not entitled to recover sums embezzled within the last three months, because if the check promised had been observed in November something might have been recovered from Slater and further embezzlement stopped.

The respondent argued — The monthly accounts to be settled were commission accounts, but there had never been any commissions to settle. Even if Slater had been asked monthly about customers' accounts, it would have been no check upon him. He would simply have lied. As to sending accounts direct to customers, that was only to be done after three months. It would not have led in any case to the discovery of embezzlements in and after October. But it was capable of meaning at the first quarterly audit after three months had expired, and this had been done and the check had operated successfully. If the term was ambiguous it was to be construed against the insurance company. Further, the policy contemplated considerable trust being put in the person whose honesty was guaranteed. That was the reason of the policy. The checks were not to be read too strictly. They were honest expressions of intention rather than conditions-precedent—*M'Taggart & Others* v. *Watson*, April 16, 1835, 1 Sh. & Maclean 553, Lord Brougham 590-91; *Benham* v. *United Guarantee & Life Assurance Company*, June 7, 1852, 7 W. H. & G. (Excheq.) 744; *British Guarantee Association* v. *Western Bank of Scotland*, July 8, 1853, 15 D. 834.

At advising—

LORD YOUNG—The insurance here was a policy or agreement to guarantee entered into upon a proposal with questions and answers which it is clear formed the basis of the contract between the parties. The important part of the proposal so far as before us is the account therein given by the employers of the checks they would use to prevent embezzlement by the employed whose dishonesty was insured against. Two of these checks have been prominently brought forward, viz., first, that the employers would call the employed to account monthly, and secondly, that they would render accounts directly to their customers every three months—that is, that those customers not reported to them as having paid their accounts should have accounts regularly and directly sent to them every three months, with the view plainly of checking the employed if inclined to embezzle by uplifting money and not accounting for it.

Now neither of these two checks was employed, and the only question is whether that fact is a good answer to the claim now made. It is with regret that I have come to the conclusion that it is, for the employers evidently acted in perfectly good faith and with no intention of neglecting the legitimate interests of the insurers. I think, however, that they did neglect these interests, and I am therefore of opinion that the Lord Ordinary's interlocutor should be recalled.

The LORD JUSTICE-CLERK, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

The Court recalled the Lord Ordinary's interlocutor, and assoilzied the defenders.

Counsel for the Pursuers and Respondents—J. A. Reid—Ferguson. Agents—Fyfe, Ireland, & Dangerfield, S.S.C.

Counsel for the Defenders and Reclaimers—Lorimer—W. C. Smith. Agents—Ronald & Ritchie, S.S.C.

HOUSE OF LORDS.

Monday, July 14, 1890.

(Before Lord Chancellor Halsbury, and Lords Watson, Herschell, Macnaghten, and Morris.)

NORTH *v.* STEWART.

(*Ante*, July 5, 1889, vol. xxvi. p. 650, 16 R. 927.)

Jurisdiction—Foreign—Arrestment jurisdictionis fundandæ causa—Decree for Expenses—Act 23 and 24 Vict. c. 127 (To Amend the Laws Relating to Attorneys, Solicitors, &c.), sec. 28.

The Act 23 and 24 Vict. c. 127, enacts, sec. 28—"In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the court . . . to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved; and upon such declaration being made, such attorney or solicitor shall have a charge upon and against and a right to payment out of the property . . . for the taxed costs, . . . and it shall be lawful for such court or judge to make such order or orders for taxation of such costs, charges, and expenses out of the said property as to such court or judge shall appear just and proper; and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right shall, unless made to a *bona fide* purchaser for value without notice, be absolutely void and of no effect as against such charge or right."

North, a domiciled Englishman, was sued in the Queen's Bench Division by Welsh, a domiciled Scotsman, but in April 1887 obtained decree for expenses. On May 26th Stewart arrested in the hands of Welsh the sum due under the decree, and next day served a summons on North. On June 13th North's solicitors in the English suit obtained a charging order in terms of the above-cited Act, on the costs for which North had obtained decree.

Held (*aff.* judgment of the First Division—*diss.* Lord Morris) that jurisdiction had been properly founded by

arrestment when the summons was served, and was not affected by the charging order, even assuming that to be retrospective in its operation.

This case is reported *ante*, July 5, 1889, vol. xxvi. p. 650, 16 R. 927.

