

COURT OF SESSION.

Tuesday, October 22.

SECOND DIVISION.

[Lord Wellwood, Ordinary.]

B. & H. M'GUIRE v. SMITH.

Jurisdiction—Arrestment ad fundandam jurisdictionem—Partnership.

A firm of merchants in Glasgow raised an action for slander against A. R. Smith, an Irish merchant with whom they had done business, but of whom personally they had no knowledge. The alleged slander was contained in a letter unsigned but written upon a memorandum "From A. R. Smith, Cavendish Quay, Bandon." To found jurisdiction in the Scottish Courts the pursuers arrested in the hands of another merchant in Glasgow funds due to the defender, who pleaded no jurisdiction. A proof was allowed, from which it appeared that the defender had written the letter complained of, but that the funds arrested belonged to another person who was the sole proprietor of the business carried on under the name of A. R. Smith, and of which the defender was manager.

Held that the arrestments used did not attach any sums due to the defender as an individual, and the plea of no jurisdiction *sustained*.

B. & H. M'Guire, wholesale butter and egg merchants, South Wellington Street, Glasgow, raised an action of damages for alleged slander against Albert Robert Smith, export and produce merchant, Cavendish Quay, Bandon, County Cork, Ireland, and arrested funds due to the defender in the hands of another merchant in Glasgow for the purpose of founding jurisdiction.

The alleged slander complained of was contained in the following memorandum:—"From A. R. Smith, Cavendish Quay, Bandon, to B. & H. M'Guire, Glasgow, February 15th 1889. We are very sorry to have settled with you, as still you have the best of us. We should have preferred exposing to the public your swindling practices. We think it our duty to try and prevent others falling into your trap."

In answer to the defender "admitted that in his capacity of manager to Edward Dartnell of No. 60 Grand Parade in the city of Cork, egg and seed merchant, and carrying on business at Bandon under the style of A. R. Smith," he had done business with the pursuers.

The pursuers averred—"Arrestments to found jurisdiction have been used by the pursuers, and have arrested sums in Scotland, due to the defender, who is thus subject to the jurisdiction of the Scotch Courts. The statements in answer are denied."

The defender answered—"Denied. Explained that the goods, the price of which

had been arrested by the pursuers, did not belong to the defender, but to the said Edward Dartnell. The defender is merely the servant of the said Edward Dartnell, paid by a fixed salary and a share of profits. This state of relationship between the defender and the said Edward Dartnell has existed since July 1886. Any sums that have been arrested by the pursuers are monies belonging to the said Edward Dartnell, and not to the defender."

The defender pleaded—" (1) No jurisdiction."

The Lord Ordinary (WELLWOOD) allowed to both parties a proof of their respective averments on the question of jurisdiction.

In the course of his evidence A. R. Smith admitted having written the letter complained of. The other facts established are sufficiently set forth in his Lordship's opinion.

The Lord Ordinary upon 17th July 1889 pronounced the following interlocutor:—"Finds that the arrestments used by the pursuers did not attach any sums due to the defender A. R. Smith as an individual: Therefore sustains the first plea-in-law for the defender, dismisses the action, and decerns: Finds the defender entitled to one-half of his expenses as taxed, &c."

Opinion.—This is an action of damages raised in consequence of a libellous letter said and proved to have been written by the defender A. R. Smith, and quoted in the third article of the condescendence. The defender being a domiciled Irishman, the pursuers used arrestments in the hands of certain parties indebted to 'A. R. Smith, Cavendish Quay, Bandon.' In his defences the defender averred that he carried on business under that, his own, name, not on his own account, but as manager to Edward Dartnell, of 60 Grand Parade, in the city of Cork; and that the sums arrested were due to Dartnell, and not to him, the defender.

"A proof was allowed on the question of jurisdiction, and the result is, I think, that it is clearly proved that Dartnell was the sole proprietor of the business in question, and that the defender was merely his manager, entitled to £40 a year as salary, and ten per cent. on the profits. This being so, the sums arrested were due to Dartnell and not to the defender; and that, I think, is conclusive of the question of jurisdiction. There is no question here as to A. R. Smith's liability for the debts of the concern in respect of holding himself out as proprietor or partner; neither is there any question of the right of a debtor to the concern to plead compensation on a debt due to him by A. R. Smith as an individual. The only question is whether the sums arrested belong to A. R. Smith, and could be taken in execution for a personal debt due by him. I think they clearly could not, first, because they are the property of Dartnell; and secondly, because the letter complained of was not written by Dartnell, or with his authority, express or implied.

