that that makes any difference. A trustee in a sequestration is just in the same position as any ordinary client—he is personally liable for the accounts which agents incur on his employment, and I think it would be very much against the interests of ordinary creditors in sequestrations if a difference were to be made between such a client and the ordinary run of clients.

All that we know with regard to the accounts with which I am now dealing is that they were rendered. It is not even said that a demand was made for payment, far less that there was any intimation that if payment were not made by a given date interest would be charged. There are thus no special circumstances to take these accounts out of the ordinary rule, and I propose that we should direct the Accountant accordingly.

LORD MACKENZIE—The question which is raised by the Accountant of Court is whether interest is payable in the case of agents' accounts, not only on outlays, but also on professional charges.

As regards the first question, it has been conceded at the Bar that interest must run upon outlays, and I understood that the further concession was given that interest should run from the dates at which the different outlays were made. We are not called upon to go into that matter. I only add that it seems to me that these concessions were quite properly given.

As regards interest on professional charges, that is, of course, in a different position, and the Accountant has stated that the law on the question is not definite. It appears to me that in the case of *Blair's Trustees* v. *Payne*, 12 R. 104—particularly in the opinion of Lord Fraser—which was followed in the case of *Bunten* v. *Hart*, 9 S.L.T. 476, by Lord Kyllachy, a rule was formulated which is equitable in its operation and should be followed. By that I do not mean that there may not be special circumstances which may take a particular case out of the operation of the rule; but it is on the party who maintains that the rule should not apply to show cause why it should not.

The rule that I refer to is stated by Lord Fraser in *Blair's Trustees* v. *Payne*, at 12 R., p. 112, when he deals with the effect of rendering an account. His Lordship states it thus—"In my opinion no interest ought to be allowed on such claims on open account, except when there is a judicial demand, or some such intimation given in writing as is required by the English statute, viz., that interest will be claimed from the date of the demand. In such a case the Court would in its discretion allow interest prior to the period of citation." Lord Kyllachy followed this rule in the case of *Bunten* v. *Hart*, 9 S.L.T. 476, where a claim for interest was rejected in respect of no judicial demand for payment having been made or any intimation given in writing that interest would be claimed from the date of the demand.

So far as regards the professional charges, the account of a law agent is just in the position of any other open account, and the general rule applies to them. In the present case it only applies to a limited number of the accounts before us. For the reasons which have been already explained by Lord Salvesen with regard to the accounts of Messrs Tods, Murray, & Jamieson, and of Messrs Dundas & Wilson, I concur in the judgment proposed.

LORD DUNDAS concurred.

The LORD JUSTICE-CLERK and LORD ARDWALL were absent.

The Court pronounced this interlocutor—

". . . Find that interest at 5 per cent. per annum is payable on all cash outlays included in the . . . sum of £5154, 4s. 1d. from the date of disbursement until payment: Find further that interest at 5 per cent. is payable on accounts of professional charges included in the said sum of £5154, 4s. 1d. in the cases where either a judicial demand has been made for payment of such accounts or intimation has been made to the trustee that interest is claimed, said interest to run from the date of such demand or intimation respectively, and direct the Accountant accordingly," &c.

Counsel for Somervell's Trustee—Chree—Moncrieff. Agents—R. R. Simpson & Lawson, W.S.

Counsel for Messrs Dundas & Wilson, C.S., and Messrs Tods, Murray, & Jamieson, W.S. — Blackburn, K.C. — Maconochie. Agents—Parties.

Counsel for Edinburgh Life Assurance Company — Macphail, K.C. — Hamilton Grierson. Agents—Mackenzie & Kermack, W.S.

---

*Tuesday, June 27.*

## SECOND DIVISION.

[Lord Skerrington, Ordinary.

## BROWNRIGG COAL COMPANY, LIMITED *v.* SNEDDON.

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

The Companies (Consolidation) Act 1908, sec. 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."

*Circumstances* in which the Court

*refused* to interfere with the discretion of a Lord Ordinary who had declined to ordain a pursuing limited company to find caution for the defender's expenses.

On 17th January 1911 the Brownrigg Coal Company, Limited, *pursuers*, brought an action against Robert Sneddon, coalmaster, Shotts, *defender*, for payment of sums of damages amounting in all to £9717.

