

the Lord President (Inglis) in *MacBride v Hamilton & Son*, (1875) 2 R. 775. That opinion, however, was purely *obiter*, and I am unable to reconcile it with the general principles of contract law. Accordingly I am prepared to hold that the defender in an action like the present one is entitled to establish and set off a claim of damages based upon the ground of the pursuer's failure to deliver within a reasonable time. While such, however, is my opinion upon the general legal question, I am equally clear that the Court, as the master of its own procedure, has an equitable power to prevent a defender from taking advantage of the rule of law as to mutual contracts merely for the purpose of delay and in order to try to set up a counter claim which could not in all probability be successfully established in a cross action. This power is expressly conferred or recognised by section 59 of the Sale of Goods Act 1893. Both the Sheriffs refer to the provisions of this statute, but they do not, in my opinion, give to them their due effect. I shall assume that in the present case the time of delivery was not of the essence of the contract within the meaning of section 10. In any case the defenders waived this point by taking delivery—See *Paton & Sons v. Payne & Company*, (1897) 35 S.L.R. 112. It follows from section 11 (2), section 53, and section 62, that the defenders were entitled to claim "compensation," or in other words to set up against the seller the breach of contract alleged to have been committed by the latter "in diminution or extinction of the price."

The Sheriffs refer to rule 55 of the Sheriff Courts Act 1897. Seeing that the counter claim in the present case was smaller than the principal claim, the defenders did not need to found upon this rule, and their position would have been just as strong if the rule had never been enacted. The effect of the rule, as I read it, is to empower the Sheriff to grant a decree in favour of a defender as if the latter had brought a cross action. In every case, however, the Sheriff will require to consider whether the counter claim is of a kind which entitles the defender to have a judgment upon it before a decree is issued on the principal claim.

LORD ORMDALE—I concur with your Lordship and have nothing to add.

The Court recalled the interlocutors of the Sheriff and Sheriff-Substitute and remitted the cause to the Sheriff-Substitute to proceed.

Counsel for Pursuers (Respondents)—A. M. Mackay. Agents—R. C. Gray & Paton, S.S.C.

Counsel for Defenders (Appellants)—Lippe. Agents—Alex. Morison & Co., W.S.

Thursday, July 16.

EXTRA DIVISION.

[Lord Anderson, Ordinary.]

S'TEVENS v. MOTHERWELL
ENTERTAINMENTS, LIMITED AND
ANOTHER.

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

The defenders in an action reclaimed. They did not print and box the notes of evidence. Subsequently they craved leave to amend the record by adding certain averments and pleas-in-law in the light of facts divulged at the proof. The respondent asked that the reclaiming note be dismissed in respect of the omission to print the notes of evidence which were necessary to make the amendment intelligible, but which would also show that he was entitled to hold the decree. *Held* that the amendment should be allowed on condition of the reclaimers paying within one month to the respondent the taxed amount of his expenses since the closing of the record.

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

James Cousin Stevens, Edinburgh, pursuer, brought an action against Motherwell Entertainments Limited, incorporated under the Companies (Consolidation) Act 1908, and having its registered office at 47 Frederick Street, Edinburgh, and Robert Colburn Buchanan, theatrical director, Ulverston, Oswald Road, Edinburgh, *defenders*, for payment of certain sums amounting in all to £885, 5s. 10d., as provided for, *inter alia*, in and by (1) an agreement "between the pursuer and the defenders, Motherwell Entertainments Limited, dated 8th July 1913, and relative missives therein referred to, and (2) deed of guarantee granted by the defender Robert Colburn Buchanan to the pursuer, dated 31st July 1913."

The Lord Ordinary (ANDERSON), after a proof, awarded the pursuer the sum of £213, 12s. 10d. with expenses.

The defenders reclaimed, and boxed with the reclaiming note a copy of the closed record and of the interlocutors in the cause, but not the notes of evidence. Subsequently they craved the Court in view of facts which the proof had disclosed to allow a minute of amendment to be lodged adding certain averments and pleas-in-law to the record. The respondent admitted the relevancy of

the proposed amendment, but moved the Court to dismiss the reclaiming note in respect of the failure of the reclaimers to print the evidence in the proof from which, in conjunction with documents in process, he maintained that he could show, even if the amendment were allowed, that he was still entitled to hold the decree.

