

the said three sums of interest were paid respectively; and with this finding remit the cause to the Lord Ordinary to proceed therein as may be just, reserving all questions of expenses; and decern: Grant power to the Lord Ordinary to deal with the whole questions of expenses, both in the Outer and Inner House, and to decern therefor."

Counsel for Pursuers—Asher—M'Kechnie.
Agents—D. & W. Shiress, S.S.C.

Counsel for Defender—Kinnear. Agent—George Burn, W.S.

Wednesday, July 11.

FIRST DIVISION.

[Lord Rutherford Clark, Ordinary.]

GIBSON'S TRUSTEES v. FRASER.

Court of Session Act 1868 (31 and 32 Vict. c. 100, sec. 29).

Amendments proposed to be made under this section must be for the purpose of determining the question between the parties that is raised by the summons and condescendence.

Observed (per Lord President) that the time at which the proposal to amend is made is a very important consideration.

This was an action by the trustees of the late Patrick Gibson, a farmer near Brechin, against Robert Fraser, who was to become tenant of the farm which Gibson had held, at Martinmas 1876. The summons concluded for declarator that an agreement, consisting of eight different heads, had been entered into between the pursuer and defender, whereby it was agreed that the defender should take over certain crops and implements at a valuation, and should accept the houses and fences as in the condition in which the outgoing tenant was bound to leave them. The summons set forth the whole alleged agreement, and further concluded for decree ordaining the defender to implement it or to pay damages.

In the condescendence it was averred that a draft of the agreement had been written out, and that the defender had agreed to sign it when extended.

The pursuer pleaded—"The defender having entered into the agreement libelled with the pursuers, and having refused to implement the same, the pursuers are entitled to decree as concluded for, with expenses."

After a proof the Lord Ordinary pronounced the following interlocutor:—

"Edinburgh, 13th February 1877.—The Lord Ordinary having considered the cause, dismisses the action, and decerns: Finds the defender entitled to expenses, &c.

"Note.—The Lord Ordinary regrets that he has been obliged to pronounce this decision. But from the form of the action he does not think that he can do otherwise. No proposal was made to amend the summons.

"The only purpose of the action is to declare that the pursuers and defender entered into an

agreement consisting of eight different heads. It is contained in an informal writing prepared by Mr Shiell, as the agent of the pursuers, and sent to the defender on 18th August 1876. It was not signed by the defender, but the pursuers alleged that *rei interventus* followed.

"It is plain from the evidence that before the writing was drawn up no such agreement as that which it expresses was ever entered into between the parties. Certain obligations existed on the pursuers and defender as the outgoing and incoming tenants. But these were ascertained by the lease, and, with perhaps a small exception relating to the time when the turnips were to be removed, it had never been proposed to make them the subject of any agreement. Indeed, at the time when the writing was sent to the defender it is not contended by the pursuers that anything had been agreed on, except that the defender was to take over a number of farm articles, and that in consideration of his obtaining immediate access to the steading he should take over the houses and fences as being in the condition in which the pursuers were bound to leave them. The defender does not deny that he agreed to take the farm articles, but he maintains that he never undertook to accept the houses and fences.

"After the writing was communicated to the defender, a meeting took place on 22d August. The pursuers say that the defender approved of it, and agreed to sign it, and indeed that it would have been signed then and there but that it was only in scroll. The defender says that he refused to sign it in consequence of his objection to the clause relative to the houses and fences, but he does not seem to have stated much, if any, objection to the other clauses. It is certain, however, that when it was sent to him on the 23d of August, for his signature he refused to sign it and returned it.

"The Lord Ordinary is of opinion that the pursuers have not established that the agreement libelled was concluded between them and the defender. It was intended to be reduced to writing, and the defender refused to sign it. Even assuming that the defender agreed to it, there was *locus penitentiae* until it was signed; and in regard to the question whether the agreement as a whole was ever concluded, the Lord Ordinary is of opinion that nothing followed between the 22d and 24th of August to prevent the defender from resiling. On the 24th of August the defender definitely refused to sign, and his refusal was never withdrawn.

"The real question between the parties was whether the defender agreed to take over the buildings and fences as in good order. On this question there is a painful conflict of evidence. But the Lord Ordinary forbears to express any opinion upon it, as owing to the form of the action he cannot decide it. He has thought it proper to dismiss the action and not to assoilzie."

The pursuer reclaimed, and proposed to amend his record to the effect of abandoning his attempt to set up the written agreement, relying instead upon evidence as to a verbal agreement and *rei interventus*, which had reference to the taking over of the farm buildings.

