce any right to their share under their father's will, but that is of no moment in the present case. They renounced no right had by them under the mother's settlement.

"In these circumstances the plea against the jurisdiction of this Court must be repelled, on the ground that when the summons was served, the defender was owner of heritable estate in Scotland. It is of no moment that he parted with it within twenty-four hours after the summons was served. When jurisdiction is validly constituted at the time when the action is instituted, such jurisdiction will not be affected by the circumstances that the defender immediately withdraws himself from the country, and takes up his domicile in England or elsewhere abroad; nor will it be affected by the circumstance that he sells the heritable property on which jurisdiction is based when served with the summons. The judge who has right to try the case when the summons was served still continues to have right to do so notwithstanding such evasions on the part of the defender. It may be quite true that the pursuer upon obtaining decree may not be able to adjudge the heritable property if it had been sold to a *bona fide* purchaser; but the decree will stand as that of a court of competent jurisdiction, and the foreign court of the country (Calcutta) to which the defender has betaken himself will, according to the rules of international law, enforce it just in the same way as they would enforce a decree where the defender has remained during the whole course of the action in Scotland, and has only left that country when judgment has been pronounced against him. 'It is no good ground,' said Lord Kinloch in the case of *Fraser* v. *Fraser and Hibbert*, 14th January 1870, 8 Macph. 407, 'for finding jurisdiction not to lie that the heritable right is not a perpetual one. The apparent heir may die without making up a title. The liferenter may not live a month. The heir of entail may vanish from the scene, and the estate pass to some-one who does not represent him. There may be a *pactum de retrovendendo* terminating the existing occupancy, or a simple sale, where inhibition has not been used, may destroy it. In these and various other ways the possession of the heritage may be temporary and uncertain, and yet none would say that it would not suffice to found jurisdiction.' In the same case the Lord President summarised the rules upon this subject in the following terms:—'It is also clearly settled by a train of decisions that the nature of the defender's title is of no importance to the question of jurisdiction. It does not need to be a complete feudal title. A personal right on a disposition is as good a title as an infeftment. The mere title of apparency without any possession has been held sufficient. In other cases the possession of a bare superiority of no pecuniary value has been held sufficient. Lastly, a beneficial interest in lands held under trust has been held sufficient to found jurisdiction. It is plain, therefore, that the nature of the title is not important.' The Court in this case added to the category given by the Lord President the case of a lease of property in Scotland held by a defender not otherwise subject to the jurisdiction of the Scottish Courts.

"The result is that the plea against the jurisdiction of the Court must be repelled."

The defender (having obtained leave) reclaimed, and argued—The house in St Vincent Street was at first bought for the use of the defender's mother, but when she died it became the property of John Steel, who resided in Glasgow. He paid the money for it, was answerable for any claims that might be made in regard to it, and got any benefit that might be derived from it. The house was held in trust for John Steel although the title was made out in the names both of John and of Octavius Steel. A heritable *jus crediti* under a trust-deed had never been held sufficient to ground jurisdiction. Jurisdiction founded on ownership of heritage was founded on a reality, and not on a fiction

—*Bowman* v. *Wright*, January 24, 1877, 4 R. 322. The defender had in 1885 divested himself of any right he might have had. The deed of 1885 was not an evasion of the jurisdiction of the Court, but was merely a way of putting the title to the house in St Vincent Street in proper order so that John Steel could deal with it as he thought proper. No doubt the actual date on which the deed of 1885 was signed was the day after the execution of the summons, but the deed itself had been prepared long before, and the pursuer could not get any privilege from a mere matter of delay such as this was.

In the course of the argument it was admitted that the statement in answer 1 was inaccurate, viz., that the defender "had only acquired the property in trust for the trustees under the mother's settlement," and an amendment put on record to the effect that the property belonged to John Steel, conform to the writings executed in 1871 and the possession following thereon.

