ously during her life or by will. She is not a mere liferenter; as Lord Stair says (3, 5, 51) —"The nature and extent of such clauses is not to constitute the first person as a naked liferenter, but that they are understood as if they were thus expressed, 'with power to the first person to alter and dispose at pleasure during his life.'"

But if she does not do so, and the funds are extant at the date of her death, so much of them as is required shall be taken to satisfy the legacies mentioned in Peter Bell's settlement and codicils. The will provides no trust or other machinery to protect the interests of the substitutes, but this does not prevent an effectual substitution. If indeed the funds had once passed into the possession of Mrs Bell, there might have been grounds for maintaining, though this is by no means clear on the authorities, that the substitution was, *ipso facto*, evacuated—*Buchanan's Trustees* v. *Dalziel's Trustees*, 6 Macph. 536, *per* Lord Deas, p. 540. But in the present case the funds were not paid over to Mrs Bell. She survived her husband and therefore right to the money was fully vested in her. But she died within six months of her husband, and therefore before the executor was legally bound to make payment to her. She died intestate without having assigned her right and apparently no creditors are claiming as in her right. The funds are still in the hands of Mr Bell's executor. There is no practical difficulty in the way of giving effect to the truster's intention. I know of no case in which a substitution, being well created, and the funds having been paid over to the institute has not received effect on the institute dying without evacuating the substitution.

On these grounds I am of opinion that the third parties are entitled to payment of their respective legacies out of the moveable (the only) estate in the executor's hands.

The Court answered the first question in the negative, and found it unnecessary to answer the second question.

Counsel for the First, Second, and Fourth Parties — Macfarlane — Graham Stewart. Agent—John Mackay, S.S.C.

Counsel for the Third Party—Guthrie Q.C.—Gunn. Agent—John Dobie, Solicitor

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Thursday, July 15.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

BROWN'S TRUSTEES *v.* HAY.

Process—Summons—Plurality of Pursuers —Amendment.

A's trustees, and B, the law-agent of the trust, raised an action against C, who had formerly been in the employment of B's firm, for delivery of certain documents belonging to the trust, and for damages in respect of C's having illegally used these documents while in his possession (in a manner specifically set forth) to the pursuers' prejudice.

The pursuers averred that C had originally obtained possession of some of the documents while employed by the trustees as auditor of a business carried on by them, and of the others while acting as liquidator in the winding up of B's firm.

After the record was closed, the pursuers, in order to meet objections to the competency of the action, applied for leave to amend the summons by making the conclusion for damages one in favour of the trustees alone, and not of all the pursuers.

Held (*aff.* the judgment of the Lord Ordinary) that the summons was relevant, in so far, at least, as its conclusions were founded on a breach, on the part of the defender, of the contract of employment between him and the trustees; and (2) that the conjunction of the law-agent of the trust, as a pursuer along with the trustees, did not, at least as regards the conclusion for delivery, render the instance invalid; and (3) that in any event the amendment had been properly allowed by the Lord Ordinary.

Opinion by Lord M'Laren, that the Court ought not to interfere with the Lord Ordinary's discretion as to amendment, even if differing from him as to the expediency of allowing the amendment.

The Court of Session Act 1868, sec. 29, enacts—"The Court or the Lord Ordinary may at any time amend any error or defect in the record or issues in any action or proceeding 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: Provided always that it shall not be competent by amendment of the record or issues under this Act to subject to the adjudication of the Court any larger sum or any other fund or property than such as are specified in the summons or other original pleading, unless all the parties interested shall consent to such amendment."

An action was raised by Mrs Brown, widow of the late Mr William Brown of Dunkinty; Mr Ralph Cameron, Writer to the Signet, Elgin; and Mrs Brown's two sons, all as trustees acting and assumed under his trust-disposition; and by Mr Cameron, as an individual, against Mr James Hay, accountant, Elgin. The summons craved the Court to ordain the defenders "to deliver to the pursuers all documents or copies of documents having reference to the business of distillers sometime carried on by the said William Brown, and now by

the pursuers, . . . including therein all extracts, excerpts, or copies made from the books . . . of the said business during the period from about 1880 to 1893 inclusive, during which the defender audited the books; to interdict the defender from communicating any information relating to the affairs of the distillery, and obtained by him while acting in the capacity of auditor, to third parties, without the pursuers' consent, or to their prejudice; and to ordain the defender to make payment to the pursuers of the sum of £500 in name of damages."

