Friday, November 19.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

MAULE & SON *v.* PAGE & COMPANY AND OTHERS.

Sheriff — Process — Foreign — Privative Jurisdiction — Summons—Competency—Arrestment — Action for Less than £50 *against Foreign Defender Based on Arrestment ad fundandam jurisdictionem on Signet Letters—Sheriff Courts (Scotland) Act* 1907 (7 *Edw. VII, cap.* 51), *sec.* 7.

Arrestments *ad fundandam jurisdictionem*, proceeding on Letters passing the Signet, were used against a foreigner, and an action was thereupon raised against him in the Court of Session. The summons concluded for £41. The pursuers arrested on the dependence.

Held that the action was incompetent, the Sheriff having privative jurisdiction in actions for less than £50; that the fact of the defender being a foreigner, or of the arrestments *ad fundandam jurisdictionem* being on Signet Letters, and not after the forms provided for the Sheriff Court in the Sheriff Courts Act 1907, did not take the action out of the general rule requiring it to be raised in the Sheriff Court; and that the pursuers had therefore established no preference on the property arrested on the dependence.

Process—Multiplepoinding — Title of One Claimant to Examine Grounds of Another Claimant's Claim.

A claimant in an action of multiplepoinding may competently examine the grounds of another claimant's claim.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51) enacts—Section 6—"*Action Competent in Sheriff Court.*—Any action competent in the Sheriff Court may be brought within the jurisdiction of the Sheriff . . . (*c*) Where the defender is a person not otherwise subject to the jurisdiction of the courts of Scotland, and a ship or vessel of which he is owner or part owner or master, or goods, debts, money, or other moveable property belonging to him, have been arrested within the jurisdiction. . . ."

Section 7—"*Privative Jurisdiction in Causes under* £50 *value.*—Subject to the provisions of this Act and of the Small Debt Acts, all causes not exceeding £50 in value, exclusive of interest and expenses competent in the Sheriff Court, shall be brought and followed forth in the Sheriff Court only, and shall not be subject to review by the Court of Session: Provided that in actions *ad factum præstandum*, where the value of the cause is not disclosed, the same shall be deemed to exceed £50, unless in the course of the cause the Sheriff shall determine, as after provided, that the value thereof is less than £50. . . ."

Section 9—"*Value of Cause. How determined.*—The Sheriff before whom the cause depends shall (in such way as he may think expedient) inquire into and determine the value thereof for the purposes of this Act, and his determination shall be final as regards the competency of the action on the ground of value but not otherwise."

On 25th September 1908 Robert Maule & Son, merchants, Princes Street, Edinburgh, *pursuers* and *real raisers*, brought an action of multiplepoinding against (1) Victor Page & Company, shopfitters, London (*common debtors*), and (2) Dickson & Walker, glass merchants, Edinburgh, and others (*defenders*), to have it found that they were only liable in once and single payment of the sums of £40 and £150 due and about to become due by them to Page & Company and arrested in their hands by the defenders.

Claims were lodged by, *inter alios*, (1) Dickson & Walker; (2) Frank Haddow, painter and decorator, Edinburgh; and (3) John Mitchell & Company, timber merchants, Leith.

The *facts* were as follows:—On 29th July 1908 Dickson & Walker raised an action in the Court of Session against Page & Company for the sum of £41 odd (having previously used arrestments *ad fundandam jurisdictionem*), and in virtue of a warrant to arrest contained in the summons they on 30th July 1908 arrested in the hands of the pursuers and real raisers a sum of £100. In this action Dickson & Walker obtained decree in absence on 30th September 1908. After using letters of arrestment *ad fundandam jurisdictionem*, signeted at Edinburgh on 10th July 1908, the claimant Haddow brought an action against Page & Company in the Sheriff Court at Edinburgh for the sum of £46 odd, on the dependence of which he, on 6th August 1908, arrested in the hands of the pursuers and real raisers a sum of £100. Decree in absence in this action was obtained by Haddow on 23rd September 1908. On 18th September 1908 the claimants John Mitchell & Company brought an action in the Court of Session for £52 against Page & Company, after using arrestments to found jurisdiction against them, and on the dependence of this action they on 19th September 1908 arrested in the hands of the pursuers and real raisers a sum of £100. Decree in this action was duly obtained by Mitchell & Company. With regard to the claim of Dickson & Walker, the claimants Haddow and Mitchell & Company maintained that the said claim was void and inept, in respect that the action raised by them—Dickson & Walker—in the Court of Session concluding for a sum of less than £50 was incompetent, looking to the provisions of the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 6 (*c*) and sec. 7, and that consequently the said claim fell to be postponed to that of the competing claimants.

