that case there was no defeasance. It was only held that a legacy appointed to be paid to a nephew on the death of a certain person vested in him, subject to defeasance if he died before that certain person and left issue. But in this case it was plainly the intention of the testator, as already pointed out, not that all payment should be postponed till a certain event, but that there should be payment of greater or less amount whenever possible to all his children, and in one possible event of very large amount indeed in proportion to the estate. His intention was that, in so far as might prove to be possible consistently with what he provided for his widow, the division should be made among his children. I am unable to hold that, because he expressed in words what would have resulted by operation of law, the fee which he intended to give to his children was taken out of his daughter by her dying before her mother. I do not know of any decision, and can find none, where this has been held in such a case as the present—that of a settlement by a father on his own children, where plainly the intention was to give a fee, and payment was only postponed in part in order to provide for the mother of his children, the testator taking pains to provide for as early payment as possible of such parts of the residue as might be set free during the widow's survivance to his children. That seems to me to be a different case from any to which we were referred, where vesting subject to defeasance was treated as being part of our law.

Upon the whole matter I propose that the Court shoud adhere to the judgment of the Lord Ordinary.

The LORD JUSTICE-CLERK added that Lord Young, who was absent, concurred.

LORD RUTHERFURD CLARK—I have found this case one of very considerable difficulty. I only wish to say that if I had been left entirely to my own judgment I would have been of the opposite opinion, but seeing that all your Lordships concur in the judgment to be pronounced, I do not dissent.

LORD TRAYNER—I agree with the Lord Ordinary. I should only add, that with reference to the question argued at the bar (but not referred to in the Lord Ordinary's note) upon the doctrine of vesting subject to defeasance, I give no opinion.

The Court adhered.

Counsel for the Claimant, W. M. Roland—Rankine—Sym. Agents—Richardson & Johnston, W.S.

Counsel for the Claimants, Mrs Roland's Trustees—H. Johnston—Dundas. Agents—Carment, Wedderburn, & Watson, W.S.

Tuesday, December 11.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

HERON *v.* WINFIELDS, LIMITED.

Jurisdiction — Arrestment Jurisdictionis fundandæ causa—Possession—Liability to Account.

H, at the termination of his engagement as agent of an English company, retained in his possession goods belonging to the company, on the ground that he had a claim against them for commission. These goods he placed in the hands of D, instructing him not to deliver them up to the company without further orders from himself. Thereafter H arrested the goods in the hands of D, and raised an action in the Court of Session against the company.

Held (*rev.* judgment of Lord Stormonth Darling) that the arrestment was ineffectual to found jurisdiction, in respect that the arrestee was under no obligation to account for the goods to the defenders.

Charles Millar Heron, commission-agent, Edinburgh, was in the employment of Winfields, Limited, a manufacturing company, whose registered office was in Birmingham, and who carried on business there. His engagement with them terminated in April 1893. He subsequently claimed from Winfields a sum of £100, which he alleged to be due to him in respect of commission, and in security of this claim he retained certain samples, drawings, &c., belonging to them which were in his possession. In January 1894 Heron placed these goods in the custody of Messrs Aitken Dott & Son, picture framers, Edinburgh. In the same month he arrested the goods in the hands of Messrs Aitken Dott & Son *jurisdictionis fundandæ causa*, and on 22nd January he raised an action against Winfields, Limited, in the Court of Session, of count, reckoning, and payment in respect of the commission alleged to be due to him.

The defenders pleaded, *inter alia*—"No jurisdiction."

On 10th July 1894 the Lord Ordinary (STORMONTH DARLING) allowed the parties a proof of their allegations as to the arrestment *jurisdictionis fundandæ causa*. The evidence led showed that the pursuer had admittedly placed the goods in the hands of Messrs Aitken Dott & Son for the purpose of arresting them; that after delivering the goods to Messrs Aitken Dott & Son he had directed them to retain them till he had had an opportunity of using arrestments in their hands; that Messrs Aitken Dott & Son knew the goods to be the property of the defenders, but that they would at any time have returned them to the pursuer on demand without any reference to the defenders. The pursuer admitted that he would not have allowed the goods to be returned to

the defenders till his claim was satisfied.

On 3rd November 1894 the Lord Ordinary repelled the defenders' plea of no jurisdiction.

"*Opinion.*—I am of opinion that the arrestments used on 22nd January 1894 in the hands of Messrs Aitken Dott & Son of Edinburgh were sufficient to found jurisdiction against the defenders. There is no dispute that the samples arrested were the property of the defenders, and were of considerable value, but it is said that they were placed by the pursuer in the hands of the arrestee for the very purpose of arresting them, and that this was a mere device for bringing the defenders within the jurisdiction of the Scottish courts.

