iii. 5, 1; *Nisbet* v. *Whitelaw*, July 1, 1626, M. 3982 and 3995; Ross's ed. of Bell's Dict., *voce* "Exhibition."

HALL, for the petitioner and respondent—*Craig* v. *Howden*, May 24, 1856, 18 D. 863.

At advising—

LORD PRESIDENT—There is no authority for saying that an apparent heir is entitled to recover or demand possession of all the title-deeds of his or her ancestor as a matter of absolute right in all circumstances. An entered heir certainly has that right. It might be, though I should be sorry to anticipate the decision in that case, that an apparent heir could not exercise some of the undoubted rights of an apparent heir without possession of his ancestor's titles. In such circumstances a case might be made out which would vindicate his right to recover the title-deeds. But no such circumstances are here laid before us. The case, as presented, is one of the purest and simplest possible. The question is just this—Is an heir-apparent entitled to instant delivery of his ancestor's title-deeds from the holder, without serving, and without instructing any special necessity? As at present advised, I am not inclined to assent to such a proposition. But at the same time I should be sorry to see this petitioner, where the property is so small, and the expenses already incurred so considerable, put entirely out of Court. We are not informed whether it is her intention to make up a title and enter heir or not. I do not wish to insist upon her committing herself to that course, but, at the same time, all the length I think we can go is this, to dismiss the appeal, and sustain the interlocutor of the Sheriff, but superseding extract until a decree, at any rate of general service, is produced by the petitioner. The competency of setting up a title *cum processu* is quite established, and that is, I think, all the favour we can show the petitioner under the circumstances.

LORD DEAS—It cannot be denied that a great deal of responsibility lies upon any stranger who happens to be the holder of title-deeds, in whatever manner he may have come by them. And I think that from that responsibility he is entitled to demand a certain relief, more particularly if he came honestly by the deeds in question. Suppose, for instance, that an heir-apparent comes and gets from a party, who is for some cause the custodier of them, possession of the title-deeds of a large estate, and after all does not enter heir, the next heir, entitled to pass him over and serve to the common ancestor, may very well come to the former custodier and say, Where are my title-deeds? and if they are not forthcoming, may have a very good case against him. We cannot, of course, here go into the question whether this woman is going to die in a position which would entitle the next heir to pass her over?—but still it is an example showing the difficulties which might occur.

According to my own recollection in the *Bredalbane* case, though we found the heir-apparent entitled to enter into possession and draw the rents, we refused to grant his application for possession of the title-deeds of the estate, which were in the hands of the late Earl's trustees. I am disposed to think with your Lordship that it is not absolutely necessary to decide this point in such a small case as the present, but that we are entitled to take the intermediate course proposed by your Lordship.

LORD ARDMILLAN—There are three different cases in which an application such as the present may be made. *First*, against a person making a competing claim to the estate; in which case an apparent heir could not succeed in his demand, as that would be only to arm one competitor out of the other's arsenal. *Second*, where the case is such as that referred to by Lord Deas in his remarks upon the *Bredalbane* case, where there is a competition, and the title-deeds are in the hands of a third party. And *third*, where, as in the present case, the holder alleges no right whatever to the custody of the deeds, but simply says he is to keep them until the heir chooses to serve. I think that in such a case the holder cannot resist the proposition that he is not to keep them perpetually, but I am inclined at the same time to adopt your Lordship's opinion that he may be entitled to some protection, and I think your Lordship's proposal entirely meets the case.

LORD KINLOCH—I feel great difficulty in qualifying the right of the petitioner as proposed by your Lordships, because it is impossible to say that that qualification does not import that the lady has no right to the title-deeds without serving heir. I can see no sufficient authority for that proposition. It is true that she is not entitled to the property of the title-deeds. She is no more entitled to the property of the title-deeds than to that of the estate, without expeding a service of some kind. But the present is simply a question of custody or possession, and I view it as a case in which the party who has the titles has no right or interest to keep them. He seems to be no better than a party who has come into possession of the title-deeds by accident, and the question is, Whether he is not bound to give up their custody to this lady, who is the heir-apparent? Certainly, as apparent heir, she is not the legal proprietrix. But she is entitled to perform a great many acts of proprietorship which require the use of the titles. She is entitled to the possession of the subjects, and I cannot see why she should not equally be entitled to the possession of the title-deeds. If Mr Jackson could say that any serious risk was incurred by him in giving them up, then we should be bound to take steps to protect him. But nothing of the kind is pretended; and I think a decree of this Court will prove sufficient protection.

The Court accordingly refused the appeal; adhered to the interlocutor of the Sheriff, but under condition that extract should be superseded until a general service was produced by the petitioner.

Agent for Appellants—James Barton, S.S.C.

Agents for Respondents—D. Crawford & J. Y. Guthrie, S.S.C.

Saturday, December 9.

KEITH *v.* DEAN & SON.

