Tuesday, March 13.

SECOND DIVISION.

[SINGLE BILL.]

THE DORIE STEAMSHIP COMPANY, LIMITED, PETITIONERS.

Ship — Process — Action against Ship to Enforce Maritime Lien—Statutory Limitation of Time within which Action "shall be Maintainable" — Petition to Extend Time Limit for Raising and Maintaining Action — Competency of Petition—Maritime Conventions Act 1911 (1 *and* 2 *Geo. V, cap.* 57), *sec.* 8.

The Maritime Conventions Act 1911, section 8, enacts—"No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight, or any property on board her, or damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel, whether such vessel be wholly or partly in fault . . . unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused. . . . Provided that any court having jurisdiction to deal with an action to which this section relates may, in accordance with the rules of court, extend any such period to such extent and on such conditions as it thinks fit, and shall, if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court or within the territorial waters of the country to which the plaintiff's ship belongs, or in which the plaintiff resides or has his principal place of business, extend any such period to an extent sufficient to give such reasonable opportunity." [The Court has not yet formulated rules under the section.]

The Court *dismissed* as unnecessary a petition to extend the time within which the petitioners might raise and maintain an action against a vessel to enforce their maritime lien against her, *holding* that there was nothing in the statute to prevent such an action being raised after the statutory limitation of time had expired, any objections to the maintainability of the action or extension of the time being appropriate to a subsequent stage of the case.

The Dorie Steamship Company, Limited, London, owners of the s.s. "Dorie," presented a petition to the Court to extend the period within which the petitioners may raise and maintain an action against the steamship "Kamenetz Podolsk" to enforce their maritime lien against her in respect of the loss and damage sustained by them in consequence of a collision between the "Dorie" and the "Kamenetz Podolsk."

The petition stated — "2. On the 17th January 1918 the said vessel collided with the s.s. 'Kamenetz Podolsk' near Gibraltar. As a result of the said collision the 'Dorie' was seriously damaged. 3. The said collision was caused by the fault of those in charge of the 'Kamenetz Podolsk.' 4. As the result of the said collision the petitioners have suffered loss and damage to the value of £5157, 14s. 6d., and they have a maritime lien over the said ship for the said damages. 5. The 'Kamenetz Podolsk' is at present laid up in the Gairloch, and is accordingly within the jurisdiction of your Lordships' Court. 6. The said vessel was at the time of the collision privately owned by Russian owners, and it is believed that she was then registered in the name of the association known as the Russian Volunteer Fleet Committee. After the said collision the petitioners endeavoured to ascertain her movements with the intention of arresting her as soon as she entered a British port. She was, however, under Admiralty control, and information with respect to her movements was accordingly at that time unobtainable. The petitioners made special inquiries at Lloyds, the secretary of which informed them on 6th June 1918 that no information about vessels in Admiralty control could be communicated. The petitioners also communicated with the Admiralty, who informed them on 23rd July 1918 that the said vessel had since the date of the collision become the property of His Majesty and registered in the name of His Majesty as represented by the Shipping Controller, and that she was accordingly not subject to legal proceedings. On or about 14th February 1923 the said vessel was transferred again to private ownership and the petitioners believe that she was then transferred to her former owners, but definite information on this point has been refused by the Board of Trade, and in any event the domicile of the said owners is unknown to the petitioners. 7. The petitioners not having commenced an action within two years from the date of the said collision, and being now desirous of taking proceedings to arrest the said vessel to enforce their maritime lien against her, are under the necessity of applying to your Lordships in terms of the said section of the said Act to extend the period within which they may raise and maintain an action against the said ship. The petitioners have in fact not had within the period referred to in the said section of the said Act any reasonable opportunity of arresting the said vessel."

On the petition appearing in Single Bills counsel for the petitioners moved that the prayer of the petition be granted, and argued—The petitioners were asking merely for authority to commence an action. The Court could pronounce an interlocutor similar to that pronounced by the Lord Ordinary on the Bills (Cullen) in *Birkdale Steamship Company, Limited, Petitioners*, 1922 S.L.T. 575. Although the Court had not formulated rules, it had power to exercise the discretion conferred on it by the section—*H.M.S. Archer*, [1919] P. 1, and since the Court had not formulated rules it was necessary in order to obtain the

desired authority that an application should be made to one of the Divisions of the Court. The following cases were also referred to—*M'Connachie, Petitioners*, 1914 S.C. 853, 51 S.L.R. 716; *Clan Line Steamers Limited* v. *Earl of Douglas Steamship Company, Limited*, 1913 S.C. 967, 50 S.L.R. 771; *The P.L.M.* 8, [1920] P. 236.

