"If this view be correct, it seems decisive of the question as to the liability of the defenders, unless the pursuer wilfully, or with utter recklessness, exposed herself to injury—a supposition quite unsupported by the evidence. It is unnecessary to inquire whether or not the machinery which caused the injuries unreasonably exposed to danger the persons working in the factory. In the words of Lord Campbell, Chief-Justice, 'the Act does not merely provide that machinery in factories is to be fenced when it is dangerous. All mill gearing while in motion for a manufacturing purpose is to be fenced. The Legislature did not intend to leave it to be decided upon the circumstances of each case whether the machinery was dangerous and required fencing.'

"As to the extent of the injuries received by the pursuer, by which the amount of damages must be determined, the evidence is not so specific as might be desired.

"It is certain that the pursuer has lost part of one finger, has had another much hurt, that she was injured on the left side, and that her whole system has received a severe shock from which she has not yet wholly recovered, although she is recovering. The statements of the defenders on this part of the case seem wide of the truth. On the whole, it is thought that the amount found due will meet the justice of the case."

The defenders appealed, and the Sheriff adhered to the interlocutor of his Substitute on the merits, but reduced the damages to £50.

The defenders advocated.

W. A. BROWN (with him GIFFORD) for the defenders, argued—1. In respect that the proof establishes that the respondent's injuries were caused by her own fault solely, the advocators are not liable in damages. 2. They are not liable in damages if the respondent's injuries were to any extent caused by her own fault. 3. Under her employment the respondent had no occasion to be at that part of the machinery where she received her injuries, and she was therefore not *in titulo* to object that the machinery was unfenced. 4. It being proved in evidence that no complaint was made by the inspector authorised by the Factories' Acts to inspect the works, that the machinery in question was not properly fenced, there was a presumption that it was so, which could only be set aside by direct proof to the contrary. Further, the damages awarded both by the Sheriff-Substitute and the Sheriff were excessive. O'Neill *v.* Wilson, Jan. 21, 1858, 20 D. 427; M'Naughton *v.* Caledonian Railway Company, Dec. 17, 1858, 21 D. 160; 7 and 8 Vict., c. 15, sec. 21; 19 and 20 Vict., c. 38, sec. 4.

J. C. SMITH, for the respondent, answered—The allegation of fault on the part of the pursuer herself was irrelevant in respect of her youth; and, further, the proof established that she was not injured by her fault at all, but by the fault of the advocators in not having their machinery fenced. The obligation of the advocators was absolute to have the machinery fenced, and their liability follows necessarily on proof of its not being so. 7 and 8 Vict., c. 15, sec. 21; Doel *v.* Sheppard, Jan. 18, 1856, 5 Ellis and Blackburn, p. 859.

The Lord Ordinary (Jerviswoode) pronounced the following interlocutor, in which parties have acquiesced :—

"*Edinburgh, 3d July* 1866.—The Lord Ordinary having heard counsel, and made avizandum, and considered the record, with the proof led in the inferior court, additional pleas in law for the parties respectively, and whole process: Finds, 1st, as matter of fact, that the respondent Ann Allan received the injury of which she complained by being caught in the machinery within the mill of the advocators through the fault of the advocators in failing to fence sufficiently the machinery at or near to which the pursuer was employed within the said mill of the advocators; and 2d, with reference to the foregoing finding, refuses the note of advocation, remits *simpliciter* to the Sheriff, and decerns: Finds the advocators liable to the respondents in the expenses incurred by them in this Court, allows an account of such expenses to be lodged, and remits the same to the auditor to tax and to report.

"CHARLES BAILLIE.

"*Note.*—The Lord Ordinary understood, and he does not doubt the fact from the tone of the debate which here took place before him, that the present advocation was brought by the defenders in the original action rather with the view of obtaining a judgment on the question as to their obligation in law to fence their machinery to the extent maintained on the part of the pursuer, so as to render them responsible in respect of their failure to do so, than from any indisposition on their part to make pecuniary compensation to the pursuer.