Debts Recovery Act, 30 and 31 Vict. c. 96, § 9—Competency of Appeal—Note of Evidence. In an action under the Debts Recovery Act, the defender objected to the action as incompetent, on the ground that he was not subject to the Sheriff's jurisdiction. The Sheriff, after evidence, of which he was not required by either party to take a note, found certain facts proved which established his jurisdiction, repelled the defender's plea, and, on the merits,

found for the pursuers. The defender appealed to the Court of Session. The pursuers objected to the appeal as incompetent—(1) because the sum in dispute was under £25; (2) because the Sheriff was not asked to take a note of the evidence, and therefore there could be no review. *Held* that although an appeal might otherwise have been open on the question of jurisdiction, in this case the Sheriff's findings in fact, which must be held to be true, were conclusive as to the question of jurisdiction; and appeal dismissed.

Counsel for Appellant—Scott. Agent—J. M. M'Queen, S.S.C.

Counsel for Respondents—Dundas Grant.

Tuesday, December 12.

ANDERSEN *v.* HARBOE.

Process—Amendment of Record—Court of Session Act, 32 *and* 33 *Vict. c.* 100, § 29—*Title to Sue—Ship—Part Owner—Arrestment* jurisdictionis fundandæ causa. The pursuer in an action of damages, arising out of the collision of ships, sued as "owner of the ship 'Oscar.'" He had previously used arrestments to found jurisdiction against the defender, who was a foreigner. It was afterwards discovered that he was not the sole owner, and a minute was put in for the pursuer, craving leave to add to his name in the summons the names of three other parties, who along with the pursuer were the registered owners of the ship. Minute *refused*, the proposed amendment not falling within the scope of § 29 of the Court of Session Act 1868.

A collision took place in the Forth between the ship "Peter," belonging to the defender Harboe, of Denmark, and the ship "Oscar," of which the pursuer Andersen, of Laurvig, Norway, is part owner and managing owner. Harboe being a foreigner, Andersen used arrestments to found jurisdiction, and raised an action against him, concluding for payment of £500 for damages said to be done to the "Oscar" by the collision. The summons was at the instance of "Soren Andersen, owner of the ship 'Oscar.'"

After a proof had been taken for the pursuer, a minute was put in for the pursuer, craving leave to amend the summons by adding to the pursuer's name the names of three other parties who along with the pursuer are registered owners of the "Oscar."

The Lord Ordinary (GIFFORD) refused to allow the amendment.

"*Note.*—The proposed amendment was resisted by the defender as incompetent; and although it might be admitted of consent, the Lord Ordinary has found himself compelled to reject it, as not falling within the provisions of the 29th section of the Act of 1868. The real purpose of the amendment is to add three new pursuers, that is, three new parties to the suit, so as to make the action one at the instance of different parties from the party at whose instance it was instituted. The Lord Ordinary thinks that an alteration like this is not contemplated by the statute, and as the defender stands upon his strict legal right, the Lord Ordinary has rejected the amendment."

The pursuer reclaimed.

TRAYNER for him.

ASHER and THORBURN for the defender.

At advising—

LORD PRESIDENT—The pursuer sues as owner of the ship "Oscar," by which he means the sole owner. It now turns out that the pursuer is not the sole owner. He proposes to substitute for himself in the summons the owners of the ship "Oscar." This is really a change of pursuers, for I do not think it makes any difference that he happens to be one of the parties whom he proposes to substitute. In fact, the pursuer finds that he has not the title to sue the present action. It is said that the proposal is justified by the 29th section of the Court of Session Act 1868. I agree with the Lord Ordinary that the proposal does not fall within the provisions of that section. What is authorised by the 29th section is, "all such amendments as may be necessary for the purpose of determining, in the existing action or proceeding, the real question in controversy between the parties." Following out the object and spirit of that enactment, we have allowed a considerable latitude in amending records, but we have never gone beyond the true object of the statute, viz., allowing such amendments as will enable the Court to determine the true question between the parties, *i.e.*, the parties to the record. It would be very strange if we could allow an amendment which should have the effect of raising a question with different parties. As the pursuer could not try the question to the effect of recovering the whole damages, we are asked to amend the record so as to enable us to try that question between the defender and different parties. I consider this incompetent. On this ground alone I think the amendment should be refused.

But the difficulty of allowing the amendment is illustrated and confirmed by a specialty in the case. The only way in which jurisdiction could be founded against the defender was by arrestment. Now, arrestment *jurisdictionis fundandæ causa* has not the effect of subjecting the person against whom the arrestment is used to the jurisdiction of the Court in all actions, even at the instance of the same party, or involving the same subject-matter. It founds jurisdiction only in a particular action. The other parties whom it is proposed to make pursuers have not used arrestments to found jurisdiction. The defender is not bound to answer at their instance. The first thing that would happen, if we were to allow this amendment, would be that the defender would object to the jurisdiction of the Court, and I do not see any answer to the objection. We cannot sanction an amendment which would have the effect of destroying the very jurisdiction we are exercising.

LORD DEAS—I consider it a conclusive objection to the proposed amendment that, according to the original pursuer's own showing, there would be no jurisdiction against the defender as regards the new pursuers.

LORD ARDMILLAN concurred on both grounds.

LORD KINLOCH—I should not like to decide that in no case whatever can a new pursuer be allowed to appear. There might be twenty owners of a ship, nineteen might appear, and the twentieth be omitted by accident. I do not decide whether his name might not be subsequently added to the summons. But this is a different case. Independently of the specialty about arrestment, I should say it is not a case for the application of the statute. But the specialty as regards arrest-