fully considered the authorities cited, but I cannot say that I think they afford much assistance, as so much depends on the particular turn of expression. The question is to my mind very much one of impression. But I think that one ought to approach that question with the knowledge that the payment is really, though not formally, in lieu of the old casualty of relief and the payment of composition, on the footing that the feu-duty was a competent avail and therefore the measure of composition as well as of relief in the normal case; and further, that from nineteen to twenty-two years has come to be regarded as, so to speak, the average duration of a generation in feu holdings. Hence if parties were merely seeking for an average equivalent of the former feudal exactions on transmission, a payment as such equivalent of a sum equal to the feu-duty is what one would fairly expect. But it was quite open to the superior to stipulate for any payment he could get his vassal to assent to, provided he made the stipulation so as clearly to disclose his meaning. Not only then is he *in petitorio*, but he is asking for what would not be based on the fair calculation of the normal, but would have a colour of the severe or exacting condition. I therefore think that I am specially bound to be satisfied, not on probability but on language which is conclusive, that the stipulation in question bears the superior's interpretation.

Now I must say that the impression which the words used have made upon me is, that "a double of" in the collocation in which the words occur, naturally means a replica of—that is, as "the double" is something to be calculated in money, that these words mean a sum which is the same as, and not twice as much as, the feu-duty. Had the superior intended to stipulate the latter, it would have been easy for him to use words distinctly expressing that the parties meant a sum equal to twice the amount of the sum which is the stipulated feu-duty. I cannot say that I am satisfied that the superior has done so. And I do not think that I am entitled to give him the benefit of the doubt, on the assumption that it is most probable that he intended the higher exaction.

But the words used are susceptible of a different meaning. Your Lordships, being differently impressed by them, are prepared to give them a different interpretation. Accordingly, though I have expressed my doubt, I agree in the judgment which your Lordship has proposed.

LORD MACKENZIE concurred.

The Court answered the question in the affirmative of sub-head (*a*), and in the negative of sub-head (*b*).

Counsel for the First Parties—Constable, K.C.—Russell. Agent—Peter Macnaughton, S.S.C.

Counsel for the Second Parties—Cooper, K.C.—Menzies. Agents—Duncan Smith & M'Laren, S.S.C.

Friday March 15.

FIRST DIVISION.

[Sheriff Court at Glasgow.

SHANKLAND & COMPANY *v.* M'GILDOWNY.

Arrestment—Jurisdiction—Arrestment ad fundandam jurisdictionem—Consignation—Arrestment in Hands of Clerk of Court—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51) *section* 6.

A domiciled Irishman raised an action in a Sheriff Court against a Scotsman for payment of sums alleged to be due for limestone and sand. The Scotsman lodged defences in which he admitted that he was due a certain sum for the limestone, but denied that he was due anything for the sand, in respect of which he counter-claimed for a larger sum. With his defences he consigned with the Sheriff-Clerk a sum corresponding to the amount admittedly due for the limestone, and obtained from the Sheriff-Clerk a simple acknowledgment which did not state why the money was consigned. While the money was in the Sheriff-Clerk's hands notice of arrestment *jurisdictionis fundandæ causa* at the instance of a firm was served upon the Sheriff-Clerk of all sums due to the Irishman. Thereafter the action was settled and the money consigned was, by order of Court, paid back to the Scotsman, the consigner.

The firm having raised an action against the Irishman, *held* (*diss.* Lord Johnston, who was of opinion that after consignment the Irishman was bound to get the benefit of the fund, if not in cash at least in account) that the arrestment was bad, because it was uncertain who would eventually get the money, and accordingly the Sheriff-Clerk was not at the time of the attempted arrestment accountable to the Irishman.

Lockwood, July 4, 1738, M. 736, and *Pollock* v. *Scott*, July 9, 1844, 6 D. 1297, *commented on*.

The Sheriff Courts (Scotland) Act 1907, sec. 6, enacts—"Any action competent in the Sheriff Court may be brought within the jurisdiction of the Sheriff—(*c*) where the defender is a person not otherwise subject to the jurisdiction of the Courts of Scotland, and a ship or vessel of which he is owner or part owner or master, or goods, debts, money, or other moveable property belonging to him, have been arrested within the jurisdiction."

Shankland & Company, coal, sand, and limestone merchants, Glasgow, *pursuers*, raised an action in the Sheriff Court at Glasgow against H. M. M'Gildowny, residing at Clare Park, Ballycastle, County Antrim, Ireland, *defender*, "against whom jurisdiction has been founded by arrestment *jurisdictionis fundandæ causa*."

The pursuers sought payment of £228,

18s., which they alleged was due to them in respect of payment for services rendered, money advanced, goods supplied, and breach of contract.

The defender pleaded, *inter alia*—"(1) No jurisdiction."

The following narrative of *facts* is taken from the opinion of the Lord President:—"The sole question before your Lordships in this action is whether jurisdiction was properly founded. With the merits of the action at present we have nothing to do, and of them we know nothing. Now jurisdiction was only founded, admittedly, upon an arrestment *jurisdictionis fundandæ causa*. I need scarcely remind your Lordships that this is a way of founding jurisdiction which is rested upon a fiction which may almost be said to be peculiar to our system, and which I certainly think ought not to be extended one whit beyond the limits laid down by the decisions.

"Now the arrestment was founded in the following way. The present defender M'Gildowny raised an action in the Sheriff Court in Glasgow against a person of the name of Hart, making a claim for limestone and sand delivered to him under contract. The sum which he claimed for the limestone was £64, 11s., and £33, 6s. 1d. for sand. Hart admitted that he was due the sum for the limestone, but he did not admit that he was due the sum for the sand, because he said that he had a counter-claim upon that matter for damages. The conclusion of the action, as I understand, was for a slump sum, being the amount of the two items added together. Hart accordingly put in defences, and with his defences he consigned a sum of £64, 11s., corresponding exactly to the sum which was due for the limestone. This consignation was not made in connection with any minute in the case, nor was there any interlocutor, so far as I know, pronounced upon it, but it was simply consigned with the Sheriff-Clerk, and the Sheriff-Clerk granted a simple acknowledgment which bore—'The defender has this day consigned in my hands the sum of £64, 11s. sterling,' not a word being said as to why or wherefore it was consigned. Now while the money was in this position the arrestments in question were executed—that is to say, a notice of arrestment was served upon the Sheriff-Clerk arresting all sums due to M'Gildowny. What happened afterwards was that the action was settled between the two parties upon terms with which we have nothing to do, but upon the terms of settlement the consignor of the money, namely, Hart, was entitled to get it back again, and accordingly, although we have not any actual evidence of that before us, we find from the excerpt which we have got from the consignation book that the money which had been consigned by the defender with the defences on a certain date, and had been paid into the bank, and on which a little interest had accrued, was paid back to Messrs Mackay & Mackintosh, agents for the defender—that is to say, the person who had consigned the money—*per* order of the Court dated 21st December 1911."