Argued for the pursuer—The whole course of dealing here showed that Octavius Steel was part proprietor of the house in St Vincent Street. Mere agreement to sell heritable property in Scotland will not divest any of the parties to that agreement of the property to the extent of releasing them from their liabilities—*Kirkpatrick* v. *Irvine*, June 23, 1838, 16 S. 1200, *aff.* 2 Robinson 473. The deeds did not show, *ex facie*, anything relating to a trust, and the deed of 1885 bore that Octavius Steel was desirous of getting rid of his interest in the subjects. The slander was published in this country and therefore this was the proper *forum* in which to try the cause if the Court had jurisdiction—*Fraser* v. *Fraser and Hibbert*, 14th January 1870, 8 Macph. 407.

At advising—

Lord Young—This is an action for damages for libel brought by the Rev. Mr Hastie, who resides in Edinburgh, against Octavius Steel, who is designed in the summons as a merchant in Broad Street, London, and Old Court-House Street, Calcutta.

The pursuer appears to have been appointed in the year 1878 Principal of the General Assembly's Institution and Superintendent of the Church of Scotland's Mission at Calcutta, and he went to Calcutta about that time to discharge his duties accordingly. He there became acquainted with the defender Mr Steel, who then carried on business, as he carries on business now, as a merchant in Calcutta, although he also apparently has a house in London. His residence and the business he personally superintends are in Calcutta. The pursuer became acquainted with him, as I have already said, and their intercourse seems to have been more or less of an intimate character. It is quite obvious that the defender took an interest in the Church of Scotland institutions to which I have referred.

The libels of which the pursuer complains are contained in a number of letters, which are referred to in the record, written by the defender from Calcutta to people connected with these Church institutions or Church missions in Calcutta, which are under the direction of the General Assembly in Scotland. These letters certainly make allegations and reflections on the pursuer's conduct and character of such a nature that one is not surprised that the pursuer should desire to clear his character from them. They are, to a certain extent at least, of a private nature, and I am rather surprised that these statements should have been made or published as they apparently have been. But they relate to a slanderous matter; they are certainly slanderous unless justified by the facts. The pursuer's conduct in Calcutta is implicated in them. They do not give a favourable account of the pursuer's conduct; quite the contrary. He seems to have got into controversy in Calcutta with the lady superintendent of the Orphanage, to whom he attributed improprieties, with the result that there was an action in the Courts in Calcutta relating to these matters. The expressions alleged to be libellous, and the statement alleged to be injurious to the pursuer's character, and of which he naturally and properly desires to clear his character, relate to what he said and did, and to his conduct generally when in Calcutta. The result of his life at Calcutta and of his conduct in the office to which he was appointed was that he was removed. I do not say that he was rightly removed, or that his removal was really the result of anything which he personally did, but the result was that he was removed from the place which he held in India, and he returned to this country.

Now, the pursuer's action to vindicate his character in these matters is brought, not in Calcutta, where the defender resides, and where his conduct and proceedings are impeached by the libellous matter referred to, but in this Court in Scotland. What I have stated I mean to be only introductory to the only question which was argued before us, and indeed the only question which we have to decide. That question is whether we have jurisdiction in this case against Mr Steel, who resides in Calcutta. The defender is resident in Calcutta, which is his home. He carries on his business there. He objects to the jurisdiction of this Court, since he is resident there and carries on his business there. He says he is prepared to answer in his own *forum*—the *forum* of his own jurisdiction—for anything he may have done. He states that he is ready to meet any complaints which the pursuer has against him. But for perfectly intelligible reasons he objects to answer to these matters in this Court, which he contends and pleads has no jurisdiction in the matter.

