one way. A sale by wholesale is a sale, in my judgment, to a retailer for re-sale; a sale by retail is a sale to the consumer for consumption. I cannot understand that any other view can be taken of this Order unless it is to be rendered wholly inoperative, and to put the retail dealer at the mercy of the wholesale dealer, because the retail dealer cannot charge, without committing an offence against the law, more than a certain fixed sum per gallon. If the wholesale dealer, by limiting the quantities which he sells from time to time below 17 gallons, can demand any price he pleases from the retailer, then there is no protection for the retailer's profits, which I think was one of the objects of the Order.

In the case of this particular respondent perhaps the course which the Solicitor-General proposes to take is not unwise, because, undoubtedly, the respondent might honestly commit the same mistake as the learned Sheriff has done, and yet would not consciously offend against the law. That might enter into the quality of the offence which he has committed and the penalty which ought to be imposed upon him, but after our judgment in this case no wholesale dealer will be entitled to shelter himself under that circumstance.

I entirely concur with Lord Dundas that you cannot import a definition clause from one Order, which deals with a wholly different matter, into another, unless the subsequent Order expressly incorporates the definition clause from the prior one. In this case there is no such incorporation. The matter is left to be determined by the meaning—the popular and ordinary meaning—of the word used in the Order, and it must have been so admittedly, from the fact that there was a Milk Order fixing prices prior to the Registration of Milk Dealers Order, where there was no definition clause, and where the argument which found favour with the Sheriff could not have been maintained had there been a prosecution under it.

LORD JUSTICE-CLERK—I confess I have much more difficulty in this case than either of your Lordships. The Solicitor-General in his last observation referred to the words of section 18 (c) of the Registration of Dealers Order of 8th January 1918, that nothing in the Order should affect a "wholesale sale of milk by the producer of the milk sold." The whole point of that is in the word "wholesale"; but according to the definition the sales here were not wholesale sales, and accordingly the said order has no application to this case. We are left to consider the question on the view your Lordships have taken of the meaning of "wholesale." My difficulty arises from the fact that the Registration Order introduced this rule, that no person should deal in milk in wholesale without getting a licence, and it defined what "wholesale" meant.

It would be the easiest thing in the world to evade the Order by selling a little less than 17 gallons. But it is said that following upon that there was an Order which did not contain a definition, and that is quite true—the Order upon which this prosecution proceeds. I quite appreciate the argument that you cannot import a definition clause from one Act of Parliament into another; but on the other hand I have some difficulty in seeing how the word "wholesale" is any more intelligible without a definition than, say, the word "reasonable," and I have a great doubt whether this Order which it is contended creates a criminal offence can be made effective without a definition.

The Court answered the first and second questions of law in the negative.

Counsel for the Appellant — Solicitor-General (Morison, K.C.) — Wark, A.-D. Agent—W. J. Dundas, W.S., Crown Agent.

Counsel for the Respondent — Gentles. Agents—Weir & Macgregor, S.S.C.

COURT OF SESSION.

Wednesday, February 5.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

RACKSTRAW *v.* DOUGLAS AND OTHERS.

Process—Summons—Amendment—Amendment of Instance—Competency—Title by Assignation Subsequent to Raising Action—C.A.S., B. I, secs. 1 *and* 3.

An heir of entail who had brought an action of reduction of the decree in a petition of disentail, discovered a defect in his title, and acquired by assignation the rights of a nearer heir of entail. He then craved leave to amend the instance by adding thereto his rights as assignee. *Held* that the amendment was competent.

The Codifying Act of Sederunt, Book B, Chap. I, enacts—Section 1—"Where an action or other proceeding has been commenced in the name of the wrong person as pursuer, or where it has been commenced without a person whose conjunction may be deemed necessary to make a good instance, or where it is doubtful whether it has been commenced in the name of the right person, the Court or Lord Ordinary if satisfied that it has been so commenced through *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, may allow any other person to be sisted as pursuer in substitution for, or in addition to, the original party, on such terms as to expenses as the Court or Lord Ordinary shall deem proper." Section 3—"Where a party sues or is sued in his own right, but it appears that he ought to have sued or been sued in a representative character, the Court or Lord Ordinary may, at the instance of either party, on such terms as to expenses as to the Court or Lord Ordinary shall seem proper, amend the record accordingly; and thereupon the action shall proceed in all respects as if the proper description of the

party had been given in the summons or other writ."

John George Hay Rackstraw, Monkwearmouth, Sunderland, England, as one of the heirs of entail under a disposition and deed of tailzie, dated 14th June 1809, *pursuer*, brought an action against Miss Elizabeth Bryce Douglas, Edinburgh, and others, *defenders*, in which he craved the Court to reduce a decree dated 14th and recorded in the Register of Entails, 28th July 1914, granting the prayer of a petition presented by the defender Miss Elizabeth Bryce Douglas for authority to record an instrument of disentail under the Entail Acts, and also for reduction of the instrument of disentail, and of certain procedure following on the decree.