The defender John Thomas North appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—It appears to me that the dates of the various steps in this litigation may be simply and very conveniently collected from the respondent's case. On the 25th of April 1887 Colonel North got judgment for costs in an action raised against him by a Mr Welsh. On the 26th of May arrestment in Welsh's hands was used at the respondent's instance to found jurisdiction against the appellant. In truth, the whole question appears to me to resolve itself into this, whether at the time when that arrestment was used, there was a subject-matter capable of being taken in execution—not necessarily so taken in execution as ultimately to bear fruit to pay the debt—but whether there was at that time a subject capable of being taken in execution. As to that, it appears to me that there is really no doubt. The judgment is recovered by Colonel North; it is Colonel North's judgment. It is true that a counter claim may be made against him by Eldred & Bignold, the attorneys, in respect of their costs. I deliberately use the term "counter claim," because it is not true to say that it was a lien or anything which in strictness is a lien known to our law, but it was a claim which the attorneys might have enforced against their principal. That it ultimately became a charge under the powers of the statute seems to me to be immaterial; the whole question in debate appears to be this, whether the fact that there was a claim against that judgment which Colonel North had recovered, vacates a jurisdiction which is created by the possession of some subject-matter capable of being taken in execution in Scotland.

Now, looking at the authorities—the cases which have been quoted—it seems to me absolutely hopeless to contend that because that claim might have been defeated by the attorneys setting up their claim against Colonel North, therefore it was not Colonel North's property at that time, and capable, if the attorneys had not intervened, of being used for any purpose for which Colonel North desired that the judgment should be used. If I understand the judgments of all the learned Judges in the Court below, including the Lord Ordinary, their view is that when once the jurisdiction has been properly founded no subsequent matter can take it away. The question therefore whether it is properly founded or not depends upon the question whether it was Colonel North's judgment and not the attorneys' judgment. As to that I can entertain no doubt that it was Colonel North's judgment, and that therefore the jurisdiction which depended on that question was well founded.

The argument upon the statute seems to me to raise more important questions which I think it is hardly necessary to decide in this case, for the reason that I pointed out to Sir Horace Davey, that it appears to me that under no circumstances can it be said that the arrestment delays or defeats or in any way affects the order obtained by the solicitors under the circumstances of this case. I myself should be very sorry, without further consideration, to give such a construction to the statute itself as that which Sir Horace Davey contended for. I very much doubt whether it would be possible to put such a construction upon it as would give it an operation such as that which is contended for, by which the charging order would defeat something which had perfectly *bona fide* taken place before and on which the charging order would have a retrospective effect. But, as I have said, it seems to me quite unnecessary to decide that question in this case looking to the facts. Under those circumstances it appears to me that the charging order obtained by the solicitors could not be affected or defeated by that which had served its purpose at the time when that charging order was made, and that it in no way affected the right of preference between themselves of the different persons claiming this fund.

Under these circumstances it appears to me very plain that the interlocutor of the Court below ought to be affirmed and this appeal dismissed with costs.

LORD WATSON—Since the facts of this case were explained by counsel, I have seen no reason to doubt that the judgment appealed from is in accordance with Scots law, and ought therefore to be affirmed by the House.

The Dean of Faculty relied in argument upon a statement of the law in Erskine's Institutes (i. 2, 19), a work of great authority, to the effect that an arrestment of moveable property in Scotland belonging to a foreigner, used to found jurisdiction against him, has the effect of creating "a jurisdiction in our Supreme Court to judge in a personal action against the foreigner, proceeding on edictal citation for constituting the debt due by him to the arrester, in order to pronounce a decree of furthcoming against those in whose hands arrestment was used." To obtain a decree of furthcoming, which is a transference of the thing arrested to the arrester, may be an ultimate object contemplated by the arrester, and that is possibly all that the learned author meant to affirm. If he intended to represent that object as being either the purpose or the effect of an arrestment *jurisdictionis fundandæ causa*, his statement is plainly inaccurate, and is not borne out by *Hardie* v. *Liddel*, Morr. Dict. 4830, which he refers to as justifying the text, because the only expression of judicial opinion in that case is contained in the finding that "the arrestment on the Sheriff's warrant founded a jurisdiction to the Court of Session." If the arrester desires to make the moveable which he has

attached available for satisfaction of any decree which he may obtain against the foreign defender, he must use a second arrestment on the dependence of his action in order to interpel the person in whose hands it is laid from parting with the moveable until the action is at an end, and if and when he gets a decree he must use a third arrestment in execution, and it is only in the latter proceeding that he can obtain a decree of furthcoming against the arrestee.