At advising—

LORD JUSTICE-CLERK—The petitioners are shipowners, and as such they own the s.s. "Dorie." That vessel was in collision on the 17th January 1918 with the "Kamenetz Podolsk" near Gibraltar and sustained damage, so the petitioners aver, amounting to £5157, 14s. 6d. The petitioners say that though they have made diligent inquiry they are unable to ascertain who the present owners of the vessel are, but they state she is now in the Gairloch, and is thus within the jurisdiction of the Court.

The petitioners have not raised an action within two years of the date of the collision, but they now desire to arrest the ship in order to euforce their maritime lien against her. They find themselves, however, confronted by section 8 of the Maritime Couventions Act 1911, which provides—[*His Lordship quoted the section*].

The prayer of the petition presented to this Court is "to extend the period within which the petitioners may raise and maintain an action against the 'Kamanetz Podolsk' to enforce their maritime lien against her in respect of the loss and damage sustained by them in consequence of the said collision."

It appears to me that the application is, to say the least of it, premature. The section provides, not that no action shall be *raised* after the expiry of two years, but that no action shall be *maintainable* after that time has elapsed. The word "maintainable," I think, postulates the existence of an action which may, however, in its course be arrested and may fail. I am confirmed in that view by the opinion of Mr. Justice Hill, who in the *P.L.M.* 8, [1920] P. 236, at p. 241, says—"The Act says that 'No action shall be maintainable.' I do not think that that means that no writ may be issued, but that if the statutory limitation has expired the action shall not be maintainable. Therefore I think the proper order is not that the writ should be set aside, but that the action is not maintainable. That in effect is just as if a preliminary objection had been raised at the trial and decided against the plaintiffs, and the result is the same as if I had set aside the writ." There is, I think, nothing in the statute to prevent the petitioners from raising their action, and no need therefore to invoke the authority of the Court to enable this to be done. There is, moreover, an obvious convenience in applying the statute, not on an *ex parte* application, when —as here—the available information is exiguous, but when both parties are present and the the Court is fully seised of the facts. Mr Normand feared that if he omitted to apply for leave now it might be successfully maintained against him at a subsequent stage that he ought to have sooner invoked the sanction of the Court, and that the mistake, if mistake it was, might prove to be irremediable. I think this apprehension is unfounded and that the case of The *P.L.M.* 8 is an authority to that effect.

Again, there is an obvious inconvenience in asking the Court *in limine* to exercise the jurisdiction conferred by the statute, seeing that at a subsequent date the Court may be invited to review its own order.

I may add that the mere fact that the Court has not yet formulated rules under section 8 of the Act does not, in my opinion, preclnde it from exercising its jurisdiction under that section. In this I agree with the view expressed by Mr Justice Hill in *H.M.S.* "*Archer*," [1919] P. 1.

On the whole matter I suggest that your Lordships should find that the petition is unnecessary, and that accordingly it should be refused.

LORD ORMIDALE—I agree, and I do so for two reasons.

I think it would be inexpedient to grant the prayer of this petition, because it might lead to this extraordinary and novel result, that a judgment pronounced by a Division of the Court would be open subsequently to review and recal by a judge in the Outer House. While one quite recognises the force of the argument that the order of this Court if made would be made upon an *ex parte* application, still I think the fact that that order had been made by a Division of the Court might tend to prejudice the interest of the defenders in the subsequent action which it is proposed to raise.

My other ground is this—It seems to me that the question raised in this petition is of such vital importance that it is undesirable that the matter should be considered at all until all parties interested are convened in an action raised in the ordinary way. The petitioners or the pursuers would then have a competent objector, and the question whether the action so raised was maintainable in view of the provisions of section 8 could be investigated and determined on a preliminary plea in that action.

Therefore I agree with your Lordship that this petition ought to be refused.

LORD HUNTER—I agree. The prayer of this petition is that we should "extend the period within which the petitioners may raise and maintain an action against the steamship 'Kamenetz Podolsk' to enforce their maritime lien against her."

Under the Maritime Conventions Act 1911, section 8, it is provided that no action in order to enforce a claim or lien against a vessel or her owners in respect of damage arising out of a collision shall be maintainable unless the action is brought within two years of the time the collision occurred. A much longer time than two years has elapsed in this case, but section 8 of the Maritime Conventions Act has this proviso —[*His Lordship quoted the proviso contained in the section*]. Manifestly it is not possible for a court exercising jurisdiction under that proviso to do so on an *ex parte* application. It appears to me to be essen-

tial in order to the Court taking action that it should be seised with the facts. In the present case no proposal was made on the part of the petitioners that there should be any inquiry at all, or, indeed, that we should cause the petition to be served.

