The Court pronounced this interlocutor—

"Recal the said interlocutor: Find that the pursuers have failed to prove that the s.s. 'Gala,' the defenders' vessel, was to blame for the collision referred to on record: Assoilzie the defenders from the conclusions of the summons, and decern."

Counsel for the Pursuers (Respondents) — Hon. Wm. Watson, K.C. — Normand. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Defenders (Reclaimers) — Sandeman, K.C. — Carmont. Agents — Beveridge, Sutherland, & Smith, W.S.

Friday, February 20.

FIRST DIVISION.

[Sheriff Court at Aberdeen.

MITCHELL & MUIL LIMITED *v.* FENISCLIFFE PRODUCTS COMPANY, LIMITED, AND ANOTHER.

Process — Jurisdiction — Arrestment — Arrestable Subject—Claim and Counter Claim.

Arrestments to found jurisdiction were used in an action in the Sheriff Court. The defenders pleaded no jurisdiction, and as the result of a proof it was established that at the date of the arrestment the arrestee was due to the defenders, as appeared from his books, £286 odds; on the other hand the arrestee had prior thereto given a cheque for a larger sum to the defender to prepay a consignment of beef which was not delivered at the date of the arrestment, but against which the arrestee had obtained a delivery order. The arrestee never got delivery of the beef, and his claim against the defenders was ultimately adjusted at £525. *Held* that jurisdiction had not been validly founded, in respect that at the date of arrestment the payment by the cheque had the effect of extinguishing the indebtedness of £286, and that consequently nothing had been arrested. *Napier, Shanks, & Bell* v. *Halvorsen*, 1892, 19 R. 412, 29 S.L.R. 343, *followed, per* Lord Mackenzie. Graham Stewart, Diligence, at p. 256—"Although the defender has a claim of accounting against the arrestee, if the Court have allowed proof whether anything is due, and it appears that there is nothing due, jurisdiction will not be constituted"—*approved per* Lord Mackenzie.

Mitchell & Muil Limited, bakers, Aberdeen, *pursuers*, brought an action in the Sheriff Court at Aberdeen against The Feniscliffe Products Company, Limited, Blackburn, England, and another, *defenders*, concluding for decree for £194, 10s. Arrestments to found jurisdiction had been used.

The parties *averred, inter alia*—"(Cond. 5) The defenders have been rendered subject to the jurisdiction of this Court by arrestment *ad fundandam jurisdictionem*. (*Ans.* 5) Not known and not admitted."

The defenders *pleaded, inter alia*—"1. No jurisdiction."

The Sheriff-Substitute (LAING) having allowed and taken a proof on the question of jurisdiction pronounced the following interlocutor:—"Finds in fact (1) that on 4th February 1919, the date on which the pursuers used arrestments in the hands of William Watt Hepburn, produce merchant, Aberdeen, for the purpose of founding jurisdiction against the defenders, the said William Watt Hepburn was not due and indebted to them in any sum whatever; and (2) that said arrestment *ad fundandam jurisdictionem* did not attach any sum belonging to the defenders in the hands of the arrestee the said William Watt Hepburn; Therefore sustains the first plea-in-law for the defenders and dismisses the action."