"It appears from the proof that the samples had been for a considerable time in the hands of the pursuer, who was from 1888 to 1893 agent for the defenders in Scotland. Questions arose as to the balance of commission due to him, and at first the pursuer's expectation was that the defenders would sue him in Scotland for delivery of the samples, and that he would have an opportunity of stating his claim for commission by way of reply. But time passed without the defenders taking any action, and both the pursuer and his law-agent, Mr J. B. Sutherland, quite frankly admit that they then resolved to transfer the samples to neutral custody for the purpose of arresting them to found jurisdiction. What happened was, that on 11th January the pursuer asked Mr Dott to remove the goods to his warehouse, not telling him at the time what his purpose was. He told him what it was some days afterwards, and on 22nd January the arrestment was laid on. Mr Dott knew from the first that the goods belonged to the defenders, because the goods had formerly passed through his hands in connection with some of the Edinburgh Exhibitions. No intimation of the transfer was made to the defenders.

"It seems to me that the hard-and-fast rule of law which allows jurisdiction to be founded by arrestment does not admit of any inquiry into the motive with which the goods are placed in the hands of the arrestee. It is enough that at the time when the arrestment is laid on the arrestee is in possession of property belonging to the foreigner of which he would be bound to make payment or delivery if the owner demanded it. There must, in short, be the relation of debtor and creditor between them with reference to the property arrested, but, if there is, the arrestment is sufficient to found jurisdiction. In the present case that relation existed, and the arrestee knew it. It is quite possible that if a demand had been made upon him by the defenders for delivery of the goods, he would not have complied with it until he had first consulted the pursuer, but he would have had no good answer of his own to such a demand. I therefore repel the plea of no jurisdiction."

The defenders reclaimed, and argued—The goods were not really parted with by the pursuer, who never gave up the right of retention he might have had over them. Messrs Aitken Dott & Son were under no contract with the defenders so as to be bound to restore the goods to them, but, as the evidence showed, were subject to the orders of the pursuer. The pursuer admitted that he had deposited the goods for the purpose of arresting them; if sued by the defenders he would have had to take them out and return them. The fact of his having deposited the goods in a warehouse did not deprive him of the possession of them — Bell's Prins. sec. 1412; Bell's Comm. i. p. 199, ii. p. 88. The arrestees not being bound to account to the defenders, the arrestment was invalid — *Young* v. *Aktiebolaget Ofverum's bruk*, November 27, 1890, 18 R. 163; *Cunninghame* v. *Home*, 1760, M. 747, 5 Brown's Sup. 878; *Trowsdale's Trustees* v. *Forcett Railway Company*, November 4, 1870, 9 Macph. 88; *Cameron* v. *Chapman*, March 9, 1838, 16 S. 907. There must be a contractual relation between the arrestee and the common debtor, such as did not exist here—Bell's Comm. ii. p. 70; *Græme's Trustees* v. *Giesberg*, June 1, 1888, 15 R. 691. The Court would consider the *bona fides* of the arrester, and the pursuer's assertion that the arrestment would be good however the property might get into the country, the jurisdiction of whose courts was in question, was refuted by the cases of *Rintoul & Company* v. *Ballatyne*, December 21, 1862, 1 Macph. 137; *Campbell* v. *Lothians & Finlay*, December 2, 1858, 21 D. 63. The present case was analogous to the arrestment of a ship, which was held bad under similar circumstances in the cases of *Carlberg* and *Borjessen*, November 21 and December 22, 1877, 5 R. 188 and 399, *aff.* July 9, 1878, 5 R. (H. of L.), 215 and 217. If the validity of this arrestment were upheld, the case would go further than any previous authority.

Argued for the pursuers—The arrestment could only be bad if the arrestees were nothing but the servants of the arresters, but Messrs Aitken Dott & Son were responsible to the defenders, to whom they knew the goods belonged, and they would have had no good answer to a demand by the defenders for them. The pursuer thought that in consigning the goods to the care of the arrestees he had parted with his lien over them, and substituted for it this arrestment, and accordingly the arrestees became bound to the defenders. He did in fact abandon his lien over the goods—Bell's Prins. sec. 1415; *Johnstone* v. *Duncan*, May 16, 1827, 5 S. 660 (new ed.) 615. The Merchant Shipping Act 1862 (25 and 26 Vict. cap. 63), sec. 68, was intended to provide against anyone using his right of lien in this sort of way, but, if he failed, as the pursuer had failed, to comply with the formalities prescribed by the Act, he lost his right just as he would have lost it at common law. In the case of *Appine's Creditors*, 1760, M. 749, the goods having been transferred to a warehouse, arrestment of them was held good

