

so arose from an oversight. And I am unable to see any sufficient ground for holding his evidence to be false and unacceptable.

If Mr Marshall did not have authority to conclude a binding lease at his own hand, his premature acceptance of the payment of £5, 5s. 11d. as the expenses of the lease is unimportant. It was not authorised by or known to the defender. The money was to be paid for the formal lease if and when completed by execution. The payment of it was made and accepted by Mr Marshall but of course without the lease being completed.

With regard to the pursuers' plea of *rei interventus* founded on their refraining from looking out for other premises, I quite agree with the view that inaction may, in a particular context of circumstances, take the character of *rei interventus*. But in the present case, *esto* there was an informal non-binding agreement leaving right to resile on both sides, the pursuers were free to seek for a lease of other premises more acceptable to them, with a view to resiling. Whether they should take this course or not was a matter for their own discretion. In point of fact they abstained from taking it. But that they did so is not shown by the evidence to have been known to the defender. No attempt is made to prove such knowledge on his part. And in absence of any knowledge by him I am unable to see how the pursuers' inaction in this respect could be said, as *rei interventus*, to affect him so as to bar his *locus penitentie*.

I concur in the judgment which your Lordships propose.

LORD MACKENZIE was absent.

The Court recalled the interlocutor of the Lord Ordinary and assolized the defender from the conclusions of the action.

Counsel for the Pursuers and Respondents—Chree, K.C.—W. A. Murray. Agent—T. M. Pole, Solicitor.

Counsel for the Defender and Reclaimer—MacRobert, K.C.—Gentles, K.C.—Berry. Agent—Thomas J. Addly, Solicitor.

Saturday, July 15.

FIRST DIVISION.

[Lord Ashmore, Ordinary.]

CARMONT AND ANOTHER, PETITIONERS.

Process—Petition—Competency—Nobile Officium—Petition Amended in Inner House—Amendment Rendering Petition Competent in First Instance only before the Junior Lord Ordinary—Power of Inner House to Deal with Petition so Amended—Distribution of Business Act 1857 (20 and 21 Vict. cap. 56), sec. 4.

Where a petition is competently brought before the Inner House on a

reclaiming note the Distribution of Business Act does not impose any restraint on the power of the Court to allow an amendment designed to facilitate an appeal to the *nobile officium*, even though the effect of that amendment is to change the petition into one which could only have been presented in the first instance to the Junior Lord Ordinary.

A petition under the Trusts (Scotland) Act 1921 for the appointment of a judicial factor or new trustees was amended on a reclaiming note in the Inner House by deletion of the references to the Trusts (Scotland) Act 1921 and by the addition of a crave for sequestration. *Held* that the amendment did not render the petition incompetent as one which should in the first instance have been presented to the Junior Lord Ordinary.

The Distribution of Business Act 1857 enacts—Section 4—“... In particular all petitions and applications falling under any of the descriptions following shall be so enrolled before and dealt with and disposed of by the Junior Lord Ordinary, and shall not be taken in the first instance before either of the two Divisions of the Court, viz.—“4. Petitions and applications for the appointment of judicial factors. . . .”

John Carmont, advocate, Edinburgh, and another, a majority of the Trustees of No. 2 Branch of the Edinburgh Division of the Comrades of the Great War Association, *petitioners*, presented a petition under the Trusts (Scotland) Act 1921 for appointment of a judicial factor upon heritable property at 22 Forth Street, Edinburgh, or for the appointment of a new trustee or trustees, for authority to resign, and for exoneration and discharge. The petition did not contain a crave for sequestration of the estate. Answers were lodged for Lawrence Walls and others, members of No. 2 Branch, *respondents*, and minutes approving the petition were lodged on behalf of the British Legion and the United Services Fund.

On 18th March the Lord Ordinary (ASHMORE) appointed a judicial factor and authorised the petitioners to resign.

The respondents reclaimed, and argued that the petition was incompetent under the Trust Act 1921 in respect that there was another trustee who was not a party to it and who had not resigned, and that it should have been presented in the first instance to the Junior Lord Ordinary, and could not be granted without sequestration of the estate.

The Court continued the cause to allow the petitioners an opportunity of amending the petition, and on 22nd June 1922 allowed the petition to be amended and granted warrant for service upon John Stewart, Leith, the other trustee, and upon the Comrades of the Great War No. 2 Branch, Limited. The amendment consisted of deleting from the petition all reference to the Trusts (Scotland) Act 1921 and of adding to the prayer a crave for sequestration of the estate held by the Trustees.

