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 condescendence 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 decerned 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 Rutherfurd 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 disponed, and contained in the particular charters and infeftments 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 disponer 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 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 disponed, and contained in the particular charters and infeftments." The trustees were infeft 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 infeftments. 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 expede a service as heir to his uncle Æneas the elder, and obtained a precept from Chancery on which he was infeft. He then executed an entail by grant-

ing a procuratory of resignation in the hands of the Crown in favour of a certain series of heirs. The trust-disposition and the disposition by the trustees contained no special description of the lands, while the subsequent deeds did so. On the other hand, in the writs subsequent to the deed of the trustees there was no mention of the teinds of the lands.

The pursuer further contended that he had possessed the teinds under the conveyance by the trustees in 1772 for the period of prescription, and therefore was entitled to the declarator asked.

The Lord Ordinary assoilzied the defenders, adding this note:—

"*Note.*—The pursuer maintains that he has an heritable right to the teinds in question in virtue of a title commencing in 1770, followed by possession. Apart from this prescriptive title he does not pretend any right.

"The original title on which the pursuer founds is a *mortis causa* trust-disposition, dated 2d December 1766, whereby Æneas Mackintosh conveyed to trustees a variety of lands, including the lands of Brae Lochaber, 'with the several manor places, milns, teinds, &c., belonging to and on the said respective lands above disponed, and contained in the particular charters and infeftments thereof.' On this deed the trustees were infeft in 1770. The instrument of sasine contains no limitation such as exists in the disposition by reference to the previous charters and infeftments.

"In 1772 the trustees, in execution of their trust, conveyed the lands to Æneas Mackintosh and a series of heirs. The description of the subjects so conveyed is the same as in the trust-deed, and the infeftment following on the disposition is the same as the infeftment of the trustees.

"The deeds which have been just mentioned did not contain any special description of the lands conveyed. But the subsequent titles do so. The lands of Brae Lochaber are conveyed without the teinds, and no title subsequent to the trust-deed and the disposition by the trustees contains them.

"The defenders object to the dispositions of 1766 and 1772 that they are mere general conveyances referring to the previous charters and infeftments for the subjects which are actually conveyed, and they plead that they are explained by the subsequent titles, which contain a particular description, and convey the lands of Brae Lochaber without the teinds. They further produce the infeftment of the granter of the trust-deed, which shows that he was not infeft in the teinds of Brae Lochaber.

"The Lord Ordinary is of opinion that the defenders are right. The dispositive clause contains the measure of the subjects conveyed; whether the teinds of Brae Lochaber were included or not depended on the previous charters and infeftments, and these showed that the granter of the trust-deed was not the proprietor of them. The titles following on the disposition by the trustees show that neither they nor the truster intended to convey the teinds of Brae Lochaber.

"Besides, in the opinion of the Lord Ordinary, the pursuer and his predecessors have not possessed the teinds under the titles on which they o und. In the several localities they have been localled on as not possessing the teinds on an heritable right. It appears that there has been a dispute as to the titularity, and the pursuer alleges that he and his predecessors have never paid the surplus teinds to any one. But when they have been localled on on the footing that they have no heritable right, it seems to the Lord Ordinary to be impossible to hold that they have been possessing their teinds as the owners thereof."

The pursuer reclaimed, and argued—The conveyance of the teinds by the trustees in 1772 is a good title on which to prescribe an heritable right to the teinds—*Learmonth* v. *Hamilton*, June 26, 1829, Shaw's Teind Cases 192. A title to teinds is easily presumed—*Scot* v. *Muirhead*, M. 15,638. Besides, it is not competent in a question of prescription to go beyond the title on which the plea of prescription is founded to inquire whether the granter had power to convey that which he professes to convey—Napier on Prescription 56; *Scott Elliot* v. *Buccleuch*, June 7, 1815, 2 Connell 68. It is not competent therefore to go beyond this conveyance to trustees by Æneas Mackintosh the elder, particularly as the reference made in that conveyance to earlier titles is "and contained," not "as contained." A general conveyance of teinds such as we have here has been held to be a good title on which to prescribe an heritable right—*Lord Advocate* v. *Balfour*, December 12, 1860, 23 D. 147, and *Budge* v. *Solicitor of Teinds*, referred to there. Then there had been here sufficient possession.