It appears from the case of *Young* v. *Arnold*, Morr. Dict. 4833, which is cited by Mr Erskine in the passage already referred to, that the Court of Session, at the time when his treatise was written, was in use to grant special warrants for arresting *jurisdictionis fundandæ causa* moveables belonging to a foreigner "ay and while he should find caution *judicio sisti et judicatum solvi*." An arrestment in these terms would, unless loosed by the Court on security being given for payment of any sum which might be found due to the arrester, continue to attach until final decree was pronounced in the action. But in modern practice warrants are issued in the form of that used by the respondent in the present case, which bears that the goods, gear, debts, &c., to be arrested are to remain in the hands of the arrester "under sure fence and arrestment *jurisdictionis fundandæ causa*." The sole purpose and effect of an attachment in these terms is to fix the locality of the subjects arrested in Scotland, and thereby to render their foreign owner liable to be convened in a process issuing from the Court of Session at the instance of the arrester for recovery of a personal debt. As soon as the foreign owner has been duly made a party to that process the arrestment is spent, and the arrestee is no longer, as in a question with the arrester, under any obligation to retain in his hands the moveables which it affected. It is a sufficient answer to any charge of breach of arrestment to show that the foreign owner has been made liable to the jurisdiction of the Court of Session in a competent suit at the arrester's instance, founded on the arrestment.

I observe that it was pleaded in the Court below, and the plea is repeated in the appellant's case, that the jurisdiction of the Court of Session over a foreign defender is not complete unless the arrestment to found jurisdiction was subsisting and effectual at the time when his defences to the action became due. That point, which was the main ground upon which the Lord Ordinary gave judgment in favour of the appellant, was not pressed in the argument addressed to us, and is based on a misconception of what was decided by the First Division in the recent case of *Walls' Trustees* v. *Drynan*, 15 R. 359. In my opinion, the *punctum temporis* which must be looked to in considering whether the foreign defender has been effectually made subject to the jurisdiction of the Court is the date of his citation upon the summons. If at that date there is a valid arrestment *jurisdictionis fundandæ causa* against him, and the writ is duly served, the action has commenced, and the jurisdiction of the Court over the defender in that suit is fully constituted. When jurisdiction has been thus constituted it requires nothing to support it beyond the fact that the defender was answerable to the Court at the time when he was served with its process. After that date another creditor of the defender having *parata executio* may carry off the subject arrested or it may perish, but the action already begun will not in either of these cases abate through defect of jurisdiction. That appears to me to be a principle which applies to the exercise of jurisdiction by all Courts irrespective of the particular circumstances which originally gave them jurisdiction. When a party has been competently brought into Court he cannot thereafter escape from its jurisdiction by reason of circumstances supervening which had they originally existed would have exempted him from its process.

In this case the respondent used his arrestment on the 26th May 1887, and his summons was served edictally upon the defender on the following day. The debt arrested was a sum of £419, 11s. 4d., being costs of suit for which the appellant had obtained a judgment of the Queen's Bench Division against the arrestee on the 25th April 1887. On the 13th June, seventeen days after the execution of the summons, Messrs Eldred & Bignold, the appellant's solicitors in the suit in which the judgment for costs was given, obtained a charging order in terms of 23 and 24 Vict. cap. 127, sec. 28.

The main contention of the appellant has been that the arrestment of 26th May did not attach any moveable estate belonging to him. That objection usually takes the form of an assertion that at the date of the arrestment there was no sum due to the objector by the arrestee, an assertion which, if proved, is fatal to the validity of the arrestment. But the appellant was at that date a judgment creditor of the arrestee, and he was therefore driven into maintaining that the arrestment was inept because Messrs Eldred & Bignold had a lien by way of hypothec over the debt. That is a somewhat startling proposition, and one for which there is no authority whatever. Assuming that their lien, when charged by the order of 13th June, might operate in the same way as an intimated assignation by the original judgment creditor, and terminate his interest in the debt so long as the debt remains his property, the mere existence of a lien does not exclude the diligence of others having claims against him. The opinions expressed by the English bench in *Hough* v. *Edwards*, June 1856, 1 H. and N. 171, and *Mercer* v. *Graves*, April 26, 1872, L.R., 7 Q.B. 499, appear to me to clearly show that in the courts of common law a solicitor's lien upon costs decreed does not, until it is converted into a charge by virtue of the statute, prevent their attachment by other persons having claims against the judgment creditor.

