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-

ment is quite conclusive. Here are parties seeking to be sisted as pursuers, and the moment they appeared they would be met by the question, Where is your arrestment? The want of an arrestment is an absolute bar to jurisdiction. This is not a question of title; it is a question preliminary to appearing in Court at all. We may mend the record, but we cannot mend the arrestment.

The Court adhered.

Agents for Pursuer—Scarth & Scott, W.S.

Agents for Defender—Murdoch, Boyd, & Co., S.S.C.

Wednesday, December 13.

SPECIAL CASE—JAMES REID & OTHERS.

*Special Case—Pupil—*Curator ad litem. On the motion of counsel for two pupils, parties to a Special Case, the Court appointed a *curator ad litem* to them, the father of the pupils having an adverse interest.

Reference was made to the following Special Cases:—*Clinton*, Nov. 27, 1869, 8 Macph. 370, in which the Court appointed a *curator ad litem* to a minor, a party to the case; *Rankin*, March 5, 1870, 8 Macph. 878, in which, at the suggestion of the Court, a pupil was made a party, and the Court thereafter appointed a *curator ad litem; Hope and Ors.*, March 15, 1870, and *Walker's Trs.*, June 16, 1870, 8 Macph. 870, in both which cases the Court appointed a *curator ad litem* to a married woman, a party to the case.

Agents—Jardine, Stodart, & Frasers, W.S.

Wednesday, December 13.

BEGBIE'S TRUSTEES *v.* THOMSON.

Road—Possession—Property. In a division of runrig lands by decree-arbitral, the arbiter found and declared that there should be a road between the houses of A and B for an entry to the allocations of C, D, E, and F, all of them being parties to the arbitration. *Held* that C, D, E, and F could not establish a claim to the property of this road, or to exclude B from using it, without proving exclusive possession; and (by Lords Deas and Kinloch) that it was intended by the arbiter that D should have the use of the road,

Between the years 1769 and 1772 various deeds of submission, with relative deeds of accession, were entered into by a great number of persons, all heritors of lands lying runrig and rundale in the parishes of Dirleton and Gullane, or having interest in the commonties of these parishes. Mr Law of Elvingston, Sheriff of East-Lothian, was appointed arbiter, and was empowered so to divide the lands as to let each person's property lie together. In 1772 Mr Law issued an award, by which he found, *inter alia*, that James Darg, John Darg, James Thomson, Andrew Grier, and John Warrock were possessed of certain portions of land, and in lieu of these he assigned to them certain other portions. The new allocations of John Darg, Thomson, Grier, and Warrock lay alongside of one another, and were all bounded on the north by the drain of the north common, and on the south by the yeard dykes north of the town of Dirleton. The eleventh finding was in the following terms:—"And I also find and declare that there shall be a road from the green of Dirleton between the houses belonging to the said James Darg on the east, and the houses or yeards belonging to Mr Nisbet of Dirleton on the west (for an entry to the new allocations above described, belonging to John Darg, Andrew Grier, James Thomson, and John Warrock), and that the said road shall land much about the middle of the south end of the said James Thomson's grounds, for which landing place the said Andrew Grier shall have a right of servitude to a ten feet broad road to his said allocation; and the said John Darg shall have the benefit of the said ten feet broad road through the west side of said Thomson's allocation, and through the south end of said Grier's allocation (for an entry to his property above mentioned), and that the said John Warrock shall be entitled to the benefit of the said ten feet broad road through the south end of the said Thomson's property, as a passage to and from his lands on the east side thereof."

The pursuers were now proprietors of the allocations of Thomson, Grier, and Warrock, and brought this action of declarator against the defender, who was now in right of James Darg's houses, to have it found that under the decree-arbitral they were (along with the proprietor of John Darg's allocation) proprietors of the road leading to these four allocations from the high road, and also that they were entitled to exclude the defender from the use of it. Both parties renounced probation.

The Lord Ordinary (JERVISWOODE) assoilzied the defender in the following interlocutor:—

"*Edinburgh, 4th July* 1871.—The Lord Ordinary having heard counsel in the procedure roll and made avizandum, and considered the record and whole process, including the excerpts forming No. 59 of process, from submission and decree-arbitral relative to the runrig and rundale lands and commonties of Dirleton, and also including the joint minute, No. 60 of process, whereby both parties renounce probation, and admit that said excerpts are correct,—Finds that the pursuers have failed to establish that, under the terms of the titles produced by them in process, or under the terms of said decree-arbitral, they and their predecessors and authors had and have the sole and exclusive right and property along with the proprietor of the allocation of ground which at one time belonged to John Darg of Dirleton, of and in the road described in the summons, and to which the conclusions thereof relate, or that they and their foresaids had and have any right to said road beyond a right of entry or access thereby to the several properties allocated to them by the said decree-arbitral: Therefore, and in respect of no proof of exclusive possession on the part of the pursuers or their foresaids, repels the pleas in law stated on behalf of the pursuers, assoilzies the defender from the conclusions of the summons, and decerns: Finds the defender entitled to his expenses, of which allows an account to be lodged, and remits the same to the Auditor to tax and to report."

The pursuers reclaimed.

WATSON and J. M. LEES, for them, argued that the terms of the decree-arbitral showed the road was a new road; and, as the validity of the finding had never been questioned, that the land on which it was made must have been part of the runrig land. The road was for the four allottees, and the right given was evidently one of property, especially seeing that the learned arbiter described the