

chargeable is 10s. per cent. ; if it is not, then the security escapes with 6d. per £100.

The Act supplies us with a definition of the words "marketable security"—[His Lordship here read the clause quoted above]—and the question comes to be, whether the transfer of this debenture bond was a security "capable of being sold in any stock market of the United Kingdom." Now, I can hardly imagine more comprehensive words. There must be some limitation contemplated by the Legislature, but I do not know where it is to be found. As regards the present case, however, there can be no doubt that this is a security which is saleable in a stock market. It is just the place to take such a security in order to sell it. The words of the clause "capable of being sold" point to a kind or description of security, and it certainly appears to me that the transfer of a debenture bond is a security which is capable of being sold in a stock market. I therefore think that this security falls to be dealt with under the Act 51 Vict. cap. 8, as liable for *ad valorem* conveyance on sale duty.

LORD MURE concurred.

The LORD PRESIDENT, who was absent at the hearing, did not deliver any opinion.

The Court affirmed the determination of the Commissioners.

Counsel for the Texas Company—Balfour, Q. C.—Lorimer. Agents—Morton, Neilson, & Smart, W. S.

Counsel for the Commissioners of Inland Revenue—The Lord Advocate, Q. C.—A. J. Young. Agent—D. Crole, Solicitor of Inland Revenue.

Friday, November 9.

FIRST DIVISION.

[Lord Lee, Ordinary.]

MORLEY v. JACKSON AND OTHERS.

Jurisdiction—Arrestments ad fundandam jurisdictionem—Question of Status—Amendment of Summons—Forum Conveniens.

The child of a deceased person raised an action against his trustee, his widow, and his sister, concluding (1) for declarator of legitimacy on the ground of a putative marriage between the pursuer's parents; (2) for payment of legitim; (3) for payment of aliment in the event of decree not being obtained under the first two conclusions. The defenders were not resident within the jurisdiction of the Court, but it was averred that by arrestments *ad fundandam jurisdictionem*, jurisdiction had been constituted as regarded the trustee. By leave of the Lord Ordinary the pursuer amended her summons, and sued for decree under the summons, as the offspring of a legal marriage. *Held* that the principal question in the action being one of status, jurisdiction could not be founded by arrestments, and the action dismissed.

Opinions (per Lord Shand and Lord Adam) that the question of jurisdiction fell to be determined under the action as originally laid, and could not be affected by subsequent amendments; and further, that as the parties really interested as defenders were beyond the jurisdiction of the Court of Session, it was not *forum conveniens* to try the question with a party merely interested as trustee.

This action was raised by Agnes Mary Morley, against James Allen Jackson, as sole surviving trustee under the deed of settlement of the deceased Thomas Morley, Catherine Anderson or Morley, "widow of the deceased Thomas Morley," and Mary Ann Morley or Jackson, his sister. The pursuer concluded (1) for decree of declarator that she was the legitimate child of Thomas Morley; (2) for decree ordaining the defender Jackson to pay her legitim out of his estate; and (3) for decree ordaining the same defender to pay her an annual sum of aliment in the event of her not obtaining decree under the first two conclusions of the summons.

The pursuer was the daughter of Thomas Morley and Agnes Newberry or Morley, and in the action as brought, declarator of legitimacy was sought on the ground that there had been a putative marriage between her parents.

