damages are given because substantial damages are not sought. The purpose of action is by giving a sum of damages, however small, to mark the fact that there was a wrong done.

Now I must concur with your Lordship in thinking that the fact that the verdict of the jury was for the pursuer, and that fulfilling their duty they had to assess damages even although they assessed them at so small a sum, implies that the action was an action which might be raised and for which the pursuer could bring facts entitling him to a verdict in his favour.

In these circumstances I cannot see that there is any ground for holding that the defenders are entitled to get expenses up to date when by their practical act of putting in a tender of a certain sum of money they placed the pursuer in a position of considering whether he would go on with the action and try to get more or would accept what was offered. If he had accepted the tender he would certainly have been entitled to expenses up to its date. I entirely agree with what your Lordship has said.

LORD DUNDAS, LORD JOHNSTON, and LORD GUTHRIE concurred.

LORD KINNEAR, and LORD MACKENZIE were absent.

The Court applied the verdict, and in respect thereof decerned against the defenders for the sum of one shilling and sixpence, being the *cumulo* amount of the damages assessed by the jury, found neither party entitled to expenses up to the date of the tender, and found the defenders entitled to expenses subsequent thereto.

Counsel for the Pursuer—Watt, K.C.—J. R. Christie. Agent—Robert Anderson, S.S.C.

Counsel for the Defenders—Constable, K.C.—Hon. W. Watson. Agents—Finlay & Wilson, W.S.

Thursday, June 5.

FIRST DIVISION.

[Sheriff Court at Glasgow.

HOLMAN & COMPANY *v.* UNION ELECTRIC COMPANY, LIMITED.

Jurisdiction — Arrestment ad fundandam jurisdictionem — Action for Implement of a Contract, and, Failing Implement, Damages.

A Scottish firm raised an action in a Sheriff Court against an English limited company and used arrestments to found jurisdiction. The action was for delivery to the pursuers of 30,000 pairs of carbons in terms of a contract, or failing delivery for £1000 damages.

The Court, *holding* that there being no question of a *pretium affectionis* the action was not truly one *ad factum præstandum*, *sustained* the jurisdiction.

Holman & Company, electrical engineers, 20 West Campbell Street, Glasgow, *pursuers*, raised an action in the Sheriff Court of Lanarkshire at Glasgow against the Union Electric Co., Ltd., Park Street, Southwark, London, *defenders*. The claim of the pursuers' initial writ was—"For delivery of 30,000 pairs Excello yellow flame carbons 600 m/m by 10 m/m and 9 m/m, ordered by pursuers from the defenders on 18th December 1912 at the price of £153, 10s. nett per 10,000 pairs, in virtue of a contract between the parties for the supply of such carbons for one year from 20th December 1911, or failing delivery payment of £1000, being damages sustained by the pursuers through defenders' failure to implement the said contract [or alternatively for payment of £1000 damages in respect of defenders' breach of said contract]." The alternative claim in brackets was added by amendment as after mentioned. Their crave to the Court was similar and was similarly amended.

The defenders pleaded, *inter alia*—"(1) No jurisdiction; and *separatim*, the action is incompetent in respect that a decree *ad factum præstandum* cannot be granted by the Sheriff of Lanarkshire against an English company."

On 4th March the Sheriff-Substitute (LYELL) pronounced this interlocutor—"Having considered the closed record and heard parties' procurators under reference to the subjoined note, appoints the cause to be put to the procedure roll."

Note.—"This is an action for implement of a contract, or failing implement for damages, in which jurisdiction has been founded by arrestment. The defenders object that in respect the leading conclusion is for delivery in implement of the contract—which is just a conclusion for decree *ad factum præstandum*—no effective jurisdiction has been founded against them by arrestment. The question is not free from difficulty, and one can certainly see that such a decree would be difficult to enforce against an English defender. It could not be enforced by registration under the Judgments Extension Act of 1882, which applies only to judgments for debt, damages, or costs. It has been held that arrestment does not confer jurisdiction to try questions of status, and it appears unsettled whether jurisdiction has been thereby conferred to try declarators and reductions—*Lindsay* v. *London and North Western Railway Company*, 18 D. 62, App. 3 Macq. 99; *Longworth* v. *Hope*, 3 Macph. 1049; *Shaw* v. *Dow & Dobbie*, 7 Macph. 449. But after full consideration of the cases Lord Kincairney sustained his jurisdiction, when so created, in an action *ad factum præstandum* in *Powell* v. *MacKenzie & Company*, (1900) 8 S.L.T. No. 152, p. 182. It appears to me, however, seeing that the conclusion for damages for breach of contract is obviously competent, that the pursuers might well confine themselves to that conclusion, more especially as on their own showing the contract cannot now be implemented in terms as the time of the delivery stipulated is long past. I

shall therefore put the case out for further procedure, and allow the pursuers, if so advised, to strike out their conclusion for delivery, and confine their crave to one for damages, in respect that the defenders have failed timeously to deliver the articles contracted for."