"I therefore sustain the first plea-in-law

for the defender, and dismiss the action; but as the confusion has been caused in a great measure by the defender himself, who, for his own convenience, at present carries on no less than three businesses in the name of 'A. R. Smith,' I have modified the expenses found due to him to one-half."

The pursuers reclaimed, and argued—The Lord Ordinary had proceeded upon the assumption that the action was laid against an individual, whereas the action was against a person who might for all they could know be either an individual or a firm. They had proceeded against the only person of whom they had any cognisance, the person with whom they had done business, in whose name they had made out their cheques, who had discharged their accounts, who could sue them for the price of goods supplied, and who had slandered them. They had arrested funds due to the same person by another merchant. That was enough for their case. But if there was a partnership, whether the respondent was a partner or not he had held himself out as such, and consequently must be regarded as such so far as his liability to the reclaimers was concerned. That was well-settled law, and it was a legitimate deduction that the arrestment of funds due to him founded jurisdiction against the firm. A slander by a partner might be a company debt. It depended upon circumstances, but that question did not fall to be answered at this stage.

Argued for the respondent—A slander justified an action of damages against the person uttering it, but not against any firm of which he might be a partner. Here the action was against an individual. No funds of that individual had been arrested, but only funds belonging to another individual with whom the respondent was proved not to have been in partnership. Accordingly no jurisdiction had been established over him.

At advising—

LORD JUSTICE-CLERK—According to all the ordinary rules, the person who is to be sued for any wrong committed by him, must be sued within the jurisdiction of his own domicile, but our law gives power to a pursuer, if he can find funds in this country belonging to a foreigner—that is, to one not a domiciled Scotsman—to establish jurisdiction by the use of arrestments against such foreigner, and so to compel him to answer the charge in the Courts of this country. The privilege so given is, however, subject to this condition, that the pursuer must show he has effectually arrested funds belonging to the defender so as to complete his right to have him sued in this country.

Now, what are the facts in this case? The pursuer proceeds against a person whom he calls in his summons "A. R. Smith, export and produce merchant, Cavendish Quay, Bandon, County Cork, Ireland." I take that to be an action against an individual person A. R. Smith, and nothing else, and I regard the other

words as just the general designation of the man sued. There is no intention disclosed in the summons of suing a firm carrying on business under the name of A. R. Smith. Well, if the action is against an individual, the pursuer must take means to found jurisdiction against that individual, who is not a domiciled Scotsman. Accordingly in this case he takes means to do so by arresting money in the hands of a firm in Glasgow, money which he alleged to belong to A. R. Smith. The Lord Ordinary, rightly I think, allowed a proof from which it appeared that the funds arrested belonged to Edward Dartnell, and that A. R. Smith had himself no right to these funds at all. In these circumstances the Lord Ordinary held—and I agree with him—that the pursuer had failed to arrest any funds of A. R. Smith in this country, and had therefore failed to found jurisdiction against him.

I likewise agree with the Lord Ordinary that this is not a case in which the defender should be allowed full expenses in the Outer House. He is, however, entitled to the expenses of the discussion on the pursuers' reclaiming-note.

LORD YOUNG—I am of the same opinion. I do not think that the action can be regarded as an action against a company. Indeed there is no evidence of the existence of a company, and it was frankly said by the pursuers' counsel that when the action was raised the pursuer thought it was an action against an individual. The action itself, being an action for slander, is essentially an action of a personal character. We have therefore no occasion to consider any question as to the power of a company or the manager of a business to create a responsibility against the company or the principal in the business. It is a personal action against an individual, Albert Robert Smith and the question is one of jurisdiction. Now, there is admittedly no jurisdiction, unless property in Scotland belonging to that individual has been arrested to found it. Certain debts have been arrested. The defender says he is not the creditor in them. The Lord Ordinary allowed a proof on that question in order to determine whether there was jurisdiction, and issue was joined upon it. Proof was led, not upon the question whether these debts were due to a partnership or to some trader other than Albert Robert Smith, but whether Albert Robert Smith was the creditor. As the result of the proof, the Lord Ordinary found that Albert Robert Smith is not the creditor. The result is, that there is no jurisdiction by arrestment, and no other ground of it being suggested the Lord Ordinary has rightly sustained the plea that there is no jurisdiction and dismissed the action.

LORD RUTHERFURD CLARK—I agree.