In support of the above conclusion the pursuer averred—" (Cond. 2) The late Mr Morley first married Helen Hunter, who belonged to Dumfries. She died without issue, and thereafter, in or about March 1868, he married the defender Catherine Anderson. He lived with her in lodgings, first at Newcastle-on-Tyne, and afterwards at Carlisle, until about 1873, when owing to disagreements between them they separated. They never lived together again, and they had no communication thereafter with each other. No children were born of the marriage with the said Catherine Anderson. After the separation Mr Morley returned to Scotland. (Cond. 3) Whilst living in Edinburgh in 1876, and in the beginning of 1877, Mr Morley courted Agnes Newberry, daughter of William Newberry, fishing-rod maker, Canongate, Edinburgh, with a view to marriage. He fraudulently represented himself as being free to marry, telling her that he was a widower, and she, being in complete ignorance that he had then a living wife, relying upon his representations, and *bona fide* believing that no impediment existed, agreed to marry him. Accordingly, after due proclamation of banns they were regularly married by the Reverend James Macnair, minister of the parish of Canongate, on 28th April 1877. A certificate of the proclamation of banns and of the marriage is produced. Thereafter they lived together as husband and wife at 27 Elder Street, Edinburgh, and on 22nd December 1877 the said Agnes Newberry or Morley gave birth to the pursuer. Mr Morley was father to the pursuer. On 2nd January 1878 he registered the pursuer's birth at the register of births for St Andrew's District, Edinburgh. The registration bears to be made by him as the father, and the pursuer is registered as a lawful child of his marriage with the said Agnes Newberry or Morley. An extract of the entry is produced. Mr Morley and the said Agnes Newberry or Morley con-

tinued to live together as husband and wife at various places in Edinburgh down till Mr Morley's death in 1877. During all that time the said Agnes Newberry or Morley was kept in entire ignorance of the fact that there was a surviving wife of a previous marriage. She became aware of that circumstance only after Mr Morley's death."

Thereafter by leave of the Lord Ordinary the summons was amended by deletion of the words in the designation of Catherine Anderson or Morley, "widow of the deceased Thomas Morley," and the ground of action was changed, the pursuer seeking decree on the ground that she was the offspring of a legal marriage between her parents. She now averred—“(Cond. 2) The late Mr Morley first married Helen Hunter, who belonged to Dumfries. After the marriage they lived for many years in Dumfries in a house of their own. Helen Hunter died on or about 25th February 1870 without leaving issue. The statement in the answer that Mr Morley married Catherine Anderson is denied. (Cond. 3) On 28th April 1877 Mr Morley married Agnes Newberry, daughter of William Newberry, fishing-rod maker, Canongate, Edinburgh. The ceremony of marriage was performed, after due proclamation of banns, by the the Reverend James Macnair, minister of the parish of Canongate. A certificate of the proclamation of banns and of the marriage is produced. Thereafter the parties lived together as husband and wife at 27 Elder Street, Edinburgh, and on 22nd December 1877 the said Agnes Newberry or Morley gave birth to the pursuer there. On 2nd January 1878 Mr Morley registered the pursuer's birth at the register of births for St Andrew's District, Edinburgh. An extract of the entry is produced and referred to. Mr Morley and the said Agnes Newberry or Morley took up house and continued to live together as husband and wife at various places in Edinburgh down till Mr Morley's death in 1887.”

None of the defenders were resident in Scotland, and there was no averment that jurisdiction had been constituted as regarded Mrs Morley and Mrs Jackson, but with regard to Mr Jackson, the trustee, it was averred as follows:—“(Cond. 4) The late Mr Morley left considerable means, and the defender James Allen Jackson has entered upon the possession thereof, and has intromitted therewith. For many years prior to Mr Morley's death the defender Jackson, as general agent of the deceased, and also as the near relative of Mr Morley's only surviving sister and next-of-kin, the defender Mary Ann Morley or Jackson had the whole of the deceased's means and estate under his charge, and with deceased's consent administered the same. He also made large payments thereout when necessary and called on to do so by the deceased. Until after the present action had been raised, while alleging that he was acting as sole surviving trustee under a deed of settlement executed by Mr Morley, he, Jackson, refused to exhibit the deed to the pursuer's agent, or to give any information as to its provisions. Moreover he has refused to account to the pursuer for her interest in her late father's said means and estate. In these circumstances the present action has been rendered necessary.” “(Cond. 5) The late Mr Morley at the time of his death, was tenant under formal missives of a house at

21 Salisbury Street, Edinburgh, and the defender Jackson, as trustee foresaid, is now the tenant thereof, and he has not only paid the rents formerly due, but he has also paid the rent due therefor at Martinmas 1887, and the taxes, rates, and others recently due in respect thereof. The said defender Jackson, or his firm of J. A. Jackson & Son, solicitors, 22 Parliament Street, Hull, are cautioners and full debtors for the rent of said house. The pursuer has also used an arrestment *ad fundandam jurisdictionem* against the said defender, conform to execution thereof, herewith produced and referred to, attaching furniture and effects belonging to him as trustee foresaid. Said furniture and others were bought by the defender Jackson, and paid for by him out of the funds and estate of the deceased Mr Morley in his hands.”

