

court-martial, but also has done an act which, according to the popular view of an officer's duty, is one that can only be justified in very special circumstances. This is all the more the case where, as here, it is averred that the surrender for which the pursuer is said to have been entirely responsible had been the subject of rumours which seriously reflected on the conduct of the troops and on the courage and capacity of the officers who took part in it, and especially of the officer in command. It is no doubt true that the writer of the article states circumstances connected with the surrender which may be taken to indicate that in his opinion the surrender might be considered as justifiable, but it does not follow that military critics, or even the ordinary members of the public, reading his statement of the alleged facts, would have shared this opinion. It is for a jury to say how far they may be taken to obviate or mitigate the slander contained in the first three lines of the article complained of, from which they are separated by nearly a page of print.

In my opinion an issue should be allowed substantially in the terms proposed by the pursuer and without innuendo. The words complained of are not open to two interpretations—the one innocent and the other defamatory; and it is only in such cases that an innuendo is required. If it is not defamatory to say of an officer in command that he gave an order to his men to throw down their arms when no such order was in fact given, then the action would fall to be dismissed; if, on the other hand, such a statement is *prima facie* defamatory, no innuendo is required.

On the construction of Article 555 of the King's Regulations I entertain no doubt. I think an officer who orders his men to put down their arms and surrender comes as clearly within the purview of that article as if he had himself hoisted a white flag or ordered one to be hoisted. The ordinary symbol of surrender is the throwing down of the arms and the raising of the unarmed hands in token of this having been done. I am therefore in favour of affirming the Lord Ordinary's interlocutor so far as he repels the first plea-in-law for the defenders, and for granting the pursuer an issue for the trial of the cause.

LORD GUTHRIE was absent.

The Court recalled the interlocutor of the Lord Ordinary in so far as it assigned a diet for the adjustment of issues, *quoad ultra* adhered to the interlocutor, and allowed the issue as amended *supra*.

Counsel for the Pursuer and Respondent—Macphail, K.C.—Fenton. Agents—Melville & Lindesay, W.S.

Counsel for the Defenders and Reclaimers—Sandeman, K.C.—Macquisten. Agents—Alex. Morison & Co., W.S.

Tuesday, March 18.

SECOND DIVISION.

[Sheriff Court at Glasgow.]

G. & J. RAE, LIMITED v. PLATE
 GLASS MERCHANTS' ASSOCIATION,
 AND OTHERS.

*Trade Union—Jurisdiction—Agreement for
 Payment of a Penalty—Trade Union Act
 1871 (34 and 35 Vict. cap. 31), sec. 4.*

The Trade Union Act 1871, section 4, provides—"4. Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely—(1) Any agreement between members of a trade union as such concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business. . . . (2) Any agreement for the payment by any person of any subscription or penalty to a trade union."

The rules of a trade union provided that all members should adhere to the selling price fixed by the union, and should give full information or show their books when required to do so. A firm which was a member of the union was fined under these rules by deduction of the sum of £10 from their membership deposit for refusal to supply information as to a certain transaction. The firm thereupon brought an action against the union for declarator that during a period which covered the transaction in question they had ceased to be members of the union, and for interdict against the union putting the fine into force. It was admitted that at the date when the fine was imposed the pursuers were members of the union. *Held* that the action was excluded by section 4 of the Trade Union Act 1871.

The Trade Union Act 1871 (34 and 35 Vict. cap. 31), section 4, is quoted *supra* in rubric.

G. & J. Rae, Limited, glass merchants, Ingram Street, Glasgow, *pursuers*, brought an action in the Sheriff Court at Glasgow against the Plate Glass Merchants' Association, 94 West Regent Street, Glasgow, and others, *defenders*, in which they craved the Court "(1) to find and declare that during the period from 24th August 1916 until 26th October 1916 the pursuers were not members of the Plate Glass Merchants' Association, 94 West Regent Street, and (2) to interdict the defenders, jointly and severally or severally, or anyone acting on their behalf or on behalf of any one of them, from putting into force against the pursuers a pretended fine of ten pounds sterling, which pretended fine was imposed on or about 30th March 1917, and particularly from putting said pretended fine into effect by applying the pursuers' present deposit in payment thereof, and to grant interim interdict."

