a sounder discretion if, taking the fact into consideration that those two brothers were now to some extent provided for, they had not continued to give the £200 which they had power to do under the tenth purpose, but that was purely a matter of discretion. In this case I think it is the same as if the income that was given to the younger brothers had come from an entire stranger. Upon these grounds, with reference to this part of the deed, as far as the case of William is concerned, I entirely concur with Lord M'Laren and differ from the Lord Ordinary.

Now, I do not think the case of the other brother Alexander can be different from that of William at all, because by the deed, as it appears to me, with regard to the special provisions, of which the £200 is one, Alexander is put in exactly the same position as William. The testator, though he might have other children after the date of the deed, did not care to make another will, but he provides for children coming into existence; he provides for daughters, and then he says that if sons shall come into existence after the date of the will they "shall each receive a proportion corresponding to the special provisions hereinbefore conceived in favour of each of my sons before named." It appears to me that the proper construction of that direction is that Alexander having come into existence after the date of the deed is put exactly in the same position as sons already born. Therefore it appears to me that if the trustees—as I think they had—had power to make those payments to William, they had power to make such payments to Alexander, and I agree with Lord M'Laren that there can be no distinction between the cases of William and Alexander.

I also concur with Lord M'Laren in everything he said with regard to the other points in the deed. With reference to the small matter of interest, I would in addition say that the guarantee given by the two gentlemen under which they are sought to be made liable for £95 was only during and so long as they continued agents in the trust. It is perfectly clear that the trustees' meaning was, not so long as they continued agents in the Brodie trust, but so long as they continued agents in the Traill trust. They were agents for Mr Traill's trustees (the borrowers), and it is perfectly clear on the construction of the obligation that it applied to the time during which they continued agents in that trust. Upon the whole matter I entirely concur with Lord M'Laren.

LORD KINNEAR and the LORD PRESIDENT concurred.

The Court pronounced the following interlocutor:—

"Adhere to the 1st, 4th, and 6th findings of the interlocutor of 22nd November 1892 under the declaration that the pursuers have not stated relevant or sufficient grounds for inferring personal liability against any of the defenders for the capital sums lent on the security of the Traill estates: Recal the 3rd finding of the said interlocutor: Repel the objections stated to the allowances of £200 a-year to each of the truster Kenneth Sutherland Brodie's two sons: Find that the trustees were entitled to make payment to each of the said two sons of the sum of £200 a-year after the trust-disposition of 1876 granted by Arthur James Brodie came into operation: Recal the 2nd and 5th findings of the said interlocutor *in hoc statu*, and decern: Find the defenders entitled to expenses since the date of the interlocutor reclaimed against."

Counsel for Pursuers and Reclaimers—Comrie Thomson—M'Lennan. Agent—Alfred Sutherland, W.S.

Counsel for Defenders and Respondents—Dickson—Salvesen—Craigie. Agents—Horne & Lyell, W.S.

Tuesday, June 13.

FIRST DIVISION.

[Sheriff of Lanarkshire.

DOUGLAS *v.* MAIN.

Reparation—Slander—Wrongous Apprehension—Privilege—Malice—Repetition of Charge of Theft on which Apprehension had Followed, to Members of Public.

In an action of damages for slander and wrongous apprehension the pursuer averred that on a date mentioned he travelled by rail from Glasgow to Wemyss Bay in the same compartment as the defender. There were other passengers in the compartment, and the defender sat at the farthest side from him. At Wemyss Bay he went on board the steamer for Millport, and the defender thereafter caused him to be apprehended on a charge of having stolen her watch. The defender persisted in this charge, though she was assured by some of the other passengers that he was a respectable person. On the way to Millport, after pursuer's apprehension, the defender frequently repeated in a loud tone before the other passengers that the pursuer had stolen her watch. The defender had never lost her watch.

Held that the pursuer had sufficiently averred facts and circumstances from which malice might be inferred, and that he was entitled to two issues—(1) An issue (in which malice and want of probable cause were inserted) relating to his alleged wrongous apprehension; and (2) an issue (in which malice and want of probable cause were not inserted) relative to the alleged repetition of the charge of theft to members of the public subsequent to the pursuer's apprehension.

James Peden Douglas brought an action in the Sheriff Court at Airdrie for slander

and wrongous apprehension against Margaret Main.