In the course of the action the pursuer obtained a disposition and assignation from Andrew Hay, the next heir of entail entitled to succeed after the defenders, under the deed of tailzie, whereby Andrew Hay conveyed to the pursuer "All and whole the lands and others described in the disposition and deed of tailzie, and other subjects therein mentioned, together with his whole right, title, and interest, present and future, vested and contingent, to the lands, subjects, and others therein conveyed, but under the declaration therein written;" and gave to the pursuer full power and authority to use his name in challenging all deeds and acts which had been or might be done to the prejudice of his (the said Andrew Hay's) rights and interests, and particularly the instrument of disentail brought under reduction in this action.

The pursuer then moved the Lord Ordinary (ORMIDALE) for leave to amend the record, *inter alia*, by adding to the instance the pursuer's title as assignee of Andrew Hay.

On 29th June 1918 the Lord Ordinary allowed the amendments.

In the record as amended the pursuer *pleaded*—"2. The pursuer, as one of the heirs of entail under said disposition and deed of tailzie, *et separatim* as disponee and assignee of the said Andrew Hay, the next heir under the said disposition and deed of tailzie after the defenders first and second mentioned, has a good and sufficient title to pursue this action, and to obtain decree in terms of the conclusions of the summons."

The defenders pleaded—"1. The action as amended is incompetent 2. The pursuer has no title to sue, in respect that (1) he is not a legitimate descendant of an heir under the deed of entail founded on, and (2) the disposition and assignation founded on is not habile to convey to the pursuer the rights of an heir under the said deed of entail."

On 3rd December 1918 the Lord Ordinary sisted the process to allow the pursuer, if so advised, to bring an action of declarator establishing the putative marriage averred on record.

Opinion, from which the *facts* of the case appear:—"The pursuer sues this action on two different titles, *first*, as himself, an heir of entail under the disposition and deed of tailzie of Burnbrae; and *second*, as the assignee of Andrew Hay, who, he says, is the next heir under the deed of tailzie after the defenders first and second mentioned.

"His claim to be himself an heir of entail admittedly depends, in the first place, upon whether his mother Hannah Hay was a legitimate child. She was the offspring of Robert Hay, the eldest son of the entailer's nephew Robert and Hannah Lauder, but at the time of Robert Hay's marriage to Hannah Lauder he had been already married, and both then and at the date of the birth of the pursuer's mother his first wife was still alive. The pursuer, however, avers that his mother was entitled to the status of a legitimate child, because her mother again, Hannah Lauder, was in good faith and ignorant of any impediment to her marriage with Robert Hay—in other words, he claims that his mother was the child of a putative marriage. He avers, further, that his grandfather Robert Hay was born in Scotland and retained his domicile of origin until his death.

"The pursuer asks for a proof, that he may establish the facts of his father's domicile and the putative marriage.

[*His Lordship then dealt with the question of whether the legitimacy of the pursuer's mother fell to be determined by the law of England or the law of Scotland and reached the conclusion that it should be determined by the law of Scotland.*]

"If that is so, then the pursuer is entitled to prove if he can the putative marriage of his grandmother. . . .

"I shall therefore sist this action to allow him, if so advised, to raise such a declarator.

"I do not at this stage decide the question as to the pursuer's title to sue as assignee of Andrew Hay.

"If he is himself an heir of entail, as he says he is, although not the nearest heir after the defenders, he has nevertheless a title to sue, and it is not necessary to sist any other person for the determination of the real matter in dispute. On his own statements and relative pleas-in-law—all of which he still maintains—he is not the wrong person; the conjunction with him of another person having an independent title is not necessary to make a good instance, and it is not doubtful that the action has been commenced in the name of a right person. The provisions of the C.A.S., B. I, on which Mr Scott said he relied, do not therefore apply.

"If the pursuer should fail to establish a putative marriage, then he will have commenced the action without either title or interest, and totally different considerations will arise in determining as to the competency and otherwise of his title to sue as assignee. I see no good reason for dealing with that question now."

The pursuer reclaimed, and at the hearing both parties concurred in stating that they did not wish the interlocutor sisting the case to stand.

Argued for the pursuer and reclaimer—The pursuer was entitled to the benefit of the Codifying Act of Sederunt, B. I, sections 1 and 3. He had originally brought the action in his own name as an individual.

