Counsel for the Appellants — Constable, K.C.—Wilson. Agent—Peter Macnaughton, S.S.C.

Counsel for the Respondent — Solicitor-General (Morison, K.C.)—R. C. Henderson. Agent—Robert Pringle, W.S.

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*Saturday, January* 17.

## FIRST DIVISION.

[Sheriff Court at Banff.

## FRASER-JOHNSTON ENGINEERING AND SHIP REPAIRING COMPANY, LIMITED *v.* JEFFS.

*Process — Jurisdiction — Arrestment ad fundandam—Sheriff—Form of, Application for Letters, Letters, and Execution—Timeous Stating of Plea of No Jurisdiction—Sheriff Courts (Scotland) Act* 1907 (7 *Edw. VII, cap.* 51), *First Schedule, Rules* 1 *and* 2, *and Forms A and K, as Amended by the Sheriff Courts (Scotland) Act* 1913 (2 *and* 3 *Geo. V, cap.* 28).

To found jurisdiction in the Sheriff Court arrestments were used against a ship. The application for letters of arrestment contained no condescendence or pleas-in-law, but contained a crave to dismantle the ship. The letters bore that the property arrested was "to remain under sure fence and arrestment . . . until sufficient caution shall be found acted in the Books of Court." The execution substantially repeated the letters, including the words quoted, and added "that the same shall be made furthcoming to the pursuers." The application, letters, and execution all distinctly bore that the arrestment was *ad fundandam jurisdictionem.* At adjustment a plea of no jurisdiction was added for the first time. It was supported on the ground that the arrestment was bad. *Held* (1) that as no *nexus* was laid upon property arrested to found jurisdiction, and as it was clear from all the writs that the arrestment was merely to found jurisdiction, the crave in the application and the words referred to in the letters and execution were mere surplusage; and (2) that for a like reason the disconformity between the letters and execution was immaterial; and jurisdiction *sustained.*

*Opinions per* the Lord President and Lord Mackenzie that the plea of no jurisdiction was timeously added at adjustment.

*Opinion per* the Lord President that in the circumstances the objection to the application in respect that it did not contain a condescendence and pleas-in-law could not be sustained.

The Fraser-Johnston Engineering and Ship Repairing Company, Limited, Aberdeen, *pursuers,* brought an action in the Sheriff Court at Banff against Charles Jeffs junior, Grimsby, owner of the drifter "Don Pedro," *defender,* craving decree for £2276, 13s. 4d. alleged to be due in respect of repairs executed by the pursuers upon the "Don Pedro," and also craving warrant to arrest on the dependence.

The pursuers prior to raising the action brought an *application for letters of arrestment jurisdictionis fundandæ causa* in the following terms:—"The claim of the pursuers is for letters of arrestment *ad fundandam jurisdictionem* against the said Charles Jeffs junior. The defender is due to the pursuers the sum of £2276, 13s. 4d., being the cost of repairs to the drifter 'Don Pedro,' YH 441, executed on or about the months of September and October 1918, for which pursuers are about to raise action against him. The defender is not subject to the jurisdiction of the Courts of Scotland, but has the said drifter 'Don Pedro' belonging to him situated within the county of Banff. Therefore the pursuers crave the Court to grant warrant to the Clerk of Court to issue letters of arrestment at the pursuers' instance *jurisdictionis fundandæ causa,* authorising arrestment of the said drifter, of which defender is owner, and of goods, debts, money or other moveable property belonging to defender situated within the county of Banff, all to remain under arrestment *jurisdictionis fundandæ causa,* and meantime to grant warrant to dismantle the said drifter 'Don Pedro.' In respect whereof," &c.

On 23rd April 1919 *warrant* for letters of arrestment as craved was granted.

