a share. Nor is there the slightest indication in the deed that the truster contemplated two periods of vesting.

There is a difficulty which I do not attempt to disguise with regard to the provision by which the lawful issue of a child predeceasing the terms of payments is to succeed to the parent's share. This would seem to point, in the case of the daughters at least, to the period of the widow's death. But upon considerrtion of the whole deed, I am of opinion that this is not the meaning of this clause.

LORDS NEAVES, ORMIDALE, and GIFFORD concurred.

The Court adhered.

Counsel for Reclaimer — Asher — Darling. Agents—Mackenzie,—Innes & Logan, W.S.

Counsel for Respondents—Gloag. Agents—Gillespie & Paterson, W.S.

Friday, October 22.

FIRST DIVISION.

[Sheriff of Lanarkshire.

WILSON *v.* MACKIE.

Damages—Wrongous Arrestments—Malice—Want of Probable Cause

In an action of damages for injury alleged to have been caused by the arrestment of the pursuer's personal funds upon the dependence of an action against him as executor—*held* (*dub.* Lord Deas) that proof of malice and want of probable cause was not necessary.

This was an appeal from the Sheriff-court of Lanarkshire in an action of damages at the instance of William Wilson, baker, Glasgow, as an individual and as executor of the deceased John Wilson, against Archibald Mackie, provision merchant, Glasgow, as an individual, and against him and his son Archibald Mackie junior, as partners of the firm of Archibald Mackie. Previously to the raising of this action there had been various legal proceedings between the parties in the Sheriff-court of Glasgow; in particular on 4th December 1872, the defenders, or one or other of them, had raised a summons against the pursuer, in his capacity of executor, for a balance of £142, 6s. 6d., which they alleged to be due to them by the deceased John Wilson. The pursuer averred that the defenders maliciously, without probable cause, and for the purpose of injuring his personal credit, had, on the dependence of that action, used arrestments in the hands of various persons of funds belonging to the pursuer personally, and not in any way connected with the executry estate, these arrestments proceeding upon the warrant contained in the foresaid summons against the pursuer as executor. None of the executry funds were ever held by any of the parties in whose hands the pursuer's funds were thus arrested. The schedules of arrestment used were in the following terms:—"I, Alexander Macintyre, sheriff-officer, by virtue of a libelled summons from the Sheriff-court books of Lanarkshire, containing warrant to arrest, dated at Glasgow, the fourth day of December 1872 years, raised at the instance of Archibald Mackie, provision merchant, 82 Main Street, Anderston, Glasgow, *pursuer*, against William Wilson, baker, Thistle Street, Glasgow, executor decerned and confirmed to the late John Wilson, baker in Glasgow—in Her Majesty's name and authority, and in that of said Sheriff, lawfully fence and arrest in the hands of you, the sum of Three hundred pounds sterling, more or less, due and addebted by you to the said William Wilson, together also with all goods and gear, debts, sums of money, or any effects whatever, lying in your hands, custody, and keeping, pertaining, or in any manner of way belonging to the said William Wilson, or to any person or persons for his use and behoof, all to remain under sure fence and arrestment, at the instance of the said pursuer, aye and until payment be made or security be found, acted in the Sheriff-court books for Lanarkshire, as accords of law, with certification.—This I do upon the seventh day of December 1872 years, before Alexander Macintyre junior, residing in Glasgow, *witness*."

A petition for the loosing of these arrestments was presented to the Sheriff, which was granted without caution, and his judgment was sustained on appeal. The judgment proceeded on the footing that it was the personal and not the executry funds of the pursuer that had been arrested. In the present action the sum of £150 in name of damages was claimed for the loss, injury, and damage which the pursuer had sustained through the actings of the defenders, or of one or other of them. The defenders pleaded that the arrestments had been legally and regularly laid in virtue of a warrant of Court.

The defender Archibald Mackie senior having been sequestrated, his trustee did not enter an appearance, and on 15th July 1873 the Sheriff-Substitute pronounced an interlocutor holding him confessed, and decerning against him as libelled.

Archibald Mackie junior being thus the only defender, the Sheriff-Substitute (GUTHRIE) after a proof pronounced the following interlocutor:—

"*Glasgow*, 10*th December* 1874.—Finds that the individual defender Archibald Mackie junior maliciously and wrongously caused the arrestments libelled to be used against the funds of the pursuer: Finds him liable in damages therefor jointly and severally with the other individual defender Archibald Mackie, against whom decree by default has already passed for the whole sum sued for: Assesses the said damages at £25: Finds the defender Archibald Mackie junior liable in expenses.

"*Note.*—In the conjoined actions between the same parties the Sheriff-Substitute has found that a partnership exists between the Mackies to the effect at least of making them responsible to the present pursuer in respect of his claim in that action. But he is not sure that the principles of agency on which he proceeded there are applicable to a claim of damages for a malicious and illegal act which is not properly within the agency of a partner acting for his firm. Possibly the Sheriff-Substitute may take too narrow a view of a firm's liability for the way in which its members use arrestments in the course of their business. But he thinks that in the present action, which is directed against both the Mackies, as individuals as well as partners, and concludes

for decree against them jointly and severally, the justice of the case may be arrived at by decrees against them as individuals, leaving the firm out of the question.

