will only of their respective shares; but that the said trustees are bound to pay over the whole of the said shares to the said Maria, Christina, and Elizabeth, and decern."

Counsel for the First Parties—Sir C. Pearson—J. E. Graham. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Second Parties—Gloag—Sir Ludovic Grant. Agents—Fraser, Stodart, & Ballingall, W.S.

Friday, July 5.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

STEWART *v.* NORTH.

STEWART *v.* ELDRED & BIGNOLD.

Jurisdiction—Arrestment jurisdictionis fundandæ causa—Foreign—Transference of Right to Fund Arrested.

An arrestment valid to found jurisdiction at its date is not rendered ineffectual, though, after the raising of the action but before the defences are lodged, the right to the fund arrested is transferred from the party against whom it is sought to found jurisdiction to someone else.

Arrestment—Foreign—Transference of Right to Fund Arrested.

A having used arrestments to found jurisdiction, raised an action against B, on the dependence of which he again used arrestments. The fund arrested was in both cases the amount of costs due by the arrestee to B under the decree of an English Court. About a fortnight after the arrestments had been laid on, the solicitors who had acted for B in the action before the English Court obtained from that Court a charging order upon the costs in said action.

In an action of multiplepoinding raised by the arrestee to determine who had right to the fund arrested, the Court ranked and preferred B's solicitors, in respect that by the law of England the charging order transferred the right to the fund arrested from B to his solicitors, and that the arrestments on the dependence were thereby rendered ineffectual.

Robert Stewart, farmer, Elibank, near Peebles, raised an action of count, reckoning, and payment against John Thomas North, residing near London, against whom arrestments had been used *ad fundandam jurisdictionem*.

The arrestments were used in the hands of a Mr Welsh, and the fund arrested consisted of a sum of £419, 11s. 4d., due by Mr Welsh to the defender under a decree of the High Court of Justice in England, Queen's Bench Division, for costs. That decree was pronounced on 25th April 1887. The arrestments *ad fundandam* were executed on 26th May 1887, and the summons in the present action was signeted on 27th May, and on the same day the said fund was again arrested on the dependence of the action. A certificate of the judgment in the English suit, dated 31st May, was registered in the Books of Council and Session on 1st June under the Judgments Extension Act 1868. On 13th June Messrs Eldred & Bignold, solicitors in London, who had acted for the defender Colonel North in various litigations in England, including the action before the High Court of Justice already referred to, obtained from the English Court a charging order upon the costs recovered in that action, and this was intimated to the arrestee on June 14th.

The defender averred, *inter alia*—"The sum in the said decree was not arrestable or attachable in respect of claims against the defender. Messrs Eldred & Bignold are in right of the whole fund, which is due and payable only to them in respect of their costs as solicitors to the defender North in the said cause, which costs exceed the said fund of £419, 11s. 4d., and have not been otherwise paid or satisfied. They hold the said judgment or decree as from the date of the same being signed, and instructed registration thereof to recover their said costs, consisting chiefly of outlays. According to the law of England, so long as the costs of the solicitors of the party found entitled to costs by decree of Court are not otherwise paid or satisfied, the debtor in the said decree is not entitled to pay or satisfy the decree except with their assent or through their hands, and they have a lien on the decree, and all costs payable to their client in the cause, for the full amount of their costs as between solicitor and client, which lien attaches *ipso jure* on judgment being signed, and is preferable to the claim of any assignee or creditor of their client. The said solicitors are held as creditors in the said debt *quoad* their unpaid or unsatisfied costs substantially to the same effect as law-agents who have obtained decree for expenses in the Courts of Scotland in their own names as agents-disbursers. The said Messrs Eldred & Bignold on or about 13th June 1887 obtained a charging order for their said costs upon the said fund, which is produced and referred to, and which declares their pre-existing right as aforesaid."

The defender pleaded—"(1) The said debt not being arrestable by a creditor of the defender, no jurisdiction has been founded against him. (2) The alleged arrestments not having affected any property of the defender, the jurisdiction ought not to be sustained, and the present action should be dismissed, with expenses."

On 2nd December the Lord Ordinary (LEE) repelled the plea of no jurisdiction, and allowed parties a proof of their averments on the merits.

Against this interlocutor the defender reclaimed to the First Division, and on 20th December their Lordships recalled the interlocutor of the Lord Ordinary, and remitted to him to allow the defender a proof of his averments (above quoted) in support of the plea of no jurisdiction.

