LORD ARDMILLAN—I agree with your Lordship. Under the least favourable view for him, the pursuer has suffered great pain and injury, and though I agree with your Lordship in thinking that the damages are rather too high, yet we do not interfere with a verdict unless the sum given is preposterously too large. I am of opinion that a verdict as a rule is not to be interfered with on account of emerging circumstances, and I am of opinion that nothing but an extreme case would justify us in interfering with this verdict. I see no reason to doubt the accuracy of the doctors' diagnosis.

LORD MURE—I am of the same opinion. I have some doubts on the simple question of excess of damages, which I think very high; but though I should have given less had I been on the jury, still I have no wish to disturb the verdict on that ground. I entirely concur with Lord Deas in his remarks as to the effect of the evidence, and as to the competency of such a ground for granting a new trial.

LORD PRESIDENT—If it had been my duty to give a verdict, I should not have given £3000; but I agree with your Lordships in thinking that the excess beyond what we think reasonable is not so great as to entitle us to grant a new trial; we never do so unless the damages are excessive, and I am not much surprised that the jury gave heavy damages. The other ground is peculiar, and rather novel. If the case had been tried during session, the verdict would have been applied in a few days, and there would have been no chance of applying for a new trial on such a ground, and so the defenders' opportunity can only be called a piece of luck; but still if they are so lucky as to have a long interval in which circumstances may emerge, I am not clear that under the statute they have not the right to avail themselves of it. All we have to do therefore is to see what is the state of the facts. I am assuming that £3000 was a proper award, but it is said that the medical evidence has turned out untrustworthy, that the doctors represented the case as a hopeless one, and now it turns out that the man is better. I do not think that is enough. If it turned out that the doctors had been utterly wrong in their diagnosis, there might have been something to be said, but I can find no reason in the affidavits for coming to that conclusion. I think their diagnosis is quite accurate, and that the pursuer has sustained permanent and serious organic lesion. Professor Lister's and Dr Watson's certificates seem to be a fair representation of what has happened, and they are still of the same opinion as they were at the trial—though there is abatement of the symptoms, the disease is the same. I think the circumstances do not amount to such an emergence as to make it essential to justice to grant a new trial, so I am for discharging the rule.

The Court pronounced the following interlocutor:—

"The Lords, on the motion of the pursuer, and of consent of the defenders, apply the verdict found by the jury in this cause, and in respect thereof decern against the defenders for payment to the pursuer of the sum of Three thousand pounds sterling in name of damages; find the defenders liable in the expenses incurred by him; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuer—Solicitor-General (Watson) and Gloag. Agent—George Burn, W.S.

Counsel for Defenders—Dean of Faculty (Clark) and Balfour. Agents—Hill & Fergusson, W.S.

Friday, November 27.

FIRST DIVISION.

[Lord Shand, Ordinary.

F. GOETZE & SOHN *v.* ADERS, PREYER, & CO.

Bankrupt—Foreign Sequestration.

A foreign firm trading with this country had been sequestrated in the country of their domicile. An English creditor arrested a sum of money due to them in Scotland, and the bankrupts and their foreign assignee presented a petition for sequestration, with the view of cutting down the preference created by the arrestment. *Held* that the bankrupt's goods wherever situated were carried by the foreign sequestration, and that a second sequestration here was incompetent.

The affairs of the firm of F. Götze & Sohn, and Johann Friedrich Götze, sole partner of the firm, having become embarrassed, they found it necessary to stop payment, and to apply for concurs process or sequestration of their estates in the Court at Glauchau of the Prince and Count of Schönburg, in Saxony, which was awarded on the 2d day of January 1874; and Richard Clauss was appointed trustee on said estates by said Court on the 3d January 1874. At the time when sequestration was awarded, F. Götze & Sohn and Johann Friedrich Götze had moveable goods and effects belonging to them situated in Scotland, which were attached, on 8th December 1873, by particular arrestments used at the instance of Messrs Aders, Preyer, & Company, merchants in Bradford, England, who were creditors of F. Götze & Sohn and Johann Friedrich Götze. The bankrupts, with concurrence of Mr Clauss, on 4th February 1874 applied to the Court for sequestration, which was opposed by the arresting creditors on the ground of the existing Saxon sequestration. The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 4th February* 1874.—The Lord Ordinary having heard counsel for the petitioners in support of the competency of the application, and considered the Petition and productions, Refuses the same.