The defender argued — It is necessary and therefore competent to go back to previous titles, not indeed as being part of the prescriptive title, but as explaining what the truster intended to convey in this trust-disposition which is the foundation of the prescriptive title—*Lord Advocate* v. *Balfour*, December 12, 1860, 23 D. 147 (Lord Curriehill's opinion, 152), 2 Connell 66; *Lord Dalhousie* v. *M'Inroy*, July 20, 1865, 3 Macph. 1168. A reference to previous or subsequent titles shows that the conveyance of teinds is a mere general conveyance, and was not meant to include the teinds of these lands, to which the truster never had a right, and which had never till now been claimed as belonging to him. As to possession, there was no such distinctive possession here as would be necessary to constitute prescription.

At advising—

Lord President—The pursuer of this action maintains that he has an heritable right to the teinds of his lands called Brae Lochaber, or otherwise Glenroy and Glenspean, which are in the parish of Kilmonivaig, and on that ground he seeks to set aside the two last decrees of locality, because his lands were localled on in these localties on the footing that he has no such right. He also asks for a declarator that he does possess such a right.

Now, the title—and by that I mean the writs by which this heritable right is said to have been conveyed to him—are dated in last century, the first in 1766 with infeftment following thereon, another dated 1772 with infeftment following upon it. The first is granted by Æneas Mackintosh, then proprietor of the lands, in favour of certain trustees, and it is plainly intended to convey the

whole of his various estates for family purposes. It may be said to be a general conveyance of his whole heritable estate. The lands were not described at full length, *i.e.*, the lands in question are described as "the lands of Brae Lochaber, commonly called Glenroy and Glenspean, lying within the parish of Kilmanvach," whereas they are described at much greater length in the other deeds we have before us. After this short description there follows this clause—"With the severell manner places, milns, teinds, fishings, woods, shealings, grazeings, priviledges, parts, pendicles, and haill pertinents belonging to and on the said respective lands above disponed, and contained in the particular charters and infeftments thereof." It is obvious, on the face of it, that this clause is intended to cover everything contained in the previous titles, and so vested in the disponer. That it conveys anything else—anything that is not contained in the previous titles—cannot be maintained. The object of this clause, as I read it, is to make sure that he had omitted no part of his heritable estate. Upon this disposition the trustees were infeft. The warrant of infeftment corresponds to the dispositive clause. After an interval of two years the trustees conveyed the subjects to the disponer's nephew Æneas Mackintosh. The conveyance is expressed in the same terms, and the infeftment is substantially the same. Now, the pursuer maintains that this is a good title to the teinds of these lands, and in support of that contention he cites the cases with which your Lordships are familiar, in which it has been held that teinds have by similar deeds been impliedly conveyed. But I am not at all sure that these cases have any application to the present. In these cases the question was, whether the disponer, being undoubted proprietor of the teinds, had conveyed them along with the lands? In this case it cannot be assumed that the disponer was owner of the teinds. If that could be established, probably the terms of this conveyance would be sufficient to carry them. If the disponer had the teinds, I say there could have been little doubt that this would have been a good title on which to prescribe a right to them. But that cannot be assumed, especially in the case of a family settlement such as this is. It must therefore be a matter of doubt whether the teinds were intended to be conveyed, and to solve that doubt it is quite competent to look to the previous and to the subsequent titles. If we were considering a feudal progress of titles we could not do that, but as it is quite ambiguous whether the teinds of these lands are by this deed intended to be conveyed or not, therefore we are quite entitled to go back, and all the more so as the truster particularly says that he intends to convey what is contained in the previous titles and nothing more, and in these titles there is no mention of teinds. Again, looking at the subsequent titles, we find no conveyance of teinds. If this was a good title on which to prescribe a right to teinds, there was abundance of time in which to prescribe; but when Sir Æneas Mackintosh came to deal with the estate, his method was this—he expede a special service as heir to his uncle Æneas Mackintosh, then he obtained a precept from the Crown to infeft him under that retour; the Crown officials took for their guidance the last Crown charter, and by a precept in accordance with that charter they enabled Sir Æneas to place himself in the position of the author of the trust-disposition, viz., proprietor of Glen Roy and Glen Spean without the teinds. He made an entail, and being clothed with a Crown right he granted a procuratory of resignation in the hands of the Crown in favour of a series of heirs, subject to the fetters of an entail; in that procuratory there is again no mention of teinds. There is no doubt that he acquired right to what was conveyed by the trustees, and got that confirmed, and if the effect of that conveyance had been to give a right to teinds, his heirs in making up titles to these lands would have been entitled to take infeftment in the teinds. But they did not do so. This clause in old Æneas Mackintosh's trust-deed is the only clause which gives any foundation for the pursuer's claim, but that clause depends entirely on a reference to previous deeds; it is merely inserted in order to make sure that his whole heritable estate had been conveyed. But there is a third element in this claim that requires our consideration, viz., possession, and by that I mean the possession that followed this disposition, and must be held to interpret it; and that possession is consistent with all the other titles, and inconsistent with this disposition, for the owner of these lands has always been localled on on the footing that he has no heritable right to the teinds. After examination of the previous titles the subsequent titles, and the state of possession, such as I have made, I feel myself constrained to conclude that it was not intended by the disposition of 1766 to convey the teinds in question.