The pursuers averred—" (Cond. 4) On 2nd November 1916 the secretary of the Plate

Glass Merchants' Association wrote the pursuers asking them to furnish the secretary with a copy of a quotation for a job at Glengarnock, said quotation having been given during the period between 24th August and 26th October 1916. The pursuers by letter of 7th November 1916 refused to give the information requested, on the ground that during the period in question pursuers were not members of the Association. On 17th January 1917 the secretary wrote the pursuers to send him a copy of their quotation for the job at Glengarnock with the official acceptance therefor, and pursuers by letter of 26th January 1917 stated that they had no intention of departing from the attitude taken up by them that they were now members as from 26th October 1916, and that any of their actings previous to that date did not come under the jurisdiction of the Association. Notwithstanding this, on or about 30th March 1917 the defenders' Association at the Executive meeting held on that date imposed a pretended fine of ten pounds sterling on the pursuers for refusal to give the information asked for in their letter of 17th January. Pursuers thereupon, through their solicitors, on 31st March 1917 again informed the defenders' Association by letter to the secretary on that date that the pursuers were not bound to supply the information, and asked for an undertaking from the defenders' Association that they were not to put the fine into force; no such undertaking has been given. The defenders have, by letter from their secretary, dated 21st June 1917, applied for payment of the fine, and have intimated that failing payment within seven days the present deposit will be applied in payment of the fine." The defenders denied that the pursuers had ever ceased to be members of their Association.

The defenders further averred—" (Stat. 1) The Plate Glass Merchants' Association (Scottish District) is a trade union within the meaning of the Trade Union Acts 1871 to 1913, but it is not registered. It regulates the relations between masters and masters in the glass trade throughout the whole of Scotland, and imposes restrictive conditions on the conduct of the businesses carried on by its members. Certain preferences are granted by the manufacturers to members of the Association over non-members. . . . The pursuers are full members, and Mr James Anderson is their managing director. (Stat. 2) Article 2 of the rules requires each full member to deposit £20 with the Association, and article 4 provides as follows:—"All members shall be bound to adhere to the selling prices and to conform to the rules and conditions adopted by the Association and in force from time to time, and the deposit of each member shall be held by the Association as a guarantee and security for the due fulfilment of this obligation." (Stat. 3) Article 5 provides—" . . . A member who has been fined must forthwith pay to the Association the amount of such fine, failing which such member's deposit shall be applied in payment thereof so far as necessary . . ." Stat. (6) The fine

referred to was imposed in respect of the offence described in pursuers' condescence No. 4, being a refusal to supply information to which defenders were entitled, and was in accordance with the rules of the Association, and particularly rules 8 and 26, which provide as follows:—(Rule 8) 'All members shall give full information to the secretary, or his approved representative, when required to do so, shall show their books relating to same if requested, . . .'; (Rule 26) 'The executive committee may remove from membership any member who has failed to observe and comply with any of the rules in force for the time being, and may also impose a fine of such amount as it thinks proper for each such failure.'

The pursuers *pleaded, inter alia*—"2. The pursuers not being members of the defenders' Association for the period in question, are entitled to the declarator asked, with expenses. 3. The pursuers not being members of the defenders' Association during the period in question, the defenders have no jurisdiction over them for their actions during said period, and the defenders should accordingly be interdicted from putting the pretended fine of 30th March 1917 into force, with expenses."