The circumstances in which the action was brought were as follows:—The pursuers' company was incorporated as a private company on 8th July 1909. On 20th November 1909 they obtained an assignation of a certain mineral lease from Andrew Orr Bain, coalmaster, Glasgow, whereby they acquired right, with entry as at 1st July 1909, to work the seams of coal in certain lands in the parish of Shotts, which were immediately adjacent to the defender's lands. They averred that after obtaining access to a certain seam of the coal contained in their lease, in January 1910 they discovered that the defender had illegally worked a large quantity thereof. As regards operations carried on before their entry they produced assignations dated 16th March 1910 and 9th January 1911 from former proprietors assigning to the pursuers all claims of damage competent to them in respect of the abstraction of the said coal.

The defender denied the pursuers' averments and averred, *inter alia*—"(Ans. 1) . . . The nominal capital of the pursuers is £5000, in shares of £1 each. Of this capital 1600 shares in all have been issued, 800 thereof for payment in cash, and the other 800 as part of the price of the business of Mr Andrew Orr Bain after mentioned. The directors of the pursuers are a Mr Robert Osborne, the said Andrew Orr Bain, and Mr Charles Leigh Brown, chartered accountant, Glasgow, the secretary of the company. With the exception of 300 shares held by Mr Osborne, all the remaining shares issued are held by the said Andrew Orr Bain and Charles Leigh Brown, who hold 50 each, and their respective wives, who hold 750 and 450 respectively. . . . (Ans. 17) The defender believes and avers that the pursuers will be unable to pay the expense of the defender if successful in his defence. The total cash raised by the pursuers amounts to £800. Of this sum £300 has been paid to the said Andrew Orr Bain as vendor to the pursuers, and £25 to the said Charles Leigh Brown in terms of the sale agreement. A further sum of £150 has been paid to the Messrs Thomson in respect of the assignation of 16th March 1910. There remains a balance of £325, subject to the following charges which more than exhaust the same, viz.—The said Andrew Orr Bain's salary at £250 per annum from 1st July 1909, the said Charles Leigh Brown's salary of £25 per annum from the same date, the expenses of forming the company and relative deeds, the expenses of the workings hitherto carried on by the pursuers from which no profit has resulted, and the expenses incurred and to be incurred by the pursuers in the present litigation. The objects of the pursuers, as set out in their memorandum, contemplate extensive mining operations, for which they have no resources whatever. The defender believes and avers that one of the main objects of the pursuers' incorporation was to enable the present unfounded litigation to be carried on without liability for the expenses thereof."

In answer to the above averments the pursuers averred—"(Cond. 1) The statements in the answer are admitted under the explanation that the price paid to Mr Andrew Orr Bain was paid in respect of his interest in the colliery concern taken over and acquired by the pursuers. . . . (Cond. 17) With reference to the answer, admitted that the total sum raised in cash on the formation of the company was £800, of which £300 was paid to Mr Bain and £25 to Mr Brown. Admitted that a sum of £150 was paid to Mrs Thomson. Explained that this sum was advanced to the company on loan, and that Mr Bain's salary has been paid out of revenue from the colliery. Further, explained that the balance of the said working capital has been applied in developing the colliery. The company must also be credited with the sums previously expended in connection with the work of development. The pursuers have sufficient capital to enable them to carry on their business in the meantime, and, apart from the loss, trouble, and expense caused by the defender's illegal actions, they believe and aver that they will have no difficulty in procuring whatever additional capital will be required to enable them to successfully develop the colliery. *Quoad ultra* the statements in the answer so far as not coinciding herewith are denied."

The defender pleaded, *inter alia*—"(1) The pursuers should *ante omnia* be ordained to find sufficient security for the defender's expenses, and the action should be sisted until such security is given, in terms of section 278 of the Companies (Consolidation) Act 1908."

On 2nd June 1911 the Lord Ordinary (SKERRINGTON) pronounced this interlocutor—"The Lord Ordinary, . . . on the motion by counsel for the defender that the pursuers should be ordained to find security for the costs of the action, and to stay all proceedings therein until the security is given, in terms of section 278 of the Companies (Consolidation) Act 1908, refuses said motion: . . . Grants leave to reclaim."

The defender reclaimed, and argued—It appeared by credible testimony in the form of admissions on record that the pursuers would be unable to pay the defender's expenses if he were successful in his defence. The averments made it quite plain that the company was formed for the purpose of raising a speculative action of damages, and at the same time of shielding the members of the company from liability for expenses. There was no *bona fide* intention of working coal, for the company had not the requisite amount of capital for such operations. No doubt the statute entrusted

the Lord Ordinary with a discretion, and it was true that the Court would not interfere with the exercise of his discretion unless he had gone quite wrong — *New Mining and Exploring Syndicate, Limited* v. *Chalmers & Hunter*, 1909 S.C. 1390, 46 S.L.R. 1002. But the Lord Ordinary had gone wrong here. A Court of Appeal was entitled to examine into the grounds of the exercise of discretion by a Judge of first instance—*Northampton Coal Company* v. *Midland Waggon Company*, 1878, 7 Ch. D. 500, Jessel, M.R., at 502.

