Agent for Petitioner—W. H. Muir, S.S.C.
Agent for Respondent—James Young, S.S.C.

Tuesday, February 2.

FIRST DIVISION.

SHAW *v.* DOW AND ANOTHER.

Jurisdiction—Insolvent—Heritage in Scotland—Fraudulent disposition—Reduction. D, proprietor of heritage in Scotland, and residing there, being insolvent, convened his creditors, and offered a composition of 5s. per £. At an adjourned meeting this offer was accepted. D, having executed a disposition of his heritable property for a price between the first and second meetings of his creditors, left Scotland, and took up his permanent residence in England. A creditor, who had accepted the composition, brought a reduction of the composition contract and of the disposition, alleging that the sale of the property was a fraudulent device for the purpose of putting it beyond the reach of the creditors. *Held* that as, if the creditors' allegations were made out, D was still proprietor of heritage in Scotland, the Court had jurisdiction to entertain the action.

Jurisdiction—Arrestment jurisdictionis fundandæ causa—*Debt—Illusory—Reduction—Prescription.* (1) It is not a relevant objection to arrestment *jurisdictionis fundandæ causa* that the debt arrested is prescribed. (2) A debt of £1, 8s. 6d. arrested *jurisdictionis fundandæ causa* is not "illusory."

Question, is arrestment *jurisdictionis fundandal causa* a proper foundation for trying reductive conclusions?

Dow was at one time an innkeeper in Scotland, and proprietor of heritable estate there. Having become insolvent, he called a meeting of his creditors in June 1862. The pursuer Shaw, a creditor for £800, attended the meeting along with other creditors. Dow produced a state of his affairs, and offered a composition of 5s. per pound, requesting a fortnight's delay to find security. The creditors, with one exception, agreed to Dow's proposal. At the adjourned meeting no security was offered by Dow; but Dobie, as Dow's agent, intimated that a composition of 5s. per pound would be paid to such creditors as were willing to take it. Shaw accepted the composition, and discharged his debt. Shaw, in this action, now alleged that the state of affairs submitted by Dow to his creditors was not a full and fair disclosure, but was false and fraudulent; that between the first and second meetings of his creditors he executed a pretended disposition of his heritable property to the other defender for the fraudulent purpose of putting that property beyond the reach of his creditors. "The said disposition was executed by the defender Dow when he was insolvent, and after he had contracted the debt due to the pursuer, as well as debts to other creditors, and after he had called together a meeting of his creditors and offered them a composition of 5s. in the pound on their debts, and between the date of the first and adjourned meeting of his creditors before mentioned, and when he knew himself to be on the eve of bankruptcy, and without the knowledge of his creditors or of the pursuer; and these facts were all well known to the other defender Dobie when he accepted of the same. The said sum of £250 sterling, being under deduction of the sum of £1200, the balance of the sum of £1450, alleged to have been instantly advanced and paid to the defender Dow as the price of the said subjects, was neither advanced nor paid by the defender Dobie; and the defender Dow was not then indebted to the defender Dobie in any sum whatever. The alleged sale was not a *bona fide* sale, but a device resorted to by the defenders for the purpose of putting the subjects beyond the reach of the defender Dow's creditors. The pursuer believes and avers that it was part of the arrangement that the defender Dobie should reconvey the property to the defender Dow, but that no back letter or other writing to that effect should pass between them. Or otherwise, the said sum of £1450 sterling, under the burden and deduction of £1200, was not a fair, just, or adequate price for the said subjects, which were and are worth £2000 or thereby. The said disposition was granted without any true, just, and necessary cause, and without a just price really paid for the same. And the said disposition was granted and taken by the defenders fraudulently and collusively, with a view to defraud and disappoint the pursuer and the other just and lawful creditors of the defender Dow."

The pursuer concluded for reduction of (1) the minutes of meetings of Dow's creditors; (2) the discharge of the debt of £800 granted on payment of the composition; and (3) the foresaid disposition. He admitted that Dow did not now reside in Scotland, but maintained the jurisdiction of the Court on the grounds (1) of Dow being still owner of the heritable property, and (2) of arrestments *jurisdictionis fundandæ causa.*

The defender Dow pleaded no jurisdiction.