"There is no direct proof of malice on the part of the younger Mackie. But there is a clear proof of malice on the part of the father; and considering that the younger Mackie was the avowed pursuer of the action on the dependence of which the arrestments were used, as well as the proved relations between the parties, and the nature of the arrestments, which were entirely disconform to their warrant, and were therefore recalled by this Court without caution, the Sheriff-Substitute thinks that he is bound to impute that legal malice to the son also, now the only defender."

On appeal the Sheriff-Principal (DICKSON) pronounced the following interlocutor:—

"*Glasgow*, 11*th March* 1875.—Adheres to the interlocutor appealed against, except in so far as it assesses the damages in question at £25 sterling, and decerns for that sum: In lieu thereof assesses the same at £10 sterling, and decerns therefor with interest as libelled.

"*Note.*—The only question submitted to the consideration of the Sheriff on the appeal was the amount of damages; the defenders' agent frankly admitting (what could hardly be disputed) that damages had been incurred.

"As to their amount, the Sheriff has considerable difficulty. On the one hand, merely nominal damages are not enough; for it is evident that the locking up of the funds of a man in business must cause him annoyance and trouble, and tends to impair his credit. On the other hand, the original pursuer was unable to specify any damage which he had incurred, or to say that any customers had left him in consequence of the arrestments in question. In these circumstances it is thought that £25 is too large a sum to meet damage of a not very tangible kind, and that £10 is a fairer sum.

"The full amount of expenses has been allowed, because the case was not appropriate for trial under the Small Debt Act."

Archibald Mackie junior appealed to the First Division.

Argued for him—The schedules of arrestment were ambiguous, but if it should be held that they were directed against executry funds alone, then malice and want of probable cause must be proved upon authority of *Brodie* v. *Young*, 13 D. 737. The Sheriff was wrong in holding that malice of Mackie senior attached to Mackie junior. In any case ambiguity in a schedule of arrestment was ground for very small damages.

Argued for Wilson—This is really a case of arrestment without warrant. There was therefore no need to prove malice and want of probable cause. The action had been treated by parties all along as one against the firm, so that Mackie junior was in any view liable.

Authorities cited—*Brodie* v. *Young*, Feb. 19, 1851, 13 D. 737; *Meikle* v. *Sneddon*, March 5, 1862, 24 D. 720.

At advising.

LORD PRESIDENT—This is an appeal from the Sheriff Court of Lanarkshire, in an action which has arisen out of previous litigation and counteractions between the parties and proceedings in connection therewith. William Wilson, baker, Glasgow, is the pursuer, and in this action he claims damages for wrongous use of the arrestments by the defender, upon the dependence of a previous action at the instance of the latter against himself in his capacity of executor of the deceased John Wilson. Arrestment may be used in two ways, each of which may in a different sense be said to be wrongous. Property may be arrested under warrant on the dependence of an action, and it is rightly so arrested, unless the party arresting act with malice and without probable cause. But if an action is raised, and arrestment thereupon is used without warrant, and therefore wrongously, then the term "wrongous" has a different signification, and the party so using arrestment is answerable for the consequences. In such a case it is not necessary to prove malice and want of probable cause. This is the nature of the present case. This action, upon the dependence of which the defender used arrestment, was laid against William Wilson as executor of John Wilson, for a debt due by the executry estate. William Wilson was not personally liable for any part of that debt, nor at all beyond the extent of the executry estate. The warrant of arrestment in the summons authorizing the use of arrestment gave no right to touch the personal funds of the executor, yet that was what happened. In the petition for loosing arrestment, which proceeded on the narrative that the personal funds of William Wilson, the arrestee, had been attached, the Sheriff granted the prayer of the petition without caution, and his judgment was affirmed in this Court. This is a material circumstance in the case. Had it been necessary to prove malice, I should have had difficulty in concurring with the opinion of the Sheriff-Substitute. He holds that Mackie acted maliciously, but I am bound to say I can find no evidence of this. He further thinks that Mackie junr., in any event, whether malice be proved against him personally or not, must be saddled with a kind of vicarious malice for his father, against whom he finds malice clearly proved. To such a proposition I cannot assent, and that interlocutor cannot stand. I must find that the arrestments have been wrongously used; and as to the amount of damages to be given, I adhere to the interlocutor of the Sheriff Principal.

LORD DEAS—In this action, assuming damages to be given to the pursuer, I agree with your Lordship that the sum at which the Sheriff-Principal has assessed these is reasonable and fair. In regard to the question whether or not malice and want of probable cause must be proved to entitle the pursuer to succeed, I think there is great difficulty; and I entertain doubt whether this case is an exception to the general rule. This schedule of arrestment, it was argued, should have been directed against executry funds alone, but from an error in framing it the funds of the individual were arrested. This is hardly so strong a case as that of an arrestment without warrant, and I hesitate before coming to the conclusion that such a mistake renders unnecessary proof of malice and want of probable cause. Supposing malice to be necessary, I can hardly approve of the logic of the Sheriff-Substitute, which attributes to the younger Mackie the malice of the elder.

