in *Heritable Reversionary Company* v. *Miller*, 1892, App. Cas. 610, the validity of the disponer's right 'does not rest on the recognition of any power in the trustee which he can lawfully exercise, because breach of trust duty and wilful fraud can never be in themselves lawful, but upon the well-known principle that a true owner who chooses to conceal his right from the public, and to clothe his trustee with all the *indicia* of ownership, is thereby barred from challenging rights acquired by innocent third parties for onerous considerations under contract from the fraudulent trustee. There, however, the peculiarity is that the true owner has himself clothed the trustee with the legal title either by conveying the subject or by directing it to be conveyed in the trustee's favour. The trustee has therefore a good title to convey to a third party, and all that the true owner has to complain of is the trustee's breach of a personal obligation. That is a complaint good against him but not good against the disponee. A different rule must, I think, apply where the true heir has done nothing active to confer a title upon the false heir, but has merely been dilatory in asserting his rights. In that case (which is the present) the title is infected by what Baron Hume (in his commentary on the case of *Calder* v. *Stewart*, at p. 446 of his Decisions), calls 'a *labes realis* intrinsic to the real and feudal right, and touching therefore all who acquire the subject how onerously and fairly soever.' It seems to me to be impossible to hold, consistently with sound principle that so radical a vice in title can be cured by a mere plea of personal bar, or indeed by anything short of prescription.

"Assuming I am right on the facts, there is no dispute as to the pursuer's right to decree of reduction with regard to the other properties which have not been transferred. The conclusions for accounting cannot be disposed of until an account has been lodged by the leading defender, and it may be that under that head the pursuer will have to suffer for his delay in raising the action."

Counsel for the Pursuer—Sym. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Defender Mackie—Graham Stewart—Sandeman. Agents—R. R. Simpson & Lawson, W.S.

Counsel for the Defenders The United Breweries, Limited—H. Johnston—Cooper. Agents—Philip, Laing, & Company, S.S.C.

Friday, October 23.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.

ROTTENBURG *v.* DUNCAN AND OTHERS.

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

In an action by the purchaser of a share in a ship, the title to which, at the date of the purchase, was vested in certain of the defenders, the pursuer averred that they had, in breach of trust, and without his authority, sold the ship to another of the defenders. In the record, as originally framed, the pursuer claimed repayment of the price of his share, with interest from the date of the purchase, or, alternatively, from the date of the alleged alienation, and for an accounting up to that period. After the action had been brought on appeal to the Inner House, the pursuer craved leave to add averments and pleas to his record, in which he claimed the sum sued for as damages due to him by the defenders.

The Court *allowed* the amendments.

Process — Judgment — Cancelling Interlocutor.

The Court issued an interlocutor in an action founded on a tender by the defenders. Between the date of the tender and the interlocutor the subjects tendered were sold by mortgages, but *per incuriam* of the defenders this fact was not stated in Court. On the motion of parties the Court *cancelled* the interlocutor and continued the cause.

This was an action at the instance of Paul Rottenburg, merchant, Glasgow, against John Duncan, Hope Street, Glasgow, James Brown, coal merchant, Glasgow, and the Triton Steamship Company, concluding against the defenders, jointly and severally, for payment of the sum of £450 with interest from 9th May 1892, or (*second*) for payment of £450 with interest from 2nd January 1895; and for an account of their intromissions with the funds and estate of the steamship "Triton" from May 1892 to January 1895, and payment to the pursuer of his share of the balance of profits.

The pursuer averred that the defenders Duncan and Brown were two of the persons in whom the steamship "Triton" was, until shortly before the action was raised, vested, and that she was held by them, along with Thomas Brown, Milford Haven, in trust for the defenders, the Triton Steam Ship Company; that on 9th May 1892 the pursuer invested £450 in the purchase of a part interest in the steamship 'Triton'; that in December 1892 a limited company was formed to acquire the ship, and without the pursuer's authority, he was entered as a shareholder; that the

pursuer thereupon presented a petition for rectification of the register, and had his name removed; that he thereafter intimated to the defenders Duncan and Brown that he withdrew authority from them to deal with the ship, which was held in part for him, and asked for an account of their dealings.

