from 25th May. It seems to me that the fair reading of the stipulation for a week's trial is that it was intended that the defenders should have that period for testing whether the horse conformed to the warranty or not.

The LORD JUSTICE-CLERK and LORD ARDWALL were absent. LORD DUNDAS was sitting in the Extra Division.

The Court pronounced this interlocutor—

"Sustain the appeal, and recal the . . . interlocutor appealed against except in so far as the findings in fact therein are concerned: Find in law that under the warranty contained in the contract of sale as found by the Sheriff the defenders were entitled to reject the horse within one week if disconform to warranty, but not otherwise, and in respect the Sheriff has not held that the horse was disconform to warranty, decern against the defenders for the payment of the sum of £28, with interest, as concluded for."

Counsel for Pursuer (Appellant)—J. A. Christie—Paton. Agents—St Clair Swanson & Manson, W.S.

Counsel for Defenders (Respondents)—T. G. Robertson. Agents—Laing & Motherwell, W.S.

Saturday, December 9.

FIRST DIVISION.

[Sheriff Court at Glasgow.

LEGGAT BROTHERS *v.* GRAY.

(See *Leggat Brothers* v. *Gray*, 1908 S.C. 67, 45 S.L.R. 67.)

Sheriff—Process—Reduction—"Deed or Writing"—Objection Stated Ope exceptionis to a Decree—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *First Schedule, Rule* 50.

The Sheriff Courts (Scotland) Act 1907, First Schedule, Rule 50, provides—"When a deed or writing is founded on by any party in a cause, all objections thereto may be stated and maintained by way of exception without the necessity of bringing a reduction thereof."

Held that a decree *in foro* was not a deed or writing in the sense of the rule.

Sheriff—Jurisdiction—Arrestment—Furthcoming—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 6 (9).

The Sheriff Courts (Scotland) Act 1907 enacts, section 6—"Any action competent in the Sheriff Court may be brought within the jurisdiction of the sheriff . . . (*g*) Where in an action of furthcoming or multiplepoinding the fund or subject *in medio* is situated within the jurisdiction, or the arrestee or holder of the fund is subject to the jurisdiction of the Court."

Held that where the arrestee was subject to the jurisdiction it was unnecessary to found jurisdiction in a furthcoming against the common debtor.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), section 6, and First Schedule, Rule 50, are quoted in the rubrics (*supra*).

Leggat Brothers, printers, Port-Dundas, Glasgow, *pursuers*, raised in the Sheriff Court at Glasgow an action of furthcoming against Moss' Empire, Limited, of 23 York Place, Edinburgh, having a place of business in Sauchiehall Street, Glasgow, *arrestees*, and George Gray, music hall artiste, "whose only known address is The Savage Club, Adelphi Terrace, London," the *common debtor*.

The claim or demand of the pursuers was—"That there should be made available to them for satisfaction of—(First) The sum of £125 sterling, with interest thereon from the 19th day of January 1910, (Second) the sum of £20, 0s. 11d. sterling of expenses, and (Third) for the expenses of this process, 145 preference shares and 100 ordinary shares held by the defender, and registered in the name of George Herbert Gray, of Moss' Empires, Limited, and which shares are numbered as follows, . . . the said sums of £125 sterling, with interest as aforesaid, and £20, 0s. 11d. sterling of expenses, being the amounts contained in an extract decree obtained by the pursuers in the Sheriff Court of Lanarkshire at Glasgow in an action at their instance against the defender George Gray, upon the dependence of which action the pursuers on the 18th day of February 1910 used arrestments in the hands of the defenders Moss' Empires, Limited."

The pursuers accordingly craved the Court to grant warrant to a stockbroker to sell the shares or such a number as might be sufficient to satisfy their claim.

The pursuers in evidence of their claim produced the extract decree, which was in the following terms—"At Glasgow, the fifteenth day of June, and fourth day of July Nineteen hundred and ten, in an action in the Sheriff Court of the County of Lanark at Glasgow, at the instance of Leggat Brothers, printers, one hundred and seven Bishop Street, Port-Dundas, Glasgow, *pursuers*, against George Gray, music hall artiste, presently performing at The Palace Theatre of Varieties, Main Street, Gorbals, Glasgow, *defender*, the Sheriff decerned the defender to pay to the pursuers One hundred and twenty-five pounds sterling, with interest thereon from the Nineteenth day of January Nineteen hundred and ten, and twenty pounds and elevenpence of expenses: And the Sheriff grants warrant for all lawful execution thereon by instant arrestment, and also by poinding after a charge of seven free days if the defender is within Scotland, and fourteen free days if furth thereof."

The pursuers also produced the execution of the arrestments on the dependence referred to in their claim.

Defences were lodged in the action of furthcoming for George Gray, the common debtor. His defence was threefold.

