COURT OF SESSION.

Tuesday, December 2.

FIRST DIVISION.

[Lord Dewar, Ordinary.

J. & C. MURRAY *v.* WALLACE, MARRS, & COMPANY.

Arrestment jurisdictionis fundandæ causa—Validity—Contract to Deliver Cash against Documents—Arrestment of Price by Buyers in Hands of Bank Employed by Sellers' Bankers to Carry out Transaction—Accountability—Personal Bar.

A Glasgow firm purchased from a London firm a quantity of iron, the terms of the contract being nett cash against shipping documents. In implement of the contract the sellers sent the bills of lading to their bankers in London with instructions to deliver the documents in exchange for the money. The London bank transmitted the bills to the Commercial Bank in Glasgow to carry out the transaction. The sellers were not parties to the employment of the Commercial Bank—the selection of the Glasgow bank being left to the bank in London. In exchange for the documents the buyer paid the money to the Commercial Bank, who credited it in their books to the London bank. On the same day the buyers arrested the money in the hands of the Commercial Bank *ad fundandam*, and thereafter sued the sellers for damages. At the date of the arrestment there was no accountability on the part of the Commercial Bank towards the defenders, though the bank was aware that the defenders had the ultimate right of property in the money.

Held that, as there was no accountability on the part of the Commercial Bank towards the defenders, and no privity of contract between them, the arrestments attached nothing and were therefore invalid.

Held further (on the assumption that the money had been validly attached) that the pursuers were not barred from arresting it—*diss.* Lord Mackenzie, who was of opinion that the correspondence between the parties disclosed an implied undertaking that the pursuers would not themselves do anything to prevent the money reaching the defenders' hands.

On 6th August 1912 J. & C. Murray, iron merchants, Glasgow, brought an action against Wallace, Marrs, & Company, iron merchants, London, against whom arrestments had been used *ad fundandam* for payment of £5000 as damages for breach of contract. The defenders denied that they were subject to the jurisdiction of the Court, and averred—"Explained that no money or other effects belonging to the defenders have been arrested in Scotland, *and that in any event the pursuers were not entitled to arrest the funds alleged to have been attached in respect of a special obligation undertaken by them to pay over to the defenders the said funds in exchange for shipping documents handed to the pursuers thereagainst. The alleged arrestment was contrary to the good faith of the pursuers' said undertaking and in breach of the said obligation.*" They pleaded, *inter alia*—"(1) In respect that the defenders are not subject to the jurisdiction of this Court, the action should be dismissed. (2) *The alleged arrestment being in breach of the obligation undertaken by the pursuers, and contrary to the good faith of their undertaking as condescended on, the pursuers are barred* personali exceptione *from maintaining that jurisdiction has been constituted against the defenders.*" [The words italicised were added by way of amendment in the Inner House.]

On 27th February the Lord Ordinary (DEWAR), after a proof, the import of which appears from his Lordship's opinion (*infra*), sustained the defenders' first plea-in-law and dismissed the action.

Opinion.—"The question for decision here is whether jurisdiction has been competently founded against the defenders—a firm of London metal merchants—in respect of arrestments laid on by the pursuers *jurisdictionis fundandæ causa.*

"In December 1911 and January and February 1912, the pursuers, who are metal merchants in Glasgow, entered into several contracts with the defenders, whereby the defenders agreed to deliver a large quantity of Continental iron bars. The pursuers allege that the defenders failed to implement their contracts, and they have brought this action of damages against them, having laid on arrestments to found jurisdiction.