That is sufficient for the decision of the question, but I think it right to say something about a difficulty that has arisen as to the state of possession. The proprietor here has not been called on to pay anything to the titular, but he has been called on to pay a large part of his teind to the minister. He was no doubt subject to that in any case, but if he had had an heritable right to the teind he should have paid a very much smaller sum; that, therefore, is a most serious invasion by the party making the locality, and by all who were concerned in its adjustment, on the rights of this gentleman, if he had been in possession under this disposition of 1766, for then he would have kept to himself a much larger portion of these teinds. I am therefore for adhering to the Lord Ordinary's interlocutor.

Lord Deas concurred on these grounds—(1) That there was no title given to the pursuer's predecessors *ex facie* of the trust-deed, and therefore it was necessary and competent to refer to the previous titles to see what was conveyed by them; (2) In the entail deeds there is no mention of the teinds; (3) The possession of these teinds has not been that of an owner at all.

Lord Mure concurred, pointing out that there was in the entailed title no conveyance of the teinds of these lands, while the teinds of other lands were conveyed; the earlier conveyances carry only what was contained in previous charters, and in them there was right to teinds given. The possession in this case was not that of an heritable proprietor.

Lord Shand concurred.

The Court adhered.

Counsel for Pursuer — M'Laren — Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defender—Balfour—Keir. Agents —Dundas & Wilson, C.S.

Friday, July 13.

FIRST DIVISION

[Lord Young, Ordinary.

SCOTTISH EQUITABLE LIFE ASSURANCE SOCIETY *v.* BUIST AND OTHERS.

(*Ante*, vol. xiii., p. 659.)

Insurance—Acquiescence—Mora—*Bar—Fraud.*

Held that it was no bar to an insurance company pursuing assignees of a policy of insurance for reduction thereof on the ground of wilful fraud and misrepresentation by the insured as to his habits and state of health, that certain of the officers of the company, after acceptance of the proposal and before the death of the insured, had suspicion as to his habits, but made no inquiry and gave no intimation to the assignees till after his death.