The debt in question having been validly attached by the respondent on the 26th May, its assignment by way of charge to Eldred & Bignold on the 13th June could not *per se* affect the jurisdiction previously constituted by service of the summons. The appellant argued, however, that the respondent's arrestment has been made void *ab initio* by the retrospective operation of the statute, and that the citation which followed upon it has consequently become ineffectual. Section 28 enacts that "all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right shall, unless made to a *bona fide* purchaser for value without notice, be absolutely void and of no effect as against such charge or right." It is not necessary to consider to what acts, other than those of the judgment creditor, the enactment was meant to apply, because it cuts down no act which does not prevent the charge from taking full effect. An arrestment on the dependence or an arrestment in execution, followed by a decree of furthcoming, may possibly be without its provisions, but they cannot apply to an arrestment *jurisdictionis fundandæ causa*, which does not in any way obstruct the efficacy of the solicitor's charge.

Upon these grounds I concur with the judgment which has been moved by the Lord Chancellor.

LORD HERSCHELL—I am of the same opinion. As I understand the law of Scotland, in order to found jurisdiction it is necessary that there should exist in Scotland a subject-matter belonging to the foreigner capable of being arrested, and that this condition of things should continue down to the time that the suit is commenced by process. When once these conditions are satisfied the arrestment to found the jurisdiction ceases to have further effect—it no longer binds the property or in any way restrains future dealings with it.

In the present case there did exist a judgment debt due to Colonel North from Mr Welsh, and I do not understand it to be disputed that this was a sufficient subject-matter within the rule applicable to such cases, and that if there had been nothing more in the case than this the arrestment would undoubtedly have been good and the jurisdiction well founded.

The case of the appellant rests entirely upon the fact that the judgment debt was obtained in an action in which Messrs Eldred & Bignold were the solicitors to Colonel North, and that their costs in that action had not been satisfied by Colonel North, and that they had therefore a lien upon the sum recovered to satisfy those costs. I do not understand it to be contended that the mere existence of this common law lien would have been sufficient in any way to prevent the arrestment for the purpose of founding jurisdiction of the debt due from Welsh to North; indeed, upon the authorities which were cited to us by Mr Asher on behalf of the respondent, such a contention would appear to be hopeless. But the appellant rests his case upon the provisions of a statute which enables the solicitor to obtain a charging order, and upon the fact that a charging order was obtained under the provisions of that statute. It is said that the charging order has a retrospective effect given to it by the language of the statute. The argument of the appellant raises some very serious considerations with reference to the extent of that retrospective operation, upon which it does not appear to me to be necessary to pronounce any opinion in the present case. Assuming to the fullest extent the retrospective operation contended for, what does it come to? The statute provides that any acts done to defeat, or any acts which would operate to defeat, the charge shall be void. It cannot be said to have any greater effect than that; and therefore unless it can be shown that there is some act which would operate to defeat the charge, there is nothing to be avoided by giving the fullest effect to the statute.

Now, the arrestment to found jurisdiction clearly could not in any way operate to defeat the charge, inasmuch as at the time when the charge was obtained it was capable of having just as full and complete effect as if there had never been an arrestment to found jurisdiction. That being so, it is obvious that the statute could have no possible effect, and I really am hardly able to follow the argument that because a charging order was obtained under this statute, therefore there was not at the time of the arrestment and down to the time when the process was issued a subject-matter, namely, the debt due to Colonel North, in existence capable of being arrested and sufficiently arrested for the purpose of founding jurisdiction.

LORD MACNAGHTEN—I agree in the view expressed by my noble and learned friends who have preceded me, and in the motion proposed by the Lord Chancellor.

LORD MORRIS—I regret extremely that I am obliged to come to a different conclusion. I accept entirely the law enunciated by my noble and learned friend opposite, Lord Watson, as regulating these matters in Scotland, and I accept in this way, that the point of time to be considered is when the citation by summons was served upon the defender. If at that time there was matter which brought him within the jurisdiction of the Scottish Courts it could not be avoided by subsequent events, apart, of course, from any question upon the Solicitors Statute, which is another branch of the case.