"But the Lord Ordinary has been unable to find elements in the proof which would here warrant him in altering the judgment pronounced by the Sheriff. Looking to the evidence as it stands, it appears to the Lord Ordinary to be proved that the direct cause of the accident was the act of the pursuer in reaching for a ring which was lying on the top of the machine at which she was employed, and towards one end of it. While taking down the ring the pursuer's dress was caught by the machinery, and she was injured as described in the evidence.

"Before the Lord Ordinary could decide here that no liability whatever was attachable in respect of this misfortune to the defenders, he would have required more distinct evidence than any which has been adduced to show the absence of necessity for fencing the machinery at the particular place. The Inspector of Factories has not been called as a witness here. His evidence might have been important on one side or the other, but there was no proposal for further inquiry, so far as the Lord Ordinary understands, and he has consequently disposed of the case on the evidence on which the original judgments were pronounced.

"C. B."

Agents for Advocators—Ronald & Ritchie, S.S.C.
Agent for Respondents—J. Somerville, S.S.C.

Saturday Dec. 8.

FIRST DIVISION.

MORISON AND MILNE *v.* BARTOLOMEO AND MASSA.

Ship — Collision — Arrestment jurisdictionis fundandae causa—Reconvention. A British and a foreign ship having come into collision, the owners of the British ship arrested the foreign ship to found jurisdiction, and raised an action of damages against the master of it who was a foreigner, the owners being unknown to him. The master and owners of the foreign ship next day raised an action of damages against the owners of the British ship in respect of the same collision. The master of the foreign ship thereafter declined jurisdiction in the ac-

tion against him. Held that there was jurisdiction in respect (1) of the arrestment, and (2) of reconvention or prorogation of jurisdiction.

These were counter actions of damages, the first at the instance of Morison and Milne, registered owners of the schooner "Scotia" of Aberdeen, against Francesco Massa, master of the barque "Ghilino" of Genoa, as master, and also as owner or part owner of said ship, and in these capacities or one or other of them, or otherwise, representing the said ship; the other at the instance of Guiseppe Ghilino di Bartolomeo, shipowner, residing in Genoa, owner of the barque or vessel "Ghilino," and Francesco Massa, master of said barque or vessel, as master, and representing the owner of said vessel, against Morison and Milne. With the original action against Massa was conjoined a supplementary action at the instance of Morison and Milne against Bartolomeo as owner of the "Ghilino."

The ground on which the claim of damages was founded in all the actions was injury sustained by the respective vessels in a collision which took place off Holy Island, on 17th January 1866. The summons in the first action was signeted on 26th January 1866, and was served personally on the defender Massa, against whom jurisdiction was alleged to have been founded by arrestment of the "Ghilino," on the following day. The summons at the instance of Bartolomeo and Massa was signeted on the 27th January 1866, and served on the 28th. The summons in the supplementary action was signeted on the 1st February 1866. The cross actions of the 26th and 27th January were both called in Court on 15th February, and defences ordered to be lodged in both on the 28th February. On that day Morison and Milne gave in defences. Massa, however, did not do so till 14th March, of which date he gave in defences, in which he declined the jurisdiction of the Court, on the ground that, being neither owner nor part owner of the "Ghilino," nor representing the said ship in these capacities, or either of them, jurisdiction could not competently be founded against him by an arrestment of the vessel. The Lord Ordinary (Kinloch) on the 14th July 1866, repelled the objection, and sustained the jurisdiction.

In his note his Lordship observed:—

"The present is an action of damages raised by Messrs George Morison and John Milne, both of Aberdeen, and joint owners of the schooner "Scotia" of that port, in respect of injury alleged to have been sustained by collision with the brig "Ghilino" of Genoa. The injury is alleged to have occurred 'about nine miles off Holy Island, and about twelve miles south-east of Burnmouth,' and to have been entirely produced through the fault of the master of the "Ghilino," thereby inferring a claim for reparation against the owners of the "Ghilino," who are responsible in this matter for the master.

"The action is laid against the defender Francesco Massa, 'master of the "Ghilino" of Genoa, presently lying in the harbour of Leith, as master and also as owner or part owner of said ship, or in those capacities, or one or other of them, or otherwise representing the said ship, and answerable for the loss and damage due to the pursuers in the premises.'