On 13th February 1911 the Sheriff-Substitute (FYFE) allowed a proof of the defender's first plea-in-law, and on 13th May 1911 he sustained this plea and dismissed the action.

Note—[*After narrating the facts*]—"I think that the sole question is, was the arrestee (the Sheriff-Clerk) at 5th December 1910" [the date of the arrestment and also of the raising of the action] "a person bound to pay to, or at least liable to account to, the common debtor (M'Gildowny)? I do not think he was. He was merely a custodier. He held the money for the Court, not for either M'Gildowny or Hart. He could not at his own hand either give it back to Hart or pass it on to M'Gildowny, nor could either of them demand payment. The Sheriff-Clerk's duty was to hold the consigned fund till the Court directed what was to be done with it, and to part with it only upon the Court's order. Unless and until the Court repelled the counter claim, M'Gildowny could not claim the arrested fund.

"It was entirely problematical whether M'Gildowny would ever be in a position to ask the holder of the fund to pay or account to him.

"I think it is an essential element in arrestment, alike on the dependence, in execution, and *ad fundandam jurisdictionem*, that the common debtor must have a present claim against the holder of the fund which he could vindicate in an action for payment, or at least an action for count and reckoning. The exact amount of the common debtor's claim against the arrestee may be not yet ascertained, or it may be indefinite, but on principle the relationship of debtor and creditor must subsist between the arrestee and the common debtor. A Court official who holds a fund subject to the direction of the Court is at no point of time a debtor to anybody. At 5th December 1910 there certainly did not exist the relationship of debtor and creditor between the Sheriff-Clerk of Lanarkshire and H. M. M'Gildowny.

"I am of opinion that the arrestment which is now alone relied upon as founding jurisdiction against defender was not an effective arrestment for that purpose, or, in other words, that the circumstances as disclosed in evidence do not bring the defender within the scope of section 6 (*c*) of the Sheriff Courts Act 1907. The defender's first plea is therefore well founded, and the action accordingly falls to be dismissed."

The pursuers appealed to the Sheriff.

On 2nd August 1911 the Sheriff (MILLAR) recalled the interlocutor of 13th May 1911, repelled the first plea-in-law for the defender, and remitted the cause to the Sheriff-Substitute for further procedure.

Note.—"The question that is raised in this appeal is whether an arrestment in the hands of the Clerk of Court *ad fundandam jurisdictionem* of funds in which the defender has an interest is sufficient to

found jurisdiction against him. The facts with regard to the money which was arrested are set forth in the note to the learned Sheriff-Substitute's interlocutor, and it is not necessary for me to recapitulate them. It appears that in an action raised by the present defender against a man Hart, Hart admitted that he had received the goods therein specified from the pursuer, but he stated a counter-claim for an illiquid claim of damages arising out of the same contract. He accordingly consigned in Court the amount which he admitted to be due under one branch of the contract, namely, £64, 11s. Thereafter that sum was arrested *ad fundandam jurisdictionem*, and the present action has been raised. Now I think it clear that the Sheriff-Clerk was at that time the custodier of a sum in which the present defender clearly had an interest. The arrestment could not in any way interfere with the disposal of the money by decree of Court, or interfere with the Court's power of disposing of it in any way. But subject to that, if the arrestment had been in execution, then it would have attached the fund, if any, to which the debtor of the party arresting would ultimately have been found entitled. If that is so, then it would equally have attached the fund if the arrestment was to found jurisdiction. An arrestment in the hands of a Clerk of Court has long ago been held good in the law of Scotland. It is so laid down in More's notes on Stair, ii, cclxxxvi. The matter was again raised before a Court of Seven Judges in the case of *Pollock* v. *Scott* (1844), 6 D. 1297, when it was decided that such an arrestment was good. It is further maintained that as a result of the other action it may turn out that there was no sum due to the present defender, and that therefore at the present time the Clerk of Court could not be said to be either a debtor or a custodier for him. But in the case of *Lindsay*, 22 D. 571, it was decided that where there is a subject in which the party has an interest, although on an accounting it may be found that that interest was *nil*, nevertheless the arrestment *ad fundandam jurisdictionem* is sufficient. The ground of the decision therefore was that it was impossible to have a trial of the cause in the other action in order to decide the question of jurisdiction in the case in which the arrestment is pled—nor could the case be sisted until the other action was decided. It was enough if the Court found that the defender had an interest in the subject-matter of the other action, although eventually it should prove on an accounting that interest had disappeared and he could not obtain decree in it. Now I think in the present case the defender clearly had an interest in the sum consigned in the hands of the Clerk of Court, because the defender in the other action had admitted the present defender's right by consigning the sum. I am therefore of opinion that the arrestment founded on in the present action did attach a fund in which the present defender had an interest, and that therefore jurisdiction was founded against him. It is nothing to say that the fund remained at the disposal of the orders of the Court, because the effect of an arrestment *ad fundandam jurisdictionem* does not permanently attach the fund arrested, but the effect of it is gone as soon as the action following on the arrestment is raised, and the sum remains freely in the hands of the Clerk of Court and subject to its orders. I am therefore of opinion that the first plea for the defender ought to be repelled and the case sent back to the Sheriff-Substitute for further procedure."

The defender appealed, and argued—In view of *Pollock* v. *Scott*, July 9, 1844, 6 D. 1297, and *Lockwood*, July 4, 1738, M. 736, it was not maintained that arrestments in the hands of the Sheriff-Clerk were necessarily bad, but that they were not good except at the instance of creditors of the consigner, or, if as in *Lockwood*, the consigner had abandoned the money, at the instance of creditors of the person for whose benefit, free from the contingency of defeasance, it had been consigned. In any case, where, as here, an arrestee had at the time of arrestment no present liability to pay or to account to the alleged common debtor an arrestment was ineffectual—Stair, iii, 1, 31; Ersk. Inst., iii, 6, 8; Bell's Com., ii, 73; Stewart on Diligence, p. 81; *Riley* v. *Ellis*, 1910 S.C. 934, 47 S.L.R. 788, *sub nomine General Billposting Company* v. *Youde and Others*. Reference was also made to *Gordon* v. *Brock*, November 13, 1838, 1 D. 1; *Lindsay* v. *London and North-Western Railway Company*, January 27, 1860, 22 D. 571; *Stiven* v. *Reynolds & Company*, January 20, 1891, 18 R. 422, 28 S.L.R. 271; *Leggat Brothers* v. *Gray*, 1908 S.C. 67, 45 S.L.R. 67; *Trappes* v. *Meredith*, November 3, 1871, 10 Macph. 38, 9 S.L.R. 29; More's Notes on Stair, ii, cclxxxvi. Moreover a mere claim for an accounting was not sufficient to satisfy the provisions of the Sheriff Courts (Scotland) Act 1907, section 6 (*c*).