The *letters of arrestment* were as follows:—"In the Sheriff Court of Aberdeen, Kincardine, and Banff, at Banff, John Campbell Lorimer, Esquire, Sheriff of Aberdeen, Kincardine, and Banff. To officers of Court, executors hereof, jointly and severally, hereby specially constituted, greeting: Whereas it is humbly meant and shown to me by The Fraser-Johnston Engineering and Ship Repairing Company, Limited, Stell Road, Aberdeen, pursuers, against Charles Jeffs junior, 364 Cleethorpes Road, Grimsby, registered owner of the drifter 'Don Pedro,' YH 441, defender, that he is due the pursuers the sum of £2276, 13s. 4d., and that the defender is not subject to the jurisdiction of the Courts of Scotland as is alleged: The said pursuer therefore applied by writ in the Sheriff Court of Aberdeen, Kincardine, and Banff, at Banff, for warrant to arrest *ad fundandum jurisdictionem*—upon presenting of which writ, upon the day and date hereof, warrant was granted in manner and to the effect underwritten: Herefore it is my will that this my precept seen, ye pass, and in His Majesty's name and authority and mine lawfully fence and arrest, the said drifter 'Don Pedro,' YH 441, and all goods, debts, money, or other moveable property belonging to the defender, wherever the same may be found, within the county of Banff, all to remain under sure fence and arrestment at the said pursuers' instance, aye and until sufficient caution shall be found, acted in the Books of Court, *ad fundandam jurisdictionem,* as accords of law: The which to do I hereby commit to you,

and each of you, full power and warrant by this my precept. Given and subscribed by the Clerk of Court at Banff the twenty-third day of April Nineteen hundred and nineteen years. ROBERT G. SHIRREFFS."

The *execution* of the arrestment was as follows:—"Upon the twenty-third day of April Nineteen hundred and nineteen years, by virtue of letters of arrestment *ad fundandam jurisdictionem* of the Sheriff of Aberdeen, Kincardine, and Banff, dated at Banff the twenty-third day of April Nineteen hundred and nineteen years, raised at the instance of The Fraser-Johnston Engineering and Ship Repairing Company, Limited, Stell Road, Aberdeen, *pursuers*, against Charles Jeffs junior, 364 Cleethorps Road, Grimsby, registered owner of the drifter 'Don Pedro,' YH 441, *defender*, I, John Gordon, sheriff officer, passed and in His Majesty's name and authority, and in that of the said Sheriff, lawfully fenced and arrested the ship or vessel called the 'Don Pedro,' YH 441, presently lying in the harbour of Buckie, of which ship or vessel the defender is owner or part owner, with her whole float, boats, furniture, and apparelling, all to remain in the said harbour of Buckie under sure fence and arrestment, *jurisdictionis fundandæ causa*, at the instance of the said pursuers, aye and until sufficient caution and surety be found, acted in the Sheriff Court Books of Banffshire, that the same shall be furthcoming to the said pursuers as accords of law: Conform to the said letters of arrestment *ad fundandam jurisdictionem*. A just copy of arrestment to the effect foresaid I affixed and left upon the main mast of the said ship or vessel, and marked the letters G.R. above the same, which schedule of arrestment did bear the name and designation of George F. Barclay, residing in Buckie, witness to the premises.—JOHN GORDON, *Sheriff-Officer*. G. F. Barclay."

The defender *pleaded, inter alia*, which plea was added at adjustment—"2. No jurisdiction in respect that the arrestment of the vessel is inept."

On 10th October 1919 the Sheriff-Substitute (MORE) repelled the second plea-in-law for the defender, and later granted leave to appeal.

*Note*—"The defender in this action is an Englishman and registered owner of the drifter 'Don Pedro,' which is the subject of this litigation. On 23rd April 1919 arrestment of the 'Don Pedro' in the harbour of Buckie was used by the pursuers *ad fundandam jurisdictionem*. Following on the arrestment the action was served and appearance entered on 30th May. No objection to the arrestment used was taken in the original defences, but the defender's second plea-in-law — 'No jurisdiction in respect that the arrestment of the vessel is inept'—was added at adjustment,

"The defender contends that the form of arrestment used is bad in respect that the words contained therein, 'aye and until sufficient caution and surety be found acted in the Sheriff Court Books of Banffshire, that the same shall be made furthcoming to the said pursuers,' are words appropriate to an arrestment on the dependence.

