paid. It appears that under the deed which gives Lord Charles Clinton any right there is a condition that his right is to be forfeited if he suffers anything to be done whereby the rents, or any part thereof, would cease to be receivable by him for his own use. It is contended that the arrestments which were used by Lindsay, Mackay, & Howe, and those which have been used by the pursuer, have the effect of putting an end to the right of Lord Charles Clinton to the sums arrested; that by allowing arrestments to be used, or an action to be raised in which a decree of forthcoming may be pronounced, he has incurred the forfeiture. This defence is contained in the third plea which the Lord Ordinary has repelled. It appeared to us that in this English deed there might be some technicality of expression, and we accordingly sent a case for opinion to an English counsel. He tells us there is no technicality, and gives us his opinion that the arrestments, and the raising of the action, did not produce the effect contended for. But it is still maintained that the direct result of pronouncing a decree of forthcoming will be to make the rents, or part thereof, no longer receivable by Lord Charles. The only question before us at present is the third plea. What effect the decree of forthcoming may have is not before us. The question is, shall this action be dismissed, or the defender assoilzied, because the demand made is for a decree of forthcoming which may have that effect? I do not think that the arrestments have the effect of interposing an obstacle to our pronouncing a decree of forthcoming. Those used by Lindsay, Mackay, & Howe were taken out of the way by reason of an arrangement whereby the debtor authorised payment to the creditors. They therefore cannot be founded on. Then, in regard to the arrestment used by the pursuers, I think it is practically in the same position. I cannot see how the funds attached by it have ceased to be payable to Lord Charles Clinton by reason of it. They are not payable to anyone else. The arrestment does not make them payable to the arrester, and the arrestment may be taken out of the way as the others were. That a decree of forthcoming if pronounced, will have the effect alleged, does not appear to me any reason why we should not pronounce it. Until it is pronounced it has not that effect. Whether it will have that effect, I do not say, but if it has, the result will be what the defenders desire. I therefore agree with the Lord Ordinary. But there is an expression in his interlocutor—"except in so far as the same may be effectually transferred to the parties using said arrestments"—which appears to me somewhat inconsistent with the rest of the interlocutor, and which I think should be deleted.

Lord CURRIEHILL—I assume that here there was an arrestable fund—that is, the trustees are debtors to Lord Charles Clinton, the common debtor. The pursuer has used the appropriate diligence for attaching that fund, and she is now following it out by an action of forthcoming, which will have the effect of transferring to her the *jus crediti*. It is said that Lord Charles Clinton's right is so qualified that such a decree cannot be demanded, in consequence of the arrestments which have been used. Those of Lindsay, Mackay, & Howe can clearly have no effect, because the *jus crediti* never was transferred by them, and they have been discharged. The only question is the effect of the arrestment founded on in this action. It is said the fund had ceased to be receivable, in other words, that Lord Charles Clinton had ceased to be the creditor. At this moment he has not ceased to be the creditor. There is nothing but a *nexus*, which may be removed by Lord Charles. But then it is said that his right is gone as soon as the decree of forthcoming is pronounced, and that as the forfeiture will then be incurred we cannot pronounce the decree. I think there is no soundness in that argument. [His Lordship concluded by reading a passage from Lord Kames' Law Tracts, which he said exposed the fallacy. It will be found in the Tract on "Property," pp. 134–6 of the 2d edition.]

Lord DEAS—I agree very much in what has been said. The question is what is the effect of this arrestment of the pursuer in giving or not giving her a right to a decree of forthcoming. That depends on the construction of the clause in the English deed. It was conceded that we are to construe the deed according to our own views. It seems substantially to declare a forfeiture of Lord Charles Clinton's right on either of three things taking place (1) on his granting any voluntary deed of sale, mortgage, or security, or attempting to do it; (2) on his bankruptcy or insolvency; (3) on his doing or suffering anything to be done whereby the rents would cease to be receivable by him for his own use. It is under the last head that it is contended the forfeiture has taken place. It is said he has suffered something to be done which will prevent the rents being receivable by him. There is no doubt that the provision applies. The question is whether he forfeits not only the rest of the fund but also that part of it which is arrested. My opinion is that he has not forfeited the sum arrested. I found that opinion on the construction of the clause. Unless this decree is pronounced the sum will not cease to be receivable by Lord Charles for his own use.