"In order to found jurisdiction, the ship was arrested in Leith Harbour by an arrestment *jurisdictionis fundandæ causa*, framed as understood in terms quadrating with those of the summons. The question is now raised, whether this proceeding legally founded jurisdiction.

"The defender does not dispute, that in so far as the action concludes against him as owner or part owner of the ship, jurisdiction is well raised by the arrestment of the vessel, but he denies that he is either owner or part owner, and says that he is only master. The pursuers rejoin, that the action is in that view itself sufficiently supported by the arrestment, and on this point the controversy took place before the Lord Ordinary.

"If the action was merely personal to the master, as for debt or damage constituting a claim against him individually, and not affecting the ship or the owners, it would be very clear that there is no jurisdiction; for the ship is in no sense the individual property of the master, and could not be affected in respect of such a debt, either for jurisdiction or execution. Again, if the master stood in the mere position of an ordinary mandatory, binding his employers and not binding himself, then, although the ship would be affectable, it would not be so under proceedings directed against the master, the mandatory—but only under proceedings directed against the owners, the employers.

"But the master of a ship stands by law in a position altogether different from an ordinary mandatory. When he contracts for the ship, he binds both himself personally, and also his owners and the ship. In the course of ordinary contract debts engaged in legitimately by the master on behalf of the ship, the Lord Ordinary conceives this doctrine fully settled, and it is exemplified in many cases. The consequence, as the Lord Ordinary conceives, is that the master is liable to be sued for such debts in his capacity of master, and to the effect of making the ship responsible in execution if a decree is obtained against him. He is as much so liable as is a trustee to the effect of making the trust-property affectable by legal diligence. If this be so, it seems to follow by necessary consequence that the ship is arrestable in order to found jurisdiction for an action laid on such a contract. If the action is such that a decree obtained in it would warrant the ship being taken in execution on the decree, it cannot, as the Lord Ordinary thinks, be disputed that the ship may be preliminarily arrested in order to found jurisdiction for the action. The arrestment *jurisdictionis fundandæ causa* rests on the principle that the thing arrested is liable to answer the decree. If these Aberdeen shipowners had made a contract with the defender as master of the "Ghilino" for ship furnishings, the Lord Ordinary cannot doubt that an action would competently have been raised against the master as such for the amount of the debt, and that arrestment of the ship would have been competent, both for jurisdiction and in execution. The present is not a case of debt but of damages; but the Lord Ordinary, on full consideration, cannot draw a distinction between the cases, the damages being sought from the defender in his capacity of master, and for an act on his part by which, if it truly occurred, he bound both the owners and the ship in pecuniary reparation. In legal character this is just a debt by ship and owners. It is not a debt *ex contractu*, but *ex delicto*. But delict is, in the eye of the law, a *quasi* contract. There is in every wrong an implied contract of reparation. Turn it in whatever way, there is here just a debt, contracted by the act of the master, due by owners and ship. The Lord Ordinary is of opinion that the same principle must apply as in the case of ordi-

nary contract debts incurred by the master for the ship.

"The defender made reference to the 527th section of the Merchant Shipping Act, 17 and 18 Vict., cap. 104, as if the present proceeding was thereby excluded. That statute gave the remedy of a summary attachment of the ship by certain proceedings, 'whenever any injury has in any part of the world been caused to any property belonging to her Majesty, or to any of her Majesty's subjects, by any foreign ship, if at any time thereafter such ship is found in any port or river of the United Kingdom, or within three miles of the coast thereof.' It appears to the Lord Ordinary that this special remedy does not interfere with the ordinary legal proceedings taken in common form, and without respect to the nationality of the vessel." "W. P."

The cross action was conjoined on the 20th July 1866, and of same date the Lord Ordinary conjoined with them the supplementary action against Bartolomeo.