"*Note.*—It is not alleged that the bankrupts ever carried on business, or had a domicile or residence in this country. Messrs Bentzen & Co., yarn merchants in Glasgow, are alleged to be debtors of the bankrupts, and the debt due by them is said to have been arrested by one of the bankrupts' creditors. The schedule of arrestment *ad fundandam jurisdictionem* has been produced, and is the sole foundation for the statement in the Petition that the bankrupts 'are subject to the jurisdiction of the Supreme Courts of Scotland.' It was explained that the object of the Petition was to cut down a preference which otherwise might possibly be acquired by one of the creditors over the others.

"The application is rested on section 13th of the Bankrupt Act (1856), which provides that

sequestration may be awarded 'in the case of a living debtor, subject to the jurisdiction of the Supreme Courts of Scotland;' and it was maintained that this requirement of the Statute is satisfied by the arrestment which has been used to found jurisdiction. No case has hitherto occurred in which sequestration of the estates of a person who has neither resided nor carried on business in this country, and against whom jurisdiction has only been constituted by arrestment, has been granted, although the Bankrupt Statute has been in operation for eighteen years. The Lord Ordinary is of opinion that the words 'subject to the jurisdiction of the Supreme Courts of Scotland' cannot be extended in their meaning and application, on a sound construction of the Statute, to such a case as the present. The jurisdiction founded by arrestment has a limited effect, enabling only the person who has used the arrestment to maintain the jurisdiction in a question with him; and it appears to the Lord Ordinary that it cannot be the true meaning of the Statute that a sequestration should be granted, with all its consequences of having a trustee and commissioners appointed, claims lodged by creditors, and the trustee and bankrupt discharged, merely because the bankrupt has, it may be, a single debt due to him in this country, which has been made the subject of arrestment. The bankrupt must be subject to the jurisdiction the Court in the ordinary sense to all effects, and not to the limited effect of being bound to meet the demand of a particular creditor. The Lord Ordinary has therefore refused the Petition."

The petitioners reclaimed.