At the proof Mr Eldred, of the firm of Eldred & Bignold, who was the only witness examined, gave evidence to the effect that Colonel North had been due from 25th April 1887, and still was due, to his firm in respect of their account in the action before mentioned, a sum exceeding £419, 11s. 4d., which was the amount of costs found due by Welsh to North.

A case was thereafter prepared for the opinion of English counsel, on the assumption that from and after April 25th 1887 there had been due by

North to Eldred & Bignold in respect of their account in the said action a sum exceeding £419, 11s. 4d., which, after a recital of the facts narrated, proceeded as follows—"The question between the parties to the present action, viz., Stewart and North, is whether the arrestments used by Stewart attached anything. The answer to that question depends upon whether Welsh was or was not under an obligation to account to North for the £419, 11s. 4d. of costs in the action which had depended between them, and it is on this latter point that the opinion of counsel is desired. It is said by North that the solicitors are the creditors in the debt instituted by the judgment for their unpaid costs, and that the debtor is not entitled to pay this debt to the other party in the action, except through the hands of the solicitors, or with their assent. Stewart, on the other hand, founds upon the terms of the judgment as constituting a debt by Welsh to North, which Welsh is bound to pay to North, unless it is regularly assigned to some other creditor."

The opinion of counsel is desired on the following queries—"(1) Was North, before his solicitors obtained the charging order, entitled, while his solicitors' account for the costs of the action remained unpaid, to demand payment to himself of the amount of costs found due in the action, or were the solicitors the true creditors to the exclusion of their client? (2) What was the effect, if any, either at common law or under the provisions of the 28th section of 23 and 24 Vict. c. 127, upon the respective rights of the solicitors and North of the charging order, and in particular, had it any retrospective effect upon their respective rights?"

The opinion of Mr Finlay, Q.C., to whom the case was referred, was in these terms—"I assume from my instructions, and the terms of the charging order of 13th June 1887, that Colonel North is still indebted to Messrs Eldred & Bignold in a sum not less than £419, 11s. 4d., in respect of the costs of the action in which he obtained judgment for that sum as costs.

"Query 1. Colonel North was, before his solicitors obtained the charging order, entitled to demand payment to himself of the amount of costs found due to him by Mr Welsh, and could have given a good receipt for it—*Mercer* v. *Graves*, L.R., 7 Q.B. 499—but Messrs Eldred & Bignold, in virtue of their particular lien for costs in that action, might, at any time while the money remained unpaid, have given notice to Mr Welsh not to pay Colonel North, and if, after such notice, Mr Welsh had paid Colonel North, he might have been compelled to pay again to Messrs Eldred & Bignold—*Omerod* v. *Tate*, 1 East. 464. To this extent, but no further, were Messrs Eldred & Bignold the true creditors to the exclusion of Colonel North. In virtue of this lien, as it has been called, the claim of Messrs Eldred & Bignold in respect of their costs would have priority over an attachment obtained by a judgment creditor of Colonel North against Mr Welsh as garnishee, if notice of their lien had previously been given to the garnishee—*Eisdale* v. *Conyngham*, 28 L.J. Ex. 213; *Simpson* v. *Prothero*, 26 L.J. Chan. 671—and I think even where notice had not been so given, though on this last point there does not appear to be any direct authority. In the case of *Hough* v. *Edwards*, 1 H. and N. 171, the solicitor had no lien for costs in the proceedings in which the judgment had been recovered.

"Query 2. I am of opinion that the charging order of the 13th June 1887 conferred a valid title upon Messrs Eldred & Bignold under the statute, and that such charging order had a retrospective effect. This order was properly made, as costs are 'property recovered,' within the meaning of the section (*per* Brett, M.R., in *Dallow* v. *Garrold*, 14 Q.B.D. 545, 546). A charging order under the statute 23 and 24 Vict., c. 127, sec. 28, gives the solicitor priority over a judgment creditor who has previously served a garnishee summons—*Dallow* v. *Garrold*, 14 Q.B.D. 543. As Mr Stewart was of course aware that the sum which he arrested was payable under a judgment, he had constructive notice of the lien of Colonel North's solicitors—*Faithful* v. *Ewen*, 7 Ch. D. 495. I am of opinion that the charging order converted the inchoate right of Messrs Eldred & Bignold at common law into an actual charge, and made them the owners in equity of the sum due from Mr Welsh to the extent of their claim against Colonel North."

On 3rd November 1888 the Lord Ordinary (KINNEAR) (to whom the case had been transferred) found the arrestments used by the pursuer were inept to found jurisdiction; therefore dismissed the action, and decerned.

"*Opinion.*—The question whether the arrestments used by the pursuer are effectual to found jurisdiction depends upon the relative rights of Colonel North and his solicitors Messrs Eldred & Bignold in the debt which is said to have been attached.