The defenders *pleaded, inter alia*—"1. The action is incompetent at common law, the defenders being a trade union for the purposes stated in article 1 of the defenders' statement of facts, and is excluded by section 4 of the Trade Union Act 1871, and by section 4 of the Trades Disputes Act 1906, and should be dismissed, with expenses. 5. The fine objected to having been imposed in accordance with the rules of the Association, and for a breach of these rules committed by the pursuers whilst members of the Association, the defenders should be assolized, with expenses."

On 6th November 1917 the Sheriff-Substitute (FYFE) sustained the first plea-in-law for the defenders and dismissed the action.

The pursuers appealed to the Sheriff (A. O. M. MACKENZIE), who on 8th March 1918 refused the appeal.

Note.—"This is an action at the instance of a member of a trade society called the Plate Glass Merchants' Association, against that society, in which the pursuers crave the Court to find and declare that during the period from 24th August 1916 until 26th October 1916 they were not members of the defending Association, and to interdict the defenders from putting into force against the pursuers a pretended fine of ten pounds sterling, imposed on 30th March 1917, and particularly from applying the pursuers' present deposit with the society in payment of that fine. The defenders plead that the jurisdiction of the Court is excluded by section 4 of the Trade Union Act of 1871, and it was admitted by the pursuers' agent that the defenders were a trade union within the meaning of that Act. The Sheriff-Substitute has sustained the plea of no jurisdiction, and has dismissed the action. From the note appended to the Sheriff-Substitute's interlocutor it appears that his ground of judgment was that the privilege of a trade union is that it cannot be sued at law. It

is, I think, clear that this ground of judgment is too broadly stated, because there are in the books a number of cases in which actions at the instance of members of trade unions against their respective unions have been entertained. The question is whether the action falls within the description of 'legal proceeding,' in regard to which the jurisdiction of the courts of the country is excluded by the provisions of section 4 of the Act of 1871, and the answer to that question depends on whether or not the action is brought for one or other of the objects enumerated in the section referred to.

"What, then, is the object of the action? Shortly stated, the object is to prevent the defenders from putting into force against the pursuers a fine which the executive of the defenders' Association imposed upon the pursuers for an alleged breach of the rules, which the pursuers say they did not commit, and from applying part of a sum which they had deposited with the society, in terms of the rules, in payment of that fine. The alleged breach of the rules for which the fine was imposed was this—By rule 8 of the rules of the Association it is provided that all members shall give full information as to all transactions to the secretary when required to do so. On 2nd November 1916 the pursuers were called upon by the secretary of the society, under rule 8, to give him information as to a quotation which they had given for a job at Glengarnock. The pursuers refused to give the information asked for, on the ground that at the time when the quotation was given they were not members of the Association. They explain that they had been members of the Association prior to August 24th of the same year, but that on that day an intimation of resignation, given by them a month before, took effect, and they accordingly ceased to be members, and they aver that they were not restored to membership until 26th October 1916. The averment of the defenders is, that the pursuers did not insist in their intimation of resignation, and consequently did not cease to be members of the society on 24th August, and were members at the date on which the quotation referred to was given. The pursuers complain that the defenders, disregarding their assertion that they had not been members when the quotation was given, imposed upon them on 30th March 1917 the fine of £10, to which they object, and subsequently intimated to them that, failing payment, the pursuers' deposit with the society would be applied, so far as necessary, in payment of the fine. It is not matter of dispute that the defenders' Association by their rules are entitled to impose a fine on members who fail to comply with the rules, and in the event of any member who is fined failing to pay the fine imposed upon him, to apply his deposit money, so far as necessary, in payment of the fine.

"Such being the object of the action and the nature of the dispute between the parties, the defenders maintain that the action is excluded by the following provision in section 4 of the Trade Union Act 1871—

'Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely, . . . (2) Any agreement for the payment by any person of any subscription or penalty to a trade union.'

