

that is sued for, and it is interest which necessarily follows upon the decree for the principal, and is strictly accessory to the principal, just as the expenses of an action are an accessory depending upon the success of the pursuer in the Court below.

I am therefore of opinion with your Lordship that the appeal is incompetent. As regards the other question, I hold that no counter-claim, however large, could make appealable a cause which judicially satisfies the definition of section 3. A pursuer who brings his action into Court on the footing that it falls normally to be decided finally in the Sheriff Court cannot be subjected to an appeal to this Court because the defender chooses to put in a counter-claim of an amount exceeding the statutory limit. The defender can of course obtain a decision in this Court if he raises a substantive action to constitute his counter-claim, so that he is not without his remedy if he genuinely considers his counter-claim to be of a value exceeding £50,

LORD ORMIDALE — I concur with your Lordship.

The Court sustained the objection, dismissed the appeal as incompetent, and remitted the cause back to the Sheriff-Substitute to proceed as accords.

Counsel for the Appellants (Defenders)—
Scott. Agents—Armstrong & Hay, S.S.C.

Counsel for the Respondents (Pursuers)—
Paton. Agents—Maxwell, Gill, & Pringle,
W.S.

Thursday, November 3.

FIRST DIVISION.

(SINGLE BILLS.)

CLYDESDALE MOTOR TRANSPORT
COMPANY, PETITIONERS.

Statute—Registration of Business Names Act 1916 (6 and 7 Geo. V, cap. 58), sec. 8—Failure to Register Business Name—Consequent Disability to Enforce Contractual Rights—Application for Relief.

A firm and its individual partners presented a petition under the Registration of Business Names Act 1916 for relief against the disability imposed upon them by section 8 of the Act in respect of their failure to furnish the Registrar with the particulars necessary for registration. The petitioners, who had formed a copartnership business in 1920 under a business name, stated that they had through inadvertence and ignorance of the existence of the Act omitted to register their business name, that thereafter having in the course of business raised an action in the Sheriff Court for rescission of a certain contract the defenders had pled that they, the petitioners, were barred from insisting in the action in respect that they had not registered, and that the Sheriff-Substitute had accordingly sisted procedure

in order that an application for relief might be made. The Court in respect that the failure to comply with the Act had been satisfactorily explained granted the application.

Observed (per the Lord President) that it must not be assumed in relation to petitions of this kind that the Court will grant relief merely in reliance upon the statements made in the petition and on the explanations with regard to them given by counsel.

The Registration of Business Names Act 1916 (6 and 7 Geo. V, cap. 58) enacts—"8. . . *Disability of Persons in Default.*—(1) Where any firm or person by this Act required to furnish a statement of particulars or of any change in particulars shall have made default in so doing, then the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business in respect to the carrying on of which particulars were required to be furnished at any time while he is in default shall not be enforceable by action or other legal proceeding either in the business name or otherwise: Provided always as follows:—(a) The defaulter may apply to the Court for relief against the disability imposed by this section, and the Court, on being satisfied that the default was accidental, or due to inadvertence or some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may grant such relief either generally or as respects any particular contracts, on condition of the costs of the application being paid by the defaulter unless the Court otherwise orders, and on such other conditions (if any) as the Court may impose, but such relief shall not be granted except on such service and such publication of notice of the application as the Court may order, nor shall relief be given in respect of any contract if any party to the contract proves to the satisfaction of the Court that if this Act had been complied with he would not have entered into the contract; (b) Nothing herein contained shall prejudice the rights of any other parties as against the defaulter in respect of such contract as aforesaid.; (c) If any action or proceeding shall be commenced by any other party against the defaulter to enforce the rights of such party in respect of such contract, nothing herein contained shall preclude the defaulter from enforcing in that action or proceeding, by way of counter-claim, set off, or otherwise, such rights as he may have against that party in respect of such contract. (2) In this section the expression 'court' means the 'High Court' or a judge thereof: Provided that, without prejudice to the power of the High Court or a judge thereof to grant such relief as aforesaid, if any proceeding to enforce any contract is commenced by a defaulter in a county court, the county court may, as respects that contract, grant such relief as aforesaid." And by section 23 of said Act it is enacted—"Application to Scotland.—(1) In the application of this Act to Scotland 'Court of Session' shall be substituted for 'High Court; 'Sheriff

Court' shall be substituted for 'County Court.'"

