argument for the minister is thus weakened. The lands of Kirkmichael have, however, in my opinion, the necessary incidents of a landward district attaching to them.

"As regards the plea of acquiescence, the facts are that the successive ministers have since 1632 had something in lieu of a manse, and since 1763 something in lieu of a glebe. When, however, the history of these matters is inquired into, there is not, in my opinion, sufficient to support this plea.

"The argument that the charter of 1609 was *ultra vires* it is not necessary to consider. I may, however, say that I do not think this sound. The saving clause in the ratifying Act may be held to apply to matters of private right. It could not affect the public law. I am unable to see how an Act passed in 1644 could disable the king from granting a charter in 1609.

"Upon the whole matter I am of opinion that the minister is entitled to a glebe."

The Court pronounced this interlocutor—

"Recals the interlocutor of the Sheriff-Substitute appealed against, of date 1st February 1907, except sanctioning counsel: Finds that Dumbarton is a burghal parish with a landward district annexed: Finds that the minister is therefore entitled to a glebe: Recals the deliverance of the Presbytery designating a glebe, of date 16th May 1906, other than finding as to expenses: Remits of consent of the minister to David Rankine, C.E., Glasgow, to inspect the lands in the parish of Dumbarton, and report to the Court where four contiguous acres of arable land can be most readily found in the parish nearest to the church and manse—the report to be lodged *quam primum:* Finds the respondents liable in expenses, in Sheriff Court and here, to the appellant," &c.

Counsel for the Appellant—Crabb Watt, K.C.—Spens. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Respondents—Chree—Macmillan. Agents—Dalgleish, Dobbie, & Company, S.S.C.

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*Thursday, November 5.*

## FIRST DIVISION.

[Lord Ardwall, Ordinary.

## LEGGAT BROTHERS *v.* MOSS' EMPIRES, LIMITED, AND ANOTHER.

*Arrestment — Jurisdiction — Arrestment Jurisdictionis Fundandæ Causa—Subject Arrestable—Debt for which Cheque already Given, but Cheque not yet Cashed —Validity.*

A used arrestments *jurisdictionis fundandæ causa* in the hands of B against C, a foreigner. Prior to the laying on of the arrestments B had given C a cheque for his salary (which was the thing sought to be attached), but the cheque had not been presented, although it was subsequently honoured.

*Held* that the arrestments were inept, there being nothing in B's hands at the time capable of being attached, and that jurisdiction had not been established.

*Per* the Lord President—"When you are considering whether a subject is arrestable to found jurisdiction . . . the true criterion is whether the subject is something which, if it were arrested in execution and the diligence were worked out, could be made available by the creditor in the debt."

*Payment—Cheque—Cash Payment.*

Where a cheque, which is afterwards honoured, is given by the debtor and accepted by the creditor in payment of the debt, its acceptance is equivalent to payment in cash at the date of its receipt by the creditor.

On 8th September 1906, Leggat Brothers, lithographers, 107 Bishop Street, Port-Dundas, Glasgow, brought an action of furthcoming against Moss' Empires, Limited, 23 York Place, Edinburgh, *arrestees*, and George Gray, actor, a domiciled Englishman, *principal debtor*. In it they sought to have the defenders, Moss' Empires, Limited, ordained to make payment to them of £150, or such other sum as might be found due by them to Gray, the principal debtor, alleged to have been arrested on August 1, 13, and 15, and September 7, 1906.

Gray had given a letter of guarantee, for £125, to the pursuers, but had failed when called upon to pay the amount contained therein. The pursuers therefore had used arrestments in the hands of Moss' Empires, Limited, *ad fundandam jurisdictionem*, and thereupon had served an action in which they had obtained, on 10th July 1906, a decree in absence. The arrestments *ad fundandam jurisdictionem* were laid on at 4·20 p.m. upon Thursday, June 14, 1906. Gray had, as was held proved in the case, received that morning from Moss' Empires, Limited, a cheque in payment of the sum due to him for that week's engagement, the only debt then due to him by them, and had endorsed it over to a friend, Cosens, to whom he owed £105, for the purpose of paying his debt to his friend and receiving the balance. The cheque was presented at the bank and cashed on the morning of Friday, the 15th June. The arrestments now founded on had followed upon the decree in absence.

