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WINTER SESSION, 1910–1911.

COURT OF SESSION.

Saturday, October 15, 1910.

FIRST DIVISION.

(SINGLE BILLS.)

[Lord Guthrie, Ordinary.

WYLLIE *v.* WYLLIE.

Process—Jury Trial—Failure to Timeously Lodge Issues—Act of Sederunt, July 15, 1865, *sec.* 12—*Act of Sederunt, March* 10, 1870, *sec.* 1 (5).

The Court has a discretion to allow to be adjusted issues not timeously lodged.

The Act of Sederunt, July 15, 1865, section 12, enacts—"All appointments for the lodging or adjusting of issues shall be held to be peremptory; and if the issue or issues be not lodged within the time appointed, it shall be competent to the opposite party to enrol the cause, and to take decree by default. . . ."

The Act of Sederunt, March 10, 1870, section 1 (5), enacts—"In every case in which proof is to be taken before a jury, issues shall be adjusted either at the time of proof being appointed in the cause, or on a day to be fixed not later than eight days thereafter; and the parties shall lodge the issues respectively proposed by them two days before the day so fixed."

Wallace Wyllie, 30 Union Buildings, Smith Street, Ayr, raised an action against Charles Wyllie, manufacturing chemist, Mews Lane, Ayr, for damages on the ground that the defender had falsely, maliciously, and without probable cause lodged a complaint with the criminal authorities charging the pursuer with theft or embezzlement, and had caused him to be arrested and detained in custody.

On 19th May 1910 the Lord Ordinary (GUTHRIE) closed the record and assigned the 26th May for the adjustment of issues.

The 24th of May was Victoria Day, and the pursuer's agent, in the belief that it was a holiday, did not lodge issues on that date, but did so on the 25th.

On 26th May the Lord Ordinary pronounced this interlocutor—"Adjourns the adjustment of issues till the day of ."

On 14th July the Lord Ordinary pronounced this interlocutor—"The Lord Ordinary, in respect the pursuer has failed timeously to lodge the issues proposed for the trial of the cause, in terms of section 12 of the Act of Sederunt of 15th July 1865, dismisses the action and decerns," &c.

The pursuer reclaimed, and argued—(1) The Lord Ordinary had proceeded on the view that the appointment to lodge issues was peremptory under the Act of Sederunt 15th July 1865, and that he had no discretion in the matter. The provisions of that section had, they maintained, been superseded by those of the Act of Sederunt of 10th March 1870, section 1 (5), and as no sanction was there expressed, the Lord Ordinary had a discretion. (2) In any case the defender had not enrolled the cause to take decree, but had allowed the cause to come out automatically, and accordingly could not take advantage of section 12.

Argued for the defender and respondent—(1) The provisions of the two Acts of Sederunt could stand together. The lodging of issues was peremptory. (2) Assuming the Lord Ordinary had a discretion, all the facts were before him, and it did not appear that he had not exercised that discretion.

LORD PRESIDENT—I am of opinion that the Lord Ordinary has taken too strict a view of this matter. I confess I do not think that the Act of Sederunt of 1865 applies to the case in hand, because its provisions as to the lodging and adjustment of issues were of necessity superseded by the new code of the Court of Session (Scotland) Act 1868. This latter was very soon altered by the Act of Sederunt of 1870,

and now stands as if the first section of that Act of Sederunt were printed *in gremio* of it instead of its own section 27. Under the proviso of that section the direction to lodge issues is not made peremptory with a rigid sanction. It therefore remains a matter in the discretion of the judge whether he will allow the excuse for the issues not being lodged in due time. Had the Lord Ordinary considered himself free, I do not doubt that in this case he would have allowed the issues to be held as timeously lodged.

The interlocutor reclaimed against must therefore be recalled and the case remitted to the Lord Ordinary to allow issues to be adjusted—the expenses of the reclaiming note to be expenses of the cause.

LORD KINNEAR—I agree.

LORD JOHNSTON—I also agree.

LORD SALVESEN—I agree. It follows from what your Lordships have held that where the Act of Sederunt of 10th March 1870 has been infringed by issues not having been timeously lodged, the Lord Ordinary has a discretion as to further procedure, and is not bound as under the previous practice to dismiss the action. No doubt he will exercise that discretion according to circumstances; but I should like to say that where an honest mistake has been made by the one side and no prejudice is being suffered by the other, that the discretion ought generally to be exercised so as to permit of the action being proceeded with.

The Court remitted the cause to the Lord Ordinary in order that he should allow issues to be adjusted.

Counsel for the Pursuer and Reclaimer—D. P. Fleming. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defender and Respondent—A. A. Fraser. Agent—James G. Bryson, Solicitor.

Saturday, October 15.

FIRST DIVISION.

(SINGLE BILLS.)

EADIE, PETITIONER.

SEAFIELD PRESERVE COMPANY, LIMITED, PETITIONERS.

Company—Liquidation—Expenses—Petition for Judicial Winding-up Followed by Petition for Supervision Order instead of a Note.

When a petition is already in Court for the judicial winding-up of a company, and thereafter the company resolves to wind itself up and obtain the supervision of the Court, it should for this purpose present a note in the petition already before the Court and not a new petition.

When a new petition was presented the company was found entitled only to such expenses as would have been incurred by it had a note been presented.

On 19th July 1910 Andrew Morrison Eadie presented a petition for the judicial winding-up of the Seafield Preserve Company, Limited, in which he was a shareholder, and suggested Robert Archibald Craig, C.A., as liquidator.

On 20th July 1910 an extraordinary general meeting of the shareholders of the company was held, when the following extraordinary resolutions were unanimously adopted—"That it has been proved to the satisfaction of the company that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same, and that the same be wound up accordingly." "That Charles John Munro, chartered accountant, Edinburgh, be and is hereby appointed liquidator for the purpose of winding-up, and that the liquidator be instructed to take the necessary steps for having the liquidation placed under the supervision of the Court."

On 21st July the company and the liquidator thereof presented a petition for a supervision order.

LORD PRESIDENT—Two petitions have been presented with regard to the winding-up of this company, one by a shareholder and the other by the company. The shareholder presented his petition on 19th July, and the crave of that petition is that the company should be wound up by the Court. On 21st July the company presented a petition on its own behalf craving that the voluntary winding-up resolved on at a meeting of the Company should be continued under the supervision of the Court; and it subsequently lodged answers in the other petition.

We shall dispose of the matter in this way. We shall order the company to be wound up under the supervision of the Court, as craved in the company's petition, but we shall make the order, not in that petition, but in the shareholder's petition, as it was first presented, and we shall find the petitioner entitled to expenses. That will make it unnecessary for us to deal with the company's petition except as to the crave for expenses, and in that matter we shall allow the company its expenses, but limited to those only which would have been incurred had the company lodged a note in the shareholder's petition, for that was the course which the company should have taken, and there was no necessity for its presenting a separate petition.

LORD KINNEAR, LORD JOHNSTON, and LORD SALVESEN concurred.

The Court pronounced these interlocutors in the respective petitions:—

". . . Order that the voluntary winding up of the Seafield Preserve Company, Limited, resolved on at an extraordinary general meeting held