Argued for the pursuers — The Lord Ordinary had rightly exercised his discretion. Moreover, the Court would not reverse his judgment unless they were quite satisfied that he had obviously erred —*New Mining and Exploring Syndicate, Limited* v. *Chalmers & Hunter* (*sup. cit.*). No sufficient reason had been shown for interfering with the discretion of the Lord Ordinary. The company was not in liquidation, nor averred to be insolvent. The company had been floated for the *bona fide* purpose of working coal. The Court could not say *prima facie* by admissions on record and without inquiry that it had been formed in order to make the present claims of damage. On the contrary, the record showed that it was only in January 1910, in the course of their operations—six months after the formation of the company—that the pursuers became aware of their claims of damage.

LORD DUNDAS—The pursuers are a limited company formed in 1909 and carrying on business at Brownrigg Colliery, Shotts, and the defender is Mr Robert Sneddon, who is a coalmaster now or lately carrying on business at Currieside Colliery. The pursuers sue the defender for sums of damages of a large amount upon the allegation that he has executed illegal operations at various times in or affecting what is now their coalfield, and they aver that they are in right of such claims of damages, for what they may be worth, as belonged to the former proprietors of the coalfield. The defender's first plea-in-law is that "The pursuers should, *ante omnia*, be ordained to find sufficient security for the defender's expenses, and the action should be sisted until such security is given, in terms of section 278 of the Companies (Consolidation) Act 1908." That section is a useful one. Its policy is too obvious to require comment, and it is one that the Court will apply readily, and have applied before now, where the circumstances seem to call for it. It is not a new section, because it is substantially the same as section 69 of the Companies Act of 1862. The Lord Ordinary refused the motion, and granted leave to reclaim, though in doing so he did not think fit to furnish us—as I rather wish he had done—with the grounds of his decision. The defender has reclaimed, and the matter is thus brought before us quite competently. At the same time we, sitting here, do not view such a motion in the same manner as the Judge sitting in the Outer House views it. That matter was recently put very clearly by Lord Dunedin in the *New Mining Syndicate* v. *Chalmers & Hunter*, 1909 S.C. 1390. That was a reclaiming note against an interlocutor by Lord Skerrington upon a motion similar to the present. Lord Skerrington had granted it in that case, and also granted leave to reclaim, explaining the grounds of his judgment. Lord Dunedin says this—"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." I accept the authority of these words, all the more readily that I see I was myself a party to the judgment. It just comes to this, I think, that the Inner House, while it does not refuse to consider such a motion as the present, will not reverse the judgment of the Lord Ordinary, in which ever way he has exercised his discretion, unless they are satisfied that he has plainly erred.

Mr Fleming founded upon allegations which his client makes in answer 1 and in answer 17, and the admissions made by the pursuers, as affording sufficient grounds for his motion. These allegations and admissions do seem to show that this company is far from affluent, and they did seem at first to give some room and afford some warrant for the suggestion that the case was not brought in *bona fides*, but was really an attempt by Mr Orr Bain to form himself into a company and then raise a speculative action for recovery of damages on a comfortable but illegitimate footing of security in regard to costs. But I am bound to say that Mr Wilson has, to a large extent at all events, succeeded, to my mind, in dispelling the darkness of these shadows by a reference to the averments on record and to the dates at which the occurrences seem to have taken place. This company, though as I have said it is not affluent, is not in liquidation, and is not said to be insolvent; and we are bound at this stage to take a *prima facie* view of the situation and to consider what is just having regard to the parties. I am content to say for myself that I think no sufficient reason has been shown for interfering with the discretion of the Lord Ordinary, reminding your Lordships that in order to warrant such an interference there must be a clear case made out that the Lord Ordinary has gone wrong. I apprehend that the refusal of this motion will leave it open to the defender, if so advised, to make a similar motion later on, if he thinks he can do so with more effect. I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD SALVESEN — I am of the same opinion. If it were sufficient for the defender to show that there is reason to believe that the pursuers will be unable to pay the costs of the defender if successful in the defence, then I think he has adduced a *prima facie* case in support of that proposition. But that is not enough. The

defender has further to satisfy us that the Lord Ordinary has wrongly exercised the discretion, which in the first instance is vested in him, of granting or refusing the motion, even after proof of the pursuers' inability to pay the defender's expenses.

