Find neither party entitled to expenses in the Inner House; and decern."

Counsel for Petitioner—Mackay—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for Respondents—Balfour, Q.C. —C. K. Mackenzie — Don Wauchope. Agents—Tods, Murray, & Jamieson, W.S.

Wednesday, January 15.

SECOND DIVISION.

[Lord Moncreiff, Ordinary.

H. FISCHER AND COMPANY *v.* AKTIESELSKABET TREMASTET SKONNERT "MOLLY."

Process—Decree in Absence—Mandate to Lodge Defences.

Defences were lodged to an action in the name of a foreign defender upon the instructions of a party whose authority to act for the defender was denied by the pursuer. The Lord Ordinary, without pronouncing an order for the production of a mandate, granted decree in absence.

Held that the procedure was irregular, and the decree *set aside.*

Arrestment—Amendment of Summons—Validity of Arrestment upon Dependence prior to Amendment—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 20.

An action was raised at the instance of five pursuers concluding for payment to each of separate sums, and arrestments were used upon the dependence of the action. A minute was thereafter lodged by the pursuers craving that the names of four of the pursuers should be struck out of the summons along with the conclusions relating to the sums claimed by them, and that this having been done, decree should be pronounced for the sum claimed by the remaining pursuer. Decree was pronounced in terms of this minute.

Held that the action as originally raised was incompetent, and that the arrestments upon its dependence were therefore without warrant, and could not be validated by the subsequent amendment of the summons so as to prejudice the rights of competing creditors.

In July 1895, H. Fischer & Company raised an action against Aktieselskabet Tremastet Skonnert "Molly," the registered owners of the "Molly" of Svendborg, Denmark, arrested at Grangemouth, to have the ship sold and the proceeds divided.

The ship was sold by public roup at Grangemouth under order of the Court on 3rd September 1895 for £675. Of this sum over £400 was found due to various persons having preferable claims. As to the balance there was a competition between J. R. Andersen, shipbuilder, Svendborg, Denmark, and H. Fischer & Company, depending upon the priority and validity of the arrestments on which they respectively founded.

The claimant J. R. Andersen founded on an arrestment dated 8th April 1895, on the dependence of an action raised at the instance of himself and Thorvald Hansen, J. Anderskouv, R. Skraep, and H. L. Kroyers Enke, four other tradesmen and merchants at Svendborg, against the company registered as owners of the "Molly," and Hans Iversen, G. Christensen, and H. Fischer, three members of the company. The summons concluded for payment to the pursuer J. R. Andersen, of £311, 15s. 7d., and to each of the other pursuers of separate sums for work done on and furnishings made to the "Molly." The summons was served edictally on the owners of the "Molly," which was at that time lying at Grangemouth. Defences were lodged in name of the registered owners by the instructions of H. Fischer, pleading, *inter alia*, that the action was incompetent. Before the case was called the pursuers annexed to the summons a minute of restrictions, in which, in respect that the defenders Aktieselskabet Tremastet Skonnert "Molly" were a registered company capable of being sued in their own name, they restricted the summons to the conclusions directed against the company. When the case was in the adjustment roll, the pursuers objected that Fischer had no mandate to lodge defences for the owners of the "Molly." The Lord Ordinary (STORMONTH DARLING) granted three adjournments extending over a period of three weeks till 22nd June, to admit of a mandate from the company being obtained. On that date a minute was tendered for Fischer to the effect that he was managing owner of the company, and held a majority of the shares, and asking that the time for lodging a mandate should be extended till a meeting of the company could be held. The Lord Ordinary refused to receive this minute. On 25th June the pursuers lodged a minute in which they "craved leave of the Lord Ordinary to strike out of the summons the names of the pursuers, the said Thorvald Hansen, J. Anderskouv, R. Skraep, and H. J. Kroyers Enke, and the second, third, fourth, and fifth conclusions of the summons, and on this being done, to grant decree in favour of the pursuer the said J. R. Andersen, in terms of the first conclusion of the summons."

On the same date the Lord Ordinary decerned in absence against the defenders Aktieselskabet Tremastet Skonnert "Molly" in terms of the first petitory conclusion of the summons as restricted by the minute annexed thereto and the minute of 25th June.

The claimants H. Fischer & Company founded on an arrestment dated 7th May 1895. They maintained that J. Andersen's arrestment, although prior in date to their own, was invalid; and pleaded—"(4) The claimants are entitled to be ranked and preferred for all their claims in priority to the claim of the said J. R. Andersen, in respect (1st) the decree in absence on which he founds was irregular and should be set aside, and (2nd) in any event, the decree proceeded on an amendment which was

subsequent in date to the arrestments at the instance of the claimants."