This was the sequel of the case reported *ante*, of date July 14, 1876 (13 Scot. Law Rep. 659, and 3 R. 1078). The points now before the Court were —1st, On the facts—whether there was fraudulent concealment as to the health, habits, and previous proposals for insurance of the insured? 2d, On a plea of personal bar—whether the office, having been put on their guard by some suspicions entertained by their medical officer, and by him communicated to the manager of the Insurance Company, could now insist in this action?

The pursuers averred that the answers given by the insured George Moir to the usual questions put to him as to his health, his habits, and whether he had previously proposed his life for insurance to any other company, were false and fraudulent, and that the policy should therefore be reduced.

The defenders denied these statements, and pleaded further—"(6) The pursuers, after ascertaining the facts, or at least having the means of ascertaining them and being put on their inquiry, having admitted the claim made by the defenders, cannot now dispute the same." The nature of the evidence as to the fraudulent statements and misrepresentations of Moir appears sufficiently from the judgments. The evidence upon the above plea was as follows:—Mr Finlay, secretary of the Scottish Equitable Company, said—"The late Mr George Todd was manager of the Scottish Equitable in May 1872. I find that the papers in this proposal were lent to the Scottish National Insurance Company. I remember that those papers were returned to us, and that the Scottish National informed us that they did not intend to proceed with the proposal which had been made to them. I think they said they considered that the applicant was not satisfactory. I think they informed us that he was of dissipated habits. This was in the autumn of 1872. I cannot give the exact date, but I think it was about September. Dr Robertson did not inform me about that time that he had discovered that Moir was of dissipated habits. Mr Todd did not tell me that Dr Robertson had told him so." And Dr Robertson, who had acted as medical officer for the Company, said—"I recollect being informed that Moir was to call upon me for examination in connection with a proposal to the Scottish National Insurance Company. I was then acting for that office in the temporary absence of Dr Hunter, their medical officer. This was some months, at all events, after the application to the Scottish Equitable. I do not think the proposal to the Scottish National came the length of being considered by the directors. By that time I had heard something about Moir. I had heard that his mode of life was not exactly what it ought to be. I had heard he was in humble circumstances, and was not a man of substance that he should be proposing for large sums. (Q) Had you heard he was of dissipated habits?—(A) I had heard a hint of the kind, and enough to make it necessary that there should be further inquiry in the event of the proposal going on. I mentioned that to one of the officials of the Scottish National. The matter was the subject of conversation between Mr Todd, of the Scottish Equitable, and me more than once — partly at the time of the proposal to the Scottish National, and partly before that, but all subsequent to the proposal to the Equitable. It was Mr Todd who informed me about Moir. He said, 'I believe this case which we passed the other day has not turned out to be a good one, for I understand the policy has since been assigned.' He also said, 'I believe he is not in very flourishing circumstances'—or words to that effect; that, in short, he was not a man who should be proposing for £2000. I understood him to be referring to Moir's pecuniary means. I understood him to say that Moir was lodging with some people at Corstorphine, and was not a man of substance, which at first I had taken him to be."

The Lord Ordinary reduced, decerned, and declared in terms of the conclusions of the summons.

The following was the judgment pronounced by his Lordship:—"This is an action to set aside a policy of life insurance, and is laid on a breach of the conditions on which it was issued, viz., that the answers given by the assured to the queries submitted to him, and the declaration, forming with these answers part of his proposal for insurance, were true. The particulars in which these are alleged to be false are specified on record, and I need not here repeat or summarise them. The relevancy of the action is undoubted, and the only question is whether or not the evidence is sufficient to sustain it in fact. At the conclusion of the evidence, and after hearing counsel for the parties, my strong impression was that the pursuers had proved their case—so strong, indeed, that in an ordinary case I should not have hesitated to act upon it by giving judgment at once. But to reduce a policy of insurance upon a *post-mortem* inquiry regarding the habits of the assured, and the bodily ailments with which he may have been afflicted prior to the insurance, is not an ordinary or commonplace matter, and I accordingly delayed judgment until I had reconsidered my impression with such aid to my memory and notes as the shorthand writer's notes of the evidence might give me.