trustees the management of the truster's estate, and the remaining purposes are purely testamentary. I see no inconsistency in these two objects being combined. It has been assumed throughout the discussion that the deed was a delivered deed, and in the view I take it necessarily was so, because delivery was necessary to put the trustees in possession and enable them to enter upon the management of the granter's estate. The object and intention of the deed was not to protect any right contingent or vested on the part of beneficiaries, but purely to vest the trustees with the management of the estate. If so, it follows that the trustees held during the granter's life for her and no one else, and I agree that a party who appoints trustees to manage his estate for him can put an end to the arrangement when he likes. No doubt the granter undertakes in this case not to interfere with the trustees, but that is a mere promise which she might keep or not just as she liked. Accordingly the possession which the trustees had was in my view entirely for her, and not for the benefit of any of the parties named in the testamentary parts of the deed. I need not go over these, but I may point out that the granter winds up by recalling "all prior settlements made or executed by me" which appears to me to suggest in so many words that this is a settlement. I think it is. I think it gave no right, vested or contingent, to beneficiaries, and that the deed was delivered only for the purpose of the temporary management of the estate by trustees.

The LORD PRESIDENT was not present at the advising.

The Court recalled the interlocutor of the Lord Ordinary in so far as it found that the trust-disposition was irrevocable if duly delivered, and had not, if delivered, been revoked; found that the said trust-disposition was revocable; recalled said interlocutor also in so far as it allowed a proof in regard to the delivery of the trust-deed; *quoad ultra* adhered to the said interlocutor; found the respondents David Logan and others as trustees of Mrs Byres, and Mrs M'Chlery and the other claimants specified in No. 24 of process, liable jointly and severally to the reclaimers in expenses since the closing of the record in the competition: *Quoad ultra* reserved the expenses of the competition so far as not decerned for; and remitted the case back to the Lord Ordinary in order to proceed further therein, with power to deal with the Auditor's report, and to decern for the amount of the taxed expenses.

Counsel for Pursuers and Real Raisers—M'Lennan—Wilton. Agent—P. Pearson, S.S.C.

Counsel for Defenders and Reclaimers (Mr and Mrs Gemmell)—Lord Advocate Pearson, Q.C.—Guy. Agents—Henderson & Clark, W.S.

Counsel for Defenders and Respondents (Mrs M'Chlery and Others)—Kennedy. Agents—Martin & M'Glashan, S.S.C.

Saturday, December 7.

SECOND DIVISION.

(With Lord Adam and without Lords Young and Rutherfurd Clark.)

[Lord Kincairney, Ordinary.

RUSSELL, HOPE & COMPANY *v.* PILLANS.

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

In an action of damages for breach of contract by a firm of iron merchants against a rivet manufacturer, the pursuers averred that they entered into a contract with the defenders for a supply of rivets to enable them to fulfil a contract which they had made with a firm of shipbuilders; that by reason of the defenders' failure to supply the rivets, the pursuers had been found liable to the firm of shipbuilders in an action at their instance in the sum of £175 as damages, and in £172, 18s. 11d. as costs, and that in addition their own costs in the said action amounted to £232, 8s. 10d. The pursuers accordingly sued for repayment of these sums from the defenders and for payment of a further sum of £23, 9s. 6d. stated to be the pursuers' loss of profit upon their contract with the defenders. The Lord Ordinary (Kincairney) assoilzied the defenders from the conclusions of the summons.

The pursuers reclaimed, and presented a note to the Court asking to be allowed to amend their summons by adding an alternative conclusion, to the effect that the defender should be decerned to pay £300, with a relative statement in the condescendence that this was the difference between the contract price of the rivets and the price at which they could have been obtained in in the market at the date of the breach of contract.

The Court (*diss.* Lord Adam) refused the note.

By section 29 of the Court of Session Act 1868 (31 and 32 Vict. cap. 100) it is enacted:—"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."

On 23rd October 1894 Messrs Russell, Hope, & Company, iron and steel merchants, Whitehaven, England, raised an action against Alexander Pillans, bolt and rivet manufacturer, Motherwell, concluding for payment to them of "(*first*) the sum of £175, with interest thereon at the rate of 5 per centum per annum from the 31st day of July 1890; (*second*) the sum of £172, 18s. 11d., with interest thereon at the rate of 5 per centum per annum from the 20th day of August 1890; (*third*) the sum of £23, 9s. 6d., with interest thereon at the rate of 5 per centum per annum from the date of citation to follow hereon; and (*fourth*) the sum of £232, 8s. 10d., with interest thereon at the rate of 5 per centum per annum also from the date of citation to follow hereon."

