

case, said—"In many ways the Act of Sederunt leaves no discretion to the Court. For example, where a maximum fee is fixed for a particular step in procedure the Court cannot allow a larger fee. But I cannot doubt that the Court has some discretion in applying the general regulations, and is entitled to make some modification upon the strict letter of such regulations if the justice of the case so requires."

That seems to me to be very sound law, and nothing was said against the authority of *Govan's* case except that there was not cited to the Court there the decision of this Division of the Court in the prior case of the *Mica Insulator Company v. Bruce Peebles & Company*, 1907 S.C. 1293, 44 S.L.R. 674, and it was argued—so at least I understood—that had the *Mica Insulator* case been quoted the judgment would have been the other way in the case of *Govan*. I cannot think so, for I find in the observations made by Lord Dunedin upon this regulation—1907 S.C., at p. 1301—noting hostile to the view that was taken by the Second Division in the case of *Govan*. The general regulations attached to the Act of Sederunt are, of course, of the highest authority, but they are only regulations. They are merely a set of rules which the Court gives out for the guidance of the Auditor. They are not rules which any one Division sitting by itself can in any way set aside, because they have the authority of the Whole Court by which one Division is bound. But on the other hand they are not a statute where one must necessarily stick upon the mere letter of what has been enjoined; they are merely rules for our guidance, of which we are fully entitled to interpret the spirit." That is all that I propose to your Lordships that we should do in the present case.

It is true, no doubt, that in the *Mica Insulator* case the Court refused to allow the defenders the expense of preliminary inquiries to enable them to state their defence, but that was for a reason given which is wholly inapplicable to the present case. This is emphatically not a case in which the defenders were bound to know what their defence to these very detailed and elaborate statements truly was. This is not a case in which they were therefore not entitled to have any allowance made for finding out their defence.

For the reasons I have given I think this a highly exceptional case in which we ought to relax the third regulation, and accordingly I propose to your Lordships that we should pronounce an interlocutor very much on the lines of the interlocutor pronounced by this Division of the Court in the case of *Shirer v. Dickson*, 1885, 12 R. 1013, 22 S.L.R. 669, referred to at the discussion, viz., remit to the Auditor to reconsider his report with special reference to the objection of the defenders set forth in their note, to hear the explanations of the parties, and to allow the defenders such a sum as he, the Auditor, may find reasonable.

LORD MACKENZIE— I am of the same opinion. I agree with the views expressed

by Lord Low in the case of *Govan*, 1909, S.C. 562, as to the discretionary power of the Court in dealing with the Act of Sederunt, and I think that the circumstances of this case are so exceptional that we ought to relax the rigid application of the Act of Sederunt.

But I think it my duty to point out that a considerable sum of money has in this case been absolutely thrown away in consequence of our rule of practice which makes it necessary to state the whole defence at once. I would point out that, if there had been a discretionary power vested in the Lord Ordinary to allow issue to be joined solely on the question of relevancy in the first instance, the whole of this expense would have been saved.

LORD SKERRINGTON concurred.

LORD JOHNSTON, who had not heard the case, delivered no opinion.

The Court remitted to the Auditor "to reconsider his report, with special reference to the objections of the defenders set forth therein, to hear the explanations of the parties, and to allow the defenders such a sum as he may find reasonable," and found the defenders entitled to the expenses in connection with their objections.

Counsel for the Pursuer—Moncrieff, K.C. —M. P. Fraser. Agents—Campbell & Smith, S.S.C.

Counsel for the Defenders—Dean of Faculty (Clyde, K.C.)—Watson, K.C.—Wark. Agents—Hope, Tod, & Kirk, W.S.

Wednesday, July 19.

FIRST DIVISION.

(SINGLE BILLS.)

[Lord Anderson, Ordinary.]

WEINSCHEL v. WEINSCHEL'S
 TRUSTEE AND ANOTHER.

Process—Reclaiming Note—Competency—Bankruptcy—Reclaiming Note without Petition and Answers Appended—C.A.S., 1913, D, i, 2—Judicature Act 1825 (6 Geo. IV, cap, 120), sec. 18.

In a petition for recall of sequestration, the Lord Ordinary having allowed a proof, the trustee in the sequestration reclaimed. The prints of the petition and answers were not appended to the reclaiming note, but were lodged and boxed separately and later. The respondent objected to the competency of the reclaiming note on the ground that in this respect it did not comply with the Judicature Act, 1825, sec. 18, and C.A.S., D, i, 2. In the special circumstances of the case the Court *repelled* the objections to the competency, but *observed* that petitions and answers were in this matter exactly equivalent to a closed record, and must be appended to any reclaiming note and boxed therewith.

The Judicature Act 1825 (6 Geo. IV, cap. 120), section 18, enacts—"When any interlocutor shall have been pronounced by the Lord Ordinary either of the parties dissatisfied therewith shall be entitled to apply for a review of it to the Inner House . . . provided that such party shall . . . print and put into the boxes appointed for receiving the papers to be perused by the judges a note reciting the Lord Ordinary's interlocutor . . . and if the interlocutor has been pronounced without cases the party so applying shall, along with his note as above directed, put into the boxes printed copies of the record authenticated as before. . . ."