The defender (Gray) pleaded—"The decree libelled having been pronounced, and the arrestments libelled having been used by the pursuers without effectually constituting jurisdiction over this defender, and being therefore wrongous and inept, this defender should be assoilzied, with expenses."

On 22nd January 1907 the Lord Ordinary (ARDWALL), after a proof, granted absolvitor, holding that the arrestments *ad fundandam jurisdictionem* had been inept.

*Opinion.*—". . . (*After examining evi-*

*dence*) . . . A question of law was raised, which I do not think, however, admits of doubt, and it is this—It was contended for the pursuers that on the assumption that the cheque was endorsed to Cosens for an onerous consideration before the arrestments were laid on in the afternoon of the 14th June, the endorsation was only onerous to the extent of £105, leaving a balance of £65 still a debt due by Moss' Empires to Mr Gray, and that, in any view, the arrestments were in time to attach this sum. I am of opinion that this contention is unfounded in law, that the endorsation of a cheque blank, and the handing of it over to a person for onerous consideration, who thereupon becomes a 'holder in due course for value' is a transaction one and indivisible, and that there can be no such thing as a partial endorsation of a cheque—see Bills of Exchange Act 1882, section 32, subsection 2. I am accordingly of opinion that the arrestments on the afternoon of 14th June 1906, to found jurisdiction in the action in which decree was obtained against George Gray on 10th July 1906, did not attach any funds due or belonging to George Gray. It follows that jurisdiction was not effectually constituted against him. It follows that the said decree was inept, and that the arrestments used on the decree in the said action, and which are libelled in the summons, were also inept. Accordingly I assoilzie both defenders from the conclusions of the summons, and find the defender Gray entitled to expenses against the pursuers."

The pursuers reclaimed, and argued—The evidence showed that the arrestments were laid on before the cheque was received by Gray. *Esto*, however, that they were not laid on until after the cheque had been received and endorsed, they were admittedly used before it was cashed, and therefore they were valid. Indorsement of a cheque was not an assignment of the indorser's funds, till presentment. It was merely a mandate enabling the indorsee to get the money, and the debt was not discharged till the cheque was honoured. Giving a cheque was not payment, but only the means of getting payment of a debt—Bills of Exchange Act 1882 (45 and 46 Vict. c. 61), sec. 74. The debt subsisted till the cheque was paid—*Cohen* v. *Hale*, (1878) L.R., 3 Q.B.D. 371. It was a startling proposition to say, as the respondents did, that the giving of a cheque extinguished liability for a debt. It was at the most conditional payment, and that was not extinction of a debt. The cases of *Palmer* (*cit. infra*) and *Elwell* (*cit. infra*), relied on by the respondents, proceeded on the doctrine of English law that the drawer of a cheque was not bound to stop it in the interest of third parties. That doctrine did not affect the validity of arrestments to found jurisdiction. The cases cited by the respondents from the law of insolvency (*infra*) were inapplicable, as they fell within the exception of cash payment or that of transactions in course of trade. Arrestments to found jurisdiction were effectual though nothing was attached. They were valid although no *nexus* was laid on—*North* v. *Stewart*, July 14, 1890, 17 R. (H.L.) 60, 28 S.L.R. 397. It was enough if at the time they were used there was indebtedness, and that existed here.