The pursuers averred—"(Cond 2) The defender was cashier for over twenty years to the late firm of Cameron & Allan, solicitors, Elgin, of which the pursuer Mr R. C. Cameron's father, Mr Alexander Cameron, now deceased, and the said R. C. Cameron and James Allan, were the only partners. Mr Alexander Cameron, the senior partner, died on 2nd March 1895, and the business of Cameron & Allan was carried on by the surviving partners till 31st May 1895, when it was dissolved at Mr R. C. Cameron's request by mutual consent of the surviving partners. The defender was appointed to wind up the business of the firm of Cameron & Allan, and undertook at its conclusion to return to the employment of Mr Cameron, but it is believed he was induced by Mr Allan not to do so. He thereupon set up in business on his own account as an accountant in Elgin. . . . (Cond. 3) The pursuer Mr R. C. Cameron and his father were nearly related to the late William Brown of Dunkinty, and their firm of Cameron & Allan were employed by him as his solicitors. From about 1880 until 1893 the defender was employed by Mr Brown, through said firm of Cameron & Allan, to make up and audit the accounts of the distillery, and an annual fee was paid to his employers for the work which he did in this capacity, they paying the defender a salary which covered this amongst other duties. The defender docqueted the accounts as auditor in his own name, and for the last year (1892-93) in which he did so, the defender was paid the auditor's fee personally. (Cond 4) While acting as auditor of said distillery, the defender had full access to all the books and documents belonging to the distillery and relating to its affairs, and he thereby obtained information on private and confidential matters connected with the business of the distillery. As liquidator of the dissolved firm of Cameron & Allan the defender also obtained possession of numerous documents and papers belonging to the said firm as clients thereof. Amongst said papers the pursuers believe and aver were some which were prepared in connection with the business of the Linkwood Glenlivet Distillery belonging to them, and which had come into the possession of Cameron & Allan as agents for the late Mr Brown. . . . (Cond. 5) The pursuers have recently ascertained and aver that, in breach of his said, duty the defender made copies or extracts of books, accounts, and documents relating to the affairs of the Linkwood Distillery, which he retained after his duties as auditor had terminated." . . .

The pursuers averred further that the defender had used these copies and excerpts to communicate to third persons the information contained therein, and that in particular he had communicated to the Inland Revenue a document entitled—"Account of profits of Linkwood Distillery from 1873 to 1891," which represented the gross profits, but which he had represented as the actual profits, after debiting the business with repairs, &c,, and upon which income-tax should have been paid, and that in consequence of this the Revenue claimed payment of a large sum in respect of eight years alleged under-statement of profits, to resist which claim the pursuers would be put to great expense and trouble.

They pleaded—"(1) The defender having obtained the documents or copies mentioned in the first conclusion of the summons confidentially, while acting in the service of the pursuers' author, or as liquidator of the firm which acted as their law-agents, the pursuers are entitled to decree for delivery of same in terms thereof. (2) The defender having wrongfully disclosed information of a private and confidential nature, which he obtained while acting as auditor for said distillery, the pursuers are entitled to decree of interdict in terms of the second conclusion. (3) The pursuers having suffered loss, injury, and damage to the extent of the sum third concluded for, through the defender's wrongful actings as condescended on, are entitled to decree therefor, as craved."

The defender pleaded, *inter alia*—"The action is incompetent as laid," and "The pursuer's averments are irrelevant."

The pursuers, after the record had been closed, craved leave to amend the summons by inserting the words "the trustees aforesaid" after the word "pursuers" in the last conclusion of the summons quoted above. They further craved leave to amend the averments in the condescendence relating to their claim for damages in respect of the alleged disclosures to the Inland Revenue by making similar additions, and to insert the words "Mr William Brown's trustees" between the words "pursuers'" and "author" occurring in their first plea-in-law, and after "pursuers" in their third.

The Lord Ordinary (STORMONTH DARLING) on 1st July 1897 pronounced the following interlocutor—"Allows the pursuers to amend the summons in terms of the minute of amendment: Finds the defender entitled to the expenses of the discussion in the procedure roll, modifies the same at £5, 5s., for which sum decerns against the pursuers, and before answer allows the parties a proof of their averments in the record as amended."