LORD ARDMILLAN—If it is necessary to the

pursuer's case to prove malice, I cannot accept the doctrine of the Sheriff-Substitute, that the malice of the elder Mackie applies to the younger. Malice is purely personal and must be within one's own heart. But is malice necessary and must it be proved? I think it right to say that I hold there is a distinction between the use of diligence wrongfully and nimiously, where there is no debt due, but upon legal warrant, and the use of diligence upon no warrant at all. In the former there is good ground of action, but malice must be proved. Where arrestment is used without legal warrant, the effect is different. Here the warrant gives power to arrest the goods of one party, and it is used to arrest those of another *persona*. The arrester proceeded *ultra fines decreti*, and used it illegally. Therefore I am of opinion that malice and want of probable cause need not be proved here.

Lord Mure—The question whether it is necessary to libel malice and want of probable cause in this action is one attended with delicacy and difficulty. I am of opinion that the circumstances of this case fall under the rule of law as laid down by the Court in the case of *Meikle* v. *Sneddon*, 24 D. 720, and that proof of malice and want of probable cause is therefore not necessary.

The Court pronounced the following interlocutor:—

"Recall the interlocutors of the Sheriff-Substitute and the Sheriff, dated respectively 10th December 1874 and 11th March 1875; find that the firm of Archibald Mackie, provision merchants, 82 Main Street, Anderston, Glasgow, and the individual defender (appellant) Archibald Mackie junior, one of the partners thereof, caused the arrestments libelled to be used against the personal funds of the pursuer (respondent) William Wilson, executor of the deceased John Wilson; find that the said arrestments were so used wrongously and without legal warrant; find the said firm of Archibald Mackie and Archibald Mackie junior, one of the partners thereof, liable in damages therefor jointly and severally with the other individual defender Archibald Mackie, the other partner of said firm, against whom decree by default has already been pronounced in the Inferior Court for the whole sum sued for; assess the said damages at the sum of ten pounds sterling, and decern therefor with interest as libelled against the said firm of Archibald Mackie and the said Archibald Mackie jun., one of the partners thereof; find the said firm of Archibald Mackie and the said Archibald Mackie junior liable in expenses, both in the Inferior Court and this Court; allow accounts thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuer—Scott. Agent—George Begg, S.S.C.

Counsel for Defender — Thoms—Trayner. Agent—Lindsay Mackersy, W.S.

Friday, 22d October.

SECOND DIVISION.

[Lord Mackenzie.

BLAIR *v.* RAMSAY.

Property—Servitude—Superior and Vassal—Minerals—Reserved Right.

A acquired three parcels of land from B by three separate titles. In the first of these titles B reserved "the coals and coal-heughs to be won and disposed upon at our pleasure;" in the second, he reserved "the whole coal, stone quarries, and all other metals and minerals, with power to search for, work, and carry away the same;" and in the third he reserved "the coal, with full power to dig for, work, win, and carry away the same." B was proprietor of land on either side of A's property, and let the whole coal-field on lease to C, who made a mine under and through A's land, whereby he conveyed coal and minerals worked there, and on B's property beyond, to the surface. *Held* (1) that the rights to coal and other minerals reserved were rights of property belonging to B; (2) that the wastes caused by the minerals being exhausted also belonged in *plenum dominium* to B; and (3) that B's right of carriage was one of servitude, and did not extend beyond the limits of the lands conveyed to A.

This was an action at the instance of James Blair of Glenfoot, Clackmannanshire, against Robert Balfour Wardlaw Ramsay of Whitehill and Tillicoultry, and the Alloa Coal Company in the following circumstances:—

The pursuer was proprietor of certain lands of which the defender, Mr Wardlaw Ramsay, was superior. In the first place, the pursuer acquired from a predecessor of the defender the lands of Langour, and in the titles of that property, dated in 1825, there were reserved to the superior his heirs and successors "the coals and coal-heughs of the said haill lands to be won and disposed upon by me and my foresaids at our pleasure and the right of all others."

In the second place by contract of excambion, dated 25th August 1857, the pursuer acquired from Mr Ramsay's predecessor three acres of the lands of Westqarter of Coalsnaughton, "reserving always to the said Robert Wardlaw Ramsay, and his heirs and successors, the whole coal, stone-quarries, and all other metals and minerals within the said three acres of the lands of Westquarter hereby disponed, with power to search for, work, and carry away the same."

In the third place, the pursuer further, under contract of excambion with Mr Wardlaw Ramsay, dated 21st and 24th September 1857, acquired certain other lands, the coal in which was specially reserved to Mr Ramsay in the following clause of the deed:—"But excepting always the coal within the said several subjects above disponed to the said James Blair, which coal is hereby expressly reserved to the said Robert Balfour Wardlaw Ramsay, with full power to him to dig for, work, win, and carry away the same, on paying surface damages which the ground may thereby sustain, as the same shall be ascertained by two persons to be mutually chosen by the said parties,