part of Scotland. But we have no concern with that; I think we are bound to give effect to the plain words of the statute.

Upon the second question I also agree with Lord Adam, but not without hesitation. I have great doubt whether the possession on the part of the manager of the Dead Meat Company was not constructively such possession on the part of the accused as would make him responsible, but my doubt is by no means so strong as to induce me to take a different view, and I therefore concur in thinking that the second question should be answered in the negative.

Lord Justice-Clerk—I concur with your Lordships upon both points. I think that in dealing with a statute we are bound to take the literal meaning of the words, and the literal meaning of the section in question is that the warrant of the Judge of the Police Court in Edinburgh is to be sufficient beyond the burgh, if endorsed by the Sheriff of Edinburgh or any of his substitutes, or by the Sheriff of the county in which it is executed. And whether the Legislature intended it or not, one can see that there is great convenience in the Sheriff of the jurisdiction where the burgh is situated having authority to assist the Police Magistrate in making citations throughout the country. Such a provision does no doubt, to a certain extent, give jurisdiction to the Sheriff beyond the limits of his county, but it is conceivable that reasons of public convenience might render that expedient, and a Sheriff being looked upon as an official of a superior grade might very well have such a jurisdiction conferred upon him—a jurisdiction which applies only to the bringing up of the accused for trial.

As regards the question on the merits, I think the view which Lord Adam has stated is a perfectly sound one. If the manager of the Dead Meat Company had authority to do what the facts set forth show that he did do, I think it is plain that the meat was in his possession and not in the possession of anyone else, because he seems to have had full control over it and power to deal with it as he liked.

The phrase used in the statute with regard to possession is, as applicable to this case, a peculiar one. The phrase is "shall sell, or expose for sale, or have in his possession as or for human food." The meat was never sold or exposed for sale. Was it, then, in the possession of anyone "as or for human food." These words rather seem to indicate that to constitute a contravention of the statute something must be done which commits the person doing it to having overtly dealt with the meat as being presented to the public as being for human food. For example, if a contractor was caught in the act of delivering diseased carcases at a butcher's door, it might very reasonably be held that he had them in his possession "as or for human food." But the case here is different. There was no overt act. There can be no doubt that had the carcase been found in the premises of the appellant there could have been no ground for saying that he had it in his possession "as or for human food." The carcase was quite innocently in his possession, he having killed the animal by advice of the veterinary surgeon. Nor did the sending of it to Edinburgh imply, in my opinion, that his possession was of this character. I think there is great force in what Lord Adam has pointed out, namely, that the appellant sent it to parties in Edinburgh who were judges of such matters, and whose duty and interest it was to inspect the carcase on arrival, and to withhold it from the market if it were in bad condition. It is also to be noted that the appellant did not have this animal slaughtered by his own servants, but by a butcher from Auchterarder, which indicates that he acted in *bona fide*, and did not think the animal had any other disease than that from which the inspector had pronounced it to be suffering, which was not a complaint tending to make it unfit for human food.

Upon the whole matter I think we should sustain the appeal upon the ground that the case does not set forth facts sufficient to infer that the accused had the meat in question "in his possession as or for human food."

The Court answered the first question in the affirmative and the second in the negative, and quashed the conviction.

Counsel for the Appellant—John Wilson. Agent—T. M'Naught, S.S.C.

Counsel for the Respondent—D.-F. Mackintosh—Boyd. Agent W. White Millar, S.S.C.

COURT OF SESSION.

Tuesday, March 5.

SECOND DIVISION.

[Lord Wellwood, Ordinary.

M'MURCHY *v.* MACLULLICH.

(*Ante*, May 21, 1887, vol. xxiv. p. 514.)

Process—Amendment—Expenses.

In an action of damages for slander, the Court, holding the pursuer's statements irrelevant, assoilzied the defender from the action as laid, and found him entitled to expenses.

The pursuer, without having paid these expenses, raised a new action against the same defender in respect of the same alleged slander, making certain new averments which would have been capable of being added by amendment if he had so moved in the previous action.

Held that he must pay the expenses in the previous action as a condition of insisting in the new one.

In 1887 Donald M'Murchy, sometime Police-Sergeant at Oban, brought an action of damages for slander against Peter Campbell, late Inspector of Police, Oban, and John Campbell Maclullich, S.S.C., Procurator-Fiscal, Inverary.

The ground of action was that the defenders on 19th September 1885, "acting in concert together, or separately, or one or other of them," prepared a report concerning the pursuer which they sent to Colin M'Kay, Chief-Constable of Argyleshire. The report charged the pursuer with immoral and improper conduct when on duty. He averred—"These statements regard-

ing the pursuer are unfounded and malicious falsehoods, and represented the pursuer to have acted as an immoral and dissolute person, and to be unworthy of employment in the police force." The above-mentioned false and calumnious charges against the pursuer were made and circulated by the defenders maliciously and without any just and probable cause. The defenders were actuated by a feeling of ill-will against the pursuer, and a desire to damage his character and deprive him of his situation in the police force.