The Lord Ordinary (BARCAPLE), on 19th December 1868, pronounced this interlocutor:—"The Lord Ordinary having heard counsel for the parties on the preliminary defences for Andrew Dow—Finds it is stated by the pursuer that the said defender Andrew Dow has resided in England since June 1862, and that he still resides there: Finds that the pursuer alleges, as a ground for holding that the said defender is subject to the jurisdiction of this Court, that he is the owner of heritable subjects in Scotland: Finds that the pursuer's averment as to this matter is, that the defender Dow was, in and prior to the said month of June 1862, proprietor of heritable property in Langholm, known as the Crown Inn there, of which he executed a disposition in favour of the other defender Dobie, dated and recorded in the Register of Sasines on the 18th of said month, and that it was arranged that the defender Dobie should reconvey the property to the defender Dow, but that no back letter or other writing to that effect should pass between them; or otherwise, that the price for which the said disposition bore to be granted was not a fair, just, or adequate price: Finds that the defender Dow admits that he was proprietor of said subjects, and conveyed them in June 1862 to the other defender, but in other respects denies the pursuer's said averments, and states that he has no heritable property in Scotland: Finds that, in these circumstances, there are not *termini habiles* for sustaining jurisdiction against the defender Dow in this action in respect of his being owner of heritable subjects in Scotland, or of his connection with said property in Langholm, or on any other ground, except in so far as jurisdiction may have been founded against said defender by arrestment: Finds that the pursuer alleges that he has founded jurisdiction against

the defender Dow by using an arrestment *jurisdictionis fundandæ causa* in the hands of James Frater & Company, but that the defender states that he has no debtor in Scotland, and that the said James Frater & Company are not indebted to him, or in possession of moveable property belonging to him: Appoints the pursuer to give in a minute stating the nature and amount of the funds or effects belonging to the defender Dow alleged to have been arrested, in order to found jurisdiction against him in this action, said minute to be lodged by the first sederunt day in January next; and, *quoad ultra*, reserves further consideration of the preliminary defences and the question of expenses."

"*Note.*—The combination of conclusions in this action is somewhat anomalous, and complicates the question of jurisdiction. The leading conclusions are for reduction (1) of a minute of meeting of the defender Dow's creditors, by which they agreed to accept a composition of 5s. in the pound upon their debts; (2) of a discharge granted by the pursuer, as one of the creditors, for a debt of £800 due to him by Dow, on receiving the composition of £200; and (3) of a disposition of heritable property in Scotland granted by Dow to the other defender Dobie, bearing to be for a price paid. The whole writs called for are dated, and the disposition was recorded in the Register of Sasines, in June 1862; and the pursuer states that Dow went to England in that month, and has resided there ever since. The defender Dobie does not appear to have any patrimonial interest in the first two writs, and the defender Dow does not maintain that he has any interest in the disposition granted by him to Dobie. The defender Dobie is, however, alleged to have acted as agent for Dow in arranging with and paying his creditors, and the pursuer states that he believes and avers that it was arranged that he was to reconvey the property to Dow. These are averments to the effect that the whole arrangement with the creditors, and the disposition to Dobie, were fraudulently carried through by both defenders to defeat the rights of Dow's creditors. Such being the nature of the averments, it was clearly right that both parties should be called as defenders to the reduction. But that does not settle the question as to jurisdiction against Dow, who is permanently resident in England.

"There follows after the reductive conclusions a conclusion that both defenders shall be decerned to deliver up to the pursuer a docqueted account, signed by Dow, bringing out the debt of £800 due to the pursuer, which was given up to Dobie, as Dow's agent, when payment of the composition of £200 was received. Lastly, there is a conclusion against Dow alone for payment of the balance of £600 on the pursuer's debt.

"Apart from the conclusion for reduction of the disposition, it appears to the Lord Ordinary that, so far as Dow is concerned, this is just an action for constitution and payment of an alleged personal debt of £600. The two first reductive conclusions, and the conclusion for delivering up the docqueted account, which is the document of debt, are all ancillary to the conclusion for payment. Looking at the action in this aspect, the Lord Ordinary does not think that there is any ground, apart from arrestment, on which jurisdiction can be sustained against Dow. He has been out of the country for upwards of six years, during all which time it is said that he has been indebted to the pursuer in the sum concluded for. It is true that the debt was incurred in Scotland while the defender was domiciled here, but that will not *per se* constitute jurisdiction against him now when his domicile is in England. It might be different if he had been personally cited in Scotland; *Sinclair* v. *Smith*, 22 D. 1475. Neither does it appear to the Lord Ordinary that jurisdiction can arise from the circumstance that the pursuer alleges that the composition and the discharge granted by him were obtained by fraud perpetrated in Scotland. This is a question which the courts of the defender's present domicile are perfectly competent to try. And here again personal citation in Scotland is requisite to constitute jurisdiction on this ground. For these reasons, the Lord Ordinary thinks that there would be no ground on which to found jurisdiction against Dow if the summons did not contain a conclusion for reducing the disposition of the heritable subjects.