There was, however, a defect in his title of which he was not then aware, and he was entitled to have the representative capacity which he had since acquired as assignee of Andrew Hay added to the instance, and to proceed with the action as his assignee—*Paxton* v. *Brown*, 1908 S.C. 406, 45 S.L.R. 323; *Klein and Others* v. *W. N. Lindsay and Others*, 1909 (O.H.), 1 S.L.T. 89; *Doughty Shipping Company, Limited* v. *North British Railway Company*, 1909 (O.H.), 1 S.L.T. 267.

Argued for the defenders and respondents—The pursuer was not entitled to the benefit of the Codifying Act of Sederunt. He was not introducing a new pursuer, and he held no representative capacity such as an executor. The Court had a discretion under the sections founded on, and the Codifying Act of Sederunt could not be read so widely as to allow anyone to become a party to an action in which he had no concern. The present case was ruled by *Symington* v. *Campbell*, 1894, 21 R. 434, 31 S.L.R. 372. Reference was made to *Summerlee Iron Company, Limited* v. *Caledonian Railway Company*, 1911 S.C. 458, 48 S.L.R. 536.

LORD JUSTICE-CLERK—Before the recent changes made by the Act of Sederunt on the forms of process, the pursuer in this action, if he had sought by subsequently acquiring a right which he did not possess when the action was brought, to bring that right into the pending action, would have been met by the plea that it was not competent so to do. But in my opinion the Act of Sederunt to which we were referred has completely altered that position. And what we have to determine is whether, under B. I, 1, of the Codifying Act of Sederunt, this amendment was competent.

To my mind the terms of that section of the Act of Sederunt are too clear for argument. I think it was intended, in the interests of litigants and in the interests of the Court, to do away with unnecessary procedure, and that, accordingly, where it has been found that a pursuer who had brought an action was not the proper party, but that there was a proper party, or where it was found to be doubtful whether the pursuer was the proper party when there was a party vested with an undoubted title to sue, the Court was given power to allow the pleadings to be amended by amending the instance and also the condescendence so far as it was necessary to give effect to the main amendment. I think that on a proper reading, the terms of the Act of Sederunt are to that effect, and that the purpose which the Act of Sederunt was intended to effect entitles, and indeed requires us, to give what I would call a wide reading to its terms, any abuse of the new power of amendment being sufficiently restricted, in the first place, by the words "if the Court or the Lord Ordinary is satisfied that the action has been so commenced through *bona fide* mistake," and, secondly, by its leaving the power to allow the amendment entirely discretionary. I have, for my own part, no doubt at all as to the competency of this amendment and as to the propriety of the exercise of his discretion by the Lord Ordinary in allowing it.

It was suggested that the pursuer, by taking an assignation and adding to the instance his own name as assignee of Andrew Hay, was not adding another pursuer. I confess that I do not understand that argument in the very least. There is an old maxim *unus homo potest sustinere plures personas* which in my opinion expresses sound sense and law. When Mr Rackstraw seeks to add to the instance the name of himself as assignee, he is adding to the instance another and entirely separate and distinct person from himself *qua* individual. Therefore I am quite content to adopt the view of the Lord Ordinary that this is a competent amendment, and an amendment that should be allowed.

With regard to the terms upon which the amendment ought to be allowed, however, I think we should go further than the Lord Ordinary does, that we should find pursuer liable to pay the defenders the expenses since 20th March 1917 in so far as those expenses are not available to the defenders in any subsequent proceedings, and that payment of these expenses should be made a condition of the pursuer being allowed to make the amendment and proceed with the action.

LORD DUNDAS—I concur.

LORD SALVESEN—I am of the same opinion. The situation is very much altered since the Lord Ordinary dealt with the case, because the pursuer does not now ask the Court to investigate his title as one of the heirs of entail and is content to have the action proceed at his own instance as assignee of what appears to be a nearer heir of entail, whether the pursuer can sustain the character of heir of entail or not. Accordingly it would be most unfortunate if procedure were sisted to try a matter in which neither party seems any longer to have much interest.

On the question which your Lordship has dealt with—the competency of the amendment—I agree entirely. I think the object of the Act of Sederunt was to make it possible to avoid unnecessary procedure. The position of matters is that, admittedly, the pursuer as assignee of Andrew Hay could bring a fresh action of reduction, even on the assumption that this particular action which he sues in his own character was dismissed. The result of that would be that the whole procedure that has been gone through in this action would be to a large extent wasted. Now the defenders have no real interest in keeping back this amendment so long as they are kept free from the expenses occasioned by the pursuer's discovery of the weakness of his own title and the sisting of himself as assignee of Andrew Hay.

Therefore I think the case falls under the Act of Sederunt, it being admitted that the pursuer raised this action under a *bona fide* mistake as to his propinquity to the defenders. Further protection is afforded to the defenders by the provision that it is in the discretion of the judge to allow or refuse the proposed amendment of the instance. Here the judge has exercised his discretion

in favour of allowing the amendment, and I see no reason for differing from him.