Upon 25th March 1887, as previously reported, the Lord Ordinary (LEE) found that the pursuer's allegations were not relevant or sufficient to support the action, and found the pursuer liable to the defenders in the expenses of process, and assoilzied the defenders from the conclusions of the summons. Upon 21st May 1887 the Second Division adhered, with additional expenses. The pursuer was charged to make payment of the taxed amount of the expenses to the defenders in the case of Campbell, amounting to £33, 1s. 10d., and in Maclullich's case £32, 8s. The pursuer, however, did not pay these sums, and on 21st September 1888 decree of *cessio* was pronounced against him at the instance of the agents for Campbell.

Upon 5th July 1888 M'Murchy, who had not paid these expenses, raised actions of damages for slander against Peter Campbell and John Campbell Maclullich, the defenders in the former action.

The ground of action was the same alleged slander as in the previous case, but the pursuer stated further in the action against Maclullich that the defender "was, in making said false statement or report, actuated by a feeling of revenge and ill-will towards the pursuer, owing to the pursuer having reported on the 14th September 1885 to the Chief-Constable Peter Campbell, then an Inspector of Police at Oban, for irregularities and misconduct. A copy of said report is herewith produced and referred to, and the said Peter Campbell, who is said to be a relative of the defender, made a complaint at Oban on the 18th September 1885 to defender, who was in Oban on that date, taking precognition in a case of housebreaking and theft, and informed him that he was reprimanded by the Chief-Constable upon the pursuer's report, and the defender undertook to support and aid the said Peter Campbell to obtain the dismissal of pursuer from his situation on the police force by sending the aforesaid private calumnious imputation against the moral character of the pursuer, maliciously and recklessly, for the purpose of aiding said Peter Campbell, and was thus actuated by a feeling of revenge and ill-will against the pursuer with a view of damaging his character and depriving him of his situation on the police force, well knowing the same to be false."

The defender Maclullich pleaded—"(2) The pursuer's averments being irrelevant the action ought to be dismissed. (3) The pursuer being insolvent, ought to be ordained to find caution for expenses."

In the other action against Campbell the defender pleaded—"The pursuer is not entitled to proceed with the present action to any extent until he has paid the expenses awarded against him in the former action.

The Lord Ordinary (WELLWOOD) pronounced the following interlocutors in each action:—

"*23rd November* 1888.—The Lord Ordinary having heard the pursuer and counsel for the defender, in respect the pursuer has not paid the taxed expenses found due to the defender in the action at the pursuer's instance against the defender and John Campbell Maclullich, the summons in which was signeted on 12th January 1887, Refuses *in hoc statu* the pursuer's motion for issues, and continues the cause till the first sederunt day in January next."

"*9th January* 1889.—The Lord Ordinary, in respect that pursuer has not yet paid the taxed expenses found due to the defenders and referred to in the preceding interlocutor, dismisses the action and decerns: Finds the defender entitled to expenses," &c.

The pursuer reclaimed.

The defender (Maclullich) was permitted to add to his defences, on payment of the expenses incurred in the present action, a plea similar to that for Campbell quoted above.

The pursuer argued—This was an action for vindication of character. The pursuer ought therefore not to be barred from proceeding with his action because he had not paid the expenses in a former action—*Buchanan* v. *Stevenson and Others*, December 7, 1880, 8 R. 220. The defenders in this action had already taken out *cessio* against the pursuer; they had therefore used their only legal remedy, and could not in addition make it a condition of his going on with this action that he should pay the expenses of the preceding one. In the former action the pursuer's agent had not carried out the instructions he received, and made up the record without putting in specific allegations of malice; that was the ground upon which the action was dismissed, but the pursuer in this action ought not to suffer from the fault of his agent in previous transactions.

The defender (Maclullich) argued—The defender had been assoilzied in the former action because the averments of the pursuer were irrelevant and insufficient to support his pleas. The same averments were made in this action, the report to which the pursuer objected, the manner of publication alleged, and the allegations of malice were the same; all that the pursuer had done was to say that he had reported a relation of the defender Campbell for misconduct, and that therefore the defender had conspired against him. That did not make the condescendence relevant against the pursuer, but even if it did, the pursuer could not ask for a proof of his averments until he had paid the expenses in the former action. Any change that the pursuer now made in his averments could have been made by new averment upon record in the previous action. That would only have been allowed to be done on payment of the expenses incurred up to the date of amending the record. The same principle ought to apply here, as in fact the cases were the same—*Irvine* v. *Kinloch*, November 7, 1885, 13 R. 172; *Wallace* v. *Henderson*, December 22, 1876, 4 R. 265; *Struthers* v. *Dykes*, February 10, 1848, 8 D. 815; *Macleod*, 3 S. 79. The action was not relevant, as it was laid against a public officer in discharge of his duty—*M'Murchy* v. *Campbell*, May 21, 1887, 14 R. 725.