He averred—"At the time said action, *i.e.*, the action of constitution, was raised, and during the dependence thereof, there was no jurisdiction to entertain it. No such action was served upon him, and he gave no instructions to anyone to defend such an action. The said decree is inept, irregular, and illegal, and the said decree does not constitute any debt against this defender. It is referred to for its terms, beyond which no admission is made.

He also averred—"The execution of arrestment is referred to for its terms, beyond which no admission is made. Explained that the said arrestments are inept, invalid, and illegal, in respect that they were used against a foreigner without jurisdiction having been constituted against him. Explained that the defender was not aware of said arrestment until the present action was raised, no notice of these or of any arrestments having been made to him."

In the third place he made averments to the effect that the shares arrested were not really his, but fell under a postnuptial marriage contract which he was bound to make in virtue of an antenuptial agreement. On this third defence the case is not reported.

The pursuers pleaded, *inter alia*—"(1) No relevant defence. (4) The defender George Gray being indebted to the pursuers in the sums mentioned in the condescendence, and the said shares having been duly attached by arrestment, warrant to sell and apply the proceeds as craved, and authority to register should be granted with expenses."

The defender pleaded, *inter alia*—"(1) The action is incompetent. (2) The action is irrelevant. (4) No jurisdiction in the action of constitution or in the action of furthcoming following upon it. (5) Said arrestments being inept, invalid, and illegal in respect they were used on the dependence of an action against a foreigner without jurisdiction having been constituted against him, the action should be dismissed. (6) Said arrestment being inept, invalid, and illegal in respect of no service, either of the action of constitution or of the warrant to arrest, the action should be dismissed."

On 16th November 1910 the Sheriff-Substitute (FYFE) pronounced this interlocutor—"Repels the first plea for defender, the common debtor; sustains pursuers' first plea; grants leave to appeal."

Note—"Strictly speaking, as I have sustained pursuers' plea to the relevancy of the defence, I should remit to a stockbroker to sell the shares, but that would not be an appealable interlocutor, and it would be obviously useless to consider the competency or the relevancy of the defence if the shares have been sold. Both parties accordingly request that I should at present pronounce only upon the first plea stated for each party, and grant leave to appeal.

"I have no hesitation at all in repelling the defender's first plea. The action is an action of furthcoming following upon a decree of this Court. If the decree is to stand, the validity of the execution of arrestment is not challenged. The only ground for the plea of incompetency is that jurisdiction was not founded in the action in which decree has been granted. In other words, the defender now wants to get behind the decree. That he cannot competently do in this Court either in the present process or any other. A decree of Court cannot be reduced by exception, for it is not a deed or writing in the sense of Rule 50 of The Sheriff Courts Act 1907. A direct action of reduction not being competent in the Sheriff Court, the only notice which I could take here of the defender's first and fourth pleas would be to sist this process to await the issue of an action in the Court of Session to reduce the decree.

"The defender, however, does not ask the process to be sisted, but wants to challenge the decree in this Court, and that, in my opinion, is clearly incompetent."

The defender appealed, and argued—It was necessary to constitute jurisdiction against the common debtor, but this had not been done. There had been no arrestment, *jurisdictionis fundandæ causa*, in the action of constitution, and accordingly the arrestment on the dependence and the decree of 12th July 1910 were invalid. The decree should be set aside, *ope exceptionis*, under Rule 50 of the First Schedule to the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51). Even if that decree could not be so set aside, the furthcoming was a fresh process and should have been preceded by arrestment *jurisdictionis fundandæ causa* — *Wightman* v. *Wilson*, March 9, 1858, 20 D. 779; *Harvey, Hall, & Co.* v. *Black & Son*, June 21, 1831, 9 S. 785; *Burn* v. *Purvis*, December 13, 1828, 7 S. 194. At the most *Burns* v. *Munro*, July 18, 1844, 6 D. 1352, merely decided that it was not necessary to found jurisdiction afresh if the furthcoming were raised in the Court of Session. The Sheriff Courts Act 1907, section 6, had not taken away the rule of *Wightman*. Reference was also made to Graham Stewart on Diligence, p. 228.

Argued for the pursuers and respondents—The decree of 12th July was a decree *in foro*, and could not be set aside *ope exceptionis*. The furthcoming was merely ancillary to the arrestment on the dependence. *Wightman* (*cit. sup.*) was decided prior to the Sheriff Courts (Scotland) Act 1876 (39 and 40 Vict. cap. 70). By that Act, section 47, an action of furthcoming was declared competent before a Sheriff, to whose jurisdiction the arrestee was subject, and the common debtor did not require to be subject to the jurisdiction, but provision was made for his citation. The provisions of section 6 of the Act of 1907 were similar, except that under them even citation of the common debtor was unnecessary.