There is apparently no statutory form of arrestment *ad fundandam jurisdictionem*, but the form used in this case while it contains words which are superfluous and inappropriate is the form generally in use in the Sheriff Courts of Scotland, and clearly bears on the face of it that its purpose is *ad fundandam jurisdictionem*. The arrestment, moreover, was used at the only time appropriate for founding jurisdiction, namely, before the action was raised.

"While it is unfortunate that unnecessary words were used in the form in question, I am of opinion that their presence does not invalidate its efficacy for founding jurisdiction, and I must accordingly repel the defender's plea. I have the less hesitation in doing so, as I do not consider that the defender has suffered any prejudice, and in any event did not on entering appearance move the Court to recal the letters of arrestment."

The defender appealed, and argued—Jurisdiction had not been founded. (1) The application for letters of arrestment was not in the statutory form which required a condescendence and note of pleas-in-law—Sheriff Courts (Scotland) Acts 1907 (7 Edw. VII, cap. 51), section 6, First Schedule, Rule 1, Form A, and 1913 (2 and 3 Geo. IV, cap. 28); Lewis Sheriff Court Practice, p. 537; Scots Style Book, i, pp. 417-421. That form of arrestment, to found jurisdiction, in a Sheriff Court action was wholly statutory and at first was limited to the arrestment of ships—Sheriff Courts (Scotland) Act 1877 (40 and 41 Vict. cap. 50), section 8 (4). [Counsel was stopped on that line of argument in respect that it had not been stated in the Court below.] (2) It was not too late to add a plea of no jurisdiction at adjustment. The defender had not prior thereto the execution of the arrestment before him; till closing the record he could state all other pleas; further, the object of adjustment was to fix the questions to be tried. Those must include the question of jurisdiction. *Thorburn* v. *Dempster*, 1900, 2 F. 583, 37 S.L.R. 415; *Cairns* v. *Lee*, 1892, 20 R. 16, *per* Lord Kinnear at p. 21, 30 S.L.R. 47; Sheriff Courts Act 1907 (*cit.*), First Schedule, rules 45, 49, and 52, as amended by the Act of 1913 (*cit.*), and Court of Session Act 1868 (31 and 32 Vict. cap. 100), sections 25, 26, and 29, were referred to. *Assets Company Limited* v. *Falla's Trustee*, 1894, 22 R. 178, 32 S.L.R. 143, was distinguished. [Counsel was stopped on this line of reply, that point not having been taken in the Court below.] (3) None of the writs were in proper form. They used the terms appropriate to an arrestment on the dependence. The application craved dismantling of the ship. The letters and the execution provided that the arrestment should only be loosed on caution, and the execution provided that the property arrested should be made furthcoming. As the Court would not pronounce an idle decree, arrestment was in original theory recognised as founding jurisdiction because it fixed goods in the jurisdiction upon which the decree might operate. Consequently it necessarily involved a *nexus* upon the goods