Argued for respondent—The granting of a cheque was provisional payment, and if the cheque were duly honoured it operated *retro*. *Esto* that the granter could while the cheque was with the payee stop payment, he could not do so after indorsation, for that interposed a new creditor, who alone could sue on the cheque—*Clydesdale Bank, Limited* v. *M'Lean*, March 2, 1883, 10 R. 719, 20 S.L.R. 459, *aff.* November 27, 1883, 11 R. (H.L.) 1, 21 S.L.R. 140. The giving of a cheque was, according to ordinary mercantile usage, payment, assuming of course that it was taken as such, and it was so taken here. The debt was therefore extinguished, though if the cheque were dishonoured the debt would revive—Chitty on Contracts (14th ed.) 628; Byles on Bills (16th ed.), 24–29; *Pearce* v. *Davis*, (1834) 1 Moo. & Rob. 365; *Carmarthen, &c., Railway Company* v. *Manchester, &c., Railway Company*, (1873) L.R., 8 C.P. 685; *Elwell* v. *Jackson*, 1884, 1 C. & E. 362; *in re Palmer*, 1881, L.R., 19 Ch.D. 409, at p. 416. There being no indebtedness, therefore, when the arrestments were used, they were invalid. The granter of a cheque was not bound to stop it on diligence being used in his hands. The case of *Cohen* (*cit. supra*), relied on by the reclaimers, was not really adverse, for it came to this, that a garnishee order was only effectual if the debtor stopped the cheque—a thing which he was not bound to do—*Belshaw* v. *Bush*, (1851) 11 Scott's C.B. Rep. 191, at p. 207; *Currie* v. *Misa*, (1875) L.R., 10 Ex. 153, at 163; *Hall* v. *Pritchett*, (1877) L.R., 3 Q.B.D. 215; *Cohen* (*cit. supra*); *Stott* v. *Fairlamb*, (1883) 53 L.J., Q.B. 47. The giving of a cheque was equivalent to payment in questions as to illegal preferences in bankruptcy—*Carter* v. *Johnstone*, March 5, 1886, 13 R. 698 (*per* Lord M'Laren at p. 700), 23 S.L.R. 458; Bell's Com. ii, 202; Bell's Prin., 2327. So too in questions as to whether shares had been duly paid for prior to allotment—*Glasgow Pavilion, Limited* v. *Motherwell*, November 18, 1903, 6 F. 116, 41 S.L.R. 73. Arrestments to found jurisdiction required to be laid on something, although after jurisdiction was founded *nexus* no longer remained — *North* v. *Stewart* (*cit. supra*); *Craig* v. *Brunsgoord, Kjosterud, & Company*, February 7, 1896, 23 R. 500, 33 S.L.R. 348. Here, however, there was nothing to arrest, for the giving of the cheque had operated payment, and the arrestments were therefore invalid.

At advising—

LORD PRESIDENT—Mr Gray, who is the defender in this action of furthcoming, granted a guarantee in favour of Messrs Leggat Brothers, the pursuers, for a debt due to them by one Mussett. Mussett had not paid his debt and Messrs Leggat were anxious to raise an action against Gray upon the guarantee, Gray having refused

to pay without legal process. Gray was an Englishman and not subject to the jurisdiction of the Scottish Courts, and accordingly Messrs Leggat sought to subject him to the jurisdiction of the Scottish Courts by arrestments *ad fundandam jurisdictionem* in the hands of Moss' Empires, Limited, a Scottish registered company who owed Gray money from time to time in respect that Gray was a person who took engagements with Moss' Theatre of Varieties. With that purpose Messrs Leggat used arrestments in the hands of Moss' Empires, Limited, at 4·20 p.m. upon Thursday, June 14. The arrestment was immediately followed by service of the action, and in that action Messrs Leggat eventually obtained a decree in absence. They subsequently on the dependence of the action arrested other sums of money, and the present action is one of furthcoming as regards the sums of money so arrested. The defence to the action is that there was no jurisdiction in the action in which decree was got, and the defence of no jurisdiction admittedly depends on whether the arrestments *ad fundandam* were good or not. There is a great deal of controversy as to the precise state of the facts, but in order to see the questions that arise I may take first what is common ground between the parties. There is no doubt that during the week which began on Monday the 11th, and ended on Saturday the 16th of June, Gray was fulfilling an engagement for which Moss' Empires would owe him a salary, and in ordinary course the salary would have been paid at the end of the week. There is no doubt also that Gray, having had a hint that it was possible that he might be proceeded against under this guarantee, had telegraphed to Moss' head office in London requesting that his salary might be paid before the usual day; and there is no doubt that, acceding to that request, Moss' Empires' office in London sent during the course of the week a cheque made out directly to Gray, which they addressed to the Glasgow manager, Mussett, with directions to him to hand it over to Gray.

Now, the controversy on the facts is when that cheque arrived and was handed over. Gray says that it arrived on the morning of Thursday the 14th, and it was then handed over by him to a certain friend of his, Cosens, for value, the value consisting partly in a sum which he had already received from Cosens, and partly in an undertaking on Cosens' part to give him the balance of the cheque. Leggat Brothers, the pursuers, on the other hand contend that the cheque was not received until the morning of Friday the 15th, and was then handed to Gray. It is common ground between the parties that the cheque, as a matter of fact, was cashed in the early morning of Friday the 15th, although there is again a discrepancy of statement, the pursuers saying that it was cashed by Gray himself, and the defender saying that it was cashed by Cosens. As I have already said, the arrestments were laid on at 4·20 on Thursday afternoon, and the question arises whether at that time there was anything to arrest.