Note—"The evidence given by Mr Hepburn, the arrestee, shows (1) that on 4th February 1919 he was due to the defenders a sum of £286, 16s.; and (2) that at the same date the defenders were due to him a much larger sum, which was finally adjusted at £525. That being the state of the accounts between them it is plain, as Mr Hepburn stated, that he was as at 4th February not due to the defenders a single penny. It was, however, maintained for the pursuers that it was sufficient to found jurisdiction if at the date when the arrestment was used Mr Hepburn as the arrestee was under an obligation to account to the defenders, even although as a result of an accounting between them it should be found that they were really debtors to him. On the authority of *Napier, Shanks, & Bell* v. *Halvorsen* (1892, 19 R. 412), it seems to me clear that the mere fact that at the date when the arrestment was used there existed an obligation on the part of the arrestee to account to the defenders, is not sufficient to found jurisdiction when it is in point of fact proved that at that date there was no sum whatever due by the arrestee to the defenders. The parties here have joined issue upon the question whether at 4th February 1919 Mr Hepburn had in his hands any sum of money belonging to the defenders, and as result of the proof it is clear that that question must be answered in the negative. The legal result therefore is that jurisdiction cannot be found to have been constituted. As Lord Adam in *Napier's* case, *supra*, said—'I know of no case in which jurisdiction has been sustained where it is ascertained in point of fact as here that nothing is covered by arrestment'; and referring to the argument founded on a claim to an accounting, Lord President (Robertson) said—'There is nothing in the cases to countenance the argument that the arrestments will be good wherever there is a claim of accounting between the parties, no matter on which side the balance may be, and even admitting (or it being proved) that the balance is against the party asserting such claim. The argument is repugnant to common sense, and I cannot assent to it.' In short, in view of the result of the proof

in this case, the judgment in *Napier's* case is, I think, conclusive on the legal question here raised for decision."

The pursuers appealed, and argued—The *onus* of proof was in the first instance on the pursuers, but having proved an apparent debt due by the arrestee to the defenders it was for the defenders to show that that debt had been wiped out. That they had failed to do. Arrestment *ad fundandam* being merely an attestation that there were visible funds within the jurisdiction, the only visible funds were the debt of £286 entered in the arrestee's books as being due to the defenders. The counter claim did not appear in the books till after the arrestment. On the proof it was established that there was a liquid debt of £286 due by the arrestee to the defenders. On the other hand the arrestee had an illiquid and contingent counter claim against the defenders. If there had been an instantly verifiable counter claim exceeding the debt jurisdiction would not have been founded, for there would have been nothing to arrest. Here the counter claim was not instantly verifiable. In point of fact it was not adjusted in amount till months after the arrestment. Further, at the date of the arrestment the counter claim was not for money but for the delivery of beef. It could have been satisfied by the delivery of beef, and might never have become due as a money debt. In those circumstances jurisdiction had been founded. The date of arrestment was the critical *punctum temporis*, and if there was then a debt due jurisdiction was validly founded though that debt was subsequently wiped out—*North* v. *Stewart*, 1890, 17 R. (H.L.) 60, *per* Lord Watson at p. 63, 28 S.L.R. 397. Here there was a debt due, for the counter claim had not been established till after arrestment. But it was not necessary to go so far. It was enough if there was a present liability to account — *Shankland & Company* v. *M'Gildowny*, 1912 S.C. 857, *per* Lord President Dunedin at p. 861, and Lord Kinnear at p. 866 and p. 868, 49 S.L.R. 564. A contingent debt might be arrested to found jurisdiction—*Riley* v. *Ellis*, 1910 S.C. 934, *per* Lord President Dunedin at p. 941, 47 S.L.R. 788; Ersk. iii, 6, 6. *A fortiori* a debt subject to a counter claim could be arrested. It was enough if it appeared that the defender was asserting a claim against the arrestee whatever the ultimate liability might turn out to be, so long as no counter debt had been established or the books had not been balanced at the date of arrestment —*Lindsay* v. *London and North-Western Railway Company*, 1860, 22 D. 571, *per* Lord Curriehill at p. 593, and Lord Deas at p. 595. *Napier, Shanks, & Bell* v. *Halvorsen*, 1892, 19 R. 412, 29 S.L.R. 343, was distinguished, for it was not immediately ascertainable in the present case that the admitted debt due by the arrestee had been extinguished by a counter liability to him. *Baines & Tait* v. *Compagnie Generale des Mines d'Asphalte*, 1879, 6 R. 846, 16 S.L.R. 471, and *Douglas* v. *Jones*, 1831, 9 S. 856, decided that where there was, as here, *prima facie* evidence of indebtedness which could not be disproved immediately or without a collateral litigation that was sufficient to found jurisdiction —see Lord President Robertson at p. 414 and p. 415, and Lord Kinnear at p. 416, in *Napier, Shanks, & Bell* v. *Halvorsen*, (*cit. sup.*). *Wyper* v. *Carr & Company*, 1877, 4 R. 444, 14 S.L.R. 299, was distinguished. In view of the cases of *Shankland* and *Riley* the statement of the law in Graham Stewart on Diligence, p. 256, was no longer accurate.