The pursuers averred—"(Cond. 1) . . . On or about 8th April 1889, by contract note of said date, the said firm of Russell, Hope, & Company entered into a contract with the defender for delivery to them of 100 tons of rivets at the price of £7, 15s. per ton, delivery to be made as required. They had previously entered into a contract to deliver to the Whitehaven Shipbuilding Company, Limited, 100 tons of rivets at the price of £8 per ton, delivery to be made as required, and it was, as the defender well knew, in order to enable them to fulfil that contract that the contract with the defender was entered into. (Cond. 2) In pursuance of said contract between the pursuers and the defender, the pursuers, in July 1889, specified and required delivery of an instalment of said rivets, under which specification they were supplied by the defender in July with 2 tons 7 cwts. 3 qrs. 24 lbs., and in August with 3 tons 14 cwts. 2 lbs., making together 6 tons 1 cwt. 3 qrs. 26 lbs. (Cond. 3) By letter dated 24th March 1890, written by Messrs J. A. Hope & Company of Whitehaven on behalf of the pursuers, the pursuers required the defender to make a further delivery of said rivets against said contract amounting to 100 tons, but the defender declined to supply the same, stating that he held the contract between the pursuers and him as cancelled, and since that date he has refused to deliver any portion of the said undelivered balance of his contract quantity. By reason of the defender's refusal to supply pursuers with said rivets, as he was bound to do under his contract with the pursuers, they were prevented making delivery to the said Whitehaven Shipbuilding Company, and thereby incurred serious liability to that company. (Cond. 4) Upon 14th April 1890 the said Whitehaven Shipbuilding Company issued a writ of summons in the High Court of Justice in England against the pursuers, claiming payment of £281, 14s., being the difference between the contract price of the undelivered balance of rivets, and the market price at the date of their demand for delivery. The said claim was duly intimated to the defender, who declined to interfere, and disclaimed any responsibility in the matter. The pursuers thereupon defended the said action, which was tried at Manchester before Mr Justice Vaughan Williams, who upon 18th July 1890 gave judgment for the company for £232, 16s. 3d. of damages with costs. Against this judgment the pursuers appealed to the Court of Appeal, which on 21st January 1891 dismissed the appeal with costs, but modified the judgment by reducing the damages to £175. (Cond. 5) Upon 31st July 1890 the pursuers paid into Court the said sum of £232, 16s. 3d., to meet the said first mentioned judgment, and from the sum so consigned the company uplifted the said sum of £175, being the amount first sued for. Upon 20th August 1890 they further paid to the said company their costs of the action as taxed, amounting to £172, 18s. 11d., being the amount second sued for. (Cond. 6) The undelivered balance of rivets falling to be supplied by the defender is 93 tons 18 cwts. 2 lbs., the price of which, at £7, 15s. per ton, is £727, 14s. 7d. The price thereof payable by the said company to the pursuers at £8 per ton is £751, 4s. 1d., and the pursuers have suffered loss to the extent of the difference between the said two sums, or £23, 9s. 6d., which represents their loss of profit, and is the sum third sued for. (Cond. 7) Further, the pursuers have paid to their own solicitors, Messrs Wright & Brown, Carlisle, the sum of £232, 10s. 8d., as the costs of defending the said action at the instance of the said company against the pursuers, being the sum fourth sued for. (Cond. 8) In consequence of the defender's failure to deliver the said rivets in breach of his said contract, the pursuers have suffered loss and damage to the extent of the four sums sued for. The pursuers have frequently applied to the defender for payment of the said sums, but he refuses to make payment thereof, and the present action has therefore been rendered necessary."

The pursuers pleaded—"(1) The defender having failed to implement to the pursuers the contract libelled, is liable to the pursuers in reparation for breach thereof. (2) The pursuers having, by the failure of the defender to implement the contract libelled, suffered loss, injury, and damage to the extent of the sums libelled, are entitled to decree as concluded for with expenses."

The defender asked absolvitor on two grounds—(1) that there was no breach of contract on his part, because he was entitled to consider the contract at an end since the pursuers had failed to send specifications or orders for rivets from August 1889 till March 1890; and (2) that the pursuers had broken their contract with the Whitehaven Shipbuilding Company on 17th January 1890, and that the defenders were not liable for breach of contract at that date because the pursuers had never asked them to supply rivets.

