special legacy to the children of Mrs Dallas.

The facts, therefore, were that here was a special legacy which on the face of the settlement it was absolutely clear was given to the children of the deceased Mrs Dallas, and nobody had ever said anything to the contrary. Applying the tests your Lordships have laid down, it is quite out of the question that people are to be entitled to cause all the expense of a multiplepoinding just because at the end of a counsel's opinion on the question of discharge he put a suggestion that possibly it might be suggested that some other persons might have a right.

Accordingly, I am of opinion that when this multiplepoinding was raised, there was no ground for having a multiplepoinding in which all these special legacies were included. The multiplepoinding which counsel really contemplated was one concerned only with Miss Gollan's legacy.

In ordinary circumstances the result of that view would be to dismiss the action; but then I think that certain circumstances have arisen since the multiplepoinding was brought which do show that there is room for a multiplepoinding though not exactly this multiplepoinding. That being so, your Lordships will be very unwilling to cause additional expense if that can be avoided.

The doubts that have arisen are these—(1) There is a legacy to the Free Church. At the time the multiplepoinding was raised there could be no question as to who were the Free Church, because the judgment of the Court of Session had not then been reversed by the House of Lords. But it is common knowledge that after the reversal in the House of Lords there are two bodies that might claim the legacy. (2) There is another matter which raises a question which might probably be argued. In the clause I have read there is a provision substituting the children or executors and next of kin of predeceasing persons as the only persons to whom legacies may be paid. I can conceive that a question may be raised as to whether that provision applies to the residue itself.

Both these questions seem to me to be questions which the trustees are entitled to raise in a multiplepoinding, and therefore I should not wish to turn this action out of Court. I would therefore propose that your Lordships should find that the action is incompetent in so far as it deals with this special legacy, but instead of the action being dismissed, that it should be remitted to the Lord Ordinary to see that the pursuers and real raisers should have an opportunity of amending their condescendence of the fund *in medio* and thereafter proceeding with the action.

LORD M'LAREN—I concur. I only add a sentence upon the point of the criterion of double distress in a multiplepoinding. It might at first sight appear hard on trustees that they should be put into the position of having to administer an estate where there is a doubt as to the person entitled, but where the parties have not put forward competing claims. In such a case it seems to me the duty of the trustees would be, if they are advised by counsel as to which of the parties has the better right, that they should communicate with the other party and ask that other party whether he wishes that his legacy should be made the subject of an action—whether he makes a claim to it or not. If he says he makes no claim to it, then they are in safety to pay in accordance with the opinion they have got. If he says he does make a claim, and that they pay it to the other party at their peril, then I do not think there could be much doubt, if the sum were a substantial sum, that the trustees would be justified in taking the case into Court.

In this particular case I agree with your Lordship there are questions—though not questions agitated when the multiplepoinding was raised—that make it desirable that the rights of parties in this estate should be the subject of judicial determination.

LORD ADAM and LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"Recal said interlocutor: Find that the action is incompetent in so far as it submits for adjudication the special legacies mentioned in article 3 of the condescendence other than that to Miss Catherine Gollan, and remit to the Lord Ordinary to proceed in accordance with this interlocutor, and decern: Find the defenders entitled to expenses," &c.

Counsel for the Pursuers (Real Raisers) and Respondents—Mackenzie, K.C.—Macphail. Agent—Forrester & Davidson, W.S.

Counsel for the Defenders and Reclaimers—Kennedy—J. B. Young. Agents—Forbes Dallas & Company, W.S.

Tuesday, June 27.

FIRST DIVISION.

HOPE *v.* DERWENT ROLLING MILLS COMPANY, LIMITED.

Jurisdiction — Arrestment jurisdictionis fundandae causa — Amendments Subsequently Made in course of the Action.

Held that an arrestment *jurisdictionis fundandae causa* constitutes a proper foundation for jurisdiction in an action, although the action is subsequently altered and amplified by amendments, provided that these amendments are competent.

Process — Amendment — Competency of Amendments—Summons Laid on Bill of Exchange—Insertion of Alternative Conclusion and Averment of Circumstances in which Bill was Granted.

In an action originally laid on a bill of exchange drawn by the pursuer upon and accepted by the defender, *held* that an amendment inserting an alternative conclusion for payment of

the sum in the bill of exchange, and an amendment setting forth the circumstances under which the bill of exchange was granted, were competent amendments.

Loan—Proof—Writings Held Sufficient to Prove Loan.

Held that a cheque granted by the lender, post-entries in pencil in the borrower's ledger, and an entry by the borrower in a statement of account between him and the lender, taken together, constituted sufficient written proof of loan.