The pursuer averred that in June 1892 he was living with his family at Millport; that on June 27th he travelled from Glasgow (Central Station) to Millport *via* Wemyss Bay; that the defender, her mother, and another passenger travelled in the same compartment with him from Glasgow to Wemyss Bay; that a fifth passenger entered the compartment at Bridge Street Station, Glasgow, and left at Paisley; and that the defender sat at the farthest side of the compartment from the pursuer. He further averred—"(Cond. 4) At Wemyss Bay pursuer . . . went on board the steamer for Largs and Millport ('The Marchioness of Lorne') going downstairs to the saloon. . . . On going out of the saloon Constable M'Condie . . . confronted pursuer, and acting on the instructions of defender, and on her information, accused pursuer in presence of defender of stealing a watch from defender in the train between Glasgow and Wemyss Bay. Defender also accused pursuer of having stolen her watch. . . . That pursuer denied, and he thereupon handed his card to the constable, and Mr Hunter and others also testified to pursuer's respectability, and that it was impossible that he could be guilty of such an act, but notwithstanding defender persisted that pursuer stole her watch, and would not allow the constable to release pursuer. Pursuer was accordingly in custody from time of accusation was made till he was liberated at Millport Police Office. The defender frequently, from time of apprehension till the boat reached Millport, in a loud tone of voice continued to say, in the presence of the passengers, that pursuer had stolen her watch, and that he was the only person who was in the carriage with defender and her mother. . . . Pursuer believes and avers that defender never lost her watch, and avers that defender has stated that to several persons since, including Janet Steel, Glenlore Farm, New Monkland, and Margaret Steel, residing there, the exact places and dates being unknown to pursuer." At Millport the pursuer was liberated after being searched. "(Cond. 8) The apprehension of the pursuer by Constable M'Condie and Constable Munro was done by and at the request and on the information of the defender, and in giving the information defender did she acted in a wrongous, illegal, cruel, reckless, oppressive, and malicious manner, and without probable cause, and it was an insult to pursuer, and the loud talking and personal accusation by defender of pursuer being a thief in a crowded place, and her persisting on the constable detaining pursuer in custody after reasonable evidence of his respectability had been established, and of her subsequently concealing the fact that her watch had never been stolen, were wrongous, illegal, cruel, reckless, and oppressive, and malicious, and were made without probable cause."

On 12th April 1893 the Sheriff-Substitute (MAIR), before answer, allowed parties a proof of their averments.

The pursuer appealed to the First Division, and proposed the following issues for trial of the cause—"(1) Whether on or about 27th June 1892, on board the steamer 'Marchioness of Lorne,' during the passage between Wemyss Bay and Largs, the defender maliciously, and without probable cause, caused the pursuer to be apprehended on a charge of theft, and thereafter to be searched by a police officer at Millport, to the loss, injury, and damage of the pursuer? (2) Whether on or about 27th June 1892, on board the steamer 'Marchioness of Lorne,' during the passage from Wemyss Bay to Millport, the defender falsely and calumniously stated, in presence and hearing of Charles Hunter, grocer, Millport, and Peter Campbell, grocer, Millport, that the pursuer had stolen her watch, to the loss, injury, and damage of the pursuer?"

The defender objected to the relevancy, and argued—1. In regard to the first issue, it was not only necessary for the pursuer to aver malice, but to aver facts and circumstances from which malice might be inferred. This he had failed to do, and accordingly the first issue should be disallowed—*Lightbody* v. *Gordon*, June 15, 1882, 9 R. 934. 2. The alleged repetition of the charge made by the defender against the pursuer after the latter's apprehension was part of the *res gestæ* connected with the charge originally made, and the second issue should therefore be disallowed—*Hassan* v. *Paterson*, June 26, 1885, 12 R. 1164; *Ferguson* v. *Colquhoun*, July 19, 1862, 24 D. 1428. There was no such lapse of time between the bringing of the original charge and its repetition as in *Walker's* case.

Argued for the pursuer—1. The pursuer's averments, if true, showed that the defender had made a charge of theft on most insufficient grounds against a respectable citizen, and had recklessly persisted in that charge after having been informed of his respectability. There was thus, in the sense of the decisions, a sufficient averment of facts and circumstances from which malice might be inferred. 2. The allegation that the defender went about after the apprehension repeating her accusation against the pursuer entitled the pursuer to the second issue—*Walker* v. *Cumming*, February 1, 1868, 6 Macph. 318.

At advising—

LORD PRESIDENT—As regards the first issue, I cannot say that I have any doubt that the averment of facts and circumstances is sufficient to justify the inference of malice. On the second point, it is to be observed that according to the pursuer's account the defender went about proclaiming him to be a thief after he had been apprehended, and accordingly after the legitimate object of the defender in bringing the accusation, assuming it to have been well-founded, had been served. It seems to me that this is a separate and substantially distinct charge against the defender, and therefore I think that separate issues should be allowed.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court approved of the two issues proposed by the pursuer.

