

Friday, March 17.

FIRST DIVISION.

[Lord Stormonth Darling,  
 Ordinary.]

ATKINSON & WOOD v. MACKINTOSH.

Process—Sisting Procedure—Forum non  
 conveniens—Diligence—Arrestment.

In an action raised in Scotland in which an English firm sued a married woman resident in England, but having in Scotland separate estate against which arrestments *ad fundandam jurisdictionem* had been used, the plea of *forum non conveniens* taken by the defender was sustained. The pursuers had arrested on the dependence of the action. No proceedings had as yet been taken by the pursuers in England. *Held* that the action fell to be dismissed, and not to be sisted with the view of giving the pursuers the benefit of the arrestments on the dependence in the event of their raising an action in the English Courts and getting decree therein.

*Hawkins v. Wedderburn*, March 9, 1842, 4 D. 924, and *Fordyce v. Bridges*, June 2, 1842, 4 D. 1334, commented on and distinguished.

On the 14th October 1904 Atkinson & Wood, tailors and habit-makers, 63 English Street, Carlisle, raised an action in the Court of Session against Mrs Eugenie Fairweather or Mackintosh, wife of and residing with the Reverend John Mackintosh at 77 Scotland Road, Stanwix, near Carlisle, and the said Reverend John Mackintosh for his interest, in which they sought to recover £48, 5s. 2½d., the value of goods alleged to have been supplied to her. Mrs Mackintosh was in the enjoyment of a separate income derived from marriage-contract funds in Scotland, and arrestments *ad fundandam jurisdictionem* had been used. The defender, *inter alia*, pleaded—(1) No jurisdiction, and (2) *Forum non conveniens*. The case came before ANDREW JAMESON K.C. (LORD ARDWALL) as Lord Probationer in the Outer House, who reported to the Division that in his opinion the second of these pleas should be sustained. The case went back to the Lord Ordinary (LORD STORMONTH DARLING), who sustained this plea, but meanwhile the pursuers had arrested on the dependence. His Lordship pronounced this interlocutor:—“ . . . In respect the first plea-in-law for the defender is not insisted in, repels the same; sustains her second plea-in-law; sists further procedure for six months in order to give the pursuers time, if so advised, to raise and follow forth an action in the English courts, and grants leave to reclaim.”

The defender reclaimed, and argued that the case should have been dismissed. The rule was that where a plea of *forum non conveniens* was sustained the action should be dismissed—*Sim v. Robinow*, March 17, 1892, 19 R. 665, at p. 669, 29 S.L.R. 585. The pursuer could obtain in it no decree on the

merits, and the action was of no use for putting in force a decree obtained in an English action, for that could be effected under the Judgments Extension Act 1868 (31 and 32 Vict. cap. 54). The cases of *Hawkins v. Wedderburn* (March 9, 1842, 4 D. 924) and *Fordyce v. Bridges* (June 2, 1842, 4 D. 1334) were prior to the date of that Act, and were also to be distinguished, in that the Scottish actions were in these cases brought purposely for the sake of the arrestments on the dependence in conjunction with actions already proceeding elsewhere. In this case there was no action proceeding in any other Court.

Argued for the pursuers—The course taken by the Lord Ordinary was right. The plea of *forum non conveniens* was only to be sustained when the pursuer had elsewhere as full a remedy—*Williamson v. v. North Eastern Railway Company*, February 28, 1884, 11 R. 596, at p. 600, 21 S.L.R. 421, but if this action were to be dismissed the pursuer would not have as full a remedy, for he could not arrest here on the dependence of a case in England. It had further been decided that if the defender had funds in Scotland the pursuer was entitled to have an action there, although the object of such action was merely to get the benefit of an arrestment on the dependence—*Hawkins v. Wedderburn, cit. sup.*; *Fordyce v. Bridges, cit. sup.* It followed that the pursuer was entitled to have an action already brought kept in Court for the same purpose. The right to raise such an action existed at any time, and could not be affected by the Judgments Extension Act, which merely simplified the procedure in carrying out a decree obtained elsewhere. Such an Act could not be held to have taken away a very valuable right, viz., that of having the defender's property maintained intact until the pursuer had an effectual decree.

At advising—

LORD PRESIDENT—This is an action at the instance of a firm of tailors of Carlisle against a Mrs Mackintosh, residing at Stanwix, near Carlisle, to recover a sum of money, the price of goods supplied by them. Among other pleas taken by the defender is one of *forum non conveniens*, and that plea was sustained on a former occasion when the case was before you. The case at that time went back to the Lord Ordinary, and would no doubt have been dismissed, but that meanwhile the pursuers had arrested on the dependence of the action and asked that it should not be dismissed but sisted. The avowed object was to have the advantage of such arrestment at a later stage of their proceedings, and was in order that when it should be necessary to put in force the decree to be obtained in the action about to be raised in England, the defender's property here should be found intact. As authority for this position we were referred to the case of *Hawkins v. Wedderburn*, 4 D. 924, a decision of the whole Court, and also that of *Fordyce v. Bridges*, in the same volume of the reports. If this case were precisely on all fours with that of *Hawkins* I would