"Before the date when the arrestments were used, Colonel North had obtained judgment against the arrestee for the sum of £419, 11s. 4d. as the taxed costs of a suit in the High Court of Justice in England. At the date when the defences in the present action were lodged, Messrs Eldred & Bignold had obtained a charging order, the legal effect of which is explained in Mr Finlay's opinion. It was held in *Walls' Trustees* v. *Drynan*, 15 R. 359, that the question raised by a plea to jurisdiction is 'not whether the Court had jurisdiction over the defender at any antecedent time, but whether it has jurisdiction *de presenti* at the time when the objection is stated,' and if it were to be held in accordance with that judgment that the question is to be determined with exclusive reference to the state of rights at the time when defences are lodged, it would appear to me to follow from Mr Finlay's opinion that the jurisdiction is not well founded, because at that time the arrestments were according to the opinion ineffectual. Mr Finlay says not merely that the charging order 'conferred a valid title upon Messrs Eldred & Bignold,' but also that it had a retrospective effect, so as to give them a priority over an attachment previously obtained by a creditor of Colonel North.

"It is enacted by the statute to which the learned counsel refers, sec. 28, 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 without notice, be absolutely void and of no effect as against such charge or right.' It seems to be clear enough, both from the opinion and from the case of *Dallow* v. *Garrold*, cited by Mr

Finlay, that the pursuer, as arresting creditor, does not fall within the exception in favour of purchasers without notice, and accordingly it was hardly disputed that in the multiplepoinding Messrs Eldred & Bignold must be preferred, because in a question with them the arrestments used by the pursuer are absolutely void.

"But it is said that the true point of time to be considered is the date when the arrestment was used to found jurisdiction, because if that arrestment were effectual at the time no subsequent event could displace the jurisdiction thereby established. It may be that is a sound proposition—and I do not think there is anything to the contrary in the judgments delivered in the case of *Walls*—but I think the arrestment was inept from the beginning, because I must hold, in accordance with Mr Finlay's opinion, that it was ineffectual to attach the debt. It is true that before his solicitors obtained the charging order Colonel North could have demanded payment, but Messrs Eldred & Bignold might at any time while the money remained unpaid have given notice to Mr Welsh not to pay to Colonel North. Colonel North therefore had at no time an exclusive right to recover, and his right, such as it was, could not be made available to attach the debt so as to exclude Messrs Eldred & Bignold, because they could defeat the attachment so long as the money remained unpaid. They have in fact defeated the arrestment, and they must obtain decree in the multiplepoinding for payment of the money alleged to have been well arrested by Mr Stewart. It appears to me impossible to give effect to their claim in that action, and at the same time to hold in the present action that the money was effectually arrested by the competing claimant in the multiplepoinding.

"It is said that the arrestment to found jurisdiction is in a totally different position from an arrestment in execution, because it does not impose a *nexus*. It may not be a lasting *nexus*, and there may be a question how long it continues. But still, like any other arrestment, it must be effectual to attach the subject arrested for the purpose for which it is used or else it must be inept.

"The *nexus* must be capable of subsisting until the time when the objection to jurisdiction can be pleaded or else it is of no effect. This appears to me to be very clearly brought out in the Lord President's judgment in the case of *Lindsay*, where he explains the meaning of an arrestment to found jurisdiction. 'It means this, that it fixes a subject in the country, and the subject being in the country the party is answerable to the jurisdiction of this Court.' On this principle it was held in the case of *Trowsdale's Trustee* v. *The Forcett Railway Company*, 9 R. 89, that in order to found jurisdiction by arrestment the subject arrested must be capable of attachment by diligence in execution; and Lord Neaves states the reason very much in the same way as the Lord President does in *Lindsay's* case. The principle rests on the fact that there is something within the jurisdiction of the Court which can be specifically taken in execution of any decree which may be pronounced. . . . But must not extend the fiction beyond the limits already recognised. I am not aware of its having been extended beyond circumstances where the arrestment shows that the decree will not be a *brutum fulmen* from there being a subject within the jurisdiction of the Court which can be attached.' It is true that the effect of the decree is not to be measured by the value of the subject arrested. But the subject, whatever be its value, must be effectually seized by the arresting creditor, although the seizure may be only temporary, and although it may cease to operate without the procedure which is necessary to determine the effect of an arrestment in execution.

"In the present case the arrestment has fixed nothing within the country. There is no subject attached which could be taken in execution of a decree against the defender. The arrestment is therefore in my opinion inept.