"It appears from the evidence that in July 1912 the defenders undertook to ship a consignment of bars to Scotland, provided the pursuers agreed to pay cash against presentation of bills of lading. The pursuers having agreed to do so, the defenders shipped the goods to Grangemouth, and on 1st August sent the bills of lading together with an account to their bankers, the London, County, and Westminster Bank, with instructions to deliver the documents in exchange for the money—a sum of £890, 7s. 11d. On the same day the London bankers forwarded these documents to their correspondents, the Commercial Bank, with instructions to carry out the transaction. On 2nd August the pursuers, having received an order notice from the Commercial Bank, paid over the money and received the bills of lading in exchange. But they had previously arranged with their solicitors that when the money was paid over it should immediately be arrested to found jurisdiction. The money was paid at two o'clock, and the arrestments were laid on at three. The parties had been in correspondence for some time previously regarding this transaction, and the letters show that the defenders were careful to stipulate that they should receive the cash in exchange for the documents, and the pursuers agreed to these terms, but they did not

disclose to the defenders that they had arranged to arrest the money when they had obtained possession of the documents.

"The defenders' name appears both on the account and on the bills of lading, but it appears that in a banking transaction such as this no notice is taken of this. The practice is for the collecting bank to account only to the instructing bank.

"In these circumstances the pursuers maintained that the arrestment was valid—that although the Commercial Bank may have considered itself accountable to the London bank alone, yet it was truly accountable to the defenders, whose names were disclosed on the account and bills of lading. To this the defenders replied that there was no contract between the arrestees and the defenders, and they were not accountable to them. If they were not identified with the defenders, then they were not directly debtors to the common debtors, and the arrestment was invalid. If, on the other hand, they were in reality identified with the defenders, then there was not such independent possession as could be the foundation of an arrestment. And further and in any case they argued that the pursuers were personally barred from using arrestment in respect that they had agreed to transmit the money if they got possession of the documents, and to prevent the transmission of the money in such circumstances was contrary to good faith.

"In the view I take of the case I do not think that I require to determine what the true position of the bank was in the transaction, because I am of opinion that the defenders are right in their contention that the pursuers are, in the circumstances disclosed in the evidence, barred by their actings. They agreed that if they obtained possession of the documents they would immediately transmit the money to the defenders. They got the documents and they did not transmit the money, and the evidence shows that they never intended to do so. They instructed their solicitors to lay a *nexus* on it to prevent that very transmission which they had promised and on the faith of which they had obtained the documents. I do not think that they were entitled to do that. I was not referred to any case where a point precisely similar had been considered, but there are a number of decisions which show that the Court will not sanction an arrestment where the arrester has not treated his opponent quite frankly or fairly. Thus when an arrestment is made possible by the illegal use or *mala fides* or negligence of the arrester, the arrestment is held ineffectual. In the case of *Rintoul*, 1 Macph. 137, where the arrester had wrongfully withheld a delivery order for goods till arrestment could be used, the arrestments were recalled on the ground that 'this is a style of practice which cannot be sanctioned, and ought not to be encouraged . . . just a trick, and the parties who played it should not get the benefit of it.' See also *Heron*, 22 R. 182; *Trowsdale's Trustee*, 9 Macph. 88; *Campbell*, 21 D. 63.

"In the present case I think the use of arrestment was contrary to the good faith of what passed between parties. I accordingly sustain the first plea-in-law for defenders and dismiss the action."

The pursuers reclaimed and craved leave to amend their record to the effect above mentioned and to lead additional proof. The Court having allowed the amendment and the additional proof, the import of which sufficiently appears from their Lordships' opinions (*infra*), the case was heard before the First Division on the reclaiming note.

