Friday, February 7.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

CRAIG v. BRUNSGAARD, KJOSTERUD AND COMPANY.

Jurisdiction — Arrestments Jurisdictionis fundandæ causa—Period within which Effectual—Unreasonable Delay—Nexus.

Jurisdiction *sustained* in an action against a foreign shipowner where an interval of three months had been allowed to elapse between the use of arrestments *jurisdictionis fundandæ causa* and the service of the summons.

Opinion that the arrestment did not create a *nexus*, and that it was immaterial that the ship arrested had left the jurisdiction before the action was raised.

Opinions *reserved* as to what would constitute unreasonable delay in following up the arrestments, such as to entitle the person against whom they had been used to equitable relief.

An action was raised by Mrs Guthrie or Craig against Messrs Brunsgaard, Kjosterud & Company, owners, and Klaus Olsen, master of the s.s. "Nordlyset," concluding for damages in respect of the death of her husband Alexander Craig, who was killed while engaged in unloading the vessel. The defenders reside in Norway, and accordingly on 5th June 1895 the pursuer used letters of arrestment *jurisdictionis fundandæ causa* attaching the vessel "Nordlyset," which was at that time lying at Glasgow.

No further steps were taken by the pursuer while the ship lay there. She left before the end of June. On 30th August 1895 the summons in the present action was signeted.

The defenders maintained that owing to the delay in raising the action the arrestments used by the pursuer had become inoperative, and pleaded, *inter alia*, "No jurisdiction."

The Lord Ordinary (KINCAIRNEY) on 26th December repelled this plea.

Opinion.—"The defenders in this case plead 'no jurisdiction' and it was conceded that this plea depends on the validity of the arrestments of the steamship "Nordlyset" used to found jurisdiction. The arrestment was used on 5th June 1895, when the ship was in Scottish waters, and near Glasgow, and the action was not signeted until 30th August, that is, after an interval of eighty-six days. It is argued that by that time the arrestment had become inoperative. Between these dates and some time in June the ship had left and had gone out of the country. The question seems not without difficulty, but I am of opinion that the plea ought to be repelled, and that the jurisdiction of the Court should be sustained.

"It is settled that when objection is taken to the jurisdiction of the Court in a question of the kind raised in this action, the question is, whether there was jurisdiction at the date of citation—*Stewart* v. *North*, July 14, 1890, 17 R. (H.L.) 63. It is not well settled whether an arrestment *jurisdictionis fundandæ causa* creates a *nexus* on the object arrested—see *Malone* v. *Caledonian Railway Company*, May 28, 1894, 11 R. 853, and cases and *dicta* there referred to. But if it does not, then the validity of the arrestment to create jurisdiction cannot depend on the continuance of the thing arrested within the country; and if it does create a *nexus*, then I think that the effect of the arrestment on the liability of the defenders to answer in the courts of Scotland cannot be destroyed by the defenders' voluntary disregard of the arrestment. Accordingly it was not argued that the efficacy of the arrestment in founding jurisdiction was destroyed by the ship leaving the country before citation on the summons. The argument was to the effect that the arrestment was lost by delay. It was urged that it was unreasonable to hold a foreigner liable to answer in the Scotch courts when no step was taken to follow up the arrestment. The defenders supported their argument by two analogies—the first, the analogy of jurisdiction in virtue of the defenders' personal presence in the territory; and the second, the analogy of arrestment in security on the dependence of an action. It is our law that residence of a party in the territory for forty days will give the Scotch courts jurisdiction to try ordinary actions against him not involving questions of status. That is customary law. It is also the law that if a man be absent from his usual place of residence for forty days he falls to be cited edictally—Act of Sederunt, December 14, 1805; *Joel* v. *Gill*, June 10, 1859, 21 D. 929. It was argued that in like manner the force of an arrestment to found jurisdiction should fall in forty days. But I see no ground for reasoning from a rule settled by custom, or a rule settled by Act of Sederunt, to a case wherein neither custom nor municipal regulation can be appealed to. It was further pleaded that, if that argument could not be supported, the rule applicable to arrestments on the dependence should be adopted, viz., that the arrestment should fall unless the warrant of citation on the summons was executed within twenty days after the date of the execution of the arrestment—1 and 2 Vict. cap. 114, sec. 17. But it was not maintained that the provisions of the Personal Diligence Act applied to arrestments used to found jurisdiction; and it is impossible to extend statutory enactments to analogous cases.

