he was in good or bad faith in building his house. There are a great many circumstances which bear upon this point. The defender here produces no written title, but he avers that the ground upon which the house is built was sold in 1861 by the defender's father to the Duke of Hamilton. He further states—"The defender's father, however, did not include in his disposition of sale to the Duke his rights and interests in the portion of the common muir of Redding as presently possessed by the defender, upon which he lately built a house." The disposition has been produced, and we can see how far that contention is supported by the title. There is conveyed by that deed "All and Whole the lands of Middlerig . . . . with the share and proportion of the common muir of Redding given and allotted to the said lands of Middlerig by the decree of division of the same,"—so that that subject is expressly conveyed by the disposition. There is no doubt a reservation of certain lands called Herdeshill, Now, if the defender's house had been built upon Herdeshill, he would, so far as the disposition goes, have a good title, or at least the foundation of one, which he could have no difficulty in proving, for there is an obligation in the deed to produce these titles. But the defender knows that the house is not built upon Herdeshill. That defence was unfounded, and contradicted by the terms of the disposition to which reference has been made.

But he further says when he is examined as a witness, that if he has no title neither has the pursuer, and the property belongs to the Carron Co. In this way he exposes himself by his own statement to a claim of removing at the instance of the Carron Co. The whole object of his proof is to show that the house is built upon their ground, and apparently that it was put there expressly because the Carron Co. and not the Duke of Hamilton were the proprietors. These are important circumstances in the consideration of the question of *bona* and *mala fides*. It is quite plain that when the defender built the house he not only had no title, but that he knew that he had none. That view is supported from the evidence by what took place afterwards. The pursuer's factor says that in the month of January or February 1872 the defender called upon him and asked permission to get a piece of ground to build a house upon, which was refused. He was further informed by letter that the Duke was not to grant any more leases; and the first time the defender was cautioned by the factor was before he began to build. In what the factor states upon this matter he is corroborated by other testimony. The defender's case is thus placed in a very awkward position. We begin with a contention that he himself has a title to the ground. He then shows a consciousness that he is wrong in that by going to ask the permission of the factor to build upon the ground which was not his, and permission was refused. He has thus put himself in the position that his grounds of defence shift about with the most wonderful dexterity. And when the disposition is produced the defender then insists that his house is built upon the Carron Company's ground.

I search in vain for any evidence in support of the findings in point of fact in the Lord Ordinary's interlocutor. I think there is nothing to justify them, and it is upon them his Lordship has constructed the legal deduction he makes. The defender was in *mala fide* in this case, and therefore I use in reference to this case the very emphatic words of Lord Fullarton in the case of *Barbour* v. *Halliday*, July 3, 1840, 2 D. 1279—"He had not even a title challengeable; he had no title at all, and he knew it." That is quite the position of the defender here.

But it occurs to me that while it is impossible to sustain any defence founded upon *bona fides*, there may be one which is not stated here. The summons concludes for decree only as regards the piece of ground, and does not conclude for removing from the house. No doubt the defender cannot remove from the ground without removing from the house also. But there may be a question how far the house or its materials are removable? I only mention this for the purpose of saying that no such question as that is determined by the judgment which I propose your Lordships should pronounce here. The defender had an excellent offer made him of a lease from the pursuer at a very small rent, and if the advisers of the Duke have still in mind to make the same terms, I think the defender would do well to come to an arrangement. In the meantime, my opinion is entirely adverse to the defender, and I think we must pronounce decree of declarator and removing against him.

LORDS DEAS, MURE, and SHAND concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming-note for the pursuer the Duke of Hamilton, against Lord Craighill's interlocutors, dated 28th June and 10th July 1876, Recal the said interlocutors: Repel the defences, and declare and decern in terms of the conclusions of the libel: Find the defender liable in expenses, allow an account thereof to be given in, and remit the same to the Auditor to tax, and report."

Counsel for Pursuer (Reclaimer)—Asher—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defender (Respondent)—Mair—Rhind. Agent—William Officer, S.S.C.

Friday, February 2.

