COURT OF SESSION.

Thursday, July 15.

OUTER HOUSE.

[Lord Kincairney.

VALENTINE *v.* GRANGEMOUTH COAL COMPANY.

Jurisdiction — Arrestment — Furthcoming —Judgments Extension Act 1868 (31 *and* 32 *Vict. cap.* 54), *sec.* 2.

An arrestment was used on an extract registered certificate of a judgment of the Queen's Bench, which, by section 2 of the Judgments Extension Act 1868, is equivalent to an extract decree of the Court of Session. *Held* (*per* Lord Kincairney, Ordinary) that the common debtor, who was a domiciled Englishman, could be validly cited in the action of furthcoming in respect of the arrestment, without the use of arrestments *jurisdictionis fundandæ causa. Burns* v. *Munro*, July 18, 1844, 6 D. 1352 *followed; Wightman* v. *Wilson*, March 9, 1858, 20 D. 779, *distinguished.*

Process — Furthcoming — Competency — Arrestment of Shares.

Held (*per* Lord Kincairney, Ordinary) that an action of furthcoming, following on an arrestment of shares in the hands of the company, the conclusions whereof were for payment of any debt due by the common debtor to the arrestee, and alternatively for the transfer of the shares in the company held by the common debtor, to the end that the arrester might sell so much of them as would satisfy his debt, was competent, and warrant granted to sell the shares.

The facts in this case are fully stated in the opinion of the Lord Ordinary.

On 10th July 1897 the Lord Ordinary pronounced the following interlocutor:—"Repels the fifth and sixth pleas-in-law for the compearing defenders and appoints the cause to be put to the roll for further procedure: Grants leave to reclaim and reserves meantime as to expenses."

Opinion.—"In this action of furthcoming the arrestees are the Grangemouth Coal Company, Limited, and the common debtor is Mr Russell Aitken, who is said to be a shareholder of the company. The furthcoming has been brought in order to give effect to arrestments by which the pursuer alleges that he has attached the shares in the company belonging to the common debtor. The arrestments were used in virtue of an extract of a certificate of a judgment of the Court of Queen's Bench obtained by the pursuer against the common debtor, which was registered in the Books of Council and Session in terms of section 2 of the Judgments Extension Act (31 and 32 Vict. cap. 54). The conclusions of the action are that the arrestees should be decerned to pay to the pursuer £100, or such sum as might be owing by them to the common debtor, or otherwise should transfer to the pursuer the shares of the company belonging to the common debtor, to the end that the pursuer might sell as much of the shares as will satisfy his claim.

"The arrestees have lodged defences, but the common debtor—who has been cited edictally—has not entered appearance. It does not appear with certainty whether the common debtor is a shareholder of the company, and it may be that inquiry may be necessary on that point.

"But the arrestees have objected to the action on various grounds. They plead that it is incompetent. The argument in the procedure roll was mainly directed to three pleas—'(3) As the summons contains no conclusion whereby the shares held by the principal debtor in the Grangemouth Coal Company, Limited, can effectually be transferred to the pursuer, or judicially sold for payment to the pursuer, the action should be dismissed. . . . (5) The action should be dismissed, in respect that the principal debtor is not subject to the jurisdiction of the Court, and that no arrestments *jurisdictionis fundandæ causa* have been used against him. (6) The arrestees are not in safety in allowing decree to pass against them till the principal debtor is properly made a party to the action.'

"The latter pleas go to competency and fall naturally to be considered first. It is settled law that a common debtor is an essential party in an action of furthcoming, and that the arrestee is entitled to object to the action unless and until he is made a party, because otherwise he, the arrestee, cannot be in safety to pay the pursuer. This was distinctly recognised and affirmed in the cases of *Smyth* v. *Ninian*, Nov. 16, 1826, 5 S.D. 8; *Burns* v. *Munro*, July 18, 1844, 6 D. 1352; and *Wightman* v. *Wilson*, March 9, 1858, 20 D. 779, and was decided in *Smyth* v. *Ninian* and *Wightman* v. *Wilson*.

"The arrestees have maintained that as the common debtor is domiciled in England he is not subject to jurisdiction of this Court, and has not been and cannot be made a party to the action so as to make a judgment in it binding on him, and they maintain that the action should therefore be dismissed.

"The pursuer has not averred that the common debtor is domiciled in Scotland, and has not disputed the averment of the arrestees that he is not. He may have been a domiciled Scotchman, but the pursuer does not aver even that. He is designed in the summons as of Piccadilly, London, and has been cited edictally, and the judgment which the pursuer seeks to enforce is the decree of an English Court. In that state of the pleadings I think I may assume that the common debtor is not a domiciled Scotchman; and I did not understand it to be suggested at the debate that he was so, or that the jurisdiction of the Court could be maintained on that ground. No steps have been taken to found jurisdiction by arrestment for that purpose.