"It was argued that unless some limitation in point of time were admitted, it would follow that an arrestment to found jurisdiction would subsist for forty years, or possibly beyond that. But that does not appear to me to be a necessary consequence. For it may, perhaps, be that jurisdiction would not be sustained on the ground of an arrestment if there was clearly unreasonable delay in following it out, such as might warrant the infer-

ence that it had been abandoned. On this point I was referred to a judgment by Lord Stormonth Darling in *Jacobo* v. *Scott*, February 2, 1895, shortly noticed in 2 Scots Law Times 458, where jurisdiction in an action raised on 13th September 1894 was sustained in respect of arrestments used on 12th July 1894, it being held that there had been no undue delay; and in this case there are no averments inferring undue delay.

"Farther, it might be maintained that the Statute 1669, cap. 9, and the 22nd sec. of the Personal Diligence Act, applies to arrestments used to found jurisdiction, and if so, they would prescribe in three years. It may be worthy of notice that the hardship to a defender is not so great as is represented, because an arrestment *jurisdictionis fundandæ causa* can, I apprehend, be loosed on caution *judicio sisti* — see Juridical Style Book, 2nd ed., vol. iii. 564, and 3rd ed., vol. iii. 325; *Carlberg* v. *Borgesson*, November 26, 1877, 5 R. 188, *per* Lord President Inglis, at p. 192. Now, by the ordinary form of a bond of caution *judicio sisti* the obligation of the cautioner is limited to the period of six months—*Herries* v. *Lidderdale*, March 7, 1755, M. 2044; Bell's Pr., sec. 275. It appears, therefore, to be within the power of a foreigner subjected to arrestment to found jurisdiction to force on the action within six months. On the whole, I think that the defenders' objection to the arrestments on the ground of undue delay fails, and that as that is the whole ground of objection to the jurisdiction the plea of no jurisdiction must be repelled.

"It is averred that the defenders Brunsgaard, Kjosterud, & Company are not owners of the steamship 'Nordlyset,' but yet it was conceded that the action was competently laid against the master of the ship, and through him, against the true owners, if there was jurisdiction. The action is further said to be irrelevant, but the averments appear sufficient to entitle the pursuer to lay her case before a jury.

"I am therefore of opinion that the plea of 'no jurisdiction' must be repelled, and that the pursuer must be allowed to proceed with the action."

The defenders reclaimed, and argued—There had been undue delay in following up the arrestment by raising an action. This kind of arrestment did not lay a *nexus* upon the subject arrested. Its effect was merely to create a personal bar against a defender pleading "no jurisdiction"—*Cameron* v. *Chapman*, March 9, 1838, 16 S. 907. Accordingly, while there was no authority as to the duration of the jurisdiction conferred by this arrestment, it ought not to put a foreigner in a worse position than a domiciled Scotsman, by holding him liable to answer a summons at any time thereafter. There should be some reasonable limit within which a person using arrestment was bound to follow up his arrestment by serving a summons--a reasonable limit would be the period of 40 days, during which a domiciled Scotsman retained his domicile after leaving the country, or the period of the duration of arrestment on dependence, viz., 21 days. The Lord Ordinary was wrong in saying that the rule to be applied here was not analogous to the customary rule by which the former period of 40 days was fixed, for this was essentially a case where the period should be determined by custom. His reasoning with regard to its being possible to loose this arrestment by finding caution, and that accordingly there was no hardship, was based upon the false assumption that it created a *nexus*.

Argued for respondent—The arrestment was admittedly a valid one, and it lay upon the defenders to show that it had ceased to be so. There had been no undue delay here in raising the action. In the case of *Jacobo* v. *Scott*, January 30, 1895, 2 S.L.T. 456, the Lord Ordinary had upheld the arrestment when there was an interval of two months between the arrestment and the raising of the action, while in *White* v. *Spottiswoode*, June 30, 1846, 8 D. 952, it appeared from the session-papers that there had been an interval of two years.—*Longworth* v. *Hope*, July 1, 1865, 3 Macph. 1049, at 1055. The analogies drawn by the defenders failed. The rule in arrestments on dependence was a statutory enactment, which could not be extended to a different class of arrestments, differing essentially in respect that they created no *nexus*. The rule that 40 days' non-residence terminated the jurisdiction was based on custom which could not be applied to a totally different procedure.

At advising—

LORD ADAM — There are two distinct questions in this case, the first being whether the pursuer has constituted jurisdiction against the defenders, who for the purposes of this action are admitted to be the owners of the ship? The ship came into a Scotch port, and arrestment *jurisdictionis fundandæ causa* was used on the 5th of June. She sailed away on some day in June, and the summons in this action was not served till August 30th. Now, it is said that, in consequence of this delay in serving the summons, the arrestment which was used had fallen and lost its effect. It was admitted by Mr Dickson that arrestment *jurisdictionis fundandæ causa* is essentially different in character from other forms of arrestment, such as arrestment in security on the dependence of an action, or for execution, because this form operates no *nexus* upon property, the result being that the master of a ship is entitled to sail away without committing any breach of arrestment. That is of course different from the case where there is a *nexus* laid upon property. In that case it is necessary to find caution to escape the effects of arrestment, and then to come to the Court to have it loosed. Accordingly the reasons applying to the one class do not apply to the other, and the analogy drawn between them is not in point. If this be so, the question is, whether, assuming the captain of the ship was entitled to sail away, any effect arises from the action not having been raised till 30th August? Now there

