on the point above reported, and allowed the defender, if so advised, to answer within eight days.

Counsel for the Pursuer and Reclaimer—Wark, K.C. — Burns. Agents — Cowan & Stewart, W.S.

Counsel for the Defender and Respondent — Jameson — Gibson. Agent — R. D. C. M'Kechnie, Solicitor.

Saturday, January 7.

FIRST DIVISION.

[Lord Hunter, Ordinary.

THE PERFORMING RIGHT SOCIETY, LIMITED *v.* MAGISTRATES OF EDINBURGH.

Trade Union—Restraint of Trade—Title to Sue — Company — Combination to Exercise and Enforce Rights under Copyright Act 1911—*Trade Union Act* 1913 (2 *and* 3 *Geo. V, cap.* 30), *sec.* 2 (1).

The objects of an association of composers of musical works, and authors of literary or dramatic works, and of owners, publishers, and persons interested in the copyrights in such works, which was incorporated under the Companies Acts 1908 to 1913, were, *inter alia,* to exercise and enforce on behalf of the members of the company all rights and remedies under the Copyright Act 1911, or otherwise in respect of the public performance of the works. The memorandum of association contained a provision that the objects of the company should not extend to any of the purposes mentioned in section 16 of the Trade Union Act Amendment Act 1876. Under the articles of association every member undertook during the period of his membership to assign to the company his interest, whether present or future, in the right to perform any work which had been published or should thereafter be published by him, and invested the association with the sole right, so far as it was or should be invested in him, to authorise or forbid the public performance of the works published or to be published by him. In an action by the association to interdict the performance in public of certain musical compositions, the defenders objected to the pursuers' title to sue on the ground that the association was a trade union, and that therefore its registration under the Companies Acts was null and void. *Held* that the association was not a trade union within the meaning of the Trade Union Act 1913, section 2 (1), and objection *repelled.*

The Trade Union Act 1913 (2 and 3 Geo. V, cap. 30) enacts—Section 2 (1)—"The expression 'trade union' for the purpose of the Trade Union Acts 1871 to 1906 and this Act means any combination, whether temporary or permanent, the principal objects of which are under its constitution statutory objects. . . ." Section 1 (2)—"For the purposes of this Act the expression 'statutory objects' means the objects mentioned in section 16 of the Trade Union Act Amendment Act 1876, namely, the regulation of the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or the imposing of restrictive conditions on the conduct of any trade or business, and also the provision of benefits to members."

Upon 6th March 1914 The Performing Right Society, Limited, the membership of which consisted of composers of musical works, authors of literary and dramatic works, and of owners and publishers and persons interested in the copyrights of such works, was incorporated under the Companies Acts 1908 and 1913, with its registered office at Chatham House, 13 George Street, Hanover Square, London.

The memorandum of association stated—"3. The objects for which the company is established are (*a*) To exercise and enforce on behalf of members of the company, being the composers of any musical works or the authors of any literary or dramatic works, or the owners or publishers of or being otherwise entitled to the benefit of or interested in the copyrights in such works (hereinafter called 'the proprietors') all rights and remedies of the proprietors under the Copyright Act 1911, or otherwise in respect of the public performance of their works. . . . (*y*) Provided nevertheless that the objects of the company shall not extend to any of the purposes mentioned in section 16 of the Trade Union Act Amendment Act 1876."

The articles of association provided, *inter alia*—"4. Every member who is a publisher by virtue of his election undertakes . . . during the period of his membership to assign to the company in accordance with the rules for the time being in force his interest, whether present or future, in the right to perform any musical or dramatic work which has been or shall hereinafter [hereafter?] be published by him. . . . 5. Every member who is a publisher by virtue of his election also invests the company for and during the period of his membership with the sole right so far as it is or shall be or become vested in him (*a*) to authorise or forbid the public performance of all or any of the works published or to be published by him. . . . (*d*) To protect generally his interests in the said works."

In 1921 the Society brought an action against the Provost, Magistrates, and Councillors of the City of Edinburgh, *defenders,* concluding for interdict against the infringement of the rights of performance in public, vested in the pursuers, of certain musical compositions, and for damages in respect of infringement.