Massa reclaimed against the interlocutor of the 14th July, and Bartolomeo against that of the 20th July, conjoining the cross actions with the supplementary process against him. When the case came on for discussion before the Inner House, the pursuers pleaded reconvention as an answer to the objection of want of jurisdiction. They further stated that they now admitted that Massa was neither owner nor part owner of the "Ghilino," and that they insisted in the action against him as representing the ship *qua* master.

ASHER (with him GIFFORD) for the defender, Massa, argued—1. Arrestment of the "Ghilino" could not found jurisdiction against Massa, he being, as is now admitted by the pursuers, neither owner nor part owner of the vessel, nor in either of these capacities representing the ship. His sole connection with the vessel was as master. On a decree against him as master, execution could not pass against the ship: *e contra* arrestment of the ship cannot found jurisdiction against him as master. The personal obligation of the master of a vessel was exceptional, and was specially for the protection of the owner. But if decree could attach the ship for the debt of the master, the property of the owner would be attached without his being present to protect himself. Bell, Com. i. 500; Ersk. 3. 3. 43. It is admitted that if the debt had been one by the master personally, arrestment could not be founded against him by an attachment of the ship. But this is really the character of action when it is pleaded that the collision took place through the *culpa* of Massa, or of those for whom he is responsible. 2. Neither was jurisdiction founded against the master by reconvention. Because the *actio conventionis* must precede the *actio reconventionis*. Here the procedure was the reverse. Thomson *v.* Whitehead, 24 D., 331. 3. The manner adopted of convening the defender was incompetent, in respect that the proper remedy for such a case was provided by sect. 527 of the Merchant Shipping Act.

MILLAR (with him YOUNG), for Morison and Milne, argued—Jurisdiction was competently founded against Massa in this case—viz., (1) by reconvention; and (2) by the arrestment of the "Ghilino" *jurisdictionis fundandæ causa* before the date of the action. 1. Reconvention was clearly established. There was an absolute identity as to the parties to the two actions, and as to the subject-matter of both suits. The objection here taken to the plea was that the foreigner's action was not the first, as it was not signeted till the day after that raised by the owners of the "Scotia." But consent was the basis of reconvention, and Massa must be held to have consented to the jurisdiction by raising the action against the defenders on the following day. If the want of this consent at the time when the first action was raised was to make that action absolutely null, no after consent could remedy it. Harvey *v.* Forrest, 28th June 1839, 1 D. 1137. But in an action against a foreigner where jurisdiction has not been founded against him, jurisdiction may be prorogated by his subsequent consent and conduct. White *v.* Spottiswoode, 30th June 1846, 8 D. 952.

[Lord ARDMILLAN—Your plea is prorogation of jurisdiction. That is not reconvention. The difference between the two may practically be only a legal subtlety. But the principle of reconvention is different from that of prorogation.]

Reconvention is a species of prorogation. None of the institutional writers mention any particular *punctum temporis* at which an action is held to be raised. Bell's Prin., sec. 2226. 2. Massa was called as master, and in that capacity he represents the owners as he represents the ship in matters of this kind, just as he has power to bind them in contracts for ship stores. In some cases a master may contract so as to bind the owners without becoming personally liable. Abbott on Shipping, pp. 97 and 98; Story on Agency, sec. 116. The master has a kind of "special property in the ship," which makes arrestment of her a good ground on which to found jurisdiction against him. Shutts *v.* Davis, 6 Taunton 65. Although in the general case where an action is based on *culpa* the arrestment must be of the property of the individual, this right of special property makes the case of a shipmaster different.

At advising,

The LORD PRESIDENT—This is a question of jurisdiction. It arises under an action raised at the instance of George Morison and others, registered owners of the schooner "Scotia," of Aberdeen, against Francesco Massa, who is described in the summons "as master, and also as owner or part owner," of the ship "Ghilino," of Genoa, "or in those capacities or one or other of them, or otherwise representing the said ship," against whom arrestments have been used to found jurisdiction." The question between the parties was as to damage done by collision at sea; and in the action raised at the instance of Morison and others, it was alleged that the damage was occasioned by the mismanagement of Massa and the persons navigating the "Ghilino," for whom he was responsible, whereby she had been brought into contact with the "Scotia," and had damaged her. The "Ghilino" is a foreign vessel, and Massa is a foreigner, and the owners of the "Scotia" are now attempting to maintain an action for recovery of the damage caused by the proceedings of Massa. And in order to get at that they have used arrestment against the vessel to found jurisdiction.

