The note for the Lord Advocate was allowed to be seen, and thereafter on 9th July 1858 the Lord Ordinary pronounced the interlocutor (which is particularly founded on by the respondent), and which he remitted to the clerk to rectify the locality and to report.

It appears that the clerk prepared a rectified locality, but I understand that it has never been acted on, and certainly has never been approved as final. No further proceedings have taken place in the case.

Now, I agree with the Lord Ordinary that the question whether the teinds of the lands now in question were valued or unvalued was raised in the course of the proceedings as between the Crown and the common agent. It is true that it was not raised in the form in which it is raised in the present case, viz., whether the lands in question were valued in 1797 as part of the lands of Pitkellony.

Neither was the question directly raised in the course of the proceedings, but it was necessarily involved in the question whether or not the lands in question were liable to be localled on for one-fifth of the real rent as being unvalued, and if the interlocutor of 9th July 1858 is to be held as importing a judgment of the Court to that effect, then I think it is *res judicata* that the teinds of these lands are unvalued.

But then I agree with the Lord Ordinary that the interlocutor in question does not import a judgment to that effect. It will be observed that the note of the Lord Advocate craves the Court to sustain his objections, but the interlocutor does not do so, but merely remits to the clerk to rectify the locality. I agree with the Lord Ordinary that such a remit does not imply any judgment on the merits of the objections and answers, and I think the interlocutor submitted to review ought to be affirmed.

LORD M'LAREN, LORD KINNEAR, and the LORD PRESIDENT concurred.

The Court refused the reclaiming-note.

Counsel for the Objector—D.-F. Balfour, Q.C.—Guthrie. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Respondent—Asher, Q.C. —Dundas. Agents—Dundas & Wilson, C.S.

Tuesday, January 20.

SECOND DIVISION.

GUINNESS, MAHON, & COMPANY *v.* THE COATS IRON AND STEEL COMPANY AND OTHERS.

Process—Court of Session Act 1868, sec. 29—Amendment of Record—New Defence after Proof and Decree in the Outer House.

A firm of bankers brought an action against two firms of ironfounders, and the individual partners thereof, for payment of certain sums contained in three promissory-notes granted by said firms, and endorsed to the pursuers. After a proof the Lord Ordinary pronounced decree in terms of the conclusions of the summons. Certain of the partners of one of the firms reclaimed, and moved to be allowed, upon payment of all expenses hitherto incurred, to amend their record for the purpose of advancing an entirely new defence.

Held that under the 29th section of the Court of Session Act 1868 they were entitled to have their motion granted.

Messrs Guinness, Mahon, & Company, bankers, Dublin, brought an action against The Coats Iron and Steel Company, Coatbridge, and Matthew Dean Goodwin, David Goodwin, William Jardine, and John Smith, the individual partners of said company, as such partners and as individuals, and against James Goodwin & Company, engineers and founders, Ardrossan and Motherwell, and James Goodwin, John Goodwin, David Goodwin, Matthew Dean Goodwin, Robert Boyd Goodwin, John Topping Goodwin, and David Boyd Goodwin, the individual partners of said firm, as such partners and as individuals, for payment, jointly and severally, of three sums of £1800, £2200, and £2000 due under three promissory-notes respectively, all of date 16th April 1889, and payable three months after date, and granted by the said Coats Iron and Steel Company and James Goodwin & Company in favour of Messrs Hume, Webster, Hoare, & Company, bankers, London, and endorsed in favour of the pursuers.

The pursuers averred, *inter alia*, that they were the holders for value of the three promissory-notes above referred to, which were granted by the defenders The Coats Iron and Steel Company and James Goodwin & Company, payable at the Union Bank of Scotland, Limited, Cornhill, London, E.C., on 19th July 1889; that the said promissory-notes were presented on behalf of the pursuers, then the onerous holders thereof, on 10th January 1890 at the place of payment aforesaid, and that payment was refused.

