principles of justice and of just procedure as recognised by all courts of law. It is oppression to deny to a party to a cause his ordinary legal rights of leading evidence and being heard thereon. I further think that the same proceedings constituted such a deviation in point of form from the statutory enactments as prevented substantial justice from having been done, and that on both grounds the judgment ought to be set aside. It would be extraordinary if we were to refuse to do this, because the Sheriff-Substitute bases his wrongous declinature to hear evidence on an alleged view of the law. It is a judge's duty when a proof has been allowed, to hear the evidence tendered and then to apply the law; and it is obvious that in many cases the law can best be applied after all the evidence has been led.

LORD DUNDAS—I am of the same opinion. It may not be necessary in every case of this kind to define with precision the exact grounds on which the judgment complained of can be said to be open to appeal under section 31 of the Small Debts Act of 1837. Broadly viewed, this judgment seems to me to violate the spirit and the letter of that section in several respects. But I think that a safe and sufficient ground of decision is found in the Sheriff-Substitute's refusal to allow the defender (appellant) to lead evidence directed towards extinction or diminution of damages. The refusal was, in my opinion, such a deviation from the statutory enactments as prevented, or might have prevented, substantial justice being done in the case.

The Court sustained the appeal, recalled the judgment or decree, and remitted to the Sheriff-Substitute to proceed in terms of law.

Counsel for the Appellant — Mercer. Agents—Dalgleish, Dobbie, & Co., S.S.C.

Counsel for the Respondent — J. R. Christie. Agents—Bryson & Grant, S.S.C.

COURT OF SESSION.

Saturday, October 24.

FIRST DIVISION.

[Sheriff Court at Glasgow.

PATERSON *v* WALLACE.

Process—Amendment of Instance—Act of Sederunt, 20th March 1907, *sec.* 2 (*a*)—*Application of Section to Actions Initiated in Sheriff Court.*

In an action initiated in the Sheriff Court a liquidator of a company sued in his own name for certain uncalled capital of the company. No objection was taken to the instance until the action had been appealed to the Court of Session. The pursuer then sought to amend the instance by adding the name of the company as pursuer.

Held that the Act of Sederunt of 20th March 1907, sec. 2 (*a*), which gave certain powers of amending the instance, applied only to actions initiated in the Court of Session.

Process — Record — Amendment—Addition of Plea to Title to Sue Refused when No Defence on Merits—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 29.

"The duty of the Court to allow pleas, that have been omitted, to be put on at a subsequent stage is entirely conditioned by the fact that it must be for the purpose of bringing out the true question in dispute between the parties."

In an action initiated in the Sheriff Court a liquidator of a company sued in his own name for certain uncalled capital. After the action had been appealed to the Court of Session, the defender asked leave to add a plea of no title to sue. It was admitted that there was no defence on the merits.

The Court *refused* leave to amend.

The Court of Session Act 1868 (31 and 32 Vict. cap. 100) enacts, sec. 29—"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: . . ."

The Act of Sederunt of 20th March 1907 provides, section 2—"The first proviso in section 29 of the above-recited Act—*i.e.*, Court of Session Act 1868—is hereby repealed, and the following provisions shall have effect in addition to the provision as to amendment of records in defended actions contained in said section 29; . . . . (*a*) 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 to the Court or Lord Ordinary shall seem proper. . . ."

James Barrie Paterson, of 4 Sardinia Terrace, Glasgow, "as liquidator of the Patriotic Investment Society, Limited (in liquidation), 113 West Regent Street, Glasgow," on 6th May 1907 raised an action in the Sheriff Court at Glasgow against

William Wallace, M.B., C.M., 25 Newton Place, Glasgow, for £50, being the amount due as alleged on 100 £1 shares, 10s. paid, in the said company.

In the Sheriff Court no objection was taken to the instance, and the Sheriff-Substitute (BOYD), on 18th October 1907, granted decree.