It appears that the next day after that action was raised at the instance of Morison against Massa, an action was raised at the instance of the owners of the "Ghilino" and Massa against Morison and others, concluding that the fault lay with those navigating the "Scotia." A day or two after that, Morison and others raised an action against the owner of the "Ghilino," Bartolomeo, and in that action, which is of a supplementary character, they maintained a claim of damages against the "Ghilino." The action we

have to do with at present is the first in date of these—the action raised by Morison and others against Massa, in the alleged double character of "master or owner, or in those capacities or one or other of them representing the ship." The allegation that he is owner is now out of the case, as it is now admitted that he is not owner; and the summons stands as against Massa, with that admission. It is said this is an action against the master of the ship, and it is attempted to found jurisdiction against him by arrestment of the vessel, which is not his; and that being so, there is consequently no jurisdiction to maintain the action against Massa merely as master of the "Ghilino," and the action must be dismissed. The Lord Ordinary has sustained the jurisdiction, and Massa has reclaimed; and Morison and others say that the objections are not well founded for two reasons. The first is the plea of reconvention, and the question arises whether it is strictly reconvention or not, seeing that there was no action at Massa's instance at the time this action was raised against him. In considering that question, I don't think it is necessary to inquire narrowly whether reconvention is the proper name of that state of matters. But the facts are, that on the 26th January this action was raised against Massa, in reference to the matter of that collision at sea, and the next day an action was raised by Massa and the owners of the "Ghilino" against Morison and Milne in reference to that same collision. The name of the owner of the "Ghilino" was not known at the time the action was raised against Morison and Milne; but Bartolomeo's name was disclosed by the action raised next day against Morison and Milne. Thereupon Morison and Milne raised an action against both Bartolomeo and Massa in regard to this same matter of the collision. Defences were given in by Morison and Milne as regards the action raised by Bartolomeo and Massa against them. But defences were not given in by Massa in the action against him till March; therefore he, by delay, got Morison and Milne to join issue in his claim for damages done by that collision, and he maintains that they are not entitled to have the matter of their claim investigated at all, because there was no jurisdiction against him, as he had not previously made a claim against them in this Court. I think that contention is altogether against the principle of reconvention, for the broad principle of reconvention is that the party appealing to the jurisdiction of this Court is amenable to it, and eminently so in an action arising out of the same matter, and when it is essentially a matter of investigation which of the two vessels was in fault. It seems that the whole matter is before the Court. Each party is claiming and invoking its jurisdiction, and they are doing so at the same moment, for I do not think the difference of one day is of consequence, both actions being called in Court on the same day. Therefore, I think that both parties are here, and the subsequent repudiation of that jurisdiction in March will not relieve him from the jurisdiction of this Court.

The other answer made was this—That the original action against Massa was an action against him as representing the ship. It called him as master and also as owner or part owner, in these capacities or one or other of them, representing the said ship. He was not owner or part owner, and it was as master that he represented the ship. It is said that this is an individual action against Massa. That raises a question of some nicety. If it was necessary for me to give an opinion upon it, I confess I am inclined to think the action is directed against him not as an individual, but as representing the ship, in this matter of collision at sea; and I think it was competent for a British owner to found a claim against him by arrestment of the vessel in an action directed against him as master. The statements as to this matter are clearly such as to make the owners liable.