After hearing proof the Lord Ordinary (KINCAIRNEY) on 16th July 1895 pronounced the following interlocutor:—"Finds that the sums first, second, and fourth sued for were incurred and paid by the pursuers in respect of their breach of the contract between them and the Whitehaven Shipbuilding Company, Limited: Finds that

the said breach of contract was not caused by any failure on the part of the defender to fulfil his contract with the pursuers: Therefore finds that the defender is not bound to relieve the pursuers of said sums, or to pay them to the pursuers: Finds that the pursuers have not established a right to the third sum sued for: Therefore assoilzies the defenders from the whole conclusions," &c.

The pursuer reclaimed, and presented a note to the Court asking to be allowed to amend his record (1) by adding to the conclusions of the summons "or otherwise to make payment to the pursuers of the sum of £300 with interest thereon at the rate of 5 per cent. per annum from the date of citation to follow hereon till payment. (2) By deleting condescendence 8 from the words "four sums sued for," and substituting "sums sued for in the first, second, third, and fourth places in the summons, being (first) £175 found due and paid as damages to the Whitehaven Shipbuilding Company; (second), £172, 18s. 11d., being judicial costs found due and paid by them to said company; (third), £23, 9s. 6d., being loss of profit on said contract; and (fourth) £232, 10s. 8d., being costs incurred by the pursuers to their solicitors, all as above condescended on, or otherwise the pursuers have suffered loss and damage to the amount of not less than the sum of £300 alternatively sued for, being the difference between the market price at or about 25th March 1890 and the contract price of the rivets then undelivered under said contract, being 93 tons 18 cwts. 2 lbs. The pursuers have frequently applied to the defender for reparation of said loss and damage, but he refuses to accord any such, and the present action has therefore been rendered necessary." (3) By deleting from the second plea-in-law the part from the word "libelled," and substituting "in the first, second, third, and fourth places libelled, or otherwise of the sum alternatively libelled, are entitled to decree in terms of one or other of the alternative conclusions of the summons with expenses."

Argued in support of the note—(1) The motion was authorised by the Court of Session Act 1868, sec. 29. It was necessary in order to determine the real question between the parties. That question was, Whether a breach of contract had been committed by the defender, and if so, what was the amount of damages due by him? If the sums sued for in the present summons were added together they amounted to £600, so the amendment did not subject to the Court any larger sum than that specified in the original summons. The mode of estimating the damages might be altered by the amendment, but the real controversy between the parties and the liability in respect of breach of contract remained the same. (2) There was authority for allowing an amendment of this kind. In *Stewart* v. *Stewart*, 1877, quoted in Mackay's Practice of the Court of Session, i. 485, the action being one for damages, Lord Rutherfurd Clark allowed an alternative conclusion for restoration of the subject damaged. And in another unreported case, referred to in the same passage, where the action concluded for payment of the price of certain subjects, the same Judge allowed a conclusion for damages for breach of contract. (3) It was the most expedient course, because if the amendment was allowed the proof already led would be available, while if a new action had to be raised the proof would have to be led of new.

Argued for defender—(1) The amendment was incompetent. It raised an entirely new question, and would turn what was an action of relief into an action of damages. It enlarged the conclusions of the summons by claiming a sum not in the action as originally served — *Forbes* v. *Watt's Trustee*, November 9, 1870, 9 Macph. 96; *Laming & Company* v. *Seater*, June 21, 1889, 16 R. 828. (2) Even if the amendment was competent it was in the discretion of the Court to allow it, and the Court should not exercise their discretion in the present case. The pursuers did not propose to abandon their original ground of action, and there would be no use of the amendment if the judgment of the Court was different from that of the Lord Ordinary—*Taylor* v. *Macdougall & Sons*, July 15, 1885, 12 R. 1384.

At advising—

LORD TRAYNER—This is an action for damages for breach of contract, the conclusions in which are of a very specific character. The ground of action is this—The pursuers entered into a contract with the defender for a supply of rivets to enable them (the pursuers) to fulfil a contract which they had made with a firm of shipbuilders. The latter contract was broken by the pursuers, and they were, in a litigation which ensued, found liable to the shipbuilding firm in a sum of £175 as damages, and in the costs of the litigation, which amounted to £172, 18s. 11d. They had also to pay the costs incurred by them to their own solicitor, which amounted to £232, 8s. 10d. The breach of contract which led to the pursuers requiring to pay these several sums is said to have arisen from the defender having broken his contract with the pursuers; and accordingly in this action there are specific conclusions that the defender should be decerned to make payment of these specific sums, and so reimburse the pursuers. There is a fourth conclusion under which decree is sought for £23, 9s. 6d., being the loss of profit (at the rate of 5s. per ton) suffered by the pursuers, who had contracted with the defender for rivets at £7, 15s. per ton, while they were entitled to £8 per ton for the same rivets from the shipbuilding firm. On the case thus stated the parties joined issue, and the result is that the Lord Ordinary has assoilzied the defender from the whole conclusions of the summons. The pursuers now propose to amend their summons by adding a new conclusion, alternatively to the existing four, to the effect that the defender should be decerned to pay a sum of £300, with a relative statement of fact