both in the hands of the depositor and of the warehouse owner. The case was analogous, though they could not in the present case have been arrested in the hands of the pursuer. It was no matter how the goods came into the possession of the arrestee so long as they were there, and the Court would not consider the motive of the arrester. If, for example, a ship was blown into a port involuntarily, that would not prevent an arrestment being good if on the face of the schedule of arrestment every requisite was complied with. If the arrestment were held bad the anomalous result would be that the pursuer, who had possessed and parted with a right over the goods, was the only man in Scotland who could not profit by arresting them.

At advising—

LORD ADAM—The question raised here is, whether jurisdiction has been competently founded against the defender in respect of arrestments laid on by the pursuer *jurisdictionis fundandæ causa.*

The relation between the parties seems to have been this. The pursuer, Mr Heron, had for some time been acting as agent for the defenders, Winfields, Limited, and had a quantity of their goods in his possession. It had come to the knowledge of Messrs Aitken Dott & Son that the goods were in fact the property of the defenders. It further appears that there was a question between the pursuer and defenders as to whether or not the pursuer was entitled to a certain commission. The defenders are an English firm, and there is no jurisdiction against them here. The pursuer, however, anxious to settle the question of commission in Scots Courts, in order to accomplish that end, under legal advice took this course. He took the goods which he held as the defenders' agent, and parted with them to Messrs Aitken Dott & Son. And so having got the goods into the hands of a third party on 22nd January 1894 he arrested them *jurisdictionis fundandæ causa.* The question therefore is, whether this arrestment is good. Now, it appears to me that Mr Heron in so parting with the goods to Messrs Aitken Dott & Son was acting in a way in which he was not entitled to act. The goods had been entrusted to him as the defenders' agent, and he was not entitled, without their knowledge, to part with them. I further think that the goods were not put into the hands of Messrs Aitken Dott & Son for the defenders but for the pursuer himself, and solely in his interests and for his purposes, and that they would at any time have been bound to restore them to him at his request. The circumstances were these —Mr Dott being in the defenders' room, where the goods lay, was ordered by him to remove them, without receiving any other instructions at that time, except perhaps that his firm were to hold them. They were subsequently instructed, as Mr Heron says in his evidence, that the terms on which they held the goods were "to send on to defenders, but to await my instructions. I certainly would not have allowed him to send them to the defenders unless I had been paid." I cannot therefore form any other conclusion than this, viz., that if at any time the pursuer had instructed Messrs Aitken Dott & Son to return the goods they would have done so, and would have been bound to do so. These were the terms upon which they held the goods at the time of the arrestment, for the pursuer not for the defenders —subject to the pursuer's, not to the defenders' orders. If this be so, I cannot see how the arrestment is competent. On these grounds, without going further into the merits of the case, I am disposed to disagree with the Lord Ordinary, and to say that the arrestment was bad. There was no contractual relation or *quasi*-contractual relation between the third parties and the defenders; no obligation on them to hand over the goods to their true owners. It seems to me that the question is not altered by the fact that the defenders might, when they heard that Messrs Aitken Dott & Son had the goods in their possession, have asserted their right to them if necessary by legal proceedings. The only real contract and obligation to return the goods was between Messrs Aitken Dott & Son and the pursuer.

On these grounds, I am in favour of reversing the Lord Ordinary's interlocutor.

LORD M'LAREN—I agree with the opinion delivered by Lord Adam. In order that goods in the hands of one person may be lawfully arrested, as being the property of another, it is necessary, in accordance with past decisions and the course of practice, that the arrestee should be in the position of debtor to the common debtor or defender in the action. It has been suggested in the course of the argument that for an arrestment to be valid, there must be a contractual relation between the arrestee and the common debtor. There seems to be authority of some weight to support this proposition, but perhaps it is unnecessary for the purpose of deciding this case to lay down an absolute rule upon the question. There may be cases where the arrestee is in the position of debtor to the common debtor, though there be no positive contractual relation between them, no agreement to deliver, but merely an implied obligation from other causes, *e.g.*, from some rule of law, or from a *jus quæsitum*, under which the arrestee is taken bound to deliver to the common debtor. But it is, in my opinion, sufficient for the disposal of this case to hold, as I do, in accordance with the views of Lord Adam, that Messrs Aitken Dott & Son were not debtors to the defenders under any obligation whatever, whether resulting from contract or from law or indirect relation. The essential fact is this, that the pursuer, who had been the defenders' agent, placed in the hands of Messrs Aitken Dott & Son certain goods belonging to the defenders, but which were subject to his right of retention, with instructions not to deliver them up until he had had an opportunity of doing