The C.A.S., 1913, D, i, 2, enacts—[After providing that reclaiming notes shall be at first moved in the Single Bills]—"Provided always that such notes, if reclaiming against an Outer House interlocutor, shall not be received unless there be appended thereto copies of the papers, authenticated as the record, in terms of the statute, if the record has been closed."

The Bankruptcy (Scotland) Act 1913 (3 and 4 Geo V, cap. 20), enacts, section 167—"Where any judgment of the Lord Ordinary is to be brought under review of the Inner House, the same shall be done by a reclaiming note in common form. . . ."

Robert Greenwood Morton, C.A. (trustee on the sequestrated estates of David Weinschel) and another, *reclaimers*, brought a reclaiming note against an interlocutor allowing proof dated 29th June 1916, pronounced by the Lord Ordinary (ANDERSON) in a petition at the instance of Mrs Rachael Weiner or Weinschel, wife of David Weinschel, *respondent*, for recall of the sequestration of the estates of her husband.

The respondent moved in the Single Bills that the reclaiming note should be dismissed in respect (1) that prints of the petition for recall and the answers thereto were not appended to the reclaiming note and were not boxed therewith, but were lodged and boxed separately from and later than the reclaiming note, and (2) that the reclaiming note was marked "Junior Lord Ordinary" instead of "Bill Chamber."

Argued for the respondent—The reclaiming note should be dismissed as incompetent. The petition and answers must be appended thereto and be lodged and boxed therewith—Bankruptcy (Scotland) Act 1913 (3 and 4 Geo. IV, cap. 20), sec. 167; C.A.S., 1913, D, i, 2; Judicature Act 1825 (6 Geo. IV, cap. 120), sec. 18; A.S., 11th July 1828, sec. 77; *M'Evoy v. Braes' Trustees*, 1891, 18 R. 417, 28 S.L.R. 276; *Wallace v. Braid*, 1899, 1 F. 575, 36 S.L.R. 419, where that objection was sustained though the respondent waived it. If the objection was sustained the reclaimers had a remedy by reponing note as provided by the Court of Session Act 1808 (48 Geo. III, cap. 151), sec. 16—*Watt's Trustees v. More*, 1890, 17 R. 318, 27 S.L.R. 259; *M'Arthur v. Mackay* 1914 S.C. 547, 51 S.L.R. 466. It made no difference that here there was a petition and answers and not a closed record. The petition and answers were equivalent to a closed record,

and in sequestration proceedings the reclaiming note had to be in common form—Bankruptcy (Scotland) Act (*cit.*) 1913, sec. 167. There might be a reclaiming note without the record being closed—*Spence v. Spence*, 1914 S.C. 887, 51 S.L.R. 766. The reclaiming note was wrongly marked, and was therefore incompetent—*A v. B*, 1859, 21 D. 203.

Argued for the reclaimers—The reclaiming note was competent. The statutes, Acts of Sederunt, and cases cited were not in point, for they applied only to reclaiming notes where there was a closed record, whereas the recal of a sequestration was to be obtained by petition—Bankruptcy (Scotland) Act 1913 (*cit.*), sec. 30. In any event the A.S. 11th July 1828, sec. 77, and the C.A.S. 1913, D, i, 2, were directory and not imperative—*M'Lachlan v. Nelson & Company, Limited*, 1904, 6 F. 338, 41 S.L.R. 213. If so the Court should exercise its discretion and receive the prints, as the reason for separate lodging and boxing was the inability of the printers to do the work in time owing to shortage of hands.

At advising—

LORD PRESIDENT—This is a reclaiming note against an interlocutor of the Lord Ordinary on the Bills in a petition for recal of a sequestration, presented under the 30th section of the Bankruptcy Act of 1913. By the 167th section of the statute it is provided that where any judgment of the Lord Ordinary is to be brought under review of the Inner House the same shall be done by a reclaiming note in common form. The reclaiming note, when lodged, had not appended to it the petition and answers, nor were the petition and answers boxed to the Court, and objection to the competency of the reclaiming note is taken on that ground. Confessedly the provisions of the Judicature Act of 1825, section 18, and of the Codifying Act of Sederunt, D, i, 2, have not been complied with.

After consultation with the Judges of the other Division of the Court, we have come to the conclusion that the statute and the Act of Sederunt ought to have been complied with in this case, and that in all such cases a petition and answers must be treated as if they constituted a closed record within the meaning of the sections of the statute and the Act of Sederunt to which I have referred. We desire that it shall be clearly understood for the future that the Court will act on the assumption that the petition and answers in cases such as this are exactly equivalent to a closed record within the meaning of the statute and the Act of Sederunt. But inasmuch as this question has apparently arisen now for the first time, and some misunderstanding accordingly may have occurred, we are not prepared to visit the claimer with the extreme consequences of the omission and to throw out the reclaiming note as incompetent. The conclusion we have reached is that in the special circumstances of this case we may repel the objection to the competency and send the case to the Summar Roll, but in future petitions and

answers must be appended to the reclaiming note and must be boxed in terms of the Act of Sederunt and Act of Parliament respectively.