The parties averred, *inter alia*—"(Cond. 1) The pursuers The Performing Right Society, Limited (hereinafter referred to as 'the Society'), were incorporated under the Companies Acts 1908 and 1913 upon 6th March 1914 with the object, *inter alia,* of

exercising and enforcing on behalf of members of the Society, being the composers of any musical works, or the owners or publishers of such works, or persons being otherwise entitled to the benefit or interested in the copyrights thereof, all rights and remedies conferred by the Copyright Act 1911, or otherwise, in respect of the public performance of their works. The Society's repertoire, which embraces the performing rights in this country of foreign as well as British musical compositions, is very extensive, comprehending the most attractive of musical works, amongst which are those hereinafter specified, and is continually increasing. With reference to the statements in answer, added at adjustment, it is admitted that the pursuers are not registered under the Trade Union Acts, and that some of their members are publishers entitled to the benefit of copyrights in musical works. *Quoad ultra*, so far as not coinciding with the pursuers' averments, denied, under reference to the certificate of incorporation and memorandum and articles of association of the Society and its rules. Explained that the pursuers are seeking to enforce no rights of monopoly other than the rights conferred by the statutory and common law of copyright. (*Ans.* 1) The memorandum and articles of association of the pursuers are referred to for their terms. *Quoad ultra* denied. Explained that the pursuers are an association formed for and carrying on business in restraint of trade, and are endeavouring to obtain possession and control of, and to create a monopoly in, *inter alia*, popular light music, and that apart from the Trade Union Acts 1871 to 1913 they are an illegal association. They are a trades union within the meaning of the said Trade Union Acts, and their registration and incorporation as a company are void and illegal. They are not registered under the Trade Union Acts. Their members comprise, *inter alios*, publishers of musical works. The pursuers are called upon to produce their bye-laws and rules."

The defenders pleaded, *inter alia*—"1. The Society and its articles of association, bye-laws, and rules being in restraint of trade, and the Society being a trade union within the meaning of the Trade Union Acts, the action falls to be dismissed in respect that (*a*) The Society is not registered as a trade union; (*b*) The Society has no title to sue as a company registered under the Companies Acts; (*c*) The Society's registration under the Companies Acts is illegal and void."

On 7th December 1921 the Lord Ordinary (HUNTER) pronounced the following interlocutor:—" . . . Repels the pleas-in-law for the defenders to the pursuers' title to sue; *quoad ultra* allows to the parties a proof of their averments and to the pursuers a conjunct probation. . . ."

Opinion.—"The Performing Right Society, Limited, who are a company registered under the Companies Acts, have brought actions against the Dennistoun Picture Houses, Limited, the City of Edinburgh, and the City of Edinburgh Council of Social Service, in consequence of acts of alleged infringement of the rights of performance in public of certain musical works vested in the pursuers.

"All the defenders maintain that the pursuers have no title to sue the actions. This plea is based upon the allegation that the pursuers are a trade union, and the consequent contention that their registration under the Companies Acts is illegal and void.

"At the discussion it occurred to me that as the pursuers are in fact on the Register of Joint Stock Companies their title ought to be assumed until formal proceedings for the removal of their name from the register have been successfully taken. But in the *Edinburgh and District Aerated Water Manufacturers' Defence Association, Limited* v. *Jenkinson & Company* (1903, 5 F. 1159) a defence was sustained upon the ground that the association was a trade union within the meaning of the Trade Union Act Amendment Act 1876, and that consequently its registration under the Companies Acts was void. For the pursuers it was quite properly admitted that this decision precluded me from repelling the plea on the ground indicated, and the point was therefore not argued. I express no opinion upon this question, though I may note that the point is at present under consideration of the English Courts.

"The Trade Union Act 1871, sec. 5 (3), enacts—'The Companies Acts 1862 and 1867 shall not apply to any trade union, and the registration of any trade union under any of the said Acts shall be void.'

"Section 16 of the Trade Union Act Amendment Act 1876 (39 and 40 Vict. cap. 22) provides—'The term trade union means any combination . . . for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act (of 1871) had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade.'

"The terms of this definition are, as Lord Moncreiff pointed out in the case I have referred to, very wide, but their scope has been considerably curtailed by the Trade Union Act 1913 (2 and 3 Geo. V, cap. 30), which by section 2 (1) limits the definition, *inter alia*, to a combination whose principal objects are in restraint of trade. If this statute had been in existence in 1903 I think it is at least doubtful whether the decision in the *Edinburgh and District Aerated Water Manufacturers'* case would have been what it was.