The pursuer further averred—"(Cond. 5) Notwithstanding his intimation, on or about the 2nd January 1895 the defenders, Duncan and Brown and Thomas Brown, in breach of trust, conveyed the whole ship 'Triton' to the defenders, the 'Triton' Company, including the part held for the pursuer. The said company were well aware that the part of the ship in which the pursuer was interested was held by the defenders Duncan and Brown and Thomas Brown for him, and that they had no right or authority to convey it to the company. (Cond. 6) The said ship 'Triton' has, it is believed and averred, been traded with to this date. The pursuer has received no account whatever of the intromissions with said ship."

He pleaded—"(1) The defenders Duncan and James Brown having, in concert with Thomas Brown and the other defenders, in breach of trust conveyed to the company the ship 'Triton,' including the pursuer's interest therein, the pursuer is entitled to decree with interest as craved. (2) *Separatim*, Or otherwise, the pursuer is entitled to decree with interest from 2nd January 1895 as craved, and to an accounting with the funds of the ship down to said date, and in his option, to decree for any balance due thereon."

The defenders The "Triton" Steamship Company in their defences made a tender to allot shares to the pursuer for £450, or to grant in his favour a bill of sale for six 64th shares, being the number of 64th shares of the purchase price of the vessel represented by the amount subscribed by him, under burden of an existing mortgage on the vessel, and to pay his expenses up to date.

The Sheriff-Substitute (BALFOUR), after a proof by writ, on 13th March 1896 found that the pursuer had failed to prove the alleged trust, and assoilzied the defenders.

The pursuer appealed to the First Division of the Court of Session.

The Court on 25th June 1896 pronounced the following interlocutor:—"Recal the interlocutors subsequent to 20th May 1895, and in respect of the undertaking of the defenders on record (1) to procure and grant in favour of the pursuer a bill of sale for six sixty-fourth shares of "the 'Triton' s.s., under burden of existing mortgages, and (2) to account for the ship's profits from 1st January 1893, dismiss the action."

It subsequently appeared that prior to this date, but subsequently to the tender in the Sheriff Court, the 'Triton' had been sold by the mortgagees, and by error on the part of the company this fact was not stated in Court. The parties accordingly presented a joint-minute, in which they moved the Court to cancel the above interlocutor, and put the cause to the roll for further procedure.

The pursuer argued that this could be done on the authority of *Harvey* v. *Lindsay*, July 20, 1875, 2 R. 980.

The Court on 10th July 1896 pronounced an interlocutor by which they, "in respect of the said minute," and "that the pursuer and the defender James Brown were ignorant of the sale having taken place, appoint the Clerk of Court to cancel the said interlocutor, . . and continue the cause in order that the pursuer may state what amendments, if any, he is desirous to make upon his record."

The pursuer proposed to amend his record by adding to Cond. 5 an averment that the ship had since August 1893 been held by the defenders Duncan and Brown, who were also directors of the Triton Company, for behoof of that company without regard to the pursuer; that in December 1894 or January 1895 the existing mortgage was discharged, and that thereafter the defenders Duncan and Brown formally transferred the title in the whole ship to the Triton Company, and that company of new mortgaged the ship to the Marine Securities Corporation, which sold the whole ship, this being done without the pursuer's authority; that the pursuer's interest in said ship in August was not less than £450, and that in March 1894, in ignorance that Duncan and Brown had given up control of his interest, he had agreed with Brown, Sons, & Company to sell his interest for £337, 10s.; that Brown, Sons, & Company deposited £33, 15s. on account, which they forfeited by failure to complete the transaction; that the pursuer was willing to take the balance, viz., £303, 15s. as the value of his interest in said ship, and that by the defender's actings he had suffered loss and damage to at least the amount of £350.

The pursuer proposed also to add to Cond. 6 the averment that if he obtained decree for £450, or even £303 15s., he was willing to abandon his claim to an accounting. He proposed to add the following pleas-in-law:—"(3) The defenders having illegally and without the pursuer's knowledge or authority appropriated or otherwise disposed of the pursuer's interest in said ship, are bound to make good the value of said interest to him, and the pursuer is therefore entitled to decree as craved. (4) The value of pursuer's interest in said ship being not less than the sum sued for, or at all events (in the circumstances condescended on) not less than £303 15s., with interest from 30th March 1894, the pursuer is entitled to decree. (5) The pursuer having, through the actings of the defenders as condescended on, sustained loss and damage, is entitled to decree. (6) The loss and damage sustained being moderately estimated at the sum sued for in the first alternative conclusion, or at all events, as the sum of £350, which pursuer is willing to accept in full of his damage, he is entitled to decree in terms of the first alternative conclusion, or at all events for the said sum of £350."