something and had directed them to deliver them. That is a clear indication that the pursuer did not intend to part with his right of retention of the goods. Accordingly Messrs Aitken Dott & Son were not debtors to the defenders; they held the goods for the pursuer, and were bound on demand to redeliver to him. If that be so, the arrestment was not good. It is not enough to say merely that the goods were the property of the defenders. That might be a good ground of jurisdiction in principle if the law recognised it, and extended to moveables the analogy of heritable property. But it results from all the authorities that proprietary right is not enough to snpport jurisdiction founded on arrestment, unless the arrestee is also under obligation to account or to deliver to the common debtor.

I agree therefore with Lord Adam.

LORD KINNEAR—I am of the same opinion. The meaning and effect of the diligence of arrestment is settled beyond question. According to Mr Bell's definition arrestment is an attachment followed by adjudication. The method of attachment is that the Court, at the instance of the arresting creditor, issues a warrant by which the arrestee, or debtor's debtor, is prohibited from discharging his obligations to his own creditor, the common debtor, and the arresting creditor ultimately obtains the benefit of his arrestment by compelling the arrestee to perform this obligation to him. It follows that arrestments are of no effect unless there are some goods or debts in the hands of the arrestee which he is under an obligation to deliver or discharge to the common debtor. I agree that it is unnecessary to decide that the obligation must be created by a direct contract between the arrestee and the common debtor. It may be so, but at anyrate there must be a direct personal obligation to pay or deliver, whether arising *ex contractu* or *quasi ex contractu*. Now, if Messrs Aitken Dott & Son had been under an obligation to deliver to the defenders, then the pursuer's arrestment would have been effectual to prevent their performance of that obligation till the pursuer's claims were satisfied. But I agree that, on the contract of deposit, as described in the evidence by both parties, the obligation to deliver was not to the defenders but to the pursuer. The goods were deposited with Messrs Aitken Dott & Son with instructions not to send them on to the defenders till the pursuer told them to do so. It is, I think, of no consequence that these instructions were not given at the moment of deposit but subsequently. The pursuer says he would not have allowed the goods to go to the defender till he had been paid his commission, and Messrs Aitken Dott & Son say they would have returned them to the pursuer if ordered so to do. Under these circumstances I agree in thinking that they held for the pursuer, and had undertaken no personal obligation to the defenders. It follows that they might deliver to the pursuer according to their obligation without any breach of arrestment, and therefore that the goods are not effectually attached. The pursuer founds upon the case of *Appine's Creditors*, M. 749, and maintains that the goods might have been arrested in the hands of either himself or Messrs Aitken Dott & Son. I am not sure that I fully apprehend the grounds on which it was held that goods might be effectually arrested by different creditors in the hands of different arrestees at the same time. But at all events, I do not think the case helps the pursuer. It is clear that the pursuer could not have arrested in the hands of another goods which might at that very time have been validly arrested in his own hand as the true debtor in the obligation to deliver.

The LORD PRESIDENT concurred.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action.

Counsel for the Pursuer — Salvesen. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Defenders—C. S. Dickson —C. N. Johnston. Agents — Hagart & Burn Murdoch, W.S.

Tuesday, December 11.

FIRST DIVISION.

[Sheriff of Ross and Cromarty.

ROSS *v.* ROSS.

Process—Sheriff—Interlocutory Judgment —Jurisdiction—Appeal—Competency— 50 *Geo. III. c.* 112, *sec.* 36—*Sheriff Court Act* 1853 (16 *and* 17 *Vict. c.* 80), *sec.* 24.

Section 36 of 50 Geo. III. c. 112, enacted that bills of advocation from the sheriffs "against interlocutory judgments shall be allowed only on the following grounds, viz., first, of incompetency, including defect of jurisdiction." . . .

Section 24 of the Sheriff Court Act of 1853 provides that it shall not be competent "to take to review" of the Court of Session any interlocutor of a sheriff "not being an interlocutor sisting process, or giving interim decree for payment of money, or disposing of the whole merits of the cause," and repeals the provisions of 50 Geo. III. c. 112, so far as inconsistent with this enactment.

In an action of summary ejection brought in the Sheriff Court, the defender pleaded that the action was incompetent in the Sheriff Court, in respect that it involved a question of heritable right exceeding £50 in yearly value. The Sheriff having pronounced an interlocutor repelling this plea, the defender appealed to the Court of Session.