The pursuers pleaded, *inter alia*—“(1) The pursuer, as the only lawful child of the late Mr Morley, is entitled to a share of his moveable estate, and the defender Mr Jackson, having intromitted therewith, is bound to account to her therefor. (2) Failing an accounting, the pursuer is entitled to decree of payment against the defender Mr Jackson, as concluded for in the second place. (3) In the event of the pursuer failing to obtain decree of count, reckoning, and payment as concluded for, she is entitled, as the child of the late Mr Morley, to aliment as concluded for. (4) *Separatim*, in the event of the defenders succeeding in establishing as valid the alleged marriage of the deceased with the defender Catherine Anderson, decree of declarator of legitimacy ought to be pronounced as concluded for.”

The defenders pleaded, *inter alia*—“(1) No jurisdiction, in respect that (1) no funds belonging to the defenders or any of them were attached by the arrestment, and (2) that an arrestment *ad fundandam jurisdictionem* does not subject questions of status to the jurisdiction of the Court. (3) The deceased Mr Morley having been a domiciled Englishman, and the English law not recognising legitimacy by a putative marriage, the pursuer cannot obtain decree of declarator as concluded for.

The Lord Ordinary (LEE) on July 12, 1888, pronounced the following interlocutor:—“The Lord Ordinary allows the summons to be amended at the bar by the deletion of the words ‘Widow of the said deceased Thomas Morley:’ . . . Further, having heard counsel in the procedureroil, and considered the cause with the minute for the curator *ad litem*, before further advising allows to the pursuer and defender James Allen Jackson a proof of their respective averments in articles 4 and 5 of the consendence and answers thereto, so far as relating to the jurisdiction as against the said defender.

The defenders reclaimed, and argued—No jurisdiction could be founded by arrestments to try questions of status, and the principal question here was of that kind; the action should therefore be dismissed—*Scruton v. Gray and Another*, Dec. 1, 1772, M. 4822. The action as originally laid very clearly involved a question of status, and it was with reference to that period that the question of jurisdiction must be determined. Even if jurisdiction had been founded against the trustee, this Court was not a *forum conveniens* to try the questions involved in the action, as

there was admittedly no jurisdiction over the two defenders really interested in the result of the case—*Brown's Trustees v. Palmer*, December 17, 1850, 9 S. 224.

The respondent argued—The arrestments used founded jurisdiction against Jackson. This was mainly a petitory action. The other conclusions were ancillary to the conclusions for payment.

At advising—

LORD MURE—The pursuer of this action sets forth in the summons that she is the daughter and only child of the deceased Thomas Morley, and concludes, first, for declarator of legitimacy; second, for count, reckoning, and payment; and third, for payment of a sum as aliment in the event of the pursuer not obtaining decree in terms of the two first conclusions of the summons. The parties called are Mr Jackson a trustee under two marriage-contracts of the pursuer's father in the English form, and other two, viz., Mrs Catherine Anderson or Morley, designed in the summons as it was originally brought as widow of the deceased Thomas Morley, the pursuer's father, and Mrs Mary Ann Morley or Jackson. These parties all are resident in England, and this Court plainly has no jurisdiction against them, unless something has been done to create jurisdiction in the manner competent. It is alleged that jurisdiction has been founded by arrestments *ad fundandam jurisdictionem* against Mr Jackson—it is alleged that such were used against him—but there is no allegation of the kind as to the other defenders. In these circumstances the defenders come forward and plead “no jurisdiction.” Their first plea in law is—“No jurisdiction in respect that (1) no funds belonging to the defenders or any of them were attached by the arrestment, and (2) that an arrestment *ad fundandam jurisdictionem* does not subject questions of status to the jurisdiction of the Court.” Now this plea is plainly good as regards the two defenders Mrs Morley and Mrs Jackson, as they are resident in England and no arrestments have been used against them. In a question with them clearly the jurisdiction of this Court cannot be maintained, and they are entitled to have the action dismissed as regards them on that ground.