We are told that the Merchant Shipping Act provides a different remedy, and that that is the true remedy in this case. It contains a provision that when any British vessel is injured by a vessel coming to any port in this country the injured vessel may attach and detain the other till satisfaction is made or security found; and when security is found, then the cautioner is the proper party against whom to direct the action. I don't think that interferes with the question whether the other remedy provided by our common law does or does not apply. The Merchant Shipping Act is a statute which applies all over the kingdom. But it does not follow from that that we have not our own remedy. If Morison and Milne had known the name of the owner, they could at once have attached the ship to found jurisdiction. They had no way in England of getting at the foreigners before the passing of this Act. They have not the remedy of founding jurisdiction by arrestment. They had not the action against the owner; and they proceeded to find a substitute for the action against the owner, and this was, that the master of the vessel being found, action could go against him or the cautioner. Therefore, the question is, whether, apart from this Act, you can get at the owners by founding jurisdiction against the master. Action is raised against Morison and Milne by Bartolomeo and Massa, an action not founded on a mandate to pursue it. The action is raised next day, and who does it? Why, the master, as representing the owner, taking upon himself, as representing the owners, to recover damages for the injury caused by the collision. If he does so raise action, are Morison and Milne not to raise action against him as representing the owners? Is he to be found entitled to sue as representing the owner, but not to defend? That is out of the question.

Lord CURRIEHILL—I think the question raised in the defences is one of very great nicety, and I have had considerable difficulty with it. I think it is a pity that parties did not avail themselves of the remedy provided by the Merchant Shipping Act. But I am clear that although that remedy was open to them, that does not exclude the remedies competent by the common law of Scotland; and it is with these we have now to do.

This is a very peculiar case. Its features are different from those of any other I know. The first point is, that the action, which was raised on the 26th January by Morison and Milne, concludes against Massa as master or owner of the ship, but concludes against him personally, in order to constitute him the debtor in the claim; and the conclusion accordingly is, that he should be decerned to pay; and the question we have to determine is, whether or not there is jurisdiction to entertain action against Massa, for a personal claim, he being a foreigner. If there were no other ground of jurisdiction except the arrestment, I would feel difficulty in sustaining it. I think that jurisdiction cannot be founded against a foreigner for a personal debt owing by him by means of arrestment, *ad fundandam jurisdictionem*, unless the subjects arrested be his property. Here the subjects arrested are not his

property. I am not aware of any principle or authority by which a foreigner can be subjected to the jurisdiction of this Court by arrestment, unless the subjects be his. The argument addressed to us on this subject was, that the debt was the debt of the ship, and that Massa was the administrator of the ship. I don't know what is meant by the statement that it is the debt of the ship. It is not a real debt. What is meant by calling it the debt of the ship? The ship cannot come under a personal obligation, and, even if it could, would arrestment of her be a habile means of rendering her master liable? If that were the only ground relied on, I do not see my way to sustain the jurisdiction.

But another ground is stated, namely *reconvention.* The first point to be attended to in regard to that is that in this action Massa must be held to be the debtor—that he is personally liable for the debt claimed. The action is brought against him as master, and also as owner or part owner, and in those capacities or one or other of them representing the said ship. It is brought against him as owner, and the third statement of facts makes out a case of *culpa* against him. If the action is well founded on the merits, it is a debt for which he is personally liable, and to the fullest extent, for the Act of Parliament which limits the liability of the master to the ship and cargo does not operate when injury is occasioned by his fault.

The next point is that he came within the jurisdiction of this Court personally. He came to Leith, and was personally within the jurisdiction of the Court. He might have been kept within the jurisdiction if the creditors had thought proper to apply for a *meditatione fugæ* warrant. If they suspected he was going away they might have prevented him and made him find caution *de judicio sisti.* And if they had done so, and action had been brought, he could not then have pleaded that he was not liable, for I hold it as settled law that arrestment of the person is a mode of founding jurisdiction as well as arrestment of property. This was settled by the case of Muir *v.* Collett, 23 D. 1229. So that we have this debtor remaining within the jurisdiction, and no proceeding taken to prevent his getting away. I hold it clear, if his residence had continued for forty days, he could not have pleaded want of jurisdiction. But the very day after action is raised against him he himself raises an action, and raises it in the very character in which the action of the preceding day had been raised against him, and he concludes for payment of a sum of money in name of damages to himself. He raises it *qua* master and also *qua* representing the ship. The action is brought by him in the same character in which he is sued. By doing so he subjects himself to the jurisdiction of the Court in a question with Morrison and Milne; and, what is more, the ground of his action is the very proceeding in reference to which the counter action of the preceding day was brought. It is not a case of compensation where the object is to establish what is a good claim of compensation or retention; but it is an individual matter. That being the case, I think he himself has obviated any objection that it might have been competent to him to state against this action.