Lord ARDMILLAN—This is an extremely nice and interesting question. I arrive at the same result as your Lordship on two grounds. The first is the technical ground on which Mr Giffard has rested his opinion; the second is the wider one Lord Curriehill has referred to. I think Mr Giffard's opinion contains a sufficient answer at present to the defender's plea. The right has not ceased, it is only suspended. The arrestment does not place Lord Charles Clinton's right in the position of having ceased. But then, if it be the fact that the decree of forthcoming may have, when pronounced, the effect of putting an end to it, the maxim might apply "frustra petis quod mox restiturus es." I do not think that, reading the clause fairly, the effect is to forfeit the sum arrested. I don't say anything about the remainder. There is a difference betwixt the first branch of the clause and the last. In the first an attempt to do the thing is sufficient to infer the forfeiture, but in the last there is no reference to an attempt—success is necessary. Therefore nothing but the actual transference of the right operates the forfeiture; but in the case we have here, the moment there is enough to infer the forfeiture, that same moment there is enough to transfer the right to the pursuer.

The Court accordingly adhered to the interlocutor of the Lord Ordinary, with the variation proposed by the Lord President.

Agent for Pursuer—James Macknight, W.S.
Agent for Defenders—Alex. Howe, W.S.

BARTOLOMEO *v.* MORRISON AND MILNE, *et e contra.*

Process—Amendment of Summons. An amendment of a summons raised as a supplementary one, having for its object the conversion of the summons into a substantive one, *disallowed*

On 17th January 1866 a collision took place between the schooner "Scotia," of Aberdeen, and the barque "Ghilino," of Genoa, by which both vessels were injured. On 26th January an action of damages for the sum of £1000 was raised by George Morrison and John Milne, merchants in Aberdeen, the owners of the "Scotia," against Francesco Massa, master of the "Ghilino," then lying in the harbour of Leith, as "master, and also as owner or part owner of said ship, and in these capacities, or one or other of them, or otherwise representing the said ship." Jurisdiction was alleged to have been founded against Massa by arresting the "Ghilino." To this action the defender pleaded no jurisdiction. Thereafter, on 27th January, Guiseppe Ghilino di Bartolomeo, shipowner, Genoa, the owner of the "Ghilino," and Francesco Massa, "as master, and representing the owner of said vessel," raised a cross action against Morrison & Milne, the owners, and Alexander Nicholson, the master of the "Scotia," concluding for £200 as damages for injury occasioned to the "Ghilino" by the collision. On 1st February 1866 the owners of the "Scotia," in order to preclude the possibility of the original action against Massa being cast on the plea of no jurisdiction, raised a supplementary action against Bartolomeo as owner of the "Ghilino." The summons concluded for conjunction of this supplementary action with the summons in the original action against Massa; and the conclusion thus proceeded:—"And the said cases being so conjoined, the defenders and the said Guiseppe Ghilino di Bartolomeo ought and should be decerned and ordained, in terms of the foresaid summons at the instance of the pursuers against the said Francesco Massa, by decree of the Lords of our Council and Session, to make payment to the pursuers of the sum of £1000 sterling, or such other sum as, in the process to follow in the said conjoined actions, shall be ascertained to be the loss and damage due to the pursuers in the premises, with interest at the rate of 5 per cent. per annum from the date of citation in the action against the said Francesco Massa until paid." When the case was called in Court the pursuers (Morrison & Milne) lodged a minute craving leave to amend their supplementary summons as follows:—"In the first place, immediately after the words, 'the said cases being so conjoined,' to introduce the following words, viz.—'or whether they shall be conjoined or not.' In the second place, to delete the words, 'in the process to follow in the said conjoined actions.'"