"In considering whether or not the pursuers are a trade union within the meaning of the above Acts it is not unimportant to observe that the exclusive right of performing a musical work conferred by the Copyright Act 1911 (1 and 2 Geo. V, cap. 46) upon the author or publisher of such work is a peculiar right of property. It is not like ordinary subjects of commerce, which may be produced by any manufacturer, where the public are interested that the

prices should be regulated by fair competition in the open market, and not by a combination of manufacturers who maintain prices at an artificial level. It is essentially a privilege or monopoly right conferred by statute to encourage invention, and thereby to benefit the public by addition to its stock of original works. The value of the right depends upon the effective prevention of its infringement by unauthorised persons. A single author or publisher is greatly handicapped in the protection of such a right. He has at best but imperfect means of discovering acts of piracy, and their suppression if they are discovered by action in Court may involve him in pecuniary expenditure which he cannot face. A combination of authors and publishers is therefore almost a necessity for the reasonable enjoyment of such rights. In the formation of a combination to protect these statutory rights there is nothing unlawful either at common law or under statute. The lawfulness of the main objects of the Society has been recognised by decision in England. In the *Performing Right Society, Limited* v. *Thompson* (34 T.L.R. 351) Lord Justice, then Mr Justice, Atkin, in the course of his opinion, with a copy of which I have been provided, said—'It appears to me that the objects of the society, so far as they are to be derived from its memorandum and articles, which seem to me to be the true source to look for the objects of it, are in every respect legitimate. I think that it was an organisation which was intended to obtain for composers the full remuneration for their performing rights, and it was intended to provide efficient machinery for protecting those rights, for collecting fees, and if necessary for protecting the rights from those who were inclined to pirate them.' That summary I adopt as containing my own view of the objects of the company as disclosed in their memorandum and articles, which I have read but do not intend to refer to in detail.

"The defenders maintain that as all publishers who are members of the pursuers' company are during their period of membership bound to assign to the company all their musical rights, and as the amount of the fees to be paid for licences to perform are determined by the company, publishers are restrained in the exercise of their trade. No publisher who has assigned his rights has so maintained, and I doubt whether the defenders in these cases have any real interest to advance the plea. If they have infringed performing rights it would be unfortunate that they should escape the consequences by some flaw in the pursuers' title. In my opinion, however, the defenders have not succeeded in establishing that the pursuers are a trade union, and that their registration under the Companies Acts is therefore void.

"In a sense, no doubt, the provisions in the pursuers' memorandum and articles of association may operate as a restraint on the trade of publishers who are members of the company, and if the question had arisen under the Trade Union Act of 1876 the defenders would have had a much stronger case than they have since the passing of the Act of 1913. But if I am right in accepting the statement of Lord Justice Atkin as defining the principal objects of the company I do not think that they can be fairly said to be in restraint of trade. The circumstance that, as an ancillary result of their enforcement trade may be restrained, does not justify the inference that their principal object is to restrain trade. Article 3 (7) of the memorandum of association of the company is in these terms—'Provided nevertheless that the objects of the company shall not extend to any of the purposes mentioned in section 16 of the Trade Union Act Amendment Act 1876.' The defenders argued that this provision shows that the pursuers were conscious that their objects made them a trade union, but I do not think that this reasoning is sound. In the *Aberdeen Master Masons' Incorporation, Limited* v. *Smith* (1908 S.C. 669) the Court repelled a plea that a company was a trade union. There was a provision in the memorandum of that company that the incorporation should not impose on its members or support with its funds any regulation which if an object of the incorporation would make it a trade union. The Court founded upon this provision as negativing the view that the company was a trade union.

"The Town Council of Edinburgh and the City of Edinburgh Council of Social Service advanced a number of special points. It was said that the liability for infringement rested with the bands whom they employed to play. A number of cases dealing with the question of a principal's liability for his agent's acts were cited. On a careful consideration of the averments made by the pursuers I think that I shall be in a more favourable position to dispose of this plea when the facts are proved. I do not propose therefore at this stage to deal with the cases cited on this branch of the case. Similarly, I am indisposed to deal with the contention of the City of Edinburgh that the case against them should be dismissed because the town were not making profit out of the entertainments at which the infringements occurred. I am not satisfied that the point is sound, and on the averments it may never arise. I propose to repel the defenders' pleas to title, and *quoad ultra* to allow parties a proof of their averments."

The defenders reclaimed, and argued—The Society was not a company but was a trade union, and until registered as such had no title to sue. Restraint of trade being amongst its principal objects it came within the definition of a trade union under the Trade Union Act 1913, section 2 (1). At common law it was an illegal association—*Johnston* v. *Aberdeen Master Plumbers' Association*, 1921 S.C. 62, 58 S.L.R. 47. Registration under the Companies Acts did not cure the defect—*Edinburgh and District Aerated Water Manufacturers' Defence Association, Limited* v. *Jenkinson & Company*, 1903, 5 F. 1159, 40 S.L.R. 825. The facts showed that the Society was a trade union, so the registration was null—Trade