Well, to found this arrestment which gives jurisdiction to the Scottish Courts, as I understand it, there must be a subject-matter existing in the country the property of the defender, the person who is sought to be brought within the jurisdiction of the Scottish Courts. In this case, by the arrestment citation, it is stated to be a debt. The words are:—"On the 26th day of May 1887, the sum of £5000 sterling alleged to be due and addebted by the pursuer, the said

John Welsh, to the defender, the said John Thomas North, was arrested in the hands of the pursuer by Robert Stewart;" "and on the following day, viz., on 27th May 1887, the sum of £5000 was arrested in the hands of the pursuer, in virtue of a precept of arrestment contained in a summons at the instance of the said Robert Stewart against the defender, the said John Thomas North." The question therefore appears to me to be relegated to this, Was there, on this 26th day of May, which as I say, is the date of this arrestment order, a debt due to John Thomas North by John Welsh? I am of opinion that there was not, in the sense in which, as I understand it, there would be a debt due by one person to another, namely, that it could be made capable of execution and of being realised. Colonel John Thomas North appears to have got a judgment in this country, in England, against Welsh for costs. He was the defendant in a suit brought by Welsh; therefore the only judgment which he could get, being a defendant, or did get, was for costs in an action brought against him, and it is so stated in the judgment that the judgment was for the costs of the suit, *prima facie* the property of the attorney, at all events popularly so, unless the defendant in the suit, Colonel North, paid them. That judgment is registered in Scotland, and upon the face of it, as I have already mentioned, it states that it is a judgment for costs.

Now, what is the position between Colonel North and Mr Welsh as regards that judgment which Colonel North had so obtained against him for the costs of the action which he had brought against Colonel North? As I understand it, it is admitted that if a trustee, at all events, obtained a judgment and registered it in Scotland, and if he was a bare trustee for some other person in this country, in England, it could not be contended (and I believe it was not contended) that it would not be a debt which could not be arrested for the purpose of founding jurisdiction, because it would be merely a nominal judgment on the record, and the amount ought to go to his *cestui que* trust. On the other hand, I am free to admit that if there was an ordinary debt between Colonel North and Mr Welsh, upon the authorities, according to this so-called contrivance for creating jurisdiction, there would be jurisdiction, and this arrestment notice would be good. But this is an intermediate case, in which, although Colonel North was plaintiff in a judgment which *prima facie* he would have been entitled to levy from Mr Welsh, and which I quite concede Mr Welsh was entitled to pay him if he did not receive notice, still it was a debt of this character, that there was an inchoate right in the solicitors at any moment to swoop down and say that the debt should be paid to them; and if they gave notice to Mr Welsh, and if after that notice he paid Colonel North, they could go to Mr Welsh and make him pay them over again if they had not been paid by Colonel North. Therefore, in my judgment, undoubtedly there never was at any time such a debt as that the relation of debtor and creditor existed unconditionally between Colonel North and Mr Welsh. I suppose I must be wrong, differing as I do from the view of my noble and learned friends who have preceded me; but I feel very strongly about it, and hopeless as the contention has shown itself to be, still I must say it appears to me very plain that there is no such debt existing between the parties. Upon that short ground I am of opinion that this arrestment order was never properly in existence so as to found this jurisdiction.

I should be quite content to base my judgment upon that simple ground; but if I had to resort to the statute I should also be of opinion that this was not an act which operated to defeat, but an act done to defeat the claim of Eldred & Bignold. It certainly was done with that object, because Welsh had contested in the multiplepoinding suit the right of Eldred & Bignold, and this was the very inception of the transaction which gave him a right to dispute all through that action the right of Eldred & Bignold to recover the amount. I am of opinion that it was an act done to defeat the right of Eldred & Bignold; but as I said before, I quite rest my own judgment upon being clearly of opinion, so far as my judgment can be clear upon any matter, that this was never a debt between the two parties such as was capable of being realised by execution at all—there was this inchoate right of Eldred & Bignold to swoop down upon it and claim it as theirs.

Upon these grounds I am of opinion that the interlocutor of the Lord Ordinary should be affirmed.

Their Lordships affirmed the judgment of the First Division, and dismissed the appeal with costs.

Counsel for the Appellant—D.-F. Balfour, Q.C.—Sir Horace Davey, Q.C.—Odgers—Kennedy. Agents—Eldred & Bignold, for Alex. Campbell, S.S.C.

Counsel for the Respondent—Asher, Q.C. —Wilson—Le Breton. Agent—A. Beveridge, for J. & A. Hastie, S.S.C.

COURT OF SESSION.

Thursday, December 18, 1890.

FIRST DIVISION

(WITH TWO ELDER BRETHREN OF TRINITY HOUSE).

[Sheriff-Substitute of Lanarkshire and Nautical Assessors.

BROWN *v.* BOARD OF TRADE.

Ship—Court of Inquiry—Merchant Shipping Act 1854 (17 *and* 18 *Vict. c.* 104), *sec.* 242—"*Wrongful Act or Default*"—*Suspension of Master's Certificate—Process—Expenses where Appellant Unsucessful but Charge against him Withdrawn on Appeal.*