The defender resisted this motion, on the ground that this was really a different ground of action, and that the pursuer was bound to have taken up

this position sooner and amended his record at an earlier stage if he had it in his mind to do so at all.

At advising—

LORD PRESIDENT—The 29th section of the Court of Session Act of 1868 gives a very large power to the Court to allow amendments of the record at any time, and even contains imperative words directing the Court to allow “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.” The meaning of these words is very important in the administration of this statute. They cannot mean that amendments may be made so as to enable parties to obtain the judgment of the Court upon any question that may be in controversy between them; they mean, to enable parties to obtain that judgment on the question raised by the summons, whatever that may be. If an attempt is made to raise any other question by an amendment, it is not only not imperative to allow it, but it is impossible for the Court to allow it. That is illustrated by the case of *Forbes v. Watt's Trustees*, decided in the Second Division. A motion for amendment there was refused “on the ground that the question was a separate dispute between the parties, and that it was not the intention of the Act of 1868 to allow parties by amendment of the summons to raise at the end of a case an entirely different question from that originally in dispute.” Now, the proposal to amend the record here comes at the end of the case. The Lord Ordinary says that there was no attempt to amend the record while the case was before him. We have therefore here a closed record, a concluded proof, and a judgment by the Lord Ordinary against the pursuer. It is only on a reclaiming note that this proposal is made. No doubt the Act allows an amendment to be made at any time, but the time at which the proposal to amend is made is a very important consideration.

The important point then is, Whether this amendment will raise the same question between the parties as was intended to be raised by the original summons? Now, with every inclination to allow all reasonable amendments, I cannot answer that question in the affirmative. I think a different question is raised and was intended to be raised by that amendment. The intention of the summons must be judged of not merely by its conclusions, but by the condescence and pleas annexed to it. Having in view the statements and the plea I find here, I think they amount to an averment that a completed agreement was made, though not signed, and that the pursuer is entitled to have that enforced. We find the whole of the draft agreement engrossed in the conclusions of the summons, and we are asked that the defender should be decreed to implement the whole of it. Now, what is intended to be done by the proposed amendment? It is this—to enforce against the defender, as if it were a substantial and separate agreement, one of the heads of that other agreement. I am satisfied that this is a case of the class to which the 29th section of the Act does not apply, and that this is an attempt, as in the case of *Watt's Trustees*, to raise at the end of a case an entirely different question from that originally in dispute.

The other Judges concurred.

The motion for amendment was accordingly refused.

Counsel for Pursuers—Asher—Mackintosh.
Agent—John Henry, S.S.C.

Counsel for Defenders—Trayner—Lorimer.
Agents D. & W. Shiress, S.S.C.

Thursday, July 12.

FIRST DIVISION

[Lord Rutherford Clark,
Ordinary.]

MACKINTOSH v. LORD ABINGER AND
OTHERS.

Teinds—Prescription.

Where an alleged prescriptive title to teinds, founded on a conveyance which conveys for family purposes in general terms a variety of lands “with the teinds belonging to and on the said respective lands above disposed, and contained in the particular charters and infestments thereof,” it is competent to go back to the earlier titles to ascertain whether this general conveyance carries a right to the teinds of a particular parcel of lands, it being disputed that the disposer ever had an heritable right to them.

Teinds—Prescription—Possession—Payments to Minister.

Held a sufficient objection to the claim of an heritor to an heritable right to teinds founded upon possession for the prescriptive period, that the teinds had been localled on the footing that there was no heritable right, and stipend had been paid accordingly.

This was an action at the instance of Mr Mackintosh of Mackintosh against the patrons, heritors, and minister of the parish of Kilmonivaig, Inverness-shire, for reduction of two decrees of locality, dated respectively 1837 and 1862, and for declarator that such reduction should be held to have taken place as for crop and year 1834, the date of the first process of augmentation. The pursuer was proprietor of the lands of Glenroy and Glenspean, in the said parish of Kilmonivaig, and averred that he had an heritable right to the teinds of these lands. The foundation of this claim was a conveyance by Æneas Mackintosh in 1766 to trustees of certain lands, including the lands of Brae Lochaber, “with the several manor places, milns, teinds, &c., belonging to and on the said respective lands above disposed, and contained in the particular charters and infestments.” The trustees were infest on this deed in 1770, conform to instrument of sasine which contained no limitation as in the trust-disposition by reference to the previous charters and infestments. Thereafter, in 1772, the trustees conveyed the lands to Æneas Mackintosh the younger, in terms similar to those of the trust-deed. In 1819 Æneas Mackintosh the younger expedie a service as heir to his uncle Æneas the elder, and obtained a precept from Chancery on which he was infest. He then executed an entail by grant-