On 27th December 1895 the Lord Ordinary (MONCREIFF) repelled the second branch of the fourth plea-in-law stated for H. Fischer & Company, and appointed parties to be heard for further argument, and granted leave to reclaim.

Note — [*After stating the facts*]—"The claimants H. Fischer & Company maintain that the whole proceedings whereby decree in absence was pronounced were incompetent and irregular, but in order to establish this they would probably require to raise a reduction of the decree. There is another ground, however, upon which they maintain that Andersen's claim should be repelled *de plano*, and that is, that by the 20th section of the Court of Session Act 1868, it is provided that an amendment allowed under that section shall not validate diligence to the effect of prejudicing the rights of other creditors.

"Now, the summons as originally framed was no doubt incompetent in this sense, that if the defenders had appeared and objected the Court would not have allowed the action to proceed at the instance of more than one of the pursuers. But the defenders, whom I must assume in regard to this question to have had an opportunity of appearing and objecting, did not do so; and even if decree in absence had gone out at the instance of all five pursuers, the case of *Douglas* v. *Tait*, 12 R. 10, is an authority, by which I am bound, that the objection would have come too late, and the diligence would have been sustained. But the pursuers did not trust to this, and decree was taken in the name of Andersen alone. It is pleaded by Fischer & Company that this having been done by means of amendment the proviso of section 20 applies. In form perhaps it was an amendment, because the structure of the summons was altered by deletion. But I do not think that in substance it really was an amendment. It was a restriction both of the conclusions and of the instance, and the purpose might have been, and probably would have been, more correctly effected by the pursuers other than Andersen disclaiming or abandoning the action, in which case it would not have been necessary to touch the summons.

"But further, if the decision in *Douglas* v. *Tait* rules, the rights of other creditors were not prejudiced by the amendment, because a decree without any restriction would have been sustained.

"I therefore repel the second branch of the fourth plea-in-law stated for the claimants H. Fischer & Company. If I am right on that point, it will be necessary to consider whether Fischer & Company should not have an opportunity of raising an action of reduction of the decree on the other grounds condescended on."

The claimants H. Fischer & Company reclaimed, and argued — (1) The alteration of the summons in Andersen's former action was an amendment under section 20 of the Court of Session Act 1868, and therefore could not validate the arrestment used on the dependence of the unamended action on 8th April 1895, so as to prejudice the reclaimers. The case of *Douglas* v. *Tait*, founded on by the Lord Ordinary, was not in point. It was a case between a debtor and creditor, and was decided on the ground of personal bar. (2) The decree in absence founded on was irregular, having been improperly pronounced. No order was ever pronounced requiring H. Fischer to get a mandate from the Company. The defences lodged were, *prima facie*, regular, and H. Fischer had offered to produce a mandate if his authority was called in question. An action of reduction was not necessary; in a competition an objection of this sort would be received by way of exception — Shand's Practice, p. 618.

Argued for claimant Andersen — The decision of the Lord Ordinary was right. (1) The arrestment on which he founded was on the dependence of an action which consisted of a bundle of five summonses. The Lord Ordinary in that action had allowed four to be dropped. This was not an amendment in the sense of section 20 of the Court of Session Act. It was a restriction of the summons. Each summons was complete in itself, and if four of the pursuers withdrew their summonses, there was no reason why the first should not proceed with the action—*Gray* v. *Stewart*, 1741, M. 11,986—or why the arrestment on the dependence of the action should not continue to be valid. (2) If the decree in absence was irregular, it would require to be reduced.

At advising—

LORD YOUNG—This is a question dealing with the law of diligence, and it is quite true that all such questions must be dealt with strictly. The Lord Ordinary has held that Mr Andersen's arrestment being prior in date to the arrestment of his competitor, he is entitled to prevail, and in order to reach that conclusion the Lord Ordinary has repelled the second branch of the fourth plea-in-law stated by the reclaimer.