It is said by the pursuer that we have jurisdiction, because the defender has a proprietary interest in a dwelling-house in Glasgow, and it is undoubtedly according to our law that this Court has a jurisdiction against any proprietor of heritage in Scotland even in actions not relating to that heritage at all. That is a rule of our law of very much the same character as that which gives jurisdiction in Scotland upon arrestments *jurisdictionis fundandæ causa*, even although the thing arrested may be of the most insignificant value. A learned Judge instances an umbrella or a toothpick as articles which might be arrested so as to found jurisdiction. He said if such articles were arrested within the jurisdiction of the Scottish Courts that would give the Scottish Court jurisdiction over the foreigner to whom such trifling articles belonged in any action, however important the subject-matter might be, and it is, I am almost ashamed to say, the law that a proprietary interest in any ground or house, however small it may be,

would give jurisdiction in any action, however large and however unconnected it may be with the house or property.

We have therefore had to consider whether the defender here, who is not resident in Scotland at all, who has no home in Scotland, but has a home and is resident in Calcutta, has a proprietary interest in a certain house in Glasgow, such as will warrant and compel this Court to take up this action of slander against him and exercise jurisdiction over him. With respect to this case it appears—and I may state the facts generally—that it was bought so long ago as the year 1871. The particular date is of no great importance. The defender has a brother John Steel, who lives in Glasgow, and at the time of the purchase Mr John Steel was living with his mother in Glasgow—his mother happening to be then alive. The intention of the two brothers was to purchase a house for their mother, in which she and her son John, who was living with her, might reside; unfortunately she died the day after the purchase was completed, and so she required a house no longer, and the law-agent in Glasgow in these circumstances took a title to the house in the joint names of the two brothers—John, who then had been living with his mother, and Octavius, who was not living there at all. At the same time he asked them to sign a declaration of trust that the property was to be held by them as trustees as part of their mother's estate. I suppose the intention originally was that the sons should pay for the house, and that they should give it to their mother, and that she should dispose of it as she pleased, and that thus it should pass under her will. That intention, however, if it was really the intention, was frustrated by her death, and the man of business in Glasgow made out the title in the way I have indicated. The defender, however, it is quite clear, had no occasion for such a house at all. I think John Steel paid £500 to account of the price, and the money to pay the remainder of the price was raised upon the joint obligation of the two brothers. The matter was, in short, quite satisfactorily arranged in the manner shown by written documents. The effect of the arrangement was that this house which the sons had intended for their mother, and which they immediately after her death declared that they held in trust as part of her estate, should not form part of her estate, but that it should belong to John, who should use it as his own property, paying the price of it, living in it if he chose, and raising money on the security of it if he required the money, and paying no rent. I think it is quite proved that this is what in fact occurred. The former title was not in quite a satisfactory form, and some months before this action was instituted the title was put into what the man of business considered a proper form, making the house John's property absolutely, as on the face of the title it had been in reality. It happened, however, that the deed was not signed until the day after this summons was executed. It is proved that it was not only drafted, but was extended, and that the only effect of the document was to put the formal title in conformity with the reality, namely, that the house should be entirely the property of John. I am of opinion that it was entirely John's property, and therefore that at the date of this action the defender was not a heritable proprietor in Scotland—that he was not to the extent of any proprietary interest interested in this house.

I am glad to be able to reach this conclusion, and to reach it on grounds which I think common sense will support without injury to the legitimate interests of the pursuer. He wishes to vindicate his character—I think very properly wishes to vindicate his character—but in the proper *forum* of the defender, which happens to be the locality in which his character was impugned. The general rule of our law—and I sincerely wish that we had not these exceptions to it, namely, arrestment *jurisdictionis fundandæ causa*, and the validity of a proprietary interest in a tenement as a ground of enforcing jurisdiction—I say the primary rule of our law in regard to jurisdiction is *actor sequitur forum rei*. The *forum* of the *reus* here is undoubtedly Calcutta, and the *locus* of the pursuer's speech and action and conduct generally which are impugned is the same. The pursuer says that his action and conduct have been impugned libellously, and he does not dispute that the *locus* was Calcutta. Every reason of convenience and of justice to the parties and all good sense therefore are against entertaining the action here, and in allowing the pursuer to seek his remedy in any other than the place where the libels complained of were committed. He must therefore seek his remedy in the tribunal of the defender's *forum*. I have therefore to propose to your Lordships that we should alter the interlocutor of the Lord Ordinary, and sustain the plea against jurisdiction of this Court, and in respect of it dismiss the action.

