and in that case the law is clear, as stated by Mr Bell in his Principles, sec. 1237, that the effects of the subtenant are liable to hypothec for the principal tenant's rent.

The defender therefore was entitled and did nothing wrongful in sequestrating the pursuers' effects.

It is in respect of these sequestration proceedings that the present action of damages has been brought, and the Lord Ordinary has adjusted an issue in these terms—[*read issue given above*].

Now, it appears to me that this issue would not in any view have been an appropriate issue for the trial of the cause, because the proceedings are alleged to have been wrongful on two different and quite distinct grounds—the first in respect of the alleged assurance by the defender's agent that the pursuers would not be held liable for Macintosh's rent, and the second, that apart from any such assurance the sequestration was wrongful in point of law.

With reference to the latter of these grounds, the defender, as I have said, was entitled to sequestrate the pursuers' effects for Macintosh's rent. This was all that she did. Prior to doing so she was not bound to cite Macintosh or to give any notice or intimation to the pursuers, and apart, therefore, from the alleged assurance given by Mr Colville, I think the pursuers have no ground of action against the defenders.

With reference to this alleged assurance the pursuers were allowed to amend their record in order to make their averments specific in this respect, but all they now say is that in course of a conversation, and in answer to Mr Brodie, Mr Colville assured him that the pursuers would not be held liable for the balance of rent due by Macintosh, but when, where, or in what terms their assurance, upon which everything depends, was given, is not averred. It appears to me that such an averment is much too vague and indefinite to be allowed to go to proof, and I am therefore of opinion that the defender should be assoilzied.

LORD PRESIDENT and LORD M'LAREN concurred.

LORD KINNEAR — I am of the same opinion. There can be no question that the landlord's right is as strong over effects of the sub-tenants as of the principal tenant himself unless he has abandoned the power of exercising that right in some competent form. *Prima facie* this landlord was undoubtedly entitled to sequestrate the furniture in the house. It might be that part of the furniture inventoried was not liable in sequestration. A sub-tenant might say that some part of the furniture ought not to be carried off and might be able to establish that it was not liable in hypothec. All that was done here was that in course of sequestration an inventory was drawn up, and even if the inventory had been erroneous, which has not been averred, I should think there was no wrong done, and I agree with Lord Adam in thinking that there is no tenable ground of action in this case in law—not even the shadow of a ground.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defender.

Counsel for Pursuers and Respondents—Jameson—Galloway. Agent—John Elder, S.S.C.

Counsel for Defender and Reclaimer—Comrie Thomson — Salvesen. Agent — Alexander Morison, S.S.C.

Tuesday, March 20.

FIRST DIVISION.

[Lord Low, Ordinary.

LENY AND ANOTHER *v.* MAGISTRATES OF DUNFERMLINE.

Process—Summons, Amendment of—Court of Session Act 1868 (31 *and* 32 *Vict. c.* 100), *sec.* 29.

The Court of Session Act 1868 by section 29 allows all such amendments to be made on the record "as may be necessary for the purpose of determining in the existing action the real question in controversy between the parties . . . provided always that it shall not be competent by amendment of the record to subject to the adjudication of the Court any . . . other fund or property than such as are specified in the summons or other original pleading." The pursuers in an action of declarator sought by amendment of the summons, without practically altering the condescendence, to substitute a claim to the exclusive right of property in the minerals under a portion of the *solum* of a loch, for their original claim to a joint right with the defenders in the minerals under the whole of the *solum*. *Held* (*rev.* Lord Low) that the amendment proposed was incompetent, and *observed* that it was not sufficient to warrant an amendment under the Act that the property in question was the same if the right claimed with respect to it was different.

The Court of Session Act 1868 (30 and 31 Vict. cap. 100) by sec. 29 provides that "The Court or 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 . . . 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." . . .