This was an action at the instance of Henrietta Alice Ashby or Hope, with the consent and concurrence of her husband John Alfred Hope, against the Derwent Rolling Mills Company, Limited, Workington, against whom arrestments had been used *ad fundandam jurisdictionem*, concluding for payment "of the sum of £500 sterling, being the amount contained in a bill of exchange, dated 19th February 1902, drawn by the female pursuer upon and accepted by the defenders, and payable on demand with interest. . . . *Or otherwise, the defenders ought and should be decerned and ordained by decree foresaid, to make payment to the pursuer of the sum of £500 sterling, with interest.* . . ." The words printed in italics were added by an amendment in virtue of an interlocutor of the Lord Ordinary, dated 12th December 1902. The record was closed on 13th January 1903.

The pursuers averred (Cond. 1) that by bill of exchange dated 19th February 1902, drawn by the female pursuer upon and accepted by the defenders, the latter bound themselves to pay to the said pursuer on demand the sum of £500 sterling for value received. They admitted that the acceptance was written by the secretary of the defendant company, and averred (Cond. 2) that the sum contained in the said bill was still due and resting-owing.

The defenders (Ans. 1) averred that the acceptance of the bill in name of the defendant company was written by John Cunningham, the secretary of the company, and was not authorised by the board of directors—"By the articles of association of the company it is provided. . . . 'The board may, under special circumstances, authorise two directors and the secretary to draw, make, endorse, and accept bills of exchange and promissory-notes.' The said acceptance in name of the said company was *ultra vires* of the said John Cunningham, and the defenders are not thereby bound. Both the pursuer and her husband knew when she took the said bill that the secretary had no authority to grant it, and that the defenders had received no value for the said bill."

With regard to the circumstances in which the bill of exchange was granted the pursuers averred :—(Cond. 3) "In the beginning of February last the Derwent Company contracted to purchase from Le Bas & Co. of Billiter Street, London, a cargo of steel bars, and being short of funds and unable to uplift the bills of lading for the said cargo, approached Mrs Hope through her husband, who was a member of the board, and requested an advance for this purpose. Mrs Hope attended a meeting of the directors on 5th February, and at that meeting agreed to advance the sum necessary to enable the company to uplift the bills of lading. Mrs Hope on the same day granted a cheque in favour of the company for £2000 for this purpose. On 15th February the bills of lading were uplifted. The amount required for this purpose was £2196, 17s. 3d. (*of which £196, 17s. 3d. was advanced by the company's bankers*), and Mrs Hope advanced the company a further sum of £196, 17s. 3d. It was a condition of said [*transaction that the warrants representing the said cargo should be held subject to Mrs Hope's orders and released by her from time to time to such extent as should be required by the company, and that the company should pay to Mrs Hope the value of each lot of bars so released. When Mrs Hope was asked to release a second lot of bars the bill sued on was handed to her by the company on account of the value of said lot and the first lot released by her. The*] advances that the company should grant Mrs Hope a bill for £500 payable on demand to secure her against loss in the realisation of the cargo, and the board agreed to grant it. In pursuance of said agreement the said bill was executed with the authority of the board. Mrs Hope has received from time to time the sum of *(£670)* £866, 17s. 3d. in repayment of said loan, but the balance thereof, with interest, still remains due."

[What is printed in italics was added on amendments—the portions within round brackets having been allowed by interlocutor of 16th December 1903, and the portion within square brackets by interlocutor of 16th December 1904; the portions underlined were deleted in the record.]

The defenders (Ans. 3) "admitted that the Derwent Company, prior to 15th February last, contracted to purchase from Le Bas & Co. a cargo of iron bars; that the company approached Mrs Hope in regard to the matter; and that on 15th February she agreed to purchase and take over the bars on her own account. On said date the bills of lading were uplifted by her, and she paid the price, viz., £2196, 17s. 3d. by cheque, in favour of Le Bas & Co." [the cheque was for a sum of £2000]. They further admitted that the company had from time to time made payments to Mrs Hope, but explained that these payments were made on account of the price of bars received by the company from Mrs Hope.

With reference to the letters of arrestment to found jurisdiction against the defenders, the defenders averred—"The said letters of arrestment have been executed only with reference to the sum alleged to be contained in and due under the bill of exchange, being the debt originally sued for. The said letters are not competent to found jurisdiction with reference to the alleged loan of £500 said to be due

apart from the bill, as set forth in the amendment added to the summons after the execution of the said letters of arrestment."

The pursuers pleaded, *inter alia*—"(1) The sum sued for being due and resting-owing to the female pursuer under the bill of exchange libelled, decree should be pronounced as concluded for, with expenses. (2) The female pursuer having advanced on loan to the defenders the sums above set forth [*or, in any event, having disbursed the same on behalf of the company and at their request*], and the defenders being due and resting-owing to her in respect [*thereof*] of said loans in a sum exceeding the sums sued for, the pursuers are [*is*] entitled to decree as concluded for. (5) The defences are irrelevant."