The case of Jackson is rather different. Certain funds have been arrested and the pursuer says that she has thus constituted jurisdiction against him. It is with the view apparently of disposing of that question that the Lord Ordinary has pronounced the interlocutor reclaimed against, by which the Lord Ordinary “allows to the pursuer and to the defender James Allen Jackson, a proof of their respective averments in articles 4 and 5 of the condescendence and answers thereto, so far as relating to the jurisdiction as against the said defender.” That applied to the question as to whether there had been arrestment of funds sufficient to constitute jurisdiction or not, and if we were dealing with a purely petitory action the course taken by the Lord Ordinary would have been the natural one to follow in view of the contradictory statements of the pursuer and defender as to the funds which have been arrested. This, however, is not an ordinary action of payment, but in substance and in its leading conclusion is an action of legitimacy to constitute status. That is the nature of the action, and the defenders have

brought the interlocutor of the Lord Ordinary under review on the ground that his Lordship was mistaken in allowing proof, because no jurisdiction could have been founded by the arrestments, as the action was one for regulating status, and in such actions jurisdiction cannot be constituted by arrestments against parties. We have heard parties, and have been referred to certain cases, particularly the case of *Scruton v. Gray, &c.*, dated in 1772, M. 4822. Now, it appears to me that substantially the same question was raised and decided in that action as is before us here. The action was one for declarator of marriage, not of legitimacy, brought against a native of Ireland, who had been a student in Glasgow, and who was alleged to have entered into some arrangement and been married there. There was a conclusion for declarator of marriage, and a petitory conclusion for aliment in the event of the conclusion for declarator of marriage not being established. The objection was raised that jurisdiction could not be constituted by the arrestment of funds belonging to a foreigner in the hands of a person in Glasgow when the action raised a question of status, and the Court had that matter seriously under its consideration. The case was first argued before the Commissary, who repelled the objection. There was then a hearing in presence, when their Lordships unanimously came to the conclusion that jurisdiction could not be founded by arrestment in order to try a question of status. There is, I think, nothing in the circumstances of the present case to distinguish it from the principle of that case. That action was for declarator of marriage, and in the event of that declarator not being obtained, for aliment; this action is for declarator of legitimacy, and in the event of that not being obtained, for aliment. It therefore appears to me that there is no occasion to do as the Lord Ordinary has done, and I think, on the authority of the case I have mentioned, we ought to recall the Lord Ordinary's interlocutor and dismiss the action on the plea of no jurisdiction.

LORD SHAND—I have had no difficulty in coming to the same conclusion. As this action was laid and originally brought into Court I think it was scarcely maintained that there was jurisdiction, and at all events if it was to be decided on that footing, I should find that there was no jurisdiction, because the pursuer in the action as laid expressly set forth that her purpose was to have it decided that she was legitimate because of a putative marriage between Agnes Newberry, her mother, and the deceased. Now, that was stated, because the pursuer set forth that at the time of her mother's marriage to Morley he had been previously married to a lady in England, who still is living, and in the summons she was designed “widow of the deceased Thomas Morley,” and in the narrative of facts for the pursuer it was set forth that Mr Morley, her father, had married in 1868 Catherine Anderson, and had lived with her as her husband for five years.

Another defender was the sister of Mr Morley, who was represented as being interested in respect of her legal rights on his estate, which she would lose in the event of the putative marriage being established.