We had a very satisfactory and good argument from the bar in this case, and a point has been raised in the Inner House which does not seem to have been argued before the Lord Ordinary, and which logically comes first, because if the decision on it were to go in a certain way it would make inquiry as to the disputed facts unnecessary. The pursuers, who of course are contending for the validity of the arrestments, say that even supposing the defender's story were correct, *i.e.*, that the cheque arrived on Thursday morning, and was endorsed or handed to some-one else even for value on that Thursday, yet inasmuch as it was admittedly not cashed until Friday, therefore at a quarter past four on Thursday afternoon there was still a debt owing by Moss to Gray. In other words, they say that the effect of handing the cheque by the debtor to the creditor is not to operate payment, but that the relation of debtor and creditor still exists until the cheque is cashed, and the creditor either directly or through some-one else gets possession of the money.

In order to investigate that question I think it is first of all necessary to clear one's mind upon the true nature of an arrestment. There is a great deal of authority, and there has at one time or another been a good deal of controversy upon the precise nature of an arrestment *ad fundandam*. I am not going through all these authorities to trace the development of the doctrine, but I think I am correctly summarising them when I say this. All admit that the proceeding is exceedingly anomalous. Nobody exactly knows what was its historical origin, but I think that while there has been perhaps a vacillation of opinion as to whether an arrestment *ad fundandam* does or does not create a *nexus* upon the property arrested, the opinion has come to be quite settled that although no *nexus* is created, at least after jurisdiction is founded and the action has commenced, yet the origin of the whole proceeding can be traced to the idea that when the arrestment was laid on there was some property to be taken in execution.

I think the authority which most directly supports what I am now saying is the case of *Trowsdale's Trustee* v. *The Forcett Railway Co.* (9 Macph. 88). The question there was as to the class of subject that was arrestable. The Lord Justice-Clerk there says — "It is perfectly true that in point of fact an arrestment *ad fundandam* does not fix the subject arrested within the jurisdiction, for the arrestee may safely part with it, and it so far differs from an arrestment in execution, but it does not follow, and is not in my opinion the law, that there is any difference between the two kinds of arrestment in regard to the subjects arrestable. I know no better statement of the law than is to be found in the opinion of Lord Corehouse (concurred in by a number of other Judges) in the case of *Cameron* v. *Chapman*, 16 S. 907, at p. 918 — 'If,' says Lord

Corehouse, 'an arrestment *jurisdictionis fundandæ causa* was, as the defenders assume, a process by which a moveable subject is fixed down in this country, and rendered, in so far as jurisdiction is concerned, the same in all respects as a heritable subject, there might be some plausibility in their argument. But assuredly that is not the case. . . . It is not necessary to inquire on what principle the custom is founded of arresting moveables to found the jurisdiction against their owner, being a foreigner. It is plainly in opposition to the general doctrine both of the Roman law and modern jurisprudence, both of which admit the maxim *actor sequitur forum rei.* It was borrowed in Scotland from the law of Holland, where, as Voet observes, it had been introduced, contrary to principle, from views of expediency, and for the encouragement of commerce. We are of opinion, therefore, that it must not be carried further in any case than is expressly warranted by authority and precedent.'" In the same case of *Trowsdale's Trustee* Lord Neaves, after also observing that this arrestment is an exception to the rule that a creditor must go to the *forum* of his debtor, and that it had been introduced gradually, says—"The principle rests on the fact that there is something within the jurisdiction of the Court which can be specially taken in execution of any decree which may be pronounced." And accordingly the Court held in that case that there could not be an arrestment *ad fundandam* founded on the arrestment of books and papers, because these were not articles which could be taken by diligence.