[The words printed in italics were amendments allowed by interlocutor of 16th December 1904; the words underlined were deleted.]

The defenders pleaded, *inter alia*—"(1) No jurisdiction *quoad* the alleged debt referred to in the alternative conclusion of the summons, added by way of amendment after execution of the letters of arrestment to found jurisdiction. (2) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons. (6) The averments of loan can only be proved by writ or oath of the defenders."

Intimation of the action was made to Mr William B. Peat, who had been appointed by the English Courts receiver on defenders' estates, in order that he might sist himself, if so advised. On 4th July 1903 Peat was sisted as a defender.

A proof was led. The material facts disclosed in the proof are sufficiently set out in the opinions of the Lord Ordinary and the Lord President.

The bill founded on by the pursuers was in these terms:— "*Derwent House, Workington, 19th Feb.* 1902.

"£500. Stp. 5/0d.

"On demand pay to me or my order the sum of Five hundred pounds for value received. (*Sgd.*) H. A. HOPE.

"*To* Derwent Rolling Mills Co., Ltd. Workington."

The following was written across the face of the bill:—

"Accepted payable at the York City and County Bank, Sheffield.

"*For* DERWENT ROLLING MILLS CO., LTD., JOHN CUNNINGHAM, *Secretary*."

In a statement of account between the pursuer Mrs H. A. Hope and the defenders (No. 82 of process), dated 7th November 1902, there occurred this entry—"Feb. 15, 1902.—By cash received for bars £2196, 17s. 3d." By joint-minute of the parties it was admitted that, *inter alia*, No. 82 of process was a true copy of the original document.

The defenders' cash-book contained the following entries in pencil:—

Dr.

Feb. 15.—Mrs Hope . . £2196, 17s. 3d.

Cr.

Feb. 15.—E. Le Bas & Co. . £2196. 17s. 3d.

On 16th December 1904 the Lord Ordinary (KYLLACHY) decerned against the defenders, the Derwent Rolling Mills Company, Limited, for £500 as concluded for, and found the defenders liable in expenses.

Opinion.— . . . "What I have to decide is whether or not on the whole matter the defenders have any good defence to the pursuer's claim. I am of opinion in the negative, and I am disposed to think that when the case is understood no other result is possible.

"The facts—the relevant facts—are very simple, and are, I think, shortly these. The defenders' company had in the beginning of 1902 bought for the purposes of their works a cargo of iron bars to be paid for on ship's arrival, and exchange in due course of dock warrants for bill of lading. When the iron arrived the company were unable to pay the price, which turned out to be £2196. The iron was required, and if not got the company's rolling mills must have been stopped. In these circumstances the pursuer, who is the wife of the managing director and principal shareholder of the company, was applied to for an advance out of her separate estate of £2000 to enable the company to take up the warrants. She ultimately agreed, on being secured to the satisfaction of her solicitors, who were, as it happened, also the solicitors of the company's bankers. The result was an arrangement whereby by means of the £2000 which she provided, and £196 provided by the bank, the pursuer took up the warrants, doing so in her own name, but on the footing that she should release or deliver them to the company in lots as required, upon payment for each lot of a proportion of the disbursed price. She agreed also, in consideration of the company's bankers advancing the said £196, that they should hold the warrants to her order and on her behalf, but primarily in security to themselves (1) of the £196, and (2) of a previous advance of about £350 made by them to the company on the pursuer's guarantee. In the outcome of the transaction the pursuer received only about £670 to account of her £2000. For the rest, unfortunately for herself, she released the warrants, or allowed their delivery to the company, upon receipt only of the company's cheques, and not of cash. Of these cheques she has not yet got, and I am afraid is not likely to get, payment. She got, however, upon the release of the first two lots of warrants (about 100 tons) a bill for £500 payable on demand and signed by the company's secretary. For the amount of this bill she some time ago brought the present action, the bill being produced and founded upon. But the facts being as I have said, the summons was at an early stage amended, I think sufficiently, to cover any claim within the amount sued for, which upon the actual facts arose to the pursuer against the company.

