Wednesday, May 28.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MALONE & M'GIBBON *v.* CALEDONIAN RAILWAY COMPANY.

Arrestment—Arrestment Jurisdictionis fundandæ causa, *Use of against Property Consigned with a Carrier for Transit—Carrier.*

Cattle which had been consigned with a railway company for transmission were arrested the same day in their hands by certain cattle salesmen, in order to found jurisdiction in an action to be raised by them against a person in Ireland said to be the owner of the cattle. The railway company having refused to deliver up the cattle until recall of the arrestment, the consigners presented to the Sheriff a petition against the company for immediate delivery, but did not call the arresting creditors as parties to the process. *Held* that the railway company were, in the circumstances, justified in refusing delivery.

Arrestment Jurisdictionis fundandæ causa—*Nexus. Question*, Whether arrestment to found jurisdiction imposes a *nexus* on goods arrested?

On Saturday the 26th January 1884 Messrs Malone & M'Gibbon, cattle salesmen, Glasgow, delivered to the Caledonian Railway Company at Sighthill twenty black cattle, to be fed and transmitted to Forfar for the market there on the following Monday. At a later part of the same day, when they called again to arrange for the despatch of the cattle, they were informed that the cattle had been arrested in the hands of the company, conform to arrestment of the same date (26th January) by virtue of letters of arrestment by the Sheriff of Lanarkshire *jurisdictionis fundandæ causa* containing warrant to arrest dated at Glasgow the 26th of January, raised at the instance of Sheehan & M'Gibbon, cattle salesman, Market Street, Glasgow, and William F. Sheehan, cattle salesman there, the liquidator of said firm, or as in right of the assets thereof, complainers, against Peter Meere, cattle merchant, Ennis, County Clare, Ireland, defender. The schedule of arrestment contained a marginal note, which stated that "this arrestment applies to a consignment of twenty black cattle lying at St Rollox cattle shed, Glasgow." The railway company refused to deliver up the cattle until this arrestment was recalled, and Malone & M'Gibbon presented this petition to the Sheriff in order to have them ordained to deliver up the cattle, or otherwise to pay the sum of £300 as the value of them.

The defenders (who averred that the cattle belonged to Peter Meere, for whom the pursuers were agents) pleaded—"The cattle in question having been arrested while in the custody of the defenders, and therefore the defenders not being in safety to deliver the cattle to the pursuers, they are entitled to absolvitor."

The pursuers pleaded—"(1) The defences not being relevant or sufficient to sustain the defenders' pleas, they ought to be repelled, and decree granted in the pursuers' favour, with costs."

The Sheriff-Substitute (SPENS) repelled the defences and ordained delivery of the cattle.

"*Note.*—It is admitted that the pursuers handed the cattle in question to the defenders as public carriers for transmission to Forfar. I know it is a common practice to arrest goods in the hands of railway companies at the instance of third parties claiming a right of property. It may, however, be open to argument that a railway company being merely an agent of the consigner or consignee as the case may be, goods are not attachable by arrestment in their hands. In the present case there is no necessity for deciding such a point, for the view I take of the present case is as follows:—The arrestment lodged was admittedly an arrestment to found jurisdiction against a man of the name of Meere. An arrestment to found jurisdiction imposes no *nexus*. If the cattle in question belonged to Meere, the purpose of the arrestment was attained whenever the arrestment was served on the railway company, because Meere would *ipso facto* be subject to the jurisdiction of the Scotch Court. This being so, the duty of the defenders as public carriers to the pursuers was in no way interrupted. Even if the view were taken that a *nexus* was imposed by the arrestment, it is clear, I think, that such a *nexus* cannot be held to subsist, the party who laid the arrestment not having up to the present time raised an action and arrested on the dependence."

On appeal the Sheriff-Principal (CLARK) found that the defenders were warranted in detaining the cattle until released from the order contained in the arrestment: therefore recalled the interlocutor appealed against, and dismissed the action.