At advising—

Lord Justice-Clerk—The pursuer in this case formerly brought an action against the same person who is defender here, which was dismissed by this Court on the ground of irrelevancy. It may be the fact, but I do not think it matters, that the irrelevancy was not his fault; he says that he gave instructions to his agent, and that it was owing to his agent's fault that the action was found to be irrelevant. But he now brings a new action against the same defender of the same kind and upon the same grounds as before. The only difference is, that there is now an averment as to the malice which he says existed, which was previously wanting. The question is, whether because he has brought a new action such as I have described, with a new averment which he might have added to his previous record, he is entitled to pursue that action without paying the expenses he had incurred to the defender in the previous one.

No case was quoted to us which was quite upon all fours with this one, but when we consider the cases to which we were referred, where the pursuer of an action found it necessary to amend his record for the purpose of making a relevant case, we find that he was usually called upon to pay the expenses previously incurred as a condition to his being allowed to make the amendment. I am unable to see any distinction between what was done in those cases and the principle which I think ought to govern this case. In bringing this action the pursuer is just endeavouring to do what he might have done in the former action by adding averments which he thinks will make a relevant case, and that is what he might have done by amendment in the previous case. I am clearly of opinion that if he had proposed to do that there would have been some conditions as to expenses imposed upon him, and I think that the same principle ought to be carried out here.

I think that the case of this defender in asking that the pursuer should be called upon to pay the expenses of the former action before he can proceed is even stronger than if the request had been made upon an application to amend the record, because it is plain that the defender had been put to greater expense in the one case than in the other. I think we must adhere to the Lord Ordinary's interlocutor of 23rd November.

Lord Young—I am of the same opinion, and I cannot say I regret the result, because I think that it will be beneficial to both parties. During the discussion I indicated that in my opinion a party would not be hindered from pursuing an action against another merely because he was in that other's debt, and I do not think that he would be precluded from suing that other person because the debt that he owed consisted of expenses which he had been judicially ordered to pay by a decree of this Court in another action. When we come to consider the real merits of the question it is this, whether the expenses which had been incurred by the pursuer in the former action ought not to be regarded as substantially expenses incurred in one and the same action as he has now brought. They were held to be so in the case of *Irving*, to which we were referred, and I think that the solution of the question is to be found in discovering whether the previous action might not have been converted into this action by amendment of the record.

What, then, are the facts of this case. The groundwork of it is the same grievance as in the previous case; it is brought against the same defender by the same pursuer, but at that time he did not present it in a relevant manner, as he had no averment of malice, which might have made it relevant, but these could have been added to the record at any time before judgment was pronounced, and if the pursuer had stated on record facts which would have authorised him to make the averments of malice, he might have asked that they should be added, and the Court would have been bound to allow them in order to get at the real matter in dispute between the parties in terms of the 29th section in the Court of Session Act of 1868. Then it is a matter of familiar practice that an amendment of that character, changing the ground of action completely, is only allowed upon condition of paying the expenses incurred by the opposite party as they have thus been rendered useless. That is the general rule. I assume Lord Lee's judgment in the former case, dismissing the action as irrelevant, to have been right, that the case had been reclaimed, and that before judgment had been pronounced affirming the judgment, that the pursuer had asked leave to amend his record by adding these statements of malice, and had been allowed to do so on condition of paying to the defender the expenses he had incurred. Suppose that was so, and the pursuer did not wish to incur that penalty, but allowed the defender to obtain his decree by not paying the expenses, and then said, "I will reach my end by another way; I will bring a new action, and add these averments so as not to have to pay these expenses," I think that the Court would have frustrated such an attempt. It may be very true that the irrelevancy for which the first action was dismissed did not arise from his fault; he may have given his agent proper instructions, which were not carried out, but his adversary must be reimbursed in the expenses which he had expended in defending the action. Therefore, in my opinion, the only condition upon which we can allow the pursuer to continue this action is that he should pay the expenses incurred by the defender in the previous case.

Lord Rutherfurd Clark concurred.

