

to one where the agreement refers to two arbiters and each provides the appropriate remedy.

*Prima facie* summary procedure is only appropriate to a case which falls naturally and obviously under the provision of section 2 or of section 3. But there are cases which in truth may fall within these provisions and yet do not obviously do so—that is to say, cases of this sort where, if you look at the arbitration clause and read it, you do not find in so many words a reference either to a single arbiter or to two arbiters, but where you find a reference to a custom, which custom being interpreted and writ large will give you a reference to one arbiter or to two arbiters. But in any case where such a question emerges, whether it be upon the original statement of the case or upon the defences that are put into the original case, I think it is obvious that summary procedure is inappropriate, if for no other reason than this, that by making the procedure summary and so dispensing with a record of the evidence you would practically exclude review upon what might be the crucial point of the dispute between the parties. I think that is really what the learned Sheriffs felt in this case, because although they treated the matter as a summary cause, they granted, what they would not ordinarily grant in a summary cause, leave to appeal from what was purely an interlocutory judgment; and I cannot doubt that, actuated by the same spirit, they would probably, even if nothing had been said to them, have kept a record of the evidence so that appeal would have been possible upon the whole merits of the cause. But as the matter has been raised here, what I feel constrained to say is that I think technically they did make a mistake in treating this cause all through as a summary cause. I think as soon as they found out as they did what was the true contention between the parties, they ought to have sent this cause to the ordinary Sheriff Court roll. It does not follow, however, that we can do nothing except *sist*, because I see no incompetency whatsoever in a person presenting a writ in the Sheriff Court in which he first asks for judgment in what I may call a declaratory form and thereafter, such judgment having been pronounced, craves an appointment under the Act of 1894. I see no incompetency in that. Accordingly I do not think there was any necessity, so to speak, to turn the case out of Court or *sist* it, and to say, go and try the case in another action. But I think it ought to have been tried in the ordinary Court so as to allow an appeal, and having that put before them I have no doubt that the learned Sheriffs will do so in the future.

The only question is what is to be done in this case. I think it would be a great pity not to utilise the procedure which has already taken place, because although Mr Horne was entitled to argue as he did that there was no relevant averment of custom here, I do not think your Lordships were impressed with his argument. In

other words, we thought that the decision of the Sheriffs in this matter was clearly right. If it can be shown that there was a custom in the oil trade in Glasgow to have arbitration in the way proposed, then the other party would be bound to go to arbitration.

I would therefore move your Lordships to remit the case to the Sheriffs with instructions to them to proceed with the proof which they have allowed, but to proceed with that proof sitting in the ordinary Court and keeping a record of the evidence which may be used in an appeal if necessary.

LORD JOHNSTON—I quite agree. As soon as it became apparent that something more than the performance of a ministerial duty was involved, it was obvious that this case could not either conveniently or properly be tried in a summary form. That, however, did not prevent the Sheriff, as soon as this was made apparent—and it was so at a very early stage of the case—from transferring it at once to his ordinary Court, and I agree that that may now be done with advantage to the parties and a saving of expense.

LORD HUNTER—I entirely agree.

LORD KINNEAR and LORD MACKENZIE were absent.

The Court pronounced this interlocutor—

“Recal the interlocutor of the Sheriff and Sheriff-Substitute dated 3rd January 1912 and 8th September 1911 respectively: Remit the cause to the Sheriff-Substitute to transfer it to the ordinary Court, to close the record, to allow a proof *primo loco* upon pursuers’ averments in condescendence 10, and to proceed as accords.”

Counsel for Pursuers (Respondents)—Sandeman, K.C.—Hon. W. Watson. Agents—J. & J. Ross, W.S.

Counsel for Defenders (Appellants)—Horne, K.C.—Paton. Agents—J. W. & J. Mackenzie, W.S.

Wednesday, February 28.

FIRST DIVISION.

(SINGLE BILLS.)

MARLOW, PETITIONER.

*Company--Winding-up--Voluntary Winding-up—Petition for Appointment of Committee of Inspection—Procedure—Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), sec. 188.*

In a petition under section 188 of the Companies (Consolidation) Act 1908 for the appointment of a committee of inspection to act along with the liquidator in a voluntary winding-up, the Court, on the production of a letter from the liquidator consenting to the application, made the appointment craved without intimation or service.

