and ask for payment from them. But here the creditor—if we may call him so—is to come to the debtor and intimate that he means to ask for his instalment; he does not come to enforce a debt, he only intimates an intention of asking for his money. If he fails in that, and fails again when the second, third, and fourth instalments fall due, what is his position? His first instalment would have been for the year 1881, and he might have got his instalment out of that year's stipend, and so on; but it is a matter of ascertained fact that he never came to make a demand till March 1887. Now, while such was the conduct of the patron, what were the heritors doing? The Sheriff's determination was as far back as 1875. They had no intimation of the petition to the Sheriff, or of his determination, and none in 1880 that a vacancy had occurred, and that that gave rise to a claim on the part of the patron extending over the next four years. They never heard of all this till March 1887. Now, I do not say that there is any statutory obligation on the patron to make intimation to the heritors, but the question is, whether the patron has not barred himself from challenging the payments made in good faith by parties who had no cause to suppose that his claim would be enforced. My opinion is, that the payments by the heritors were made in good faith. I do not say they were not bound by the Act of Parliament, and that such an action might exist. But they were not bound to know the determination of the Sheriff, and that the patron in the exercise of his discretion was to act upon it. Even after the interlocutor of the Sheriff it is mere matter of will on the patron's part, and seeing that there was no movement by him for so many years, I have no doubt of the good faith of the heritors. There was very serious negligence on one side and good faith on the other, and these are together a good ground in law to prevent this claim being enforced.

Lord Mure concurred.

Lord Adam—I think, in the first place, that these payments were made in good faith, and in the second place, that the heritors had probable grounds for believing that they were paying to their true creditor, and if that be so, there is no ground for the present claim. I do not think that the presentation of the petition to the Sheriff in the least indicates that the patron intends to insist on his claim when it emerges. The object of the petition is to settle the amount of the patron's claim.

Again, the fund out of which the payment was to be made came into existence each year, and disappeared in each year, and it was the duty of the patron to claim it at once. It was not a common case of debt. It was a payment out of a particular fund. But if the fund is paid away by the heritors there is no other out of which payment can be claimed. It was the clear duty of the patron to have made the claim, and not having made the claim, the heritors were entitled to pay the minister his stipend in the usual way.

Lord Shand was absent from illness.

The Court found and declared that in the circumstances set forth in the special case the first party was not entitled to demand from the second parties the sum claimed, and found the second parties entitled to expenses.

Counsel for the First Party—Sol.-Gen. Robertson—Low. Agents—Dundas & Wilson, C.S.

Counsel for the Second Party—Sir C. Pearson—Dundas. Agents—Mackenzie & Black, W.S.

Wednesday, February 1.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

WALLS' TRUSTEES *v.* DRYNAN AND OTHERS.

Jurisdiction — Arrestments jurisdictionis fundandæ causa—Signeting of Summons.

Held that arrestments to found jurisdiction are effectual if executed before the service of a summons, though after the summons has been signeted.

This was an action of multiplepoinding for the distribution of the estate of the deceased John Walls, in which his testamentary trustees were the real raisers.

A share of the trust-estate went under the truster's settlement to his son Thomas Walls, for whom a claim was lodged. Creditors of Thomas Walls also lodged riders. Amongst these was a claim for John Drynan and mandatory, founded upon a decree obtained in the Court of Session on 23rd October 1886, in an action at the instance of Drynan against Thomas Walls. In that action letters of arrestment to found jurisdiction were signeted on 20th September 1886, the summons was signeted on 21st September, and the letters of arrestment were executed on 23rd September. The summons was served upon the defender personally on 24th September. Arrestments upon the dependence of the action were used in the hands of John Walls' trustees of the same date as the arrestments to found jurisdiction.

In the action of multiplepoinding it was pleaded against Drynan that the action and diligence on which his claim was founded were inept.