Lord DEAS—I agree with your Lordships that any remedies which owners of Scotch vessels may have under the Merchant Shipping Act cannot interfere with those competent by our law and practice apart from that statute. Even if the remedy provided by the Act had been better than any we had before, this would still have been so; but I think that remedy is not so good as what we had before.

It appears that a collision took place in British waters between a British ship belonging to Scotch owners and a foreign ship of which Massa was master. The master of each ship attributes the fault to the other. The vessels were both injured. The foreign ship comes immediately after into Leith, and the owners of the British ship raise this action against the master for compensation, upon the footing that the fault was his, as being the party in charge of the foreign ship, and that the owners and the ship itself are liable for the fault of the master. The action is raised against him as representing the owners, or what is the same thing, as representing the ship.

It may be a question whether that action involved the consideration of the personal liability of the master. I have no doubt that if the collision took place by the fault of Massa, he would be liable as well as the owners. It is not very clear whether the action is directed against the master as personally liable or not. It is clear that the defender did not so understand it; for in his second plea in law it is said, "it is not set forth that the defender is individually liable; and as he does not represent the owners, he should be assoilzied." He not only does not understand the action as one directed against him as representing the owners, but he understands it as an action not involving his personal liability at all. Then was jurisdiction really founded against him? It was founded by letters of arrestment. These letters set forth that the owners of the "Scotia" had a claim of damage against the owners of the foreign vessel, in respect the injury done to their vessel had been brought about by the fault of Massa; and then they go on to say that Massa is a foreigner, but that he has goods and property in this country as representing the owners of the vessel. That is what is set forth in the summons. Therefore, it is clear that the action is against him as representing the owners, and that in his representative character the ship belongs to him. The first thing to be considered is this. Suppose the master were otherwise liable to the jurisdiction of this Court—suppose he had been domiciled in Scotland—would an action of this kind have been competent against him as representing the owners to constitute this as a debt against the owners. I am disposed to think that such an action would be competent. It is plain that this is an action which may be brought against the master as representing the owners under such circumstances. If he had bought stores, and these had been delivered to him, and he had sailed away and not paid the price, I don't see why action could not be directed against him. In the same way, if he had ordered them and not taken delivery, I think an action of damages for so doing would be competent against him in this Court. This action is founded not on contract but on delict. I don't see any ground for holding that when the question comes to be which of the two ships is liable to the other, it would not be quite competent, in an action against the master domiciled in Scotland, to get decree against him as representing the owners. It seems to me almost unnecessary to say that jurisdiction may be founded by arrestment of that which is said to belong to him in his representative character. Therefore, I am disposed to think that jurisdiction was well-founded by that arrestment.

Of course if jurisdiction is well founded on either of the two grounds here relied on, that is sufficient. But I think the jurisdiction is also

well founded on the ground of reconvention. It does not matter whether we call this plea reconvention or not. I think if we are to give it a name at all, I know no name so good as reconvention. It is more appropriate than prorogation of jurisdiction. It was matter of argument whether reconvention is prorogation of jurisdiction or not. Pothier and Heineccius are both of opinion that it is a species of prorogated jurisdiction. Other jurists think it is not. But that appears to me to be a mere war of words depending upon what you take to be the meaning of the word prorogation. If you understand prorogation to be what a man voluntarily does—what he wants to do—then reconvention is not prorogation. But if prorogation is not confined to that, if you take prorogation in a wider sense, there is no difficulty in bringing reconvention within it. Now, that being the case, can a man be allowed to take the benefit of the jurisdiction of this Court, and at the same time refuse its jurisdiction in respect of matters intimately connected with the matter, in respect of which he claims jurisdiction? The question to be tried here is, which of these two ships is liable, and accordingly the action which is brought the very next day by the master and owner of the ship, and which is called in Court at the same time as the action first executed, is as clearly an action at his instance in his representative character as the other is against him as representing the ship. It is not an action at the instance of Massa individually. I don't see how he could sue individually. The only way would be that he was said to be in fault and that there might be some back claim against him in respect of that fault. But this action is raised as master and as representing the vessel. How can it be said that the action is to go on at his instance as representing the ship, in order to get damages for behoof of the ship, and that the counter action cannot go on? I look upon these actions as in the same position so far as the master is concerned. And I don't think there is any charm about the words *convention* and *reconvention*. They do not imply that you must have convention before you have reconvention.