Argued for the reclaimers—There was no necessity for printing the evidence, since the reclaiming note contained all that was required under the Judicature Act 1825 (6 Geo. IV, cap. 120), section 18. The Court looked with disfavour on the printing of unnecessary portions of process—*Cranston v. Mallow & Lien*, 1912 S.C. 112, 49 S.L.R. 186. The legality of the amendment was regulated by the Court of Session (Scotland) Act 1868 (31 and 32 Vict. cap. 100), sec. 29, which made the amendment of the record imperative when necessary for determining the real question in controversy—*Gelot v. Stewart*, March 4, 1870, 8 Macph. 649, Lord Neaves at 656, 7 S.L.R. 372; *Guinness, Mahon, & Company v. Coats Iron and Steel Company*, January 21, 1891, 18 R. 441, 28 S.L.R. 285. The amendment contained averments of *res noviter veniens ad notitiam* which could always be added to record—*Johnston v. Johnston*, March 14, 1903, 5 F. 659, 40 S.L.R. 499. When an amendment of record was allowed the proper course was to remit to the judge of first instance to take additional proof—*Muir & Son, Limited v. Edinburgh and Leith Corporations Gas Commissioners*, May 22, 1906, 8 F. 810, 43 S.L.R. 598.

Argued for the respondent—The reclaiming note should be dismissed in respect that the evidence led at the proof had not been printed, in the light of which alone the amendment would be intelligible—*Muir v. Mackenzie*, October 15, 1881, 9 R. 10, Lord President Inglis at 11, 19 S.L.R. 3; *Penney v. Savers and Others*, July 3, 1890, 27 S.L.R. 988. Assuming the proposed amendment were made, it could be shown from the evidence and the documents that the respondent was entitled to the decree he held. It should therefore be disallowed.

The Court (LORD DUNDAS, LORD MACKENZIE, and LORD CULLEN) pronounced this interlocutor—

“The Lords having heard counsel for the parties on the minute of proposed amendment . . . allow the same to be received on condition that the defenders pay to the pursuer within one month from this date the taxed amount of the expenses incurred by him since closing the record, and remit the account thereof to the Auditor to tax or to report, and on payment of such expenses allow the pursuer if so advised to answer the said amendment.”

Counsel for the Reclaimers—Maclennan, K.C.—Christie. Agents—M'Kenzie & Fortune, S.S.C.

Counsel for the Respondent—M. P. Fraser. Agents—Erskine Dods & Rhind, S.S.C.

Friday, July 17.

FIRST DIVISION.

WILLIAM BAIRD & COMPANY,
LIMITED *v.* ANCIENT ORDER OF
FORESTERS.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Sched. II(9)—Insurance—National Insurance Act 1911 (1 and 2 Geo. V, cap. 55), sec. 11 (1) (c)—C.A.S., L. xiii, sec. 12—Approved Society Intervening as to Agreement Dealing with Compensation—Procedure.

An approved society under the National Insurance Act 1911 were of opinion, that the lump sum £100, proposed in an agreement under the Workmen's Compensation Act 1906 for the redemption of the compensation payable to an insured person, was inadequate, and lodged a minute with the sheriff-clerk objecting to the recording of the memorandum. The sheriff-clerk handed on the minute to the Sheriff, who proceeded to consider the matter. Held (1) that the procedure was incompetent, as it was for the sheriff-clerk to consider information tendered him, and then for him, if he were satisfied, to prepare and lodge a minute setting forth all his reasons, when the memorandum fell to be dealt with as an application for arbitration on the questions raised in the sheriff-clerk's minute, but (2) that the approved society was entitled to tender information to the sheriff-clerk, and might be heard by the arbitrator, if arbitration evolved, in considering what order he should pronounce.

Question if an approved society is a “party interested” in the sense of the Workmen's Compensation Act 1906, Schedule II (9).

Burns v. William Baird & Company, Limited, 1913 S.C. 358, 50 S.L.R. 280 commented on.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Schedule II (9), enacts—“Where the amount of compensation under this Act has been ascertained, or any weekly payment varied, or any other matter decided under this Act . . . by agreement, a memorandum thereof shall be sent in manner prescribed by Act of Sederunt . . . by any party interested to the sheriff-clerk, who shall, subject to such Act of Sederunt, on being satisfied as to its genuineness record such memorandum in a special register without fee, and thereupon the memorandum shall for all purposes be enforceable as a recorded decree-arbitral: Provided that . . . (d) where it appears to the sheriff-clerk on any information which he considers sufficient that an agreement as to the redemption of a weekly payment by a lump sum, or an agreement as to the amount of compensation payable to a person under any legal disability or to dependants, ought not to be registered by reason of the inadequacy