FIRST DIVISION.

[Lord Shand, Ordinary.

WYPERS *v.* HARRISON CARR & CO.

Diligence—Arrestment ad fundandam jurisdictionem—*Bankrupt*—19 *and* 20 *Vict. cap.* 79, *sec.* 103.

Held that an arrestment used *jurisdictionis fundandæ causa* in the hands of a bankrupt's trustee, who deponed that he had not funds sufficient to pay the expenses of sequestration, was ineffectual as it had attached nothing, and as any estate that might afterwards belong to the bankrupt did not vest in the trustee until the date of its acquisition or the

succession to it in terms of the 103d section of the Bankruptcy Act.

A bought coals from B and paid the price to him; C raised an action against A for that price, alleging that B was merely his agent, and used arrestments in the hands of B.'s trustee in bankruptcy to found jurisdiction against A. *Question* whether A's claim of repetition from B, available only in the event of C's success in his action, was arrestable *jurisdictionis fundandæ causa.*

P. & R. Wyper, coalmasters at Motherwell, brought this action against Harrison Carr & Company, coal merchants in Newcastle, for the price of two cargoes of coal delivered to the defenders by Frank Lindsay, merchant and shipbroker, of Leith, who was, the pursuers alleged, their authorised and accredited agent. When the account for the coals was rendered to the defenders by the pursuers, they refused payment, on the ground that they had purchased direct from Lindsay, and were not indebted to the pursuer, denying that Lindsay either was or was reputed to be agent for the pursuers. Lindsay's estates were sequestrated in April 1874, and the pursuers on raising this action used arrestments in the hands of his trustee, in order to found jurisdiction against the defenders. The defenders alleged that at the date of the arrestment they had no claim against Lindsay's estate, and their first plea in law was, "No jurisdiction, in respect that the arrestments used have not attached any funds of the defenders in Scotland." The Lord Ordinary allowed the pursuers a proof of their averment that funds were attached by the arrestments, and to the defenders a conjunct probation. The trustee on Lindsay's bankrupt estate was examined, and gave this account of his position—"All the assets that Mr Lindsay left were his office furniture, which was sold and realised about £50. I do not think that after paying the rent there will be as much left as pay the expenses of the sequestration. There are no funds for division amongst the creditors." It further appeared from the proof that the defenders paid Lindsay for the coals.

The Lord Ordinary pronounced the following interlocutor and note:—

"*Edinburgh, 6th July* 1876.—Having heard counsel and considered the cause, Finds that by the arrestments used by the pursuers the defenders have become liable to the jurisdiction of the Court in the present action: Repels the defenders' first plea-in-law, and finds them liable in expenses since the record was closed, and remits the account thereof when lodged to the Auditor to tax, and to report.

"*Note.*—The evidence appears to me to show that the defenders have a contingent claim against the bankrupt estate of Mr Lindsay, merchant and shipowner in Leith, which would entitle them to have dividends laid aside under the Bankrupt Statute in any division of the estate, and which they would be entitled to have made the subjects of a valuation under the 53d section of the statute.

"The bankrupt in January of this year sent to the defenders two cargoes of coals, one by the 'Ariel' of the value of £228, and another by the 'Dwina' of the value of £149. If it be assumed that the parties who supplied these coals became creditors to Lindsay only, and not to the defenders, the defenders would be debtors to the bankrupt estate. But the pursuers maintain that Lindsay acted as an agent only, and that the defenders are their debtors, and the parties who supplied the 'Ariel's' cargo have intimated a similar claim, although they have not followed it up by raising an action. It is clear that if either of these claims be well founded, the defenders, who paid Lindsay for the cargoes, would have a claim for repayment. They are therefore, I think, entitled now to claim the values of the cargoes in the sequestration, to the effect of having dividends set aside to meet the contingency of the shippers establishing direct liability against them. Their own view is that they must be guaranteed against any claims by the shippers of the cargoes before they can come to any settlement with Lindsay's trustee. In this state of matters I am of opinion that the defenders have an interest in the bankrupt estate which is arrestable, and which having been arrested is sufficient to found jurisdiction. *Lindsay* v. *North-Western Railway Co.*, 22 D. 571, and *Douglas* v. *Jones*, there cited, 9 S. 856.