The Lord Ordinary (M'Laren) found, with reference to the claim of Drynan and his mandatory, "that when the summons at their instance, containing a warrant for arrestment, passed the signet, jurisdiction had not been founded against Thomas Walls, and consequently that the said warrant of arrestment, and the execution of arrestment following thereon, are null and ineffectual, &c.

"*Opinion.*— . . . . The third and only remaining question is, whether the arrestment which was used by the creditor Drynan to found jurisdiction is well laid on in view of the fact that the letters of arrestment were signeted before the signeting of the summons, but were not executed until after the signeting of the summons. The letters of arrestment were signeted 20th September, the summons was signeted 21st September, and the letters of arrestment were executed on the 23rd September. These are the material dates.

"In the argument before me it was not contended

that this Court had jurisdiction over the debtor otherwise than as was constituted by the arrestment. And it is evident that an arrestment which is to be used for the purpose of founding jurisdiction must be executed before any act of jurisdiction can be done, because a mere issue of letters of arrestment attaching nothing is no ground of jurisdiction against anyone. Now, in the present case the arrestment had not been executed at the time when the summons passed the signet, and the question is whether jurisdiction is necessary in order to support the issue of a summons by a writer to the signet against a foreigner. If the summons were no more than a statement of the pursuer's case, together with a warrant for summoning the defender to enter appearance and to plead, I confess I should have no great difficulty in holding that it might be written, signed, and sealed before the arrestments were laid on. I think, for example, that a petition or a note of suspension and interdict might be prepared and signed by the petitioner or complainer in anticipation of jurisdiction being constituted against the defender by arrestment. In such a case jurisdiction only begins when an order of service is pronounced by the officiating judge. But the case of a summons is different. It is not only a warrant for service, but it is in form and substance a warrant for decree against the defender unless he shall show a 'reasonable cause to the contrary.' The issue of a summons is accordingly an act of jurisdiction, as indeed appears from the consideration that in our older practice the summons was preceded by a bill, and bore to be granted *ex deliberatione dominorum*. I am therefore of opinion that the decree in question (that of John Drynan and mandatory) is defective on the ground of want of jurisdiction, and that the arrestments used in the action cannot compete with those of the other opposing creditors."

Drynan reclaimed, and argued—The question here was, when was the action raised? There was jurisdiction, because the action was raised after the 23rd September, when the letters of arrestment to found jurisdiction were executed. The respondents were wrong in contending that the action was raised on 21st September. An action was raised on the date of the execution of the summons—*Alston* v. *M'Dougall*, November 18, 1887, 15 R. 78. The Lord Ordinary stated that a summons was a warrant for decree against the defender, but it was not so without service. Whether a signeted summons was analogous to a petition with an order for service on it or not, the question remained whether the signeted summons, or a petition with such an order on it, was an exercise of jurisdiction. The only warrant on a signeted summons was for service, and the only ground on which that proceeded was, that a complaint was made to Her Majesty by one of her lieges. The signeting of a summons was not an act of jurisdiction. It was not the case that in the older practice a summons was always preceded by a bill; that was only required for privileged summonses—Stair, iv. 3, 20, 27, 28, 32, 33; Shand's Practice, 230; Beveridge's Practice, 234. Jurisdiction was not necessary in order to have the summons signeted—*Dickson, De Wolf, & Company* v. *Wilkie*, June 25, 1859, 31 Jur. 595. The time when jurisdiction was essential was when the summons was executed—Mackay's Practice, i. 174. A summons was not in dependence until it was executed—*Aitken* v. *Dick*, June 7, 1863, 1 Macph. 1038. The time of execution was the time when the action began, for a summons was the writ by which one private party invoked the Court against another; there must be a pursuer and a defender, and it was impossible to conceive how a summons could depend until there was a defender to meet it. The respondents maintained, on the authority of Erskine, that the issuing of a summons under the signet involved an act of jurisdiction. The soundness of this authority was doubted, for Erskine, i. 3, 39, laid down that the signet was the seal of the Court of Session, and so it was natural that he should define a summons—iv. i. 4—as a writ going forth with the authority of a judge. Both these passages must be read together. The Crown was the fountain of jurisdiction in the constitutional sense, but not in the continuing sense, for its power was transmitted to the Judges. The keeper of the signet was not a delegate. Jurisdiction was confined to the judge who pronounced the law. The difference between a summons and a petition with an order for service on it was, that the latter had been considered by the Court, who might refuse to write upon it. If a summons was signeted by a writer to the signet, the keeper had no discretion but to signet it. And if the signeting of a summons was to be taken as an act of jurisdiction, just so must the signeting of the letters of arrestment be regarded, which *ex hypothesi* they were not. There were two stages in the Roman law, the *vocatio in jus*, and then the parties were *in jure*. It was only at the second stage that the parties were in Court. Till the execution of a summons there was only *vocatio in jus*, and therefore the signeting of a summons did not involve an act of jurisdiction.