At advising—

Lord President—This is a petition for sequestration of F. Götze & Sohn, and of Johann Friedrich Götze, the only surviving partner of the firm. It is stated in the petition "that the affairs of the said F. Götze & Sohn, and of the said Johann Friedrich Götze, the only partner of said firm, having become embarrassed, they found it necessary to stop payment, and to apply for concurs process or sequestration of their estates in the Court, at Glauchau, of the Prince and Count of Schönburg, in Saxony, which was awarded on the 2d day of January 1874, and the petitioner, Richard Clauss, was appointed trustee on said estates by said Court on the 3d day of said month of January 1874." Mr Götze's trade was carried on entirely in Saxony, where he had his domicile. Of course he had foreign correspondents, and in consequence it happened that at the date of the sequestration certain goods belonging to the firm were in the hands of Messrs Bensen & Sinclair in Glasgow, and these were arrested by certain creditors in England, Messrs, Aders, Preyer, & Co. This occurred in the month of December preceding the Saxon sequestration. On the 4th February following, a petition was presented to the Lord Ordinary, and was refused by him. The petitioner reclaimed, and at this stage the arresting creditors began their opposition. We heard parties, but could not deal with the case until we knew the nature and effect of the title of Mr Richard Clauss, the trustee in the Saxon sequestration. This has led to delay. We hoped the parties might have been able to lay before us a joint statement as to these points, but unfortunately it was found that they could not agree, and so it became necessary to have evidence as to Mr Clauss' title. A case was prepared for the opinion of Saxon Counsel, and we have it now before us. It is quite unnecessary to go minutely into it, because it shows that Mr Clauss' title is universal in so far as regards moveables; it carries the bankrupts' moveables everywhere. In short, the trustee's title is of the same kind as that of a trustee in Scotland or an assignee in England. It would be improper to offer any opinion as to the effect of the arrestment by the respondent. We have not the materials for forming one, and hereafter there may arise a competition between Mr Clauss and the arresters. The only question we have to deal with here is, Whether sequestration should be awarded in terms of the prayer of the petition. This seems a strange application to be made by the bankrupt and Mr Clauss. He asks that sequestration may be awarded, while he already has a complete title. Whether he supposed that something of the nature of partial sequestration could be awarded, I am not able to say; but if so, such an idea is quite unfounded and really wild, for nothing is clearer than that we must follow the terms of the Bankrupt Act in granting sequestration, and therefore to grant the prayer of this petition would be to sequestrate over again an estate which has been already sequestrated in Saxony, and to grant a title which would conflict with the title of the trustee there. Mr Clauss cannot think that he will be appointed, being an alien, and so the effect would be to lead to the appointment of a Scotch trustee, who would be vested with a title co-extensive with that of Mr Clauss. It is impossible to conceive anything more inconsistent with international law, of which *mobilia non habent situm et sequuntur personam* is a universal maxim. The succession to a moveable estate is regulated exclusively by the law of the domicile, and hence arises the practice of giving confirmations to foreign executors, whether nominate or at law. So also, all conveyances of moveables receive effect here as if they had been made here, and it does not in the least matter how they were made. Now it would be inconsistent with this principle to deny the same privilege to involuntary and judicial transmissions, and so such a title as Mr Clauss' always receives effect as a good transmission. This general principle has been acknowledged both in Scotland and England from an early period. The well known case of *Strother* v. *Reid*, 1 July 1803, 13 F. C. 253, M. App. For. Comp. In that case the bankrupts were English, but the creditors arrested some of their goods in Scotland, and a competition arose between the assignees and the arresting creditors, the English assignees being preferred because they had a prior title. At that time England was a foreign country; but if any specialty may be supposed to have arisen from that I may mention the case of *Maitland* v. *Hoffmann* (4th March 1807, 13 F. C. 622, M. App. 26, Bankruptcy), in which a precisely similar judgment was given. In both these cases, and in many others, the arrestment was posterior in date to the commission of bankruptcy. The principle is to give effect to the title of the foreign trustee as from its date. Such regulations as may be introduced in different countries as to preferences can receive no effect *extra territorium*. In the case of *Hunter & Co.* v. *Palmer & Wilson* (25th February 1825, 3 S. 402), a question of this kind having arisen, the assignee under an English bankruptcy

having come here and competed with certain English creditors, the Court refused to give effect to the regulations of the English Court. Now, keeping these general principles in view, let me revert to the fact that Mr Clauss has already a complete title to the moveables—as good a one as he could get here. Now, what is his object? It is quite plain. If sequestration were awarded, as of date February 1874, it would operate to cut down any preference which may be held by Messrs Aders, Preyer, & Co. But while that is plainly his object, which may be a perfectly fair one, we must consider whether the means taken to accomplish it are legitimate. It appears to me that the reverse is the case. It would be to upset an established principle of international law if we were to grant the prayer of this petition. A very similar question arose in the case of the *Royal Bank* v. *Smith, Stein, & Co.*, 20th January 1813, F. C. The bankrupts carried on business in London and Edinburgh. Subsequently to the bankruptcy in England the Bank applied for sequestration here, because of the existence of the prior sequestration in England. There the bankrupts were Scotch traders; and it might have been possible to administer the estate under two commissions, though great difficulty would have arisen in the distribution, but still there was the plausible ground that the bankrupts were Scottish traders. Here they have nothing whatever to do with Scotland. The grounds of judgment are so well stated in that case by Lord Robertson that, in conclusion, I shall ask your Lordships' attention to a few passages. "It is a question of great importance what is the effect in Scotland of an English commission of bankrupt. In my opinion, the effect to be given to it in every country where the true principles of international law are understood, is, that it must carry the whole effects belonging to the bankrupt. It is a principle which has long been established, that moveables have no locality, they follow the person of the owner, and their condition is governed by the law of his domicile. It may be said that this is a fiction, and it is so; but it is a fiction introduced upon the soundest principles of justice, and in practice has been attended with the most beneficial consequences. It has been confirmed by repeated decisions, and it is a principle which your Lordships will not now shake. . . . This indeed was settled in Scotland in the case of *Strother* v. *Reid*. It is impossible for your Lordships to overlook the effect of this decision, in which the principles which I have mentioned were most fully recognised by a most solemn and deliberate judgment. It is said that the jurisprudence of the country where the transactions are entered into is an essential part of the contract between debtor and creditor. This is certainly true, but what is the inference from it? It is as good in the mouth of an English creditor as of a Scotch creditor, and the result would be that there must be two commissions going on *simul et semel*, with all the inextricable consequences that must follow from such a system. It is impossible for your Lordships to listen to this doctrine without flying in the face of the principle of law that moveables follow the person."