The claimant Haddow pleaded, *inter alia*—". . . (2) In virtue of the arrestment condescended on, and in respect that the decree obtained by the claimants Dickson & Walker was void and inept, the claimant is entitled to be ranked and preferred

on the fund *in medio* in terms of his claim, and that preferably, as therein mentioned."

The claimants Mitchell & Company, *inter alia*, pleaded—". . . (3) In respect that the Court of Session had no jurisdiction to pronounce the decree founded on by the claimants Dickson & Walker, and in respect that the said decree and the arrestment founded on by said claimants are null and void, any ranking which the said claimants may obtain should be postponed to the ranking of these claimants."

On 20th March 1909 the Lord Ordinary (MACKENZIE) repelled the claim of Dickson & Walker, and preferred those of Haddow and Mitchell & Company.

Opinion.—"In this multiplepoinding the claimants Dickson & Walker claim a preference in respect of arrestments they used on the dependence of a summons. This is challenged by two other claimants, who say the arrestments are bad because the summons was incompetently brought in the Court of Session, in contravention of section 7 of the Sheriff Courts Act of 1907.

"Dickson & Walker raised an action on 29th July 1908 in the Court of Session for payment of £41, 11s. 6d., with interest from the date of citation, against Victor Page & Company, a London firm. They had previously used arrestments to found jurisdiction against the defenders, and in virtue of a warrant to arrest contained in the summons they on 30th July 1908 arrested on the dependence. They obtained decree in absence on 30th September 1908.

"The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 7, provides—'Subject to the provisions of this Act, and of the Small Debt Acts, all causes not exceeding £50 in value, exclusive of interest and expenses, competent in the Sheriff Court, shall be brought and followed forth in the Sheriff Court only, and shall not be subject to review by the Court of Session.' There is no question of the cause not exceeding £50 in value, exclusive of interest or expenses. It was brought in the Court of Session. The question is whether it was competent in the Sheriff Court. If competent in the Sheriff Court, then section 7 provides that the cause shall be brought and followed forth in that Court only.

"Section 6 provides—'. . . *quotes v. sup.* . . .' This is an alteration on the common law, by which arrestment only founds jurisdiction against the defender in the Court of Session. In the present case money belonging to Page & Company was arrested in the hands of a firm which was within the jurisdiction of the Edinburgh Sheriff Court. The letters of arrestment made it competent for Dickson & Walker to sue Page & Company in the Sheriff Court. The amount of their claim being under £50, the jurisdiction of the Sheriff Court was privative. It was incompetent to bring the action in the Court of Session, and the arrestments on the dependence of the summons are bad. Being a question of the law of diligence, it must be dealt with strictly. According to the argument presented for Dickson & Walker, the effect of the decree is of little moment.

It was argued that section 7 applies only to cases where the defender is subject to the jurisdiction otherwise than by arrestments to found jurisdiction, as was the case in *Allan* v. *Alexander's Trustees*, 16 S.L.T. 491; and also that it was not declared that a Court of Session summons as the foundation for diligence was incompetent, whatever view might be taken of the value of the decree following upon it. In the view I take of the true construction of sections 6 and 7, these points are not tenable. It was also maintained that the objection to the competency of the summons and arrestments on the dependence was not properly raised on the record. I think the question is sufficiently raised in the condescendence for Mitchell & Company.