Thereafter the pursuers made the amendment above referred to, and the defenders added these pleas-in-law—"(1A) The amendments made by pursuers being incompetent and insufficient to alter or vary the *ad factum præstandum* conclusions still sought *primo*, the action should now be dismissed. (1B) In any event, in the action as amended by pursuers in terms of interlocutor dated 17th March 1913, the defenders plead 'no jurisdiction' in so far as the *ad factum præstandum* conclusions are concerned, and *separatim*, the action is incompetent as regards the *ad factum præstandum* conclusions in respect that a decree *ad factum præstandum* cannot be granted by the Sheriff of Lanarkshire against an English company. The action should therefore be dismissed with expenses. (1C) In respect that by minute pursuers have amended the prayer of their petition, defenders are entitled to their expenses to date before the case is allowed to proceed further."

On 2nd April the Sheriff-Substitute repelled, *inter alia*, the defenders pleas 1, 1A, 1B, and 1C, and before answer allowed parties a proof of their averments on record; and on 8th April he granted leave to appeal against the interlocutor of 2nd April.

The defenders appealed, and argued—The primary conclusion of the action was one *ad factum præstandum*. It was one which the Court could not enforce, and accordingly arrestment to found jurisdiction was invalid. In determining whether the action was truly *ad factum præstandum* the test was whether the conclusion challenged was a primary conclusion or merely ancillary. That test was applied in *Lindsay* v. *London and North-Western Railway Company*, November 20, 1855, 18 D. 62, affirmed February 23, 1858, 3 Macq. 99, where the objection to the arrestment was that the action was a declarator, and in *Morley* v. *Jackson*, November 9, 1888, 16 R. 78, 26 S.L.R. 52, where the objection was that the action raised a question of status. Here the primary and leading conclusion was for implement, and the amendment really did not alter this. But in any case if the Court had no jurisdiction to try the cause as the writ was originally served, subsequent alterations of it could not confer jurisdiction—*Morley* (*cit. sup.*), Lord Shand at p. 83, Lord Adam at p. 84. The law of arrestment *ad fundandam* was artificial—*Hope* v. *Derwent Rolling Mills Company, Limited*, June 27, 1905, 7 F. 837, Lord President at 845, 42 S.L.R. 794—and it should not be carried further than was warranted by precedent and authority—*Cameron* v. *Chapman*, March 9, 1838, 16 S. 907 at 918. Reference was also made to *Longworth* v. *Hope and Others*, July 1, 1865, 3 Macph. 1049. The Lord President referred to Lord Ivory's Note to Ersk. Inst. i, 2, 17, Note 25.

Counsel for the pursuers and respondents were not called upon.

LORD PRESIDENT—This is an action in the Sheriff Court at Glasgow by a Scottish firm against an English firm, against whom arrestments *ad fundandam jurisdictionem* had been used. The crave of the initial writ was to ordain the defenders to deliver to the pursuers 30,000 pairs of certain carbons in terms of a contract, and failing their so delivery for damages stated at £1000 sterling. The defenders appeared and submitted to the Sheriff that there could be no jurisdiction, in respect that a decree of that sort could not be sought upon a jurisdiction that was admittedly only founded on arrestments *jurisdictionis fundandæ causa*. The Sheriff said he thought the point was one of some nicety, but said that he would continue the cause in order that the pursuers might abandon their claim for delivery and merely ask for damages for breach of contract. The pursuers, whether entirely understanding what the Sheriff had said or not I do not know, did amend their summons, but they did so by putting in a simple alternative conclusion for the sum of £1000 sterling. That amendment was allowed, and upon that the Sheriff sustained the jurisdiction and granted leave to appeal upon that question.

In my opinion no amendment of the writ was at all necessary, and if I thought that the jurisdiction depended upon the amendment I should have considerable doubt, because I humbly agree with what was said by Lord Adam in the case of *Morley* v. *Jackson* (1888, 16 R. 78) that if there is no jurisdiction when the parties join issue it is difficult to see how you can then introduce jurisdiction by an amendment of the summons. But I do not think it at all necessary to consider that matter, because it seems to me that there was perfectly good jurisdiction irrespective of the amendment, and I cannot see that the learned counsel's address has given me any reason for forming another opinion.