It seems to me that to priority in point of time we must give effect here.

Lord Deas—This petition for sequestration was presented on February 4, 1874. The petition itself is entirely in form, and is just such as would have been presented if the debtor had been living here. It appears that he lives and carries on business in Saxony. Two objections have been taken to it; one, that the debtor was not liable to the jurisdiction of this Court, which was said to be founded on arrestment, and the other was in respect of the prior Saxon sequestration. The Lord Ordinary has dealt entirely with the first, but when the case came before us it appeared to the Court that there was a more important question involved, viz., Whether there could be a second sequestration? It was on the footing of that very important question that your Lordships directed the opinion of Professor Endemann to be taken in order to ascertain the effect of the Saxon sequestration. We have his opinion before us, and I think it is a very able and a very satisfactory opinion; I cannot say that I ever saw one more so. The result is, that there has been what we should call an effectual sequestration awarded in Saxony on January 2, and I am clearly of opinion that where there is a competent sequestration in any one country, it carries the debtor's moveables wherever situated. I am quite clear, both on principle and authority, that we should have held a sequestration here to have done so. The application before us here being in the usual form, the question arises whether a second sequestration is competent. There is nothing else asked for, and all we need consider is, whether the application is competent, and when we have decided that we have no materials for going further. It is difficult to see how a foreign trustee is to get possession of an estate here, except under any burden attaching to it at present, but we have not at present to deal with that. I agree with your Lordships that where there has been one regular sequestration awarded in another country, that excludes a second there.

Lord Ardmillan—I do not think it necessary to rest the decision of this case on the plea that jurisdiction to support the petition for sequestration has not been constituted by the arrestments used *ad fundandam jurisdictionem*. On that point I shall not express an opinion, because I think we have a ground of judgment broader and more important, and quite sufficient for disposal of the cause. I accordingly concur with your Lordships in placing the decision on the separate ground, which I think sound and most important, to which your Lordships have directed attention.

The decisions in the case of *Strother* v. *Reid* in 1803, and in the case of *Selkrig* in 1805, and in the more recent and more serious case of *Stein & Coy.* in 1816, are of the highest authority, and really conclusive. They are recognised by Professor Bell as settling the law on the subject. Moveables have no locality which law can recognise. They follow the owner, and personal estate is held as situate where the bankrupt had domicile, and is to be administered according to the law of the country where he is declared bankrupt. Therefore a sequestration—or other process equivalent to sequestration—in one country, if there effectually issued, must embrace and attach the whole moveable estate of the bankrupt wherever situated. A second attachment by a second sequestration of equal scope and comprehensiveness, while the first is extant and in force, is unnecessary and un-

reasonable, and indeed is contrary to sound principles of international law.

In my opinion the German or Saxon sequestration did in this case embrace and attach all the personal property of these debtors. We are bound, on principles of international law, to recognise it, and to give it effect, and we are therefore bound to refuse to interpose by a second sequestration.

The opinion which we have from the learned German Jurist, Dr Endemann, is interesting, instructive, and important, and his exposition of the universality of the attachment by sequestration of the whole personal estate of the bankrupt, according to the principles of international law, is very valuable.

The opinion which your Lordship has now expressed is in entire accordance with the German law and the international law explained in the opinion of Professor Endemann, and is equally in accordance with the law authoritatively settled by the Scottish decisions to which I have already referred.

I concur so entirely in your Lordship's opinion and observations that I shall not add another word.

LORD MURE concurred.