"He feels that the question is one of much greater difficulty, when regard is had to the existence of that conclusion. The question under it relates to a conveyance of Scotch heritage, and is proper for the courts of this country. But the defender is domiciled in England, and he is not on the face of the records, and does not himself profess to be, proprietor of or in any way interested in the subjects in question. If it were alleged that he is personally liable to grant a deed, or do any other act in favour of the pursuer in relation to these subjects, the action for implement of such personal liability would fall to be brought in the court of his domicile; Ersk. i, 2, 17. If, for instance, he were now made bankrupt in England at the instance of the pursuer, or any other alleged creditor, any obligation he might be under to convey an alleged interest in the property in question would be adjudicated upon in an English Court of Bankruptcy, though any real action against the subjects themselves, or for declarator of right in regard to them, would be in this Court. It was not unnatural that Dow should be called in such an action, or that, being called, he should have appeared to concur in the defence. But it is not apparent that, so far as relates to the conclusion for reduction of the disposition, and any conclusions that are ancillary to it, excluding, of course, the conclusion against Dow for payment, it may not proceed against Dobie alone, who is on the records the sole proprietor of the subjects, and whose title is proposed to be reduced. If Dow were dead, with no known heir, the action must have been directed against Dobie alone.

"The question, as already noticed, is complicated by the other reductive conclusions, and the conclusion for redelivery of the discharge granted by the pursuer. If the Lord Ordinary could have come to the conclusion that, in the circumstances, there is jurisdiction against Dow as regards the reduction of the disposition, he would have been disposed to hold that it would have extended to these other conclusions, provided they were to be used solely in aid of, and as leading up to the conclusion for reducing that deed. But even in that view the question would have been one of some difficulty, as they are evidently and necessarily intended also to found the personal conclusion against Dow, payment of the balance of the pursuer's debt, as to which the Lord Ordinary is clearly of opinion that there is no jurisdiction.

"It is with difficulty, and some regret, that the Lord Ordinary has come to the conclusion embodied in his interlocutor. The whole action is one which would with great propriety and advantage be tried

in Scotland, if there were jurisdiction against the defender.

"The pursuer urged to have the present question decided before he should be called upon to show that he has attached funds by his arrestment."

A minute was given in by the pursuer, stating that in June 1862 Frater & Co. hired a couple of gigs from Dow, the hires of which, amounting to £1, 8s. 6d., were still unpaid. A letter from Frater & Co. was produced, dated 25th July 1868, bearing that the gigs had been hired as stated in June 1862, and that "about the month of August or September following Dow sent in an account to Mr John Frater, Langholm, father of the said James Frater, in which those two hires were charged. We have not yet paid for these gig hires, and are still due Dow for them, and are quite ready to pay them as soon as the arrestment is loosed.—We are, yours truly," &c.

The Lord Ordinary, on 12th January 1869, pronounced this interlocutor:—"The Lord Ordinary having heard counsel for the pursuer and the defender Andrew Dow, and considered the minute for the pursuer, No. 20 of process, Finds that the alleged debt which the pursuer states that he has arrested in order to found jurisdiction against said defender, amounting to the sum of £1, 8s. 6d., having been, according to the pursuer's allegation, incurred in the year 1862, has fallen under the triennial prescription, and the pursuer does not allege the existence of written proof of the said debt: Finds that in these circumstances the pursuer has not set forth the existence of funds or effects of the said defender which can be held to have been attached by the said arrestment so as to constitute jurisdiction against him: Sustains the plea of no jurisdiction: Dismisses the action as against said defender, and decerns: Finds the pursuer liable to him in expenses: Allows an account thereof to be given in, and, when lodged, remits the same to the auditor to tax and report."

"*Note.*—The Lord Ordinary would have had difficulty in any view in holding that the sum which is alleged to have been arrested is not altogether illusory, and such as cannot be considered as sufficient for constituting jurisdiction. For all practical purposes, it might as well have been any smaller and merely nominal sum. But he thinks that the objection founded on the triennial prescription is in itself sufficient. The defender denies the existence of the debt. The pursuer does not allege that there is writing by which it can be proved. The arrestment on the dependence has not the effect of transferring the debt, so as to constitute the pursuer the creditor, and entitle him to refer its constitution and subsistence to the oath of the alleged debtors. In these circumstances, he can only prove it, if at all, by the voluntary deposition of the debtors as witnesses, which would not be effectual to establish a claim against them by the defender, who can only prove the debt *scripto vel juramento*. The Lord Ordinary thinks there would be great danger in allowing a pursuer to set up, by the acknowledgment of the alleged debtor, an unconstituted and prescribed debt of merely nominal amount as the subject of arrestment for founding jurisdiction; and he is of opinion that there is neither authority nor principle for holding that jurisdiction can be so constituted."