was a good and valid arrestment laid on, which undoubtedly created jurisdiction, and the only question is how long that lasted. No authority has been quoted, and I believe none exists, to the effect that mere lapse of time will cause an arrestment to become invalid; but it has been said that it is impossible to allow it to hold good for ever, and that some limit must be fixed to its duration. It is unnecessary to decide that point in the present case, for there is nothing to show that here there was unreasonable delay, and so we need not consider whether such a rule might be applied in cases where that had been proved. Accordingly I reserve my opinion on the question whether, if the action had not been raised for a year or two years, we might not on equitable considerations apply some such principle as that contended for by the defenders.

LORD M'LAREN—On the question of jurisdiction we have a very distinct and satisfactory statement of the law from the Lord Ordinary, in which I concur.

It is now settled, I think, beyond dispute that arrestment *jurisdictionis fundandæ causa* does not attach the property arrested. Perhaps it has not been defined what is the precise effect of the diligence. It seems to me merely to attest the fact that the ship is at the time within the jurisdiction, and that notice has been given that it is the intention of the person using the diligence to raise an action founding on the jurisdiction which results from the property being within the country. It is difficult to see what hardship should result from the continuance of the effect of such a certificate or notice in the case of maritime subjects. No disability is imposed upon the owner of the ship, and the master is put under no obligation to make the ship forthcoming. Within reasonable limits, therefore, we may leave it to the person using the diligence to serve his summons, it being his interest to use dispatch. It may be that if the vessel sails from the country after the first arrestment has been used the claimant may wish to defer raising his action until she returns, so that he may be able to use arrestments on the dependence, and I cannot say that such a delay would be illegitimate. The Lord Ordinary thinks that possibly a fixed period might be settled, say six months, or perhaps a year and day, so that if the summons is served and there is no further procedure within that time the action should fall. I do not think it is likely that the Court would be called on to fix such a limit, for it would probably be held that the party who had used the diligence had not followed up the arrestments within a reasonable time.

LORD KINNEAR—I agree. It is, I think, a very anomalous rule that jurisdiction should be founded by a diligence which is utterly ineffectual to attach anything. It is conceded—and indeed that is the basis upon which the whole discussion arises—that the arrestment upon which the pursuer relies lays no embargo upon the ship. It does not attach the ship. It is not an arrestment, in fact, of anything whatever, but it is an arrestment which the owner or master of the ship may disregard entirely; or which, if it were used with reference to debts or goods in the hands of a third person, the arrestee might disregard so as to render it absolutely of no effect. But it is conceded—and I think the concession could not be withheld—that the rule, however anomalous, is so well fixed by decision that we cannot refuse to give effect to it. We cannot hold that an arrestment to found jurisdiction lays a *nexus* upon the subjects arrested, or that it must be immediately followed up by an arrestment on the dependence in order to make the jurisdiction valid. It is decided the other way. Now, if that be a fixed rule, the only question is whether there is anything in the circumstances of this case to prevent its being applied in favour of the pursuer. I agree that there is no sufficient ground for refusing to give the ordinary effect, which the law attaches to this arrestment. I quite concur with what has been said that there may be a case in which the Court might find it necessary or proper to refuse effect to such an arrestment if it were allowed to lie dormant for an unreasonable time; but I am not prepared to say, as we are asked to say by the defenders, that an arrestment of this kind must be good for forty days and no longer. Nor am I prepared to say in this particular case that more than reasonable time was allowed to elapse before the action was raised. I am not disposed to agree with all that is said in the Lord Ordinary's note, because I cannot see how the question can be affected at all by the consideration that arrestments may be loosed on caution *judicio sisti*. The defender is not bound to find caution unless he is already subject to the jurisdiction of the Court, and I do not see what interest he could have in finding caution, or how that is supposed to alter the position of the parties. The sole effect of the arrestment is, according to the argument, to subject the defender to the jurisdiction of the Court; and if that is a disadvantage to him, I do not see how he is relieved by finding security to abide the judgment. The condition on which the argument proceeds, and on which we are asked to sustain the jurisdiction, is that there is nothing to loose. There is no *nexus*, the ship is gone, and that being so the pursuer maintains nevertheless that there is a good arrestment. How this ineffectual tie can be loosed at all, or why it should be supposed that the defenders have any interest to have it loosed if they are still to abide judgment within the jurisdiction, I do not understand.