"*Note.*—The facts appearing on record, and the productions, appear to be sufficient to dispose of this action without proof. It may be that the diligence of arrestment *ad jurisdictionem fundandam* may operate with considerable inconvenience and even harshness in the case of certain parties, and this may be true in the present instance in so far as the pursuers are concerned. But while the law stands as it does, it seems to me that effect must be given to it regardless of such considerations. The arrestment in question was laid in the hands of the defenders, and requires the subjects arrested to remain in sure fence and arrestment until sufficient caution be found acted in the books of Court. Whatever equities, therefore, might exist as between the users of the arrestment and the parties claiming rights of property or otherwise to the articles arrested, it was the plain duty of the arrestees, the defenders, to retain the arrested subjects until relieved of this obligation in regular form. It was maintained, however, on the authority of certain cases noted below, that the articles said to be arrested were not duly specified, so that in point of fact they were not made the subject of proper arrestment. On referring, however, to the schedule of arrestment, it will be seen to bear the following note:—'This arrestment applies to the consignment of 20 black cattle lying at St Rollox cattle shed, Glasgow.' This, in the circumstances of the case, appears to me sufficient specification to put the arrestees in *mala fide* if they had disregarded it. It was contended that this note, being a mere marginal addition, was not to be held as part of the writ. I can find no authority for this view. I have made full inquiries into the practice of the Court, and I find

that such notes are quite common in practice as a mode of specifying the articles made the subject of arrestment. Indeed, it would appear that introducing such specification into the body of the writ is unknown. Furthermore, it must be considered that the articles arrested being cattle, no other specification than that contained in the note could well have been given. Cattle are not ticketed, and it is hard to see how addresses could be attached to them. The notice given seems amply sufficient to identify the cattle in so far as the arrestees were concerned; and this really is all that can be required. It may also be observed from the pleadings, particularly the third article of the pursuers' condescendence, that they were in no doubt as to the sufficiency of the notice; but that the real ground upon which they intended to rest their case was that double distress did not exist, a matter which has no proper bearing on the issue raised in the present case. It was further argued that a duty was laid on the defenders—if they did not choose to deliver in consequence of the arrestment—to have brought a multiplepoinding. It may be doubted, however, whether until the present action was raised there could in a proper sense be double distress, and the question falls to be determined in relation to the facts as they existed when the demand was made, not when the action was raised. In any view, the pursuers had the obvious remedy of bringing a multiplepoinding, though, if they had done so, it could scarcely be held as a means of deciding the question really raised in the present action, namely, whether or not the defenders would have been justified in setting at nought an arrestment laid in their hands, provided the same were sufficiently specific, as I think it was, to throw a *nexus* over the cattle.—*North British Railway Co.* v. *White*, 9 R. 97; *Matthews* v. *Fawns*, 4 D. 1242; *Metzenburg* v. *Highland Railway Co.*, 7 Macph. 919."

The pursuers appealed, and argued—The case raised an important question, viz., Does an arrestment *fundandæ jurisdictionis* impose a *nexus* on the property arrested? This question, while it had never been authoritatively settled, fell, on the authority of certain *dicta* in the following cases, to be answered in the negative. —*Trowsdale's Trustee* v. *Forcett Railway Co.*, November 4, 1870, 9 Macph. 88, opinion of the Lord Justice-Clerk, p. 92; *Lindsay* v. *London & North-Western Railway Co.*, November 20, 1855, 18 D. 62—Lord Deas in this case was of opinion that the operative *nexus* for security and payment falls to be laid on afterwards by arrestments on the dependence and in execution—*Cameron* v. *Chapman*, March 9, 1838, 16 S. 907, Lord President, p. 918; Bell's Conveyancing, vol. i. 543; Menzies' Conveyancing, 2d ed. 306; Bell's Comm. vol. ii. 65. There were only two cases in which opinions would be found stated from the Bench affirmatory of the question, viz.—*Carlberg, &c.* v. *Borjesson, &c.*, November 21, 1877, 5 R. 188; *White* v. *Spottiswoode*, June 30, 1846, 8 D. 952. There being, then, no *nexus* imposed on the arrested cattle by the arrestment to found jurisdiction, the defenders ought to have complied with the order for delivery. Further, there was nothing to identify the cattle arrested as those to which this action applied, except the marginal note on the schedule of arrestment, which could not be held as sufficient specification.

