

HIGH COURT OF JUSTICIARY.

(GLASGOW CIRCUIT COURT.)

[Lord Pearson.]

Wednesday, February 28.

TAYLOR v. ORMOND & COMPANY.

Justiciary Cases—Small Debt Appeal—Deviation in Point of Form from the Statutory Enactments—Leading without Notice Evidence of Previous Over-Payments in Defence of Claim for Wages—Counter Claim—Small Debt (Scotland) Act 1837 (7 Will. IV and 1 Vict. cap. 41), secs. 11 and 31.

In a small debt action for wages, the defenders, without having given any notice of counter claim, led evidence of previous over payments to the pursuer to an amount exceeding the sum sued for, and the Sheriff giving effect to such evidence assoldied them. *Held (per Lord Pearson)* on appeal that this defence was truly a counter claim of which notice should have been given in terms of the Small Debt (Scotland) Act 1837, section 11, and that its admission without notice was such a deviation in point of form from the statutory enactments as had prevented substantial justice from being done within the meaning of section 31 of the said Act, and appeal *sustained*.

The Small Debt (Scotland) Act 1837 (7 Will. IV and 1 Vict. cap. 41), section 11, enacts—“And be it enacted, that where any defender intends to plead any counter account or claim against the debt, demand, or penalty pursued for, the defender shall serve a copy of such counter account or claim by an officer on the pursuer . . . at least one free day before the day of appearance, otherwise the same shall not be heard or allowed to be pleaded except with the pursuer's consent, but action shall be reserved for the same.” Section 31—“And be it enacted, that it shall be competent to any person conceiving himself aggrieved by any decree given by any sheriff in any cause or prosecution raised under the authority of this Act to bring the case by appeal before the next Circuit Court of Justiciary. . . . Provided always that such appeal shall be competent only when founded on the ground of corruption or malice and oppression on the part of the Sheriff, or on such deviations in point of form from the statutory enactments as the Court shall think took place wilfully, or have prevented substantial justice from having been done, or on incompetency, including defect of jurisdiction of the Sheriff. . . .”

Taylor, a seamstress, raised an action in the Small Debt Court at Glasgow against Ormond & Company, by whom she was employed on piecework, for the sum of £1, 15s. 7½d. as wages due for work done by her for them between 17th August and 1st September 1905. It was proved that the pursuer had worked for the defenders and earned the sum sued for

during that period. The defenders then proceeded to lead evidence and produced a written statement showing that at various dates between December 1904 and the period in question the pursuer had been erroneously paid by them various sums in excess of the wages due to her at the respective times of payment, and that the total of these sums exceeded the sum sued for. Objection was taken to such evidence being received, *inter alia*, on the ground that no notice of counter claim or statement of the dates and amounts of the alleged over-payments had been served.

The Sheriff-Substitute (BOYD) repelled this objection, admitted the evidence tendered for the defenders, and in respect of it granted them decree of absolvitor.

The pursuer appealed to the Circuit Court at Glasgow on the following grounds:—“(1) Because the Sheriff-Substitute in admitting said evidence for the respondents without any counter account or claim having been served on the pursuer deviated in point of form from section 11 of the Small Debt (Scotland) Act 1837, wilfully, or so as to prevent substantial justice from being done, and (2) because the Sheriff-Substitute, in so admitting said evidence, acted with malice and oppression in the sense of section 31 of said Small Debt (Scotland) Act 1837.”

Argued for appellant—The defence amounted to a counter claim, notice of which should have been given in terms of the Small Debt (Scotland) Act 1837, section 11—*Cowie v. Rush*, September 28, 1866, 5 Irv. 320, 2 S.L.R. 279; *Renfrew v. Hall*, November 26, 1901, 4 F. (J.) 27, 39 S.L.R. 280.

Argued for respondents—The action was properly one of accounting; the defence was an adjustment of the account and not a counter claim to which the statute would apply. This was the view taken by the Sheriff-Substitute and, whether right or wrong, his decision upon this question was final and not open to review—*Buchanan v. Glasgow Corporation Water-Works Commissioners*, September 19, 1862, 4 Irv. 225; *Mosson v. Brash*, September 27, 1872, 2 Coup. 325.

LORD PEARSON—I think this case is narrow enough, but I must say I have a very clear opinion upon it. The 11th section of the Small Debt Act says—“Where any defender intends to plead any counter account or claim against any debt, demand, or penalty pursued for, the defender shall serve a copy of such counter account or claim by an officer on the pursuer.” Now, in my opinion, a defence of over-payments made during a selected period anterior to the fortnight's wages sued for, involved a set-off; and it is admitted that no copy of the claim was served. I can hardly imagine a case where the service of such a copy was more necessary to justice, because otherwise the pursuer would be called upon to defend herself against a claim arising out of a previous part of her contract of service without any notice that it was to be raised. The whole reason of the section seems to me to apply with exceptional force in the circumstances.