Union Act 1871 (34 and 35 Vict. cap. 31), sec. 5 (3)—and the Lord Ordinary was wrong in giving weight to the certificate of registration under section 17 of the Companies (Consolidation) Act 1908. Nor could the proviso in the memorandum of association have any effect in face of the facts. Such a proviso might be of effect when the actions of the association were in restraint of trade, as in *Aberdeen Master Masons' Incorporation, Limited* v. *Smith*, 1908 S.C. 669, 45 S.L.R. 484, but could not be where, as here, the restrictive purposes were contained in the memorandum and articles of association. The restrictions here were very stringent. They compelled the members to give up the free power of disposing of the product of their work. It could make no difference that the restrictions were for the ultimate benefit of the members. The cases of *Performing Right Society, Limited* v. *Thompson*, 1918, 34 T.L.R. 351, and *Performing Right Society, Limited* v. *London Theatre of Varieties, Limited*, 1921, 38 T.L.R. 184, were not binding on this Court. Counsel also referred to the Trade Union Act Amendment Act 1876 (39 and 40 Vict. cap. 22), sec. 16, on the definition of a trade union.

Argued for pursuers and respondents—The Society was not a trade union in the meaning of the definition in the Trade Union Act 1913. The illegality of objects in restraint of trade was based upon public policy, and could not apply to a free interchange of licence to perform musical compositions. "Restraint of trade" had always been applied to restrictions affecting production or price or the relations of master and servant. It was quite a different matter to apply the description to a combination for the purpose of dealing in monopolies, the rights to which were originally vested in the members, with a view to the ultimate benefit of the individual members and without restricting production or making access to their works more difficult. Such a society certainly could not be said to have for its principal objects the imposing of restrictive conditions on the members' conduct of their trades. Any restrictions imposed by the combination were reasonable and as such legal at common law. They were for the purpose of making the best use of the monopolies. The test of the objects was the memorandum and articles of association, which expressly excluded the "statutory objects" defined in the Trade Union Act 1913. In view of the possibility of the case being heard in the House of Lords the pursuers challenged the decision in the *Edinburgh and District Aerated Water Manufacturers' Defence Association, Limited* v. *Jenkinson & Company*, *cit. sup.*, and reserved their argument.

LORD PRESIDENT — The pursuers and respondents are a Society registered under the Companies Acts and limited by guarantee. The defenders and appellants object to the Society's title to sue. They say that notwithstanding its registration under the Companies Acts the Society is in truth and in fact a trade union, and that therefore its registration under the Companies Acts is null and void. If that be so, then it has no title to sue the present action. A defence of this kind was sustained in the case of the *Edinburgh and District Aerated Water Manufacturers' Defence Association*, 1903, 5 F. 1159, to which the Lord Ordinary refers in his opinion; and accordingly the objection to the pursuers' title must be regarded as forming a competent defence for the purposes of the present reclaiming note. Is it well founded? Is this Society a trade union or is it not? Is its object to impose restrictive conditions on the conduct of their businesses by its members? Or is its object to give to its members the benefit of combined protection for, and joint profitable exploitation of, the performing rights which belong to them as holders of copyright? If the first, then the Society is a trade union; if the second, it is not. In short, the alternative lies between holding that the Society is a trade union or that the Society is a joint adventure. The answer, it seems to me, depends on the fact that in accordance with the constitution and objects of the Society the members do not conduct any business of their own in connection with their performing rights, and therefore do not submit to any restrictive conditions in conducting such business; on the contrary, they agree so long as they continue to be members to contribute their performing rights to a joint adventure, which they endow with the necessary powers, because they consider that it can protect and exploit those rights better than they could do by themselves as individuals. These objects are not in restraint of trade; they are in support and in prosecution of it. It is true that the members bind themselves to assign not only all performing rights which they possess at the date when they become members, but also all such further performing rights as they may subsequently acquire during their membership, and this was said by the reclaimers to be a condition in restraint of trade. If it merits that description it does so in no other sense than does the usual restriction in a trade partnership to the effect that a partner shall not engage in trade in the same line as the partnership, or than the not uncommon provision in the appointment of a mercantile agent that he shall be sole agent as long as his appointment lasts. I arrive therefore at the conclusion that the pursuers' Society is not a trade union, and that the objection to its title to sue accordingly fails. [*His Lordship then dealt with the scope of the proof to be allowed.*]

LORD MACKENZIE — I am of the same opinion. The attack by the defenders upon the pursuers' title depends upon their being able to make out that the pursuers are a trade union—that is to say, that they are a combination whose principal objects are to enforce restrictions in restraint of trade. In my opinion, on a consideration of the memorandum and articles of association, the defenders fail to establish this part of their case. The pursuers avail themselves of the perfectly legitimate device of working in accordance with the doctrine of

partnership through an accredited agent, not to restrain trade but to develope it. Each individual member contributes his or her individual productions, not for the purpose of withholding these productions, the creation of their brains, from the public, but to make them available to the public; and the principal object of the Society is to prevent any member of the public, whether an individual or a corporation, taking their property for nothing. The right that the members have in the musical compositions is one which is secured to them by statute, and the purposes of the Society seem to me to be legitimate. Accordingly I agree that on that point, which is the only one of difficulty, the reclaimers fail.