Counsel for the Pursuer—Baxter. Agent—John Veitch, Solicitor.

Counsel for the Defender—A. S. D. Thomson. Agents—Gray & Handyside, S.S.C.

Wednesday, June 14.

SECOND DIVISION.

[Sheriff of Aberdeen.

STOTT *v.* ALLAN.

Process—Proof—Motion to Examine Persons Precognosced but not Examined at Proof—A.S. 10th July 1839, sec. 83.

In an action of filiation a motion by the defender that the Court should open up the proof and allow him to lead the evidence of persons who had been precognosced on his behalf before the proof, but had not been examined at the proof, *refused.*

Margaret Allan, formerly domestic servant at the Douglas Hotel, Aberdeen, raised an action in the Sheriff Court at Aberdeen against John Stott, a son of the hotelkeeper, for aliment for her twin illegitimate children, of whom she averred that the defender was the father. The children were born on 27th July 1892.

The defender lodged defences denying the paternity, and averring that the father of the pursuer's children was D. Carr, who had gone to America.

A proof was led before the Sheriff-Substitute (DUNCAN ROBERTSON) on 28th February 1893.

After the proof was closed the defender presented a petition to the Sheriff-Substitute "to open up the proof, and to allow the defender to adduce Helen Johnston, domestic servant, Saltoun Arms Hotel, Fraserburgh, as a witness in the cause, in order to prove that on a Sunday evening in or about the month of April 1892, in the servants' bedroom within the Douglas Hotel, Aberdeen, the pursuer Margaret Allan stated to the witness that she did not believe she would ever see the father of her child again, and that she would have to bring it up herself; that the father of the child was D. Carr, who had gone or was going to America; and that the pursuer corresponded with D. Carr, receiving letters from him every fortnight or three weeks while she was in the Douglas Hotel."

In his condescendence the defender averred—"(1) The proposed witness Helen Johnston was a housemaid in the Douglas Hotel, Aberdeen, from May 1891 to November 1892, and occupied the same bedroom with the pursuer Margaret Allan and the witnesses Ligertwood and Simpson. (2) The defender's agent examined her before the proof, but failed to get from her the information which she has now volunteered to give. (3) On 28th February, the day of the proof, Jessie Stott, the sister of the defender John Stott, wrote to the proposed witness the letter herewith produced, making inquiry as to articles of clothing which had been missed from the hotel, and in reply received from her the letter dated 1st March, also herewith produced." This letter contained the following—"I don't think I told the lawyer of Maggie Allan saying to me that she did not believe she would ever see the father of her child again, and that she would have to bring it up herself. If it is of any use now I am ready to swear to it. I quite forgot about it at the time I saw him.—Yours, HELEN JOHNSTON."

The defender pleaded—"The defender having now discovered (which he was unable to do before) that the proposed witness Helen Johnston can give important testimony in the case, and her statements being material to the issue of the cause, the defender ought to be allowed to lead the further proof craved by him."

On 4th March 1893 the Sheriff-Substitute refused the prayer of the petition.

"*Note.*—I must say I think this is a very clear point. The proof has been closed, parties heard, and the case is at avizandum. The defender now asks to be allowed to examine another witness. The defender cannot say that this witness has come to his knowledge since the proof. On the contrary, he states that his agent precognosced her, no doubt upon this very point upon which he now says she is prepared to speak, but when precognosced apparently she could say nothing in favour of defender's case. To allow her now to be examined would, in my view, be a most dangerous proceeding, and one certainly not borne out or supported by any of the reported cases—*Brown* v. *Gordon*, January 27, 1870, 8 Macph. 432; *Mabon* v. *Cairns*, October 29, 1875, 3 R. 47."

The defender appealed to the Sheriff (GUTHRIE SMITH), who on 22nd March dismissed the appeal and affirmed the interlocutor appealed against.

On 8th April 1893 the Sheriff-Substitute found that the defender was the father of the pursuer's children, and gave decree against him. In his note the Sheriff-Substitute stated that the case was unquestionably a narrow one.

The defender appealed to the Second Division of the Court of Session.

When the appeal was called the defender renewed his motion that he should be allowed to adduce Helen Johnston as a witness in the cause, and also to examine as a witness another person who had been precognosced before the trial but had not been examined at the proof, in order to prove that the pursuer and D. Carr had been seen in Aberdeen together in October, November, and December 1891, and that on one occasion they had gone into a stable together and remained there twenty minutes.

Argued for the defender—The additional evidence should be allowed. The Sheriff-