"Such being the position—the facts being what I have said, and being really not in dispute—it should, one would have thought, have been difficult to find materials for litigation. The pursuer being undoubtedly

creditor of the company for an amount largely exceeding the sum sued for, it would not have occurred to one as useful to inquire critically to what precise legal category the transaction should be referred. For the pursuer sued simply as an ordinary creditor of the company, and doing so, it could make no difference as to her right to decree that she had founded jurisdiction by arrestments, and had also used arrestments upon the dependence. The defenders' company, however, having got into difficulties, defences were lodged, and a receiver having been subsequently appointed, that official was sisted as a defender, and has thought it necessary to litigate, doing so, it appears, in the view that as acting for creditors it was his duty —as perhaps it was—to state all pleas, however technical, which might suffice to throw out the action, and so to destroy the arrestments. And the pleas which he has in this view maintained are, in substance, I think, these — (1) That the action, so far as rested on the bill, is bad, because the bill is not signed by two directors in terms of the articles of the company; (2) that so far as the action is founded on loan, the loan is not proved *scripto* as required by the law of Scotland; and (3) that the true legal category under which the pursuer's claim comes is not loan, but either mandate or sale and delivery, neither of which grounds of action are, it is said, properly pleaded upon record.

"Now, I am bound to say that for myself I see no substantial objection to the pursuer's action, even as laid on the bill. It may be true that the bill was not signed, as required by the articles of the company, by the secretary and two directors. But it is, I think, sufficiently proved that it was got by the pursuer in exchange for warrants of about equivalent value, which she released to the company at the time; and it seems to me that if the company desires to repudiate that transaction as *ultra vires* of their official, they can only do so by returning to the pursuer her warrants, which is not proposed, and is indeed now impossible.

"Apart therefore altogether from the amendment made on the summons when the action came into Court, and the additions to the condescendence thereafter made on adjustment (an amendment and additions entirely regular), I am not, as at present advised, prepared to say anything against the propriety of the action, even as originally laid. And I am the less prepared to do so because our rule of process (which in an action like this I suppose still requires the mention in the summons of any liquid document of debt on which the pursuer may propose to found) does not, as I understand it, preclude the pursuer from resting her case ultimately, not upon the document of debt itself, but upon the contract, whatever it is, which lies behind the document.

"Again, I see no particular difficulty—taking the record as it now stands—in maintaining the action, if that is desired, as an action laid upon *loan*. There may be a question whether in strictness the real contract between the parties was not rather the contract of *mandate*—the pursuer interposing and taking up the warrants on behalf of the company and at their request, and being entitled, by way of indemnity for what she disbursed, to a sum considerably exceeding the sum sued for. But the transaction may, nevertheless, I think, quite fairly be described as a *loan*; and as such it is, I cannot doubt, quite sufficiently proved *scripto*. It is so, *inter alia*, (1) By the pursuer's cheque which was endorsed by her husband on behalf of the company, and was, as so endorsed, delivered to her, and transmitted by her to the company's bankers to be used by them (as it was used) for the company's purposes; and (2) by entries in the company's books, which, although made in pencil, and made, as the secretary explains, at posting, are yet perfectly true entries, and constitute by our law the company's writ.

"Supposing, however, all this to be otherwise — supposing that the contract between the parties was really one of mandate, or supposing even (what I think is absurd) that the pursuer bought the iron on her own account and sold it to the company from time to time by ordinary sale — supposing either of these things, what does it matter? It involves at most certain amendments on the condescendence and on the pursuer's pleas—amendments which are not only competent, but which it is the duty of the Court to make if it be necessary for determining the real question between the parties. And if the pursuer desires it, I shall have no difficulty in allowing or making any amendment necessary. What the effect of those amendments or of the original amendment of the summons may be on the pursuer's arrestments I am not called on to decide. I am merely concerned at present with the decree to be pronounced in this action. But I shall be glad to hear, before signing the interlocutor, what the pursuer's counsel say on the subject of any further amendment. Subject to any question of expenses connected with such amendment, my opinion is that the pursuer is entitled to decree as concluded for, with full expenses against the company and also against the receiver."

The defenders reclaimed, and argued—The original action was laid only on the bill of exchange, and under the articles of association of the defendant company that bill was bad. Arrestments *fundandæ jurisdictionis causa* founded jurisdiction only in the action as originally laid, and did not warrant decree in an action which had been fundamentally altered. Jurisdiction based on arrestment was limited in its effects and rested on a fiction—Voet, ii, 4, 22; *Scruton* v. *Gray*, December 1, 1772, M. 4822; Ersk. Inst. i, 2, 19; *Young* v. *Arnold*, 1683, M. 4833; *Ashton* v. *Mackrill*, June 17, 1773, M. 4835; *Cameron* v. *Chapman*, March 9, 1838, 16 S. 907; *Bertrams* v. *Barry & Bruce*, March 6, 1821, F.C. (20 F.C. 309). The nexus laid on the foreigner's goods was loosed so soon as he gave security *judicio sisti*—Ersk. Inst. i, 2, 19. The forms