The defender reclaimed, and argued—(1) There could be no question that the action as originally laid was incompetent, for two parties were represented in the summons as making the same claim, while their grounds of action were entirely different. To entitle different pursuers to combine

their claims in one action there must be community of interest—*Harkes* v. *Mowat*, March 4, 1862, 24 D. 701; *Smyth* v. *Muir*, November 13, 1891, 19 R. 81. But here, assuming the pursuers' averments to be relevant, they disclosed a separate ground of action in the case of the two parties based on separate wrongs. The case of *Mitchell* v. *Grierson*, January 13, 1894, 21 R. 367, was clearly distinguishable, because there the damages due to each pursuer were separately concluded for, while here they were lumped in one sum. (2) That being so, the amendment allowed by the Lord Ordinary was incompetent under section 29 of the Court of Session Act 1868, because it really augmented the sum concluded for, in respect that the sum demanded by both parties was now claimed by one, and his claim was accordingly augmented. In any case it was within the discretion of the Court to refuse it—*Russell, Hope, & Company* v. *Pillans*, December 7, 1895, 23 R. 256; *Taylor* v. *M'Dougall & Sons*, July 15, 1885, 12 R. 1304.

Argued for the pursuers—(1) The summons as originally laid was not incompetent. This was a case where persons having a clear title were conjoined with one who had not, and whose claims were not urged on record. The insertion of his name had been made in order to meet the argument which the defenders had advanced to the effect that the trustees had no title to sue. No harm had been caused to the defenders by the insertion of the additional name, the only result to them being that if they obtained absolvitor it would be good against an additional party. (2) The amendment did not make any change in the amount for which decree was sought, and accordingly it was an amendment of the kind authorised by the Court of Session Act. Being for the purpose of determining the real question at issue between the parties it fell under the imperative part of the section, which provided that an amendment of this kind "*shall* be so made," and it was not within the discretion of the Court to refuse it. The decision to the opposite effect by the Second Division in *Taylor* v. *M'Dougall*, *supra*, was erroneous.

LORD PRESIDENT — It is said, first, by the reclaimers that this summons as it stood was incompetent, and they go on to say that this amendment was outside the provisions of the section of the Court of Session Act. I think both these propositions are wrong.

In the first place the action must not be regarded as solely an action for the recovery of money, because the leading conclusion is for delivery of documents. I will take in the first place Brown's trustees' case. It is said by Brown's trustees — "Under the contract which our truster entered into with you, the defender, certain papers were put into your possession. Now, contrary to the contract which we are in right of, you retained these documents, and, what is worse, are making a bad use of them; and we ask that you be ordered to give them back." Now, supposing the trustees, from some legal scruple which may be unfounded in reason, choose to associate with themselves in their summons for the recovery of these writs their law-agent, I do not see anything incompetent in their asking that delivery be made to them and their nominee, in place of solely delivery to themselves; and therefore it seems to me it cannot be maintained that, in any view, the summons was incompetent, because the objection is really untenable as applied, at all events, to the first conclusion. If the action had been incompetent as to the petitory conclusion, the proper result would have been, not the dismissal of the whole action, but the dismissal of the petitory conclusion. But, as regards that conclusion, I am not at all satisfied that the action was incompetent; indeed, I think it was competent enough. It is to be observed that there is not here any combination of heterogeneous claims to found a demand for payment of one sum indiscriminately to all the parties. You are to look at the ground of action—to ascertain what the claim is, not only from the conclusions of the summons, but from the summons and the condescendence together; and you will consider what is the claim really made. As I take it, when the claim is scrutinised, it is a claim for damage which has been done to the trustees, and the position of Mr Cameron really comes on examination to this — that he has, for some reason or other been put in the instance, so as to obviate any objection that might be taken as to the rather confused circumstances in which the papers were, at one time or another, in the hands of the defender.

But then I go on to say that I think, if it should turn out that the summons was, on the face of it, incompetent, owing to an error—the claim of damage, let us say, not being in express terms limited to persons who had suffered the damage—and supposing that that rendered the summons incompetent, yet if it appeared to be in the words of the statute "an error or defect," I think—and I see the Judges of the other Division have so held—that the action can be made competent under the powers of the Court of Session Act; and therefore I think the Lord Ordinary has acted quite rightly. As I read the summons, the second claim submitted on record is a claim for injury to the trustees. That has been erroneously stated in the summons as yielding a money payment to all the pursuers instead of to the primary and proper pursuers. I think the Lord Ordinary was quite right in allowing that to be corrected.