The Court pronounced the following interlocutor:—

"The Lords having resumed consideration of the cause, and heard counsel on the Reclaiming Note for the Petitioners against Lord Shand's interlocutor, dated 4th February 1874, with the Minute of Objections for Aders, Preyer, & Company, and Answers thereto for the Petitioners, Nos. 15 and 16 of process, and also the case for the opinion of German counsel, and the opinion thereon by Professor Doctor Endemann, Nos. 18 and 21 of process—No. 19 of process being a translation of the said opinion,—Adhere to the said interlocutor; find the said Aders, Preyer, & Company entitled to expenses since the date of the Lord Ordinary's interlocutor reclaimed against; allow an account thereof to be given in, and remit the same, when lodged, to the Auditor to tax, and report."

Counsel for Petitioners—Solicitor-General (Watson) and Trayner. Agents—Ronald, Ritchie, & Ellis, W.S.

Counsel for Respondents—Dean of Faculty (Clark) and Balfour. Agents—Frasers, Stodart, & Mackenzie, W.S.

Saturday, December 19.

SECOND DIVISION.

[Lord Shand, Ordinary.

BRAND'S TRS. *v.* BRAND.

Succession—Heritable and Moveable—Lease of Minerals—Fixtures—Heir and Executor.

A tenant of minerals under a lease of nineteen years erected upon the land fixed machinery for working the minerals; during the currency of the lease the tenant died—*held*, in a question between the heir-at-law and the executor, that the machinery belonged to the executor and not to the heir.

Opinion per Lord Gifford—That even had the fixed machinery been held to be heritable in a question as to the tenant's intestate succession, yet, not being a subject heritable *sua natura*, but merely *destinatione*, it was effectually carried by the trust-disposition of a minor.

The pursuers, the trustees of Mr Brand senior, set forth in their condescendence the following facts:—Robert Brand, coal master, Wishaw, died on 26th January 1873, leaving a trust-disposition and settlement dated 7th January, by which he left his whole means and estate to the pursuers as trustees and executors in trust. The purposes of the trust were, in the first place, after payment of all the truster's just and lawful debts, sick bed and funeral expenses, and the expenses of executing the trust, to make payment to the defender Mrs Catherine M'Neil or Brand, his mother, of an annuity of £15 sterling, free from all deductions; as also to provide her during her life with a house of one apartment, and to pay the rent and taxes thereof; In the second place, to provide the defender Isabella Cross or Dunn with a house of one apartment, and pay the rent or taxes thereof during the whole of her life should she always remain a widow. The third purpose was to invest £2000 on heritable security or on such other security approved of by the pursuers, and to pay the interest to the defender Jessie Robertson or Brand, the truster's wife, in the event of her surviving him, for her own support, and also to allow her to occupy, free of rent, either of one of two dwelling-houses belonging to the truster. But declaring that, in the event of her entering into another marriage, the provision in her favour should immediately cease, and in place thereof the pursuers were to pay to her the sum of £500 sterling, either on the date of her other marriage, or within three months thereafter, as they might think most expedient. The fourth purpose was that the pursuers should manage and preserve the residue and remainder of the truster's estate, heritable and moveable, thereby conveyed, for the use and behoof of his only son Robert Brand, until he attained majority, and until that period the truster appointed the pursuers to pay and apply the rents, interests, and annual profits, or so much thereof as they might consider necessary for and towards his maintenance and education, when and so long as in the opinion of the pursuers might be deemed expedient. In the fifth place, the pursuers, after the second marriage or death of his wife, were to pay and apply the interest or other annual income to be derived from the sum of £2000 sterling, to be invested for the purpose of providing a yearly income for his wife, or from the portion of the £2000 which might remain after payment to his wife of the £500 before provided, or so much thereof as his trustees might consider necessary towards the maintenance and support of his son Robert; declaring that it should be in the power of the pursuers at any time during the minority of his son to make advances for placing him out in any profession or employment; and upon his son's attaining majority the truster directed the pursuers immediately to convey his heritable and moveable estate to his son Robert; but specially providing, that in case his son should die, leaving lawful issue, before he attained the age of twenty-one years complete, then such issue should be entitled to the residue of the truster's estate to which