I do not find that there is any subsequent authority which in any way infringes the authority of *Trowsdale*, and in particular I do not find anything inconsistent with that in a judgment, which is of course of paramount weight and authority—the judgment of the House of Lords in *North* v. *Stewart.* 17 R. (H.L.) 60. Lord Watson there also refers to the earlier history of arrestments, and says—"The sole purpose and effect of an attachment"—that is the modern form of arrestment *ad fundandam*—"is to fix the locality of the subjects arrested in Scotland, and thereby to render their foreign owner liable to be convened in a process issuing from the Court of Session at the instance of the arrester for recovery of a personal debt. As soon as the foreign owner has been duly made a party to that process, the arrestment is spent, and the arrestee is no longer, as in a question with the arrester, under any obligation to retain in his hands the moveables which it affected." But that is entirely consistent. In other words, the doctrine, which after a certain amount of doubt, especially, I think, as shown in the case of *Malone & M'Gibbon* v. *The Caledonian Railway Company,* 11 R. 853, may now be held to be firmly established by the case of *North*—the doctrine, namely, that an arrestment *ad fundandam* does not create a *nexus* as against the arrestee which prevents him from parting with the subject—that doctrine is perfectly consistent with the other doctrine that the origin of the process was the idea that there should be property which could be taken in execution; and consequently, when you are considering whether a subject is arrestable to found jurisdiction, as was being considered in the case of *Trowsdale's Trustee,* the true criterion is whether the subject is something which, if it were arrested in execution and the diligence were worked out, could be made available by the creditor in the debt.

Now I find the same idea developed in the dictum of Lord Kinnear in the case of *Lucas' Trustees,* 21 R. 1096. His Lordship there says—"An arrestment and furthcoming is an adjudication preceded by an attachment, and the essential part of the diligence is the adjudication. It follows that an arrestment is futile unless it can be followed up and the diligence worked out by a decree effectually transferring from the common debtor to the arresting creditor the obligation which was originally prestable to the former by the arrestee. The proceedings for this purpose may vary, according to the nature of the debt." Now, no doubt, in that case his Lordship is speaking of furthcomings upon arrestments which had been used in dependence. But if, as I have submitted to your Lordships, the origin of the arrestment *ad fundandam* rested upon the same principle, then the test, which is a good test for an arrestment in execution, is an equally good test for an arrestment *ad fundandam.* That being so, and assuming the facts to be as stated by the defender, I come to the question whether there was anything in this case which could have been made available to a creditor by the arrestee. That is to say, Moss' Empires having by the time when the arrestment was laid on sent a cheque in payment of their debt which had been received by Gray, was there anything resting-owing by Moss to Gray which could have been made available in execution? I am bound to say I think clearly not. I think that really the question here resolves itself into one of ordinary mercantile dealing. In one sense there can be no payment except in legal tender duly received; but in another sense there can be payment and there is payment every day, which is made otherwise than by legal tender. The most familiar instance is payment by bank notes—by any bank-notes in Scotland, and by bank-notes other than Bank of England notes in England. That is an ordinary and common form of payment. Well, in modern times, I think it is an equally common form of payment to pay by a cheque upon the debtor's own bank account. A cheque, after all, is merely an order on a third person to pay, and it is very analogous to an order on a third person to hand over hard cash. It is perfectly true and quite obvious that when a creditor takes a cheque, he takes it on the hypothesis that the cheque is going to be honoured; but if, when he goes to the bank, the cheque is not honoured, either by the bank refusing to pay,

or by the bank being unable to pay, as would be the case if it had stopped payment in the interval, then there is no question that he would still have an action against his original debtor. But I do not think that that very obvious consideration creates any difficulty, or alters the state of affairs when a cheque is ordinarily taken in payment. I do not know that it is necessary to refer the matter to any particular legal category, but if it is, I should rather suppose that the honouring of the cheque was a condition resolutive, and that if payment of the cheque failed to be made, the effect would be that no payment had been made, and the original debt would be set up again. But I am really not concerned as to whether that, which is after all a mere theory, is right or not. The point remains that according to ordinary commercial practice payment by cheque is recognised, and it seems to me that payment is complete the moment the creditor has accepted the cheque as in payment, subject always to the condition that the cheque will be met when presented.