The pursuer reclaimed.

CLARK and M'KIE for reclaimer.

Solicitor-General (YOUNG) and MACLEAN for respondent.

At advising—

LORD PRESIDENT—As regards the interlocutor of 19th December 1868, I am not able to agree with the Lord Ordinary. I think there is quite sufficient foundation for jurisdiction against Dow in the facts of this case as alleged by the pursuer, which the pursuer offers to prove, but which, of course, it would be absurd to put him to prove at this stage of the case, because that would amount to an anticipation of the entire merits of the cause. The pursuer's allegations are, that the alienation of the bankrupt's property to the other defender was not a *bona fide* sale, but a mere device on their part for the purpose of putting the subjects beyond reach of Dow's creditors. He avers (*reads ut supra*). If these allegations are true, there cannot be a doubt that Dow is in reality the owner of the estate which was conveyed by him apparently by this fraudulent disposition; and, as that estate is heritage in Scotland, that is sufficient to found jurisdiction against him, assuming these statements to be correct. The effect would be this, not that there is any sale in any true sense, or any contract between them, making the estate thenceforth the estate of Dobie, but merely a fraudulent arrangement by which in effect Dobie is only trustee for Dow, and this is not one of those trusts which may not be proved by parole evidence. It is not a question between the truster and the trustee, but this is a question with a third party alleging that, by a fraudulent transaction between Dow and Dobie, his estate has been passed by an apparently absolute title, which in reality is nothing but a fraud. If these allegations are true, the pursuer will not only succeed in making out his case on the merits, but in proving that Dow is subject to the jurisdiction of the Court as being the owner of heritage in Scotland. If he fails in his proof, he fails entirely, there being neither jurisdiction nor merits in his case, but it would be irregular and inexpedient that now we should put the pursuer to proof of his whole case on the merits in order to try if we have jurisdiction. I cannot agree therefore with the Lord Ordinary in dismissing the action. I think that, as regards the first ground of jurisdiction, that Dow is owner of heritage in Scotland, our jurisdiction ought to be sustained.

That probably would be sufficient on the assumption that the pursuer is to prevail in his reductive conclusions, for if he does so prevail the rest will follow. But we must consider the other ground on which the pursuer rests his plea of jurisdiction, viz., the ground of arrestment *jurisdictionis fundandæ causa*, for this reason, that if the pursuer fails in his reductive conclusions, he might probably still be entitled to succeed in his petitory conclusions. As regards these other pleas, I am of opinion that the arrestment is sufficient as a foundation of jurisdiction to try the petitory conclusions. Whether to try the whole case, I am not prepared to say. I rather think it is an open question whether arrestment *jurisdictionis fundandæ causa* is a proper foundation for jurisdiction to try reductive conclusions. The objections stated to these arrestments, as a foundation for trying these petitory conclusions, appear to be three in number. In the first place, it is said that the debt, which is alleged to be due to Dow by a debtor in Scotland, is a debt which has suffered the triennial prescription, *i.e.*, it is three years and more since it was incurred, and therefore the debtor in

that debt would be entitled, if he thought fit, to plead the triennial prescription. But if there be such a debt, it does not appear to me to interfere with the ground of jurisdiction that there may be pleas open to the debtor, which may or may not be sustained if they are stated. Why should we take it for granted that this debtor requires to be sued at all? And if he were sued, and thought he had a good defence on the merits, why should we assume that he would plead the triennial prescription? And lastly, suppose the plea were taken, there would not be an end of the debt; the only effect would be to limit the mode of proof, for the debt might be proved by writ or oath of the debtor.

But it appears to be thought, also, that this arrestment is of a debt of too small amount to give jurisdiction. That is a somewhat delicate matter. I see that a noble and learned Lord, in the case of *Lindsay* v. *London and North Western Railway* (3 Macq. App.), said that it would not do probably that the subject arrested should be merely illusory, and I see no reason to differ from him. But he admits it would be difficult to define what would be "illusory," and I am not prepared to say that a debt of £1, 8s. 6d. is illusory. On the contrary, it is a substantial sum of money. Whether, if the pursuer gets decree in this action, he will get any greater remedy than this sum to satisfy his debt of £800 is no matter, for it is never a question whether the sum arrested is sufficient to pay the debt. Therefore, unless we think the thing arrested to be of no value at all, the smallness of the subject is not a relevant objection to the arrestment. The only other objection to this arrestment is, that it is not sufficient as a foundation of jurisdiction to try the whole conclusions. It is not necessary here to determine whether it would be so or not. The pursuer will be sufficiently fortified by the foundation of jurisdiction resting on the heritable estate said to belong to Dow, and, even if this fail, he will have jurisdiction to try the petitory conclusions by this arrestment.