Lord Craighill—The present action is raised by the Rev. William Hastie against Mr Octavius Steel to recover damages for slander said to have been published by the defender of and concerning the pursuer. The defender for many years has resided in Calcutta, but it is alleged by the pursuer that he is proprietor of heritable property in Scotland, and is thus subject to the jurisdiction of this Court. Deeds and writings have been produced by the pursuer to prove his averments, and there has been parole proof led by the defender for the purpose of showing the relations of parties, and that any property which may have been at one time held in his name and that of his brother John did not when the summons was served, nor indeed at any time, belong to any extent to him, but was held by him only in trust for others. The Lord Ordinary has repelled the plea of want of jurisdiction, and this is the judgment which is now submitted to our review.

The first observation that occurs to me on the decision reclaimed against is that the Lord Ordinary has not referred in any way to the parole testimony which has been adduced. That appears to me to be a very important part of the proof, and neither law nor justice can be meted out to the parties in this case unless that evidence shall be taken into account in the decision. The Lord Ordinary has not explained why this part of the proof has not been taken into account, but presumably it is upon the assumption that as the question involves a question of trust, parole proof, although it has been brought forward, is in the circumstances incompetent. The Act 1694, c. 25, is presumably the reason why this course has been followed, but that statute only refers to a

question between the truster and the trustee (Bell's Prin. 1994; M'Laren on Trusts, i. 16-17), and cannot be applied where the trust arises not from the act or conveyance of the truster, but results from the interference of the trustee as *negotior* and *gestor*, for example—Bell's Comm. 7th ed. 33; nor where a person seeks to prove *pro ut de jure* that an absolute right in his favour is truly a trust (Dickson on Evidence, par. 580; M'Laren on Trusts, i. 38). Numerous decisions are cited by these learned authors, and there seems to me to be no doubt whatever that what they present is on this subject the law of Scotland. Even upon the documents the Lord Ordinary has, I think, come to an erroneous conclusion, but when these are read in the light of the evidence given by Mr Galloway and by Mr John Steel, there cannot be a doubt that the proof as a whole is inconsistent with the conclusion of the Lord Ordinary. The house in question was purchased by John Steel and his brother, the defender, in 1871, the purpose for which it was acquired being that it might serve as a residence for him (John Steel) and his mother, then a widow. The price which was to be paid was £2000; Mrs Steel unfortunately died the day after the purchase, and before a disposition had been granted. The date of the disposition was 13th March 1871. In the interval between Mrs Steel's death and the date of the disposition it was necessary in the altered circumstances to make a change as to the parties in whose favour the disposition was to be granted. Had the mother lived she would have been the disponee, and for this reason it was thought best so to arrange matters that those interested might possess the same rights as they would have possessed if the deed had been granted before her death. All those things are proved by Mr Galloway, the agent of John Steel, and by John Steel, himself. Nor is proof of the facts dependent upon their testimony alone, because the deed of trust to be immediately mentioned contains a narrative, in which all are substantially narrated. Upon the face of the disposition, John Steel and the defender are *ex facie pro indiviso* proprietors. The price was paid by a bond for £1500 and by a payment of £500 advanced by Mr John Steel. Neither in raising money for the price nor in taking the disposition in terms in which it was conceived, was there any agreement between the disponees and the other members of Mrs Steel's family that they should have the option of claiming an interest if they chose so to do, and accordingly a declaration of trust was executed in which it was confessed and declared that the disponees should hold the said house in trust to secure repayment of £500 advanced by John Steel, *second* to secure repayment of the £1500 borrowed, and *thirdly* for the use and behoof of the whole children of the said deceased Mrs Mary Heron or Steel, in the same way and to the same effect as if the said house had formed part of her trust estate and had been carried by her trust-disposition and settlement, dated 31st October 1868. Thus from the very beginning there was a trust; the property as acquired did not belong to the defender and his brother John individually, but was taken by them in trust for the beneficiaries under the testamentary settlement of their mother. The defender and his brother John may in this way have acquired an interest as members of the family under their mother's will, but it is as certain as anything