I have put the matter upon what I think are the ordinary rules of mercantile dealing, but such authority as there is points in the same direction. I refer particularly to two cases which were quoted to us at the bar. The first case was that of *Carter* v. *Johnstone*, 13 R. 698, where a distinction is made most markedly between the handing over of a person's own cheque and the endorsing of other people's cheques in which he was the payee, and it was held that one was struck at by the Bankruptcy Act, while the other was saved as a cash payment. Lord Shand, after speaking of actual cash payments, says—"It is quite true that certain equivalents to cash payments have been recognised, and in practice at least have been understood to be effectual and not struck at by the statute. A draft or order produced from a banker and transmitted to a creditor in another town and a debtor's cheque on his own banker . . . have all been regarded as equivalents for cash payments, or different forms of making cash payments." And Lord Adam in the same case says—"It is said that these endorsements were granted in the ordinary course of trade, and that a bank cheque on a man's own bank being equivalent to cash the rule should be extended to such a case as the present. The two cases, however, are very different. In the first place in actual business a draft on a man's own banker is universally held to be equivalent to a cash payment." The second case was that of *The Glasgow Pavilion, Limited*, 6 F. 116, where Lord Young says—"Now that payment by a cheque which is accepted and duly honoured is a payment in cash, as the expression is used in our law, is I think a question not capable of being easily disputed. No creditor is bound to receive payment of a debt due to him by cheque or otherwise than in the current coin of the realm. A creditor may even refuse to accept Scottish bank notes, and insist on his debtor bringing him current coin of the realm to the amount of his debt. Nevertheless, if he choose to accept these bank notes in payment, I do not think it is capable of being disputed that he would be held, according to our law and practice, to have been paid in cash. In the same way if he receives, although not bound to do so, a cheque from his debtor and gives him a receipt for the sum contained in the cheque, that is regarded as a payment in cash if the cheque is duly honoured, and the payment in cash is not at the date of the honouring of the cheque but at the date of its receipt by the creditor." That seems to me precisely to meet the case in point. Although there the Court was dealing with the application of the principle to a different matter, namely, the question whether the directors of a company before proceeding to allotment had received payment of the requisite sum in respect of the shares applied for, yet I do not think that the difference of application makes any difference to the doctrine.

Certain English authorities were quoted to us. One of them seemed at first sight to be adverse to the opinion I have expressed. I refer to the case of *Cohen* v. *Hale*, 3 Q.B.D. 37, but I have come to be satisfied that it is not. That was a case where there was a garnishee order, which is very analogous to an arrestment. The question came to be whether the garnishee order had attached anything. In that case the garnishees had granted a cheque in payment of the debt, but the cheque was stopped before it was presented. The whole point of the judgment is that when a cheque is stopped, it is as if it had never existed, and that does not of course touch the question of what is the effect when the cheque is not stopped, but on the contrary passes into the hands of the person to whom it is made out and is eventually cashed. I think the matter is made quite clear by the decision in the case of *in re Palmer*, 19 Ch.D. 409, where it was held that there was no duty in a person who had given a cheque to stop it in the interests of any other creditors. As little can there possibly be a duty in the interests of those who wish to do diligence. Accordingly upon this part of the case I am clearly of opinion that, assuming the cheque to have been received by Gray on the morning of Thursday the 14th, that paid the debt subject to the condition that the cheque should be honoured, which it was Accordingly, at twenty minutes past four on Thursday afternoon, there was no debt due by Moss to Gray, and therefore nothing which could have been made available in a furthcoming if there had been an arrestment in execution in Moss' hands. That being the proper criterion to apply in considering whether or not there was a good arrestment *ad fundandam*, it follows that the arrestment which was laid on was inept.

Now, that being so, it becomes necessary to consider the facts of the case, because it is obvious that if as a matter of fact the cheque did not reach Gray till the Friday

morning, then at the time of arrestment on Thursday afternoon there was something which was due to Gray by Moss. Nobody supposes that payment is made simply by drawing out a cheque and putting it into the post; there must be reception by the creditor as well as despatch by the debtor. The case here is one that I confess is full of difficulty, and it is full of difficulty because there are very trenchant criticisms which can be made either upon the one story or upon the other, and these criticisms very nearly balance. As I said already we have had a most excellent argument from the bar, which gave us great assistance. I do not disguise that I have had considerable difficulty in making up my mind upon the matter, but in the end I have come to the conclusion that the Lord Ordinary is right. [*His Lordship then dealt with the evidence.*]

I therefore come to the conclusion that it would certainly not be wise to disturb the findings in fact of the Lord Ordinary, who after all has seen the witnesses and heard the evidence. If Cosens and Gray are speaking the truth, there can, of course, be no question as to what is the true state of the case. Upon the whole matter therefore I am of opinion that we should adhere.