"No other ground of jurisdiction is alleged."

The pursuers reclaimed, and argued—(1) If arrestments were valid at their date to found jurisdiction their validity could not be affected by the fact that the fund arrested was subsequently carried away through the intervention of a *vis major*. If that were not so, all that would be required to defeat the jurisdiction of the Court would be to break the arrestments, and it would follow that the view of the Court varied according to the time looked at. Defeasible debts and contingent debts were arrestable—Bell's Law Dict. *voce* Arrestment; *Corse* v. *Masterton*, January 31, 1705, M. 767. The *nexus*, if it could be called a *nexus*, imposed by arrestments *ad fundandam* was of a very different kind from that constituted by arrestments in execution. The former could never be the basis for an action of furthcoming—*Malone and M'Gibbon*, v. *Caledonian Railway Company*, May 28, 1884, 11 R. 853; *Carlbey* v. *Borjesson*, November 21, 1877, 5 R 188, *per* Lord President, 192. When the arrestment used in this case was laid on, North was the creditor in the fund arrested, as was clear from the opinion of English counsel. The arrestment was therefore valid to found jurisdiction against him, and the fact that a charging order was subsequently obtained could not affect the jurisdiction which had been validly constituted, even on the assumption that the fund arrested was carried away by the charging order—*Baines & Tait* v. *Compagnie Générale des Mines d'Asphalte*, March 15, 1879, 6 R. 846; *Lothian* v. *M'Oree*, November 27, 1828, 7 S. 72; *Douglas* v. *Jones*, June 30, 1831, 9 S. 856; *Lindsay* v. *London and North-Western Railway Company*, January 27, 1860, 22 D. 571, *per* Lord President (M'Neill) 585—*aff.* February 1858, 3 Macq. 99. (2) Further, the decree for costs had been made a Scotch decree by registration, and the fund arrested was thus due under a Scotch decree. The arrestments would not therefore be defeated by the preference given by an English statute to the charging order, the effect of which was necessarily local.

The defender and respondent argued—An arrestment *ad fundandam* was a *realis vocatio in jus*. It was necessary that the subject arrested should be within the territory of the Court in which it was intended to found jurisdiction, and should not be moved therefrom till caution be found *judicio sisti*, or till the defender prorogated the jurisdiction of the Court. The time at which the question of jurisdiction fell to be

decided was when defences were lodged. If the arrestments did not impose a *nexus* till then, they failed altogether—Ersk. i. 2, 19; *Walls' Trustees* v. *Drynan*, February 1, 1888, 15 R. 359. Arrestments *ad fundandam* did not differ from other arrestments with regard to the subject arrestable—*Trowsdale's Trustee* v. *Forcett Railway Company*, November 4, 1870, 9 Macph. 88, 92; *Cameron* v. *Chapman*, March 9, 1838, 16 S. 907. The judgment following on arrestments could only affect the property arrested—*Lindsay* v. *London and North-Western Railway Company*, *per* Lord Cranbourne, 3 Macq. In this case North's right was from the beginning a qualified one, the fund arrested being *ex facie* of the decree subject to all the rights under that decree, and to the rights of North's agents. It was clear from the opinion obtained that the effect of the charging order was to transfer the right to the fund arrested from North to his agents. The effect of the arrestments had thus been defeated—*Ellis* v. *Muckersie & Rose*, May 12, 1831, 9 S. 585; *Chambers' Trustees* v. *Smith*, April 15, 1878, 5 R. (H. of L.) 151; *Wyper* v. *Carr & Company*, February 2, 1877, 4 R. 444. (2) The registration of the decree did not make it a Scotch decree. It was only to be treated as a Scotch decree for the purposes of execution. If the action were still pending in the English Court, so that the charging order could be pronounced, its effect must be judged of by English law, and the right of the arresting creditor measured by the rights of the English solicitors under the charging order—Judgments Extension Act (31 and 32 Vict. cap. 54), sec. 2.

At advising—

Lord President—In this case the Lord Ordinary has found that the arrestments used by the pursuer "are inept and ineffectual to found jurisdiction," and he therefore dismisses the action. Now, I am unable to agree with the Lord Ordinary, and I am of opinion that the arrestments used in this case were effectual to found jurisdiction. The debt due by the arrestee to the defender was a debt depending on a judgment of the English Court for costs. That judgment has been registered, and has become as a judgment of this Court effectual to found diligence. Now, the execution of the arrestment *ad fundandam jurisdictionem* was on 26th May 1887; the summons was raised the following day, and on the same date arrestments were used on the dependence. In the present case we have nothing to do with the arrestments on the dependence, and the case may be dealt with as if these had not been used. We are entirely dealing with the validity and effect of the arrestments *ad fundandam jurisdictionem*.