can be that the defender had no connection whatever with this property other than that which he possessed as a trustee for others. But was the arrangement evidenced by the declaration of trust likely to be a benefit to the beneficiaries under the settlement of Mrs Steel? They could not take the house without incurring liability for the price, and it may well have been considered a doubtful thing whether the apprehension of loss was not as reasonable as the hope of gain. All things considered, the safer conclusion was thought to be that the house should be left with the person who bought it, and accordingly arrangements were made by which this was to be accomplished. Within a day or two after the declaration of trust, the letters which are referred to by the Lord Ordinary were written by the defender for himself and as taking burden on him for three brothers who were out of the country. Another brother, Thomas Heron Steel, was in Glasgow, and it was to him and John—also in Glasgow—that the letters referred to were addressed. These letters are tested as if they were deeds, and one of their purposes obviously was to take out of their mother's succession the house which had been brought into it by the declaration of trust. The person who was to have the house in room of Mrs Steel's beneficiaries is not specified in these letters, but it was clearly in the contemplation of all that the house was to be taken by John, who had paid £500 of the price, and who was to take liability also for the £1500 with which the house was burdened. The course of events leaves no doubt that this is a true account of the transaction. John entered on the occupation of the house; he was not the tenant, for he paid no rent; he was entered on the valuation roll as proprietor and occupier. He paid the feu-duty; he paid the interest on the bond; and when a new loan equivalent in amount to the increased value to which the property had risen was obtained, he was the person who drew the money and alone participated in the profit upon the original transaction. These things are not disputed, and if they were, every one of them would be proved by the evidence of Mr Galloway and Mr John Steel. The title of the property, however, remained upon the original disposition; *ex facie* the defender and his brother John were still *pro indiviso* proprietors, but as such they were only trustees, and connection with heritage as trustee is not an ownership by which a foreigner is rendered amenable to the jurisdiction of the Court. The alternative view seems also inconsistent with what has been proved. If the trust beneficiaries continue to be the beneficiaries under the will of Mrs Steel, the defender as one of the family would, in a sense sufficient to found jurisdiction, be a proprietor of heritage in Scotland. But what he might have claimed was surrendered in 1871, and thenceforward as the other brothers had also surrendered their interests the only beneficiary under the trust for which the property was held by the defender and his brother John as trustees was John as an individual.

The narrative of the disposition of 30th October 1885 has been referred to as inconsistent with the view of the facts which has now been presented, but my opinion is that any error that exists is an error not in my view of the

facts, but in the statement, read as that statement has been by the Lord Ordinary, which is set forth in that disposition.

On the whole matter I come without hesitation to the conclusion that the defender was not at the date of the service of the pursuer's summons the owner of heritage in Scotland, and consequently that he was not within and is not now subject to our jurisdiction.

Lord Rutherfurd Clark—I am of the same opinion. I have not written an opinion. I concur in the views which your Lordships have expressed.

The only difficulty I had in the case was in regard to the form which the denuding deed took. It seemed to express that the defender had an individual interest in the property which he conveyed away to his brother. His interest is described in the narrative as his interest in the house. The words of conveyance seem to imply an individual interest. The difficulty which disturbed my mind was, whether that should not be held, as the pursuer suggests, as conclusive of the question, but I have come to think that that will not do. We are not here in a case between truster and trustee. We are not affected by the limitations of proof which the Act which was referred to in the course of the debate introduces. We may ascertain what is the real state—what is the truth—with respect to the interest which the defender did possess in this house, whatever may be the form and whatever may be the expression. I think, therefore, there cannot be but one conclusion to be drawn from the evidence, if we are to draw a conclusion from the evidence at all. I think it is perfectly plain upon that evidence that the defender never had, and never was intended to have, any individual interest, and that he was a mere name in the transaction throughout the whole of it—that name being taken out of the title by the ultimate conveyance granted in October 1885.