of letters of arrestment to found jurisdiction—Jurid. Styles, 1st ed., 1794, vol. ii, 439, 2nd ed., 1828, vol. iii, 553, 3rd ed. 1888, vol. iii, 305—were referred to—*Parnell* v. *Walter*, July 3, 1889, 16 R. 917, at p. 924, 27 S.L.R. 1. The arrestment had not the effect of subjecting the arrestee to jurisdiction in any action other than that for the purpose of which the arrestment was used, even though the new action was at the instance of the same party or in reference to the same matter—*Andersen* v. *Harboe*, December 12, 1871, 10 Macph. 217, 9 S.L.R. 155; *Goodwin & Hogarth* v. *Purfield*, December 8, 1871, 10 Macph. 214, 9 S.L.R. 151. The amendments here altered the ground of action—*Bank of Scotland* v. *W. & G. Ferguson*, November 24, 1898, 1 F. 96, 36 S.L.R. 89. The amendments allowed were incompetent as raising a different question between the parties from that intended by the summons—*Gibson's Trustees* v. *Fraser*, July 10, 1877, 4 R. 1001, 14 S.L.R. 631; *Malcolm* v. *Campbell*, December 9, 1891, 19 R. 278, 29 S.L.R. 235; *Leny* v. *Magistrates of Dunfermline*, March 20, 1894, 21 R. 749, 31 S.L.R. 617; *Hannay* v. *Muir*, December 16, 1898, 1 F. 306, 36 S.L.R. 228; *Russell, Hope, & Company* v. *Pillans*, December 7, 1895, 23 R. 256, 33 S.L.R. 242. The pencil jottings in the defenders' books were not writ of the character necessary to instruct loan—*Wink* v. *Spiers*, March 23, 1868, 6 Macph. 657, 5 S.L.R. 76.

Argued for the pursuers and respondents—The effect of an arrestment *jurisdictionis fundandæ causa*, once used, was to establish a permanent jurisdiction over the defender until decree in the action—*Cameron* v. *Chapman* (*supra*). The *punctum temporis* to be looked to in considering whether a foreign defender had been made subject to the jurisdiction of the Court was the commencement of the action—*North* v. *Stewart*, July 14, 1890, 17 R. (H.L.) 60, *per* Lord Watson, at p. 63, 28 S.L.R. 397; *Carlberg, &c.* v. *Borjesson*, November 21, 1877, 5 R. 188, *per* Lord President Inglis, at p. 192, 15 S.L.R. 112. The fact that amendments were made in the course of the action was of no moment, provided the amendments were competently made. The question of the validity of the arrestment to found jurisdiction turned wholly on the competency of the amendments. The amendments allowed were competent, under the Court of Session Act 1868, section 29—*Rose* v. *Johnston*, February 2, 1878, 5 R. 600, 15 S.L.R. 325; *Keith* v. *Outram & Company*, June 27, 1877, 4 R. 958, 14 S.L.R. 591; *Rottenburg* v. *Duncan*, October 23, 1896, 24 R. 35, 34 S.L.R. 35. The action was essentially an action for money due and the bill of exchange was merely evidence in support of the claim for debt—*Duncan's Trustees* v. *Shand*, July 19, 1872, 10 Macph. 984, 9 S.L.R. 651—and in these circumstances the summons might be competently amended under section 29 of the 1868 Act as well as the condescendence—*Shotts Iron Company* v. *Turnbull, Salvesen, & Company*, January 11, 1870, 8 Macph. 383, 7 S.L.R. 228. The cheque proved that the money passed and the pencil jottings in the books of the defendant company, taken with the cheque, were sufficient writ to instruct the loan.

LORD PRESIDENT—This is a reclaiming note against an interlocutor of Lord Kyllachy's in which he has decerned against the defender for the sum of £500 sterling, and the peculiarity of the case is that the defenders, who are now really represented by a receiver who has been appointed on the defenders' concern, do not contend that £500 is not due to this pursuer, but maintain that £500 ought not to be decerned for in this action. The reason for that contention is obvious enough. The summons has got, in usual form, a conclusion for arrestment on the dependence of the action, and we are informed that arrestment on the dependence has been executed and that funds have been arrested, and accordingly if decree is given in the present summons the preference secured by this arrestment will become available to the pursuer, whereas if decree is not given under the present summons but the debt is constituted under some other summons or by the acknowledgment of the defenders, the pursuer will only rank *pari passu* with other creditors in a question with the present defender, who, as I have already said, is the receiver of the company's property.

Now, that is a very technical defence. I am not for one instant suggesting that it is not a point that may not fairly have been taken by the receiver, who is a Court official, and whose views of his own duty I should be slow to condemn.