It appeared that on the 31st of January Messrs Sheehan & M'Gibbon had executed an arrestment on dependence of an action against Meere, and that subsequently a petition had been presented to the Sheriff at the instance of Sheehan & M'Gibbon, Malone & M'Gibbon, and Meere, the prayer of which was to have the cattle sold. This had been done, and the price consigned in Court.

At advising—

Lord Justice-Clerk—We have had a very able argument from Mr Trayner on an interesting question of law relating to the effect of an arrestment *fundandæ jurisdictionis causa* in imposing a *nexus* on the property arrested, in so far as a *nexus* on the property arrested is concerned. But it is quite manifest that this is a totally different question from the real question in the present case, which is, whether the party in whose hands such an arrestment has been used is entitled *de plano* to part with the subjects arrested. I should be prepared to go a long way with Mr Trayner in his views on the question, but I repeat, it is not the question raised here. There are no goods in the hands of the carriers. They have been parted with and the price consigned, and we cannot decide here in this process whether jurisdiction has been founded by these arrestments or not without the intervention of the debtor and the arresting creditor, and when that was done, assuming it to be done, we should simply be beating the wind, because the goods are sold and the price consigned, and jurisdiction formed so far as it can be. So that there is really nothing at all here to decide.

Lord Young—I am clearly of the same opinion. The case is a curious one. These cattle were delivered to the carriers on the 26th of January. They were arrested in the hands of the latter by arrestment *fundandæ jurisdictionis causa* on the afternoon of the same day, the arresters being Messrs Sheehan & M'Gibbon. Something must have been taken by the arrestment, and it was not illusory, because the price of the cattle was consigned in the process in which Sheehan & M'Gibbon were parties, and had an opportunity of establishing their claim. Then, on the same day, the 26th, the consigners are informed of the arrestment, and are refused delivery. It is contended that in the circumstances the railway company ought not to have paid the slightest attention to the arrestment. That would be a very convenient arrangement for all parties except the parties using arrestments, but I cannot decide the point in a process in which there is no party interested in maintaining the other side. The parties here are both interested in maintaining the same side of the question. The case has been discussed upon a general question between parties who have no interest in the matter. We are not to decide whether this was a good arrestment or not—I mean whether the cattle are sufficiently specified or not. We could not determine that any way in the absence of the arrester, who is the only party interested to maintain that it is good. The only thing therefore that we can decide is, whether or not the railway company did wrong to the present pursuers in refusing to disregard the arrestment immediately after it had been used by handing the cattle to them as if they had never received it. I take it that they would

have acted with extreme rashness if they had done otherwise. But to refuse to do that is said to be wrong. If it was not wrong, then the Sheriff has acted rightly in dismissing the petition.

LORD CRAIGHILL—I also am of opinion that the application should be dismissed, and I have only to add that were we called on to decide purely the question argued to us by Mr Trayner I should, as at present advised, be inclined to adopt the views of the Sheriff-Principal.

I concur with your Lordships in thinking that when the petition was presented the Caledonian Railway Company were entitled to refuse the demand for delivery.

LORD RUTHERFURD CLARK—These cattle were attached by arrestment *fundandæ jurisdictionis*, and that being done the consigner raises this petition against the Caledonian Railway Company for immediate delivery. He does not call the arresting creditor, but seeks to obtain warrant for delivery without calling him, and he repeats his demand by taking this appeal, for that arresting creditor has not yet been called.