until decree, but loosable upon caution *judicatum solvi*. That theory was gradually and by imperceptible steps departed from. By 1846 the *nexus* was regarded as surviving only till the parties joined issue—*White* v. *Spottiswoode*, 1846, 8 D. 952. Next, the *nexus* was regarded as being merely such a *nexus* as would found jurisdiction and as being spent the moment the defender was made a party to the cause—*Stewart* v. *North*, 1889, 16 R. 927, *per* Lord President Inglis at p. 932, 26 S.L.R. 650, 1890, 17 R. (H.L.) 60, 28 S.L.R. 397. Finally the view came to be that no *nexus* at all was created—*Craig* v. *Brunsgaard, Kjosterud, & Company*, 1896, 23 R. 500, *per* Lord Kinnear at p. 504, 33 S.L.R. 348, in which *White's* case was cited; *Leggat Brothers* v. *Gray*, 1908 S.C. 67, *per* Lord President Dunedin at p. 71, 45 S.L.R. 67. As a result a ship, *e.g.*, arrested to found jurisdiction could sail away the next moment. Consequently any order to dismantle or to find caution or make the goods furthcoming was wholly out of place. Some of the styles had not kept pace with the development of the law, *e.g.*, Sellar's Sheriff Court Styles, p. 4. But others contained no reference to caution &c., *e.g.*, Juridical Styles, 1st ed., vol. ii, p. 439, 2nd ed., vol. iii, p. 553, 3rd ed., vol. iii, p. 306, which provided that the goods were to remain under arrestment *jurisdictionis fundandæ causa*. Lees' Sheriff Court Styles, p. 85, was to the same effect. Even those words should be omitted—Graham Stewart, Diligence, p. 272 and p. 248, note 5, referring to *Freres* v. *Kinnear*, (n.r.), which showed that the omission of the reference to caution was the difference between arrestments *ad fundandam* and on the dependence. Further, the execution was disconform to the letters, which said nothing of making the goods furthcoming, and that alone was sufficient to invalidate the arrestment. Those irregularities were not immaterial or mere superfluities; misleading information was given, and a matter such as this, which was anomalous in character and of the nature of diligence, must be strictly regarded—*Craig* v. *Brock & Ferguson*, 1841, 4 D. 54, *per* Lord President Boyle at p. 56; *Graham* v. *Bell*, 1875, 2 R. 972—and it was not possible to disregard what was bad and leave what was good standing—*Davidson* v. *Dunbar*, 1821, 1 S. 41 (N.E. 46); *Inch* v. *Thomson*, 1832, 11 S. 93; *Wilson* v. *Stronach*, 1867, 24 D. 271; Graham Stewart on Diligence, p. 304.

Argued for the pursuers—The plea of no jurisdiction being peremptory must be stated at the first judicial act in the cause by the defender, *i.e.*, lodging defences. If not, he must be held to have prorogated the jurisdiction—Ersk. Inst., i, 2, 27; M'Laren, Court of Session Practice, p. 380, referring to *Shaw* v. *Dow*, 1869, 7 Macph. 449, 6 S.L.R. 297. Such a plea could not be added in revised pleadings or by amendment. Adjustment was for the purpose of meeting the opponent's case, and such a plea could not be timeously added then—*Assets Company, Limited* v. *Falla's Trustee* (*cit. sup.*). [Lord Cullen referred to the Court of Session Act 1868 (*cit. sup.