The defenders denied the accuracy of many of the pursuers' statements, referred to a special agreement, and pleaded that they should be assoilzied. Their agents, however, sent the following letter to the agents of the pursuers upon 5th July 1890—

"*Guinness, Mahon, & Company* v. *Coats Company, &c.*—Dear Sirs— . . . . With reference to the letter from Messrs Maclay, Murray, & Spens to our correspondents, which your clerk saw here, and in which they ask for an admission that the signature 'James Goodwin & Company' upon the promissory-notes in question was adhibited by the partner of that firm, who signed the promissory-notes with the authority of his co-partners, we agree to give an admission to that effect.". . . .

John Topping Goodwin alone denied that at "said date (16th April 1889) he was a partner of any firm carrying on business under the name of James Goodwin & Company," and alone pleaded that "the said promissory-notes not having been granted by him, or by any firm of which he was a member, he should be assoilzied." Subsequently, however, he lodged a minute, by which he admitted that in a question with third parties, and without prejudice to any claim of relief he might have against the other defenders, at the date the said promissory-notes were granted he was a partner of said firm, and accordingly withdrew his previous statement and corresponding plea-in-law.

The Lord Ordinary (TRAYNER) allowed a proof, and thereafter upon 19th July 1890 decerned against the defenders in terms of the conclusions of the summons.

The defenders James Goodwin & Company, James Goodwin, John Goodwin, Matthew Dean Goodwin, Robert Boyd Goodwin, John Topping Goodwin, and David Boyd Goodwin reclaimed, and when the reclaiming-note was called, the said James Goodwin, John Goodwin, Robert Boyd Goodwin, and David Boyd Goodwin moved to be allowed to amend their record by adding the following statements of facts —"(I.) Those defenders, along with the defenders Matthew Dean Goodwin and David Goodwin, who were also partners in The Coats Iron and Steel Company, Coatbridge, and John Topping Goodwin were the whole partners of the late firm of James Goodwin & Company, which carried on business as engineers, bridge-builders, and boiler-makers at Motherwell, and as iron and steel founders at Ardrossan, for many years prior to 19th March 1889. In March 1889 the said business was, along with the business of the said Coats Iron and Steel Company, Coatbridge, converted into a company incorporated in virtue of the Companies Acts 1862-1886 under the name of Goodwins, Jardine, & Company, Limited. James Goodwin & Company executed a contract of sale of their said whole business as a going concern to Frederick Fitzgerald, trustee for the said company, on or about 19th March 1889; and the said business was taken over by the said incorporated company in terms of the said sale as at 31st March 1889; and the said firm then ceased to exist for all purposes except winding-up. (II.) None of these defenders signed or authorised the signature of the firm name James Goodwin & Company to the promissory-notes now sued on or any of them. (III.) The said promissory-notes were made and granted by the defenders William Jardine and Matthew Dean Goodwin on or after 16th April 1889 without the knowledge of these defenders, and after the said firm had ceased to exist except for the purpose of winding-up. (IV.) The letter No. 215 of process, dated July 5th 1890, was written without the authority or knowledge of these defenders, and as soon as its contents came to their knowledge they repudiated the same. The admission which the writers of the said letter agreed to give was not asked by pursuers' agents until July 24th, after the proof had been closed, and the judgment of the Lord Ordinary pronounced, when these defenders' agents declined to give any such admission. A copy of the correspondence is produced and referred to."

And by adding the following pleas-in-law —"(1) The signature of James Goodwin & Company to the promissory-notes sued on having been unauthorised by these defenders, they are not liable thereon. (2) The firm of James Goodwin & Company having ceased to exist prior to the granting of the said notes, the said signature is not binding on these defenders or any of them."

The said John Topping Goodwin, notwithstanding his former admission, moved to be allowed to add similar statements of facts and pleas-in-law.

The Court of Session Act 1868, by section 29, provides that "the Court or the Lord Ordinary may at anytime 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 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." . . .

The reclaimers craving to be allowed to amend offered to pay all the expenses already incurred by the pursuers, and argued that if they did so they were entitled under the above section to make the amendment. No doubt the defence was practically a new one, and ought to have been advanced before, but substantial justice to the case required that it should still be allowed to be stated—*Gelot* v. *Stewart*, March 4, 1870, 8 Macph. 649. Upon the importance of the new defence they cited *Abel* v. *Sutton* (1800), 3 Espinasse, 108.