The reason why these arrestments are said to be inept is that the London solicitors of the defender were entitled to a preference on the arrested fund in competition with their client and all the world, and I think that to be so provided they obtained from the Court in England a charging order. That order was not obtained till 13th June, and the arrestments were used on 26th May. I have not the smallest doubt that on the 26th May the arrestee was a debtor of the defender in a sum of £419, 11s. 4d., and that he should cease to be a debtor of the defender by assignation or legal diligence does not prevent arrestments good at the date at which they were used from being good arrestments. If the arrestments were good at the date of execution, it does not affect their validity for the purpose for which they were used—to found jurisdiction—that the fund has since been carried off by someone else. Arrestments *ad fundandam jurisdictionem* can never be followed by a furthcoming, and in no other way can the funds arrested be made available for payment unless they are followed by other arrestments on the dependence; they have no further effect than for the time to lay upon the fund in the hands of the arrestee such a *nexus*, or whatever it may be, as is requisite to found jurisdiction in this Court. Now a charging order appears to me to be not different from any other preferential diligence which is not preferential from reason of priority in time but by reason of inherent right. The arrestments may be defeated by a subsequent preference caused by the charging order, but it depends whether the solicitors had occasion to obtain it or chose to obtain it. They might have refrained from applying for it if their account had been paid. In short, it was a mere contingency whether the debt should be affected by the charging order or not.

However that may be, the charging order was a subsequent proceeding, and the circumstance that it carries off the fund, if it does so operate, does not effect the validity of the arrestments *ad fundandam jurisdictionem*.

The Lord Ordinary refers to the case of *Walls' Trustees* v. *Drynan*, and I think he has misread what was the decision in that case. He says it was there held that "the question raised by a plea to jurisdiction is 'not whether the Court had jurisdiction over the defender at any antecedent time, but whether it has jurisdiction *de presenti*, at the time when the objection is stated.'" The point raised in that case was whether an arrestment *ad fundandam* was used too late or in time to found jurisdiction. The arrestment was used after the summons had been served, and the question was whether that was too late. The opinion which I gave was that the question of jurisdiction must be judged of as to the time when the objection was taken. If I could not affirm in this case that there was jurisdiction when defences were lodged and the objection stated I should adhere, but I think there was jurisdiction, because anterior to the raising of the summons arrestments had been used against a fund then belonging to the defender. I am therefore of opinion that we should recal the interlocutor of the Lord Ordinary, and repel the first and second pleas of the defender.

Lord Mure—I concur in the opinion expressed by your Lordship. On the facts of the case there is no doubt that at the date of the execution of the arrestments there were funds in the hands of the arrestee to which the defender had right. If that be so, an arrestment to found jurisdiction was laid on and jurisdiction was founded. A firm of solicitors in London contend that they have a right over the fund arrested upon which they obtained a charging order some days after the arrestment was used, the effect of which they say was to transfer any right in the fund from the defender to them. If, however, *prima facie* at the date of the execution of the

arrestment *ad fundandam jurisdictionem* there were funds in the hands of the arrestee due to the defender, any subsequent right acquired by the solicitors cannot effect the validity of that arrestment. That was settled in the case of *Douglas* v. *Jones*, 9 S. 856, where the Court held that an arrestment used by the creditor of a foreign partner of a company in Scotland in their hands, and over goods belonging to them created a jurisdiction over the partner, although he alleged he had no claim on the company funds.

Lord Shand—At the time the arrestment in question was used there was a decree of an English Court against the arrestee for payment of £419, 11s. 4d. in favour of Colonel North. The opinion of English counsel has been taken as to the right of Colonel North to that sum, and the opinion given is to this effect, that "Colonel North was, before his solicitors obtained the charging order, entitled to demand payment to himself of the amount of costs found due to him by Welsh, and could have given a good receipt for it." That is to say, when the money was arrested the fund was one of which Colonel North could have demanded payment, and which the arrestee was safe to pay to him, although as time went on it appeared that others had a right to come forward and defeat the right of Colonel North, and by Mr Finlay's opinion Colonel North's right came to an end. The question is, whether a subject of this kind is not an arrestable subject, and it is scarcely maintained that it is not. Although the right of Colonel North is defeasible in its nature, yet till defeated it is a valid right, and could be made the subject of a transaction. There can be no doubt that the fund was an arrestable subject, and of such a kind as to create jurisdiction. The usual procedure was followed, the pursuer using the arrestment before serving the summons, and then signeting and serving the summons. The point maintained by the defender is that some time after a charging order was obtained and Colonel North's right defeated before defences were lodged, and that in judging of the question of jurisdiction we must look at the time when defences are lodged. In support of this contention the defender relies on the case of *Walls* v. *Drynan*. I do not think that case has any such effect. The point decided in that case is expressed by the Lord President in these words—"It is enough to say that jurisdiction is founded in perfectly good time if it is founded when the summons is served, because until the summons is served there is no action." In this case jurisdiction was founded by an arrestment used before the summons was served or signeted. The arrestment was at its date a good arrestment, and there was nothing, I think, to lead to the conclusion that an arrestment good at its date to found jurisdiction would lose its effect because of something happening between that date and the lodging of defences.