On 23d May 1866 the Lord Ordinary (Kinloch) pronounced the following interlocutor:—"The Lord Ordinary having heard parties' procurators, sustains the minute of amendment of the libel, No. 14 of process, on payment by the pursuers to the defender of £2, 2s. of expenses: closes the record upon the revised condescendence and revised defences, Nos. 9 and 11, and minute of amendment of the libel, No. 14 of process: conjoins with this process a relative process between the same parties, also in this day's roll: Further, appoints the parties to lodge in the conjoined actions issues within eight days."

The process with which this was conjoined was that raised by Bartolomeo and Massa against the owner and master of the "Scotia" on 27th January 1866; and in that action the Lord Ordinary, of same date (23d May 1866), pronounced an interlocutor closing the record on the revised condescendence and revised defences, and conjoining it with the action raised on 1st February 1866.

Bartolomeo reclaimed against the first interlocutor, and he and Massa against the second.

ASHER for the reclaimers (with him GIFFORD) argued:—(1) The effect of the minute of amendment was to change the character of the action by converting it from a supplementary into a substantive action. A summons might be amended at the discretion of the Court, but the Court had never sanctioned an alteration whose effect was to change the fundamental nature of the action.—Gilchrist *v.* Anderson, 17th November 1838, 1 D. 37; Blair *v.* Steele, 1st June 1848, 10 D. 1095. (2) When an action as originally brought is null, no alteration can be allowed to mend its nullity.—Campbell *v.* Fotheringham, 25th June 1826, 4 S. 766. (3) The Court will not allow an amendment, if the summons though not null, is, as in the present case, in its formal parts irregular and unsatisfactory. Henderson *v.* Earl of Minto, 1st June 1860, 22 D. 1126.

MILLAR (with him the SOLICITOR-GENERAL) answered:—This amendment was required by the exigencies of the case. If the action against Massa was thrown out of Court, the owners of the "Scotia" would have nobody to go against for the injury sustained by their vessel. The amendment did not change the nature of the action, and introduced no new ground of action. It still remained an action of damages. All that it did was to entitle the owners of the "Scotia" to proceed against Bartolomeo if they failed in being allowed to go against Massa as representing him. The action did not cease to be supplementary by the amendment.

The LORD PRESIDENT—This summons is certainly very peculiar. It was framed as a supplementary summons, and intended to call into the field another party in addition to the party already in the field, and it was intended that this summons should be conjoined with that against the other party already in the field. It has this peculiarity, that it calls upon a party to come into Court to have judgment pronounced against him for £1000, in terms of the conclusions of a summons in another action raised against somebody else, and it does not tell what the conclusions of that other action are. But it was plainly intended to be supplementary to that other action. We were told that the pursuers had found that objections were stated to the other summons, and fearing there might be a casting of that summons, they wished this amendment to convert the summons into a substantive one still retaining the peculiarity to which I have alluded. The Lord Ordinary has sustained the amendment. I really cannot see that that was a proper thing to do, and I am for recalling that part of the Lord Ordinary's interlocutor. It may be that this action, though not amended, may yet be sustained as a supplementary action, if the objection to the want of jurisdiction is finally repelled. It will be competent to do that, although this amendment is not allowed. In the meantime, we must recal that part of the Lord Ordinary's interlocutor absolutely. Then, as to the conjunction of these processes with that at the instance of Bartolomeo and Massa, I think that is premature at this stage, and I am disposed to recal this part of the interlocutor *in hoc statu*.

The other Judges concurred.

The interlocutors reclaimed against were accordingly recalled, and the cases remitted back to the Lord Ordinary.

Agents for Bartolomeo and Massa—Murdoch, Boyd, & Henderson, W.S.

Agent for Morrison and Milne—John Henry, S.S.C.