*), sections 25 and 26, and Lord Mackenzie referred to Mackay's Manual, p. 229, and *Arthur* v. *Lindsay*, 1895, 22 R. 417, 32 S.L.R. 334.] If the arrestment was valid it was not competent to revert to the initial application for it. Before 1907 such *ex parte* applications contained no condescendence and pleas-in-law. In 1907 that form was applied generally—Act of 1907, section 39, First Schedule, and Form A. In 1913 the older forms were reverted to, and *per incuriam* an application such as the present was treated like an ordinary action. Rules 1 and 2 of the First Schedule as amended only applied to actions which had begun. The older form of action contained no condescendence or pleas-in-law—Sellar, Sheriff Court Styles, p. 5. Further, the present application was a summary application which required no condescendence and pleas-in-law—section 50, and Form K. Further, the arrestment was valid. An arrestment *ad fundandam* did create a *nexus*. There was no decision to the effect that it did not. *Craig's* case merely decided that a defender against whom jurisdiction had been founded could thereafter not destroy that jurisdiction by his own act, and the dicta to the effect that there was no *nexus* were *obiter*, and further, proceeded upon the concession of counsel. *Leggat's* case only went the length of deciding that there was no *nexus* after the action had begun. The dictum of Lord Justice-Clerk Moncreiff in *Trowsdale's Trustee* v. *Forcett Railway Company*, 1870, 9 Macph. 88, at p. 92, 8 S.L.R. 82, was *obiter*. The other cases supported the pursuers to the effect that a *nexus* was laid on till jurisdiction was founded—*Stewart* v. *North* (*cit. sup.*); *Carlberg* v. *Borjesson*, 1877, 5 R. 188 (H.L.) 217, 15 S.L.R. 779; *Malone & M'Gibbon* v. *Caledonian Railway Company*, 1884, 11 R. 853, 21 S.L.R. 572; *Herries* v. *Liddesdales*, 1755, M. 2044; *Longworth* v. *Hope*, 1865, 3 Macph. 1049. Further, the case of a ship was special, for there the old original maritime practice still persisted, and the law still remained as stated in Ersk. Inst., i, 2, 19—Duncan and Dykes, Principles of Civil Jurisdiction, pp. 84-86. As regards the styles it was not *hujus loci* to refer to Court of Session styles, for arrestments in the Sheriff Court to found jurisdiction, while not available to found jurisdiction in an action there, might be available to found jurisdiction in a Court of Session action—*Dickson & Walker* v. *John Mitchell & Company*, 1910 S.C. 139, *per* Lord President Dunedin at p. 144, 47 S.L.R. 110. Consequently the Sheriff Court had styles of its own. Those supported the pursuers—Forrest Shearer's Sheriff Court Styles, pp. 88 and 89; Sellar's Sheriff Court Styles, p. 4; Lewis on Sheriff Court Practice, p. 538. Lees' Sheriff Court Styles, p. 84, note (*a*), implied that there might be a *nexus*, for an arrestment on the dependence was merely regarded as *ob majorem cautelam*. Even the Court of Session styles favoured the pursuers—Juridical Styles, 1st ed., ii, pp. 440, 441, 2nd ed., iii, p. 555, 3rd ed., iii, p. 316. But even if there was no *nexus*, then all the styles contained superfluous and misleading terms, yet the defender did not attack them. Here the writs were quite clear to the effect that the arrestment was solely *ad fundandam*, and they were not vitiated by the fact