Lord Lee—I am of the same opinion, but I cannot say I am quite clear that in the case as stated by Lord Young the Court would have made the payment of expenses a condition of allowing the amendment to be made if it had been allowed. The provision in the statute is this—Section 29. "The Court or the Lord Ordinary may at any time amend any error or defect in the record or issues in any action or proceedings in the Court of Session upon such terms as to expenses and otherwise as to the Court or Lord Ordinary shall seem proper, and 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 shall be so made." The allegation of the pursuer is this—"Admitted that the pursuer in August 1886 instructed an agent to raise an action of damages for slander against the defen-

der for £1000. . . . Explained and averred that in consequence of the wilful, intentional, gross negligence, and disobedience of instructions on the part of the pursuer's agent that action was thrown out on the relevancy." Now, in an action for clearing of character I think it a nice question whether the Court would have enforced the payment of expenses as a condition of allowing the amendment or not. But I quite see the force of Lord Young's opinion, that as between the pursuer and the defender, even though the pursuer's case was thrown away by the fault of his agent, he must pay the expenses of having his record amended.

The Court pronounced this interlocutor:—

"The Lords approve of the Auditor's report on the pursuer's account of expenses: Allow the taxed amount, being £11, 14s. 6d., to be imputed in payment *pro tanto* of the sum of £33, 7s. 9d., being the taxed amount of expenses and dues of extract found due to the defender in the action at the instance of the pursuer against the defender and Peter Campbell, and the said sum of £11, 14s. 6d. having been imputed accordingly by the counsel for the defender, and the pursuer having made payment to the defender of £21, 13s. 3d., being the balance of said sum of £33, 7s. 9d., open up the record in this cause: Allow the new plea tendered by the defender to be added thereto, and the plea having been added accordingly, of new close the record; and having heard parties further in the cause, recal the interlocutor of the Lord Ordinary of 9th January last; adhere to his Lordship's interlocutor of 23rd November last."

The pursuer thereafter paid the expenses in which he was found liable in the previous case against Maclullich, and a proof before answer was allowed.

Counsel for the Pursuer—Party.

Counsel for the Defender — M'Kechnie — Forsyth. Agent—Thomas Carmichael, S.S.C.

Wednesday, March 6.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

WHYTE AND OTHERS (DALGLISH'S TRUSTEES) *v.* DALGLISH AND OTHERS.

Succession — Testament — Construction — Bequest Burdened with Trust for Issue — Vesting — Intestacy.

A truster appointed his trustees to divide the residue of his estate in certain shares among his children, payable as soon as his estate was realised, and upon the death of his wife to divide in like manner the sum set apart for her annuity. The shares of deceasers dying before payment, and without issue, were to be divided among survivors, and the issue of deceasers were to take their parents' share.

By a codicil the testator directed his trustees "to invest the shares of my means and estate falling to my daughters at my death, and at the death of their mother, in case she shall survive me, so soon as the same is realised and can be invested, upon heritable security, taking the rights thereto conceived in favour of such daughters in liferent, for their liferent use allenarly, and to the child or children of their bodies, if more than one, equally among them in fee."

In an action of multiplepoinding at the instance of the trustees, *held* that the provisions to children vested *a morte testatoris*; that the sole object of the codicil was to protect the capital of a daughter's share for possible children; and that it did not result in intestacy on the part of the testator with respect to the share of a daughter dying without issue.

James Dalglish, manufacturer in Glasgow, died on 24th July 1849, leaving a trust-disposition and settlement dated 7th May 1847, by which he disponed to trustees his whole estate, for certain purposes, *inter alia*—(2) For providing an annuity to his widow if she should survive him. (4) "I appoint my said trustees to divide the remainder and residue of my said means and estate into twenty-eight equal parts or shares, four of such parts or shares to be paid to each of my four daughters, and six parts or shares to each of my two sons; and on the death of my said spouse, in case she shall survive me, I direct my said trustees to divide the sum set apart for answering her annuity, and the proceeds of the house and furniture liferented by her, among all my children in the same proportions, said shares to be payable to my said children as soon as my estate shall be realised and converted into cash; which provision in favour of my said daughters shall be exclusive of the *jus mariti* or right of administration of any husbands they may presently have or may afterwards marry, and not subject to the debts or deeds of such husbands or the diligence of their creditors, and the same shall be under their entire control and disposal; and in the event of the death of any of my said children before receiving payment of their shares without leaving lawful issue, the share of such deceaser shall be divided among my surviving children or their issue in the proportions foresaid; and in the event of the death of any of my said children leaving lawful issue, the share of such deceaser shall be paid to said issue equally, share and share alike." By codicil dated 3rd March 1848 he directed and appointed his trustees "to invest the shares of my means and estate falling to my daughters at my death, and at the death of their mother, in case she shall survive me, so soon as the same is realised, and can be invested upon heritable security, taking the rights thereto conceived in favour of such daughters in liferent for their liferent use allenarly, and to the child or children of their bodies, if more than one, equally among them in fee; declaring that said liferent provisions shall be purely alimentary, exclusive of their husbands' *jus mariti*, not attachable for his or their debts, nor assignable by my said daughters. But providing and declaring that my said daughters or any of them may, if so disposed, by a writing under their hands, continue the liferent provi-