Lord Skerrington—I concur.

Lord Cullen did not hear the case.

The Court pronounced this interlocutor—

". . . Vary said interlocutor by inserting after the words '*quoad ultra*' therein the words 'before answer,' and by inserting after the words 'conjunct probation' the words 'and in respect of the disclaimer by the pursuers of any intention to found upon sub-section (3) of section 2 of the Copyright Act 1911, in the averment on record that the defenders derive substantial revenue from the performances condescended on,' exclude said averment from said proof; *quoad ultra* adhere to the said interlocutor. . . ."

Counsel for Pursuers—Moncrieff, K.C.—Scott. Agents—Croft-Gray & Gibb, W.S.

Counsel for Defenders—Macmillan, K.C.—Graham Robertson. Agent—A. Grierson, S.S.C.

Saturday, January 14.

FIRST DIVISION.

MAGUIRE AND OTHERS *v.* CHARLES M'NEIL, LIMITED.

Nuisance—Noise and Vibration—Industrial District—Installation of Heavy Drop Hammers in Vicinity of Church, School, and Dwelling-Houses—Interdict—Proof of Material Increase of Discomfort—Limits of the Doctrine of Locality.

The doctrine of locality does not entitle those engaged in industrial work in a manufacturing district to move their machinery where they please within that district, and to extend without restriction their operations if the result be to deprive other classes of the community, such as clergymen, school teachers, and other brain workers, whose work necessitates their living in the district, of such share of the ordinary comforts of life as the industrial character of the district, infested with noise though it be, has hitherto afforded them.

Owners of property in an industrial district of a city brought an action against a firm of forge masters who had for many years carried on business in the immediate vicinity but who had recently installed in their premises heavy drop hammers, in which they, the complainers, sought interdict against the respondents so working their machinery as to cause structural injury to the complainers' buildings and to be a nuisance to the comfortable enjoyment of their premises, and especially to a church, a presbytery, and a school.

Held that as regards structural injury the complainers had failed to prove that the injuries complained of had shown themselves for the first time after the installation of the hammers, or exhibited such marked or progressive aggravation since their introduction, as to entitle the complainers to interdict, and that as regards the comfortable enjoyment of premises they had not succeeded in establishing such a serious addition to the existing discomforts of the neighbourhood, looking to its character as an industrial district, as amounted to nuisance, and interdict *refused.*

The Most Reverend John Aloysius Maguire, Roman Catholic Archbishop of Glasgow, and others, being the Finance Board of the Archdiocese, Smith Brothers & Company (Glasgow), Limited, engineers, Park Street, Glasgow, and other proprietors in the neighbourhood of Portman Street, Glasgow, *complainers*, brought a note of suspension and interdict against Charles M'Neil, Limited, hydraulic forge masters, Portman Street, Glasgow, *respondents*, in which they sought to have the respondents interdicted from so working their machinery and so carrying on their business as by reason of noise or vibration to cause a nuisance to the complainers.

The above-named complainers averred, *inter alia*—"(Stat. 1) The complainers are proprietors of the respective premises after mentioned, all of which premises are situated in the immediate neighbourhood of premises situated at 124 Portman Street, Kinning Park, Glasgow, occupied by the respondents for the purposes of their business, which consists in the manufacture of forgings and stampings. . . . (Stat. 2) For many years down to Whitsunday 1916 the site of the said premises occupied by the respondents was occupied by a firm of iron founders who used it as a foundry for the making of grates. The premises were then known as the 'Star Foundry.' The work carried out in the said foundry was done quietly and without offence to the neighbouring proprietors and occupants. (Stat. 3) At Whitsunday 1916 the respondents acquired the said premises, which occupy ground extending from Portman Street on the east to Smith Street on the west. They proceeded at once to erect and did erect on the said ground large works in which they installed heavy machinery, including heavy drop hammers. At later dates they installed additional drop hammers of a very heavy description. . . . (Stat. 4) In any event the said drop hammers cause a very great and disturbing noise and also cause such vibra-