Lord Adam—On the 26th May 1887 the pursuer executed an arrestment *ad fundandam jurisdictionem* in the hands of Mr Welsh, who is allowed to have been a debtor of Colonel North, the defender. The subject arrested is a sum of £419, 11s. 4d., the costs in an action by the arrestee against North, for which North had obtained decree. *Ex facie* of that decree there is no doubt that a debt is due by the arrestee to North, but it is said that it is not really due to North, but to North's solicitors in London by its nature. On that matter the opinion of an English counsel has been taken, and his opinion is that up to the 13th of June, when the charging order was obtained, North was entitled to demand from Welsh, and Welsh was bound to pay to him, the above mentioned sum. If that be so, I cannot understand a better description of a debt due, and therefore I have no doubt that at the date of the arrestments *ad fundandam jurisdictionem* there was a debt due to North which was a proper arrestable subject. If that be so, the arrestments were valid, and they were followed by the signeting of the summons on May 27th, and by arrestments on the dependence on the same date. If the arrestments were good that summons formed a perfectly valid and good depending action. But if there was a valid depending action, it seems quite clear that the defender was bound to answer the citation given in the action because of the preceding jurisdiction founded by the arrestments *ad fundandam jurisdictionem*. It was because the arrestments *ad fundandam jurisdictionem* created jurisdiction that the service of the summons was a valid transaction. If that is so, it shows that as soon as the summons was served the object of the arrestments had been served; they were of no further use; they could never have been followed up in any way, and could be used for no other purpose.

It is contended that the effect of the charging order is to sweep away the fund arrested, and that may raise a question as to the effect of the arrestments on the dependence, but I do not see that the result of that charging order can affect the validity of the arrestments *ad fundandam jurisdictionem*. In my view these arrestments had already served their purpose, and could not be affected by the charging order. The conclusion to which I have come is accordingly that the use of the charging order can in no way affect the validity of the arrestments *ad fundandam jurisdictionem*, and I therefore am of opinion with your Lordship that the interlocutor of the Lord Ordinary should be recalled.

The Court, by interlocutor dated 14th June 1889, recalled the interlocutor reclaimed against, repelled the first and second pleas of the defender, and remitted to the Lord Ordinary to proceed with the case.

On 20th October 1887 Mr Welsh, in whose hands the sum of £419, 11s. 4d., being the amount of costs due under the decree of the Court of Queen's Bench in England had been arrested on the dependence of the above action, raised an action of multiplepoinding and exoneration to have it determined who had right to the said sum.

Competing claims were lodged by Messrs Eldred & Bignold, the English solicitors of Colonel North, and Robert Stewart, the pursuer in the action of count, reckoning, and payment above mentioned, and who on the dependence of that action had used arrestments in the hands of Welsh.

The claimants Eldred & Bignold pleaded, *inter alia*—"(1) In respect of their holding the said

decree for their costs as from the 25th day of April 1887, the claimants are entitled to be ranked and preferred in terms of their claim. (2) The said fund not being arrestable by any creditor of North's at the date of the said arrestments being used, and the alleged arrestments being inept, the claimants should be preferred to the arrestor or alleged arrestor. (3) The right of the claimants being preferable to arrestments laid on subsequent to 25th April 1887, they should be ranked and preferred in terms of their claim."

The claimant Stewart pleaded, *inter alia*—"(1) The claimant having attached under the diligence set forth the fund *in medio*, he is entitled to be ranked and preferred in terms of his claim."

The proof in the action *Stewart* v. *North* was held as the proof in this action.

The Lord Ordinary on 3rd November 1888 pronounced this interlocutor—"Sustains the claim for Eldred & Bignold as contained in the joint claim, and ranks and prefers them accordingly: Repels the claim for Robert Stewart," &c.