Argued for the other creditors—It was necessary for the competency of a summons that arrestments *jurisdictionis fundandæ causa* should precede the signeting of the summons. They accepted the analogy between a summons and a petition with an order for service. The warrant of citation was an assertion of power, and neither the Crown nor the Court could issue a warrant against a foreigner without arrestment to found jurisdiction. Arrestment was necessary before any act relating to the summons was done—Juridical Styles, p. 23. At all events the practice was so, and the summons proceeded on the assertion that arrestments had been used, but this summons was not truthful in this assertion. No action could be initiated till the defender was under the jurisdiction of the Court—Ersk. Inst. i. 2, 19; iii. 6, 3; iv. 1, 4; Ivory's Forms of Process, 165. The statutes as to the signeting of the summons were 33 Geo. IV. c. 74, sec. 3; 54 Geo. III. c. 137, sec. 2; 1 and 2 Vict. c. 114, secs. 16, 17. The case of *Dickson* v. *Wilkie, supra cit.*, was in their favour, for there the jurisdiction was sustained because the arrestments were prior to the summons. Were it not necessary to have arrestments before the summons was signeted the arrestment on the dependence of the action would confer jurisdiction. It ought to be enough that the practice was in their favour, but the reasons for the practice were plain. The

possession of moveables by the defender did not of itself give jurisdiction, for they might be carried off, but if arrested they were made stationary, and conferred jurisdiction. The doctrine was borrowed from Holland—Voet, ii. 422. But the signeting of a summons involved a judicial act. The citation could not proceed unless there was a defender — Kames' Historical Law Tracts, History of Court, p. 374. Without arrestments the citation of a foreigner was an order against a man over whom the Court had no power. The will of a summons was analogous to the warrant of a judge on a petition. It was even stronger, for it called on the Court to deal between two parties.

At advising—

Lord President—This is a process of multiplepoinding for the purpose of distributing the estate of John Walls. One part of his estate belongs under his settlement to his son Thomas Walls, and that share has been attached by arrestments by several creditors, who claim as riders on his interest in the property. One of these is the reclaimer John Drynan, and the Lord Ordinary has found that when the summons at his instance was signeted there was no jurisdiction against Thomas Walls, and that therefore the warrant of arrestment was null and ineffectual. Now, it is not disputed that in point of fact when the summons was signeted jurisdiction was not founded against Thomas Walls by John Drynan, but whether the consequence is that the proceedings were therefore null is the question before us.

The state of the facts amounts to this, that on 21st September 1886 the summons at the instance of John Drynan against Thomas Walls was signeted, but at that date, although he had obtained letters of arrestment *ad fundandam jurisdictionem*, they had not been executed, but they were executed on 23rd September, and on the same day arrestments were executed on the dependence of the action. On the 24th the summons was served personally on Thomas Walls.