The Lord Justice-Clerk was absent.

The Court recalled the interlocutor of the Lord Ordinary, sustained the plea of no jurisdiction, and dismissed the action.

Counsel for Pursuer — Comrie Thomson — Strachan. Agents—Welsh & Forbes, S.S.C.

Counsel for Defenders—D.-F. Mackintosh, Q.C. —Pearson—Dickson. Agent—J. B. M'Intosh, S.S.C.

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*Friday, March* 19.

## SECOND DIVISION.

[Sheriff of Forfarshire.

### HAY & KYD *v.* POWRIE.

*Bill of Exchange—Novation—Delegation—Giving Time—Course of Dealing.*

The pursuers were in the habit of selling cattle to A, and taking in payment the joint acceptances of the defender and him at two or three months. These acceptances were renewed again for similar periods, and generally for less amounts, the difference being paid by A in cash either at the time of the renewal or shortly after. If it was not paid at the time, the pursuers debited A's account in their books with it, and retained the old acceptance till it was paid. All communications betwixt the pursuers and the defender took place through A, for whom the defender was really a cautioner. On A's bankruptcy the defender retired three of the acceptances, each of which was the last of a series of renewals, but the pursuers also claimed from him the differences between the amounts in certain acceptances and the acceptances by which they were renewed. They had in each of these cases retained the old acceptance till A should fulfil his promise to pay the difference. *Held* that the obligations in the old acceptances were not extinguished by novation or delegation; that there was no such giving of time to A as to free the defender, even if he were entitled to the equities of a cautioner; and that the pursuers were not barred from suing on the bills by the fact that the defender in accepting the renewals believed that to the extent of the differences in the amounts of them, and of the acceptances sued on, the pursuers' claim had been reduced.

Hay & Kyd, agricultural auctioneers, Perth, sued James Powrie of Reswallie, near Forfar, for payment of (1) £10 as the balance due on a bill, dated 9th December 1882, drawn by them for £150 at two months upon and accepted by John Ogilvy, farmer, South Gask, Coupar-Angus, and the defender, for value received in cattle, after deducting £140 paid to account on 12th February 1883, the date when the bill fell due; (2) £10, as the balance due on a similar bill, dated 1st December 1882, for £80 at three months, after deducting £70 paid on 4th March 1883; and (3) £25, as the balance due on a similar bill, dated 12th January 1883, for £100 at three months, after deducting £75 paid on 15th April 1883.

For several years Ogilvy had been in the practice of purchasing cattle at the pursuers' auction mart, and they had in some cases taken the joint acceptances of himself and the defender in payment of the prices. He had a general account with them.

The bill for £150 first sued on was one out of a series of renewals of a bill drawn in such circumstances by the pursuers upon and accepted by Ogilvy and the defender on 3d December 1880 for £268, 6s. 9d. When this bill fell due it was renewed for the same amount; when the renewal matured, it was in its turn renewed for £265, the difference having been paid to the pursuers in cash by Ogilvy; and in this manner there were renewals for £235, £230, £200, £160, and £150, the amount of the bill the balance of which was sued for. The bill for £150 had been renewed by a bill drawn on 10th February 1883 for £140, but the difference of £10 had not been paid in cash at the time. This bill for £140 had been four times renewed for the same amount, the last renewal having been drawn on 18th February 1884 at three months. Ogilvy became bankrupt during the currency of this renewal bill, and his estates were sequestrated on 12th April 1884. The defender retired his acceptance of 18th February 1884 when it fell due; but the pursuers now claimed from him the sum of £10 as the difference