be of opinion that, looking to the great weight of the opinions of the minority in that case, this one should be sent to a larger Court in order that that decision should be reconsidered in view of the difference created by the passing of the Judgments Extension Act 1868. But this case is not on all fours with that of *Hawkins*, for there there was in England a living case. Here there is none. Here it is only said that the pursuers intend raising an action in England. Now I am not prepared to push the case of *Hawkins* one step further than it goes. I think that the defender's plea of *forum non conveniens* having been sustained the action should be dismissed, and I am therefore for recalling the interlocutor of the Lord Ordinary reclaimed against.

LORD KINNEAR—Two preliminary pleas are stated for the defender. The first is "No jurisdiction." The second is "*Forum non conveniens*," which is equivalent to "*forum non competens*," and it means that of two courts having jurisdiction it is proper that the case should be tried in one and not in the other. There is no doubt as to the first plea. Arrestments *ad fundandam jurisdictionem* were laid on in respect of which this Court undoubtedly has jurisdiction. But it is now finally decided that the other plea has been rightly sustained, and that the action ought not to proceed here but in a court in England, which is the proper *forum* both of the pursuer and the defender. It would seem to follow of logical necessity that the action should be dismissed. It has been decided that it is not to go on in this Court. I cannot see why, if it has been decided that the action is not to be sustained, it should nevertheless be kept alive in order to give the pursuer the benefit of a diligence in security which the law of the *forum* to which he is bound to resort will not allow him. The law and practice of this country enables the pursuer to arrest on the dependence of an action in this Court, but if this Court refuses to entertain the action I know of no authority and no legal principle to support an arrestment in Scotland on the dependence of an action in a foreign court.

I should therefore have had no difficulty in dismissing the action, and I understand that your Lordship in the chair would have had none either, if it had not been for the case of *Hawkins* (March 9, 1842, 4 D. 924). I agree that if that case were directly applicable we should be bound either to follow it or to send this case to Seven Judges, to consider whether the case of *Hawkins* is still a binding authority in view of the provisions of the Judgments Extension Acts (31 and 32 Vict. cap. 34, and 45 and 46 Vict. cap. 31). I should certainly not be inclined to decide that question without sending it to be considered by a larger court. But the decision in *Hawkins* is not directly in point. The plea taken there was not "*forum non competens*" but "*lis alibi pendens*." That plea could not possibly be stated in the present case, be-

cause there is no action depending in England, and besides proceedings in a foreign court do not constitute *lis alibi pendens* in the proper sense. The cases are therefore distinguishable. I think the pursuers are entitled to found upon the reasoning of the majority of the judges in *Hawkins* in support of their contention that an action may be entertained for the purpose of authorising diligence although it ought not to be entertained on the merits. But there is a difference between the authority of judicial reasoning on a point on which judgment has not actually passed and the authority of a decision. The decision is binding upon us, but I am not prepared to hold the Court bound by all that was said in the course of delivering judgment.

LORD PEARSON—This is an action on a contract between two parties, both of whom are resident and (so far as appears) domiciled in England. The contract sued on was made and performed in England; the law applicable to that contract is admittedly the law of England, and I read the pursuers' averments as implying that there is no obstacle to their having the case tried in England in the County Court (for which it seems well adapted), or, if they prefer it, in the High Court of Justice.

It is not disputed that jurisdiction in this Court has been well founded by arrestment. But the defender pleads "*forum non conveniens*," and the Lord Ordinary has sustained that plea and sisted procedure for six months to give the pursuers time, if so advised, to raise and follow forth an action in the English courts. The defender objects to the sist of procedure, and maintains that as the plea of *forum non conveniens* has been sustained the action should be dismissed. Dismissal is perhaps the course most usually adopted when that plea is sustained, but the procedure to be followed is to a certain extent in the discretion of the Court.

In the present case the pursuers, in supporting the six months' sist granted by the Lord Ordinary, rely (1) upon the fact that the separate estate belonging to the defender as a married woman is in Scotland, in the hands of two trustees who are solicitors in Aberdeen, and (2) on two cases reported in the 4th volume of Dunlop (*Hawkins*, p. 924, and *Fordyce*, p. 1334), which they say are authorities for keeping this action in Court until the pursuers have raised their action in England and have obtained decree in it. The avowed purpose is, that the pursuers by arresting on the dependence of the present action may secure a fund to answer the English decree for payment if and when they obtain it. I know of no authority in the law of Scotland which goes the length of sustaining a summons in this Court raised avowedly for that limited purpose unless the action or suit is already in dependence in England at the time the Scotch action is raised. Certainly neither *Hawkins* nor *Fordyce* is an authority for that proposition. In the latter case the opinion of Lord Justice-Clerk Hope, which may be regarded as