The parties are agreed that we are to take this discussion on the admission that the ship arrested belongs to the principal defenders Brunsgaard & Company, and therefore we are not called upon to consider the question discussed in the last paragraph of the Lord Ordinary's opinion, and I express no opinion upon that.

The Lord President concurred.

The Court adhered.

Counsel for Pursuer — Orr — Christie. Agents—Simpson & Marwick, W.S.

Counsel for Defenders — Dickson — Salvesen. Agents—W. & J. Burness, W.S.

Saturday, February 8.

FIRST DIVISION.

[Sheriff of Lanarkshire.

MACDONALD *v.* UDSTON COAL COMPANY.

Reparation—Master and Servant—Mine—Defective System—Responsibility of Mining Company — Statutory Manager — Relevancy — Coal Mines Regulation Act 1887, *sec.* 20, *sub-sec.* 1.

In an action at common law for damages by a workman against his employers, a mining company, in respect of injuries sustained by reason of alleged defects in the system of working, which the pursuer averred were due to the fault of the defenders, the defenders pleaded that fault on the part of a mining company was excluded by the employment of a certified manager in terms of section 20, sub-section 1, of the Coal Mines Regulation Act 1887.

Held that the pursuer was entitled to an issue.

An action of damages was raised in the Sheriff Court of Lanarkshire, at common law, and under the Employers Liability Act, by Daniel Macdonald, miner, against the Udston Coal Company, in respect of injuries sustained by him while working in one of the defenders' pits.

The pursuer averred that he was injured by the fall of some stones from the roof of the pit while going to the assistance of a fellow-workman who had been similarly injured.

He averred—"(Cond. 8) The defenders were bound by law and the general practice in mining to secure the sides and roof of the said slope road by putting up wooden props, or otherwise securing the said sides and roof, in respect that the crush before referred to was constantly liable to bring away falls; and in particular the defenders were bound by law and the general practice in mining to secure the junctions of the branch roads with the said slope road by putting up wooden props, or otherwise securing the same, on account of the extra width of the travelling road at that point, and the consequent greater liability to danger from falls. Nevertheless, the defenders worked the said road without putting up wood in any part of it, and in particular without putting up wood at any of the junctions of the slope road with the said branch road, whereby the pursuer's injuries, as before mentioned, were caused or materially contributed to. (Cond. 9) General Rule No. 21 of the Coal Mines Regulation Act 1887 provides that the roof and sides of every travelling road and working-place shall be made secure. The defenders deliberately violated the terms of this general rule in respect that, as before mentioned, they did not secure the roof and sides of the travelling road, either by wooden props or otherwise, whereby the pursuer's injuries, as before mentioned, were caused or contributed to."

The defenders pleaded—"(1) The pursuer's averments are irrelevant and insufficient to support the prayer of the petition."

Section 20, sub-section 1, of the Coal Mines Regulation Act 1887 provides—"Every mine shall be under a manager, who shall be responsible for the control, management, and direction of the mine, and the owner or agent of every such mine shall nominate himself or some other person to be manager of such mine, and shall send written notice to the inspector of the district of the manager's name and address."

On 19th November 1895 the Sheriff-Substitute allowed the parties a proof before answer.

The pursuer appealed to the First Division of the Court of Session for jury trial, and lodged the following proposed issue:—"Whether, on or about the 9th day of May 1895, and within or near the defenders' colliery at Udston, Hamilton, the pursuer, while in the employment of the defenders, was injured in his person through the fault of the defenders—to his loss, injury, and damage?"

Argued for respondents—The averments were irrelevant, and did not support the action as laid at common law. There had been no case in which mine-owners had been held liable at common law. In the only case apparently to the contrary, that of *Murdoch* v. *Mackinnon*, March 7, 1886, 12 R. 810, where the owner was found liable, the action was also brought under the Employers Liability Act, and the damages allowed were within the limit admitted by that statute. Moreover, the present point was not raised there. Under sec. 20, sub-sec. 1, of the Coal Mines Regulation Act 1887 (50 and 51 Vict. cap. 58), every mine was required to be under a certificated manager, whose statutory duty was to examine the condition of the mine, and to be responsible for its condition, and accordingly the owners were not themselves subject to the duty of personal supervision, their position being analogous to that of the captain of a ship employing a compulsory pilot. Accordingly the defenders would not be liable unless the pursuer could prove either that they employed incompetent servants, or that they had failed to provide proper tools, implements, &c., on being requested to do so—*Sneddon* v. *Mossend Iron Company*, June 23, 1876, 3 R. 868; *Wilson* v. *Merry & Cuninghame*, May 29, 1868, 6 Macph. (H. of L.) 89; *Stewart* v. *Coltness Iron Company*, June 23, 1877, 4 R. 952; *Gibson* v. *Nimmo & Company*, March 15, 1895, 22 R. 491;