The Lord Ordinary's opinion on the point here decided is contained in his opinion in the action of *Stewart* v. *North*.

Stewart reclaimed, and argued—The effect of the charging order was necessarily of local limitation. It was an equitable remedy to enable solicitors in England to recover their disbursements. The matter of debt rested no longer on local law, as the decree had been by registration made a Scotch decree, and the sum in question was the subject of a Scotch litigation. The charging order was obtained after the arrestments on the dependence had been executed, and the arrestments as the prior diligence must prevail—*Goetze* v. *Aders*, November 27, 1874, 2 R. 150.

Argued for the respondents Eldred & Bignold—The opinion of the English counsel settled the matter in favour of these claimants, for it clearly showed that the right of Colonel North in the sum arrested was of a defeasible nature, and had been defeated by the charging order. The fund arrested had therefore been carried off by the charging order.

At advising—

Lord President—In this case I think the Lord Ordinary was right in sustaining the claim for Messrs Eldred & Bignold, the English solicitors of Colonel North. The fund *in medio* consists of a sum owing by Mr Welsh under a judgment pronounced by the High Court of Justice in England for costs in favour of North, who had been successful in an action brought against him by Welsh, the common debtor, and we have it proved to us that the right which North obtained under the English judgment was of a qualified nature. So long as there was no intervention on the part of the English solicitors he could have received payment of the same from Welsh, and the latter would have been in safety to pay to him; but it was in the power of the English solicitors to interpose by obtaining a charging order, which had the effect of transferring the right in the sum due on the decree of the English Court to themselves from North. Therefore, according to English law, North's right was a qualified one from the beginning, and I am of opinion that the question as to the nature of the right is to be determined by the law of England.

Now, the arresting creditor arrested in the hands of the debtor under the judgment the accountability of the arrestee to North, but if there was no such accountability in the arrestee—if he was liable not to North, but to North's solicitors in England—then the debt was not prestable by the arrester, and I think the charging order, though obtained subsequently to the execution of the arrestments, has the effect of making the arrestee accountable to Eldred & Bignold instead of to North.

Lord Mure—I agree. The sum in question is the amount of costs for which decree was given in an action in the English Courts. The present question is, I think, to be determined by the law of England. I have accordingly no difficulty in concurring, for the import of the opinion of Mr Finlay is that the action taken by the English solicitors, who are claimants in this case, transferred North's right to them, for he says—"I am of opinion that the charging order converted the inchoate right of Messrs Eldred & Bignold at common law into an actual charge, and made them the owners in equity of the sum due from Mr Welsh to the extent of the claim against Colonel North."

I concur therefore in the opinion that Eldred & Bignold must be preferred to that sum.

Lord Shand—This fund in the arrestee's hands was arrested by Mr Stewart on the dependence of his action against Colonel North on 31st May 1887. The sum arrested was the amount due under a decree for costs obtained by North in England. After the arrestment had been executed by Stewart, a charging order was obtained by the English solicitors, who had conducted the case for North in the English Court, on 13th June, and it was intimated to the arrestee on 14th June. The question we have to decide is, what is the effect of the intimation of the charging order? Is it such that the English solicitors are entitled to vindicate their claim to the money, or is their claim defeated by the previous arrestment? I am pretty clearly of opinion that the arrestment is not good in competition with the claim of the solicitors. The matter must be determined by the law of England, because the question between the parties is one not of remedy but of right. The nature of North's right is explained in the opinion of Mr Finlay very clearly. In the first place, he says—"Colonel North was, before his solicitors obtained the charging order, entitled to demand payment to himself of the amount of costs found due to him by Mr Welsh, and could have given a good receipt for it." But he goes on to qualify that statement by saying—"Messrs Eldred & Bignold, in virtue of their particular lien for costs in that action, might, at any time while the money remained unpaid, have given notice to Mr Welsh not to pay Colonel North, and if, after such notice, Mr Welsh had paid Colonel North, he might have been compelled to pay again to Eldred & Bignold." In a subsequent passage he says—"I am of opinion that the charging order of the 13th June 1887 conferred a valid title upon Mesrs Eldred & Bignold under the statute, and that such charging order had a

retrospective effect." Finally, in the important passage read by Lord Mure he says—"I am of opinion that the charging order converted the inchoate right of Messrs Eldred & Bignold at common law into an actual charge, and made them the owners in equity of the sum due from Mr Welsh to the extent of their claim against Colonel North."