Argued for the pursuers (respondents)—Where a person asserted a right to a debt or to an accounting against any person resident in Scotland, the fund or interest to which claim was made could be validly arrested. There was no incompetency in an arrestment in the hands of the Clerk of Court although that arrestment was not at the instance of creditors of the consigner—*Lockwood* (*cit. sup.*). An obligation to account was an arrestable interest, although on an accounting it might prove that there was nothing due—*Douglas* v. *Jones*, June 30, 1831, 9 S. 856; *Lindsay* v. *London and North-Western Railway Company* (*cit. sup.*), *per* Lord Ivory at 22 D. 591, and Lord Deas at p. 595; *Baines & Tait* v. *Compagnie Générale des Mines d'Asphalte*, March 15, 1879, 6 R. 846, 16 S.L.R. 471. [The LORD PRESIDENT referred to *American Mortgage Company of Scotland, Limited* v. *Sidway*, 1908 S.C. 500, 45 S.L.R. 390].

At advising—

LORD PRESIDENT—[*After narrating the facts*]—Now in these circumstances the

learned Sheriff-Substitute held that it was not a good arrestment. The learned Sheriff-Substitute says in his note, after pointing out the facts—"It was entirely problematical whether M'Gildowny would ever be in a position to ask the holder of the fund to pay or account to him. I think it is an essential element in arrestment, alike on the dependence, in execution, and *ad fundandam jurisdictionem*, that the common debtor must have a present claim against the holder of the fund, which he could vindicate in an action for payment, or at least an action for count and reckoning. The exact amount of the common debtor's claim against the arrestee may be not yet ascertained, or it may be indefinite, but on principle the relationship of debtor and creditor must subsist between the arrestee and the common debtor." And then he goes on to say that a court official who holds a fund subject to the direction of the Court is at no point of time indebted to anybody.

The learned Sheriff recalled the Sheriff-Substitute's interlocutor, holding that the matter was really settled by the law as laid down in More's Notes on Stair, ii, cclxxxvi, and finally decided by a Whole Court case *Pollock* v. *Scott*, 1844, 6 D. 1279, where it was held that an arrestment in the hands of the Clerk of Court was good.

Now with the general proposition which I have quoted from the learned Sheriff-Substitute's note I entirely agree. I would alter the phraseology a little by saying that I think it is not so much a claim which he could vindicate in an action for payment or count and reckoning as one which might found an action for payment or count and reckoning. I do not think it is necessary to repeat again what I said in the case of *Riley* v. *Ellis*, 1910 S.C. 934. I have most carefully reconsidered the matter, and although I was in a minority of the Court upon the precise matter which was decided in *Riley*, I see no reason to go back upon anything which I said in that case. I am not bound by the decision there to go back upon the opinion which I gave, inasmuch as the Lord Ordinary was with me as against two of my brothers; and as I understand Lord Kinnear agrees with me on the grounds I then put, I am the more strengthened in the opinion I am to deliver.

I think it is impossible to reconcile the various judgments except upon the proposition that arrestment always depends upon a present duty of accountability. Accordingly I think the learned Sheriff-Substitute is right in what he said in his general proposition. But then he went on to say—"A court official who holds a fund subject to the direction of the Court is at no point of time a debtor to anybody." Although I have great sympathy with that, and although I think if the slate were clean I would be inclined to hold that it was a corollary to the general proposition, I think it is otherwise settled by authority. I mean, the mere fact that a fund is held by a court official, and necessarily therefore subject to such orders as the Court may give, does not necessarily destroy the present accountability of that court official or make an arrestment impossible in his hands. That, I think, is settled by authority. But I do not think any more is settled by authority. I do not wonder that Mr More in his Notes to Stair, ii, cclxxxvi, drew the conclusion from the cases, which I shall presently examine, and laid it down in the general proposition which the learned Sheriff-Depute refers to, that when a fund is consigned in court you may then have an arrestment by a creditor of any party to the cause. That is really what Mr More said, but I do not think it is law. The whole matter really depends on what was settled by the older cases, and in particular the learned Sheriff-Depute puts it upon the case of *Pollock*. I will come to the case of *Pollock* second, because the case went to the whole Court on the specific question whether an arrestment was good in the hands of a court official, and upon that matter the consulted Judges in *Pollock* all went upon the case of *Lockwood*, 1738, M. 736; Elchies, *v.* Arrestment No. 8. Now the case of *Lockwood* was this, as reported in Morrison 736—"Sir James Campbell of Auchinbrek having purchased several adjudications affecting the lands of Kirnan, did, in virtue thereof, insist in a sale of that estate, during the course of which it was found that Sir James was bound to communicate the eases he had got from the creditors, whereupon a count and reckoning ensued, from which it appeared there was a balance due to Sir James, and which balance Kirnan, by a docquet at the foot of an account, obliged himself to pay betwixt and Martinmas then next. This sum he offered to Sir James, but upon his refusal Kirnan applied to the Lord Ordinary craving that he would authorise him to consign the money, which was accordingly granted, reserving the consideration of what effect it should have. In consequence of this interlocutor Kirnan, on the 11th of November 1736, consigned the money in the clerk's hands, and on the 19th the Lord Ordinary, after hearing both parties, sustained the consignation; likeas, on the 12th and 13th of the said month, Richard Lockwood, &c., as creditors to Sir James, laid on an arrestment in the clerk's hands, and on the 18th William Wilson, another creditor of Sir James's, arrested the said sum in the hands of Kirnan, whereupon a competition ensued betwixt them."