In 1893 W. M. Leny of Dalswinton, Dumfriesshire, proprietor of the lands of Bellyeoman, Bankhead, and others, in the county of Fife, and R. W. Will, S.S.C., in whom these lands were then vested, brought an action against the Magistrates of Dunfermline to have it found and declared that "the pursuers and their authors acquired from the defenders, their authors and predecessors, and have, along with the other proprietors, or some of them whose lands lie around and border on the loch called Moncur or Town's Loch, lying in the county of Fife, a joint right or common property in said loch, and in the *solum* thereof, and minerals therein or thereunder: And it ought and should be found and declared, by decree foresaid, that the defenders, the said Magistrates and Town Council and the community of said burgh, have no exclusive right either of property or of use in or over the said loch or the *solum* thereof: And further, the said defenders ought and should be decerned and ordained, by decree foresaid, to desist and cease from molesting and interrupting the pursuers in the exercise of any of their rights in the said loch and *solum* thereof."

They pleaded—"(1) The pursuers' title condescended on confers upon them a right of common property in the said loch and a joint right to use the same, along with the other proprietors whose lands lie along the shore or margin of the said loch, and they are therefore entitled to decree as concluded for, with expenses."

The pursuers after the record was closed sought, without practically altering the condescendence, to amend the summons by substituting for the words "a joint right and common property in said loch and in the *solum* thereof, and minerals therein or thereunder" the following—"A good and undoubted joint right or right of common property in the said loch and the waters thereof, and that, subject to said joint right or right of common property and the incidents thereof, the pursuers and their authors acquired from the defenders, their authors and predecessors, and have a good and undoubted right of property in the *solum* of said loch, extending to the *medium filum* of said loch *ex adverso* of the lands of all and whole these three parks of land on the north of Kingseathill, lying south of the said loch—[*here follows the description*]—and a good and undoubted right of property in the minerals therein or thereunder."

They also desired to substitute for the declarator of common right in the *solum* of the loch, declarator that the defenders had no right in or over the *solum* thereof so far as *ex adverso* of the pursuers' said lands or in the minerals therein or thereunder, and to add at the end the words "and minerals therein or thereunder." To their plea after the words "common property in the said loch" they sought to add "and also a right of property in the *solum* and the minerals therein and thereunder *ex adverso* of their lands described in the summons."

The defenders objected to these amendments, but Lord Low by interlocutor of 16th February 1894 allowed them to be made.

The defenders reclaimed, and argued that the amendments proposed were incompetent under the Court of Session Act, as they would have the effect of subjecting to the adjudication of the Court a different property, or at least, which was also incompetent, a different right of property from that specified in the original pleadings. Only a joint right was originally claimed, but now an exclusive right of property was sought to be established. It was not enough to justify the amendment that the subject was the same if the "real question in controversy" with respect to that subject was essentially different. The case was ruled by *Forbes* v. *Watt's Trustees*, November 9, 1870, 9 Macph. 96, and *Gibson's Trustees* v. *Fraser*, July 10, 1877, 4 R. 1001.

The respondents argued—The amendment was necessary to bring out the real question in controversy, and was such as the Act contemplated. It was not sought to subject any new fund or property to the adjudication of the Court. The facts as stated in the condescendence remained practically unaltered. The property originally claimed and now claimed was the minerals under the *solum* of this particular loch.

At advising—

LORD KINNEAR—I think the question raised by this reclaiming-note is a somewhat narrow one, but it appears to me that the change which the pursuers proposed to make in the summons will have the effect of substituting for a claim to have a declarator of a common right of property in the *solum* of the loch a claim to have an exclusive and separate right of property in a particular part of that *solum*, and will substitute for a conclusion that the Magistrates have no exclusive right of property in the *solum* of the loch, a conclusion that they have no right whatever in a particular part of the *solum*.

But it is not possible to convert a declarator of a common right of property into a declarator of separate and exclusive right without subjecting to the adjudication of the Court an entirely new and different right.

It appears to me, therefore, that the amendment proposed goes beyond the purposes of the clause in question, and ought not to be allowed.