Argued for reclaimers—(1) The pursuers were not barred from arresting in the hands of the Commercial Bank, for the mode of settlement—viz. through a bank—entitled them to do so. That was especially so where, as here, the defenders were themselves responsible for that method of settlement. The cases of *Rintoul & Company* v. *Bannatyne*, December 13, 1862, 1 Macph. 137, and *Trowsdale's Trustee* v. *Forcett Railway Company*, November 4, 1870, 9 Macph. 88, 8 S.L.R. 82, were not in point, for these were cases where the arrester had acted *in male fide*—they were cases of "tricky" arrestments. (2) The arrestments were not invalid as against the defenders, for the Commercial Bank had a duty to account to them for the money, and an obligation to account was a good ground for arrestment—Graham Stewart on Diligence, 255; *Baines & Tait* v. *Compagnie General des Mines d'Asphalte*, March 15, 1879, 6 R. 846, 16 S.L.R. 471; *Leggat Brothers* v. *Gray*, 1908 S.C 67, at p. 71, 45 S.L.R. 67; *Shankland & Company* v. *M'Gildowny*, 1912 S.C. 857, 49 S.L.R. 564. *Esto* that the Commercial Bank were bound to pay over the money to the London bank, the latter was merely the hand of the defenders. *Esto* that to warrant the arrestments the defenders must have a direct right of action against the Commercial Bank—*Mitchell* v. *Burn*, May 21, 1874, 1 R. 900, at p. 905, 11 S.L.R. 518—that was so here, for the defenders could have sued the Glasgow bank for payment first, as they could have interdicted that bank from paying it over to the London bank if the latter became insolvent. That being so the arrestments were valid—*Lindsay* v. *London & North-Western Railway Company*, January 27, 1860, 22 D. 571. It was not averred that the defenders' account with the London bank was overdrawn, or that payment to the defenders would defeat any claims by the London bank against them. Even if the London bank had a lien over the money, the defenders would have had a good claim for it against the Commercial Bank. If the money were lost on the way the loss would fall on the defenders. [LORD SKERRINGTON—Is that so? I thought the case of *Mackersy* v. *Ramsay & Company*, 1843, 2 Bell's App. 30, had decided otherwise.] There was privity of contract here between the defenders and the Commercial Bank, for where, as here, the former had employed the London bank to make a contract for them in Glasgow, that created privity of contract between the defenders and the sub-agents in Glasgow—Blackwood Wright on Principal and Agent (2nd ed.), p. 167. The

Commercial Bank could not have set off the money against the London bank so as to defeat the defenders' right to it, nor could a creditor of the London bank have arrested it in the hands of the Commercial Bank—*Young* v. *Aktiebolaget Ofverums Bruk*, November 27, 1890, 18 R. 163; *Herd* v. *Winfields, Limited*, December 11, 1894, 22 R. 182, 32 S.L.R. 137. The pursuers therefore were entitled to succeed on both points.

Argued for respondents—(1) The pursuers were personally barred from arresting the price of the iron, for the terms of the contract were cash against documents. It was clearly against the good faith of such a bargain to arrest the price in the hands of the bank. [LORD SKERRINGTON referred to *Pollock, Whyte, & Waddell* v. *The Old Park Forge, Limited*, March 21, 1907, 15 S.L.T. 3.] *Esto* that a buyer might arrest when the contract was to pay cash for the goods, the bargain here implied that the price should be allowed to reach the defenders, *i.e.*, that there should be no arrestment. (2) The arrestment was invalid, in respect that at the date when it was laid on there was no liability to account on the part of the Commercial Bank to the defenders. It was not enough to say that the money was the property of the defenders; there must be a liability to account—*Shankland* (*cit.*), *per* Lord Dunedin, at p. 866. Where, as here, the arrestees were under no obligation to account to the defenders, it was immaterial that the money belonged to the defenders, and that the arrestees were aware of the fact—Bell's Com., ii, 70-1; *Heron* (*cit.*). At the date of the arrestment the Commercial Bank had no funds belonging to the defenders, for the money had been credited to the London bank. The defenders could not have sued the Commercial Bank for payment, for they left the selection of the bank in Glasgow entirely to the London bank, and if the Glasgow agent made away with the money the London bank would be liable for the loss—*Ramsay* (*cit.*). There was no privity of contract between the defenders and the Commercial Bank, for there was no evidence that the London bank had the defenders' authority to create it. The arrestments therefore were invalid.