Now, I am not able to agree with the Lord Ordinary as to the effect of these proceedings, because I do not think that the circumstance of there being no jurisdiction against the defender at the time when the summons was signeted is of any consequence. The Lord Ordinary thinks that the presenting of a summons for signeting is in some sense an application to the Court or the Judge. The Keeper of the Signet is not a Judge, neither is his deputy, and still less the clerks or writers to the signet. The whole effect of obtaining the signeting of a summons is that in the Queen's name a warrant is issued by the Keeper of the Signet or his deputy, for serving the summons. That is not a judicial act in any sense. I think the Lord Ordinary has been misled in coming to that conclusion by a mistake as to the history of summonses. He seems to suppose that at one time all summonses proceeded on a bill. That is not so. No summons ever required a bill. No doubt there was a class of cases called privileged actions, in which the pursuer was entitled, if he thought fit, to apply to the Court to grant leave to serve the summons on shorter *inducie*. But the bill was not required as authority for serving the summons, but as authority for shorter *inducie*, but if the pursuer of a privileged action was content with the ordinary *inducie* he required no bill on which his summons proceeded. Therefore no summons ever required a bill. That being so, the question is, when is it necessary that the Court should have jurisdiction over a defender personally in order to make the judgment effectual. Certainly it is not necessary till the action begins, and it has recently been decided that an action begins when the summons is served, and therefore on that ground it is enough to say that jurisdiction has been founded in good time if it is founded before the summons is served.

But that is not a full view of the case, because the first and only time the defender has an opportunity of objecting to the jurisdiction of the Court is when he lodges defences. He cannot do it sooner. *Primus actus judicii est judicis approbatorius*, and when he comes to the Court and does not object to the jurisdiction it is too late for him to object at a later date, and the judgment against him will be effectual even if there was no jurisdiction against him before. No doubt there are cases where it is not the interest of the defender but of the Court to raise the question of jurisdiction. For example, if we were asked to go beyond the subject-matter of the jurisdiction, it would be *pars judicis* to object to it. For example, if a claim to a peerage were submitted to us we should not entertain the action even if there was no objection. So in cases of privileged jurisdiction it is *pars judicis* to interfere, and we will not allow our jurisdiction to be ousted. But in a case where a particular individual is made subject to the jurisdiction of the Court, either from the possession of heritable estate, or by arrestment, the Court looks at it in a different manner. If the defender does not object to it the Court has no interest to do so, and no one other than the defender can object. Therefore it appears that the defender—and the defender only—is entitled to state an objection to jurisdiction, and if he comes into Court and does not state it then any possible objection is waived. But if he does state it, what is the question raised? It is not whether the Court had jurisdiction at any former time over the defender; it is a question *de presenti* if the Court has it now. I do not see how this objection can be sustained. I am therefore of opinion that the interlocutor of the Lord Ordinary is not well founded, and that the summons, arrestments, and decree were all competent and validly obtained, and that the reclaimer Drynan is entitled to be ranked according to the priority of his claim.

Lord Mure—I think the broad ground on which your Lordship has based your opinion is the proper one to select in the determination of this case. Of the facts of the case there is no doubt. A short consideration of the various dates of the letters of arrestment and of the summons will show that even in the strictest sense jurisdiction was founded before the summons was executed. I cannot adopt the signeting of the summons as an act of jurisdiction. I agree in thinking that signeting has no such effect as the Lord Ordinary thinks it has, and I think that the passage from Erskine which Sir Charles Pearson referred to makes it plain that it is the execution of the summons which requires jurisdiction.

Lord Adam—I am of opinion that signeting a summons does not imply any assertion or exercise of judicial authority. It is a mere warrant granted in the Queen's name to persons properly authorised to cite a defender before a Court. The question of jurisdiction arises when the person so cited appears to answer, and the question is not whether at any former time the defender was or was not subject to the jurisdiction of the Court, but whether at the present time he is now subject to it. That being so, I think the arrestments are valid, and that the reclaimers are entitled to be preferred.

Lord Shand was absent from illness.

