

bation unless the complainer consented to her being found entitled to expenses.

The facts of the case, so far as necessary to explain the present point at issue, were these. Sir Robert Menzies is entail proprietor of the lands and others on the north side of Loch Rannoch, and of the islands on the same, and claims exclusive use and possession. Mrs Macdonald succeeded her husband Alexander Macdonald, who died some years ago, as tenant of the Macdonald Arms Inn, upon the estate of Kinloch, under Lady Macdonald. As such tenant, Mrs Macdonald has the right and privilege of keeping and using boats upon the loch. In the year 1857, Sir Robert Menzies had occasion to take out an interdict, which was allowed to pass in absence, against the said deceased Alexander Macdonald, much in the same terms as that now sought for against his widow.

Notwithstanding this, Sir Robert averred that on the 8th June last a boat belonging to, or in the lawful possession of the respondent, which was on Loch Rannoch with the knowledge and sanction and in charge of her servant, Hugh Cameron, and having therein besides the said Hugh Cameron, two gentlemen who were lodgers at Mrs Macdonald's inn, put into a small bay adjacent to the complainer's lands, on which the two gentlemen landed with their fishing tackle and implements, and returned to the inn by land, while the boat went back to the inn in charge of the said Hugh Cameron. Their landing was aided and effected by the said Hugh Cameron, for whom Mrs Macdonald is responsible. The proceedings complained of were done to the great annoyance of the complainer, and injury to his rights and privileges under his titles, and he consequently submitted that he was entitled to interdict as craved, *with expenses*. The respondent, Mrs Macdonald, on the other hand, denied that the said Hugh Cameron was in any way her servant, or that he was in any way amenable to her, or she responsible for him, on the contrary, he was engaged and paid by the two gentlemen alleged to have committed the trespass. She farther asserted that she was not present on the occasion in question; that she had, in the knowledge that Sir Robert had formerly taken out an interdict against her husband as aforesaid, cautioned the gentlemen before starting to avoid landing upon Sir Robert's shore; that they had been farther cautioned by the said Hugh Cameron not to land, but that she believed they had found themselves obliged to land from stress of weather. She also averred that Sir Robert was in this proceeding merely seeking an occasion to obtain interdict against her, in terms thus broad and general; that she did not oppose interdict, but she cannot be made responsible for the future conduct of unnamed parties, to whom such interdict may be meant to apply, provided she continues to warn all and sundry not to land on Sir Robert's ground, and she pleaded that "the complainer's right to his property, and right to prevent trespass upon it, having never been called in question, or in any way violated by the respondent, she is entitled to expenses in this case."

Against the Lord Ordinary's interlocutor the complainer reclaimed.

ADAM for him.

MACDONALD, for the respondent, stated—If Sir Robert Menzies thinks it for the advantage of his estate to obtain an interdict, I am willing that he should have it on paying expenses. If he will not do so, I submit I am entitled to a proof.

At advising—

LORD PRESIDENT—The complainer alleges a trespass by a servant of the respondent; that is the state of the record. Of course, the two strangers were trespassing, but that in itself does not make the respondent liable. Now the respondent denies this allegation entirely, and makes averments which, if substantiated, take away all ground for complaint against her. The parties are therefore at variance as to whether there was or was not a trespass committed for which Mrs Macdonald is responsible. If the complainer succeeds in proving that there was, he will get his interdict and his expenses. If he fails to prove that there was, but makes out that circumstances have occurred warranting him in bringing this action, he may then be entitled to his interdict, but not to his expenses. The question, therefore, cannot be determined without a proof as to whether a trespass was committed or no.

LORD DEAS—If I were clear that Mr Macdonald devolved his lease upon his wife, I should then say that Sir Robert's remedy in this instance was an application to this Court for breach of interdict; but it is not sufficiently stated that the lease did devolve on Mrs Macdonald. Assuming, then, that she is simply tenant under a lease granted to herself, the only relevant allegation here is that the boatman was her servant. She is not directly responsible for the individuals residing in her inn, to whom she may have given her undoubted privilege of boating and fishing. But she says, farther, even supposing he was my servant, this is a case where the gentlemen's landing was a necessity. If that is true, then it is a very complete defence. On the whole matter I think, we have no choice, but allow the proof, if the parties insist on one.

LORDS ARDMILLAN and KINLOCH concurred.

The Court affirmed the Lord Ordinary's interlocutor.

Agents for the Complainer—Tods, Murray, & Jamieson, W.S.