At advising—

LORD PRESIDENT — This case relates to the validity of an arrestment to found jurisdiction. The facts are as follows:—The pursuers are iron merchants in Glasgow, the defenders iron merchants in London. A contract for the sale of a quantity of iron bars was entered into between the parties, the pursuers being the buyers and the defenders the sellers of the iron. A portion of the goods was shipped to Grangemouth, another portion to Glasgow. The terms of settlement as expressed in the contract were "net cash against shipping documents." Accordingly on the 31st July 1912 the defenders, the sellers, instructed their bankers in London, viz., the London, County, and Westminster Bank, to collect cash from the pursuers in exchange for the shipping documents which they had transmitted to their London bank. At the same time they directed the London Bank when the cash (£890, 7s. 11d.) was received to place it to their, the defenders', credit in their account with the London bank. On the following day the London bank proceeded to carry out these instructions by in turn transmitting the shipping documents to their correspondents in Glasgow, the Commercial Bank, with instructions to collect the cash from the pursuers and to hand over to them the bills of lading. The Commercial Bank on 2nd August fulfilled these directions. They received the cash at two o'clock on the afternoon of the 2nd. They handed over the shipping documents (the bills of lading) to the pursuers, and in due course they placed the cash received, £890, 7s. 11d., to the credit of the London bank and intimated that they had done so. About an hour later the pursuers laid on an arrestment to found jurisdiction by virtue of letters of arrestment obtained from the Sheriff of Lanarkshire. It is the validity of that arrestment which is now in question.

If my recital of the material facts of the case is correct, then I think it is obvious that the arrestment was inept, because on the afternoon of the 2nd the Commercial Bank in Glasgow was not under any obligation to account to the defenders. There was no direct obligation arising *ex contractu* or *quasi ex contractu* on the part of the Commercial Bank towards the defenders. There was no privity of contract between the defenders and the Commercial Bank. There was no legal relationship, so far as I can see, at all between the defenders and the Commercial Bank; and in these circumstances I think it is almost too plain for argument that the arrestment attached nothing. The relationship of the Commercial Bank to the defenders was, I think, quite clearly and quite correctly expressed in the evidence given by their agent in the proof led before the Lord Ordinary, where he says—"At the date that arrestment was laid on there was nothing standing in the books of the bank at the credit of Wallace, Marrs, & Company. The bank at that date held no money belonging to them." That seems to me to be the correct expression of the lack of legal relationship between the Commercial Bank and the defenders. It is nothing to the purpose to say that the Commercial Bank knew when the shipping documents reached them that the defenders were the customers of the London and Westminster Bank, and that their customers, to wit, the defenders, had intimated plainly to the pursuers that the cash was to be transmitted to them, the defenders, directly or through their bankers. That was no doubt true; but knowledge of these facts does not constitute a legal relationship which otherwise did not exist.

I think it unnecessary to cover familiar ground relating to the effect of arrestment to found jurisdiction, because the whole subject was so recently and so exhaustively explored in this Court in the cases of *Heron*, (1895) 22 R. 182; *Leggat*, 1908 S.C. 67; *Riley*,

1910 S.C. 934; and *Shankland*, 1912 S.C. 857. I only say that I desire respectfully to concur with the views of the Lord President and the learned Judges who gave opinions in those cases, and, applying the doctrine as there laid down, I cannot but come to the conclusion that this arrestment attached nothing, and that accordingly the plea of no jurisdiction must be sustained.