Argued for the defenders — It was clear upon the proof that the arrestee was not due the defenders anything. If the cheque had been entered in the arrestee's books there could have been no question. The arrestee admitted the debt of £286, but he did so subject to the qualification that he had a larger claim of debt. The pursuers could not approbate the statement and reprobate the qualification of it. In a matter like the present where jurisdiction rested upon a fiction the application of the rule must not be extended — *Shankland's* case (*cit.*), *per* Lord President Dunedin at p. 861 and Lord Kinnear at p. 869. To sustain jurisdiction where it was proved that nothing had been arrested was to go beyond the limits of the rule as fixed in the decided cases. The present case was covered by *Wyper's* case, *Napier's* case, and the *Union Bank of Scotland* v. *Duke of Norfolk*, 1901, 8 S.L.T. 404. Graham Stewart on Diligence correctly stated the law. Those cases were supported by *Moore & Weinberg* v. *Ernsthausen*, 1917 S.C. (H.L.) 25, *per* Lord Shaw at p. 33, 54 S.L.R. 78.

LORD SALVESEN—What we have here to decide is a pure question of fact, for the law is not doubtful once the facts are clearly ascertained.

If, as the Sheriff-Substitute has found, there was no sum due at the date of the arrestment (which is the crucial date) by the arrestee to the defenders, then it necessarily follows that the Sheriff Court of Aberdeen had no jurisdiction. If on the other hand the position established by the proof was this, that Hepburn the arrestee was undoubtedly due the defenders £286, but that there was a disputed claim of retention by him in respect of damages for failure to fulfil a contract, then my view of the authorities would be that the jurisdiction would be sufficiently established, and that it would not matter that afterwards it was ascertained that the claim of damages was well founded, and had in fact before the proof on the question of jurisdiction took place eventuated either in a decree for an amount in excess of the admitted indebtedness of the arrestee, or had been adjusted by agreement between the parties at a figure which would extinguish the indebtedness.

The parties have left the facts extremely vague upon the proof. In the first place, it may be noticed that there were no averments which could properly be remitted to proof at all. All that there is on the record is the statement that the defenders had been rendered subject to the jurisdiction of this Court by arrestments *ad fundandam jurisdictionem*, to which the answer is "Not known and not admitted"; and there is a plea of "No jurisdiction" which rests

entirely, apparently, so far as the pleadings go upon the non-admission of the effect of the letters of arrestment which were in process to found jurisdiction. Now that is a very unsatisfactory record upon which to deal with a matter of this kind; and I am a little surprised that the Sheriff did not compel the parties to state more fully their respective positions instead of allowing a proof upon what was substantially a plea-in-law. But there the matter stands, and we have to make the best of the proof.

Now for myself I would draw the inference that the case really fell within the second of the two alternatives which I have mentioned, namely, that there was an admitted debt for £286, but that Hepburn had refused to pay that debt because he had a contingent claim in respect of the hundred cases of beef which he had not got possession of under a delivery order, and for which he held the Feniscliffe Products Company responsible. If that was an unascertained claim as at that time, it would not have affected the validity of the letters to found jurisdiction that afterwards it was ascertained to be a valid claim and to wipe out the indebtedness, and I do not think that there are any authorities to the contrary. Indeed the case mainly founded on by the Sheriff-Substitute was not a case of that kind, because the matter remitted to proof was whether there was any sum in the hands of the arrestee due to the defender, and that required to be proved. It was found that there had originally been a sum of £1, 12s. due, but that before the date of arrestment that had been extinguished by admitted disbursements to the extent of £2, 13s., so that the case was a very simple one indeed—that no funds had been attached at all which could subject the defender to the jurisdiction of the Court. That case does not touch the point which I think was the only one of interest here, but which we cannot reach except upon a certain construction of the evidence.