What, then, was the right of North at the date when the arrestments were used, and what was the arrester's claim? According to Mr Finlay's opinion, North's right was of a defeasible nature. If the arrestee had thought fit to pay North, North could have received payment, and could have given a good discharge, but till payment his right could be defeated by a charging order obtained and intimated. If that be so, can the arrester get a higher right than there was in the person of the arrestee. Suppose North had assigned his right, the assignee could only take the right as it stood in the assigner. An arrestment gives no higher right than an assignation, and the arrestment in this case only attached the right as it stood in the person of Colonel North. Now, the right which he had was of a defeasible nature, as I have said, and was defeated by the charging order. I am therefore of opinion that the Lord Ordinary was right in preferring the claim of Eldred & Bignold.

LORD ADAM concurred.

The Court adhered.

Counsel for Stewart—Murray—Wilson. Agents—J. & A. Hastie, S.S.C.

Counsel for Colonel North and the Claimants Eldred & Bignold—Gloag—Kennedy. Agent—Alexander Campbell, S.S.C.

Saturday, July 6.

FIRST DIVISION.

[Lord Trayner, Ordinary.

STEWART *v.* GUTHRIE AND OTHERS.

Process — Reclaiming-Note — Competence — Court of Session Act 1868, *secs.* 53, 54.

An interlocutor repelling an objection to the competency of a multiplepoinding on the ground that there has been no double distress can only be reclaimed against within ten days, and with the leave of the Lord Ordinary.

This was an action of multiplepoinding and exoneration raised by Charles Frederick Crewes, Bank of Victoria, Melbourne, and his attorneys in this country. The pursuer and nominal raiser was Robert Stewart, solicitor, Glasgow, judical factor on the trust-estate of the deceased William Rae Wilson of Kelvinbank, near Glasgow. Charles Frederick Crewes, the real raiser, and a number of other persons were called as defenders. The nominal raiser and holder of the fund lodged objections to the competency of the action on the ground that he had not been doubly distressed, and the record was closed on the summons and objections.

On 20th February 1889 the Lord Ordinary (TRAYNER) pronounced this interlocutor:—"Repels the objections to the competency of the multiplepoinding, and appoints claimants on the fund *in medio* to lodge their condescendences and claims within the next fourteen days, reserving all questions of expenses: Further appoints intimation of the dependence of this action to be made to all concerned by advertisement twice for two successive weeks in the *Scotsman* and *Glasgow Herald* newspapers."

On 14th June the Lord Ordinary pronounced this interlocutor:—"Finds the real raiser entitled to the expenses of raising and executing this cause, bringing the same into Court, and conducting it, and remits the account thereof, when lodged, to the Auditor to tax and report: Finds Stewart, the judicial factor, liable in expenses in connection with the preliminary defences, and remits the account thereof, when lodged, to the Auditor, to tax and report."

Against this interlocutor the nominal raiser and pursuer reclaimed, but the reclaiming-note was not lodged till July 5th.

The respondent, the real raiser, objected to the competency of the reclaiming-note, on the ground that the interlocutor reclaimed against disposed merely of preliminary defences, and was in no sense a final interlocutor, and therefore could only be reclaimed against with the leave of the Lord Ordinary, and within ten days—Court of Session Act 1850 (13 and 14 Vict. cap. 36), sec. 11; Court of Session Act 1868 (31 and 32 Vict. cap. 100), secs. 52, 53, and 54.

The reclaimer argued—That a multiplepoinding was a congeries of actions. The Lord Ordinary's interlocutors disposed of the only question in the cause on which the record had been closed, viz., the question of double distress—*Walker's Trustee* v. *Walker*, February 20, 1878, 5 R. 678.

At advising—

LORD PRESIDENT—The real raiser of this multiplepoinding is not the holder of the fund, but a person who is going to claim in the competition, and who is called as a defender. The nominal raiser, and the holder of the fund, is the judicial factor on the trust-estate of the deceased William Rae Wilson. There are a number of other persons called as defenders besides the real raiser, who are supposed to have an interest in the fund.

The nominal raiser was of opinion that he had not been doubly distressed, and he lodged an objection or preliminary defence to the competency of the action, and that preliminary defence was disposed of by the Lord Ordinary on 20th February 1889 by being repelled, and by an interlocutor which he has now pronounced disposing of the expenses of the discussion. A reclaiming-note has been lodged on the footing that the judicial factor is entitled to reclaim against this last interlocutor, and thereby bring up the interlocutor of 20th February for review on a twenty-one days' reclaiming-note.

It appears to me that this reclaiming-note is not competent without leave of the Lord Ordinary, nor with leave after the expiry of ten days, because it is simply a reclaiming-note against the judgment of a Lord Ordinary repelling a preliminary defence.