"I am of opinion that the defenders' contention is sound. The rules under which the fine was imposed, and the deposit money applied in payment of it, constitute an agreement between the members of the Association for the payment of a penalty to the union within the meaning of the part of the section which I have quoted, and the object of the action, in my opinion, is to enforce that agreement. It is perfectly true that the object of the action is to have the agreement enforced not affirmatively but negatively; but to restrain a trade union from imposing a penalty which they allege, and one of the members denies, has been incurred is just as much an enforcement of the agreement as to ordain the member to pay a fine imposed by the union—*vide* opinion of Buckley, L.J., in *Osborne v. Amalgamated Society of Railway Servants*, L.R. [1911] 1 Ch. at p. 570. If in this case there had been no deposit money available for satisfaction of the fine, an action by the Association could not have been brought to have it declared that the fine was justly imposed and for decree ordaining the pursuers to pay it, and I do not think that the Legislature can have intended to exclude actions at the instance of a trade union to enforce payment of a fine which it has imposed on a member under powers conferred by the rules, and not to exclude actions by members to prevent fines being imposed. It appears to me to make no difference that the pursuers deny that they incurred the penalty by a breach of the rules, in respect that they were not members of the Association at the time when they gave the quotation about which they were asked to give information to the secretary. The fine was imposed upon them when they were admittedly members of the Association, and it was, in my opinion, for the executive of the Association to decide whether the penalty had been incurred. In *Chamberlain Wharf, Limited v. Smith*, L.R. [1900] 2 Ch. 605, the plaintiffs, having been expelled by a trade union for a breach of one of its rules concerning the conditions upon which the members should sell their goods, applied for an injunction to have the defendants restrained from acting on the resolution to expel them, alleging that they had not been heard in their defence before it was passed. Their case necessarily was that they had not broken the rule. The Court held that it could not entertain the action on the ground that the object of the action was directly to enforce an agreement between the members of a trade union concerning the conditions on which they should sell their goods, the jurisdiction of the Court being excluded with respect to legal proceedings having such an object by the first paragraph of section 4 of the Act of 1871. I am of opinion that the present

case falls under the principle of that decision, and the decision itself has been recognised as sound in later cases.

"I agree, therefore, with the Sheriff Substitute that the defenders' first plea-in-law falls to be sustained and the action dismissed."

The pursuers appealed, and argued—The Court had jurisdiction to entertain the action as laid. Under the first conclusion the pursuers were entitled to invoke the jurisdiction of the Court to determine a disputed question of membership. Under the second conclusion the action was one to prevent the misapplication of a membership deposit, and not to enforce an agreement between a trade union and one of its members. Rule 8 of the Association applied to members during their period of membership only. That being so, there was no agreement between the pursuers and the defenders under which the pursuers were obliged to pay a fine for an offence which had occurred while they were not members of the Association. The pursuers in consequence of their non-membership of the Association at the time of the contract in question were entitled to ask the Court for interdict. It was well settled that a member of a trade union was entitled to raise an action against the trade union in order to prevent misapplication of trade union funds—*Wolfe v. Mathews*, [1882] 1 Ch. D. 194—and one branch of a trade union could raise a similar action against another branch—*MacLaren v. Miller*, 1881, 7 R. 867, 17 S.L.R. 607. On a question of construction the Court had power to interfere. It was for the Court to construe the pursuers' agreement with the defenders. If the defenders had acted within their powers, however wrongly, the pursuers had no redress, but it was otherwise if the defenders had, as here, acted *ultra vires*—*Yorkshire Miners' Association v. Howden*, [1905] A.C. 256, 42 S.L.R. 868. In that case, and in the case of *Osborne v. Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540, the Court entertained a question of construction, and decided that the actions of the trade unions there involved had been *ultra vires*. Trust funds were not at the absolute disposal of executive committees to do with as they pleased—*M'Dowall v. M'Ghee and Others*, 1913, 2 S.L.T. 238, *per* Lord Cullen at p. 240. Moreover, the Association's rules could not be held to apply to a period when the pursuers were not members of the Association. Counsel also referred to the case of *Luby v. Warwickshire Miners' Association*, [1912] 2 Ch. 371.