At advising—

LORD PRESIDENT—This is an action of furthcoming, raised in the Sheriff Court at

Lanark, in which Leggat Brothers, who are the holders of a decree against George Gray, seek to have certain shares made furthcoming which stand in his name and which they have arrested in the hands of Moss' Empires, Limited—a company admittedly subject to the jurisdiction of the Sheriff Court in Glasgow, and having a place of business there.

The decree which the pursuers produce is evidenced by an extract decree for payment obtained in the Sheriff Court at Glasgow on 12th July 1910 *in causa Leggat Brothers* v. *George Gray*. The defender in that action, the common debtor, has appeared in this furthcoming, and pleads on three grounds that no decree should be granted.

His first ground is that he is not subject to the jurisdiction of the Sheriff Court in Glasgow, and that the decree of 12th July 1910 is inept. The answer to that is that the extract decree, beyond which in this case we cannot go, shows on the face of it that it is a decree *in foro*, and I think it is quite clear that rule 50 of the First Schedule to the Sheriff Courts Act 1907 does not apply. By that rule it is enacted—"When a deed or writing is founded on by any party in a cause, all objections thereto may be stated and maintained by way of exception without the necessity of bringing a reduction thereof." I am clearly of opinion that a decree of Court is not a "deed or writing" in the sense of that rule, and so long as the decree is not reduced, it is beyond our competency to consider whether it was rightly granted or not.

The second objection is that no steps were taken by arrestments *jurisdictionis fundandæ causa* in this action of furthcoming. The arrestments which are the foundation of the furthcoming were executed on the dependence of the action in which we have an extract decree *in foro*. Whatever may have been the law in the cases quoted, this point seems to me to be settled by the Sheriff Courts Act 1907, which enacts—section 6—"... [*quotes, v. sup.*] ..." In this case the arrestees, Moss' Empires, Limited, are admittedly within the jurisdiction of the Sheriff Court at Glasgow. Accordingly I think that the second objection is settled by the statute. I only say this, that that being so, I do not make any pronouncement as to what mode of intimation would be necessary to give the common debtor a fair chance of being heard, especially in the case where the decree on which the arrestments are used was a decree in absence. That question is obviously of no moment in this case, because the common debtor has had sufficient intimation to make him appear, and therefore he cannot be heard to complain of want of notice. I only say this by way of precaution, because I think the Sheriff Courts Act makes it unnecessary to found jurisdiction against the common debtor, and if the decree which the pursuers hold had been a decree in absence it would have been necessary to see that the common debtor had got fair notice that his property was being taken in execution.

The only other matter is that of the supposed transference of the shares in question by an alleged marriage contract. I think the Sheriff-Substitute has satisfactorily dealt with that matter. Accordingly upon the whole matter I think the appeal should be refused.

LORD KINNEAR—I agree.

LORD MACKENZIE—I concur.

The LORD PRESIDENT then read the opinion of LORD JOHNSTON, who was absent at advising:—

LORD JOHNSTON—[*After criticising the defender's statement of what had occurred in the prior Court of Session action*]—The facts are that the present pursuers raised against the present common debtor in 1906 a former action for the same debt in the Court of Session, having founded jurisdiction by arrestment and obtained decree in absence. They then arrested in execution in the hands of the same arrestees, viz., Moss' Empires Limited, and brought a furthcoming. When they came to raise this furthcoming it was pleaded that it could not proceed on the decree, which, as I have said, was one in absence, because the arrestment to found jurisdiction, on which the decree proceeded, attached nothing. Now at that date the pursuers knew nothing of the fund out of which they now seek to make good their claims, but on the contrary thought that the arrestees were due the common debtor a sum of money in name of salary. On this ground alone the arrestment *ad fundandam* was supported. The facts proved otherwise, and as the decree therefore appeared to have been pronounced in a case where there was no jurisdiction, because the arrestment *ad fundandam* had attached nothing, the furthcoming, which by virtue of the arrestment in execution followed on it, also failed—*Leggat Brothers* v. *Gray*, 1908 S.C. 67. Had the Court been acquainted with the proper facts the jurisdiction would, I think, have been sustained and decree in the furthcoming been obtained, for the common debtor seems to have acquired the first set of shares now in question in April / May 1906, before the arrestments to found jurisdiction were laid on. I have explained this much because of the confusing, if not misleading, statement on record regarding the previous case.