As I understand both your Lordships are agreed that the Sheriff-Substitute's finding in fact is upon the evidence correct, I content myself by making these observations, because in reality our decision will not settle anything but the true construction of the evidence which has been given in this case, and which might very well have been amplified and made clear if the parties had applied their minds to the true question involved.

LORD MACKENZIE—The law applicable to the decision of this case is in my opinion correctly stated in Mr Graham Stewart's work on Diligence, at p. 256, where he states that "although the defender has a claim of accounting against the arrestee, if the Court have allowed proof whether anything is due and it appears that there is nothing due jurisdiction will not be constituted." The authorities are the cases of *Wyper* v. *Carr & Company*, 1877, 4 R. 444, 14 S.L.R. 299, and *Napier, Shanks, & Bell* v. *Halvorsen*, 1892, 19 R. 412, 29 S.L.R. 343. There was a strenuous argument founded upon certain cases later in date than the edition of Mr Graham Stewart's work on Diligence to which I refer, namely, the cases of *Riley & Company* v. *M'Gildowny*, 1912 S.C. 857, 49 S.L.R. 564, and *Shankland* v. *Ellis*, 1910 S.C. 934, 47 S.L.R. 788. There is nothing in any of the judgments in those cases which in my opinion throws any doubt upon the statement of the law as it has been expressed in the passage I have just read.

Accordingly, the question to be determined in this case is a question of fact, and the Sheriff-Substitute has determined it in favour of the defenders and respondents and against the pursuers and appellants, because he has found in fact that on 4th February 1919, the date on which the pursuers used arrestments in the hands of William Watt Hepburn for the purpose of founding jurisdiction against the defenders the Feniscliffe Products Company, William Watt Hepburn was not due to them any sum whatever.

The way in which the appellants seek to demonstrate that that is ill-founded in point of fact is by referring to certain ledgerised entries which were produced, and which show that on the 4th February 1919 there was a sum appearing in the ledger of William Watt Hepburn as due to the Feniscliffe Products Company of £286, 16s. 1d. But Mr Hepburn was examined as a witness on behalf of the pursuers, and the point of his evidence is in my opinion this, that at the date 4th February 1919, when the arrestment was laid on, and when according to the ledger it appears there was a sum due by him of £286 to the Feniscliffe Products Company, they had in point of fact cashed a cheque of his, dated 6th November 1917, of an amount which was sufficient to extinguish the apparent debit balance of £286 odds. The exact amount of this cheque of Mr Hepburn is not very well established in the evidence, because he first calls it "my cheque for £525, or something like that, if not a little under that figure;" and then it would rather appear later on as if the cheque might have been for only £410. But it is quite immaterial for the purpose of judgment whether the one figure be taken or the other; the fact is that there was a cheque which was dated fifteen months earlier than the date of the arrestments, which was drawn by Hepburn in favour of the Feniscliffe Products Company, of an amount sufficient to wipe out and extinguish the debit balance as appearing in the books of £286. There is no book produced, nor any excerpt from a book, in which that cheque appears; but of course no business man would fail to record in the appropriate book the fact that he had sent a cheque for that amount to a person with whom he was doing business. And it does not follow that because the entry was not ledgerised therefore there was no entry in Mr Hepburn's cash book of that transaction.

That cheque was sent for the purpose of making prepayment for a consignment of beef, and Mr Hepburn got a delivery order as against it; but the delivery order he could make nothing of, and he never got delivery of the beef, with the result that the

Feniscliffe Products Company were the richer by Hepburn's funds to the extent of the cheque, whether it was for £410 or £525.