At the argument it was suggested by counsel for the petitioners that we should grant a qualified order—that is to say, an order giving them the right to raise the action, but reserving to the judge before whom the action might be raised the right to deal with the question whether a case had been made out for extending the time. I am satisfied, upon an interpretation of the words of section 8 of the Maritime Conventions Act, that such a course is unnecessary, and indeed in my opinion would be futile. The section says nothing about proceedings not being taken. What it says is that the action shall not be maintainable. I see nothing to prevent proceedings being in point of fact initiated, and then, on a plea taken by the parties who are the proper defenders, it becomes the duty of the judge who is seised with the facts to determine whether or not a case has been made out for extending the time. That will occur in the present case if we refuse this application as unnecessary.

I do not for a moment suggest—indeed the contrary has been decided—that because no rules of Court have been framed to deal with this situation it necessarily follows that the petitioners are disentitled, owing merely to the lapse of time, to initiate and prosecute the action which they are proposing to start. But under the statute it is a question of discretion, and that discretion I think is properly and rightly exercised by the judge of first instance and not by a Court of Appeal such as we are.

LORD ANDERSON—This petition, which invokes the *nobile officium* of the Court, has been brought, we are told, to obtain a decision as to what is the proper procedure to be followed in cases to which the provisions of section 8 of the Maritime Conventions Act of 1911 apply. This matter seems to me to depend upon two things—In the first place, the meaning which the section as a whole bears, and especially the proviso with which the section concludes, and in the second place, the signification which is to be attached to the phrase with which the section opens—"No action shall be maintainable."

Section 8 as a whole imposes a statutory limitation of two years upon actions of this nature. But the proviso provides for the extension of that period in certain circumstances. The proviso consists of two branches—the first permissive, the word "may" being used; and the second imperative, the word "shall" being employed. The first part of the proviso seems to be applicable, primarily at all events, to actions *in personam* where it is not proposed to use any diligence against the offending vessel, and the discretion of the judge there is entirely permissive. But in the second part of the proviso the judge is bound to give an extension, if it is proposed to take proceedings *in rem* and to arrest the ship, if he shall be satisfied that the pursuer had no opportunity within the two years of arresting the offending vessel.

Before considering the other point—the meaning of the phrase with which the section opens—I shall point out what has been the practice under this section up to the present time. There are two views. One is that the appropriate procedure is to start with preliminary proceedings, which in England take the form of an application to the judge in chambers on an *ex parte* statement, and which take the form in this country of a petition like what we have before us invoking the *nobile officium* of the Court. In England the former of these modes of procedure was given effect to by Mr Justice Hill in the case of *H.M.S. "Archer,"* [1919] P. 1. He considered the application in chambers on an *ex parte* statement, granted leave to take proceedings, and when proceedings had been taken and the parties joined issue upon whether or not the plaintiffs had had an opportunity of arresting the ship during the two years, reversed himself and decided against the plaintiffs. Similarly in Scotland that mode of procedure was followed in vacation by Lord Cullen. Sitting in the Bill Chamber as Lord Ordinary on the Bills his Lordship disposed of a petition which had been addressed to the *nobile officium* of the First Division and *sub conditione* granted the prayer, which was similar in terms to that now under consideration. In my judgment that is bad procedure and ought to be disapproved of. In my opinion we ought to adopt the other procedure followed in England, of which there is an example in *P.L.M.* 8, [1920] P. 236. In that case the plaintiff brought his action for damages straight away, and after that action had been brought parties joined issue upon the question whether cause had been shown for extension. Again, the same judge, Mr Justice Hill, declared against the plaintiffs and dismissed the action.

I am, I think, justified in my view that this is the proper procedure when I consider the meaning of the phrase "no action shall be maintainable." It seems to me that that phrase implies that before this question can arise for consideration and determination there must be an action in existence, and an action does not come into existence until the Court has considered it, and it may be until the first interlocutor of the Court has been pronounced with reference to it. And the action which the section seems to contemplate is the main action, not any preliminary proceeding, but the action which has for its purpose the obtaining of damages against the offending vessel or its owners. Here at the present time there is no action in that sense in existence, and therefore it seems to me that the question is not ripe for consideration and determination

Now the proper mode, according to the case of *M'Connachie* (1914 S.C. 853), of initiating proceedings *in rem* against an offending vessel is to present a petition to

the Lord Ordinary on the Bills for warrant to arrest the ship. That is the necessary first step, in my opinion, under the provisions of section 8 of this statute. On that being done the matter is put in the hands of the Lord Ordinary for further procedure. He may grant the warrant to arrest *de plano;* he may grant it on caution; he may only grant it on being satisfied that cause has been shown that arrestment could not have been effected within the statutory time. These are matters entirely for him in the first instance, and I express no opinion in regard to them. For these reasons I agree with your Lordship. But I would go a step further than your Lordship is prepared to do. I think this petition is incompetent. I do not think there can be at any time any occasion for the employment of the procedure here followed. Therefore I would go further and say that this petition is not only premature but that it is incompetent.