LORD KINNEAR—The question of difficulty in this case is one of fact, and as that depends on a conflict of testimony, in the course of which each side charges the witnesses of the other with perjury, I should be very slow to differ from the Lord Ordinary, who heard the witnesses and has given us his opinion upon their credibility. But looking at the evidence independently, as we are bound to do, as if it were brought before us for the first time, I have come to the same conclusion as your Lordship, and for the same reasons. I agree with the Lord Ordinary and with your Lordship, and do not repeat the considerations upon which I think that conclusion is justified. I therefore take the fact to be that the defender received a cheque from the arrestees in payment of the debt on 14th June, and that the arrestments founding jurisdiction were not used until a later hour of that day. The question therefore is, on that assumption as to fact, was there anything arrested, and I am of opinion with your Lordship that there was nothing. We had a very interesting discussion as to whether the delivery and acceptance of a cheque really extinguished the debt during the interval between its acceptance and the payment of the money by the bank, but I confess to thinking that the interest of the question is rather abstract and logical than practical. As between a debtor and a creditor the delivery of a cheque payable on demand is, according to the intentions of both parties, payment of the debt, and it is in fact as well as in intention payment if there is in truth money in the bank to pay it and it is cashed. It is beyond all question that Moss intended to pay the defender, and the defender intended to take payment by cheque payable on demand, and further, that when the cheque was presented it was duly cashed. As between the debtor and the creditor that seems to make an end of the whole matter. I do not think it is material to consider whether, according to one argument, the payment by cheque is a conditional payment suspended in its full operation until the cheque is cashed, or whether, according to the other view, it merely suspends the creditor's remedies until it is seen whether the cheque will be honoured or not. In either view there may be a contingent liability still in the debtor if it should turn out that the cheque is not cashed. The question is whether that contingent liability is a proper subject for the diligence of arrestment or not. Now, it appears to me to be perfectly clear that if the arrestment now in dispute had been an arrestment in execution it would have been inept. There was no interest of the defender's in the hands of the arrestees except, if it be an exception, a potential claim against them on a contingency which did not happen, and which was dependent upon conditions of fact which it is now certain never existed. He might have had a claim if the cheque had been dishonoured, but it was not, and if that potential claim had been arrested it would have attached nothing, because it would have been perfectly obvious as soon as the arresting creditor proposed to carry his diligence into operation by furthcoming that there was nothing in the hands of the arrestee at the time, the possible contingency on which there might have been something not having happened.

I of course keep in view what your Lordship has explained, the distinction between arrestments in execution or on the dependence and arrestments for founding jurisdiction, and we must take it as now settled in law that an arrestment for founding jurisdiction really attaches nothing. But then it does not follow that such an arrestment will be good if in fact there is nothing to attach. I think the contrary is the law, because although there is no actual *nexus* laid upon moveables or debts that are arrested for founding jurisdiction, still in order to make the arrestment effectual at all it must bear to attach something which is properly subject to diligence. I cannot find in any of the cases that it has ever been suggested that an arrestment for founding jurisdiction will be good although the subject which it bears to attach was not attachable by arrestment in execution. I think the authority of the case of *Trowsdale's Trustee*, 9 Macph. 88, to which your Lordship referred, is conclusive to the contrary. The doctrine is, that whatever be the origin of arrestment for founding jurisdiction, it proceeds upon the hypothesis that there is in fact something within the jurisdiction of the Court which can be specifically taken in execution of any decree which may be pronounced. I think it is a good test of the validity of an arrestment for founding jurisdiction to inquire whether it purports to affect any property or fund which could be taken in execution.

Now, as I have said, it seems to me perfectly clear that if the arrestment now in

question had been an arrestment in execution, or if it had been followed up by arrestment on the dependence of the action, nothing would have been attached, and for that reason and others which your Lordship has given I am of opinion that this arrestment is altogether inept. If there be any novelty in the question as actually raised—and I think there is, because so far as direct authority goes it is a new point whether this was or was not an effectual arrestment *ad fundandam*—then I think the rule for our decision is furnished by the opinion of the whole Court in *Cameron* v. *Chapman*, 16 S. 907, in which Lord Corehouse, after pointing out the opposition between the doctrine of jurisdiction founded on the arrestment of moveables and the general principles of jurisdiction both in our own law and in the Roman law, goes on to say that while an artificial method has been so established, the Court are of opinion that it must not be carried further in any case than is expressly warranted by authority and precedent. Now, I think we are asked to carry it further in this case than it has ever been carried in any previous decision, so far as I know or counsel at the bar were able to inform us. I therefore agree that we should adhere to the Lord Ordinary's interlocutor.