Now the Lord Ordinary reached exactly the same conclusion, but on a totally different ground. He found it unnecessary, he tells us, to consider the question on which I have just expressed an opinion, because he found in the case material to enable him to sustain the plea of no jurisdiction, apart altogether from the question of the validity of the arrestment itself. The Lord Ordinary said that he was of opinion that the defenders were right in their contention that the pursuers, in the circumstances disclosed in the evidence, were barred by their own actings from founding on the arrestment; and his Lordship came to the conclusion that the use of the arrestment was contrary to the good faith of what passed between the parties. I must own that I cannot understand on what ground the Lord Ordinary reached that conclusion. There are no actings averred, and none are proved, which would in my opinion bar the pursuers from exercising their legal right. No doubt a party may expressly contract not to exercise his legal rights, and if he so contracts he will be held to his bargain; and at the first discussion before this Division of the Court I understand it was maintained on the part of the defenders that the pursuers had contracted not to exercise their legal right to lay on the arrestment, and that they had undertaken that the whole £890 should reach the defenders if the bills of lading were handed over. Indeed an amendment of the record was allowed in this Division of the Court for the purpose of giving effect to that contention. It runs as follows (I am reading now from the amendment made on the first answer)—"The pursuers were not entitled to arrest the funds alleged to have been attached in respect of a special obligation undertaken by them to pay over to the defenders the said funds in exchange for shipping documents handed to the pursuers thereagainst. The alleged arrestment was contrary to the good faith of the pursuers' said undertaking, and in breach of the said obligation." In my opinion that is a hopelessly irrelevant statement, because it simply repeats in other language the express terms of the contract, "net cash against shipping documents;" and it seems to me to be idle to contend that the consignee who has paid cash in exchange for the documents into the bank of the consigner is not entitled, immediately after he has paid in the money, to arrest to found jurisdiction. There is no bad faith, there is no breach of any contract in so doing, and accordingly an averment that an express obligation was undertaken to pay over to the defenders the funds in exchange for the shipping documents does not seem to me to lead to the conclusion that there was any breach of contract in laying on the arrestment. In any event the arrestment which is here challenged is not an arrestment on the dependence or in execution. It is an arrestment to found jurisdiction. Now an arrestment to found jurisdiction creates no *nexus*. It attaches no property. It is now, I think, well-established law that an arrestment to found jurisdiction does not disentitle the arrestee immediately after to part with the subjects arrested. And accordingly the arrestment to found jurisdiction did not prevent, and could not prevent, the defenders from receiving their cash. No doubt the test of the validity of an arrestment to found jurisdiction is exactly the same as the test of the validity of an arrestment on the dependence or in execution. But the effect is entirely different. That has, I think, been well-settled law for forty years. Lord Justice-Clerk Moncreiff in *Trowsdale*, 9 Macph. 88, thus expresses the law—"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." Lord President Dunedin in the case of *Leggat Brothers* expresses the doctrine equally clearly. His Lordship says—"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*, 17 R. (H.L.) 60—the doctrine, namely, that an arrestment *ad fundandam* does not create a *nexus* as against the arrestee which prevents him from parting with the subjects; 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." And Lord Kinnear in the same case says this—"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." Accordingly the conclusion I reach is that it was an irrelevant averment to say that an arrestment to found jurisdiction prevented the defenders from receiving their cash. It did not and could not.

Now that would be sufficient for this

case; but evidence was given in support of the amendment, I presume, on the footing that the averment in the terms which we see on the amended record was really meant to allege that the pursuers had made a contract with the defenders by which they debarred themselves from exercising their legal rights, and undertook an absolute obligation that the cash should actually reach the defenders. I have examined the evidence led before Lord Mackenzie on the amendment, and I can find nothing in it to support the view that the defenders came under any such contract, or, if they did, that they broke it. No doubt at one stage the arrangement was that the shipping documents should go to the defenders in Glasgow without passing through the bank, and that in turn the pursuers should send the cash to the defenders. I think that if that mode of settlement had been ultimately resorted to the pursuers would not have been entitled to retain any part of the money against their counter claim nor to arrest in their own hands. But I can find nothing in the evidence which supports the averment. I therefore come to the conclusion that the arrestment was inept, that jurisdiction was not constituted, and that accordingly we should affirm the Lord Ordinary's interlocutor, although on totally different grounds.

LORD JOHNSTON—I concur with your Lordship. There are two grounds of decision—(1) that upon which the Lord Ordinary proceeded, and (2) that on which the case can and ought to be determined. On the first question I shall say very little except this, that I think that the proof which was led was entirely incompetent and entirely ineffectual. I do not see that any change in the conditions of the contract for delivery and payment of the goods in question was made by anything which occurred in the correspondence of July 1912. The original contract was "net cash against bills of lading," and I cannot find in any of these letters that anything was done which varies that contract one iota. The whole proof therefore has gone for nothing.