But of course a technical defence of that sort must be treated critically, and accordingly I propose to examine critically whether the particular defences proponed by this defender are good or not. The antecedent set of circumstances—for I of set purpose use a popular rather than legal expression—which gave rise to the whole matter are clear enough. The Derwent Rolling Mills Company was pinched for money. At that time the husband of the pursuer was the managing director of the company. The company had entered into a contract for delivery of certain steel bars, and they were in straits to find the wherewithal to pay for them. The manufacturers naturally were not going to part with their property unless they got cash or something equivalent to it, and, in the straits that the company were in, this managing director bethought him of the pecuniary resources of his wife, who was possessed of a separate estate. Accordingly he made a proposal to his wife that she should make available a sum of £2000 which she had at that time to invest. Your Lordships will notice that I am using words of an uncoloured description purposely to designate all these transactions. The lady, upon the advice and persuasion of her husband, was willing to make this £2000 available. There were meetings at the offices of the company with certain solicitors, and eventually the lady consented to provide this £2000. The way in which she did it was this—She paid that sum into the bank account which she kept in her own name.

At the same time she passed a cheque upon that bank account for the sum of £2000, which she made payable to the defenders' company. There was a slight complication about £196, which I do not think makes any difference, but which I merely mention in order to show that I have not overlooked it. The total bill for these steel bars was not £2000 but £2196, and there arose a question as to how with £2000 they were to meet £2196. The bank interposed there, and said they would be willing to pay the £196 if proper securities were furnished for their relief.

There is a certain controversy as to what precisely happened upon the £2000 cheque, and the controversy, I think, arises plainly enough, because in truth the documents which we have got are, so to speak, contradictory of each other. If you look at the cheque you find that the cheque is what any cheque would be, that is to say, an order of the person in right of the money directed to the bank—the persons who held the money—to pay to a certain person or his order. You thereupon find an indorsation of that cheque by the payee of the cheque, and you find a notandum by the bank that the cheque has been paid. So far, of course, that is the ordinary proceeding you would find on every cheque. But when you go to the lady's bank account, you do not find the transaction recorded in the ordinary way in which a transaction such as I have detailed would be recorded. In an ordinary statement of a bank account with the lady you would have expected to find an entry on one side or the other (which side depends on the way the account is kept) which would represent the bank taking credit in a question with the lady for having paid out £2000 of her funds to somebody else on the lady's order. You do not find that in this lady's account. The only figure of £2000 which you do find in the lady's account—which in this case was kept as that of the lady in account with the bank—is a credit entry of £2000, being the proceeds of certain bills. You do not find a payment to her order by the cheque mentioned of £2000, but you find it disguised, so to speak, under £2196 paid, not to the lady or the lady's order, but to Le Bas & Company, the persons who had supplied the steel bars. That £2196 represents in cash the £2000 supplied by the lady and the £196 which the bank were willing to advance on the lady's security. The effect of the money being paid to Le Bas & Company was that Le Bas & Company consented to deliver the bars. Delivering the bars meant giving up the bills of lading, which were in their turn replaced by dock warrants. The dock warrants practically represented the goods. These dock warrants were held by the lady, she being allowed from time to time to release each particular parcel of bars against the payment of cash to her by the defenders' company.

Certain payments were made in cash, but after a certain time had gone forward, cash became again a little scarce, and accordingly the lady consented to release some parcel of bars not on getting cash but on getting a bill. She got a bill for £500. Then matters went, so far as the defenders' company were concerned, from bad to worse. The receiver was appointed, and, the lady not having got the money, this action concluding for £500 was served, and arrestments were used to found jurisdiction in your Lordships' Court.

Now, the provisions of the Court of Session Act make it necessary as a matter of pleading that where there is a liquid document of debt it should be stated in the summons, and accordingly the summons as originally conceived concluded for £500, and went on to say that that was the sum contained in a bill which was specified by names and date. By this time the receiver was in the saddle, and he put in defences in which he said—The bill is a bad bill, because it is not accepted in the way in which under the articles of this particular company a bill must be accepted in order to make it binding. That averment was true in fact, and accordingly the pursuer, being met by that averment and seeing the materiality of it, made a motion to the Lord Ordinary under section 29 of the Court of Session Act 1868 for leave to amend the summons, and she amended the summons by putting in an alternative conclusion for £500 and by adding to the condescendence a statement of the circumstances under which the bill was granted. Now, I do not know that an alternative conclusion need have been put in. I think the same result might have been arrived at—if she really saw that the bill was useless as a bill—by striking out the words "being the amount contained," &c. But the result of putting in the alternative was to leave both the forms of contract—under the bill—the document of debt—and under the antecedent arrangement. The amendment having been made, the defender, the receiver, put in his pleadings an averment that the pursuer's new averment, being tantamount to an averment of loan, could be proved only *habili modo, i.e., scripto aut juramento*, and in that state of the pleadings the parties went to proof.