Agents for the Respondent—Paterson & Romaines, W.S.

Friday, November 4.

SECOND DIVISION.

LINDSAY v. FORCETT RAILWAY CO.

Arrestment ad fundam jurisdictionem—Document—Commercial Value. In an action against an English Railway Company the pursuer arrested certain plans and documents belonging to the Railway Company in the hands of the Company's agents in Scotland for the purpose of founding jurisdiction. *Held* the arrestments were inept, in respect—(1) That the documents being put into the hands of the arrestees by the pursuers for the special purpose of being transmitted to the defenders, arrestment was incompetent; and (2) that the documents being of no commercial value were not attachable so as to found jurisdiction.

This was an action at the instance of Lindsay, trustee on the sequestrated estate of James Trowsdale & Son, contractors, against the Forcett Railway Company, concluding for payment of the sum of £15,900, 8s. 1d., under deduction of sums paid to account, and also for delivery of the plant used

by the pursuers in the construction of the Forcett Railway Company. The pursuer used arrestment *ad fundandam jurisdictionem* in the hands of Graham & Johnston, W.S., and Mr Tennant of Ballachulish.

The defenders alleged—"The estates of Messrs Trowsdale were sequestrated in Scotland on 16th August 1866. They carried on business in Scotland as well as in England. On 21st January 1867, in virtue of a warrant obtained by the pursuer from the Sheriff of Edinburgh, the pursuer examined, under the provisions of the Scotch Bankruptcy Act, Mr Bryson, the engineer of the Forcett Railway Company, and Mr Richardson, the defenders' secretary. These gentlemen were asked to exhibit certain plans and documents in their possession, and they did so for the information of the trustee. The plans and documents were left with the trustee (pursuer) for examination. After a reasonable time had elapsed, Mr Bryson and Mr Richardson requested the plans and documents to be returned, as they were required for the purposes of the railway. The pursuer having refused, the Sheriff ordered the pursuer to return the documents demanded, being a portion of those exhibited, and which were immediately required. On an appeal to the Bill Chamber, the Lord Ordinary allowed the trustee such further time as might be reasonable to examine the documents, and remitted to the Sheriff to renew the order for return, and this interlocutor was adhered to by the First Division on 6th June 1867. Thereafter the Sheriff again ordered the documents specially required by Mr Bryson to be delivered up to him. Certain other documents produced by Mr Bryson, and certain documents produced by Mr Richardson, were in the same position, but as they were not needed by Mr Bryson they were not included in the judicial application. Messrs Graham & Johnston, W.S., Edinburgh, were the agents both for the Forcett Railway Company and for Mr Bryson and Mr Richardson. Messrs Graham & Johnston were authorised by the defenders, and by Mr Bryson and Mr Richardson, to receive back the plans and documents which had been exhibited to the trustee, in order to re-transmit them to Mr Bryson and Mr Richardson respectively, their legal custodiers. Accordingly, on 11th July 1867, the pursuers' agents, Messrs Lindsay & Paterson, delivered to Messrs Graham & Johnston the documents which had been specially applied for by Mr Bryson, and which had been ordered by the Sheriff, in accordance with the Inner House judgment, to be delivered to Mr Bryson. The plans and documents so delivered under the order of Court, were given and received for the special purpose of being transmitted by Messrs Graham & Johnston to Mr Bryson, and this was known to both parties. Immediately after the said documents were so delivered to Messrs Graham & Johnston to be forwarded to Mr Bryson, the pursuer, incompetently and illegally, caused a pretended arrestment to be used in the hands of Messrs Graham & Johnston, for the purpose of founding jurisdiction against the defenders. The said arrestment attached nothing. It was utterly inept, illegal, null and void. The arrestment did not and could not attach the plans and documents, which were handed to Messrs Graham & Johnston for the special purpose of being transmitted to Mr Bryson and Mr Richardson under the Sheriff's order. Further, these plans and documents were not the property of the

defenders. Messrs Graham & Johnston are not, and never were, indebted to the defenders in any sum whatever, nor did they ever hold any moveable property belonging to the defenders. In so far as the defenders are or may be held to be interested in the plans and documents exhibited by Mr Bryson and Mr Richardson, Messrs Graham & Johnston received them merely as the hands or agents of the defenders, and for the special purpose of being transmitted to Messrs Bryson and Richardson respectively, who were their proper custodiers. Messrs Graham & Johnston merely took the documents, &c., for the accommodation of the pursuer, who would otherwise have been bound to send them to England. In point of fact, the plans and documents do not belong to the defenders, but to Messrs Bryson and Richardson, the defenders being merely entitled to the use thereof. The pursuers also used an arrestment, for the purpose of founding jurisdiction, in the hands of Mr Tennant of Ballachulish. That gentleman was not indebted to the defenders, and was not in possession of any property belonging to them. The arrestment attached nothing. Mr Tennant was a shareholder of the Forcett Railway Company. At the date of the arrestment he was not indebted to the railway company in any sum whatever."