LORD ADAM—I have come to be of the same opinion, though with some regret, for no very definite statement has been made to us of any prejudice which the defenders would suffer if the proposed amendment were allowed. It is quite true, as Mr Johnston said, that the Court has no alternative but to give effect to 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." But then it appears to me that in order to ascertain what is the "real question in controversy" we must look to the conclusions of the summons. It will not do to say that the real question is, after all, what is my right in the lands in question?—whatever may have been the claim at first put forward — and that because the question raised by the amendment is connected with the same property that is sufficient to justify the amendment. If that were so, it would be possible to substitute for what was originally a claim to a right-of-way over lands a claim to the lands themselves. I think that we must look to the conclusions of the action and see whether the proposed amendments do enlarge and make so essentially different the original conclusions as to subject to the adjudication of the Court a different right to that which was originally specified in the summons. I agree with Lord Kinnear that the proposed amendments would have that effect.

LORD PRESIDENT—I think the conclusion your Lordships have come to is sound. I do not think the proposed amendments can be justified, unless we hold that so long as the lands are identical it is competent to substitute one dispute about the lands for another.

LORD M'LAREN was absent.

The Court recalled the Lord Ordinary's interlocutor and held that the amendment was incompetent.

Counsel for the Pursuers and Respondents—H. Johnston — Wilson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Defenders and Reclaimers —Rankine — Dickson. Agents — Morton, Smart, & Macdonald, W.S.

Tuesday, March 20.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

TENNENT *v.* COMMISSIONERS AND MAGISTRATES OF BURGH OF PARTICK.

Process—Declarator—Construction of Act of Parliament—Competency.

After the passing of the Burgh Police (Scotland) Act 1892 the magistrates of a police burgh claimed the power of granting and refusing certificates under the Public-Houses Acts for premises within the burgh. This power had previously been exercised by the justices of the district within which the burgh was situated, and was still claimed by them. The holder of a certificate granted by the justices for premises within the burgh brought an action against the magistrates for declarator that they had no right to act as the licensing authority within the burgh.

Held that the action was *competent.*

Burgh — Police Burgh — Public-House — Certificate—Licensing Authority—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 38.

Held (*aff.* judgment of Lord Stormonth Darling) that the power of granting and refusing public-house certificates for premises within a police burgh is not transferred by section 38 of the Burgh Police Act 1892 from the justices of the district within which the burgh is situated to the magistrates of the burgh.

Prior to 1862 the right of granting and renewing licences for the sale of exciseable liquors was vested in two sets of authorities only, viz., the justices of the peace for the counties and districts, and the magistrates of royal burghs. By the Public-Houses Acts Amendment (Scotland) Act 1862 the right to grant licences was extended to the magistrates of parliamentary burghs.

By section 38 of the Burgh Police (Scotland) Act 1892 it is provided that "The magistrates and commissioners elected in virtue of this Act shall, within the limits of the burgh, for the purposes of this Act, possess such and the like rights, powers, authorities, and jurisdiction as are possessed by the magistrates and council of royal and parliamentary burghs in Scotland."

On 9th June 1893 the Justices of the Lower Ward of Lanark, within which the police burgh of Partick is situated, held a general meeting, at which they resolved "that this Quarter Sessions are of opinion that the granting of publicans' certificates within the Lower Ward of the county, exclusive of the burghs of Glasgow and Rutherglen, remains with the Justices, and that their jurisdiction in this respect has neither been taken away nor interfered with in any way." This resolution was intimated to the holders of certificates granted by the Justices within the police burghs of the Lower Ward, and among others to Hugh Tennent, who held a public-house certificate for premises in Partick, which had been renewed by the Justices in April 1893 for the year from May 15th 1893.

On 17th June Tennent received a circular notifying, "in terms of the Lord Advocate's opinion, the Magistrates of Partick claim under the Burgh Police (Scotland) Act 1892 to be the licensing authority, and as such will, from this date, deal with the granting of licenses, transfer of licenses, &c., within the burgh."

On 22nd August 1893 the Magistrates held a meeting under the said Act of 1892, at which they granted transfers to certain new tenants for the current year.

In November 1893 Tennent raised an action against the Commissioners and Magistrates of Partick, and also against