that they contained as every style did superfluous words.

At advising--

LORD PRESIDENT—The question for our decision in this appeal is whether or not the defender and appellant is amenable to the jurisdiction of the Sheriff Court of Aberdeenshire at Banff. I am of opinion that he is. He is a foreigner. But a ship belonging to him was, prior to the raising of the action, arrested *ad fundandam jurisdictionem* within the sheriffdom. Jurisdiction was thus, it is maintained, constituted against the defender, and undeniably this is so if the arrestment was valid. Its validity is, however, challenged on the ground "that the form of arrestment used by the pursuers was that of an arrestment upon the dependence of an action, in place of an arrestment *ad fundandam jurisdictionem*." In the lengthy argument before us very little was said regarding this objection to the jurisdiction. But it was contended that the letters of arrestment contain a fatal flaw, and that even if they be not open to objection the execution of arrestment is disconform to the letters, and hence on that ground the arrestment is inept. In my judgment the arrestment here is valid and jurisdiction has been well constituted against the defender.

The letters of arrestment grant warrant to arrest the ship "to remain under sure fence and arrestment at the said pursuer's instance, aye and until sufficient caution shall be found acted in the Books of Court *ad fundandam jurisdictionem* as accords of law." Now it was not disputed that this is in the form of letters of arrestment given in Mr Sellar's Book of Sheriff Court Styles, now probably the most authoritative guide to practitioners in the Sheriff Court. But then it was contended that the style here used had not kept pace with the development of this branch of the law; that an arrestment *ad fundandam jurisdictionem* really attached nothing; and that the owner of the ship so arrested was free to take his ship away without committing a breach of the arrestment. To tell him therefore that his ship must remain until he had found caution, whether *judicio sisti* or *judicatum solvi*, was at this time of day quite wrong, and consequently fatally vitiated the arrestment. I agree that in the present state of the law an arrestment to found jurisdiction does not attach the defender's ship, and that she may sail away notwithstanding the arrestment. And I may add that I gave effect to this view in the case of *Murray* v. *Wallace, Marro, & Company*, (1914 S.C. 114, 51 S.L.R. 95), and see no reason after reconsideration to change my opinion. There is confessedly no case directly in point, except it may be *Craig*, 1896, 23 R. 500, 33 S.L.R. 348. But unanimous and authoritative opinions have been expressed to the effect I have indicated in this Court both in the case of *Craig* and of *Leggat* (1908 S.C. 67, 45 S.L.R. 67), opinions which I do not think we can disregard until a larger or superior court otherwise decides. Take the opinion, *e.g.*, of Lord M'Laren in *Craig's* case. He says—"It is now settled, I think, beyond dispute that arrestment *jurisdictionis fundandæ causa* does not attach the property arrested. . . . No disability is imposed upon the owner of the ship, and the master is put under no obligation to make the ship furthcoming." And Lord Kinnear says—"It is conceded, and indeed that is the basis upon which the whole discussion arises, that the arrestment upon which the pursuer relies lays no embargo upon the ship. It does not attach the ship." This being so, the arrester is not entitled to ask that the arrested ship remain until caution be found. He is not entitled to ask that she remain at all. The owner is at perfect liberty to remove her notwithstanding the arrestment. But it does not follow that because the words "to remain under sure fence and arrestment," &c., are idle and valueless, the letters of arrestment are invalid. It may well be that these words have now become obsolete and ought to find no place in the accepted styles, and yet the arrestment will remain valid. To name a definite term during which the ship must remain, or to say she must remain where she is indefinitely, may be, as I think it is, quite without warrant, and yet the arrestment may be perfectly good. The test of the validity is, I think, this — Do the letters make it clear beyond doubt that warrant is granted, and does the execution make it equally clear that the arrestment has been laid on for the purpose of founding jurisdiction and not in security or in execution. If so, in my opinion the letters and execution are valid. It must be kept in view what the real character of an arrestment to found jurisdiction according to the existing law is. It is not in the proper sense of the word a diligence at all. It attaches nothing — it affects neither the goods nor the person of the debtor. If I am to characterise it at all I prefer to adopt Lord M'Laren's description in *Craig*—"It seems to me merely to attest the fact that the ship is at the time within the jurisdiction, and that notice has been given that it is the intention of the person using the diligence to raise an action founding on the jurisdiction which results from the property being within the country." This arrestment is, in short, an attestation which if well and clearly made cannot be vitiated by being accompanied by an idle threat or warning.

It is, however, urged that even if the letters be good, the execution being disconform to the letters, the arrestment is invalid, and this would undoubtedly be so if the disconformity were in essentials. If, as is here alleged on record by the defender, an arrestment in security had been laid on proceeding on a warrant which authorised only an arrestment to found jurisdiction, the arrestment would be invalid. But that is not so here. The disconformity here, such as it is, does not touch essentials at all if my reasoning thus far be well founded, for it consists only in this, that the execution describes the endurance of the arrestment to be until caution be found that the ship "shall be made furthcoming to the pursuers." In all other respects it is conform to the letters. Now

these words are just as futile as the words objected to in the letters, and hence the disconformity founded on comes in the end to be in the addition of one set of idle words to another set of equally idle words. I am quite unable to see how this can affect the validity of the arrestment. It is quite true that the added words in the execution are appropriate, as was pointed out, to an arrestment on the dependence, and if their presence were calculated to mislead the defender into thinking that his ship had been arrested in security, and not merely to found jurisdiction, the result would have been different. But it was not, and could not be, contended that the execution was in any way ambiguous or misleading. It is plain on the face of it that it is an execution of an arrestment to found jurisdiction and nothing else. If so, it is not in my judgment disconform to the letters even although like them it bears to set out a term for the endurance of the arrestment as erroneous as the letters contain. My view in short is this, that if the letters and execution both clearly show on their face that they relate to an arrestment to found jurisdiction that is sufficient to sustain their validity. Neither needs, in the present state of the law, to say more than that the arrestment is to found jurisdiction. If they do say more, and profess to indicate the conditions on which the arrestment may be recalled, that is mere surplusage and does not touch essentials.

If, contrary to my opinion, an arrestment to found jurisdiction does attach the ship, and the owner is not at liberty to take her away without finding caution *judicio sisti* until the summons is served, or appearance is entered, or defences given in, then the result is, I think, the same. The disconformity between the letters and the execution is still in non-essentials, and the validity of the arrestment is unaffected. I am therefore for affirming the interlocutor appealed against and sustaining the jurisdiction.