Taking, then, the case upon the footing of net cash against bills of lading, there was nothing to prevent the attachment of the cash by anyone, including the purchasers, if they were smart enough to do so before the cash was put beyond their reach, and I am quite unable to see that there was anything done by the purchaser here to which bad faith could be attributed. I say as much, because it is only fair to the purchaser to point out that, in the opinion of the Court, he has done nothing to have any imputation of bad faith attributed to him.

I do not, however, think that the case ought to be determined on this ground. The question really is, Was there attachment by arrestment? Now the course which was followed was that the bills of lading were handed by the sellers to their own bankers in London for collection, and by their bankers in London were sent to the latters' agents in Glasgow, and the transaction was carried out in Glasgow by the exchange of cash for the bills of lading. Now the London and Westminster Bank were clearly agents of the sellers, but the Commercial Bank in Glasgow were not; they were only the agents of the sellers' agents. And I think it has often been laid down that the agent of my agent is not my agent. There is no privity of contract between me and my agent's agent, and therefore no direct accountability on his part to me. I therefore agree with your Lordship in thinking that as arrestability depends on accountability, there was here no valid arrestment.

LORD MACKENZIE—The question whether the arrestments to found jurisdiction attached anything depends upon whether there was, at the time they were used, any privity of contract between the Commercial Bank of Scotland, Limited, Glasgow, and the defenders. If there was not, then there was not a present accountability of the former to the latter. Unless the defenders could have brought an action against the Commercial Bank founded upon a direct personal obligation, arising *ex contractu* or *quasi ex contractu*, the arrestments are bad. An action of the nature of *rei vindicatio* would not for this purpose be sufficient. It would not be enough, to make the arrestments good, that the defenders had the ultimate right of property in what was arrested. These principles are laid down in the case of *Heron* v. *Winfields, Limited*, 22 R. 182, and *Shanklaad & Company* v. *M'Gildowny*, 1912, S.C. 157.

The application of these principles to the present case appears to me plain. The money arrested was money paid by the pursuers into the Commercial Bank of Scotland, Limited, at Glasgow. The Commercial Bank was accountable for this money to the London, County, and Westminster Bank, Limited, in London. The latter had selected and employed the former as their agents. The defenders had nothing to do either with this employment or this selection, and were not parties to the contract. There is no evidence that they knew anything about the Commercial Bank. The defenders' contract was with the London bank, to whom they wrote on 31st July 1912—"Please present to Messrs J. & C. Murray, 53 Bothwell Street, Glasgow, and hand them in exchange for the amount of our statement enclosed, £890, 7s. 11d., the attached 4 bills of lading in duplicate, and credit the amount to our a/c." The London bank were free to select any agent they chose. They chose the Commercial Bank, Glasgow, to whom they wrote on 1st August 1912—"Please present to Messrs J. & C. Murray, 53 Bothwell Street, Glasgow, and hand them in exchange for amount of statement enclosed (£890, 7s. 11d.), the attached 4 b/lading in duplicate. Please wire fate, for which we enclose stamped form." On the principle laid down in *Mackersy* v. *Ramsay, Bonar, & Company*, 2 Bell's App. 30, the London bank were liable for the actings of the Commercial Bank, their agents, and the Commercial

Bank were accountable to them. The fact that the account was transmitted by the defenders to the London, County, and Westminster Bank with their letter of 31st July, and then sent on by the latter to the Commercial Bank in Glasgow on 1st August, was founded upon by the pursuers. They referred to the docquet on the account, "All payment to be made direct to Wallace, Marrs, & Company, London, or through their bankers," and maintained that this was certioration to the Commercial Bank of the fact that the defenders were the consignees. I do not think so. The notification was to the people who owed the money, viz., the pursuers, not to the Commercial Bank. Whatever effect the docquet might have had if the defenders had brought an action against the Commercial Bank on the ground that the money arrested belonged to them, it has no effect in the present case.

On this ground, therefore, I hold the arrestments to be invalid.