He quoted a great many cases, with which we are quite familiar, illustrating the rule that you cannot have jurisdiction for actions such as actions of status and of pure declarator based upon an arrestment *ad fundandam*. I am tempted to say "Of course not."

I am not going to repeat what I said upon the origin of jurisdiction upon arrestment *ad fundandam* in the two cases of *Leggat Brothers* v. *Gray*, 1908 S.C. 67, 45 S.L.R. 67, and *Hope* v. *Derwent Rolling Mills Company, Limited, cit.*; historically, the origin of it all was that by the arrestment *ad fundandam* the pursuer got hold of something that would satisfy the judgment. In modern times that is not literally true, but the idea that something was got hold of which would satisfy the judgment was the foundation of the practice, and still remains the test of the competency. Well, it

follows, I think, that if what you are asking from the Court is some class of decree which never can be worked out in money, then you cannot suppose that there will be a jurisdiction of the Court founded upon an arrestment of money the original use of which was merely to satisfy the judgment. But I think it is really a mistake to call the decree that is asked for in this action—an ordinary action founded upon breach of contract—a decree *ad factum præstandum* at all. There is no difficulty at all in working out this judgment in money. The point between the parties upon the merits is whether there is a contract or whether there is not, and this question must always in such a case be put for the decision of the Court. In one sense there is always a declarator *sub auditus* in every decree that you ask. Take, for instance, a mere action for payment founded upon a bill or a bond. There must always be a finding that the bill or the bond was good. It would be a perfectly good answer to say that the bill was forged or that the bill was obtained by false pretences, and yet the action could be nothing but a petitory action.

Accordingly it seems to me that a demand for a declarator is a first stage of every action, whether declarator is expressly concluded for or not.

It is argued that this is an action *ad factum præstandum*, and that the subjects arrested cannot satisfy the judgment in such an action. Now it seems to me that when a person asks for delivery of a specific article of which there is a *pretium affectionis*, the decree that he wants is the true decree for specific performance, but when he says to the other person, "We have a contract; under that contract you are bound to deliver; you have not delivered; deliver or else pay damages," he is not asking for a decree *ad factum præstandum* in the proper sense at all. I think the absurdity of the situation can be illustrated by supposing that this had been an ordinary action in the Court of Session with a conclusion in the same form as the prayer of this initial writ, and that no question of jurisdiction had been raised but decree in absence pronounced. The decree in absence would be a decree in terms of the conclusions of the summons, and the extract would echo the conclusions of the summons. Does anyone suppose that if a person holding that decree had gone to a messenger and told him to charge upon the first portion of the summons, namely, that which asked for delivery, and had then come back to the Court after delivery had not been implemented, that he would then have got from the Court a warrant for imprisonment? Such a thing would be absolutely inconceivable. And so the argument for the appellants really comes to this—it is incompetent, because being an Englishman a Scotch Court could never do against him what it never would do against a Scotsman.

The truth is, that a person who comes and asks for a decree of this sort is not asking for a decree for specific performance at all. He is saying—"There is a contract between us; you have broken it; I am content with your giving me either what I am entitled to under the contract, or, if not, paying damages."

It was said that there was no authority upon this matter. I should not expect to find authority upon it, because as a matter of fact it is not to be supposed that a case would be reported upon this point alone; such a case would only be found in the books if it raised some other point to be reported. But I have not a doubt that with a little perseverance one could find many cases in the books in which jurisdiction had been founded by arrestments on a summons in terms similar to those of this initial writ. But so far as the expression is concerned, there is not the shadow of a dictum against it. One finds that Lord Ivory in his well-known notes to Mr Erskine (i, 2, 19), speaking of the class of actions which can and cannot be raised upon arrestment *jurisdictionis fundandæ causa* respectively, says that there is a distinction to be observed between such questions as originate in a mere ordinary patrimonial claim for the payment of debt or the performance of a mercantile contract or the like on one side and questions of personal status on other. In other words, he absolutely assimilates an ordinary claim for payment and a claim for the performance of a mercantile contract.

On the whole matter, I think the Sheriff-Substitute was quite right in sustaining his jurisdiction, although I do not think he need have gone through the process of allowing any amendment of the writ at all.

LORD KINNEAR, LORD JOHNSTON, and LORD MACKENZIE concurred.

The Court dismissed the appeal, affirmed the interlocutor of the Sheriff-Substitute dated 3rd April 1913, and remitted the cause to him to proceed as accords.

Counsel for the Pursuers and Respondents—Paton. Agents—Erskine Dods & Rhind, S.S.C.

Counsel for the Defenders and Appellants—Dean of Faculty (Dickson, K.C.)—M. P. Fraser. Agents—Macpherson & Mackay, S.S.C.