"It was maintained that even though there might be an arrestable interest in the case of a contingent claim where there was obviously a fund for division, this would not apply to the present case, as the trustee has been unable to realise any estate. I do not think, however, that in a question of this kind the Court can enter on an inquiry as to the probability of a bankrupt estate yielding dividends or not. Estate may yet be discovered; the bankrupt may acquire a succession, or he may succeed in acquiring property in business which he would be bound to make over to his trustee, and these considerations are, I think, sufficient to meet the argument founded on the peculiar circumstances of Lindsay's estate."

The defenders reclaimed, and argued—There is no arrestment of a subject sufficient to found jurisdiction; indeed it has been proved that there is nothing at all to arrest here. Now, there is no case where an arrestment has been found effectual except where there are funds in hand or a debt due. The case that goes furthest is the case of *Lindsay* (quoted by the Lord Ordinary), but there the stock of the Caledonian Railway Company, which was arrested in their hands, was held to be an asset. In *Shaw's* case, where an opinion was indicated, the trifling sum of £1, 16s. 8d. was sufficient; there was this specialty, that the action was one *in rem.* The defender was a disponer of Scotch property, and the action concluding for reduction of the conveyance was necessarily brought *in foro rei sitæ.* In the case of *Douglas* v. *Jones* there was a question as to the assets of a partnership; but it was quite ascertained that although these might not be equal to meet the liabilities, still they did exist. Here, on the other hand, if this arrestment is sustained it is perfectly certain that the trustee will have nothing for creditors. And as the existence of any claim by Harrison Carr & Co. on the estate of the bankrupt is contingent on the result of this case, there is as yet at least nothing in the trustee's hands to arrest.

The respondents argued—It is sufficient that there was between the arrestee and the defenders the relation of debtor and creditor. The Court cannot consider what dividend the estate will pay.

Besides, even if there be nothing at present in the trustee's hands, there is a presumption while the sequestration lasts that something may be acquired that will enable the trustee to account.

Cases quoted—*Douglas* v. *Jones*,' 9 Shaw 856, and in the Faculty Collection, 30th June 1831 (the latter said by the Lord President to be much the more correct report); *Lindsay* v. *London and North-Western Railway Company*, 22d January 1860, 22 Dunlop 571; and *Shaw* v. *Dobbie*, 2d February 1869, 7 Macph. 449.

At advising—

Lord President—This action is raised to recover the sum of £377, 0s. 5d., the price of two cargoes of coal alleged to have been delivered by the pursuers on the order of the authorised agent of the defenders, a person of the name of Lindsay in Leith. The defence on the merits is that the defenders had no transactions with the pursuers of this action, and that Lindsay was not their agent. There is, however, a preliminary defence, viz., that the defenders are foreigners, and as such not subject to the jurisdiction of this Court, and, in particular, that certain arrestments that have been laid on have not attached any funds of the defenders in Scotland so as to bring them within our jurisdiction.

The Lord Ordinary has sustained the arrestments, and in his note he has dealt with two difficulties that arise on this point, and require serious attention. In the first place, it is made quite plain from the evidence that if the pursuers fail in this action the defenders have no claim against the estate of the arrestee. The action being for the price of two cargoes of coal, supplied, as the pursuers allege, through Lindsay as their agent, it is clear that unless the defenders are found liable for the price of these coals to the pursuers they will be debtors for the price of these two cargoes in their accounts with Lindsay, or, if they have already paid to him, will have no claim for repetition of the price from the trustee on his bankrupt estate. On the other hand, if the pursuers succeed in this action, and enforce their claim against the defenders, the state of accounts between the defenders and Lindsay will stand the other way, for in that event they will be entitled to make such a claim. On the result of this action depends the question whether the defenders are creditors or debtors on their account with Lindsay.