"It was further contended that the competing claimants have no title to object to the competency of the summons and arrestments. Now the competing claimants clearly have an interest to raise the question. They founded on *Fischer & Company* v. *Andersen*, 23 R. 395. The judgment in that case is, in my opinion, an authority in their favour. There a plea was sustained to the effect, first, that a decree in absence pronounced in the Court of Session was irregular and should be set aside. This plea was stated by a competing claimant, who was in the same position as the competing claimants here. No doubt there was a second branch of the plea which was based on section 20 of the Court of Session Act of 1868. The summons upon which the decree proceeded had been amended. Section 20 provides that such amendment shall not have the effect of validating diligence used on the dependence of the action so as to prejudice the rights of creditors of the defender interested in defeating such diligence. It was said that this statutory provision was what gave the competing creditor a title. If, however, the statute alone had conferred the title, the Court would not have sustained the first branch of the plea. The fact that they sustained this branch of the plea indicates that they considered the competing claimant had a title to plead all competent objections independently of his title under the statute.

"In the same way the competing claimants here have a title and interest to maintain that the arrestments used by Dickson & Walker are bad and do not entitle them to be ranked preferably.

"The claim for Dickson & Walker will therefore be repelled.

"There is no dispute that the real raisers are entitled to be ranked *primo loco* for the expenses of bringing the action, then Robertson & Scott for £79, 5s. 3d., with interest, as claimed, then Haddow for £52, 15s. 3d., with interest, as claimed, and then Mitchell & Company for £60, 12s. 8d., with interest, as claimed. This exhausts the fund."

The claimants Dickson & Walker reclaimed, and argued—(1) The reclaimers' action was competently brought in the

Court of Session. Section 6 of the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51) was permissive only, and did not affect the ancient jurisdiction of the Court of Session against foreigners. In regard to foreigners the jurisdiction of the Court of Session was prior to 1907 privative, except (1) where a ship had been arrested in the sheriffdom, and (2) in maritime causes—Lewis, Sheriff Court Practice (4th ed.) p. 27. Even arrestment *ad fundandam* on a Sheriff's precept did not create jurisdiction against a foreigner in the Sheriff Court. The jurisdiction so created was in the Court of Session—*Burn* v. *Purvis*, December 13, 1828, 7 S. 194; *Harvey, Hall, & Company* v. *Black & Son*, June 21, 1831, 9 S. 785; *Wightman* v. *Wilson*, March 9, 1858, 20 D. 779. Section 7 of the Sheriff Courts (Scotland) Act 1907 could not be held to take away by implication that ancient jurisdiction. It only dealt with the jurisdiction of the Court of Session as a Court of Review, excluding it in causes under £50 in value. *Esto* that where arrestment to found jurisdiction had been made on a Sheriff's warrant the action might now be competently brought in the Sheriff Court—Sheriff Courts Act 1907, sec. 6 (*c*)—the arrestment here proceeded on Signet Letters, and where that was so the action could only be brought in the Court of Session—Mackay's Manual, p. 59; Dove Wilson's Sheriff Court Practice, p. 75. (2) The respondents had no title to object to the competency of the reclaimers' summons and arrestments. The case of *Fischer & Company* v. *Andersen*, January 15, 1896, 23 R. 395, 33 S.L.R. 306, relied on by them, was wrongly decided.

Argued for respondents Haddow, and Mitchell & Company—The Lord Ordinary was right. (1) The reclaimers' action ought to have been brought in the Sheriff Court, for section 7 of the Act of 1907 distinctly provided that such an action should be brought in that Court only. (2) The respondents, as competing claimants in a multiplepoinding, had a good title to object to the competency of the reclaimers' summons and arrestments—*Walls' Trustee* v. *Drynan*, February 1, 1888, 15 R. 359, 25 S.L.R. 275; *Fischer & Company* v. *Andersen* (*cit. supra*).