LORD DUNDAS—I am entirely of the same opinion and upon the same grounds. Your Lordships have dealt with the case so exhaustively both as regards the law and as regards the facts, which I think present more difficulty than the law, that it would be idle for me to attempt to add further words on my own behalf.

LORD M'LAREN and LORD PEARSON were absent.

The Court adhered.

Counsel for Pursuers (Reclaimers) — Hunter, K.C.—Macmillan. Agents—Macpherson & Mackay, W.S.

Counsel for Defenders (Respondents)— M'Clure, K.C.—Constable. Agents—Blair & Caddell, W.S.

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*Wednesday, November* 13.

## SECOND DIVISION.

[Lord Dundas, Ordinary.

## MONTGOMERIE & COMPANY, LIMITED *v.* THE BURGH OF HADDINGTON.

*Public Health — Burgh — Sewers — Formation — Procedure — Statute Applicable — Public Health (Scotland) Act* 1897 (60 *and* 61 *Vict. cap.* 38), *sec.* 103—*Burgh Police (Scotland) Act* 1892 (55 *and* 56 *Vict. cap.* 58), *sec.* 217—*Burgh Sewerage, Drainage, and Water Supply (Scotland) Act* 1901 (1 *Edw. VII, cap.* 23).

*Held* that the local authority in a burgh is entitled, in constructing sewers, to proceed under section 103 of the Public Health Act 1897, which has not been repealed either expressly or by implication by the Burgh Sewerage, Drainage, and Water Supply (Scotland) Act 1901 or any other statute; the procedure prescribed by the Act of 1897 is a code complete in itself and, in particular, the powers conferred by the 103rd section are not limited by, and can be exercised without reference to, the 217th section of the Burgh Police (Scotland) Act 1892, which imposes on the local authority the necessity of obtaining the "consent in writing" of parties affected.

*Brown* v. *Magistrates of Kirkcudbright*, November 17, 1905, 8 F. 77, 43 S.L.R. 81, *followed.*

*Public Health — Burgh — Sewers — Formation—Public Health (Scotland) Act* 1897 (60 *and* 61 *Vict. cap.* 38), *secs.* 103 *and* 109 *—"Reasonable Notice in Writing" to Persons Interested—Failure to Give Notice —Rights of Persons Entitled to Notice.*

The Public Health (Scotland) Act 1897 by section 103 authorises the local authority to construct such sewers as they may think necessary, and to carry them "after reasonable notice in writing . . . into, through, or under any lands whatsoever."

A local authority having laid certain sewage pipes upon the surface of the bed of a stream, certain proprietors entitled to notice, who considered that they were prejudiced by the pipes being on the surface of instead of under the bed, raised an action in which they demanded the removal of the pipes, on the ground, *inter alia*, that the notice required by section 103 had not been given. The Court, while *finding* that the necessary notice had not been given (*diss.* Lord Stormonth Darling, who *found* that it had), *refused* to order the removal of the pipes, *holding* that under section 103, even if read along with section 109, the consent of the parties entitled to notice was not required and no power was given them to enforce their objections.

*Observations* to the effect that the Court would not, because of some unintentional failure to comply with statutory formalities, order the removal of a structure which could immediately be replaced when the statutory formalities had been complied with, especially where there was no radical defect in the title of those who had erected it.

The *opinion* of Lord Adam in *Brown* v. *Magistrates of Kirkcudbright, cit. sup.*, as to the extent of the powers conferred on the Sheriff by section 109, *approved.*

*Public Authority—Public Health—Public Authorities Protection Act* 1893 (56 *and* 57 *Vict. cap.* 61), *sec.* 3—*Public Health (Scotland) Act* 1897 (60 *and* 61 *Vict. c.* 38), *sec.* 166—*Action for Act Done under Public Health Act—Expenses.*

*Held* (in a question as to taxation of expenses) that the Public Authorities