When we turn to the question of relevancy, some of the same considerations arise. It is quite a mistake to suppose that the claim of damages is founded on this defender having, when in the employment of the legal firm, committed a wrong against the pursuers, because the leading averments of the condescendence, as I have already pointed out, set out the contract between the truster and defender, and the retaining of the papers as really a violation of the contract which the trus-

tees are now in right of. It is quite true that a more dubious part of the case is introduced by the statement that the defender was employed by Messrs Cameron & Allan as their liquidator, and that that afforded him free access to Brown's trustees' papers, and that he misused these papers which he had access to. It may or may not be that that is a good ground of action, as adding more damages to the claim; but this is not the proper time to dissociate things which in statement are much interwoven. I have no doubt the Judge who tries the case will have his attention called to the difference in quality of these averments, and will be able to dissociate them, if in his opinion one should be good and the other bad, but on that question I pronounce no opinion at all.

I think the case should go to trial, and I am for adhering to the Lord Ordinary's interlocutor.

LORD M'LAREN — I concur in all that your Lordship has said, both as to the propriety of the amendment which the Lord Ordinary has allowed and as to the relevancy. I will only add that I think there are strong reasons for considering that the power of amendment given to the Judge or the Court under the Court of Session Act is, I will not say a discretionary power, but a power to be exercised according to the personal judgment of the Judge or Court before whom the question may arise. My reason for saying so is partly this, that the power is to be exercised at any stage of the case, and in another part of the Act it is provided that, even in the course of a jury trial, the record and issues may be amended so as to enable the Court and jury to decide the true question in dispute. Now, it can hardly be supposed that a power which is to be exercised by a Judge in the progress of a trial is one that was intended to be subject to review on the question whether there was a proper case for the application of the statutory power. As review is not excluded, we must hold that if a legal question should arise—a question involving construction of the statutory power—that may be taken to review, as has been done in this case. But in my judgment there is here no case of construction of the statute, but only a question whether the Lord Ordinary rightly applied the power given in the statute for the purpose of removing a difficulty in the statement of the case, or making the pursuer's case more clear. Even if I differed with the Lord Ordinary—which I do not—I should not be prepared to interfere with his judgment in such a matter.

LORD ADAM and LORD KINNEAR concurred.

The Court adhered.

Counsel for Pursuers—Sol.-Gen. Dickson, Q.C.—Salvesen. Agents—John C. Brodie & Sons, W.S.

Counsel for Reclaimer — A. Jameson — J. Wilson. Agent—Robert Stewart, S.S.C.

Friday, July 16.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

TAIT (BUTTERCASE AND GEDDIE'S TRUSTEE) *v.* GEDDIE.

Lease — Irritancy — Exercise of Option by Landlord—Damages for Breach of Contract.

An agricultural lease, of which the terms excluded assignees, contained a declaration that, in the event of either of the joint tenants granting a trust-deed for behoof of creditors, the lease should, in the option of the landlord, become *ipso facto* null and void.

Before the expiry of the lease the tenants executed a trust-deed for behoof of creditors, and the trustee declined to take up the lease. One of the tenants was subsequently sequestrated. The other, however, intimated to the landlord his intention of continuing the tenancy under the lease; and the landlord refused to accept him as tenant.

Held that a claim by the landlord to rank on the trust-estate for damages, representing future rents under the lease, was invalid in respect (1) that, apart from the declaration in the lease, the tenant had a right to carry on the lease (2) that the landlord had exercised his option under the declaration in the lease, and (3) that consequently the lease had been brought to an end by the act, not of the tenants, but of the landlord.

Young v. *Gerard*, Dec. 23, 1863, 6 D. 347; *Walker's Trustees* v. *Manson*, July 17, 1886, 13 R. 1198; and *Bidoulac* v. *Sinclair's Trustee*, Nov. 29, 1889, 17 R. 144, *followed*.

Bankruptcy — Voluntary Trust-Deed for Creditors — Liability of Trustee in respect of Payment of Invalid Claim.

Where a trustee, appointed under a voluntary trust-deed for behoof of creditors, had out of surplus assets satisfied a claim on the trust-estate which was subsequently determined by the Court to be invalid, *held* that he must make good the sum so paid by him in respect (1) that he paid the claim in full knowledge that one of the trusters strongly objected thereto, and (2) that he paid it so precipitately as to give no opportunity to the objecting truster to interpel him.

Expenses — Bankruptcy — Trust-Deed for Creditors—Personal Liability of Trustee for Expenses.

A trustee under a voluntary trust-deed for behoof of creditors, satisfied a claim on the trust-estate in spite of the strong opposition of one of the trusters, without testing its validity in a court of law.

In an action subsequently raised by