The defenders objected to the proposed amendment as incompetent.

Argued for defenders—The pursuer was

attempting to bring before the Court a different claim, viz., damages, to that which his original action set forth, viz., restoration of the money which he had invested. Accordingly the amendment was incompetent by section 29 of the Court of Session Act 1868. The Court interpreted that Act very strictly—*Russell, Hope, & Co.* v. *Pillans*, December 7, 1895, 23 R. 256. Even if the amendment were competent, it was within the discretion of the Court to refuse it—*Taylor* v. *M'Dougall & Sons*, July 15, 1885, 12 R. 1304; *Laning & Co.* v. *Seater*, June 21, 1889, 16 R. 829; *Forbes* v. *Watt's Trustees*, Nov. 9, 1870, 9 Macph. 96.

At advising—

LORD PRESIDENT—In my opinion the proposed amendments fall sufficiently within the scheme of the action to be within the section of the Act. I think they are necessary for the purpose of determining in this action the real question in controversy between the parties, and cannot be said, in the sense of the section, to subject to the adjudication of the Court any larger or other fund than that specified in the original action. The term "fund" seems to have been misapplied in the discussion, because in the Act it surely is applied to money set apart in the hands of some person, or earmarked and set aside for a special purpose. I may mention by way of illustration the fund *in medio* in a multiplepoinding. In this case the pursuer on record is seeking compensation simply. He says to the defenders, Duncan & Brown, "I give you £500 to put into a ship; you put it into the "Triton"; you held the ship in trust for me to that amount; and you disposed of it without my consent, and I have never got back my money." It is true that he said on record "Because I gave you the money you must give it me back," but his first view, from which he lapsed but which he never abandoned, seems to be the more proper view, namely, that he has a claim of damages against the defenders, and the action is, I think, calculated to bring out this claim.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court allowed the proposed amendments.

Counsel for Pursuer—Sol.-Gen. Dickson, Q.C.—Clyde. Agents—J. & J. Ross, W.S.

Counsel for Defenders—Asher, Q.C.—Guthrie—W. Campbell—Orr—Aitken. Agents—Clark & Macdonald, S.S.C.

Saturday, October 24.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

COMMISSIONERS OF GOVAN *v.* AIRTH.

Police—Street—Obligation to Make Footway—Burgh Police Act 1892 (55 *and* 56 *Vict. cap.* 55), *secs.* 6, 141, 327—*General Police Act* 1862 (25 *and* 26 *Vict. cap.* 101), *sec.* 149.

Section 149 of the General Police Act 1862 empowered the commissioners to call upon owners of properties abutting on any street to make footways in front of their houses, to the satisfaction of the commissioners, and further provided that the owners should repair and uphold such footways. The Burgh Police Act 1892 (which repeals the Act of 1862) enacts by section 141 that the owners of properties abutting on any street shall, when required by the commissioners, at their own expense, "cause footways before their properties respectively on the sides of such street to be made, and to be well and sufficiently paved" to the satisfaction of the commissioners, who are thereafter to maintain such footways.

Held (*rev.* the judgment of Lord Kincairney) that a proprietor was not exempted from a requisition under the Act of 1892 by reason of his having already constructed a footway under the provisions of the Act of 1862.

Section 141 of the Burgh Police (Scotland) Act 1892 provides as follows:—"The owners of all lands or premises fronting or abutting on any street shall, at their own expense, when required by the commissioners, cause footways before their properties respectively on the sides of such street to be made, and to be well and sufficiently paved or constructed with such material and in such manner and form and of such breadth as the commissioners shall direct, and the commissioners shall thereafter from time to time repair and uphold such footways." . . . Section 142 provides that in the event of the commissioners undertaking the maintenance of all the footways of the burgh, "they shall call upon all owners to have their foot pavements before their properties put in a sufficient state of repair, and failing their doing so within six weeks, the commissioners may cause the same to be done at the expense of such owners, and thereafter the said foot pavements shall be maintained by the commissioners." By section 327 the commissioners are empowered, in default of their orders being implemented by the owners, to execute the necessary work at the expense of the latter. Section 149 of the General Police (Scotland) Act 1862, which is repealed by section 6 of the Act of 1892, provided that the owners of all lands or premises fronting or abutting on any street should, at their own expense, on the requisition of the commissioners,