Argued for the defenders—The Sheriff's judgment was right and ought to be affirmed. The Court had no power to deal with an action of declarator of abstract right without an operative conclusion. Such a decree would not be effective—*Gifford v. Trail*, 1829, 7 S. 854, at p. 867; *Ailken v. Associated Carpenters and Joiners of Scotland*, 1885, 12 R. 1206, *per* Lord President Inglis at p. 1211, 22 S.L.R. 796; *Smith v. Scottish Typographical Association*, 1913, 56 S.L.R. 46. The Court could only determine whether the pursuers were members of the Associa-

tion at the period of the contract in question by considering the rules, and this it was precluded from doing, as these rules constituted an agreement within the meaning of section 4 of the Trade Union Act 1871—*Chamberlain's Wharf Limited v. Smith* [1900] 2 Ch. 605, *per* Jessel, M.R., at p. 611. The case of *Osborne v. Amalgamated Society of Railway Servants* was distinguishable.

At advising—

LORD JUSTICE-CLERK—In my opinion this appeal should be refused. I think the judgment of the Sheriff is right.

It is not disputed that the defending association is a trades union. It follows that the courts of law are not entitled to entertain any legal proceeding falling within the provisions of section 4 of the Trade Union Act 1871.

The pursuers seek a declaration that within certain dates they were not members of the defenders' association. That declaration, however, is merely ancillary to the conclusion for interdict which follows, and would not, in my opinion, of itself make the action competent if the real object of the action brought it within the purview of section 4 (*Smith*, 56 S.L.R. 46).

The particular provision we have to consider relates to "any agreement for the payment by any person of any subscription or penalty to a trade union." It is not limited to payment by a member of the trade union.

I think the case of *Smith* just referred to, and the cases of *Osborne* and *Chamberlain* cited by the Sheriff, were well decided, and are sufficient to support the conclusion at which the Sheriff has arrived.

As we are affirming the judgment of the Sheriff I do not feel called on to pronounce as to the competency of this appeal. That point was not argued before us, but I should not have been prepared to affirm the competency of the appeal without having the point fully argued.

LORD DUNDAS—I think the learned Sheriff's interlocutor is right, and as I agree with the reasons stated in his note I need do no more than briefly summarise my own views. I do not think it makes any difference that this petition is laid in a negative form—to interdict the defenders from putting into force the fine complained of—and not in the form of a demand by the defenders for payment of the fine. In substance it seems to me to be none the less a legal proceeding instituted with the object of enforcing an agreement for payment of a penalty to a trade union. It would therefore appear *prima facie* to be excluded from the jurisdiction of the courts of law by section 4 of the Act of 1871. But the appellants argued that there was here, as they undertook to prove, no agreement to enforce, because they were not members of the Association at the time when they gave the quotation in regard to which they subsequently refused to give information to the secretary. But that depends upon the meaning and construction of rule 8, as to which the parties are in dispute. The appellants were admittedly members when the fine was imposed, and I think it was for the