Answers were lodged by John Stewart the other trustee, who maintained that the petition was incompetent.

On 15th July 1922 counsel were heard on the petition as amended and the answers.

Argued for the reclaimers—The petition as amended was now one which could only be dealt with in the first instance by the Junior Lord Ordinary—Distribution of Business Act 1857, sec. 4; *Rhind v. Shlach*, 1875, 2 R. 1902, 12 S.L.R. 642; *Smith v. Smith*, 1892, 20 R. 27, 30 S.L.R. 59; *Gaff and Others, Petitioners*, 1893, 20 R. 825, 30 S.L.R. 758. It should therefore be remitted to the junior Lord Ordinary or be dismissed. The Inner House could not deal with it without consent of parties—*Mitchell v. Mitchell*, 1864, 2 Macph. 1378. The Court should not deal with the petition in the exercise of its *nobile officium*. This was only done when there was no other remedy.

Counsel for the petitioners was not called on.

LORD PRESIDENT—The petition as originally framed was properly presented to the Lord Ordinary in accordance with the Trusts Act (11 and 12 Geo. V, cap. 58), and was competently brought before this Division on a reclaiming note against the Lord Ordinary's interlocutor. In the course of the hearing, however, it became apparent that in the rather unusual circumstances presented by the case the objects of the petition could not be secured without resort to the common law powers of the Court under its *nobile officium*, and the petitioners having proposed to amend the petition we gave them an opportunity of doing so. The amendment took the form of deleting the reference to the Trusts Act from the narrative and adding a crave for sequestration to the prayer. No objection was tabled to this amendment and it was allowed. But it is now maintained that in consequence of the amendment having been made the petition has ceased to be competent before this Division. The argument is that under the Distribution of Business Act 1857 a petition of the character which this petition has come to assume in consequence of the amendment must be presented in the first instance to the Junior Lord Ordinary. I think this objection must be repelled. In the first place the objection comes too late. If it had been a good one it should have been tabled on the petitioner's motion to amend. But in the second place it would be contrary to all reason and principle to hold that in a proceeding competently before the Division on reclaiming note the Distribution of Business Act implies any restraint on the power of the Division to allow any amendment designed to facilitate appeal to the *nobile officium*, even though—had the petition been originally framed for that purpose—it would have had to be presented in the first instance to the junior Lord Ordinary.

LORD MACKENZIE—I concur.

LORD SKERRINGTON—I concur.

LORD CULLEN did not hear the case.

The Court recalled the interlocutor of the Lord Ordinary, sequestrated the estate, and appointed a judicial factor.

Counsel for the Petitioners—Patrick, Agents—Strathern & Blair, W.S.

Counsel for the Minuters the British Legion—Burns, Agents—Strathern & Blair, W.S.

Counsel for the Respondents—Mitchell, K.C.—Maclaren. Agent—W. R. Mackersy, W.S.

Counsel for the Minuters the United Services Fund—Menzies, Agents—Hutton, Jack, & Crawford, S.S.C.

Saturday, June 17.

FIRST DIVISION.

[Lord Hunter, Ordinary.

WESTVILLE SHIPPING COMPANY,
LIMITED v. ABRAM STEAMSHIP
COMPANY, LIMITED.

Title to Sue—Contract—Rescission—Assignment—Restitutio in integrum.

A Company assigned their rights under a shipbuilding contract to B & Company on certain representations as to the stage of construction reached by the vessel which were in fact false. B & Company subsequently sub-assigned their rights to C & Company, using practically the same representations but in ignorance of their falsity. On C & Company discovering the falsity of the representations and intimating that they repudiated the contract, B & Company were advised that they had no defence, and it was arranged that judgment should be allowed to go against them in the English Courts. B & Company then brought an action against A & Company for reduction of their contract with A & Company and for damages, but at the time of raising the action judgment had not been pronounced by the English Courts annulling their sub-assignment, though such judgment was obtained before the record was closed. In the action by B & Company against A & Company objection was taken that B & Company had no title to sue in respect that at the date of raising the action they had not been re-invested in their contract and therefore were not in a position to make *restitutio in integrum*. Held that B & Company had a good title to sue.

Contract—Misrepresentation—Homologation—Rescission—Shipbuilding Contract—Sub-Assignees in Knowledge of Misrepresentation Requesting Minor Alteration in Plan of Ship.

The sub-assignees of a shipbuilding contract after they had discovered the falsity of the representations on which they had bought, requested the ship-