The Court pronounced this interlocutor:—

"Having heard counsel on the reclaiming-note for John Drynan and mandatory against Lord M'Laren's interlocutor of 15th June 1887, and considered the cause, Recal the said interlocutor so far as it finds with reference to the claim of the said John Drynan and mandatory 'that when the summons at their instance containing a warrant for arrestment passed the signet, jurisdiction had not been founded against Thomas Walls, and consequently that the said warrant for arrestment and the execution of arrestment following thereon are null and ineffectual:' Find that the decree and the arrestment founded on by the said claimants are not open to any objection on the ground that the Court had no jurisdiction to pronounce the said decree; . . . and remit to his Lordship with power to decern for the expenses now found due, and decern."

Counsel for the Reclaimer—Sir C. Pearson—Sym. Agents—Scott Moncrieff & Trail, W.S.

Counsel for the Claimants Firth, Sons, & Company—Gloag—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Thursday, February 2.

FIRST DIVISION.

MONTGOMERY'S TRUSTEES *v.* MONTGOMERY.

Marriage-Contract—Trust—Denuding—Alimentary Liferent.

The trustees under an antenuptial marriage-contract were directed to hold the trust funds, to which the husband had contributed £16,000 and the wife £2500, and pay over the income to the spouses and the survivor. It was declared that this income should be strictly alimentary. Upon the death of the longest liver of the spouses the trustees were directed, in the event of there being two children of the marriage then alive, to pay to them, at majority or on marriage, the sum of £12,000 equally between them. The residue of the capital of the trust funds was, in such event, to be at the disposal of the husband, "or his heirs, executors, or assignees." After the death of the wife, when there were only two children of the marriage surviving, the husband called on the trustees, on his discharging his right to the liferent of the marriage-contract funds so far as they exceeded £12,000, to denude of the surplus in his favour. *Held* that the trustees were not bound nor entitled to denude.

By antenuptial contract of marriage dated 10th and 16th June 1835 entered into between James Montgomery and Mrs Eleanora Anstruther Thomson or Montgomery, Mr Montgomery bound and obliged himself to pay, and did thereafter pay, to the trustees therein named the sum of £16,000. Mrs Montgomery bound and obliged herself to pay, and did thereafter pay, to the trustees the sum of £2500. The trustees under the marriage-contract were appointed to hold the trust-estate and to pay the free income during the subsistence of the marriage to the spouses on the receipt of the husband, and on the dissolution of the marriage to the survivor. It was further declared "that the free interest or annual proceeds aforesaid so to be paid over to the said James Montgomery and Eleanora Anstruther Thomson, or the survivor of them, shall be strictly alimentary, and shall not be arrestable or affectable by the debts or deeds of the said James Montgomery and Eleanora Anstruther Thomson, or either of them, or of the survivor, or by the diligence of their, his, or her creditors."

With regard to the disposal of the capital of the trust funds after the decease of the longest liver of the spouses it was provided, *inter alia*, that the trustees should hold the capital for behoof of the child or children of the said intended marriage, and the issue of such child or children, whom failing as thereinafter written, and should pay over the said capital to the said child or children, or the said issue, at the times and in the manner following, viz., if there should be only one child who should attain majority, or, being a daughter, should be married, and should survive the longest liver of the spouses, or die leaving lawful issue, then to such child or issue the sum of ten thousand pounds; if there should be two children or their issue, then to such children or their issue the sum of twelve thousand pounds equally between them; and it was provided that "in either of the above events of there being only one or two children, the residue of said trust capital shall be at the disposal of the said James Montgomery or his heirs, executors, or assignees;" if there were three or more children or their issue, the whole of the trust capital was to be paid over to such children or their issue equally, share and share alike, but subject to a power of division to Mr Montgomery. Payment was to be made at the term of Whitsunday or Martinmas immediately after the decease of the longest liver of the spouses, and the majority of the children, or their marriages if daughters. Failing children of the marriage and their issue who should survive the longest liver of the spouses and attain majority, or, being daughters, marry, the trustees, or trustee acting for the time, were directed to pay over, assign, and convey to and in favour of "the assignees, executors, or nearest of kin of the said James Montgomery and Eleanora Anstruther Thomson respectively the whole of the said trust capital, and that in the proportions respectively advanced by or for them as herein specified."