At advising—

LORD PRESIDENT—The question in this case arises under competing claims in a multiplepoinding. The claim of Dickson & Walker upon the fund is for a sum of £41, 11s. 6d. with interest, and their warrant for that claim is a decree in absence obtained in the Court of Session, the decree being obtained in a summons which was raised in the Court of Session in respect of a jurisdiction founded by arrestments *ad fundandam jurisdictionem*. I ought also to mention that there was an arrestment upon the dependence in the summons in which the decree in absence was obtained.

This claim is resisted by another arresting creditor, whose date of arrestment is subsequent to the date of the said arrestment on the dependence, and the ground for objecting is that the decree in absence is bad because the summons on which it followed ought not to have been raised in the Court of Session, being for a sum of less than £50. There was a point started before your Lordships which I do not think gave your Lordships any anxiety, viz., as to whether it was competent for one claimant to examine the grounds of another claimant's claim, for cases were quoted to us which showed that it was perfectly competent to do so, and therefore I do not think the objections of the second claimant on that head can be sustained.

Now the merits of the question depend entirely upon some of the provisions of the recent Sheriff Courts Act of 1907. I may remind your Lordships that until the passing of the Sheriff Courts Act of 1907, it was not possible to convene a foreigner in the Sheriff Court by means of an action founded on arrestments *ad fundandam jurisdictionem*, and therefore prior to the Sheriff Courts Act there is no doubt that the only way to have got at him would have been to have done what was done here, but by the Sheriff Courts Act of 1907, for the first time, arrestments *ad fundandam jurisdictionem* were made competent in the Sheriff Court. The 6th section of the Sheriff Court Act is in these terms—". . . *quotes v. sup.* . . ." Now of course an action competent in the Sheriff Court in the sense of the 6th section undoubtedly includes actions with pure pecuniary conclusions for debt. The 5th section deals with the extension of the jurisdiction of the Sheriff, and brings in actions which were hitherto incompetent, but of the competency of a pecuniary claim in the Sheriff Court there was never any doubt. Accordingly, under the 6th section I think it is quite clear that if you find effects of a defender within the sheriffdom you can arrest these effects *ad fundandam jurisdictionem*, and then bring an action in the Sheriff Court. Now comes the section on which the question turns, and that is section 7. That section runs thus—". . . *quotes v. sup.* . . ."

Now the objecting creditor says that that section rules, that here there was a case not exceeding £50, that it was competent in the Sheriff Court, and that therefore it ought to have been brought in the Sheriff Court and not in the Court of Session. The argument against that went upon two branches. In the first place, the learned counsel said that here there really had not been an arrestment on which the Sheriff Court action could have been raised, meaning thereby that while there is a form given in the Sheriff Courts Act for getting an arrestment *ad fundandam jurisdictionem* by way of an application under an initial writ, which is the form of process now introduced by that Act, that means was not employed, and the arrestment here was an arrestment proceeding upon Signet letters. I do not think there is anything in that objection. We were told that the practice of getting an arrestment at all by warrant of the Sheriff only dated from

1839, but that is clearly not so. One would have expected that the power of arrestment would always have been one of the powers of the Judge Ordinary of the bounds, and accordingly, looking into the matter, we find that as long ago as 1759 arrestment on a Border Warrant was made a perfectly good foundation for an action in the Court of Session (*Hardie* v. *Liddel*, 1759, M. 4830). In the same way I think the fact that property has been arrested here, irrespective of whether it has been arrested by warrant of the Sheriff or by letters, really determines the matter. Section 6 refers to arrestment as a matter of fact without specifying method. If there has been arrestment, then there is a good foundation for an action whether the arrestment has been put on by the Sheriff himself or by the other way of securing an arrestment, and therefore I think there is nothing in that objection.