Andersen's diligence was used on the dependence of a summons at the instance of five different pursuers for five distinct debts brought against the owners of a vessel called the "Molly." It occurred to those representing the pursuers that the action was incompetent as it stood, and that it would require correction before it could proceed. So a minute was put in, in which it was proposed to make this correction by striking out four of the pursuers and four of the conclusions applicable to the debts of these pursuers, and to proceed with the case at the instance of one of the pursuers alone. Now, I am of opinion that this amendment—for I think that is the proper name for a correction of an error committed when the summons was framed —was competent. But I greatly doubt whether an arrestment can stand which has been used on the dependence of an action in its original incompetent form, although the action may have been subsequently amended so as to become competent. It would have occurred to me that the

proper course would have been to use new arrestments on the dependence of the action after the summons had been amended. This, however, the pursuer did not do, but he founds on his arrestment as having been made good by reason of the amendment of the summons to which I have referred. But if, as I submit we must, we take as an amendment of the summons this correction of the error, without which the action could not have proceeded, and would have been dismissed, section 20 of the Court of Session Act applies. This section provides that no amendment of the summons shall have the effect of validating diligence used on the dependence of the action, so as to prejudice the rights of creditors interested in defeating such diligence, or, as I read it, no amendment of the summons shall have the effect of making a diligence used on the dependence of the action prior to the amendment of the summons good, so as to give the pursuer a preference over other creditors. I am therefore of opinion that the second branch of the fourth plea-in-law should be sustained.

We have also had an argument on the first branch of the plea that the decree in absence is irregular. Mr Aitken stated that if we decided against him on the second branch of the plea, that disposed of the case and rendered it unnecessary to pronounce a decision in the first branch. But as we have heard an argument on this matter I think it proper to express an opinion upon it. I am of opinion that the decree in absence is quite irregular. Defences to the action were given in, bearing to be by those who were called as defenders. On the back of the defences is the name of a practising agent and the defences are signed by counsel. The action is therefore a defended action. No doubt it was open to the pursuer to say that the defences were lodged without the authority of the defenders. On this being stated it was explained that the authority was derived from a mercantile gentleman at Grangemouth, who was the owner of the ship to the extent of three-fourths or four-fifths, and that he had the authority of the other owners. An offer was made on his behalf to produce a mandate from these other owners if time was given him to get it sent from Denmark. I think it perfectly clear in the ordinary course of procedure that where the authority of the agent and counsel is disputed, or where the authority of the party defending an action on behalf of himself and others is disputed, time should be given so as to permit the production of a mandate. This was not done here. The Lord Ordinary proceeded to deal with the case as an undefended action, and gave decree in absence. Such a course is quite irregular and ought not to have been followed.

In order to dispose of the case it would be sufficient to sustain the second branch of the fourth plea. But if your Lordships agree with what I have said on the first branch, what I suggest we should do is to recal the Lord Ordinary's interlocutor and sustain the whole of the fourth plea-in-law.

LORD TRAYNER — I agree with Lord Young.

The soundness of the first branch of the fourth plea, viz., that the decree in absence was irregular, is made apparent by consideration of the pleadings. This decree is pronounced against a defender whose defences were lodged in process and have been considered. In such circumstances it appears to me that a decree in absence is entirely out of the question. And decree by default was also excluded, because no order on the defender was pronounced on account of which he could have been held to be in default. I therefore think that we should sustain the first branch of the fourth plea-in-law.

But the summons and the arrestment used on the dependence of the action might be good although the decree in absence was set aside, and we must therefore consider the second branch of the plea. On the question of the incompetency of the summons I entertain no doubt. I am of opinion that the summons was incompetent. If the summons was incompetent, the procedure following upon it was also incompetent, and the arrestment must fall. An arrestment used on an incompetent summons is of no avail, the precept being incompetent. In the present case before the summons was amended there was no precept on which the arrestment could be used by Andersen for his own behoof. It appears to me that section 20 of the Court of Session Act of 1868 is applicable to the present case, and that no amendment of the summons could validate an arrestment used on the dependence of the action prior to the amendment so as to prejudice the rights of other competing creditors.

I am therefore of opinion that we should sustain the fourth plea-in-law on both branches.

LORD JUSTICE-CLERK—I entirely agree, and do not think it necessary to add anything to the very clear statements of your Lordships.

LORD RUTHERFURD CLARK was absent.

The Court recalled the Lord Ordinary's interlocutor, sustained the fourth plea-in-law for H. Fischer & Company, and ranked and preferred them in terms of their claim to the whole of the balance of the fund *in medio*.

Counsel for Claimants H. Fischer & Company—Salvesen—Younger. Agents—Wm. B. Rainnie, S.S.C.

Counsel for Claimant J. R. Andersen—Dickson—Aitken. Agents—Boyd, Jameson, & Kelly, W.S.