"The pursuer, however, if I have rightly

understood his argument, maintains that an arrestment to found jurisdiction is not necessary, and that there is jurisdiction over the common debtor in this action of furthcoming in respect of the provisions of the Judgments Extension Act, and of the arrestment used by him in virtue of the extract registered certificate of the judgment of the Queen's Bench. It is provided by the second section of that Act that a certificate of a judgment obtained in the Courts mentioned—one of these being the Queen's Bench—may be registered in the Books of Council and Session 'in like manner as a bond executed according to the law of Scotland with a clause of registration for execution therein contained, and every certificate so registered shall from the date of such registration be of the same force and effect as a decreet of the Court of Session, and all proceedings shall and may be had and taken on an extract of such certificate as if the judgment of which it is a certificate had been a decreet originally pronounced in the Court of Session.'

"No. 6 of process is an extract of the certificate of the judgment obtained by the pursuer in the Court of Queen's Bench, and I assume that the certificate was registered in the manner and with the authority required by the statute. The contrary has not been alleged. The extract bears that the 'Lords grant warrant for all lawful execution hereon.'

"Counsel for the arrestees pointed out that it appeared from the extract that the judgment had been obtained 'after default in appearance, after substituted service of writ,' and he submitted that it did not appear that it had ever been served on the common debtor at all, but I do not see how I can entertain any criticism or challenge of this extract certificate of that kind. The statute declares expressly what its effect shall be, and I think that I am bound by the statute to hold that it has the full force and effect of a Scotch decree.

"In virtue of this extract certificate the pursuer used the arrestments in the hands of the arrestees on which this action of furthcoming has followed, and I am unable to see that the validity of these arrestments can be disputed, and I do not think that they were disputed. It appears, therefore, that the pursuer has attached the property of the common debtor in the hands of the arrestees by a valid and competent arrestment used in virtue of a judgment having the force of a decree of the Court of Session. The pursuer contends that, that being so, it follows that the action of furthcoming also must be sustained, and that the Court has jurisdiction over the common debtor without arrestments *jurisdictionis fundandæ causa*. In support of this argument the pursuer referred to the case of *Burns* v. *Munro, supra*. In that case arrestments had been used on a registered protest and an action of furthcoming had been raised on the arrestments. At the date of the registration the common debtor was a domiciled Scotchman, but at the date of the warrant to arrest and of the arrestment he had left Scotland and had lost his Scotch domicile. It was held (1) that the arrestment was notwithstanding valid, and (2) that the furthcoming was competent without letters of arrestment to found jurisdiction. Lord Fullarton in delivering judgment said:—'The question just comes to this, whether, having got a good decree, you must found jurisdiction by arrestment in order to extract or put the decree in execution? I quite agree' . . . 'in thinking that it is not. These proceedings towards execution do not require to be intimated to the other party at all. On the other point also I quite agree with your Lordships that, the subject being validly arrested already, there is no use for any other arrestment.' It appears to me that there is no substantial difference between that case and this, and that I must follow it. The defenders referred to the case of *Wightman* v. *Wilson, supra*. But that case is different. There seems to have been some doubt or hesitation on the part of some of the Judges in regard to the case of *Burns* v. *Munro*, but none of them dissent from it. In *Wightman* v. *Wilson* the question was about the jurisdiction of a Sheriff Court over a foreign common debtor, in an action of furthcoming following on arrestments, and the Court held that that could not be sustained. But it was not said that an action of furthcoming in the Court of Session would not have been sustained. The point decided was that the foreigner could not be convened in the Sheriff Court. It may be that the nature of a furthcoming was regarded somewhat differently in these two cases, being looked on in the case of *Wightman* as an action, and in the case of *Burns* rather as a part of the diligence of arrestment; still I cannot hold that the authority of *Burns* v. *Munro* is affected by the judgment in *Wightman* v. *Wilson*, and it is the case of *Burns* v. *Munro* which is applicable in the present case. This question did not arise in *Smyth* v. *Ninian*, because the original decree was bad for want of jurisdiction, and the arrestment was therefore bad also, and the action of furthcoming had no legal ground to rest on. On the authority of the case of *Burns* v. *Munro*, and on the grounds expressed by Lord Fullarton, I therefore hold that the Court has jurisdiction over the common debtor in this process, that the action of furthcoming is therefore competent, and that the fifth plea should be repelled. If that conclusion be sound there is no room for plea six, because the common debtor has been duly cited and has been made a party to the action, and it should also be repelled.