The general import of what had already happened I have already stated. The Lord Ordinary held that as a matter of fact the loan has been proved by the proof, but he added at the end of his note a statement that it did not seem to him to matter whether the loan had been proved or not, because there was no doubt that there was an obligation in one sense or the other to repay or make good—that is to say, that the lady's money had been enjoyed by the company, and that, even if "loan" was not exactly the correct category under which the obligation would be classed, she would still be entitled to make a correction of the summons so as to disclose the real character of the transaction. Accordingly an amendment, obviously *ob majorem cautelam*, was made at the latest stage after the Lord Ordinary had pronounced his opinion, and that amendment now stands on record.

Now, that being the state of the pleadings, the case seems to me to depend on a really very small and very narrow point. We had a very satisfactory argument by

Mr Moncrieff, for there is little direct authority as to the origin and effect of arrestment *ad fundandam jurisdictionem*. There is no doubt that it is a branch of our law which may be described as artificial in its origin. The original idea of such an arrestment was to arrest property of the defender in the territory to be made good for the purpose of the action, and in olden times there is no doubt an arrestment of that sort did form a nexus on the property, and the nexus was not lost till the action was completed. In course of time all that came to be very much modified. In the first place caution *judicatum solvi* ceased, and even the caution *judicio sisti* disappeared as a nexus on property. It was then held as a fiction, that once you had founded jurisdiction by arrestment, the jurisdiction was established. For a long time now it is trite practice to say that, though you may have arrested an amount of property by arrestment *jurisdictionis fundandæ causa*, still when you raise your action in virtue of the jurisdiction thus created you must arrest again on the dependence if you want to make a real nexus on the property. All that is by this time very familiar law, but the old idea of arrestment *jurisdictionis fundandæ causa* is a very good criterion of what action may be rested on arrestment which has been put on *jurisdictionis fundandæ causa*. It must be in other words the same action. But when I say it must be "the same action," that means an action with all the potentialities of an action, and therefore as long as arrestment *jurisdictionis fundandæ causa* is followed by the action therein referred to, it does not seem to me either here or there if that action has been in any way, so to speak, amplified, so long as the amplification is within the forms of process. Therefore the question whether this arrestment is good for the foundation of jurisdiction seems always to come back to the point of whether these amendments were proper amendments. If they were, it is a proper foundation for jurisdiction, and if they were not it is a bad foundation.

I come now to whether these were proper amendments. They were made under section 29 of the Court of Session Act. I need scarcely remind your Lordships of the terms of that section, whereby you are bound to make all such amendments as are necessary to determine the real question of controversy "provided always that it shall not be competent by amendment of the record or issues under this Act to subject to the adjudication of the Court any larger sum or any other fund or property than such as are specified in the summons." Now, I take that on the question of the bill. Of course there are bills which represent the bill transaction alone. A familiar illustration of that is a banker discounting a bill. He has nothing to do with the transaction represented by the bill, whether it is a gratuitous transaction or not; all he knows is that the bank pays money on the bill. But on the other hand there are many transactions where a bill is not the substance of the matter, but where there is an antecedent contract, and a bill is given as an easy way of making good the prestations under that contract. Under these circumstances I have always thought it trite law that though you might for convenience sake found on the bill for the purposes of your action, yet the real antecedent cause of the action lay behind the bill altogether. I should have thought, too, that one of the very objects of the improvement that was made—if it was an improvement—by the 29th section of the Court of Session Act was just to allow that sort of thing to be done in one action which could not have been done, prior to the date of that statute, without having two actions.

There is the case of *Stirling* v. *Lang*, 8 Shaw, p. 38, which I think is a very good illustration of the defects under the old procedure which were meant to be obviated by the new procedure under the Court of Session Act. Accordingly I am of opinion that the amendment that was allowed by the Lord Ordinary setting forth the circumstances under which the bill was granted and putting in the alternative conclusion is a perfectly proper amendment under the Act of 1868. If that be so, it follows from what I have said that in my view arrestment *jurisdictionis fundandæ causa* is a perfectly proper foundation for that action.

If I am right so far, the only question remaining is whether the pursuer made out her case under the amendment that was made. I am of opinion that she did make out her case. I am not going back on the rule well established that you cannot prove a loan except *scripto vel juramento*. But I think here you have the *scriptum*. You have the cheque. Now, under *Haldane* v. *Spiers*, March 7, 1872, 10 Macph. 537, a cheque will not prove a loan, but it will prove the passing of money. It is said here that the way in which the cheque was dealt with was to reduce the cheque to what one of the witnesses called the position of a piece of waste paper. I think that an absolutely unwarrantable comment. The way in which they chose to put the transaction in the books did not treat the cheque as it would have been in order in that lady's account. But I am bound to say that unless they had the warrant of the cheque, they would have had no warrant for the proceedings at all. The cheque proves the passing of money. *Quo animo* did that money pass? That also under *Haldane* v. *Spiers* must be proved in writing. But I think this must also be held to be proved by writ. In the first place you find pencil jottings on the ledger account. We were referred by Mr Wilson to *Winks'* case. That is a totally different case. There is no law I know that entries in an account may not be in pencil as well as in ink. Of course you may look on them with suspicion when made with pencil, and under *Winks'* case you may say they are not proper entries. Here, no doubt, it is a post entry, but it is an entry in the books of the company, and you have No. 82, which I think is raised by the minute of parties here into the position of being an undoubted

writ of the defenders' company. Taking all these documents together I have no hesitation in saying that in my view I regard this loan as proved. If that is so, there is an end of the action.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN having heard only part of the argument gave no opinion.