On the argument for the respondents I am asked to assume that the Sheriff entered into an accounting, and held that the work of the fortnight for which wages are sued was really covered by the alleged previous over-payments. That would be a startling result; it makes one look at the case more closely. When attention is paid to the claim in the Sheriff Court I see that the appellant lays her claim of £1, 15s. 7½d. as for wages from 17th August to 1st September 1905, for piece-work services rendered by her to the defenders during that period. Now, I have heard nothing to suggest that the Sheriff negatived that in assolzieing the defenders. It rather appears to me that he did not negative it, and that he assumed that the fortnight's wages were earned, but held that they were compensated by some over-payments made in respect of previous work. I am prepared to hold that the defence was really and truly a counter claim, and that there should have been notice of it by service, in order that the pursuer might have an opportunity of meeting it. That being so, I think I must proceed under section 31 and hold that there was such deviation from the statutory enactments as has prevented substantial justice from being done. I therefore sustain the appeal, recal the decree of the Sheriff-Substitute, and remit to him to decern in terms of the summons.

The Court sustained the appeal.

Counsel for Appellant—Mercer. Agent—Archibald Hamilton, Solicitor, Glasgow.

Counsel for Respondents—J. R. Christie. Agents—Middleton & Brown, Writers, Glasgow.

COURT OF SESSION.

Tuesday, June 5.

SECOND DIVISION.

[Lord Ardwall, Ordinary.]

CATHCART PARISH COUNCIL v.
GLASGOW PARISH COUNCIL.

Poor—Settlement—Capacity to Acquire Residential Settlement—Insanity—Certification—Poor Law (Scotland) Act 1898 (61 and 62 Vict. c. 21), sec. 1.

The fact that a pauper is insane during the necessary period of residence is *per se* sufficient to prevent him from acquiring a settlement in a parish. It is not essential that his insanity should have been formally certified.

Facts upon which the Court held that a pauper was insane and incapable of acquiring a settlement.

The Poor Law (Scotland) Act 1898, sec. 1, enacts—"Section seventy-six of the principal Act (viz. 8 and 9 Vict. c. 83, sec. 76) is hereby repealed, and in lieu thereof it is enacted as follows:—"From and after the commencement of this Act no person shall

be held to have acquired a settlement in any parish in Scotland by residence therein unless such person shall, either before or after, or partly before and partly after, the commencement of this Act, have resided for three years continuously in such parish and shall have maintained himself without having recourse to common begging, either by himself or his family, and without having received or applied for parochial relief; and no person who shall have acquired a settlement by residence in any such parish shall be held to have retained such settlement if during any subsequent period of four years he shall not have resided in such parish continuously for at least one year and a day: Provided always that nothing herein contained shall, until the expiration of four years from the commencement of this Act, be held to affect any persons who at the commencement of this Act are chargeable to any parish in Scotland."

The Parish Council of the Parish of Cathcart brought an action against the Parish Council of the Parish of Glasgow in which they sought declarator "that the Parish of Glasgow was on 29th July 1903, and still is, the parish of the legal settlement of John Nairn Baillie, presently an inmate of Riccarton Asylum, Paisley, and that on the said 29th day of July 1903 the said John Nairn Baillie became, and has ever since continued to be, a proper object of and entitled to parochial relief. And further, it ought and should be found and declared by decree foresaid that the defenders are liable to relieve the pursuers of the whole sums of money already advanced or incurred by pursuers on account of the said John Nairn Baillie on and since the said 29th day of July 1903, amounting, as at 15th November 1904, to the sum after specified, as well as of all further sums of money advanced or to be advanced by pursuers on account of the said John Nairn Baillie since the last-mentioned date, together with interest due and to become due thereon at the rate of 5 per centum per annum. And the defenders ought and should be decerned and ordained by decree of the Lords of our Council and Session to make payment to the pursuers of (*First*) the sum of £45, 11s. 7d., being the amount disbursed by the pursuers in relieving the said John Nairn Baillie from the said 29th day of July 1903 till the said 15th day of November 1904, conform to account which will be produced at the calling hereof, with the interest of the several advances of which said amount is composed at the rate of 5 per centum per annum from the respective dates of payment thereof till payment; and (*Second*) all other advances or disbursements that have since been, or may hereafter require to be, made by the pursuers on account of the said John Nairn Baillie during the time he continues a proper object of parochial relief, with interest thereon at the foresaid rate from the date of the respective payments of the same by the pursuers till payment."

The facts of the case are fully set forth in the opinion of the Lord Ordinary (ARDWALL), *infra*.