Lord ARDMILLAN—There is only one point upon which I feel hesitation, and that is the effect of the arrestment to found jurisdiction. That question is one of much delicacy, but I have come to be of the same opinion as your Lordship, and for the same reasons.

I think the original action brought against Massa, as representing the owner, is an action in which arrestment of the ship—the ship being the instrument by which Massa is said to have done the wrong—was sufficient to create jurisdiction against him as representing the ship and the unknown owners of her in matters respecting the collision. The delicacy is that he is also sued as personally liable. On the whole, I think the sound view of it is, that the jurisdiction, which would have been well founded as against the owners, and would have been well created against him as representing the owners, is not destroyed merely because there is an additional and subsidiary conclusion against the master personally.

I have no difficulty as to the second point. But I do not view the second plea in law for the defender as raising the plea of reconvention. I am satisfied that the strict plea of the civil law is not raised under the present circumstances. The circumstances here are adverse to the principle out of which the plea of reconvention arises. That principle is, that the party who has invoked the jurisdiction of a foreign country shall not be entitled to revoke the jurisdiction so invoked in a matter arising out of the same circumstances and of the same nature. But while I think that that is the nature of reconvention, I don't think the broad principle is to be excluded because we hold that this is not reconvention. In the case of Thomson, I came to the conclusion that reconvention is an equitable rule of compensatory pleading to prevent multiplicity of litigation and divided suits. I am still of that opinion.

I think this holds in this case. I can't understand anything more inexpedient than to refuse the jurisdiction of this country in one action against a party appealing to it in another, and that when the matter of both actions arises out of the same collision at sea.

I think the legal principle upon which jurisdiction is created in this case is, that the defender, Massa, has, by his own conduct, created a bar which prevents him from pleading no jurisdiction in this case.

The Court therefore adhered to the interlocutor sustaining the jurisdiction.

Agent for Morison and Milne—John Henry, S.S.C.

Agents for Bartolomeo and Massa—Murdoch, Boyd, & Co., S.S.C.

Tuesday, Dec. 11.

FIRST DIVISION.

PETITION—FLETCHER AND OTHERS.

Practice—Records—Entail—Nobile Officium. Form of procedure in an application for recording in the Register of Tailzies two deeds already recorded in the Books of Council and Session, and in the custody of the keepers thereof.

This was a petition enrolled before the Junior Lord Ordinary for "warrant to the Lord Clerk-Register and other Keepers of the Records to transmit to the Clerk to this application" two dispositions and deeds of entail which were recorded in the books of Council and Session; "and upon the same being produced, to interpone your authority to the said dispositions and deeds of entail, and to grant warrant to the Keeper of the Register of Tailzies for recording the same agreeably to the Act of Parliament 1685, cap. 22."

The Lord Ordinary having doubts as to the competency of his making the order craved upon the Keepers of the Records, reported the matter verbally.

The petitioners founded upon the Act of Sederunt 24th December 1838, sec. 15, which provides "that when any deeds, or steps, or warrants of extracted processes, deposited with the Lord Clerk-Register, are required in processes depending before the permanent Lords Ordinary, it shall not be necessary to apply to the Inner House for a warrant for the transmission of such documents, but the Lords Ordinary before whom the causes depend may grant such warrant."

The Court observed that the proceeding should be under the authority of the Inner House, and directed the Lord Ordinary to frame an interlocutor proceeding upon that authority, and providing that the documents should always remain in public custody, and should be retransmitted to the Keepers of the Records as soon as they were recorded in the Register of Tailzies.

The petition was accordingly amended so as to