that this is the difference between the contract price of the rivets and the price at which they could have been got in the market at the date of the alleged breach on the part of the defender. The pursuers support their motion to have this amendment allowed in terms of the 29th section of the Court of Session Act 1868. I am of opinion that the proposed amendment does not fall within the cases provided for by the section referred to, and that it should not be allowed.

The clause of the Act I have referred to distinctly provides that no amendment shall be competent which shall have the effect of submitting to the adjudication of the Court "any larger sum, or any *other* fund or property, than such as are specified in the summons." That, in my opinion, is what the pursuers propose to do. The original summons in this case concluded (on the grounds which I have already indicated) that the defender should be decerned to reimburse the pursuers in certain sums which they had had to pay, not directly, but consequently upon the defender's breach of contract, as well as another sum of profit which they, in consequence of the same breach of contract, had been prevented from gaining. If the pursuers had got decree for these sums, they could have claimed nothing more on account of the alleged breach from the defender. The sums specifically sued for were the measure and limit of their claim. But they propose now to turn this action into an action of damages founded on different *species facti*, and for an amount to be ascertained by a totally different standard or criterion. They want now to make this action one for damages to the extent of £300 as due to them for breach of contract, arising from the difference between the contract price and market price at the date of the breach, and irrespective and independent altogether of what they were obliged to pay to the shipbuilding firm. This is not amending any "error or defect" in the record, but setting forth and raising a new action. Suppose for a moment that the judgment pronounced by the Lord Ordinary is wrong. In that case the judgment will be reversed, and the pursuers will get decree as originally concluded for. But if the Lord Ordinary is right, and his judgment is affirmed, what then? The pursuers propose by this amendment that we should proceed to consider whether the defender is liable in damages to the extent of £300, more or less, to the pursuers. But where is the conclusion to that effect in the original summons? There is none, for all the original conclusions (in the case supposed) have been adjudicated on, and the defender assoilzied. There is no original conclusion left. The proposed amendment, therefore, if allowed, would, in my opinion, submit to the adjudication of the Court a claim involving a fund or liability not to be found in the original summons, and therefore incompetent. The only conclusion of the summons which bears the slightest resemblance to that now proposed to be added is the conclusion for loss of profit. But obviously the pursuers do not suggest that that conclusion has any connection with the amendment, for that would only make it clearer that the £300 now proposed to be concluded for is greatly in excess of the sum originally concluded for.

If the proposed amendment is incompetent, that is enough to dispose of the question before us. But I may add that, even were the competency less doubtful than it is, I think it would be very inexpedient to allow the amendment in the whole circumstances, and that it should not be allowed if the Court has any discretion in the matter, as I am disposed to think it has.

LORD ADAM—As my opinion differs from that of your Lordships, I shall shortly state the grounds on which it is based.

The 29th section of the Court of Session Act 1868 requires the Court to make all such amendments as may be necessary for determining "the real question in controversy between the parties," provided that there shall not be subjected to the adjudication of the Court any larger sum than is specified in the summons.

This is an action of damages in respect of an alleged breach of contract between the pursuers and the defender. The question in controversy is, Whether there was such a breach, and if so, what damages are due?

As originally framed, the summons concluded for payment of certain specific sums which the pursuers had been obliged to pay to another company in respect of the defender's failure to implement their contracts with them, and also a sum for loss of profits. There is no doubt that in certain circumstances that might have been a perfectly correct way of measuring the damage. In other circumstances it might not be, and the amount of damage would fall to be otherwise ascertained. It all depended on whether or not the pursuers were able to show that the loss to them was the direct result of the defender's failure to implement his contract. But after all, this was just a mode of assessing the damage said to be occasioned by the breach of contract. The real question at issue between the parties remained the same, viz., If there was a breach of contract by the defender, what was the loss occasioned thereby to pursuers?