The pursuers and respondents argued—No circumstances had been set forth to justify the Court in allowing the proposed amendments amounting to a new defence. It was not alleged that any new facts had come to the knowledge of the reclaimers, or that they had previously acted without competent legal advice.

At advising—

LORD JUSTICE-CLERK—When this reclaiming-note for James Goodwin & Company came before us the reclaimer indicated that on the pleadings as then existing they could have no case, and they asked that they might be allowed to amend the record. The statement which was made to us of that proposed amendment very plainly indicated that practically the whole of the record as it existed was to be set aside in so far as it raised a question between the parties—a new question altogether was to be set up by the amendment. That was so very strong a motion, and one which hitherto, as far as I know, has never been dealt with judicially in the Inner House—although I understand such a motion has been made in the Outer House, and made successfully—that we thought it desirable to take time to consider whether or not so sweeping an alteration of the pleadings in a case could be made consistently with the Court of Session Act of 1868; but after considering the statute, and in particular clause 29, which relates to this matter, I have come to be of opinion that such an amendment may be made. The clause is to the effect that "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." That appears to me to be a most general and comprehensive enactment, that where a case has been brought into Court, and where an alteration of the record is necessary for the purpose of enabling the real question between the parties to be decided in that action, such amendment shall be allowed upon conditions. And the comprehensiveness of the clause I think is brought into very sharp relief by the portion of the clause which follows, and which appears to me to be the only restriction which is put upon the broad power and duty of the Court to allow the record to be amended and put into such shape as shall really show the question between the parties—"It shall not be competent by amendment of the record of issues under the 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." It seems to me that the Legislature carefully guarded against allowing the scope of the pleading to be enlarged, while on the other hand making it quite clear that the statement necessary to bring out what should really try the question between the parties was ordered to be allowed, because the words are not "may be so made," but "shall be so made." Therefore I have come to be of opinion that the reclaimers here must be allowed to make the amendment upon the record which they propose. The conditions of course are a totally different question, and in this case I do not think it would be doing justice to the opposite party to make any other condition than that the reclaimers must pay the whole previous expenses of the cause.

LORD YOUNG—I quite understood that the defenders who make this motion offered to pay the whole expenses as the condition of the amendment being allowed, and if they had not, I should have been for allowing the amendment only upon that condition. The case is brought upon a question which is capable of being very briefly stated. The statute not only authorises but requires that any amendment shall be allowed which is in the opinion of the Court necessary in order to decide in the existing action the real question in controversy between the parties. Now, it appears from the statement made to us in support of the motion to allow an amendment, that the real question in controversy between the parties does not appear upon the record as it stands at all. Now, it is a question worthy of consideration whether the Legislature do not mean that if the Court shall think an amendment necessary in order to determine the real question in controversy between the parties as it is to be gathered from the imperfect and inaccurate record, it shall be allowed, but not a question which that record does not suggest at all. I am not disposed so to limit it. The case for a pursuer is simple enough. If he discovers that he has put his action upon a wrong ground, or if he discovers his true ground of action, which had only dawned upon him after the record was closed, his course is to abandon his action and bring another. But a defender cannot do that, where he discovers at a late stage that his only defence has not been stated at all, unless an amendment by which that only real defence may be put on the record shall be allowed. But is that the real question in controversy between the parties? I think it is notwithstanding that the defective, imperfect, or inaccurate record did not disclose or suggest it in any way. Upon the explanation made to the Court in support of the motion for amendment, the defence proposed to be put upon record raises the only question in controversy between the parties, or raises the real question in controversy between the parties, and I think the consideration of justice upon which the provision of the statute is founded require that that amendment shall be allowed. The statute not only permits it but requires it upon terms which shall sufficiently guard the interests of the other party. The only consideration which could be urged against it would be that it was made for the purpose of delay. I am not in this case inclined to listen to that. I do not think it is meant for the purpose of delay. It may be very rapidly tried, and the satisfying of the condition as to expenses shows that the motion is made in all seriousness. I concur with your Lordship that the amendment may be made, and that it ought to be made. I

think that under the statute it is imperative upon us to make it upon the conditions we think necessary.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER—The amendment proposed in this case is no doubt a very radical one, but I agree with your Lordships in thinking that it is of the character of those amendments which section 29 of the Act of 1868 directs. I am of opinion that the Court must allow the amendment upon the conditions proposed.