I may add that objection was taken to the validity of the arrestment on the further ground that the application for letters of arrestment was not in proper form, while the pursuer urged that the objection to the jurisdiction came too late. Neither of these points was taken in the Sheriff Court; and I am not disposed to consider either of them now. Both points are highly technical and ought certainly to have been taken in the Inferior Court. If we are called upon to decide them I may say that as at present advised I should have sustained neither as affording a good ground of objection to the arrestment on the one hand or to the challenge of its validity on the other.

LORD MACKENZIE—The first question is whether the defenders' plea of no jurisdiction can be entertained. It was not stated in the defences as originally lodged, but was added at adjustment before the record was closed. In my opinion the plea was timeously stated. The next question is whether the application for letters of arrestment is bad because the rules of the Sheriff Court Act of 1913, which require a condescendence and pleas-in-law, were not followed. I do not think it competent to raise that question here, for it would require statements of fact which are not upon record, and the point was not taken in the Sheriff Court.

The question of interest in the case is whether the arrestment used is effectual to found jurisdiction? The defenders say it is not, because the warrant and the execution are neither of them in proper form, and further, because the execution is disconform to the warrant. We had a long argument upon the effect of arrestment to found jurisdiction. The history of the customary right in the law of Scotland to use arrestments *ad fundandam jurisdictionem* is lucidly described by Mr Graham Stewart in his Law of Diligence, pp. 246 *et seq.* The vicissitudes which this species of arrestment have undergone are to be found in the series of cases commencing with *Young* v. *Arnold* (1683, M. 4833), and ending with the case of *Murray* v. *Wallace* (1914 S.C. 114, 51 S.L.R. 95). It clearly appears that the original idea of arrestment to found jurisdiction as entitling the creditor to demand caution *judicatum solvi* has long ago disappeared. That the creditor would be entitled to have caution *judicio sisti* is supported by what is said by the Lord President (Inglis) in *Carlberg, &c.* v. *Borjesson, &c.* (1877, 5 R. 188, 15 S.L.R. 112), and by Lord Watson in *Stewart* v. *North* (1889, 16 R. 927, 26 S.L.R. 650, 1890, 17 R. (H.L.) 60, 28 S.L.R. 397). According to the views expressed by those Judges arrestment to found jurisdiction does create a *nexus*, but this *nexus* flies off as soon as the summons is served, or at latest when defences are lodged. In the cases of *Craig* (1896, 23 R. 500, 33 S.L.R. 348) and *Leggat Brothers* v. *Gray* (1908 S.C. 67, 45 S.L.R. 67), however, there is stated in the most explicit terms what the settled law of Scotland must now be taken to be. According to the opinions expressed by the Lord President, Lord Kinnear, and Lord M'Laren in these cases there is no *nexus* after the arrestment is executed. Your Lordship in the chair expressed the same opinion in *Murray* v. *Wallace*. The view of the law which now prevails therefore is that stated by Lord M'Laren in the passage quoted by your Lordship.

That being so, the argument pressed upon us, that as we are within the region of diligence everything must be dealt with *strictissimi juris*, loses much of its force. The defenders here were plainly certiorated that the arrestment was used *jurisdictionis fundandæ causa*. The statement in defence, that the form of arrestment used by the pursuer was that of an arrestment upon the dependence of an action in place of an arrestment *ad fundandam jurisdictionem*, is not well founded. The ship was arrested to found jurisdiction. At an earlier period of the law the consequences attributed to the arrestment in the execution would have undoubtedly followed. In the changes which the law has undergone it is no longer correct to say that what would formerly have been the consequences are the conse-

quences now. But the insertion of obsolete words is not in my opinion sufficient to vitiate the attestation of the undoubted fact that the ship was arrested to found jurisdiction.

For these reasons I agree in the opinion of your Lordship.

LORD SKERRINGTON—I concur.

The LORD PRESIDENT intimated that LORD CULLEN, who was absent at advising, also concurred.

The Court adhered.

Counsel for the Pursuers (Respondents)—A. M. Mackay. Agents—W. & F. Haldane, W.S.

Counsel for the Defender (Appellant)—Macmillan, K.C.—A. R. Brown. Agent—Peter Clark, S.S.C.

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*Thursday, January* 29.

## FIRST DIVISION.

[Lord Ormidale Ordinary.