LORD MACKENZIE and LORD SKERRINGTON concurred.

LORD JOHNSTON did not hear the case and was absent at advising.

The Court repelled the objections to the competency and sent the case to the Summar Roll.

Counsel for the Reclaimers—Ingram. Agent—Isaac Furst, S.S.C.

Counsel for the Respondent—J. A. MacLaren. Agent—A. W. Gordon, Solicitor.

Thursday, May 25.

FIRST DIVISION.

M'LINTOCK v. CAMPBELL.

Company—Winding-up—Rectification of Register—Director—Shareholder Transferring Shares to Person of Straw when Company was to his Knowledge in Difficulties.

A director of a company, when, to his knowledge obtained both as a shareholder and as a director, the company was in acute financial difficulties, transferred his shares to a person of straw. The company coming to liquidation, the liquidator presented a petition to have the transferree's name removed from the register of members and to rectify the A list of contributories by deleting therefrom the name of the transferree and adding in place thereof the name of the transferer. *Held (diss. Lord Johnston)* that the transfer of the shares being absolute, the petition must be refused.

William M'Lintock, C.A., Glasgow (liquidator of the Cosmopolitan Insurance Corporation, Limited), *petitioner*, presented a petition for rectification of the register of the company by deleting therefrom the name of Kathleen Berry as holder of 400 shares and to rectify the A list of contributories by a similar deletion and by inserting in room of Miss Berry's name the name of William Campbell, *respondent*.

The facts of the case were—The Combined Burglary and Fire Insurance Company, Limited, was incorporated under the Companies Act 1862 to 1900 on 10th August 1905, and had its registered office in Glasgow. In 1908 its name was changed to the Cosmopolitan Insurance Corporation Limited. On 9th February 1915, at an extraordinary general meeting held at the registered office, it was resolved that the company should be wound up voluntarily, and the petitioner was appointed liquidator. On 24th March the petitioner at a meeting settled the A list of contributories, and on 15th April 1915 made a call upon all the deferred shareholders of the company, of £1 per share

payable on 15th May 1915. The A list of contributories included Kathleen O'Maille Berry, residing at 32 Monteith Row, Glasgow, as holder of 400 deferred shares, Nos. 13601 to 14000 inclusive, which had been transferred by the respondent to Miss Berry, who was his housekeeper and resided with him. The transfer was dated 22nd October 1914, and, so far as written, was in the writing of the respondent. It was signed by the respondent and Miss Berry, both of whose signatures were witnessed by respondent's law agent. The consideration was 5s., and the transfer was stamped with a 6d. stamp. It was sent to the registered office of the company by the respondent, and was passed at a meeting of the directors on 23rd October 1914, at which the respondent was present with four other directors. A new certificate in favour of Miss Berry was issued at the meeting, and was handed to the respondent, along with a counterfoil receipt for the shares to be signed by Miss Berry. The counterfoil receipt was signed by the respondent, and was thereafter returned to him for the signature of Miss Berry, which he obtained. The shares transferred to Miss Berry were £5 shares upon which 1s. per share had been paid up, leaving an uncalled liability on each of £4, 19s., or a total liability of £1980, and were the whole deferred shares held by the respondent, although he continued to hold 100 £5 fully paid preferred shares. Miss Berry made no payment to meet the call payable at 15th May 1915, nor a further call of £1 per share, payable on 9th August 1915. Miss Berry had no means, a fact which was known to the respondent, and the transfer was for the purpose of escaping liability. All the expenses in connection with the transfer were paid by the respondent, but the 5s. consideration was paid out of her wages by Miss Berry, who was told that there was a sporting chance of the shares coming right of which she would have the benefit, and who did not realise that she was taking a loss of £1980 off the respondent's shoulders. By art. 74 of the articles of association, as amended by special resolution passed at an extraordinary general meeting on 30th April 1908, the qualification of a director was the holding of shares in the company of the nominal value of £1000. As the result of the transfer the respondent no longer retained his qualification as a director. At the date of the transfer the financial position of the company was hopeless. Its last balance-sheet, issued on 17th July 1914, showed the state of the company's affairs as at 31st December 1913. At that date there was a debit balance of £13,124, 17s. 3d. exclusive of liability for unexpired risk. By the date of the transfer it was well known to the respondent, both from the balance-sheet and from his position as a director, that the position of the company was such that in all probability it would be necessary either to make a call on the shares or go into liquidation. Before October 1914 the respondent as a director had heard of a transfer by another director, Dr MacLennan, the question of whether the directors could refuse to