The defender appealed, and argued—The pursuer had no title to sue. It was incompetent to allow him to amend the instance. Any power of amendment given by the Sheriff Courts Act 1907 (7 Edw. VII, cap. 51), Schedule I, Rule 79, was not available to him, as that statute did not come into operation till 1st January 1908 (section 2 and section 52), and the rule laid down in *Turnbull* v. *Veitch*, July 18, 1889, 16 R. 1079, 26 S.L.R. 752, applied; neither did the Act of Sederunt of 20th March 1907 avail the pursuer, as the power of amendment given by section 2 (*a*) thereof only applied to actions initiated in the Court of Session, as was apparent on referring to the Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 29. Reference was also made to *Munro* v. *Hutchison and Others*, February 8, 1896, 3 S.L.T. 268; *in re Winterbottom*, 18 Q.B.D. 446.

In answer to the Lord President counsel admitted that they had no case on the merits, but urged that if decree were granted, the defender would be exposed to the risk of having to pay twice.

Argued for the pursuer—They admitted the instance was bad, but before the defender could plead this he must get leave to amend by adding a plea to title. He should not be allowed to amend unless the pursuer was allowed to amend his instance. Assuming the defender was allowed to amend, then the pursuer asked leave to amend his instance. Section 29 of Court of Session Act applied to "any action or proceeding in the Court of Session." That meant wherever initiated. Reference was made to *Lafferty* v. *Caledonian Railway Company*, October 26, 1907, 15 S.L.T. 411; *Paxton* v. *Brown*, 1908, S.C. 406, 45 S.L.R. 323.

LORD PRESIDENT—This case is really in a very peculiar state of confusion. The liquidator of a company in liquidation wishes, quite properly, to call in the uncalled capital from the contributories, and one of them, the present defender, seems to be the holder of 100 shares, on which 10s. per share has been paid up, leaving a liability of another 10s. per share. The liquidator has raised an action against him in the Sheriff Court at Glasgow for recovery of these calls, and has raised the action in his own name without adding that of the company. The defender has put in defences in which he does not plead that the instance is bad, but tables a defence which deals with quite irrelevant matters, and is really no defence at all. He tells a story of the uncalled capital having been assigned to a certain extent to a gentleman called Carmont. To obviate the difficulty thus raised Mr Carmont has appeared and has been sisted along with the liquidator as pursuer, and it is clear that if the instance is good the conjoining of Mr Carmont cures any defect arising out of the assignation of part of the capital, for the two pursuers jointly could grant a perfectly effectual discharge. The only other thing stated by the defender is that he was induced by false representations to become a shareholder, but whatever force there might be in such a contention before the liquidation has commenced, it is too late to state it afterwards, as was settled in the *City of Glasgow Bank* cases.

The case dragged on its course in the Sheriff Court, and eventually the Sheriff granted decree against the defender. The case then came here on appeal, and now for the first time counsel for the defender proposes to take a plea which is not raised on record, viz., that there is no title to sue in respect that the action was raised by the liquidator in his own name without the addition of the name of the company. Counsel for the pursuer retorts that although he cannot say that the plea, if tabled, is not a good one, yet he proposes to meet it by amending his instance and adding the name of the company.

I am sorry to say that this last proposal is one that cannot be given effect to. Under the recent Act of Sederunt such an amendment would be competent in a Court of Session action, and under the recent Sheriff Courts Act it could also be made in a Sheriff Court action. But I am satisfied that section 2 (*a*) of the Act of Sederunt of 20th March 1907 only applies to actions initiated in the Court of Session and not to those that come there by way of appeal, and the Sheriff Courts Act clearly cannot be appealed to here, for it did not come into force until after the commencement of the present proceedings.

But that question comes to be of no moment if the defender's additional plea is not allowed to be put on. Now I have always understood that the duty of the Court to allow pleas that have been omitted to be put on at a subsequent stage is entirely conditioned by the fact that it must be for the purpose of bringing out the true question in dispute between the parties. Now here there is no true question between the parties, because it is admitted that on the merits the defender has no defence. I therefore do not think it is the duty of the Court to allow a plea to be put on which will only settle a technical point and will not bring out any question on the merits, and will only cause further litigation and expense without any result. Accordingly, I would advise your Lordships that what we should do is to refuse to put on the plea of no title, and, there being no plea to title and no other relevant defence, that we should adhere to the Sheriff's interlocutor. At the same time the pursuer has really been so careless in the conduct of this case that I do not think he is entitled to the expenses of his appearance here.

