did with regard to the memorandum of agreement and the recording thereof. I therefore think the judgment of the Lord Ordinary ought to be affirmed.

The Court adhered.

Counsel for the Complainer (Respondent)—Constable, K.C.—Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for Respondent (Reclaimer)—Anderson, K.C.—Hendry. Agent—John S. Morton, W.S.

Tuesday, July 20.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

NEW MINING AND EXPLORING SYNDICATE, LIMITED *v.* CHALMERS & HUNTER AND OTHERS.

Company — Process — Expenses — Caution for Expenses by Limited Company (Pursuers) — Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *sec.* 278.

The Companies Consolidation Act 1908, section 278, enacts—"Where a limited company is plaintiff or pursuer in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given."

Per the Lord President—"Where a statute entrusts a judge with such a power and he exercises it, though I do not say that his exercise of it will never be open to review, yet before the Court will interfere it must be shown that he has gone completely wrong."

Circumstances in which *held* that pursuers, a limited company, had been rightly ordained to find caution for defenders' costs.

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), section 278, is quoted *supra in rubric.*

On 13th January 1909 the New Mining and Exploring Syndicate, Limited, 13 Rutland Street, Edinburgh, brought an action against Chalmers & Hunter, W.S., Edinburgh, then dissolved, and H. B. Hunter, W.S., Edinburgh, as partner thereof and as an individual, and R. M. Maclay, C.A., Glasgow, trustee on the sequestrated estates of R. S. Chalmers, the only other partner thereof, for recovery of a sum of £1400 admitted to have been embezzled by R. S. Chalmers when acting as secretary to the company.

The pursuers were incorporated in May 1907, when the said R. S. Chalmers was appointed secretary and law agent of the company. On 1st August 1907 Mr Chalmers assumed the defender H. B. Hunter as his partner, and on 17th December Messrs Chalmers & Hunter were appointed secretaries to the company and continued to act as such until 26th February 1908, when Mr Chalmers left the country. The defenders denied that they were responsible for the sums embezzled by R. S. Chalmers prior to the firm's appointment as secretaries, which sums, they averred, amounted to £1200. *Quoad* the balance, viz. £200, they admitted liability.

The closed record contained the following *averments* by the parties—"(Cond. 9) The defenders have been repeatedly called upon by the pursuers to make payment of the sum sued for, but they refuse or delay to make payment. A claim is about to be lodged by the pursuers upon the estate of the said Robert Scott Chalmers, but it is not anticipated that any dividend will be received in respect thereof. The present action has accordingly been rendered necessary. With reference to the averments in answer it is admitted that the defender H. B. Hunter acted as secretary of the pursuers for the period, and at the salary stated, and that they are due to him the two sums of £94 and £8, 6s. 8d. mentioned. The pursuers have no knowledge of the sums of £59, 9s. 8d. and £300 referred to, for which no account has been rendered to them, and they make no admission with regard thereto. The business account mentioned has also not been rendered to them, but they are prepared to admit liability for the taxed amount thereof, assuming it to represent business done on their behalf. *Quoad ultra* the averments in answer are denied. The pursuers are willing and offer to deliver to the said defender a certificate for the shares for which he applied. (*Ans.* 9) Admitted that the present defenders have refused to admit liability except to the extent mentioned in the preceding answer, and that only a small dividend, if any, is at present likely from R. S. Chalmers' sequestrated estates. *Quoad ultra* denied. No claim has yet been lodged. The defender H. B. Hunter acted as secretary to the pursuers' company from the date of his said appointment until 2nd February 1909, when he ceased to hold said appointment. The said defender's salary was fixed on 23rd May 1908 at £100 per annum as from the date of his appointment. The pursuers are due the said defender £94 in respect of salary, and £8, 6s. 8d., being one month's salary, in lieu of notice. Further, they are due the said defender a sum of £59, 9s. 8d., being the balance on his petty cash account as their secretary, as per account herewith produced. There are also due by the pursuers to the said defender a sum of £100 paid by him to them on 21st October 1907 for shares, which they declined to give to him, and £300, being the balance still owing on four advances amounting to £350, made by the said defender on pursuers' behalf between 3rd July and 14th November 1907 inclusive, as per statement produced. The pursuers are also due the said defender a business account of £22, 14s. also herewith produced (subject to taxation) in connection

