

Wednesday, January 13.

FIRST DIVISION.

[Lord Fraser, Ordinary.]

ENGLISH'S COASTING AND SHIPPING COMPANY (LIMITED) v. THE BRITISH FINANCE COMPANY (LIMITED).

Process—Expenses—Security for Expenses—Companies Act 1862 (25 and 26 Vict. cap. 89), sec. 69—Judgments Extension Act 1868 (31 and 32 Vict. cap. 54).

In an English suit for debt, both the parties to which were resident in England, the plaintiffs obtained a judgment against the defendants. They then registered this judgment in the Books of Council and Session under the Judgments Extension Act 1868, and proceeded to arrest a vessel in which the defendants had a beneficial interest, and which was at a Scottish port. The defendants raised an action in the Court of Session concluding for reduction of the extract registered certificate of judgment, and also for damages. *Held* that in so far as regarded the reductive conclusions the pursuers were entitled to proceed without finding security for costs, and that section 69 of the Companies Act 1862 was not applicable, in respect the pursuers, though nominally pursuers, were not truly *in petitorio*.

On 4th November 1884 the British Finance Company (Limited) obtained a judgment in default against English's Coasting and Shipping Company (Limited) for a sum of £69, 2s. for alleged debt, with £5, 11s. for costs—making together £74, 16s.—in an action raised in the High Court of Justice, Queen's Bench Division, Liverpool District Registry. Both these companies were registered under the Companies Acts, and had their registered offices in Liverpool, or elsewhere furth of Scotland.

On 15th November 1884 the British Finance Company registered this judgment in the Books of Council and Session under the Judgments Extension Act 1868. They then obtained the concurrence and authority of the Lord Ordinary on the Bills for putting the warrant of arrestment contained in the extract registered certificate of judgment into execution, and caused the vessel "Magdala," of Bristol, in which English's Coasting and Shipping Company had a beneficial interest, and which was at Grangemouth, to be arrested and dismantled, with the result, as was averred in this action, that she lost the benefit of a charter she was then under to proceed to Demerara.

English's Coasting and Shipping Company (Limited) then raised this action against the British Finance Company (Limited), concluding for reduction of the "extract registered certificate of judgment and warrant of the Lords of Council and Session thereon, dated the 10th day of November 1884, at the instance of the said defenders against the said pursuers, having concurrence and authority by Lord Kinneir, Ordinary officiating on the Bills, thereon, for putting the warrant of arrestment contained in said extract into all due and legal execution in so

far as regards maritime subjects, dated the 15th day of November 1884," with all that had followed thereon, and also concluding for £250 of damages.

The pursuers pleaded—" (1) The said registration in the Books of Council and Session at Edinburgh of said judgment, and the arrestment and whole proceedings thereon, being incompetent, wrongous, and illegal, the pursuers are entitled to decree of reduction as craved."

The defenders averred that there were only four shareholders in the pursuers' company, and pleaded, *inter alia*—" (1) The pursuers have no title to sue, in respect that they are not a company in the sense of the Companies Acts. (2) The defenders are not subject to the jurisdiction of the Courts of Scotland. (3) The pursuers having no assets sufficient to pay the costs of the present action, are bound to find caution for the expenses of process; or the liquidator, if appointed, is bound to sist himself pursuer."

The Lord Ordinary (FRASER) on 16th October 1885 appointed the pursuers to find caution for expenses within fourteen days, and on 7th November following, in respect the pursuers had failed to find caution for expenses, dismissed the action.

The pursuers reclaimed.

After hearing counsel, the Court on 19th December 1885 appointed the pursuers to put in a minute specifying the amount and description of the assets of the company. In obedience to this order the pursuers lodged a minute, stating that the assets of the company amounted to £639, 0s. 1d., which chiefly consisted of reversionary rights in two ships, of which the "Magdala" was one, and upon both of which there were mortgages.

The pursuers argued—The assets of the company, as stated in the minute, were sufficient to enable them to pay the expenses. But further, section 69 of the Companies Act 1862 [which provides that where any limited company is plaintiff or pursuer in any action, any judge having jurisdiction may, if 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, require sufficient security to be given for such costs, and may stay all proceedings until such security is given] was not applicable, because the pursuers here were not truly *in petitorio*. The grounds of reduction were that the decree was not registrable under the Judgments Extension Act 1868, as the Court which pronounced judgment was not one of the Courts mentioned in that Act; and further, because the pursuers were not subject to the jurisdiction of the Scottish Courts. They ought to be in as favourable a position as the suspenders of a decree in absence, and should not be found liable to find caution for expenses on the general rule that defenders were not so liable—*Stephen v. Skinner*, May 31, 1860, 22 D. 1122; *Accidental and Marine Insurance Company v. Mercati*, L.R., 3 Eq. 200; Buckley, p. 170. Moreover, this company was not a limited company within the meaning of section 69, as there were only four shareholders. The Lord Ordinary should have "stayed proceedings," and not dismissed the action.