Now your Lordships will notice that what happened there was this. It having been found that these eases were to be communicated by Campbell—that is to say, that he was not entitled to stick to his adjudications for the full nominal sum, but that he was bound to reconvey the lands if the sum as brought out after the eases were communicated was paid to him, his debtor by a docquet obliged himself to pay at Martinmas. At Martinmas he offered the sum, but notwithstanding the holder of the adjudication refused to reconvey the lands, whereupon, in order to prevent

any question of interest running, and also in order to get back the lands, the original debtor asked the Lord Ordinary for leave to consign the sum and leave was granted, and all that was left then in the action was to find whether, the sum which was admittedly due having been consigned, Kirnan should get rid of the adjudications. In other words, your Lordships will notice that nobody could ever get that money except Campbell. It was there for the purpose of being paid to him, and nothing was left except the transference to Campbell's pocket. The only question left was whether, that money having been consigned, there should be a conveyance of the lands free of the adjudications or the adjudications should subsist till more money was paid. That being so, I can quite understand why there should be a perfectly good arrestment in the hands of the Clerk of Court, because after all the Clerk of Court is only holding the money *ad interim* and the person he was bound to pay the money to was Campbell, and therefore I can perfectly well understand its being arrested for Campbell's debt.

But when you come to the question of competition between Wilson, who had laid on a posterior arrestment in the hands of Kirnan instead of the Clerk of Court, that raises another set of circumstances, and there, although it is a decision, there is great variety in the views upon which the decision was given. Now the decision is reported in Morrison as follows—"The Lords found the arrestment laid on in the Clerk's hands by Richard Lockwood upon the 12th and 13th of November 1736 preferable to the arrestment laid on by William Wilson in Kirnan's hands upon the 18th November 1736." That leaves it dubious what the true ground of preference was. And the history of that case is put very well in Elchies' cases (*v.* Arrestment No. 8, vols. i and ii), from which it appears that the Lords "were divided in the reasons of preference. Some indeed thought the money not at all arrestable, because secured by adjudication; but that being got over, some thought Lockwood's preferable because in the Clerk's hands, which they thought more habile than in Kirnan's; others thought it preferable only because prior in date, and thought both arrestments equally habile; *to reconcile them I proposed to mention the date,** and upon a narrow division it carried to mention the dates of the arrestments in the interlocutor." So that Lord Elchies' attempt at compromise really only resulted in making the interlocutor as pronounced quite ambiguous as to what was the true ground upon which the preference was allowed.

I have gone into this matter very carefully, because I think it is necessary in view of what happened in the next case. It is quite true that when one looks into that case narrowly it is really only a decision that where there could be no question that the money must be paid to a certain person, an arrestment in the Clerk's hands, who must eventually pay, is a good arrestment, and further than that it does not decide anything.

I come next to the case of *Pollock* v. *Scott*, 6 D. 1297. Now *Pollock's* case also is a case that has to be narrowly examined, because there again the facts are somewhat complicated. Thomas Scott held a lease of a farm belonging to Campbell of Islay, and Campbell of Islay presented a petition to the Sheriff for payment of arrears of rent and containing conclusions for removing. As appears from the report of the case, he also presented a petition for sequestration for the current rent. These petitions were conjoined. Scott lodged defences, but after some procedure decree of removing and for payment of the arrears was pronounced on 18th March 1834. On 7th April 1834 a petition was presented in name of Thomas Scott, praying to be reponed against the decree. Consignation was at the same time made of £634, 5s. 4d., being the arrears of rent, interest, and expenses decerned for, in the hands of the Clerk of Court.

Now your Lordships will see that consignation was made for the necessary purpose of being allowed to be heard upon the reponing note against the decree of sequestration and removing that had been pronounced. Well then, nothing more happened in the case, and no other procedure was taken till shortly after there was an interposition by William Scott, Thomas Scott's brother. William Scott compeared in the process and put in a minute in which he stated that it was he really that had produced this money which was consigned by his brother Thomas; that he had only consigned it with a view to joint action with the other creditors of his brother. Probably Thomas's only estate was this lease of the farm which he had got. If the lease of that farm was allowed to be forfeited under removing, Thomas would have nothing left, and therefore William, thinking that the other creditors would act with him, found the money with which to have this reponing note made good wherewith they might contest the question whether Thomas should be turned out of the farm or not, and the minute for William Scott went on to say that he now found that the other creditors would not move with him and it was not worth while going on, and therefore he asked that the money should be returned to him inasmuch as he was the man who had provided it. Well, now, Campbell, who was the real person who was in one sense interested in the money, did not make any objection to that. He said, "You can have the money if you like, provided that your reponing note goes by the board, and that I may extract my decree," and accordingly, so far as the other party to the action was concerned, there was no objection. In other words, again you are in the position that the money could not be paid to the pursuer in the action at all, because he said "I am

* The words in italics are quoted by the Lord President from the notes in the second volume.

done with it; I do not want it." And now a very peculiar thing happened. First of all an arrestment was laid on after the consignation. Pollock, a creditor of Thomas (that is, the tenant who had in form consigned the money), used arrestments to the amount of £150 in the hands of the Clerk of Court. Then the Sheriff, in respect that it was admitted by the defender and not denied by the pursuer that the consignation in question was made by the compearer William Scott (that is, the brother), authorised him to uplift the sum of £634, 5s. 4d. consigned in the hands of the Clerk of Court. Upon this interlocutor the Clerk of Court paid to William Scott the consigned fund, under deduction of the sum contained in Pollock's arrestment. A multiplepoinding was thereafter brought in the clerk's name before the Sheriff of Lanarkshire for determining who had best right to the balance remaining in his hands, and the compearers in that multiplepoinding were Pollock, who had arrested upon the footing that it was due to Thomas Scott who had nominally consigned it, and William Scott, who alleged that the money was his. In that state of affairs the learned Judges of the First Division were divided in opinion, and as the report bears (6 D. 1302), "at the debate in the Inner House the argument was confined to the point how far the respondent's allegation that the money consigned was his, and not Thomas Scott's, and had been consigned by him and not by Thomas, was relevant as against the advocator's arrestments. The Lord President and Lord Fullerton were of opinion that it was irrelevant. Lord Mackenzie and Lord Jeffrey, on the other hand, were of opinion that it was relevant and ought to be admitted to proof. The Court being thus equally divided in opinion, the cause stood over for reconsideration, and the Judges retaining their opinions, minutes of debate to the whole Court were ordered. On the suggestion of Lord Fullerton the interlocutor was expressed so as to embrace the separate question as to the competency of arresting a sum consigned in a depending action in the hands of a clerk of court."

Now when the consulted Judges came to give their opinions upon that pure question whether it was competent to arrest in the hands of the Clerk of Court, they said that that was settled in the case of *Lockwood*. But they did not give any opinion, and were not asked to give any opinion, as to whether an arrestment in the hands of the Clerk of Court would be a good arrestment as in a question with anybody in Court to whom that money might be paid under a decree of the judge in the cause in which the money had been consigned.

