Counsel for Complainer—Balfour—Moncreiff. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Respondents—C. Smith. Agent—J. Macdougall, Solicitor, Jedburgh.

COURT OF SESSION.

Saturday, March 15.

SECOND DIVISION.

[Lord Craighill, Ordinary.

BAINES & TAIT *v.* COMPAGNIE GENERALE DES MINES D'ASPHALTE, AND OTHERS.

Arrestment jurisdictionis fundandæ causa—*Claim of Accounting—Bonds payable to Bearer.*

An obligation to account is sufficient to found jurisdiction by arrestment, and in order to render such arrestment operative it is not necessary that a balance be actually due to the defender of the action by the arrestee.

Question, Whether bonds payable to bearer are prior to the term of payment arrestable subjects.

This was an action raised by Baines & Tait, iron merchants, London, for payment of £296, and also for £4000 damages against the Compagnie Generale des Mines d'Asphalte, and the partners thereof. In 1872 Mr Tait, on behalf of the Asphalt Company, made an offer to pave with asphalt the streets of Jassy, the pursuers' firm to receive 5 per cent. commission, one-fourth in money and three-fourths in municipal bonds, as the work progressed. The contract was concluded in April 1873, and the works were begun in July of that year, and carried on till 31st October 1876, when they were discontinued. At 21st August 1877 the accounts showed £3382, 12s. 7d. due to the defenders by the pursuers and a *contra* balance of £3678 in bonds at par, though the defenders denied the pursuers' right to claim them at par of exchange. In order to found jurisdiction the pursuers used arrestments in the hands of Mr Lindsay, trustee on the sequestrated estate of Wilson & Armstrong, and as such one of the partners of the Compagnie. Mr Callender had been in 1875 sole partner, but in December 1876 he had entered into an agreement to carry on the company, as acting (1) for himself as an individual; (2) for himself as trustee of Mr M'Ewen; (3) for Mr Young, trustee on the estate of Alexander Collie & Sons; and (4) for Mr Lindsay, trustee as above mentioned.

The company had no estate of any kind in Scotland. Mr Lindsay, who resided there, had no personal interest in the company, nor any funds belonging to it. As a trustee Mr Lindsay had claims against the company for about £8000 of advances, and in security for repayment he held 600 bonds of the municipality of Jassy payable to bearer, of the nominal or par value of £20 each. Their selling value was, however, not sufficient to meet the debt.

The defenders, *inter alia*, pleaded—"(1) The arrestment used *jurisdictionis fundandæ causa* is inept, and the defenders are not subject to the jurisdiction of the Court. (2) The defenders being ready to answer to any action or demand at the pursuers' instance against them in the English Courts, it is not expedient that the Court of Session should exercise jurisdiction in this case."

The Lord Ordinary (CRAIGHILL) repelled these two pleas of the defender, and added this note:—

"*Note.*—The first of the pleas which have been repelled is to the effect that this Court has no jurisdiction, inasmuch as moveable property belonging to the defenders has not been attached by the arrestments which have been used to found jurisdiction; and the Lord Ordinary is of opinion that this is an erroneous contention. Bonds payable to bearer belonging to the defenders were and are in the hands of the arrestee, though, as he alleges, these are held by him in security of a debt due by the defenders. The fact that the bonds were impledged may come to be of importance should an arrestment in execution be used, and should, as an ulterior measure, a forthcoming be instituted; but the circumstance referred to is, in the opinion of the Lord Ordinary, no bar to an effectual attachment; and this consideration appears to him to be sufficient for the determination of the present question."

"For the second plea not even a plausible reason has been set forth in the record. There is nothing which suggests—certainly there is nothing which shows—that proceedings may not be conducted before the Court of Session with as great expediency and conveniency as they could be before any of the English Courts. One of the individual defenders resides in Scotland, and another of them is or was intimately connected with Scotland, and if there is to be an inquiry as to the facts of the case out of Scotland, that will not be conducted in England, but in Roumania. Were such a plea to be sustained on the present occasion, it would be difficult to imagine that any case could or would be allowed to proceed in the Court of Session in which jurisdiction had been created by arrestment, and in which the defenders desired that the litigation should be referred to the tribunals of another country."

The defenders reclaimed.

At the hearing the court desired further information as to the nature of the jurisdiction alleged. A minute was put in by the pursuers which was answered by the defenders. The statements contained therein sufficiently appear from the opinion of Lord Ormidale (*infra*).

They argued—(1) *Ipsa corpora* were not subjects of arrestment. Here these bonds were payable to bearer, and passed from hand to hand, not being capable of being affected with any burden in the hands of the possessor. (2) Contents of bills and bonds, &c., were not arrestable prior to payment being recovered. Payment was not received on any of the bonds in the arrestee's hand at the date of the arrestments. These were mere vouchers of debt, *nomina debitorum*, and until payment were nothing in the hands of the arrestee. (3) Future debts were not affectable by arrestment, and an arrestment used in the hands of the holder of a right in security for the purpose of attaching the surplus after payment of his debt was inept. Nothing could be arrested but what belonged to the common debtor at the date of the arrestment. A contingent claim could not be arrested. Here there was no doubt a power to sell, but it was

extremely doubtful what sum might ultimately be realised.