expressing the doctrine at its highest, distinctly says that it is the dependence of the suit in England which gives jurisdiction in Scotland to the effect of securing the defender's property for the ultimate safety of the pursuer. For my part, while giving all due obedience to the principle laid down by a majority of the whole Court in *Hawkins*, I am not prepared to take a step further in the same direction, which we should be doing if we were to sustain the present action to the limited effect of enabling the pursuers to secure funds to answer a decree to be pronounced in an English proceeding not yet begun. On reading the Lord Ordinary's note in the case of *Hawkins* I was under the impression that the case of *MacMaster* (6 Jurist 394, 12 S. 731), to which he refers, was an instance to the contrary, as the first of the two actions there was raised in Scotland. But on a perusal of that case it appears that it differed entirely from the case now in hand, and really has no bearing on the question now raised. In particular, there was no question at all as to arrestment on the dependence.

I am therefore for dismissing the action.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action.

Counsel for the Pursuer and Respondent—M'Lennan—Graham Stewart. Agents—Gunn & Mulcaster, S.S.C.

Counsel for the Defenders and Reclaimers—A. J. Young—Wm. Thomson. Agents—J. Douglas Gardiner & Mill, S.S.C.

## HIGH COURT OF JUSTICIARY.

Friday, March 17.

(Before the Lord Justice-General, Lord Justice-Clerk, Lord Kinnear, Lord Kyllachy, and Lord Kincairney.)

### LAIRDS v. NEILSON.

*Justiciary Cases—Suspension—Complaint—Specification of Time and Locus—Form of Conviction.*

A and B were tried in a Police Court on a complaint setting forth that they did on a specified date in Adelphi Street, Glasgow, (First) conduct themselves in a riotous and disorderly manner, by using abusive and obscene language to C; (Second) that A assaulted C by throwing liquid from a bottle upon her; (Third) that B assaulted C by striking her. The presiding Magistrate found the accused guilty of the "crimes charged." *Held* (1) that the complaint was not wanting in specification as regards *locus* and time, and (2) that the conviction was not ambiguous in form.

*Justiciary Cases—Suspension—Summary Conviction—Refusal to Hear Witnesses—Remit to Sheriff.*

Two persons convicted in a Police Court brought a bill of suspension on an averment that the magistrate trying the case had refused to swear or hear witnesses brought by the accused to rebut the charges laid against them. The Court *remitted* to the Sheriff to inquire into and report upon this averment.

Annie Laird and Catherine Kelly or Laird, Main Street, Glasgow, were tried at the Glasgow Southern Police Court on 22nd February 1905 on a charge at the instance of George Neilson, Procurator-Fiscal, Central Police Chambers, Glasgow, on the complaint that they did on the 13th day of February 1905, in Adelphi Street, South Side, Glasgow, "(First) Conduct themselves in a riotous and disorderly manner, by cursing, swearing, shouting, and using obscene and abusive language towards Mary Ann M'Manus or Thomson, of 52 Rose Street, South Side, and Margaret M'Manus or Watson, of 7 Park Place, both in Glasgow, in breach of the peace; (Second) the said Annie Laird did assault the said Mary Ann M'Manus or Thomson, and did throw a quantity of liquid from a bottle on her face and in her eyes; and (Third) the said Catherine Kelly or Laird did assault the said Margaret M'Manus or Watson, and strike her on the face with her hand to the effusion of blood."

The Magistrate who tried the case, after hearing evidence, found the accused "guilty of the crimes charged," and sentenced each to thirty days' imprisonment.

The complainers brought a suspension on the averment that their law-agent had adduced, *inter alios*, four witnesses named, and that the Magistrate would neither swear them nor allow them to give evidence. They also averred that the complaint under which they were charged was irrelevant, in respect that neither time nor place was averred in the second and third charges, and that it was ambiguous, as was also the conviction following thereon.

Argued for the complainers—The terms of the conviction were inaccurate in respect of its finding the complainers guilty of the "crimes charged;" moreover, the second and third counts of the complaint were irrelevant, in respect of the omission to state date and *locus*. A gross irregularity had taken place in respect of the Magistrate's refusal to hear certain witnesses for the complainers, and the case should be remitted to the Sheriff to inquire into the facts—*Wright v. Dewar*, November 27, 1873, and March 9, 1874, 2 Coup. 505, 1 R. (J.C.), 11 S.L.R. 335.

Argued for the respondent—A remit was only allowed where complainer's averments were relevant and admitted to be so by the respondent—*Cochran v. Walker*, June 9, 1900, 3 Adam 167, 2 F. (J.C.) 52, 37 S.L.R. 753; also *Nardini v. Walker*, March 18, 1903, 4 Adam 174, 5 F. (J.C.) 69, 40 S.L.R. 557. The case of *Sime v. Linton and Another*, June 7, 1897, 2 Adam 280, 31 S.L.R. 664, was not in point. The complaint and conviction were both clear and unambiguous,