defenders to decide whether or not it had been incurred under the rules. This case is, in my judgment, directly within the principle of the decision in *Chamberlain's Wharf* (1900) 2 Ch. 605. The plaintiffs there sought to restrain the defendants from acting on a resolution to expel them from the trade union for an alleged breach of a rule which the plaintiffs denied having broken, and they asserted that they had not had a fair opportunity of being heard in defence before the resolution was passed. Here the pursuers seek to interdict the defenders from putting in force a fine for an alleged breach of a rule which they offer to prove that they did not break. In *Chamberlain's Wharf* the Court held that they had no jurisdiction to entertain the action, which was in substance an action to enforce an agreement between members within the meaning of section 4 of the Act. I think our judgment here must be to a similar effect. *Chamberlain's Wharf* was considered and approved by the First Division in the recent case of *Smith* (7th November 1918, 56 S.L.R. 46). I refer to the opinions then delivered, and particularly to that of Lord Cullen, which, subject to slight necessary verbal alterations, I might almost adopt as an expression of my own views in this case. The appellants cannot, in my judgment, derive aid, as they sought to do, from *Yorkshire Miners' Association v. Howden* ([1903] 1 K.B. 308, *affd.* [1905] A.C. 256, 42 S.L.R. 868), which was followed by this Division in *Wilson* (1912 S.C. 531, 49 S.L.R. 397). *Howden's* case is in no way inconsistent with *Chamberlain's Wharf*. In *Howden* a member sought to restrain the association from illegally applying the funds to purposes wholly unauthorised by its rules, and the action was therefore, as Lord Lindley put it ([1905] A.C. at p. 282, 42 S.L.R. 876), "no more struck at by section 4 than is an action brought by the trustees for the recovery of the funds of the trade union from some person wrongfully in possession of them." The present case is not of that kind; here, as in *Chamberlain's Wharf*, it seems to me that the Court is invited to adjudicate upon a domestic dispute between the trade union and a member. The pursuers being at the time members, had a fine imposed upon them, and they ask us, upon a construction of a certain rule or rules, to restrain the Association from putting the fine into force. This I think is, in view of section 4, a matter from which our jurisdiction is excluded. Persons who, like the pursuer, become members of a trade union, must, like those who submit their disputes to arbitration, remember that by so doing they agree to forego, to a greater or less extent, appeal to the courts of law, and they must accept the *incommoda* of that situation along with its *commoda*. I am therefore for refusing the appeal and affirming the interlocutor of the Sheriff.

I should add that, like the Lord Justice-Clerk, I am not as at present advised clear that this appeal was competent. No objection was stated to the competency, and

as we are affirming the Sheriff's judgment the point is not of practical moment in this case. If, however, a similar appeal should come before us I should wish to be assured of its competency before proceeding to entertain it.

LORD SALVESEN—In this case I confess that I was much impressed by the argument submitted on behalf of the appellants, that the sole question we have to decide is whether the appellants were or were not members of the defenders' Association at a given date. If this were truly the question, I think it would be competent for a court of law to consider and construe the documents, including, if necessary, the rules, in order to ascertain whether the alleged member had ever submitted himself to their jurisdiction. Accordingly if a fine had been imposed on the appellants after, according to their contention, they had resigned their connection with the Association, and they had not afterwards been readmitted to membership, I think we should have been bound to decide at what date their resignation took effect, and whether the Association had not arrogated to themselves a jurisdiction which they could only exercise over a member.

The admitted fact, however, that the appellants were members of the Association at the time when the fine was imposed upon them entirely alters the complexion of the case. The dispute between the parties is not whether the Association had jurisdiction over them, but whether on a sound construction of their rules they were entitled to impose a fine in respect of a breach of the rules committed by a member at a time when he alleged that he was not a member of the Association. This is a purely domestic difference, in deciding which the Association may have proceeded on a construction of their own rules which a court of law would not have supported. Such disputes are excluded by the Trade Union Act 1871, and I adopt the reasoning of the learned Sheriff on this point.

I cannot say that I regret reaching this conclusion, for I rather infer that the appellants resigned their membership of the Association in order that they might take a contract at lower prices than they could have done had they remained members of the Association, and that having obtained this advantage they thereafter rejoined the Association before the latter had become aware of the contract referred to. I accordingly agree with your Lordships in holding that we must affirm the interlocutor appealed against.

LORD GUTHRIE was absent.

The Court dismissed the appeal.

Counsel for the Pursuers—Brown, K.C.—Aitchison. Agents—Erskine Dods & Rhind, S.S.C.

Counsel for the Defenders—Morton, K.C.—J. A. Christie. Agents—Martin, Milligan, & Macdonald, W.S.