Now, this is a very peculiar state of matters, for if the pursuers succeed, the arrestment has attached funds and our jurisdiction is good; if they do not, the arrestment has not attached anything—that is to say, there is no accountability by the trustee to them. If the Court have jurisdiction to pronounce a judgment *condemnator* they must also have jurisdiction to pronounce one *absolvitor*. But observe that if it is found as a matter of fact that there was nothing attached by this arrestment, our jurisdiction is at an end, and we could not pronounce that judgment of *absolvitor*.

I think, however, that on the second point with which the Lord Ordinary has dealt the question stands on much clearer grounds. The evidence shows that the bankrupt has absconded, but does not suggest that there has been any concealment of estate. The state of his affairs comes to this, that so far from there being any assets available to meet the claims of his creditors there is not enough to pay the expenses of his sequestration. The Lord Ordinary very properly says that the Court cannot enter on an inquiry as to the probability of a bankrupt estate yielding dividends or not. And if it were a matter of uncertainty whether the estate is to yield a dividend or not, there is a great deal of force in that observation; but unfortunately it is perfectly certain that this estate will not pay anything. That being so, the arrestment has attached nothing, and I am certainly not aware that the doctrine has ever been laid down that such an arrestment is sufficient to found jurisdiction. Nor am I prepared to carry the doctrine at all further than it has already been carried. But it has been suggested by the Lord Ordinary that something may yet happen which will give the trustee a fund available for creditors. The bankrupt before he is discharged may succeed to an estate, or may set up in business, and the profits of that business or the estate falling to him vest in his trustee. That is quite true, but no such estate can vest in him at the present moment; and by the 103rd section of the Bankrupt Statute it is provided that the right of a bankrupt to such estate shall be held as transferred to and vested in the trustee as at the date of the acquisition thereof or succession, for the purposes of this Act. Can it be said that the bare possibility of something happening in time to come can create arrestability at the present moment? And it must further be observed that the bankrupt's trustee is not at all in the same position as the bankrupt himself. The bankrupt's liability for his debts is absolute, and lasts until they are paid. The trustee is only bound, on the other hand, to discharge himself of the funds he has in his hands, and if he never has any funds his indebtedness never arises. It is therefore a very different question where the arrestment is in the hands of the trustee in bankruptcy from that where it is in the hands of the primary debtor. But, as I have said, I entertain no doubt that where there is no accountability an arrestment attaches nothing; and therefore in the present case I feel myself obliged to differ from the Lord Ordinary's interlocutor.

Lord Deas—If an action founded by arrestment is allowed to go on and be adjudicated on, it will not do for the defender to say that it has turned out to be a bad arrestment, and therefore that the Court had no jurisdiction. But when the objection is taken *in limine* an investigation is always allowed, and the result of that determines whether jurisdiction exists or not. On the whole, for the reasons your Lordship has explained, I think this arrestment is bad.

Lord Mure—I quite concur in the first part of the Lord Ordinary's interlocutor, viz. that the cases quoted there are authorities for holding that a claim against a bankrupt's estate or an interest in it can be attached by arrestment so as to found jurisdiction. If the defenders are found liable to the pursuers for the sum here concluded for, then there is something to attach and so to found jurisdiction; the smallness of the amount and the utter insufficiency of the estate to pay its debts does not matter, but there must be something that can be laid hold of by the arrestment. Now, the trustee says the estate will not pay a penny

per pound—not even yield enough to pay expenses already incurred—and therefore, and looking to your Lordship's observations on the 103rd section of the Bankrupt Statute as obviating the Lord Ordinary's suggestion of some available estate arising, I think the arrestment here cannot be sustained as effectual; at present there is nothing to attach.

LORD SHAND—Having had the advantage of further discussion and of the opinions that have just been delivered, I am now disposed to think that the pursuers have failed to prove that there are funds or effects attached by their arrestment sufficient to subject the defenders to the jurisdiction of this Court.