Having now discovered that there are shares in Moss' Empires registered in the common debtor's name, the pursuers have raised another action against him, this time in the Sheriff Court at Glasgow, but without, so far as appears—and this, in the absence of any assertion by the pursuers to the contrary, I assume is the fact—arresting to found jurisdiction, and have obtained decree. This decree is undoubtedly one *in foro*, though again this is not directly stated, nor are we told how the defender was cited for £125 with £20, 0s. 11d. of expenses. I say undoubtedly, for the extract does not bear that the decree was in absence, as I think it would if that

had been the case, but more particularly because the expenses are not those of a Sheriff Court decree in absence. On the dependence of the action the pursuers have arrested, and raise this action to have the shares made furthcoming to satisfy their debt. It is not alleged that the common debtor had any domicile or was personally in Scotland when the furthcoming was brought. And he now pleads that it is incompetent. This he rests, I understand, on two grounds—first, that there was no jurisdiction in the action on dependence of which the arrestments were used. He further avers that he gave no authority for a defence to be lodged in his name. So long as the decree stands, being a decree *in foro*, neither of these objections to it can, I think, be listened to, even in the Sheriff Court (Act 1907, rule 50), *ope exceptionis* and without reduction of the decree. In so deciding I confine myself to the case before the Court of a decree *in foro*, and reserve my opinion as to how this case would have been decided had the principal decree here been one in absence, in case any distinction can be drawn. Second, that the furthcoming itself was not preceded by arrestment to found jurisdiction. This plea is, I think, directly met by the decision in *Burns* v. *Munro* (6 D. 1352). Given that a good decree has been pronounced against a defender—and for the purposes of the present judgment this must be assumed—nothing more is wanted to make effectual the diligence done on it than that the arrestee should be subject to the jurisdiction, the common debtor being merely called for his interest. The authority of *Wightman* v. *Wilson* (20 D. 779), which at first sight would seem to support the common debtor's contention, has been displaced by the Sheriff Courts Act 1907, section 6.

I am therefore for adhering on this branch of the case.

But the common debtor maintains further that there was nothing to attach. Here also I agree with the Sheriff, and for the reasons given by him.

The Court dismissed the appeal, affirmed the interlocutor of the Sheriff-Substitute dated 16th November 1910, and remitted the cause to him to proceed.

Counsel for the Pursuers and Respondents —Horne, K.C.—Christie. Agent—James G. Bryson, Solicitor.

Counsel for the Defender and Appellant —Crabb Watt, K.C.—Kemp. Agent—James D. Turnbull, S.S.C.

HIGH COURT OF JUSTICIARY.

Thursday, December 14.

(Before the Lord Justice Clerk, Lord Dundas, and Lord Guthrie.)

PATIENCE *v.* MACKENZIE.

Justiciary Cases—Statutory Offence—Construction—Ejusdem generis—Hanging Linen Clothes or other such Article on a Roadside Hedge—Herring Nets—Roads and Bridges (Scotland) Act 1878 (41 *and* 42 *Vict. cap.* 5), *sec.* 123, *and Sched. C—General Turnpike Act* (1 *and* 2 *Will. IV, cap.* 43), *sec.* 96.

The General Turnpike Act, sec. 96, incorporated in the Roads and Bridges (Scotland) Act 1878, by sec. 123 and Sched. C enacts that if any person shall be guilty of any one of certain enumerated offences, and, *inter alia*, "shall hang or lay any linen clothes or other such article on any hedge or fence of any such road" he shall be liable to a penalty. *Held* that a person who was charged with hanging herring nets on a roadside hedge had not committed an offence within the meaning of the Act.

The General Turnpike Act (1 and 2 Will. IV, cap. 43), sec. 96, incorporated by sec. 123 and Sched. C of the Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 52), is quoted *supra in rubric*.

George Patience, fisherman, Avoch, was charged in the Sheriff Court at Dingwall on 31st October 1911, at the instance of William Mackenzie, solicitor, Procurator-Fiscal, on a summary complaint stated as follows—"You are charged at the instance of the complainer that on the 6th and 7th days of October 1911, by the side of the public highway leading from the house at Bridge Street, Avoch, in the parish of Avoch and county of Ross and Cromarty, occupied by Donald Gray, carpenter, to the bakery occupied by Alexander Macleman, baker, Avoch, you did hang or lay herring fishing-nets on the hedge or fence of said road, contrary to 1 and 2 William IV, chapter 43, section 96, as incorporated with the Roads and Bridges (Scotland) Act 1878, whereby you are liable to forfeit or pay any sum not exceeding 50s., over and above the damages occasioned thereby, and in default of payment of said penalty of 50s. to imprisonment in terms of section 48 of the Summary Jurisdiction (Scotland) Act 1908."

The accused was convicted by the Sheriff-Substitute and sentenced accordingly.

The accused brought a bill of suspension, in which he, *inter alia*, stated that before he was called on to plead, his agent objected to the relevancy of the complaint, but that the Sheriff-Substitute repelled the objection and the trial proceeded.

The complainer pleaded—"(1) The acts set forth in the said complaint not being, upon a sound construction, an offence