Now after that they differed a great deal as to whether William Scott had made a relevant averment or not, and they differed also among themselves as to whether there was sufficient relevancy in William's averment that the money was rightly his and not Thomas's, or whether it was also necessary for William to prove a further averment which he made, that Pollock when he laid on the arrestment knew that the money was his (William's) and not Thomas's. I need not count the heads of the Judges, but the opinion of a majority was that it was sufficient for William to say that the money was his, without going further and saying Pollock knew the money was his, and accordingly the case was remitted for a proof on that matter. But your Lordships will at once see that that case could not and did not decide the general question which is put down by Mr More in his notes to Stair, namely, the general question as to whether when there is an arrestment in the hands of the Clerk of Court that is a good arrestment as in a question with every party to the process; I humbly think it is not, because I think that we find in the end that an arrestment in such a position has only been sustained where there was no question but that the Clerk of Court should pay it to one person and one person alone. In *Lockwood's* case, as I have already pointed out, the money could only be paid to Campbell, and in *Pollock's* case also, if they had held on the result of the proof (of which we know nothing, because we do not know the sequel to the case) that it was a bad arrestment in respect of a debt of Thomas. I think you always get back to this, Is there or is there not a present accountability to one person and one person alone?

I quite see in certain consignations there may be an accountability to one person only, but in the present case no one knew who the sum would be eventually paid to, and I quite agree that you cannot, so to speak, judge an arrestment by being wise after the event, because you must take the accountability as at the time the arrestment was laid on. If you were wise after the event here, M'Gildowny never got the money at all; Hart got it; and you would have the peculiarity that a nexus was put upon a fund as belonging to M'Gildowny which M'Gildowny never got, and, so far as one can see, never had a chance of getting.

Accordingly, upon the whole matter I come to the conclusion that the learned Sheriff-Substitute here was right, and that this was a bad arrestment, and I go really upon his general grounds, although I think he went too far when he said that the mere fact of its being an arrestment in the hands of the Clerk of Court made it a bad arrestment.

LORD KINNEAR—I entirely agree with the opinion which has just been delivered by the Lord President, and I have little to add; and in particular I have no intention of examining in detail the authorities his Lordship has cited. I take the effect of the decisions to be as he has explained them. I should add that I agree also with the statement of the law given by your Lordship in the chair in the case of *Riley* v. *Ellis* (1910 S.C. 934). I express no opinion at all as to the application of the rule so

laid down to that particular case. The question for decision was totally different from that which is before us now, and we are not called upon to reconsider the judgment; but as regards the general law as to arrestments *ad fundandam jurisdictionem* I have no hesitation in expressing my agreement with your Lordship.

I think that the true rule is stated correctly in your Lordship's words (1910 S.C. at p. 941)—"The only general rule that I can deduce is that arrestment is only possible where there is a present liability to account. By 'present' I mean at the date of the arrestment"; and then your Lordship goes on to guard that proposition by pointing out that it does not necessarily mean that there is a present debt—a debt presently payable; but, on the contrary, that an arrestment of a present liability to account may be perfectly good although it may turn out in the end that there was no money actually due to the common debtor. I think that is in accordance with all the authorities so far as I know. I think the rule is that there must be a real claim at the instance of the common debtor against the arrestee, either for payment of money or for delivery of moveables, or for accounting. If there is no such claim, then I apprehend there is nothing whatever to arrest. Now the learned Sheriff has said that a different rule of law has been established. He says that in the case of *Lindsay* v. *London and North-Western Railway Company* (1860, 22 D. 571), it was decided that where there is a subject in which a party has an interest, although on an accounting it may be found that that interest is *nil*, an arrestment *ad fundandam jurisdictionem* is sufficient.

With great respect, it appears to me that that statement is inexact, and whether it can be accepted as to any extent sound depends upon what is meant by an interest, and what is meant by *nil*. If an interest means a right which gives rise to a present claim for accounting at the instance of the common debtor against the arrestee, then I agree, because in that case the arrestee is prohibited from performing his obligation towards his own creditor—the common debtor. A *jus crediti* in the common debtor is thus attached in the hands of the arrestee. But if the learned Sheriff means that an arrestment is good although there is no debt or *jus crediti* in existence as between the arrestee and the common debtor, so that there is nothing whatever that can be attached, then I am unable to agree with him. The learned Sheriff refers as an authority to the case of *Lindsay* v. *The London and North-Western Railway Company* (22 D. 571), which is a very important decision, because the whole law upon the subject was very carefully investigated; but I think it establishes the very reverse of the doctrine for which the Sheriff appears to cite it. In that case arrestments were used in the hands of the Caledonian Railway Company in order to found jurisdiction against the London and North-Western Railway Company. There were a great many subjects arrested, and in particular the arresting creditor arrested shares in the Caledonian Railway which were held for the London and North-Western Railway Company; he arrested a quantity of rolling stock in the possession of the Caledonian Railway Company; and he arrested also certain claims for accounting between the two companies upon their joint traffic. There was thus a substantial amount of property attached, if it was effectually attached at all; but I presume the point for which the learned Sheriff refers to the case is the decision of the Court upon the arrestment of a claim of accounting against the Caledonian Railway Company by the London and North-Western Railway Company upon the conduct of their joint traffic; and as to that it was held that there was a good arrestment notwithstanding that it could not be proved at the time when the question was raised that there was actually a balance due by the Caledonian to the London and North-Western Railway Company upon that series of transactions. But when we examine the grounds upon which that was held I think it brings out exactly the doctrine which your Lordship laid down in the case of *Riley* v. *Ellis* (1910 S.C. 934). I refer to Lord Curriehill's opinion, because although he says nothing which is not in accordance with the views of Lord President MacNeill and Lord Ivory, he states the particular point in a more explicit form, and he says (22 D., at p. 593)—"Two objections are made in regard to this matter. One of these is that the Caledonian Company had counter-claims against the London and North-Western Company, and that we do not see if the accounts had then been balanced how the balance would have stood. That is quite true. I do not think that we have any evidence how the balance would have stood. But we have clear evidence that they were not then balanced. No balance did then take place as to a considerable amount of these sums, and I do not care whether the counter-claims which the London and North-Western Company may have had against the Caledonian Company may have been greater or less. These counter-claims do not operate *ipso jure* so as to extinguish either of them. They do not so operate unless there has been either a settlement between the parties or the claims have been pleaded in a court of law, the one as compensating the other." And therefore he says there was an arrestable fund at the date of the arrestment, because there was then a claim for accounting which involved a claim for payment at the instance of the common debtor against the arrestee. His Lordship then goes on to explain why this was sufficient for the purpose, by pointing out the distinction between an arrestment for founding jurisdiction and an arrestment in execution.