I am therefore of opinion, on the whole matter, that we must recal the Lord Ordinary's interlocutors, and sustain the jurisdiction.

Lord Deas—Two grounds of objection to the jurisdiction are stated. In the first place, it is said that Dow is, or must be assumed to be, the proprietor of the heritable subject which is disposed of by the disposition sought to be reduced. I am of opinion that we cannot at present assume that Dow is not proprietor of that subject. The object of the action is to try whether he is proprietor or no. We have undoubtedly jurisdiction to try a question of that kind, and it is not easy to understand the objection to the jurisdiction as a preliminary objection to satisfying the production. Then the whole question is whether he is proprietor or no. If he is proprietior, then undoubtedly we have jurisdiction. Suppose that, in place of being a disposition by Dow to Dobie, it had been a disposition by Dobie to Dow, and that the action was at the instance of a creditor of Dobie, alleging that though Dobie had denuded himself of the property *ex facie*, it was truly for his own behoof, and Dow is called as a party. The action could not go on without him, and there is no doubt that in that case Dow would be subject to the jurisdiction of this Court. That is clear; and the only difference between that case and this is, that in that case *ex facie* the title would be in the person of Dow, whereas here it is *ex facie* in the person of Dobie. I am not prepared to hold that in that case there is any difference in principle, for the *ex facie* title is merely a *prima facie* title, and does not exclude inquiry into the matter of fact. A trust may be proved even in a question between the truster and the trustee, by writ or oath. It is only an inquiry of a different kind, necessary to ascertain whether Dow or Dobie is proprietor.

As to the petitory conclusions, I have no doubt that this arrestment—I don't say is sufficient to entitle us to sustain the jurisdiction, but—is sufficient to prevent us from, at this stage, sustaining the plea of no jurisdiction. There is a debt, and it is impossible to say that a debt of £1, 8s. 6d. is an illusory sum in any reasonable sense. I see no difference in this question between an actual real debt of this amount and a much larger. There may be some difficulty with reference to the objection that the debt is prescribed, but the only result of that is, that before we can deal with it in any way, we must ascertain whether there is a debt or not. As it is alleged that there is no real debt, the only effect of that is, that the Lord Ordinary might not be justified in sustaining the jurisdiction, but he would not be justified in holding there was no jurisdiction until he saw whether there was a real debt or not. When the time comes for ascertaining it, there is no doubt that the production of that letter by the debtor is quite conclusive. A man is not bound to plead prescription; and, according to the only evidence before us, that plea will not be taken here. Can the debtor get quit of that letter? If an action were raised against him for payment, could he plead prescription now after that letter? Beyond doubt the letter would be conclusive against him, if ever he stated the plea, which I don't think he would do.

It may not be necessary to go further and consider whether that arrestment would found jurisdiction as to the reductive conclusions too. I am not prepared at present to throw any doubt on that. What happened here? Dow offered a composition to his creditors. The pursuer says he attended a meeting of Dow's creditors on 13th June 1867, when the creditors were favourable to accepting the composition, but the meeting was adjourned to the 27th of June. Between the 13th and the 27th that disposition was granted by the bankrupt to his own agent, and on the 27th the agent comes, and, without saying anything as to the disposition, gets the creditors to agree to the composition contract. This action concludes for reduction of the composition contract, and necessarily involves consideration of this disposition as part of the fraud. That same action goes on to conclude for payment of the whole debt due to the pursuer, which could not be concluded for until the composition contract is set aside. If there is any difficulty in some reductions, which I don't say there is, I cannot imagine any difficulty in a case like this, where reduction of the whole concern is essential before there can be petitory conclusions for anything, for, if the pursuer fails in reducing the composition contract, he cannot get decree for his full debt. Therefore, I think the Lord Ordinary has done wrong in sustaining this plea at this stage, and I don't see how it can be sustained at any after stage either.

Lord Ardmillan and Lord Kinloch concurred with the Lord President.

Agents for Pursuer—Paterson & Romanes, W.S.

Agents for Defenders—Lindsay & Paterson, W.S.