The Clydesdale Motor Transport Company, 96 Main Street, Glasgow, and Matthew Dalgleish, John M'Lean, and Janet Dalgleish or M'Lean, the only partners of the said firm, as such partners and as individuals, *petitioners*, presented a petition in which they craved the Court to pronounce an order granting relief to the petitioners against the disability imposed upon them by section 8 of the Registration of Business Names Act 1916 in respect of their default in registering or in timeously furnishing the statement of particulars required by the said Act.

The petition set forth—"1. That in or about the month of January 1920 the petitioners the said Matthew Dalgleish and Mr and Mrs John M'Lean formed a copartnership for the purpose of carrying on a motor transport business under the firm or style of the Clydesdale Motor Company, and have since carried on business as such.

"2. That at the time the said copartnership business was formed the petitioners did not consult any law agent, and had not the benefit of skilled professional advice. None of them were aware of the existence of the Registration of Business Names Act 1916, nor of the necessity for registering and forwarding to the Registrar the statement of particulars as required by the said Act. The petitioners accordingly did not in fact register under the Act until the date after mentioned.

"3. That in connection with their said business the petitioners ordered from Messrs M'Cosh & Devine, engineers, 55 and 57 Peel Street, Mile End, Glasgow, an Olson 2-ton motor-lorry.

"4. That the said lorry was delivered to the petitioners on or about 30th June 1920, but was found by them to be defective and unsuited to their requirements, and was ultimately rejected by them. The petitioners thereafter raised an action against the said M'Cosh & Devine in the Sheriff Court of Lanarkshire at Glasgow, for rescission of the contract and for repetition of the price paid by them for the lorry. The said action is presently depending before Sheriff-Substitute Lyell.

"5. In that action the defenders stated as a preliminary defence a plea to the effect that the petitioners not having registered under the Registration of Business Names Act 1916 were barred from insisting in the action. A record in the said action was made up and closed, and thereafter the Sheriff-Substitute pronounced an interlocutor sisting the action in order that the petitioners might proceed with an application for relief against the disability imposed on them by the 8th section of the said Act. The said interlocutor and note appended thereto are in the following terms:—

"*Glasgow, 25th July 1921.*—Closes the record, and having heard parties' procurators thereon, in respect that it is admitted that this action has been raised to vindicate rights alleged to have arisen to the pursuers out of a contract made

while the pursuers as a firm were carrying on business in contravention of the Act 6 and 7 Geo. V, cap. 58, sists procedure herein that the pursuers may make application for relief against the disability imposed by the 8th section of the said Act.—WILL. DARLING LYELL."

"*Note.*—It is quite obvious that the pursuers may not proceed with this action until they have obtained relief from the disability imposed by the Act. The power of the County Court—which is interpreted as the Sheriff Court in Scotland—seems to be limited to granting relief only as to the contract, the subject-matter of the action (section 8 (2) proviso), and further that the action must be one for "enforcing" that contract. As at present advised, I do not think this action, which is one not for enforcing but for rescinding a contract, comes within the ambit of that sub-section. It is therefore for the pursuers to consider whether they must now apply to the Court of Session under section 8 (2). I am not much moved by the consideration of hardship where a firm has confessedly been in default since January 1920 and has carried on business in defiance of a statute passed in 1916.—W. D. L."

"6. The statement of the said plea was the first intimation which the petitioners received of the existence of the said Act and of their failure to register. They immediately took steps to supply the necessary particulars to the Registrar and have since obtained a certificate of registration, dated 22nd July 1921, which is produced herewith and referred to. . . .

"8. In these circumstances the petitioners present this application to your Lordships for relief against the disability imposed upon them by section 8 of the said Act. They respectfully submit that their default, which they much regret, was entirely due to inadvertence and to their ignorance of the provisions of the said Act. Had they had the benefit of legal advice at the formation of the partnership they would have been informed of the provisions of the Act and would have registered them. There was no object or purpose to be served by intentional failure to register. The individual petitioners are all of Scotch nationality and are all domiciled in Scotland. As stated, on discovering their omission the petitioners at once took steps to remedy their default by complying with the provisions of the Act with regard to registration. They respectfully submit that in the circumstances the pronouncement of the order sought would be just and equitable."

No answers having been lodged, counsel for the petitioners was heard in the Single Bills on 3rd November 1921.

LORD PRESIDENT—The remedy asked in this petition is one which we have power to give only on being satisfied that the petitioners' failure to comply with the Act was accidental or due to inadvertence or to some other sufficient cause, or that on other grounds it is just and equitable to grant it.