## CALDWELL *v.* GLASGOW CORPORATION.

*Reparation—Negligence—Relevancy—Emergency Legislation—Lighting of Common Stair—Defective Fittings and Quality of Illumination—Glasgow Police Act* 1866 (29 *and* 30 *Vict, cap. cclxiii), sec.* 361—*Glasgow Gas Act* 1910 (10 *Edw. VII, and* 1 *Geo. V, cap. cxxxi), secs.* 29 *and* 30, *as Amended by the Gas (Standard of Calorific Power) Act* 1916 (6 *and* 7 *Geo. V, cap.* 25), *sec.* 1 (1) (*a*)—*Defence of the Realm Regulations, Regulation* 8 *G—Gas Works (Ministry of Munitions) Order* 1918 — *Gas Works (Ministry of Munitions) General Regulations* 1918.

In an action brought against the Corporation of Glasgow to recover damages the pursuers alleged that their father had slipped and fallen down the common stair in a tenement, that the lighting of the stair was insufficient, and that the accident would not have happened had the lighting been adequate. They further averred that the defenders were at fault in respect that their inspector of lighting had failed to see that the proprietor of the common stair had provided suitable gas pipes and brackets, lamps and burners, or one or other of them, in the stair, contrary to their obligations under the Glasgow Police Act 1866, or alternatively in respect that they had not supplied the burners with a supply of gas sufficient to illuminate the stair in a proper manner. They also averred that complaints had been made by certain persons on certain dates as to the lighting in the stair, and that nothing had been done. The pursuers did not particularly specify any defect in the fittings, nor did they aver that the defenders had failed to give gas of the thermal efficiency which they were bound to supply under the Defence of the Realm Regulations, 8 G, and the Gas Works Regulations 1918. *Held* (*sus.* Lord Ormidale) that the averments of the pursuers were irrelevant, and action *dismissed.*

The Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii) enacts—Section 361—"The proprietor or proprietors of every land or heritage having an access by a common stair shall provide and maintain suitable gas pipes and brackets, lamps and burners, in such common stair to the satisfaction of the inspector of lighting or the Corporation, and placed as the said inspector or the Corporation may direct, under a penalty of forty shillings payable by each such proprietor, and the Corporation shall cause them to be supplied with gas and lighted during the same hours as the public street lamps, and for each burner the proprietor or proprietors shall pay to the Corporation such sum not exceeding ten shillings per annum as the Corporation may from time to time direct, and the said sum shall be recoverable by the proprietor from the occupiers in proportion to their respective rents and be deemed to be a debt recoverable as and in the same way as rent."

The Glasgow Gas Act 1910 (10 Edw. VII, and 1 Geo. V, cap. cxxxi) enacts—Section 30—"The gas supplied by the Corporation for illuminating purposes shall be such as to produce when consumed at the rate of five cubic feet of gas per hour in the burner prescribed as hereinafter in this Act provided a light equal to not less than fourteen sperm candles of six to the pound and each consuming one hundred and twenty grains per hour, and shall in all respects be in accordance with the provisions of the Gas Works Clauses Act 1871."

The Gas (Standard of Calorific Power) Act 1916 (6 and 7 Geo. V, cap. 25) enacts—Section 1—"(1) Where by virtue of any Act or Order confirmed by Act of Parliament regulating the undertaking of any company, authority, or person authorised to supply gas in any area in the United Kingdom (hereinafter referred to as the undertakers), the gas supplied by the undertakers is required to be of a prescribed illuminating power, and the undertakers are liable to penalties in the case of the illuminating power of the gas provided by them being less than, or being less by a prescribed extent than, such prescribed illuminating power, then on application being made by the undertakers the appropriate Government department may if they think it expedient and subject to such conditions if any as they consider proper, including such variation as they may think desirable of the prescribed pressure at which the gas is to be supplied, by Order—(*a*) Substitute for the prescribed standard of illuminating power a prescribed standard of calorific power; (*b*) Exempt the undertakers from penalties in respect of a deficiency in illuminating power and substitute for the provisions imposing such penalties provisions imposing penalties in the case of deficiency in calorific power; and (*c*)