with an issue of debentures by the pursuers in April 1908. Interest is also due to the said defender on said various sums (which, subject to taxation of the business account, amount to £584, 10s. 4d.) as from the date when the same became due. Any part of the sum sued for in respect of which the said defender is found liable or admits liability falls to be compensated by the sums with relative interest due by the pursuers to said defender as above mentioned. There is reason to believe that if the defender be successful in his defence the assets of the company will be insufficient to pay his costs within the meaning of section 278 of the Companies (Consolidation) Act 1908. It is believed and averred that, apart from the present claim, the company is in an insolvent condition. Its mine has never been worked, no exploration work has been done since March 1908, and the option over the mine, which has been extended, will expire in November 1909. In April it was found necessary to raise some capital by means of debentures, and a subscription of £1100 was obtained. Of this £762, 10s. has been received by the company, which, it is believed and averred, has all been spent. It is believed and averred that the liabilities of the company for further debts on account of the mines amount to over £125, while their liabilities to the defender amount to over £600. Further, they are due a sum of £55 or thereby to two of their directors for travelling expenses. The company have, it is believed and averred, been attempting to raise further moneys on debenture, but are unable to do so, although a circular for that purpose was issued by them on 27th March 1909. A copy of said circular is produced and referred to." (*The information contained in this circular is summarised in the Lord Ordinary's opinion, infra*).

The defenders pleaded, *inter alia*—"(1) In respect that there is reason to believe that in the event of the defender being successful the assets of the company will be insufficient to pay his costs, the pursuers should, *ante omnia*, be ordained to find caution under and in terms of section 278 of the Companies (Consolidation) Act 1908."

On 30th June 1909 the Lord Ordinary (Skerrington) sustained the defenders' first plea-in-law, ordained the pursuers to find caution for the defenders' costs under and in terms of section 278 of the Companies (Consolidation) Act 1908, and sisted the action until caution was found. [Leave to reclaim was granted.]

Opinion.—"The financial position of the pursuing company clearly appears from the circular issued by its secretary on 27th March 1909. From this circular it appears that the company has no money and no assets except the option of acquiring certain mines in Spain. This option will expire on 24th November 1909, but may be continued for a further period of nine months on payment by the company of a further sum of £50 for each three months. At present the company has no money available for this purpose. The purpose of the circular was to point out the necessity of issuing further debentures to the extent of £1400 in addition to the £1100 of debentures already issued. The circular states that 'exploration work at the mines cannot be recommenced until further capital is provided.' It further appears that the option over the mines is now in the name of the trustees for the debenture holders with reversion to the company. It also appears that, in addition to the £1100 due on debentures, the company owes £125, 4s. 9d. on account of the mines. The defenders pointedly allege that notwithstanding the issue of this circular the pursuers are unable to raise any further moneys on debentures. The pursuers meet this statement with a general denial and give no explanation whatsoever in the pleadings as to their financial position. I invited their counsel to give me any information in his possession on the subject, but he stated that all he was in a position to say was that since the issue of the circular the company has received a favourable report upon the mines.

"Assuming that this report is of such a character as to enable the company to raise a further sum of £1400 on debentures, the exploration work can be recommenced and the period of the option extended until 24th August 1910. If the exploration proves successful it may be that the option will prove of some value. Even in this event the debenture creditors will hold the first security over it for £2500. Accordingly I am of opinion that it appears by 'credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs.' In the whole circumstances I have come to the conclusion that the present is a fair case in which to exercise the discretionary power committed to me by section 278 of the Companies (Consolidation) Act 1908."

The pursuers reclaimed, and argued—The section did not apply, for this company was not insolvent. There was no "credible testimony" that the company would be unable to pay the defenders' costs if successful, and that being so the Lord Ordinary had not rightly exercised the discretion conferred on him by the section founded on.

LORD PRESIDENT—In this case the Lord Ordinary has exercised the power which is conferred upon him by section 278 of the Companies (Consolidation) Act 1908, which provides—". . . (*quotes, v. sup. in rubric*) . . ."

One has only to read the section to see that it entrusts the judge with a discretion, and where a statute entrusts a judge with such a power and he exercises it, though I do not say that his exercise of it will never be open to review, yet before the Court will interfere it must be shown that he has gone completely wrong.