Accordingly it must not be assumed, in relation to petitions of this kind, that the Court will grant relief merely in reliance upon the statements made in the petition and on the explanations with regard to them given by counsel. But in the present case I do not think that there is anything in the petition to suggest the slightest doubt as to the good faith of the petitioners, and having regard to the explanations which Mr Gilchrist has given, I think it is one in which we may hold it to be just and equitable in the circumstances to grant the relief prayed for. The default which the petitioners made under the statute has already entailed a considerable penalty in the way of expense. I therefore move your Lordships to grant the prayer of the petition.

LORDS MACKENZIE, SKERRINGTON, and CULLEN concurred.

The Court granted the prayer of the petition.

Counsel for Petitioners—Gilchrist. Agents—Manson & Turner Macfarlane, W.S.

Saturday, November 5.

FIRST DIVISION.

(SINGLE BILLS.)

[Sheriff Court at Glasgow.]

M'SORLEY v. ARCHIBALD.

Process—Removal to Court of Session for Jury Trial—Remit to Sheriff—Conclusions for (a) Damages for Rape, and (b) Decree of Affiliation—Motion to Restrict Conclusions by Abandoning Conclusion for Affiliation—Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 30.

A Sheriff Court action concluding for (1) damages for alleged rape, and (2) decree of affiliation and aliment, having been remitted to the Court of Session for jury trial under section 30 of the Sheriff Courts (Scotland) Act 1907, the pursuer, in respect that the conclusion for paternity was unsuitable for jury trial, moved for leave to abandon the second conclusion and to limit the action by minute of restriction to the conclusion for damages. The Court without deciding the admissibility of the proposed restriction, but in respect that its admission would have the effect of exposing the defender to a double trial of the same question before two separate tribunals, remitted the case to the Sheriff for proof.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 30, is quoted *supra*, page 1.

Mrs Mary Rennie or M'Sorley brought an action in the Sheriff Court at Glasgow against John Archibald concluding for (1) damages for alleged rape, and (2) decree of affiliation of an illegitimate child, inlying expenses, and aliment of the child. The pursuer required the cause to be remitted to the Court of Session for jury trial.

On 5th November 1921, in Single Bills of the First Division, counsel for the pursuer, in respect that the second conclusion of the initial writ could not appropriately be made the subject of jury trial, moved for leave to abandon the said conclusion by minute of restriction, and cited the following authorities:—Judicature Act 1825 (6 Geo. IV, cap. 120), sec. 10; Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 29; Sheriff Courts (Scotland) Act 1907, sec. 30, and Rules 79 and 81; C.A.S., 1913, B, i, 6, and D, iv, 5; Mackay's Manual of Practice, p. 251; Maclaren's Court of Session Practice, p. 458; *Paxton v. Brown*, 1908 S.C. 406, 45 S.L.R. 323; *Wilson v. Magistrates of Musselburgh*, 1868, 6 Macph. 483; *Stewart v. Greenock Harbour Trustees*, 1868, 6 Macph. 954; *Duncanson v. Anderson*, 1908, 15 S.L.T. 684.

Argued for the defender—Even if restricted to the first conclusion, the case was unsuitable for jury trial. Partial abandonment was contrary to the practice of the Court—*Hay v. Earl of Morton*, 1862, 24 D. 1054, *aff. sub nomine White v. Lord Morton's Trustees*, 1866, 4 Macph. (H.L.) 53, at pages 54 and 59—and if admitted would in this case have the effect of exposing the defender to a double trial of the same question before two separate tribunals.

LORD PRESIDENT—The point which has been raised is attended with difficulty in reference both to the Judicature Act and to the practice of this Court in the matter of the admission of minutes of restriction. It is, however, unnecessary to come to a decision upon it, because, assuming that we had a discretion to give effect to the motion which Mr Crawford has made to us, there still remains the question whether in the circumstances of the case that discretion could be exercised with fairness or propriety in relation to the position of the defender. It is clear that all the issues of fact presented under the head of the claim of damages for seduction, would (along with others, no doubt) be involved in the issues presented under the conclusions with regard to paternity. Accordingly, to grant such a motion as Mr Crawford has submitted to us would be to put the defender to a double trial of the same question before two different tribunals. That is a hardship for which no right or interest on the part of Mr Crawford's client affords any sufficient warrant, and it seems to me therefore that the proper course is to send the case back to the Sheriff for proof.

LORDS MACKENZIE, SKERRINGTON, and CULLEN concurred.

The Court refused the motion to restrict the conclusions of the action, and remitted the cause to the Sheriff-Substitute to proceed.

Counsel for Pursuer—Crawford. Agent—R. J. Calver, S.S.C.

Counsel for Defender—Duffes. Agents—J. & A. F. Adam, W.S.