The defenders pleaded—"(1) The defenders are not subject to the jurisdiction of the Court of Session, and no jurisdiction has been founded against them. (2) The arrestments used by the pursuers *ad fundandam jurisdictionem*, are inept, void and null, and have attached nothing. (3) The plans and documents having been delivered by the pursuer to Messrs Graham & Johnston for the special purpose of being transmitted to the defenders, or to Messrs Bryson and Richardson, the legal custodiers, it was incompetent in the pursuer to attach or arrest the same. (4) *Separatim*, Messrs Graham & Johnston being merely the hands employed for convenience to forward the documents to England, arrestment in their hands is incompetent. Their possession is the possession of the defenders, or of Messrs Bryson and Richardson. (5) Jurisdiction cannot be founded by the mere arrestment of a writ or document."

A proof having been led on the question of jurisdiction, thereafter the Lord Ordinary (JERVIS-WOOD) pronounced this interlocutor:—

"*Edinburgh, 19th May 1870.*—The Lord Ordinary finds, as matter of fact, that the several books, plans, letters, and other documents which are specified in the inventories, Nos. 161 and 162 of process, were in the possession of Messrs Graham & Johnston, W.S., the agents for the defenders, on the 11th and 13th July 1867, when the arrestments *ad fundandam jurisdictionem*, of which Nos. 7 and 8 of process are the executions, were respectively used in Messrs Graham & Johnston's hands, at the instance of the pursuer against the defenders: Finds that, on the 22d of July 1867, certain sums of interest, amounting to £14, 14s. 3½d. or thereby, were due by Mr Robert Tennant of Ballachulish, who is named in the ninth head of the condescendence for the pursuer, to the defenders, the Forcett Railway Company, in respect of a deposit and calls made by and upon him as a holder of shares in the said Forcett Railway Company, and that the said sums were arrested in his hands on said 22d July 1867, at the instance of the pursuer against the defenders, *ad fundandam jurisdictionem*, conform to execution, No. 9 of process, of the arrestment in Mr Tennant's hands: Finds, as matter of law, that

in respect of the said several arrestments, and of the executions thereof as above set forth, the defenders are subject to the jurisdiction of this Court, and are bound to answer in the present action to the pursuer under the same; and with reference to the preceding findings, repels the defences so far as inconsistent therewith, and appoints the cause to be enrolled, with a view to further procedure.

"*Note.*—This case involves questions of interest and difficulty as respects the matter of jurisdiction, with which alone the Lord Ordinary has dealt under the preceding interlocutor. This course of procedure has been adopted, because it seems obvious that, unless the view on which he has proceeded in sustaining the jurisdiction be well founded, it is not within his province to deal, in any respect, with the merits of the question raised; and further, because, as it appears to him, the terms of the interlocutor of a former Lord Ordinary, of the 18th March 1868, under which the proof was originally allowed, imply that the same procedure was then in contemplation."

The Railway Company reclaimed.

WATSON and MACLEAN for them.

LORD ADVOCATE (YOUNG) and LANCASTER in answer.

The Court recalled the Lord Ordinary's interlocutor, and, sustaining the third and fourth pleas of the defenders, dismissed the action.

At advising—

LORD COWAN—The Forcett Railway Company is an English Company, having no connection with Scotland, and the debt claimed against them by Trowsdale and Son,—on whose estate the pursuer of this action is trustee,—was contracted in England, and can only be viewed as a proper English debt. The object of these proceedings is to obtain decree for this debt in Scotland against the Forcett Railway Company, whose proper domicile is England. To support the action as competently raised in the Courts of this country, it is necessary that jurisdiction be shown to have been duly constituted, and for this end two arrestments *jurisdictionis fundandæ causa* are founded on by the pursuer. That jurisdiction may be constituted in the Scotch Courts, against an English debtor, by means of such arrestments, is not open to dispute. The case of *Lindsay v. The London and North Western Railway Company* (decided in House of Lords, Feb. 1858, 3 Macq. 99) is conclusive on this question; and is indeed only a recognition of the principle, held to be established in Scotland from an early period, as will be seen from the authorities referred to in that case. The question is, Whether, by either of the arrestments founded on, there was attached, as locally within Scotland, property belonging to the debtors capable of being arrested, so as to make the defenders amenable to the jurisdiction of our Courts?