I am still of opinion that the defenders have a contingent claim on the estate of Lindsay which might found an arrestment. The moment such a claim as is made by the pursuers here, and is threatened by Mackie, Koth & Co., who supplied the defenders with another cargo of coals through Lindsay, is made against the defenders, they, as they have already settled with Lindsay for these coals, are entitled to demand that funds should be set aside from Lindsay's estate to await the issue of this case.

On the second point I quite agree with the distinction your Lordship has pointed out between the liability of the bankrupt's trustee and that of the primary debtor; still, if it appeared that the trustee was vested in any estate, I think an arrestment would attach the funds in his hands which he is bound to divide among the bankrupt's creditors. But I find that the trustee is not vested in any estate which can yield him funds to divide, and to that fact I think sufficient weight was not given. I am therefore prepared to agree with your Lordships.

The Court pronounced the following interlocutor:—

> The Lords having heard counsel on the reclaiming note for the defenders against Lord Shand's interlocutor of 6th July 1876, Recal the interlocutor: Sustain the first plea-in-law stated for the defenders: In respect thereof dismiss the action, and decern: Find the defenders entitled to expenses, and remit to the Auditor to tax the account thereof, and report."

Counsel for Pursuers—J. G. Smith. Agent—Alexander Gordon, S.S.C.

Counsel for Defenders—Lord Advocate (Watson)—M'Laren. Agent—P. Morison, L.A.

Friday, February 2.

FIRST DIVISION.

[Lord Young, Ordinary.

PEGLER *v.* THE NORTHERN AGRICULTURAL IMPLEMENT AND FOUNDRY COMPANY.

Contract—Master and Servant—Salary—Defence—Compensation.

A person agreed in writing to serve a company "as general manager of their business." He was to "have the full control and direction of it, subject always to such general and special instructions and directions in regard to his duties of manager as the company might see fit to give through their board of directors." After acting for about fourteen months, he gave the company three months' notice of leaving, under the agreement, but when the time came, at their request he continued in their employment for two months longer. No complaint was ever brought against him. To an action for payment of salary the company stated in defence that the pursuer had neglected to keep regular books in terms of his undertaking, and to account for his intromissions, and that there were sums belonging to them in his possession unaccounted for to an amount exceeding his claim.—*Held* that, as the duties, neglect of which was alleged, were outwith the agreement, and as there was no averment that the pursuer was bound by the agreement to account for his intromissions, the defences could only be pleaded as compensation, and as such were not relevant defences to a liquid claim for salary—*diss.* Lord Shand, who held that the question was one of pleading only, and as such should upon equitable grounds be entertained.

Observed by Lord Deas, that the rule by which illiquid claims cannot be set up as a defence against liquid claims is founded upon natural justice, and is intended to prevent debtors from postponing the enjoyment by others of money to which they are legally entitled.

A minute of agreement, dated 22d June 1874, between the Northern Agricultural Implement and Foundry Company, of the first part, and Thomas Boyne Pegler, of the second part, bore—"*First*, The said party of the second part shall serve the parties of the first part as general manager of their business, and shall have the full control and direction of said business, subject always to such general and special instructions and directions in regard to his duties as manager as the said parties of the first part may see fit to give through their board of directors or any committee of said board. *Second*, The said parties of the first part shall pay to the said party of the second part, as remuneration for his services as manager foresaid, a salary at the rate of £200 sterling per annum, payable quarterly, afterhand. *Third*, The said parties of the first part shall forthwith allot to the said party of the second part fifty shares of the capital stock of the said Northern Agricultural Implement and Foundry Company, Limited; and the said party of the second part shall accept the same, and shall, immediately on the execution thereof, pay to the credit of the first parties with the Caledonian Banking Company, Inverness, the sum of £500 sterling, as the price of said shares so to be allotted to him. The said shares shall be held to be, and shall be, fully paid-up shares of the Company, the amount paid on which in advance of calls shall bear interests out of the profits of the Company at the rate of five pounds per centum per annum aye and while the same is in advance of calls; and the amount paid on which not in advance of calls shall receive such ordinary dividends as may from time to time be declared on the called-up capital of the Company. *Fourth*, In the event of the said