But then the learned counsel next argued that section 7 really did not do anything except prevent appeals in causes not exceeding £50, and that it was not meant to give a privative jurisdiction to the Sheriff in the matter of originating causes. One would not have thought that there was really much to base that argument upon if it had not been that he was enabled to call in aid another section, and this other section, I am afraid, is just another instance of what we had to remark on the other day, namely, the deplorable way in which this Act has been drawn, where it is quite easy to see the underlying intention of the framer of the clauses, and where at the same time they have been so expressed as to make it exceedingly difficult to give that intention effect. Section 9 is in these terms — ". . . *quotes, v. sup.* . . ." Now your Lordships will easily see that the muddle that that section gets us into is extraordinarily peculiar. In section 7 we have it told us that in actions *ad factum præstandum*, where the value of the cause is not disclosed, the same shall be deemed to exceed £50, unless in the course of the cause the Sheriff shall determine that the value thereof is less than £50; and then in section 9 we are told that the Sheriff is to inquire into and determine the value thereof for the purposes of the Act, and his determination shall be final as regards the competency. Now in the case which is brought in the Sheriff Court, inasmuch as there is no exclusion of the jurisdiction of the Sheriff above £50, it is quite clear that the case is always competent, assuming it to be within the class of actions competent in the Sheriff Court (which is not questioned here). There can therefore be no determination of competency in respect of value so far as the Sheriff is concerned—that is to say, of the competency of the case before him —because it is equally competent whether it is under £50 or above £50, and therefore there is no use in his determining the value one way or another. There is of course the necessity for determining the value with the view to the competency of appeal, but yet section 9 does not say competency of appeal, but it says the competency of the action. Now I have already pointed out that there cannot be any question of the competency of the action before the Sheriff whether its value be £50 or not. But what shall we say of an action in the Court of Session—of an action *ad factum præstandum* in the Court of Session—when it is said that the value is under £50? Now if the jurisdiction is privative, that action ought to have been brought before the Sheriff, but the only person who can determine that question is the Sheriff before whom it depends, and *ex hypothesi* the case is not depending before the Sheriff but before the Court of Session.

Taking advantage of this extraordinary muddle, the learned counsel argued that the matter is so involved that you must hold that the true meaning of it all is to give privative jurisdiction in appeal, and no privative jurisdiction in the origination of the cause. It is one of those cases where we have got to make the best of language which, taken literally, reduces the matter to nonsense, but I cannot have any doubt that the intention of the Legislature was to give a privative jurisdiction to the Sheriff Court both in the matter of origination and appeal. And I think it is far better to hold that, which I think is in accordance with what the Act means, and then to leave these provisions as to the determination of the value of causes as utterly unworkable, as they really are, than it would be to go to the other extreme and, because these provisions are unworkable, to hold that the Legislature did not effectually settle that there was privative jurisdiction. Put in popular language, of course I have no doubt as to what the framer of the Act meant. He meant to extend the privative jurisdiction of £25, which we were all accustomed to, to £50, and then unfortunately lost the thread of the matter in section 9 by saying that the Sheriff's determination shall be final as regards the competency of the action on the ground of value. The only result of that is this, that whereas section 9 may be read—disregarding the strict meaning of the word "competency"—as giving the Sheriff a right of inquiry into the value of causes before him with the view of settling whether their value prevents appeal, it leaves the matter quite unprovided for with regard to actions raised in the Court of Session, the conclusions in which do not give you at least a *prima facie* means of expiscating what is the value. I say *prima facie*, because I think that those older decisions are still law which hold that the value of the cause is the value of the true subject of the cause as determined by the Court, and is not necessarily settled by the actual sum that you find in the conclusions. I am bound to say that I think it would have been much better if the proviso had been omitted, because actions *ad factum præstandum* really are often without a value, and there are numbers of other actions under section 6 brought within the compass of the Sheriff Court which may also be said to be actions of less than £50. It

is quite clear of course that it was not the intention of the Legislature to stop all actions whatever except a few like declarator of marriage, &c., being raised in the Court of Session, but yet really that would be the logical result of section 9, because you would have first to raise the action in the Sheriff Court for the Sheriff to decide whether it must have been brought in the Sheriff Court. I come therefore to the conclusion that section 7 does settle that there is a privative jurisdiction in the Sheriff Court in actions under £50. Applying that to the present case, there is no question that the value of this case is under £50. I think therefore the reclaimers were bound to have sued in the Sheriff Court; that the decree which they have got is bad; that consequently the claim falls to be dismissed; and that the Lord Ordinary has come to the right conclusion.