The Court dismissed the petition as unnecessary.

Counsel for the Petitioners—Normand. Agents—Boyd, Jameson, & Young, W.S.

HIGH COURT OF JUSTICIARY.

Friday, March 16.

(Before the Lord Justice-General, Lord Cullen, and Lord Sands.)

[Sheriff Courts at Cupar and Dunfermline.

BRANDER *v.* KINNEAR. KELSO *v.* SOUTAR. WILLIAMSON *v.* SOUTAR.

Justiciary Cases—Statutory Offence—Food and Drugs—Whisky—Sale of Whisky more than 35 *Degrees below Proof—Notice Exhibited in Premises that Spirits Diluted and Strength Not Guaranteed—Whether Sale to Prejudice of Purchaser—Sale of Food and Drugs Act* 1875 (38 *and* 39 *Vict. cap.* 63), *secs.* 6 *and* 8—*Licensing Act* 1921 (11 *and* 12 *Geo. V, cap.* 42), *sec.* 10.

A publican exhibited on a shelf behind the bar of his tavern, and visible from any part of the bar, a printed notice in these terms—"All spirits sold in this establishment are diluted. No strength guaranteed." The notice was printed in large letters and could be easily read by a customer. In a charge against the publican of a contravention of the Sale of Food and Drugs Act 1875, section 6, and the Licensing Act 1921, section 10, in respect that he had sold as "whisky" liquor more than 35 degrees under proof, *held* that the accused fell to be convicted on the grounds (1) that whisky so diluted by water as to be more than 35 degrees below proof was not "whisky" within the meaning of the Licensing Act 1921, and (2) that a notice such as that exhibited did not comply with the Sale of Food and Drugs Acts in respect that it failed to convey to the purchaser clear and unambiguous intimation of the character of the article with which he was being supplied.

The Sale of Food and Drugs Act 1875 (38 and 39 Vict. cap. 63) enacts—Section 6—"No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding £20. . . ." Section 8—"Provided that no person shall be guilty of any such offence as aforesaid in respect of the sale of an article of food or a drug mixed wth any matter or ingredient not injurious to health and not intended fraudulently to increase its bulk, weight, or measure, or conceal its inferior quality, if at the time of delivering such article or drug he shall supply to the person receiving the same a notice, by a label distinctly and legibly written or printed on or with the article or drug, to the effect that the same is mixed."

The Licensing Act 1921 (11 and 12 Geo. V, cap. 42) enacts—Section 10—"In determining whether an offence has been committed under the enactments relating to the sale of food and drugs by selling to the prejudice of the purchaser whisky, brandy, rum, or gin not adulterated otherwise than by any admixture of water, it shall be a good defence to prove that such admixture has not reduced the spirit more than 35 degrees under proof. . . ."

Brander v. *Kinnear.*

Henry Kinnear, publican, Edenvale Tavern, Springfield, Fifeshire, *respondent,* was charged in the Sheriff Court of Fife and Kinross at Cupar at the instance of George Brander, Procurator-Fiscal of Court, *appellant,* upon a summary complaint in the following terms—"You are charged at the instance of the complainer that on 25th October 1922, within the bar of Edenvale Tavern aforesaid, occupied by you, you did (1) in response to a demand by Marshall Gorrie, sanitary inspector and sampling officer for Cupar District of Fifeshire, for three glasses of whisky, sell to the said Marshall Gorrie an article which was not genuine whisky but whisky adulterated by the admixture of water, which reduced the spirit to 48·7 degrees under proof, and (2) in response to a demand by the said Marshall Gorrie for three glasses of whisky, sell to the said Marshall Gorrie an article which was not genuine whisky but whisky adulterated by the admixture of water, which reduced the spirit to 40·0 degrees under proof; contrary to the Sale of Food and Drugs Act 1875, section 6, as amended by the Sale of Food and Drugs Act Amendment Act 1879 and the Licensing Act 1921, section 10; whereby you are liable for each offence to a penalty not exceeding £20, and in default of payment thereof to imprisonment in terms of section 48 of the Summary Jurisdiction (Scotland) Act 1908."

The accused pleaded not guilty.

On 12th December 1922 the Sheriff-Substitute (DUDLEY STUART) found the accused not guilty.