The material point which, however, is elementary, is that arrestment for founding jurisdiction is only a part, and not the effective part, of the diligence of arrestment and furthcoming. The purpose and

effect of that diligence is to enable the arresting creditor to enforce for his own benefit obligations which are prestable by the arrestee to the common debtor. It has accordingly been defined as an adjudication preceded by an attachment. But the essential part of the diligence is the adjudication or furthcoming. It is obvious that for the purpose of execution an arrestment of a debt which, although due at the time, is liable to be wiped out by a counter-claim, must in the end be futile if, when the account is taken, the balance is found to be in favour of the arrestee and against the common debtor. But in the case of an arrestment for founding jurisdiction there is no occasion for considering the question of ultimate liability as between common debtor and arrestee, because the arrestment can never be used for the purpose of enforcing payment or performance. Its only purpose and effect is to fix the thing arrested in this country until the jurisdiction has been sustained; and accordingly it is familiar practice that when that object has been once attained, there is no longer any *nexus* upon the fund or property arrested in the hands of the arrestee; and if the arresting creditor desires to get the benefit of arrestment as a diligence, he must arrest again on the dependence. This is the rule laid down by Mr Erskine (i, 2, 19). The effect is "to fix the debtor's goods within the Judge's territory and thereby to subject him to the jurisdiction of the Courts of Scotland. . . . The *nexus* laid upon the goods is loosed so soon as the foreigner gives security *judicio sisti*, that is, to appear in court upon the day to which he shall be cited." And Lord Curriehill applies this doctrine with exactness when he says (22 D., at p. 594)—"The only question is whether at the moment it is arrested there is a claim against the arrestee by the common debtor." Therefore the whole foundation of the judgment on this point was that, since the sole purpose of the arrestment is to compel the foreigner to submit to the jurisdiction by preventing him, until he does so, from enforcing his own claims against his Scottish debtors, there must at the moment of the arrestment be a present claim at his instance against the arrestee; and it was because there was a claim for the payment of money by the one railway company against the other which could be attached by arrestment that the jurisdiction was sustained. It may be true that nothing is attached effectively by this kind of arrestment, because it will not of itself support a furthcoming, and the *nexus*, such as it is, flies off as soon as the defender enters appearance in court. But the rule is fixed that there must be a debt or obligation prestable by the arrestee which is capable of being attached. It is of no consequence that the common debtor may have some contingent or reversionary interest in the arrested funds if he was not the direct creditor of the arrestee when the arrestment was laid on (see *Whittall* v. *Christie*, 22 R. 91, 32 S.L.R. 78). The rule, although not perhaps more irrational than the fictions which have been invented for giving jurisdiction in other legal systems, is not easily reconcileable with principle; but for that very reason it is not to be extended further than has been already decided. It follows that jurisdiction on this ground cannot be sustained unless there is at the time of the arrestment a personal obligation on the arrestee to pay money or deliver goods to the common debtor.

I therefore agree with your Lordship that in the present case it is impossible to sustain the arrestment, because there is nothing to show that there ever was any claim at the instance of the appellant against the Sheriff-Clerk for the payment of this particular sum. All that we know is that the money was deposited in the hands of the Sheriff-Clerk by Hart, under no express written conditions so far as we see, and that ultimately the money was paid back to the person who had deposited it. It is possible that the appellant may have had an interest which might have been so far established in the course of the process as to enable him to obtain an order from the Sheriff for payment of the whole or a part of the deposited sum. But there is nothing in the process before us to prove even this. And if it were proved, it would only follow that the Sheriff-Clerk had no duty or obligation to pay until the rights of parties were determined by the Court or settled by mutual agreement. It appears to me to be out of the question to say that the Sheriff-Clerk was debtor to the appellant at the moment when the arrestment was used; and if he was not, there was nothing in his hands for the appellant's creditor to attach.

I desire to repeat what your Lordship has said, that in considering questions of this kind we must be careful not to go beyond what has been actually decided. I think that principle was laid down in the case of *Cameron* v. *Chapman* (1838, 16 S. 907), in the opinion of Lord Corehouse and the other Judges, in very clear terms. Their Lordships say—"It is not necessary to inquire upon what principle the custom is founded, of arresting moveables to found a jurisdiction against their owner, being a foreigner. It is plainly in opposition to the general doctrine both of the Roman law and modern jurisprudence, both of which admit the maxim *actor sequitur forum rei*. It was borrowed in Scotland from the law of Holland, where, as Voet observes, it had been introduced, contrary to principle, from views of expediency and for the encouragement of commerce. We are of opinion, therefore, that it must not be carried further in any case than is expressly warranted by authority and precedent."

I agree with your Lordship that the arrestment in the present case is not warranted by any previous authority, and therefore that we should sustain the appeal.

LORD JOHNSTON—The preliminary question at issue in the action at present before this Court, which was raised on 22nd December 1910 by Shankland & Company against M'Gildowny in the Glasgow Sheriff

Court, is whether Shankland & Company have founded jurisdiction by arrestment against M'Gildowny.

While I regret that I cannot acquiesce in the judgment your Lordship proposes, I am inclined to think that the point of difference between us is not in law but in fact. I take it that your Lordship has very much adopted the Sheriff-Substitute's view of the facts. Now he says at one place that "it was entirely problematical whether M'Gildowny would ever be in a position to ask the holder of the fund to pay or account to him." I quite admit that it was problematical whether M'Gildowny would ever be in a position to ask the holder of the fund to pay, but I dispute that it was in the least problematical whether M'Gildowny would not be in a position to require him to account. Further, the Sheriff-Substitute goes on to say that it is an essential element in arrestment that "the common debtor must have a present claim against the holder of the fund, which he could vindicate in an action for payment, or at least an action for count and reckoning." In that I entirely concur. But it does not seem to have been observed in this case that under the circumstances an action of count and reckoning proper was not necessary; that there was within the action in which the consignation was made the means of adjusting accounts without calling for any such thing as a separate action of count and reckoning. On the facts, if they there are properly understood, it appears without doubt that M'Gildowny had such a claim against the holder of the fund as entitled him to an accounting, and entitled him to payment, or the equivalent of payment, as the result of that accounting—that is, either to cash or to credit in account—notwithstanding that the accounting would take place, not in a separate action of count and reckoning, but in the action itself in which the consignation was made. It is further clear, as I think I shall show your Lordships, that M'Gildowny did get the benefit of the sum that was consigned, and did get the benefit of it under circumstances which I think your Lordships have misapprehended. Your Lordship in the chair in your concluding words said in effect that "in point of fact M'Gildowny never got this fund, and so far as could be seen never had a chance of getting it." I must respectfully say that I think M'Gildowny did get that fund, and that from the time that it was consigned he could not do otherwise than get that fund, it might not be in cash, but certainly in account. As the matter, in my opinion, depends so entirely upon matter of fact, I must ask your Lordships' indulgence if I deal with the facts as precisely as I can and with necessary detail.