Mr Wilson presented a strong argument to the effect that his clients are pursuing a *bona fide* litigation on probable grounds, and the Lord Ordinary has apparently accepted that view and has refused to ordain them to find caution as a condition of their proceeding with the action. I do not think sufficient ground has been shown for our interfering with the exercise of his discretion, although I do not doubt that if we were satisfied that the discretion had been wrongly exercised we should be entitled to do so. On this matter I adopt the language of the Master of the Rolls in the *Northampton Coal Co.* v. *The Midland Waggon Co.*, (1878) 7 Ch. D. 500, where he says that the Court of Appeal is quite entitled to examine into the grounds of the exercise of the discretion. I therefore agree with your Lordship in the chair.

LORD MACKENZIE — We are asked to apply the provision of section 278 of the Act. This the Lord Ordinary has refused to do. It is necessary in order to interfere with the exercise of a discretionary power that a very clear case should be made out.

In order to apply section 278, in the first place the Court must be satisfied upon credible testimony that there is reason to believe that the limited company will be unable to pay the costs of the defender if successful in the action. In my opinion Mr Fleming was successful in showing a strong case in favour of that proposition. But then that is only the first step. It is necessary further to consider, having in view the nature of the action and the *prima facie* case made by the pursuers on record, whether or not it is a case in which the provision of the section in regard to requiring security should be enforced. If it could have been shown that *prima facie* this company had been got up, not for the purpose of *bona fide* working coal, but—having discovered that there was a possible claim which might result in profit—of prosecuting that claim and at the same time of shielding the members of the company from responsibility for expenses, then I think that would have gone far to make out a case for putting in force the provisions of the section in question.

But the argument which we have heard from the pursuers' counsel has led me to the conclusion that that is not the *prima facie* aspect of the case. It appears, so far as we can judge from what has been put before us that the company was formed for the purpose of working coal, and that it was only in the course of their operations that the matters complained of were discovered. In these circumstances I am of opinion, with your Lordships, that the reclaiming note should be refused.

The LORD JUSTICE-CLERK and LORD ARDWALL were absent.

The Court adhered.

Counsel for Pursuers (Respondents) — D. M. Wilson. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for Defender (Reclaimer)—D. P. Fleming. Agents — Drummond & Reid, W.S.

---

*Wednesday, June* 28.

## FIRST DIVISION.

(SINGLE BILLS.)

## THE LONDON COUNTY AND WESTMINSTER BANK, LIMITED, PETITIONERS.

*Process — Vacation — Bill Chamber — Petition — Company — Statute — Companies (Consolidation) Act* 1908 (8 *Edw. VII, cap.* 69), *sec.* 135.

The Companies (Consolidation) Act 1908, sec. 135, enacts—"The Court having jurisdiction to wind up companies registered in Scotland shall be the Court of Session in either Division thereof, or in the event of a remit to a permanent Lord Ordinary, that Lord Ordinary during session, and in time of vacation the Lord Ordinary on the Bills."

In a petition for the winding up of a limited company under the above section, *held* (1) that a special adjournment of the Court on account of His Majesty's coronation was equivalent to vacation, and (2) that the Lord Ordinary on the Bills had therefore jurisdiction to entertain the petition.

The London County and Westminster Bank, Limited, presented a petition under the Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), for the winding up of D. C. Paton & Company, Limited. In consequence of His Majesty's coronation the Court of Session was adjourned from Wednesday, 21st June, to Saturday, 24th June, both days inclusive, and the petition was therefore brought before the Lord Ordinary on the Bills (SKERRINGTON), on 23rd June 1911, who pronounced an order for intimation, service, and advertisement. The petitioners being doubtful as to the jurisdiction of the Lord Ordinary on the Bills in the matter, repeated their motion on Wednesday, 28th June, at the resumed sittings of the Court.

LORD PRESIDENT—This is a petition for the winding up of a limited company, and it was presented last week to the Lord Ordinary on the Bills when the Court was not sitting. The Lord Ordinary considering that he had jurisdiction made an order for intimation and service, but *ob majorem cautelam* that order is asked again to-day. Now the jurisdiction of the Lord Ordinary on the Bills depends on sec. 135 of the Companies (Consolidation) Act 1908, which is as follows— . . . [*His Lordship here read*