In the matter of expenses I agree with your Lordship that it is only fair that in the circumstances of this case the payment of expenses should be made a condition of the pursuer being allowed to proceed.

LORD GUTHRIE—I agree. On the question of the pursuer's position as assignee of Andrew Hay I think what your Lordships propose to do is exactly in accordance with what Lord Dunedin announced in the case of *Paxton* v. *Brown*, 1908 S.C. 406, 45 S.L.R. 323, where his Lordship says—"But the question remains, what is to be done next? I think that here the modern practice of not multiplying actions and not putting parties to unnecessary expense comes to our help." And then later he says—"The defender will not be prejudiced in any way, and the expenses of preparing and serving new actions and paying the fee fund dues will be avoided."

The Court recalled the interlocutor of the Lord Ordinary and remitted to him to allow the pursuer (subject to the condition as to payment of certain expenses incurred) a proof of his averment dealing with his right as assignee of Andrew Hay, and to the defenders a conjunct probation.

Counsel for the Pursuer and Reclaimer—Christie, K.C.—Scott. Agent—J. Anderson, Solicitor.

Counsel for the Defenders and Respondents—Chree, K.C.—Hamilton. Agents—Webster, Will, & Company, W.S.

Saturday, February 8.

FIRST DIVISION.

WILSON'S TRUSTEES *v.* WILSON AND OTHERS.

Succession — Trust — Construction — "Free Yearly Income"—Incidence of Income Tax.

A testator left to his widow "after payment of [his] debts and the cost of the administration of [his] estate . . . the free yearly income [of his whole property] up to if possible £600 *per annum* as an alimentary provision . . . to cover all rent, rates, and taxes . . ., any remaining annual income to be paid" to his nephews and nieces. He further directed that all his household furniture and effects in his dwelling-house, which he held on a lease, should at the date of his death be handed over to his widow as her absolute property. At the date of his death the testator possessed no heritable estate, his estate amounting to £14,000 being moveable. *Held* (*dub.* Lord Mackenzie) that the income tax upon the bequest to the testator's widow was payable by her.

Murdoch's Trustees v. *Murdoch*, 1918, 55 S.L.R. 664, and *Smith's Trustees* v. *Gaydon*, 1918, 56 S.L.R. 92, *distinguished.*

Bruce Rennie and others, the testamentary trustees of the late John Millar Wilson, *first parties*, Mrs Lilian Harriette Wilson, widow of John Millar Wilson, *second party*, and Christina Mary Wilson and others, nephew and nieces of John Millar Wilson, *third parties*, brought a Special Case for the opinion and judgment of the Court upon questions relating to the incidence of the income tax payable in respect of a bequest of income to the second party.

The *last will and settlement* of John Millar Wilson (the testator) conveyed his whole estate, real and personal, heritable and moveable, to the first parties in trust for a variety of purposes, which included the following:—"After payment of my debts and the cost of the administration of my estate to pay to my wife Lilian Harriette Wilson the free yearly income thereof half yearly or as received so long as she remains my widow up to if possible the sum of Six hundred pounds per annum as an alimentary provision not assignable by her or affectable by her debts or deeds or attachable by her creditors to cover all rent rates and taxes and in full satisfaction of all claims against my estate legally competent to her upon or through my death any remaining annual income from the estate above Six hundred pounds to be paid (failing my leaving any lawful issue) to or for the benefit of my nephews and nieces to be distributed as and when my trustees may determine and to cease at the death or re-marriage of my said wife."

The Case set forth—"1. The testator died on 4th January 1914 domiciled in England. He left a last will and settlement dated 3rd January 1914, under which he appointed the first parties to be trustees, and provided that the trust thereby constituted should be administered in Scotland. 2. . . . The testator further provided that in the event of his wife marrying again the said annual income above provided to her should thereupon cease, that the household furniture and effects at Darrochmore should at his death be handed over to his wife as her absolute property, and that (failing his leaving lawful issue) on the death or re-marriage of his wife the capital of the estate should be divided equally among his brothers and sisters alive at the date of his death. 3. The testator was survived by his widow. He left no issue. He left a number of nephews and nieces. At the date of his death, which occurred on the day following the execution of the said last will and settlement, the testator was not possessed of any heritable estate or house property. He was tenant under a five years' lease, entered into about six months before his death, of the house 'Darrochmore,' Ipswich,' in which he resided 4. The testator's estate after payment of debts and death duties amounts to about £14,000. The income, exclusive of income tax, amounts to about £900 per annum. The income is taxed at its source before it is paid to the first parties, and the whole income is brought into charge."

The *questions of law* were—"1. In each year in which the income of the testator's estate, exclusive of income tax, amounts to or exceeds £600, is the second party entitled, so long as she remains unmarried, to pay-