The defenders replied—The only question was, whether the Lord Ordinary had exercised properly the discretion given him by section 69 of the statute. There was here an affidavit that the pursuers were unable to pay the expenses. Even supposing that the pursuers had the reversionary rights stated in their minute, those were not the kind of assets that would form a good answer to this demand—*Lydney and Wigpool Iron Ore Company v. Bird*, 23 Ch. D. 358; *Lashoe Mining Company v. Ferguson*, L.R., 2 Eq. 371. The summons here contained not only reductive conclusions, but also a conclusion for damages. According to the English practice, the order pronounced upon the defendant was to find security for costs, and failing his doing so the action was to stand dismissed—*Moscow Gas Company v. International Financial Society*, L.R., 7 Chan. 225, per Jessel; Daniel's Chan. Practice, 1954; *La Grange v. M'Andrew*, 4 Q.B.D. 210. The pursuers here were a limited company, and the Court would not go into the question of the number of shareholders.

At advising—

LORD PRESIDENT—In this case the Lord Ordinary on 16th October 1885 appointed the pursuer to find caution for expenses within fourteen days, and the pursuer having failed to obey that order the Lord Ordinary pronounced another interlocutor on the 7th of November following, by which, in respect the pursuers had failed to find caution for expenses, he dismissed the action.

I understand the ground of the Lord Ordinary's judgment to be, that he thought the pursuers were bound to find caution under the provisions of section 69 of the Companies Act 1862, which provides that "where a limited company is plaintiff or pursuer in any action, suit, or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by any 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, require sufficient security to be given for such costs, and may stay all proceedings until such security is given."

The section is applicable only to the plaintiff or pursuer in any action, &c., and that that plainly means the party who is truly *in petitorio* is demonstrated by the remedy which is provided in the event of security not being found, namely, that the Judge may stay the proceedings until security is given.

The question here is, whether the pursuers of this reduction are pursuers within the meaning of section 69, and in order to determine that it is necessary to advert shortly to the history of the case.

The parties on both sides are English, and have no connection with Scotland, and there was therefore no foundation for jurisdiction, at least before the commencement of these proceedings. On 4th November 1884 the defenders obtained a judgment in default against the pursuers for a sum of £69, 2s., with £5, 14s. for costs, making up the sum of £74, 16s. This decree was obtained in an action which seems to have been tried in the Queen's Bench Division of the High Court of Justice, Liverpool District Registry. I do not pretend to know what that means, but I suppose

it forms some part of the Queen's Bench Division as now constituted. This decree was registered here by the defenders under the Judgments Extension Act 1868, and upon that a warrant was obtained for arresting and dismantling a ship in which the pursuers had an interest, and which was lying at Grangemouth.

The objection is taken that this was an abuse and a misapplication of the Judgments Extension Act. It is said, in the first place, that this decree could not be registered because it was not pronounced by a Court which is mentioned in the statute. In the second place, it is said that the object of registering a decree is to put it into execution against persons resident in Scotland, and subject to the jurisdiction of the Scottish Courts. And, in the third place, it is said that there could be no opportunity of suspending because there was no charge, and indeed could be no charge, because the pursuers of the reduction are not in Scotland, and could not therefore be charged upon that registered decree. In point of fact diligence was done against the ship, and she was arrested and dismantled. It was necessary in challenging these proceedings to raise an action of reduction, because suspension was not applicable. In these circumstances I do not think that this reduction is an action in which the nominal pursuers are really *in petitorio*, for I think that they are really defending themselves from active diligence which is being done by the defenders. Therefore I am of opinion that section 69 is not applicable in so far as regards the conclusions for reduction.

The conclusion for damages, if it is ever reached, will stand in a very different position, and it will be quite open for the defenders to move the Lord Ordinary to ordain the pursuers to find security for costs in regard to it, for then the reclaimers will truly be *in petitorio*.

I am therefore for altering the Lord Ordinary's interlocutor and allowing the case to proceed, so far as regards the reductive conclusion, without any security for costs being found by the pursuers.

As regards the expenses of the reclaiming-note, I think they should be reserved.

LORDS MURE, SHAND, and ADAM concurred.

The Court recalled the Lord Ordinary's interlocutors of 7th November and also of 16th October 1885, and found that the pursuers were entitled to proceed with the action in so far as regarded the reductive conclusions, without finding caution for expenses, and reserved the question of expenses.

Counsel for Pursuers (Reclaimers)—Watt, Agent—Alexander Clark, S.S.C.

Counsel for Defenders (Respondents)—Darling, Agent—Thomas Dalgleish, S.S.C.