I am of opinion that he is not entitled to any such warrant in the absence of the arresting creditor, and that the petition should be dismissed. I might suggest that even now the arresting creditor might be made a party to the process, but I think it is unnecessary now that the cattle have been sold.

The Court dismissed the petition.

Counsel for Pursuers (Appellants)—Trayner—Dickson. Agent—Donald Mackenzie, W.S.

Counsel for Defenders (Respondents) — R. Johnstone — Graham Murray. Agents — Hope, Mann, & Kirk, W.S.

Friday, May 30.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

ADAM & WINCHESTER *v.* WALKER (WHITE'S TRUSTEE).

Bankruptcy— Trustee—Agent and Client—Law-Agent's Hypothec — Personal Action against Trustee—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79).

A trustee in bankruptcy obtained from the bankrupt's law-agent, for use in an action to reduce an illegal preference which the bankrupt had granted, a number of documents belonging to the bankrupt, and over which the agent claimed a right of hypothec. The trustee on obtaining them granted a receipt reserving the agent's claim of hypothec, if any. The documents were used in the action, which was successful, and thereafter the agent, alleging that the trustee had recovered funds sufficient to pay his account, sued the trustee, *qua* trustee, and also as an individual, for his business account, on the ground that he had by the manner in which he had obtained the documents made himself liable for it, at least to the extent to which he had recovered funds by means of the action of reduction. *Held* that the action as against the trustee as an individual was irrelevant, and that the agent's claim against the estate must be made by claiming in the sequestration.

John White, builder, 18 Melville Terrace, Edinburgh, was sequestrated in January 1883, the first deliverance being on the 10th of that month, and John Walker, chartered accountant, Edinburgh, was appointed trustee upon the sequestrated estate.

The present action was raised in the Sheriff Court of the Lothians and Peebles at Edinburgh by Messrs Adam & Winchester, S.S.C., Edinburgh, against Mr Walker as White's trustee, and as an individual, and it concluded for the payment of a sum of £125.

The pursuer averred that from 12th July 1881 down to the date of the sequestration they had acted as law-agents for the bankrupt, and that he was due to them a sum of £196, 18s. 6d. for professional services and disbursements in connection with various actions and other business in which they had been employed by him.

They further alleged that in the way of business and in the course of their agency for the bankrupt they came into possession in November 1882 of the following documents:—(1) A bill for £94, 4s. 2d., drawn by William White, wood merchant, Edinburgh, on the bankrupt, and endorsed by Francis Allan, cab proprietor, Edinburgh, dated 4th August 1882, at 3 m/d., which the bankrupt had paid; (2) receipt and acknowledgment granted by the said William White to the bankrupt dated 13th November 1882, of the latter having placed with the former a horse, lorry, and harness, in security of the sum then due under said bill; (3) letter from James Drummond, W.S., on behalf of the said William White to the bankrupt anent said bill and security given, dated 15th November 1882; and (4) three letters from Mr Drummond to pursuers on same subject, dated 21st and 22d November 1883. These documents the pursuers averred to be the property of the bankrupt, and they also alleged that they remained in their hands from November 1882 to 5th June 1883; that they were thus in their hands at the date of the sequestration, and so became subject to their right of lien or hypothec in respect of their account for £196, 18s. 6d., or at least of the restricted sum of £125 sued for.

It was admitted that the pursuers on 5th June 1883 handed to the defender the documents above described, to be used by him as trustee in an action which he had raised against William White, on the ground that the manner in which he had received payment of the said bill through the pledging and sale of the said horse, lorry, and harness, amounted, in respect of the subsequent sequestration of the bankrupt within sixty days thereof, to an illegal preference by John White in favour of William White, under the Act 1696, cap. 5. The defender had desired to use them *in modum probationis* in the action against William White.

The following receipt was granted by the defender's agent to the pursuers at the time when he as trustee recovered the documents from them:—