Mr Morison for the defender submitted that if we allowed the present decree to stand he might have to pay twice over. I

have no fear that that would be the result. The decree at present is in favour of the liquidator and Mr Carmont, but the defender, on paying, would be entitled to get a discharge from the company as well. If that were not given him he would enforce it by suspending a charge on the decree.

LORD KINNEAR—I am of the same opinion. The power to amend records is both by the inveterate practice of the Court and by statute conditional on the fact that such amendment is necessary to raise the true question at issue between the parties. This case has got out of shape by the fault of the agents of both parties, but the result is that the pursuer has obtained a decree from the Sheriff which is quite in accordance with the rights of parties as disclosed on record and by the statements of counsel at the Bar. If this decree were set aside the pursuer could raise the same question in a new record framed to avoid the errors in the present record, and the only result would be to arrive at the same conclusion by a more regular course. I agree that if there were any fear of the company making a second claim and of the defender having to pay twice over it would be out of the question to affirm the Sheriff's interlocutor, but there is no such danger. The liquidator has sued as liquidator for the company, and whatever he recovers must be applied for behoof of the company. The defect of title is thus purely technical, and there is no substance in the objection to it. For the liquidator is entitled to sue for the company—indeed, he is the only person that can sue, only in doing so he must sue in name of the company and not solely in his own name.

LORD SALVESEN—I entirely agree. I would only add that I am afraid that the argument submitted has made it apparent that there is a defect in the recent Act of Sederunt with regard to the amendment of a defective instance, as the Act according to its terms applies only to proceedings initiated in the Court of Session. That fortunately does not matter much now, since in the recent Sheriff Courts Act there is a similar provision with regard to actions commenced in the lower Courts.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

The Court adhered.

Counsel for the Pursuer (Respondent) — Hamilton. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Defender (Appellant) —Morison, K.C.—Garson. Agents—Webster, Will, & Company, S.S.C.

Wednesday, October 28.

FIRST DIVISION.

MAGISTRATES OF THE BURGH OF BARONY OF KIRKINTILLOCH *v.* TOWN COUNCIL OF KIRKINTILLOCH.

Burgh—Burgh of Barony—Transference of Burgh Property—General Police and Improvement (Scotland) Act 1862 (25 *and* 26 *Vict. cap.* 101), *secs.* 22 *and* 35—*Burgh Police (Scotland) Act* 1892 (55 *and* 56 *Vict. cap.* 55), *secs.* 20 *and* 27 (2)—*Town Councils (Scotland) Act* 1900 (63 *and* 64 *Vict. cap.* 49), *secs.* 8 *and* 33.

An ancient burgh of barony adopted the General Police and Improvement (Scotland) Act of 1862, and appointed Police Commssioners, who in 1892 became, under the Burgh Police (Scotland) Act of that year, the Police Commissioners of the burgh, and thereafter, by virtue of the Town Councils (Scotland) Act 1900, the Town Council of the burgh.

In a special case between the magistrates of the burgh of barony and the town council, relating to the property of the old burgh of barony, *held* (1) that as the magistrates elected under the set of the burgh had been swept away by the statutes of 1892 and 1900, the magistrates elected under these statutes were now the only municipal authorities, and that, accordingly, the property fell to be held and administered by them; (2) that it was no longer competent for any magistrates and councillors to be elected or hold office in the burgh otherwise than under and in accordance with the provisions of the Town Councils (Scotland) Act 1900; and (3) that the question whether the property was to be administered for behoof of those resident within the area of the burgh of barony, or within that of the municipal burgh, could not, in the absence of proper contradictors, be determined.

Commissioners of Blairgowrie, November 5, 1901, 4 F. 72, 39 S.L.R. 67, *followed.*

The General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. cap. 101), enacts—section 22—"Notwithstanding anything in this Act in the contrary implied or expressed, and whether this clause be adopted by any burgh or not, it is hereby enacted that in all cases where the management of the police affairs of any burgh is transferred from any existing commissioners of police or other persons to the magistrates and council of such burgh, or to commissioners elected under this Act, the whole lands, heritages, assessments, claims, demands, and effects of every kind belonging to or vested in the commissioners of police or other persons from whom such management is so transferred, or in any person on their behalf, and all powers, rights, and privileges conferred on or