M'Gildowny is a proprietor in Ireland carrying on a trade in the export of limestone and sand from his estate.

Shankland, Hart, & Company, consisting of Shankland & Hart, were M'Gildowny's shipping agents, and also purchased from him on their own account. They dissolved partnership somewhere in 1909, Shankland, under the firm of Shankland & Company, continuing his shipping agents, and Hart taking over in his own name a current limestone contract and a current sand contract. In these circumstances a triangular duel has arisen in the Glasgow Sheriff Court in this manner—In the first place, on 16th June 1910 M'Gildowny raised an action against Hart for £97, 17s. 1d. as per account annexed. And the account annexed to the summons showed that the sum sued for was made up of two distinct sums, viz.—

for 322 tons limestone . .	£64	11	0
and for 156 tons sand . .	£33	6	1
delivered respectively under the above-mentioned contracts, making the total of . .	£97	17	1

and in respect of non-payment M'Gildowny stopped further delivery under both contracts. Hart made no difficulty about the £64, 11s. claimed for limestone, but though neither did he dispute the sum claimed for sand, he made a counter-claim in respect of loss of profit on certain sand shipped to him, but diverted into another channel, and damages to the amount of £67, 4s. 1d. for the stoppage of further delivery of sand.

The position of matters in this action was that, when the record was closed on 28th July 1910, Hart had admitted in his defences that the £64, 11s. was due on the limestone contract, alleged a tender of this sum made prior to the action being raised, and having consigned the sum in the hands of the Clerk of Court, thus referred to the consignment in his defences, "said sum is herewith consigned," but added nothing further in explanation of the consignation. At the same time he took no exception in his defences to the £33, 6s. 1d. claimed for sand, but stated a counter-claim of damages of £67, 4s. 1d. for non-delivery under the sand contract.

The consignation receipt written on the interlocutor sheet bore simply—

"Glasgow, 27th June 1910—The defender has this day consigned in my hands the sum of £64, 11s. stg.

"W. G. K. DONALDSON,

"Sheriff-Clerk-Depute of Lanarkshire."

But the note in the Sheriff-Clerk's consignation book bore the additional information,

consigned "with defences, i.c. $\frac{A1168}{1910}$ *H. M. M'Gildowny* v. *Maxwell Mure Hart* (Ordinary Court)."

In the second place, Shankland & Co. on 22nd December 1910, as already stated, raised the action at present before the Court against M'Gildowny, having arrested on 5th December 1910 in the hands of the Sheriff-Clerk "all goods, debts, money, or other moveable property belonging to the defender" in common form. This action was to enforce claims arising out of Shankland & Co.'s shipping agency for M'Gildowny.

In the third place, Hart, on 12th January 1911, raised an action against M'Gildowny *ex reconventione*, claiming £127, 9s. 5d. as

damage for breach by stoppage of deliveries under the limestone contract.

After the cases between M'Gildowny and Hart, first and third above-mentioned, had proceeded a certain length, parties settled. The cases had never been conjoined, though motions to that effect had been made.

The settlement was this—M'Gildowny surrendered his claim for the two sums, of £64, 11s. for limestone delivered, and of £33, 6s. 1d. for sand delivered, though both claims were admitted, in consideration of Hart's abandoning his counter-claim of £67, 4s. 1d. for sand undelivered, and his claim of £127, 9s. 5d. in respect of limestone not delivered. That is to say, Hart's disputed counter-claims of £67, 4s. 1d. and £127, 9s. 5d., or £194, 13s. 6d. in all, were set against M'Gildowny's admitted claims of £64, 11s. and £33, 6s. 1d., or £97, 17s. 1d. in all, and on that footing both actions were settled and taken out of Court. Consequently, as no money was to pass on the settlement, Hart fell to receive back the consigned money, viz., £64, 11s.

The settlement was carried out by two minutes—one in *M'Gildowny* v. *Hart*—"The parties concur in craving the Court to dismiss the action, finding no expenses due to or by either party, and to make an order for payment of the consigned money to the defender" (that is, to Hart). And the other in *Hart* v. *M'Gildowny*—"The parties concur in craving the Court to dismiss the action, finding no expenses due to or by either party."

To these minutes the Sheriff on 21st December 1911 interponed authority by separate interlocutors in the two actions, and in M'Gildowny's action authorised "the Clerk of Court to pay up the consigned money with accrued interest to the defender." Accordingly the Sheriff-Clerk's consignation book bore that the money was paid out to the defender's agents on 27th December 1911, "*per* order of Court dated 21st December 1911."

When, therefore, the arrestment to found jurisdiction was on 5th December 1910 laid on in the Sheriff-Clerk's hands, he held a sum consigned, and necessarily, though not expressly, consigned subject to the order of the Court, in which M'Gildowny was interested to this extent and effect, viz.—He was admittedly entitled to it, and it was consigned that he might ultimately receive it, either in cash or in account, in order that the first branch of the case might not involve the consignor in the expense of litigating on the subject of that branch. It could not have been withdrawn or reclaimed by the consignor at his own hand. He could only obtain repetition in whole or in part by establishing a counter-claim. But such repetition, if successful, could only proceed on the footing that the pursuer's primary right to the consigned fund was admitted, and that it would go to his credit in account when claim and counter-claim came to be adjusted.

But the possible result that the adjustment of claim and counter-claim might have returned a part or even the whole of the consigned fund to Hart, the consignor, does not affect the arrestability of the interest of the pursuer M'Gildowny in the consigned fund as at 5th December 1910. The Sheriff-Clerk, as the hand of the Court, held it for him, subject to the order of the Court, and was bound to account to him for it. It was his either to recover in cash or to recover in the form of relief from a counter-claim. It could not go back to the consignor in cash under any circumstances. It could only do so in account when the result of the counter-claim was ascertained.