All that the pursuers propose to do by this amendment is to insert a claim for the amount of damage which had been sustained, if it fell to be calculated by a different mode from that in the condescendence, viz., the difference between the market and the contract price. This amendment is necessary for the purpose of determining the real question in controversy—viz., the amount of damages due. The amendment makes no change in the controversy between the parties. The question in controversy is as to the damages due for breach of contract. The only question proposed to be raised by the amendment is—How are the damages to be estimated? But that does not alter the real matter as in controversy between the parties. It does

not subject to the adjudication of the Court any larger sum or different property than is specified in the summons. The sum originally in the summons was £600 and upwards. This alteration makes the sum sued for £300.

I therefore think that the proposed amendment should be allowed.

LORD JUSTICE-CLERK—I concur in the opinion delivered by Lord Trayner. I certainly would be anxious to give the fullest scope to an Act of Parliament which enabled a pursuer, by altering his pleadings, to get a decision on the real question between the parties. But what is proposed here is to subject to adjudication of the Court a sum which is larger than any of those concluded for in the separate conclusions of the summons. For that reason this amendment, it appears to me, does not fall within the scope of the Act.

Even if it was competent to allow the amendment to be made, I am of opinion that the Act leaves the right to allow or to refuse to allow an amendment to the discretion of the Court, and I think that this is not a case for exercising that discretion by allowing the amendment.

LORD YOUNG and LORD RUTHERFURD CLARK were absent.

The Court refused the note, and in the same interlocutor, of consent refused the reclaiming-note.

Counsel for the Pursuers — Dickson — MacWatt. Agent—W. Kinniburgh Morton, S.S.C.

Counsel for the Defender—Salvesen—T. B. Morison. Agent—P. Morison, S,S.C.

Saturday, December 21.

FIRST DIVISION.

[Lord Moncreiff, Ordinary.

WALKER *v.* GALBRAITH.

Succession—Husband and Wife—Destination to Spouses in Conjunct Fee—Special Destination to Heirs—General Disposition.

A subject was assigned to two spouses "in conjunct fee and to the survivor of them in fee, and at the death of the survivor to the heirs of the spouses equally between them."

They subsequently executed a mutual general disposition by which they disponed to and in favour of the survivor in liferent for his or her liferent use only, and at the death of the survivor to two sons of the wife by a previous marriage, equally between them, their whole estate, heritable and moveable.

The subject acquired by them under the assignation was the only property belonging to the spouses at the time when they executed this disposition.

Held (1) that the assignation conferred upon the husband and wife a joint fee with the benefit of survivorship; (2) that the general mutual disposition evacuated the destination of the subject to their heirs contained in the assignation.

Expenses—Unsuccessful Litigant—Sale of Heritage—Objection to Title.

A purchaser of heritable subjects who had stated a plausible objection to the title offered to him, and defended an action of declarator and implement raised against him by the seller, though unsuccessful in the action, *held* entitled to expenses.

In March 1877, Mr Patrick Burns, trustee on the sequestrated estate of Hugh More, grocer, Kilwinning, granted an assignation of a ninety-nine years' lease of certain subjects near Kilwinning to "David Deans, miller and innkeeper in Stevenston, and Marion Sneddon or Deans, his wife, in conjunct fee, and to the survivor of them in fee, and at the death of the survivor to the heirs of the said David Deans and Marion Sneddon or Deans equally between them."

In 1882 Mr and Mrs Deans executed a mutual trust-disposition and settlement, and they conveyed "to and in favour of the survivor of us in liferent for his or her liferent use only, and at the death of the survivor to John Paton, miner, Stevenston, and William Paton, residing with us, both sons of me, the said Marion Sneddon or Deans, equally between them, All and Sundry, our whole estate, heritable and moveable, real and personal, wheresoever situated; also all debts, sums of money, and effects now owing and belonging or that shall be owing and belonging to the first deceased." The survivor was appointed executor of the predeceaser, and then followed—"reserving always to us, while both survive, power to alter, innovate, or revoke these presents in whole or in part as we may see proper."

Mr David Deans died in December 1890, having been predeceased by his wife.

The only property in which either of the spouses had any interest at the date of the settlement and of their deaths was the long lease referred to above.

After their deaths the beneficiaries John Paton and William Paton completed a title to the lease, which they sold to a third party, who subsequently sold it to Mr Robert Walker, wine merchant, Kilwinning. Mr Walker in 1894 agreed by missives of sale to sell the lease to Mr Archibald Galbraith, innkeeper, Kilwinning. Mr Galbraith deposited the price, but refused to accept an assignation of the subjects on the ground that Mr Walker was not in a position to give him a good title. Mr Walker accordingly raised an action against him craving for declarator that his title to the subjects was good, and for implement of the missives of sale.

The defender maintained (1) that "the special destination contained in the assignation was not evacuated by the general conveyance contained in the mutual disposi-