I do not think it necessary to say much with regard to the arrestment of the alleged debt due to the defenders, by Mr Tennant of Ballachulish. It is said to be doubtful whether any such debt is truly due, and there are plausible grounds for that contention; but apart from this, the conclusive answer to the plea of the pursuer is, that the arrestment was not duly served upon the debtor,—there having been no execution of the writ personally, or even by edictal execution, or at any dwelling-house shown to have been his domicile within Scotland. The proper domicile of Mr Tennant is England; and although he is proprietor of an heritable estate in Scotland, this does not in itself make him liable to the jurisdiction of the Scotch

Courts for personal debts, more especially for debt contracted by him in England to an English creditor. Any such debt was exigible at the instance of the creditor only in England, unless diligence had been used by the creditor to constitute jurisdiction. Here the attempt is by an alleged creditor of the English creditor of the debtor, to fix the personal debt due by him in Scotland, so as to constitute jurisdiction against the English creditor of the arrestee. I think this is without precedent, and very questionable in principle. It is not, however, necessary to press this objection to the diligence. It was indispensable that a *nexus* should be legally imposed upon the alleged debtor to the English company, by due service of the writ of arrestment. The allegation is, that this was effectually done by service of the writ at the house of Ballachulish, where Mr Tennant was not resident, and where I think the evidence conclusively shows he had no legal domicile. That house was on the property belonging to him; but from his deposition it appears that it was the residence of his factor, and that it was matter of arrangement with his factor that he should occupy that dwelling-house as part of his salary. During the autumn of 1865, no doubt, Mr Tennant says that he and his family had lived at the house for about two months; but he adds, that that was the only time they were ever there, and he had no intention of going there to stay, as the house was the factor's residence from October 1866. The arrestment served at this dwelling-house is dated in July 1867; and was transmitted to Mr Tennant by his factor to his residence at Leeds. In this state of the facts, I am of opinion that the alleged arrestment was not duly served, and although otherwise unobjectionable, cannot be held to have been legally executed, so as to constitute any *nexus* on the alleged debt due by Mr Tennant to the defenders.

The other arrestment, however, is that upon which the pursuer mainly relies, and it is necessary to attend carefully to the circumstances in which the question of its validity for that purpose arises.

The sequestration of Trowsdale & Son's estate affected property belonging to them both in England and Scotland; and the pursuer, as trustee, applied for, and obtained, warrant for examination of parties acquainted with the affairs of the bankrupt, being entitled, under the 91st section, to have produced for inspection books and other papers and documents, that might have relation thereto. And in the course of such proceedings the engineer of the Railway Company, Mr Bryson, and their secretary Mr Richardson, were examined in England, and were asked to exhibit certain plans and documents in their possession for the information of the trustee and for his inspection, and which were exhibited accordingly.

These documents were brought to Scotland solely with that view and for that purpose, and came into the hands of the trustee with no other view and for no other purpose whatever. After a reasonable time for inspection, the trustee was under an obligation to restore them to the custodiers in England. He refused to do so, and application having been made to the Sheriff for their restoration, the matter became the subject of proceedings in this Court, in the course of which the Lord Ordinary, by an interlocutor adhered to by the Inner House on 6th June 1867, allowed the pursuer further time for inspection of the documents, and appointed them "to be delivered to the respondent William Bryson, by whom the same were produced." There-

after the Sheriff, on 3d July 1867, ordained the pursuer to deliver the books and documents accordingly, within eight days from that date.

The clear duty of the pursuer, under these judicial orders, was to restore the books and documents to Mr Bryson, in England, from whom he had obtained them; but, in place of doing so directly, he made delivery of them to the agents of the defenders, and of Bryson, and of Richardson (Graham & Johnston, W.S., Edinburgh). These parties granted receipts, dated 11th and 13th July, for the documents so received by them "as agents of Bryson and of Richardson and of the Forcett Railway Company,"—the legal procedure which has been mentioned having been conducted by them for these several parties. Of these very same dates, viz., 11th and 13th July, the arrestments *juris. fund. causa* were used by the pursuer in the hands of Graham & Johnstone, of the books and documents which had been just handed over to the arrestees, for transmission to the English parties,—whose property they were, and by whom they had been produced solely for the limited purpose of inspection foresaid.