The Court pronounced the following interlocutor:—

"The Lords having considered the amendments proposed by the defenders James Goodwin and others, and by the defender John Topping Goodwin, Nos. 223 and 224 of process, Allow said amendments to be made by said defenders on payment by them to the pursuers of the expenses of the action hitherto incurred; remit the same to the Auditor to tax and to report; further allow said amendments to be answered by the pursuers within eight days."

Counsel for the Pursuers and Respondents —Asher, Q.C.—Ure. Agents—J. & J. Ross, W.S.

Counsel for the Defenders and Reclaimers —Graham Murray—N. J. D. Kennedy. Agents—Davidson & Syme, W.S.

Thursday, January 22.

SECOND DIVISION.

BLACK & SONS, PETITIONERS.

Bankruptcy—Discharge of Trustee—Appointment of New Trustee—Nobile Officium.

Certain creditors upon a sequestrated estate in which the trustee had been discharged eleven years before and the bankrupt had not been discharged, presented a petition for a remit to the Lord Ordinary on the Bills to appoint a meeting of creditors for the election of a new trustee, averring that they had been ranked for a debt still unpaid, and had now found out an asset belonging to the bankrupt not discovered during the currency of the sequestration. It was objected that the petitioning creditors' interest in the alleged asset was so trifling that the Court should not exercise their discretionary power of reviving the sequestration after the lapse of so many years.

Held that the creditors were entitled to have the prayer of their petition *granted.*

Upon 6th September 1876 the estates of William Chalmers, sometime steamboat owner, Clynder, Roseneath, in the county of Dumbarton, were sequestrated, and John M'Queen Barr, accountant, Glasgow, was thereafter duly elected trustee. Mr Barr entered upon the possession and management of the sequestrated estates, and realised the whole estates so far as available, but the sum obtained was insufficient to pay the expenses of sequestration and his commission, and he was exonered and discharged upon 5th January 1880. The bankrupt never received his discharge.

Upon 19th December 1890 Messrs William Black & Sons, merchants, Jamaica Street, Glasgow, presented a petition to the Second Division of the Court of Session, setting forth that they were creditors of the said William Chalmers, and as such were ranked in the said sequestration for the amount of £60; that since the date of the trustee's discharge it had come to their knowledge that the bankrupt was interested in an asset which was not discovered during the currency of the sequestration, and praying the Court to order intimation, and thereafter to remit to the Lord Ordinary on the Bills to appoint a meeting of the creditors of the said William Chalmers to be held with the view of having a new trustee appointed and the sequestration revived.

After intimation had been ordered and answers lodged on behalf of the bankrupt, it was explained for the petitioners that the asset they had discovered consisted of a piece of ground—the title of which stood in the name of the bankrupt—through which the avenue to a villa at Clynder ran, and without the use of which the villa would be isolated and its value greatly impaired, and that the value of the asset would probably be at least £50. It was argued for them that they were entitled to have the prayer of their petition granted, and that the recent case of *The Northern Heritable Securities Company, Limited* v. *Whyte*, November 21, 1888, 16 R. 100, was an authority in support of that petition.

It was explained for the bankrupt that his total debts amounted to £2200, and that the ground in question was held in trust for his brother, and it was argued that this was an appeal to the *nobile officium* of the Court, in whose discretion it lay to grant or refuse the prayer of the petition; that the petitioners could not have sequestration revived as a matter of right; and that seeing the alleged asset was too small, after paying the expenses already incurred and proposed to be incurred in the sequestration, to pay the petitioning creditors, whose debt was a small proportion of the entire liabilities, not more than an infinitesimal sum at most, the Court should not grant the prayer of the petition, especially after the lapse of eleven years since the trustee's discharge, and when to do so would destroy the business credit the bankrupt has been slowly and steadily acquiring in his efforts to earn a livelihood. There was no suggestion that the bankrupt had fraudulently cancelled any asset.

At advising—

LORD JUSTICE-CLERK—Certain creditors of the undischarged bankrupt Chalmers, who was sequestrated many years ago come to the Court alleging that there was