Accordingly I think the evidence, although it might have been made much clearer, and ought to have been made clearer, as indeed the record ought to have been much more specific, has established now that as at the date when the arrestment was laid on, 4th February 1919, so far from Hepburn being due the Feniscliffe Products Company, the Feniscliffe Products Company were, on a balance, due something to him. If that is so, and is established as a matter of fact, as I hold it to be proved, agreeing with the Sheriff-Substitute, then I think the law applicable to the case is that stated in *Napier* and referred to by the Sheriff-Substitute, and that accordingly the arrestment is bad, and that the judgment appealed against ought to be affirmed.

LORD CULLEN—The evidence in the case is certainly not very clear, but as I read it it shows that at the date of arrestment there was in existence a debt due by the defenders to Hepburn which they subsequently admitted and paid to him in September 1919. If that be the right view, it does not seem to me to be material that at the date of the arrestment the debt had not been admitted by the defenders to be due by them. The absence of admission did not affect the existence of the debt. And we are not here dealing with a case which has to be decided upon its *primâ facie* aspects, but are deciding upon a proof of the actual facts. If the actual fact is that the said debt existed at the date of arrestment and exceeded the debt due by the arrestee, then I think the Sheriff-Substitute's conclusion is right that no indebtedness by the arrestee then existed, and that there could be no effective arrestment to found jurisdiction.

The LORD PRESIDENT and LORD SKERRINGTON were absent.

The Court adhered.

Counsel for the Pursuers (Appellants)—A. R. Brown. Agents—Alex. Morison & Company, W.S.

Counsel for the Defenders (Respondents) Wilson, K.C. — Maconochie. Agents — Norman Macpherson & Dunlop, S.S.C.

Saturday, February 21.

SECOND DIVISION.

PEEBLES HOTEL-HYDROPATHIC, LIMITED, PETITIONERS.

Company — Capital — Reorganisation of Share Capital—Reduction of Liability of Company to Shareholders—Procedure to Obtain Confirmatory Order—Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *sec.* 45.

Where a company by special resolution reorganised its share capital in such a manner that the liability of the company to the shareholders was reduced, but the nominal amount of the share capital was not reduced, *held* that the company had rightly adopted the procedure prescribed by section 45 of the Companies (Consolidation) Act 1908 in order to obtain confirmation of the reorganisation scheme.

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69) enacts—Section 45—"(1) A company limited by shares may, by special resolution confirmed by an order of the Court, modify the conditions contained in its memorandum so as to reorganise its share capital, whether by the consolidation of shares of different classes, or by the division of its shares into shares of different classes: Provided that no preference or special privilege attached to or belonging to any class of shares shall be interfered with except by a resolution passed by a majority in number of shareholders of that class holding three-fourths of the share capital of that class and confirmed at a meeting of shareholders of that class in the same manner as a special resolution of the company is required to be confirmed, and every resolution so passed shall bind all shareholders of the class. (2) Where an order is made under this section an office copy thereof shall be filed with the Registrar of Companies within seven days after the making of the order, or within such further time as the Court may allow, and the resolution shall not take effect until such a copy has been so filed." Section 46—"(1) Subject to confirmation by the Court, a company limited by shares, if so authorised by its articles, may by special resolution reduce its share capital in any way, and in particular (without prejudice to the generality of the foregoing power) may (*a*) extinguish or reduce the liability of any of its shares in respect of share capital not paid up, or (*b*) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or (*c*) either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company, and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly."

The Peebles Hotel-Hydropathic, Limited, Peebles, *petitioners*, presented a petition to the Court under section 45 of the Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69) praying the Court to make an order confirming a special resolution which reorganised the share capital of the company.

The *petition* set forth—"That of this date, 13th June 1905, the company was registered under the Companies Acts 1862 to 1900 as a company limited by shares, and that its registered office is situated at the Hotel-Hydropathic, Peebles. That the objects for which the company was established were, *inter alia*—1. To acquire and take over the business, lands, and estate, property, assets, and liabilities of Albert Max Thiem, hotel proprietor, Glasgow and