The Court adhered.

Counsel for the Pursuers and Respondents—Wilson, K.C.—Moncrieff. Agents—J. B. Douglas & Mitchell, W.S.

Counsel for the Defenders and Appellants—Fleming, K.C.—Pitman. Agents—J. & F. Anderson, W.S.

Wednesday, July 19.

FIRST DIVISION.

[Lord Dundas, Ordinary.

BUCHANAN *v.* CORPORATION OF CITY OF GLASGOW.

Reparation — Slander — Institution of Wrongous Prosecution — Privilege — Malice — Public Officer.

In an action of damages brought against a corporation, the pursuer averred that two inspectors, appointed by the corporation to see that the bye-laws made under its Tramways Acts were observed, (1) had in a tramcar and before a friend charged him with having committed a contravention of the bye-laws a few days previously, and having at that time given a false name, and (2) had, although the pursuer had when so charged established his identity and so shown them to be in error, reported the matter to the police with a view to and with the result of a prosecution being instituted. The pursuer proposed two issues, and inserted therein the word "maliciously," but he averred no facts and circumstances from which malice could be inferred. The Lord Ordinary having allowed the second issue, the defenders reclaimed.

Held that, as there were no facts and circumstances averred from which to infer a malicious motive, there was no issuable matter on record.

James Buchanan, 7 West George Street, Glasgow, brought an action of damages against the Corporation of the City of Glasgow to recover the sum of £250. The pursuer averred—"(Cond. 1) . . . The defenders are the owners of and have the management and control of the tramway system in the city of Glasgow, and are the employers of the officials engaged in connection with that system. The defenders have made bye-laws under the powers conferred by their Tramways Acts prohibiting, *inter alia*, passengers on tramcars from spitting in or upon said cars, and enacting that persons guilty of said acts shall be liable to fine or imprisonment, and they have in their employment inspectors charged with the duty, *inter alia*, of seeing that said bye-laws are not infringed, and that persons contravening them are proceeded against. (Cond. 2) On Friday, 14th April 1905, the pursuer was travelling on a tramway car belonging to the defenders. . . . While he was on said car two tramcar inspectors . . . whose names are unknown to the pursuer, and who were in the employment of the defenders, and entrusted by them with the duty above described in connection with said bye-laws, entered the said car and falsely and calumniously charged the pursuer with having committed the said offence of spitting in or upon a tramcar belonging to the defenders in New City Road, Glasgow, on 10th April 1905, and further stated that he had been then charged with doing so, and that when so charged he had given a false name and address, or used words of similar meaning and import. Said charge so made against pursuer was false and calumnious and illegal, and said statements were made openly in said car in the presence and hearing of the pursuer and of William Gibb, Houston Street, Glasgow, and were uttered maliciously and without probable cause. The said inspectors before making said charge had called a policeman, and brought him on to said car for the purpose of arresting the pursuer. They made the said charge and the said statements against the pursuer in the presence of said policeman, and then at once requested the policeman to arrest pursuer for said pretended offence said to have been committed on 10th April. The said action on the part of the inspectors was entirely unwarranted, and was wrongful and illegal. In making said charge against pursuer, and said statements in regard to him, and in ordering pursuer's arrest, said inspectors were acting within the scope of their employment as defenders' servants and in the interest of the defenders. The pursuer assured the said inspectors and policeman, and it is the fact, that he was entirely innocent, and that the inspectors had made a mistake, but notwithstanding pursuer's explanations the inspectors persisted in the said charge and the said assertions against him. Ultimately, when pursuer exhibited his diary and season ticket, and when his friend the said William Gibb also furnished the inspectors with credentials, the pursuer was allowed to go. . . . (Cond. 3) Notwithstanding the said explanations given on said date, 14th April 1905, to said inspectors by and on behalf of the pursuer, the said inspectors thereafter unwarrantably, wrongfully, and illegally reported to the police, or caused a report to be made to the police (on or about, it is believed and averred, 21st April 1905), that the pursuer had been guilty of the said offence on 10th April, with a view to pursuer being prosecuted and fined or imprisoned. In making or causing said report to be made to the police said inspectors were acting within the scope of their em-