LORD LEE—If it had appeared that the defender had attempted to play fast and loose, and to avoid raising the true question, I should have been disposed to look very narrowly at the defence. But on

record the issue is fairly joined. The pursuers' allegation is "that arrestments to found jurisdiction have been used by the pursuers, and have arrested funds in Scotland due to the defender, who is thus subject to the jurisdiction of the Scotch Courts." In answer the defender denies that averment, and explains that the goods the price of which has been arrested by the pursuer, did not belong to the defender but to the said Edward Dartnell, whose servant he says he is and has been since 1886. Thus the defender has distinctly stated what his defence is. Further, the pursuer was put on his inquiry, in my opinion, by the very terms of the memorandum of which he complains, for it is in the plural. The writer says—"We should have preferred exposing to the public your swindling practices." A man who is about to raise an action complaining of such a letter ought to take the trouble before raising it to find out from whom it is he is to recover the damages. Here the pursuer brings his action against an individual against whom he says there is jurisdiction in respect of debts due to him in Scotland. He has failed to establish that allegation.

The Court refused the reclaiming-note with expenses.

Counsel for the Pursuers (Reclaimers)—Gloag—A. S. D. Thomson. Agent—A. Rodan Hogg, Solicitor.

Counsel for the Defender (Respondent)—Rhind—Watt. Agent—William Officer, S.S.C.

Wednesday, October 23.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

PENNEY (SAWERS' FACTOR) v. SAWERS AND OTHERS.

Process—Multiplepinding—Claim—Expenses.

A truster directed his trustees to pay the residue of his estate in liferent to A, whom failing to B, whom failing to C, and on the death of the last liferenter to pay the fee to certain parties named. C emigrated to Australia some years prior to the death of the truster, and, on the understanding that he was dead, an action of multiplepinding was raised on B's death to ascertain the party entitled to the fee.

After proof, but before a decree of ranking had been pronounced, a new claimant appeared, who averred that he was C, and claimed the liferent of the estate under the settlement, and the Court, in respect that the claimant had not been called as a defender, and had received no intimation of the dependence of the process, and that the expenses in the case had been incurred in determining the party entitled to the fee—an investigation from which the

claimant derived no benefit—*allowed* the claim to be unconditionally received.

Morris v. Geekie, in re Morgan v. Morris, 18 D. 797, 818, *distinguished*.

The late Peter Sawers, bleacher, died on 27th November 1859, leaving a trust-disposition and settlement, in which he directed his trustees to convey the residue of the trust-estate to Henry Sawers in liferent, whom failing to the Rev. Peter Sawers in liferent, whom failing to Robert Gordon Sawers, a natural son of the testator, in liferent, and in a certain event, to certain parties *nominatim* in fee.

After the death of the testator Henry Sawers, who survived him about ten years, enjoyed the liferent of the trust-estate, and thereafter the Rev. Peter Sawers enjoyed the liferent of the estate, and died on the 19th June 1885. Robert Gordon Sawers had gone abroad some years before the testator's death, and at the date of the death of the Rev. Peter Sawers it was uncertain whether he was alive or dead.

An action of multiplepinding was raised in name of the judicial factor who had been appointed on the trust-estate to ascertain the parties entitled respectively to the liferent and to the fee of the trust-estate.

After various procedure the competition was finally carried on between James Sawers, who averred that he was a grand-nephew of the testator, and claimed that he was entitled under the destination to the fee of the trust-estate, and John Sawers, who averred that he was the nearest lawful heir in general to the testator, and claimed as such the fee of the trust-estate.

After proof had been led, but before a decree of ranking had been pronounced, the Lord Ordinary was moved to allow a claim to be received for a party claiming to be Robert Gordon Sawers, the residuary legatee substituted to the Rev. Peter Sawers in the deed of settlement.

The claimant averred, *inter alia*, that he was a natural son of the testator, and was born on 12th April 1831; that after residing for about twenty-four years in various parts of Scotland and Ireland, he sailed in 1854 for Melbourne; and that he had resided in various parts of Australia from that date to the present time. He claimed the liferent of the trust-estate.

On 17th July 1889 the Lord Ordinary (M'LAREN) pronounced the following interlocutors:—[*After preference of certain debts and a legacy*].—"Ranks and prefers the claimant James Sawers to the balance of the said fund in terms of his claim." "Allows the condescendence and claim for Robert Gordon Sawers to be received on payment by him of the expenses incurred by the claimant James Sawers between the closing of the record and the last allowance of proof," &c.

The claimant Robert Gordon Sawers reclaimed, and argued that he was entitled to enter the process upon less stringent terms than those imposed by the Lord Ordinary. The expenses alleged by the successful claimant to have been incurred between the periods fixed by the Lord