Argued for the respondents—They founded jurisdiction against the defenders by arresting in the hands of Mr Lindsay moveable bonds of the municipality of Jassy, the property of the defenders, for which Mr Lindsay had to account to them. Even although held in security of advances, it was not necessary to show that a balance would remain in Mr Lindsay's hands after the advances are satisfied; it was enough that a balance might exist, and that a claim to call upon Mr Lindsay to account arose to the defenders. Said bonds were not mere *nomina debitorum*, but valuable moveable property payable to bearer. The authorities relied on by the defenders therefore did not apply. Further, these authorities all referred to arrestment in execution, which differed from arrestment to found jurisdiction. There being no poinding to found jurisdiction, all subjects which were liable either to be arrested or poinded in execution ought to be arrestable to found jurisdiction.

Authorities — Erskine, iii. 6, 7 (Bell's ed.); Bell's Com. ii. 71 (M'Laren's ed. 68); *Haddow* v. *Campbell*, Dec. 7, 1796, M. 763; *Dick* v. *Goodall*, 1st June 1815, F.C.; *Johnston* v. *Dundas' Trustees*, May 12, 1837, 15 S. 904; *Gordon* v. *Innes*, Feb. 13, 1740, M. 715; *Wyper* v. *Carr & Co.*, Feb. 2, 1877, 4 R. 444; *Lindsay* v. *L. & N. W. Railway Co.*, Jan. 27, 1860, 22 D. 571; *Hill* v. *College of Glasgow*, Nov. 13, 1849, 12 D. 46; *Longworth* v. *Hope*, July 1, 1865, 3 Macph. 1049; *Stalker* v. *Aiton*, Feb. 9, 1759, M. 745.

At advising—

Lord Ormidale—In this action, which is at the instance of Messrs Baines & Tait against The Compagnie Generale des Mines d'Asphalte, carrying on business in London, two preliminary pleas have been taken by the defenders—one to the effect that this Court has no jurisdiction to entertain an action against them as foreigners, and the other to the effect that at anyrate it is inexpedient to entertain the action here in place of allowing it to be brought and tried in England. In regard to the latter plea, I do not think the Court should interfere to prevent the pursuers having their case tried here provided there is jurisdiction. The plea of want of jurisdiction is therefore the more important one. To this plea the pursuers answer that they have founded jurisdiction against the defenders by the arrestment of funds or effects belonging to them in Scotland; but the defenders reply that no funds of theirs have been arrested by the pursuers.

In the summons it is not explained by the pursuers how jurisdiction has been founded by them against the defenders; they were therefore required by the Court to lodge a minute stating their averments or explanations on this point, and the defenders were at the same time appointed to lodge answers to the pursuers' minute. These papers having been lodged and the parties heard, the Court has now to dispose of the defenders' plea of want of jurisdiction.

According to the pursuers' statements in their minute, they have arrested in the hands of Mr Lindsay funds belonging to the defenders, inasmuch as that gentleman holds certain bonds belonging to them issued by the municipality of Jassy, and certain sums of interest which have been paid on these bonds; and at anyrate, the pursuers maintain that, as they have arrested in the hands of Mr Lindsay the claim of accounting under which he stands to the defenders, that is of itself sufficient to found the requisite jurisdiction against them. On the other hand, it would appear from the defenders' answers to the pursuers' minute that the bonds referred to are in Mr Lindsay's hands, and that he has drawn certain interests falling due under the bonds; but the defenders allege that after satisfying the purposes for which Mr Lindsay holds the bonds and interest, no balance will remain to be accounted for to the defenders.

In this state of matters, and having regard to the conflicting nature of the statements for the parties as now referred to, a question of some difficulty arises. In regard to the bonds themselves, considered as mere *nomina debitorum*, I am not satisfied that an arrestment would attach them, although it is not necessary to determine that point in this case. But whether there may not be an arrestable claim of accounting by the defenders against Mr Lindsay, the arrestee, which has been attached by the pursuers, and in that way jurisdiction founded by them is a different matter. There can be no doubt, I think, having regard to the authorities, that a claim of accounting such as that which is here said by the pursuers to exist is an arrestable interest. It seems to have been so decided in varying circumstances in the cases of *Kyle's Trustees* v. *Kyle*, Nov. 14, 1827, 6 S. 40; *Cameron* v. *M'Ewen*, Feb. 4, 1830, 8 S. 440; *Lothian* v. *M'Cree and Others*, Nov. 27, 1828, 7 S. 72; *Mackintosh* v. *Macdonald*, May 21, 1831, F.C.; and *Douglas* v. *Jones*, June 30, 1831, 9 S. 856. In the last of these cases it appears to have been held that a claim of accounting existed, or, in other words, that an arrestee was, when the arrestment was used in his hands, under an obligation to account to the defenders of an action, and that it was not also necessary, in order to render such arrestment operative to the effect of founding jurisdiction, to show that a balance was actually due by the arrestee.

On the principle, therefore, illustrated by these cases, I am disposed to think that jurisdiction against the defenders has in the present case been sufficiently founded. And in coming to this conclusion I proceed partly on the concession which I understood was made on the part of the defenders at the debate—that Mr Lindsay, if under any obligation to account at all, was under that obligation to the defenders, and not to Wilson and Armstrong.

In these circumstances, I am of opinion that the Lord Ordinary's interlocutor reclaimed against ought to be adhered to.

Lord Gifford and the Lord Justice-Clerk concurred.

The Court adhered.

Counsel for Pursuers (Respondents)—Millie. Agents—M'Caskie & Brown, S.S.C.

Counsel for Defenders (Reclaimers)—Rutherfurd. Agents—Mackenzie & Kermack, W.S.