The reclaimer's counsel maintained that this was not a case to which the section was applicable. Now there might be cases where it could be shown on his own admis-

sion that the defender was due a larger sum than his own costs would amount to, and in such a case the section might not be applicable, but here it is averred that the sums due by the defenders are wiped out by various counter-claims detailed on record, so that if the defenders were successful there will be no sums wherewith to pay their costs. I think the defenders have sufficiently shown that facts exist here which justify the Lord Ordinary in exercising the discretion conferred upon him by the section I have read, and that your Lordships have no other course open to you than to uphold his decision.

LORD KINNEAR—I concur.

LORD DUNDAS—I am entirely of the same opinion.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuers (Reclaimers)—D. Anderson. Agents—Cowan & Stewart, W.S.

Counsel for the Defenders (Respondents)—Hon. W. Watson. Agents—Davidson & Syme, W.S.

Tuesday, July 20.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

PEDRUS STEAMSHIP COMPANY, LIMITED *v.* BURNTISLAND HARBOUR COMMISSIONERS.

Harbour—Ultra Vires—Harbours Clause Act 1847 (10 *and* 11 *Vict. cap.* 27)*—Bye-laws Empowering Commissioners to Reserve Berth for Steamers Trading Regularly—Direction that Berth Occupied by Last Arrived Non-Regular Trader should be Reserved Berth for Time Being—Proviso that Vessel in Berth not to be Removed till Loaded—Applicability to Steamer Occupying Reserved Berth for Regular Traders.*

The bye-laws passed by Harbour Commissioners for the regulation of a harbour pursuant to the Harbours Clauses Act 1847 enacted:—"10. . . . The Commissioners may specially reserve or set aside for the accommodation of steamers or other vessels trading regularly with the port any berth or berths in the docks. 11. Steamers arriving in the harbour or docks shall rank for loading immediately they are ready to take in cargo, and that although sailing vessels which have arrived before them may also be ready for loading, but a vessel already in berth will not be removed therefrom until loaded if her cargo is on the quay or in the dock sidings. The Commissioners may set aside one of the berths in the docks for the accommodation of sailing vessels, and in that event sailing vessels shall take their turn for loading at such berth. Should a steamer be loading at such berth and the loading can be continuously proceeded with the steamer will not require to remove from the berth for a sailing vessel."

The Harbour Commissioners directed that, instead of any one particular berth being solely set apart as a preference berth, the last arrived non-regular trader should be turned out of her berth as soon as a regular trader arrived, and that that berth should be regarded as the preference berth until the regular trader had finished her loading.

Held (*diss* Lord Ardwall) that the Harbour Commissioners were not acting *ultra vires* of the powers conferred on them under the 10th bye-law in adopting this system inasmuch as (1) it did not amount to a reservation of all the berths, only one being reserved at a time; and (2) assuming that the proviso in the 11th bye-law that "a vessel already in berth will not be removed therefrom until loaded if her cargo is on the quay or in the dock sidings," could be regarded as applying to a steamer, it had no application to the preference berth, and therefore did not entitle the last arrived non-regular trader to remain in berth till loaded after the arrival of a regular trader.

Process—Reclaiming Note—Competency—Printing—Amendment of Record—Court of Session Act (*Judicature Act*) 1825 (6 *Geo. IV, cap.* 120, *sec.* 18—*A.S., 11th July* 1828, *sec.* 77.

The Court of Session Act (Judicature Act) 1825, section 18 provides that a party reclaiming against an interlocutor "shall along with his note put into the boxes printed copies of the record authenticated" by the Lord Ordinary. The Act of Sederunt, 11th July 1828, section 77, provides that reclaiming notes "shall not be received unless there be appended thereto copies . . . of the papers authenticated as part of the record in terms of the statute . . . and also copies . . . of the summons with amendment, if any. . . ."

The defenders in an action of declarator lodged a minute of amendment of the record, and the Lord Ordinary by interlocutor allowed the defenders to amend the record in terms of their minute, and of new closed the record. The pursuers presented a reclaiming note against a subsequent interlocutor, and did not print the amendment or the interlocutor allowing it. The amendment was not written on the process copy of the closed record till after the reclaiming note was boxed. The defenders objected to the competency of the reclaiming note on the ground that section 18 of the Judicature Act 1825 and section 77 of the Act of Sederunt of 4th July 1828 had not been complied with.

Held (1), following *Montgomerie &*