In the case as so presented it is quite clear, in the first place, that this was an action for declarator in regard to status, and next, that the proper defenders were not the defender Jackson, who was a mere holder of funds, but the widow of the deceased and the sister of the deceased. The parties who were principally interested were, first, the person who had the status of widow of the deceased, and secondly, the person who had a right to share in his estate, as Lord Mure has pointed out. It was not suggested that there was jurisdiction against the widow or sister, and the only question was, whether jurisdiction had been constituted against Jackson by certain arrestments which have been used. That arrestments are of no avail in establishing jurisdiction in questions of status is certain; that there was no jurisdiction by residence is admitted, and therefore it is perfectly plain that the action as laid, served, and called was subject to the fatal plea that there was no jurisdiction. But it is said that after the defenders had appeared and pleaded no jurisdiction, the pursuer got rid of the force of that plea by extensive alterations and amendments, and made it a good action. I am of opinion that if an action is bad because there is no jurisdiction over the defenders when it is served, it cannot be made a good action by subsequent alterations. It must remain bad. It would indeed be an anomalous proceeding if, in an action where the Court had at first no jurisdiction, it being a declarator of legitimacy, it were possible to introduce amendments to convert it into an action for a pecuniary claim, and so make it one where the Court had jurisdiction. No doubt an extensive power of amendment is allowed by the Court of Session Act of 1868. It is permissible to make such amendments as will enable the real question between the parties to be tried where it has not been properly raised at first. Such an amendment, however, as the above would be quite beyond what was intended by the Act. The pursuer's contention appears to me to amount to an attempt to evade the real questions under the action by limiting it to the petitory conclusions.

I should also have thought that the pursuer could not effect her purpose under the petitory conclusions alone, but upon those as following upon the conclusions for declarator of legitimacy and payment of legitim. And it is only as having a declarator of status that she can maintain the other conclusions.

Jackson is called, and it is said there is jurisdiction against him. He has, however, no interest in the case. The real parties to the case are the person who claims to be the widow of the deceased and the sister of the deceased. There is no jurisdiction against them, and I am of opinion that the action cannot be sustained even against Jackson.

But even if there was jurisdiction against Jackson, I should have no difficulty in holding that, looking to the fact that the real defenders are out of the jurisdiction of the Court, the action would fall to be dismissed on the plea of *forum non conveniens*, as the proper parties to it are not here.

LORD ADAM—I do not think that any alteration on the conclusions of the action as brought can alter the question of jurisdiction. Since the action was brought there has been a great change.

When the action came into Court—when it was served and called—it was an action of declarator of legitimacy, and it was nothing else. The other conclusions were quite clearly ancillary to that. That was the time at which to consider the question of jurisdiction. It is obvious that if the Lord Ordinary had no jurisdiction then, he had no power to write any interlocutor in a cause where he had no jurisdiction. His only course was to dismiss the action. He had no power to allow amendments to be made on the summons, or to pronounce a binding order, and therefore the proper time to decide the question of jurisdiction was when the action was brought into Court. I am of opinion that there was no jurisdiction in this case as the action was brought.

But if we are to take the action as now laid, I am still of the opinion that there is no jurisdiction, because in its main conclusion it is an action of declarator of legitimacy, and that is the real character of the action. Now, that being so, on the authority of *Scruton v. Gray*, as Lord Mure has said, arrestments have no effect in founding jurisdiction in a question of status.

I agree with Lord Shand that if we had jurisdiction against Jackson, we have no jurisdiction over the parties really interested as defenders, namely, the widow and sister of the deceased Thomas Morley, and I think that this is not a *forum conveniens* to try the case with a party allowed to be merely interested as a trustee.

LORD MURE—I reserve my opinion on the last question. I did not consider it to have been raised, and I do not know what course the parties may take in the future.

The LORD PRESIDENT was absent.

The Court recalled the interlocutor of the Lord Ordinary, and dismissed the action in respect of no jurisdiction.

Counsel for the Defenders (Reclaimers)—Bal-four, Q.C.—Graham Murray. Agents—John Clerk Brodie & Sons, W.S.

Counsel for the Pursuer (Respondent)—Strachan—Wilson. Agent—Andrew Newlands, S.S.C.

Friday, November 9.

SECOND DIVISION.

[Sheriff of Aberdeen.]

ROSS v. KEITH.

Reparation—Children Drowned in Pond in Private Ground—Reasonable Precautions for Safety of the Public.

Two children were drowned in a pond in private ground near a public thoroughfare. In an action by their father against the proprietor, it was proved that there was an entrance to the ground from the thoroughfare by a gate in the boundary wall, but that nearer the pond there was a paling with a gate, which had been left open by someone unknown, and it appeared that the children strayed by these means from the public road to the pond. *Held* that the death of the children was not attributable to the fault of the defender.