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), sec. 188, enacts—“(1) Every liquidator appointed by a company in a voluntary winding-up shall, within seven days from his appointment, send notice by post to all persons who appear to him to be creditors of the company that a meeting of the creditors of the company will be held on a date, not being less than fourteen nor more than twenty-one days after his appointment, and at a place and hour to be specified in the notice, and shall also advertise notice of the meeting once in the *Gazette* and once at least in two local newspapers circulating in the district where the registered office or principal place of business of the company was situate; (2) at the meeting to be held in pursuance of the foregoing provisions of this section, the creditors shall determine whether an application should be made to the Court for the appointment of any person as liquidator in the place of or jointly with the liquidator appointed by the company, or for the appointment of a committee of inspection, and if the creditors so resolve an application may be made accordingly to the Court at any time, not later than fourteen days after the date of the meeting, by any creditor appointed for the purpose at the meeting; (3) on any such application the Court may make an order either for the removal of the liquidator appointed by the company and for the appointment of some other person as liquidator, or for the appointment of some other person to act as liquidator jointly with the liquidator appointed by the company, or for the appointment of a committee of inspection either together with or without any such appointment of a liquidator, or such other order as, having regard to the interests of the creditors and contributories of the company, may seem just.”

On February 23, 1912, J. H. Marlow, 54 Marchmont Crescent, Edinburgh, representative of Minton, Hollins, & Company, Stoke-on-Trent, creditors of Messrs Cherry & Company, Limited, tile layers, Glasgow, presented a petition to the First Division under section 188 of the Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69) for the appointment of a committee of inspection in the voluntary winding-up of Cherry & Company, Limited.

The petition stated “That Cherry & Company, Limited, was registered and incorporated on the 26th December 1901, and its registered office is situated at 215 St Vincent Street, Glasgow. The capital of the company is £2000 sterling, divided into 1980 5 per cent. preference shares and twenty ordinary shares of £1 each.

“At an extraordinary general meeting of the shareholders of the company, held on 22nd January 1912, the following extraordinary resolution was duly passed—“That it has been proved to the satisfaction of this meeting that the company cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same, and accordingly that the company be wound up voluntarily.” Mr George

A. D. Scott, writer, 170 Hope Street, Glasgow, was appointed liquidator. . . .

“At a meeting of the creditors of the company convened by the liquidator, held at Glasgow on 9th February 1912, it was decided that application be made to the Court for the appointment of a committee of inspection in name of the petitioner, and that the names of John Henry Marlow, Edinburgh, representative of Messrs Minton, Hollins, & Company, Stoke-on-Trent (the petitioner), and Robert Watson, tile layer, 14 Dundrennan Road, Langside, Glasgow, be suggested for appointment as members of that committee.”

The prayer of the petition was as follows—“May it therefore please your Lordships, after such intimation and service, if any, as your Lordships shall think fit, to appoint the petitioner John Henry Marlow and the said Robert Watson, or such other persons as to your Lordships may seem fit, as a committee of inspection in the voluntary winding-up of Cherry & Company, Limited, as authorised by the said statute. . . .”

The petition appeared in the Single Bills on 27th February, when counsel for the petitioner moved the Court to make the appointment craved. The Court continued the petition till the following day in order that evidence of the liquidator's consent might be obtained. On 28th February counsel for the petitioner produced a letter from the liquidator consenting to the prayer of the petition being granted.

The Court granted the application.

Counsel for the Petitioner—W. T. Watson. Agents—Pearson, Robertson, & Finlay, W.S.

Thursday, February 8.

## SECOND DIVISION.

[Lord Ormidale, Ordinary.]

CHALMERS v. BARCLAY, PERKINS,  
& COMPANY, LIMITED.

*Reparation—Slander—Malicious Prosecution—Private Prosecutor—Malice and Want of Probable Cause—Sufficiency of Averments—Merchandise Marks Act 1887 (50 and 51 Vict. cap. 28).*

B., P., & Co. had for some time sold to C. stout in barrels for bottling. They had also supplied him with labels—on which his name appeared—to be fastened on the bottles in which he sold their stout. In May 1910 they purchased from him, through an agent, a quantity of stout which he sold as theirs. On 4th July 1910 their solicitors wrote him stating that on an examination this stout had been found to be several degrees lower in specific gravity than the stout which had been sold to him. They added—“This discloses that a very serious tampering in the way of adulteration has taken place with