LORD KINNEAR—I agree that, taking the whole fasciculus of clauses which are headed in this statute by the word "jurisdiction" together, it would be extremely difficult, if it were possible, to discover anything like a complete and coherent system of procedure. But then I do not think that difficulties of that kind, which may require to be solved on some future occasion, ought to prevent our giving their natural meaning to the plain words of one of these clauses, which is sufficient in itself for the government of the particular case before us. I confess I have no difficulty in holding upon the construction of the first part of the seventh clause of the Act, that it was intended to give to the Sheriff Court a privative jurisdiction in all cases, such as that in question, which conclude for a mere payment in money of a sum of less than £50 in value. So far I think the Act is perfectly clear. I do not found this on the head-note of the clause, which puts in so many words the meaning which I must ascribe to it, namely, "privative jurisdiction in causes under £50 value," because we must consider the clause itself as it stands irrespective of the head-note. But then I think the clause itself is clear, because it says—"All causes not exceeding fifty pounds in value, exclusive of interest and expenses competent in the Sheriff Court, shall be brought and followed forth in the Sheriff Court only." I cannot read that as meaning anything else than that actions of that kind must be brought in the Sheriff Court and not in any other Court, which of course excludes the Court of Session. Now that makes an end of the case, provided that the action which has been brought in the Court of Session was really competent in the Sheriff Court; and as to that the only question which has been raised is whether the Sheriff had jurisdiction to entertain such an action against a foreign defender. But the sixth clause provides that an action competent in the Sheriff Court may be brought within the jurisdiction of the Sheriff where the defender is not otherwise subject to the jurisdiction of the Courts of Scotland, and goods, debts, money, or other moveable property belonging to him have been arrested within the jurisdiction. The condition therefore which must be satisfied is that goods shall have been arrested within the jurisdiction. It is said that that condition has not been satisfied, because, although goods within the jurisdiction were arrested, they were not arrested upon the special forms of procedure for arrestment introduced for the first time in the schedule to this Act, but upon the forms that had long been in use for the purpose of effecting arrestments to found jurisdiction in the Court of Session. If the arrestments actually used were effectual for their purpose—that is, if they arrested goods within the jurisdiction of the Sheriff—it appears to me to be clear enough that the statutory condition is satisfied. It is not said "where goods have been arrested in accordance with the procedure of this Act," but "where goods have been arrested"—an expression general enough to cover any effectual arrestment. It is a question of fact—Have these goods been arrested or not? And if they have been, were they arrested within the jurisdiction? If these questions are answered in the affirmative, it follows that the defenders might have been brought within the jurisdiction, and the action against them rendered competent in the Sheriff Court. The statute by prescribing new forms for procedure in the Sheriff Court itself, does not abrogate the old form so as to make arrestments made otherwise ineffectual, and if it did, it would not advance the reclaimer's case, because in that case the arrestments under which they obtained decree would fall altogether. But it appears to me that the arrestments were perfectly effectual in themselves, and that the goods arrested being within the jurisdiction, the condition of the sixth clause is satisfied. In these circumstances the action could be brought in the Sheriff Court even against a foreigner, and in the Sheriff Court alone.

LORD JOHNSTON—[The LORD PRESIDENT stated that Lord Johnston, who was absent at the advising, concurred.]

LORD DUNDAS, who was sitting in the Division, gave no opinion, not having heard the case.

LORD M'LAREN was absent.

The Court adhered.

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