As I said at the outset, while I regret to find that I am obliged to differ from your Lordships, I feel satisfied that the ground of difference is on a question of fact and not on any question of principle. Your Lordship in the chair has adverted to the case of *Riley* v. *Ellis*, 1910 S.C. 934. I am equally satisfied that the difference between the majority of the Court and your Lordship in that case was also not on any question of principle in the law of arrestment, but on the application of these principles to the facts of the case.

I am at one with both your Lordships in holding that to validate an arrestment there must be a present debt due by the arrestee to the common debtor. I also gather that your Lordships admit that a present debt may involve a question of accounting, in respect that it is not ascertained in amount, or that there are counter-claims requiring the ascertainment of a balance. I think that the validity of the arrestment is not affected, though its productivity may be so, by the fact that on an accounting nothing may be found due. I quite admit that the subject of arrestment to found jurisdiction must not be an elusory subject. But if there is an accountable interest the subject is not rendered elusory because on the accounting it may produce nothing. The common debtor's interest may be extinguished by set-off, and so may produce nothing or less than nothing, but it is not elusory because it is not productive.

Where I think I differ from your Lordships is in holding that at 5th December 1910 the Sheriff-Clerk, as the hand of the Court, did hold a sum which was presently due to the common debtor, and which must have been paid to him either in cash or in account, the consignee merely awaiting the direction of the Court as to whether it was to be paid out in cash or was to suffer deduction or even extinction according to the result of a separable part of the same litigation in which the consignation was made. Whatever the result, the common debtor must have got full value for it either in cash or in account.

That arrestment can be laid on in the hands of a judicial consignee was decided in *Lockwood* (1738, M. 736), in a case where the consignation was made in the hands of a Sheriff-Clerk under the express authority of the Sheriff. And the arrestment was, as here, of the interest of the pursuer of the action in which the consignation was made. In *Pollock* (6 D. 1297), though

the consignation in the hands of the Sheriff-Clerk was, as here, voluntary, this was regarded as of no materiality, and the arrestability was so fully recognised that in the first discussion the point was not debated in the Inner House, and it was only because the case was sent on another question to the whole Court that on the suggestion of Lord Fullerton the question of the arrestability in the hands of the Sheriff-Clerk was embraced in the reference. Two only of the Judges entertained any doubt on the point—Lord Moncreiff and Lord Jeffrey—and even they, though doubting the principle, held themselves bound by the authority of *Lockwood's* case *supra*. The case of *Pollock* is of the greater importance for my present purpose, that what was arrested was the interest of the consignor, which could only be an interest on a balance in account, or in reversion. Lord Wood expresses, I think, the opinion of the Court when he says "arrestment in the hands of the Clerk of Court is competent, subject to the limitation that the object of the consignation shall not be thereby interfered with." And Lord Fullerton explains the principle on which the arrestability of the fund rested, thus—"It rests on this, that it is held to be a conditional debt. It is what may be due to one or any given number of the parties in the process in which it was consigned. It is arrestable, therefore, by the creditors of any one of the claimants in the process, subject to the result of the process. It is a conditional debt, which becomes payable either to one of the claimants, or to the consignor, in the event of none of the claimants being found entitled to it. This last is the case here." These words of Lord Fullerton are expressly applicable to the circumstances of the case before him, which was a multiplepoinding. But they are equally applicable to the circumstances of the present case, and recognise that the consignee is in the position of debtor, and though he may be debtor to the consignor in reversion, is necessarily debtor primarily to the person for whose security and satisfaction the consignation has been made, whose claim, as it happens in this case, is admitted as the basis of the consignation, though I do not think that that is essential, and who must be satisfied out of the consigned money before there can be any reversion for the consignor.

I have pointed out that the validity of the arrestment must be decided as at 5th December 1910. What happened on 21st December 1911 does not affect that question. As the arrestment to found jurisdiction laid no nexus on the subject, the parties concerned were entitled to transact about the arrested subject as they pleased. But be it noted that the common debtor got full value for the sum consigned in the comprehensive settlement of claims arising in the action in which the consignation was made, and also outside that action.

I therefore conclude with the learned Sheriff-Depute that the arrestment to found jurisdiction in this case was good.

LORD MACKENZIE was absent.

The Court pronounced this interlocutor—

"Sustain the appeal: Recal the interlocutor of the Sheriff, dated 2nd August 1911: Revert to and affirm the interlocutor of the Sheriff-Substitute, dated 13th March 1911: Of new dismiss the action, and decern. . . ."

Counsel for the Pursuers and Respondents — Graham Stewart, K.C. — T. G. Robertson. Agents—Whigham & Macleod, S.S.C.

Counsel for the Defender and Appellant —Sandeman, K.C.—W. T. Watson. Agents —Gordon, Falconer, & Fairweather, W.S.

Tuesday, March 19.

FIRST DIVISION.

[Lord Dewar and a Jury.

BERNHARDT *v.* ABRAHAMS.

Reparation — Slander — Proof — Foreign Words—Innuendo.

Where words, alleged to be slanderous, are spoken in a foreign language, not only must they be set forth in the record as having been spoken in that language, but the English equivalent must be set forth in the same way as an innuendo is set forth; they cannot be proved to have been spoken in a different language from that set forth in the record and in the issue.

Martin v. *M'Lean*, March 7, 1844, 6 D. 981, *followed*. *Anderson* v. *Hunter*, January 30, 1891, 18 R. 467, 28 S.L.R. 324, *distinguished*.

Proof — Slander — Innuendo — Innuendo not Spoken to by Witnesses.

A letter which a pursuer innuendoed as meaning that he was a dishonest servant was not at most shown by the defender to more than three persons. To none of these was the innuendo put at the trial, nor did any of them say he took that meaning from the letter. The pursuer obtained a verdict.

The Court *set aside* the verdict and granted a new trial.

William Bernhardt, commercial traveller, Govanhill, Glasgow, *pursuer*, raised an action of damages for slander against Benjamin Abrahams, carrying on business under the firm name and style of P. Abrahams & Company, tobacco and cigar merchants, Gorbals, Glasgow, *defender*.

Two issues were allowed. The first—"Whether, on or about 5th June 1910, and in the defender's warehouse in Main Street, Gorbals, Glasgow, the defender falsely and calumniously stated to Solomon Crivan, tobacco and cigar merchant, 13 Robson Street, Govanhill, Glasgow, that he, the defender, had lost an action which the firm of P. Abrahams & Company had raised in or about May 1910 in the Sheriff