The claim made in the action in support of which these arrestments were used is for an alleged debt of £16,000 for work done connected with the railway in England; and the question is, Whether jurisdiction has been well constituted by means of arrestments of such subjects as were here attached, and in such circumstances as those in which the pursuer resorted to the diligence?

I am of opinion that jurisdiction has not been thereby well constituted, and that the proceeding adopted for the purpose is an abuse of the privilege by which a creditor may, by arresting the goods of his English debtor, create jurisdiction in the Scotch courts to entertain an action and give decree for the debt if due.

In the first place, I am not aware of any instance of arrestment of this kind being used, of any subject, corporeal or incorporeal, other than such as might be attached by diligence in execution, and capable of being realized for payment of the debt when constituted; and as to the non-arrestability in execution of these books and documents, I entirely concur in the views explained by your Lordship, and in the observations in support of those views.

But, in the second place, I think it sufficient for the decision of this question that the pursuer was debarred in the circumstances from attaching the books and documents in question in the manner here attempted. He had received the documents for a special purpose, and although they were sent from England to enable him with more convenience to inspect their contents, he was under an obligation, when this temporary purpose was served, instantly to return them to England to their proper owner or custodian there. There was a judicial order against him, enforcing this duty of restoration, under which he lay. While they were in his hands they could not be the means of creating jurisdiction in the Scotch Court, and I apprehend as little were they open to be attached for that purpose when placed in the hands of Graham & Johnston as agents, with the view of their being transmitted to England to their constituents. Had the pursuer sent them direct to the English parties by carrier or railway he could not have arrested them in the course of transmission when in the hands of third parties employed in their transmission. But, in principle, Graham

& Johnston truly occupied no other position than such middle-men. Having been employed in the proceedings necessary to compel the pursuer to perform his duty of restoration of the subjects, they were naturally recognised as the proper parties to grant a receipt for the books and documents, in order that they might be forwarded safely in terms of the order of Court to their constituents. I hold it to have been incompetent for the pursuer, while with the one hand he delivered over the documents to the agents of the defenders, with the other to lay on a *nexu*s to prevent that very transmission to England as ordained by the Court, to accomplish which alone they were placed in the hands of Graham & Johnstone. I think, therefore, that the third plea in law stated for the defenders ought to be sustained.

Such being the grounds of my opinion, I do not think it necessary to enter on the question whether, having regard to the circumstances in which these subjects were brought to Scotland, and supposing them to be such goods as were capable of arrestment of this kind, they could have been attached to found jurisdiction by creditors of the defenders not exposed to the personal bar pleadable against the pursuer? But had this been necessary for the solution of the present case, I would be inclined to hold that the subjects were not so located within Scotland as to have justified their attachment with a view to the creation of a jurisdiction not otherwise competent to a Scotch tribunal.

LORD NEAVES said that this arrestment was inept for the reasons stated by their Lordships. But further, the articles in question were not arrestable. The mode of founding jurisdiction against a foreigner was very familiar in the Admiralty Court. Foreign ship captains who incurred debt in Scotland could only be reached by arresting their ship in the harbour, and thereby founding jurisdiction. The remedy was one suitable only to maritime or mercantile actions, or at all events, only to actions which could be resolved into petitory conclusions, and not in actions of a declaratory kind. If the action was such as did not admit of execution against moveables, jurisdiction could not be founded by arrestment. But the subjects arrested must not be *extra commercium*. They must be saleable, and capable of being pointed.

Agents for Reclaimers—Graham & Johnston, W.S.
Agents for Respondent—Lindsay & Paterson, W.S.

Tuesday, November 8.

FIRST DIVISION.

SPECIAL CASE FOR MRS JANET DEWAR OR
MACDONALD AND OTHERS.

Trust—Direct Disposition and Settlement—Interpretation of Writs—Testator's intention. The legal and technical difficulties which might arise under a direct disposition and settlement without a trust are obviated by the interposition of a trust. The strict legal construction of the former deed gives way to the intention of the truster under the latter. Circumstances in which—a settlement having been executed in the form of a direct disposition, with codicil attached, under which serious difficulties would have arisen, and the testator's intention might have been defeated by the