"The arrestees, the Grangemouth Coal Company, Limited, further maintained that the action should be dismissed because it contains no conclusions whereby the shares of the common debtor could be effectually transferred to the pursuer. They maintained that an action of furthcoming must be dismissed if the conclusions are not such as will make the arrestments effectual—*Lucas' Trustees* v. *Campbell & Scott*, February 15, 1894, 21 R. 1096. It is

averred that the Grangemouth Coal Company, Limited, owes no money to the common debtor, and that it cannot implement the alternative conclusion to transfer the shares. The company, it is said, can register transfers of shares or decrees of the Court in reference to them, but had no power to transfer shares—*Shaw* v. *Caledonian Railway Company*, February 20, 1890, 17 R. 467. It was admitted that the shares were arrestable, as was decided in *Sinclair* v. *Staples*, January 27, 1860, 22 D. 600. But it was maintained that the arrestment could not be worked out by mere conclusions of furthcoming, but that conclusions of declarator were essential—*Alison* v. *The African Company*, 1707, M. 707. The pursuer replied that, although it might be true that decree in the precise terms of his conclusions might not be granted, still the conclusions of an action of furthcoming might always be worked out by the sale of the subjects effectually arrested, or of so much thereof as would meet the pursuer's demand, and that this course could be followed although there were no express conclusions for a sale. It rather appears to me that this contention is in accordance with practice, and is not, as I understand, inconsistent with anything decided or laid down in *Lucas' Trustees*. I am disposed to think that it would be proceeding too strictly to throw out the action for want of a declaratory conclusion, and that the objection of the arrestees is not necessarily fatal. But before finally disposing of this plea I should desire to hear parties further in reference to the question whether there are any shares belonging to the common debtor, and what these are; and as to the precise proposal which the pursuer is prepared to submit with a view to the payment of his debt by means of the sale of the shares."

Thereafter minutes were lodged for the pursuer and for the Grangemouth Coal Company showing that Mr Russell Aitken was the proprietor of the shares in question.

On 15th July 1897 the Lord Ordinary pronounced the following interlocutor—"Repels the first plea-in-law for the defenders, the said Grangemouth Coal Company: Finds that the shares in the Grangemouth Coal Company Nos. 441 to 605 inclusive, standing on the register of this said company in the name of the principal debtor Russell Aitken, have been lawfully arrested: Grants warrant and authority to sell the same or so many of said shares as shall be required to satisfy and pay the pursuer's claims against the present debtor under the present action, including the principal sum of £27, 17s., and the sum of £5 with interest as concluded for, and also the expenses of sequestration and the expenses of the sale: Remits to Messrs Thomas Miller & Sons, stockbrokers, Edinburgh, to carry through the said sale after such advertisements as they may think proper, and to report the result of said sale to the Courts. Grants leave to reclaim.

The case was afterwards settled.

Counsel for the Pursner—A. S. D. Thomson. Agent—J. Murray Lawson, S.S.C.

Counsel for the Defenders — Grainger Stewart. Agents — Drummond & Reid, W.S.

Thursday, October 21.

SECOND DIVISION.

[Sheriff-Substitute at Falkirk.

IMRIE'S TRUSTEE *v.* CALDER.

Bankruptcy — Sequestration — Trustee — Adoption of Bankrupt's Lease.

A tenant of a farm, consisting solely of grazing ground, on a verbal lease expiring at Whitsunday, became bankrupt on 22nd March. The trustee in the sequestration advertised the stock and dairy plant for public sale, and on 7th April received an offer on behalf of the bankrupt's wife. This offer he accepted on the following conditions—that the offerer should be allowed to carry on the dairy until 28th May, on payment to the trustee, along with the price of the stock, &c., of £12 of rent of houses and pasturage; that the offerer should relieve the trustee of the proportion of servants' wages from the date of the acceptance; and that the price was to be paid immediately on acceptance. These conditions were accepted by the offerer, and she continued in possession of the farm till the conclusion of the lease.

Held that the trustee by his actings had not adopted the lease.

On 22nd March 1897 John Imrie, dairyman, Grangemouth, became bankrupt, and his estate was sequestrated. At that date he was tenant on a verbal lease from Whitsunday 1896 to Whitsunday 1897 of the farm of Reddoch belonging to James Charles Calder, Distiller, Bo'ness. The farm consisted solely of grazing ground, no part of it being under crop.

On 2nd April William Drummond Marshall, solicitor, Falkirk, was confirmed as trustee on the sequestrated estate. The trustee advertised the stock and dairy plant for public sale.

On 8th April, at a meeting of the creditors, the trustee read the following offer by Mr Henry Walker, draper, Grangemouth:— "Grange Street,
"Grangemouth, April 7, 1897.

"On behalf of Mrs Imrie, I agree to take the stock of cows, milk van, horses, dairy dishes, &c., including all Mr Imrie's sequestrated estate at Reddoch (the pony not included), but all others at valuation prices, as shewn me by Mr Allan, Solicitor; Mrs Imrie to be allowed to carry on the dairy at Reddoch until 28th May, you relieving her of all liability as to rent, wages, &c., till 28th May first. Cash to be paid on Monday first, the 12th April, or any earlier date, if transfer of stock, &c. is completed.
HENRY WALKER.