This is sufficient to dispose of the case, and the further question does not arise except on the assumption that something was attached. An argument founded on the specialties was, however, addressed to us, and as the Lord Ordinary's judgment proceeds upon the special circumstances of the case, it is right I should state shortly my opinion upon it. In the first place, I wish to say that in so far as the Lord Ordinary's opinion is founded on authorities which lay down that an arresting creditor cannot retain the benefit of a trick, I do not think there is any warrant for imputing to the pursuers any motive to get the better of the defenders by a trick. The pursuers considered that, consistently with the special bargain they had made by correspondence with the defenders, they were entitled to arrest. I think they were wrong in this view. The defenders were entitled, in my opinion, to construe the pursuers' letters and telegram as meaning that if and when the bills of lading were received by them in Glasgow payment would be made by them to the defenders, that is to say, that there was an implied undertaking that the pursuers would themselves take no action to prevent the money reaching the hands of the defenders. Now whatever view may be taken of the effect of arrestment to found jurisdiction, whether it creates a *nexus* or not, its practical result when followed by arrestment on the dependence of the action would be effectually to defeat in this case what I consider the legitimate expectations of the defenders.

The facts of the case are that the pursuers considered themselves badly treated by the defenders in regard to the contracts for delivery of iron, and were unable to get from them bills of lading for 70 tons shipped to Grangemouth, and 100 tons shipped to Glasgow. Even though they had received (by arrangement with the shipping agents) the Grangemouth consignment, they had not, without the bills of lading, a proper title to the consignment. They were pressing the defenders to send on the bills of lading. The defenders delayed doing so. The pursuers had made counter claims, not of great amount—£26, 5s. 11d.—the price of the two consignments being £890, 7s. 11d. On 12th July the pursuers wrote—"We shall send you our cheque whenever you produce the b/l." Now no doubt the terms of the original contract were "cash against bills of lading," but it is one thing to make a contract "terms cash"—it is another matter to write and induce the sellers to send something by saying, "Whenever you send what I bought I will pay you." Dealing for the present solely with the Grangemouth consignment, the letters and evidence show that the parties had in view that the bills of lading might be sent (1) to the pursuers in Glasgow; (2) to the shipping agents at Grangemouth; or (3) to the bankers in Glasgow. Mr Murray says in his evidence—"On 12th July 1912 it was a matter of complete indifference to me whether the bills were sent to me direct or to the shipping agents, or presented to me by the bank, or by someone on behalf of the defenders. I did not intend by that letter that there should be any alteration of the previous course of dealing, which had been to present the bills of lading through the bank." On 16th July the pursuers wrote—"If you will hand the bills/lading to the Shipping Company at Grangemouth, instructing them to advise us when they had received them, payment will be sent to you in course of post." In his evidence Mr Murray says—"I did not mean by that to make it a condition that the bills should be sent to the Shipping Company. I put that remark in because of a remark they made. If they had come on that date in reply to that letter of 16th July there would have been no trouble, and I would have been perfectly content that they should have been sent through the bank at that date." There was thus no indication that the receipt of the money by the defenders depended upon whether the bills of lading came to the pursuers through one channel or another. Mr Murray admits that up to the 17th July he did not care through what channel the bills of lading came, but that on that day he changed his mind, and that thereafter his promise to pay applied only to the contingency of the bills of lading being sent either (1) direct to his firm, (2) to the shipping agents at Grangemouth. If they were sent to a bank in Glasgow he was, to use his own phrase, "absolved." The unfortunate thing is that the pursuers did not make plain to the defenders what was in their minds. On 20th July they sent this telegram—"101 Canon Street, B. O., E. C., 20 Jy. 12—*received here at* 10·58. Glasgow X 13 10/22—Wallimars, Lrd. We undertake pay invoices less credit on receipt B. ladings here. Atacama." It is too narrow a construction to read "here" as limited to the pursuer's office. The defenders were entitled to read it as meaning Glasgow. The defenders accordingly wrote on 22nd July—"With reference to yours of the 20th inst., we thank you for your undertaking to pay us the above amount less our credit note for £3, 0s. 3d. in exchange for the bills of lading, as per your telegram of the

20th inst, reading as follows—'We undertake pay invoices less credit on receipt B. ladings here.'"

"On this understanding we are therefore handing the bills of lading to our bankers for transmission to you with instruction to present same in exchange for your cheque for £353, 2s. 4d." In his original examination Mr Murray said with reference to this letter—"(Q) Do you agree there was no dubiety about your position—that you contracted to pay them the money for those invoice goods against presentation of the bills of lading?—(A) Yes." I think the pursuers should have seen that the defenders were not drawing any distinctions as to the channel through which the bills of lading were to go, and that they were proceeding on an undertaking to pay "us," the mode of payment being by cheque. The unchallenged receipt by the pursuers of the letter of 22nd July, taken with the previous letters, in my opinion operates as a bar to using arrestments to found jurisdiction. Just as the pursuers would not have been entitled to stop payment of a cheque drawn by them in favour of the defenders, so they were in consequence of the terms of the correspondence not entitled to stop the money being transmitted to the defenders. So far the Grangemouth consignment only has been dealt with.

The Glasgow consignment is brought into the same position by the letter of 25th July from the pursuers, which says—"We shall of course pay for the goods immediately on presentation and in exchange for the bill of lading, and would advise you to have this document presented immediately. . . . Why don't you send your bills of lading through a bank or through your agent here."

I am therefore of opinion that if the arrestments attached anything, the pursuers were barred by their special bargain from using them.

LORD SKERRINGTON—I concur.

The Court adhered.

Counsel for Pursuers—Horne, K.C.—MacRobert. Agent—A. C. D. Vert, S.S.C.

Counsel for Defenders—Murray, K.C.—Macmillan, K.C.—Lippe. Agent—W. Croft Gray, S.S.C.

HIGH COURT OF JUSTICIARY.

Saturday, November 8.

(Before the Lord Justice-General, Lord Johnston, Lord Mackenzie, and Lord Skerrington.)

H. M. ADVOCATE *v.* LAVELLE.

Justiciary Cases—Indictment—Instance—Lord Advocate Appointed Lord Justice-General—Indictment at Instance of Solicitor-General during Vacancy in Office of Lord Advocate—Criminal Procedure (Scotland) Act 1887 (50 *and* 51 *Vict. cap.* 35), *secs.* 2 *and* 3.

The Lord Advocate having been appointed Lord Justice-General, and having taken his seat on the Bench, an indictment, dated some days later, but before his successor had been appointed, was brought at the instance of the Solicitor-General, and signed by a procurator-fiscal by his authority. The indictment was objected to on the ground (1) that the instance was bad, in respect that appointment to the bench did not constitute removal from office of Lord Advocate; and (2) that in any event there was no warrant for a procurator-fiscal signing an indictment otherwise than "by authority of the Lord Advocate."

Held that the indictment was good and objections *repelled.*

Justiciary Cases—Trial—Indictment at Instance of Solicitor-General—Sentence on Accused after Solicitor-General Appointed to the Bench.

A person was charged on indictment at the instance of the Solicitor-General during a vacancy in the office of Lord Advocate. The accused was remitted for sentence to the High Court, and in the interval the Solicitor-General was appointed to the Bench. On a motion for sentence objection was taken on behalf of the panel on the ground that the instance of the indictment had lapsed.

The Court *repelled* the objection.

The Criminal Procedure (Scotland) Act 1887 (50 and 51 Vict. cap. 35) enacts, section 2—"All prosecutions for the public interest before the High Court of Justiciary and before the Sheriff Court, where the Sheriff is sitting with a jury, shall proceed on indictment in name of Her Majesty's Advocate . . . and such indictment . . . shall be signed by Her Majesty's Advocate or one of his deputes, or by a procurator-fiscal, and the words 'By Authority of Her Majesty's Advocate' shall be prefixed to the signature of such procurator-fiscal." Section 3—"The Lord Advocate and his deputes shall not demit office on the resignation of the Lord Advocate, but shall continue in office until their successors respectively receive their appointments . . . and all indictments which have been raised by any Lord Advocate shall continue in