Friday, January 11.

FIRST DIVISION.

[Lord Johnston, Ordinary.

THE GOVAN OLD VICTUALLING SOCIETY, LIMITED *v.* WAGSTAFF.

Process—Count and Reckoning—Employers Suing Employee for Count and Reckoning upon their own Books—Action Incompetent.

In an action by a friendly society, carrying on a retail trade, against its chief salesman and treasurer to recover profits, &c., alleged to have been misappropriated by him, *held* that a conclusion for an accounting was incompetent, since he was not independent but merely a manager, keeping books which were those of the society.

Process—Res judicata—Dismissal of Action in Sheriff Court on Relevancy—Subsequent Action in Court of Session.

Held, following Menzies v. *Menzies*, March 17, 1893, 20 R. (H.L.) 108, 30 S.L.R. 530, that the dismissal of an action in the Sheriff Court on relevancy cannot be successfully pleaded as *res judicata* in a similar action subsequently brought in the Court of Session.

Agent and Principal—Employer and Employee — Friendly Society — Action by Society against Salesman and Treasurer for Misappropriation — Specification — Relevancy.

Observed by the Lord President, in an action by a friendly society against its chief salesman and treasurer for recovery of misappropriated funds, that extreme and particular specification cannot be expected in such a case, because, from the very position of parties, the parties injured do not know precisely what goods he has stolen and realised for himself, and what particular payments he has suppressed.

Averments which were *held* to be relevant.

On July 12, 1905, The Govan Old Victualling Society, Limited, registered under the Industrial and Provident Societies Act 1893, and having its registered office at 641 Govan Road, Govan, Lanarkshire, raised an action against Archibald Wagstaff, 6 Hamilton Terrace, Craigton Road, Govan, with conclusions (as subsequently restricted) for, *inter alia*, a full and particular account of his intromissions as their chief salesman and treasurer between January and December 1904, and for payment of £2500, as the balance due to them on such intromissions, and alternatively with a simple petitory conclusion for £2500.

The pursuers averred, *inter alia*—"(Cond. 2) The defender entered the pursuers' service as chief salesman and treasurer about fourteen years ago. He occupied the said post until the second week of December 1904, about which time the defender resigned his position. (Cond. 3) As the pursuers' chief salesman and treasurer the defender had the custody and control of the whole of the pursuers' funds and effects. The whole moneys received from members of the Society, either to account of shares or in payment of goods bought by them, passed through the defender's hands. The defender also ordered and paid for all goods supplied to the Society. It was the defender's duty, in terms of rule 10 of the Society, to keep regular account books of his whole intromissions with the pursuers' property. This duty, as after mentioned, the defender failed to perform. (Cond. 4) Some time before the defender left the pursuers' service it came to their knowledge that the defender had fraudulently obtained from the United Co-operative Baking Society, Limited, credit for empties which had not been returned to that Society, and that on being taxed with this the defender had paid the amount of said empties out of his own pocket to avoid exposure. (Cond. 5) (as subsequently amended) — In view of these facts coming to the knowledge of the pursuers, they caused an examination to be made of the books and accounts. As a consequence of the said examination they have ascertained and aver that during the period from 12th January 1904 to 6th December 1904 the defender failed to keep proper accounts of his intromissions as their treasurer. In particular, the defender kept no proper account of the sums received by him from members of the Society, or of sums received by him for cash sales of the pursuers' goods. The defender thus received large sums, for which he has failed to account. It was the duty of the defender while in the pursuers' service to keep books showing each separate item paid or received by him, but this he failed to do as aforesaid. There is herewith produced and referred to the quarterly statement prepared by the defender as at 12th January 1904. It is an accurate statement of the Society's affairs as at said date. The said statement shows that at that time the Society's stock amounted to . . . £1744 12 4

An examination of the Society's books shows that during the period from 12th January 1904 to 6th December 1904 stock was purchased to the amount of . 9369 15 8

£11,114 8 0

The sales of stock for the same period as shown in the books realised . . £10,650 13 9

The average gross profit on sales based on the said period was 16·74 per cent. . . 1782 0 0

Deducting this percentage leaves . £8868 13 9

which represents the amount of stock shown in the books as sold during the said period at invoice prices. Deducting this from the amount in hand and purchased as above . . . 8868 13 9

leaves . . £2245 14 3

Brought forward,	£2245	14	3
which is the amount of stock that should be in hand at 6th December 1904. Instead of this, however, there was only stock to the amount of . . .	1101	0	7
showing a deficiency of . .	£1144	13	8

The pursuers believe and aver that the defender made large sales of goods for cash without making any corresponding entry of the transactions in the Society's books. No entries appear in the books of cash sales at the Shaw Street or Govan Road shops during the period from 11th October 1904 to 6th December 1904, though both shops were open during said period. The cash sales at said shops during said period amounted to not less than £50. The pursuers believe and aver that the whole of said deficiency was due to the defender misappropriating either goods belonging to the Society or cash received by him from members in payment of goods purchased by them. The defender also received and applied to his own uses sums paid by members in respect of their shares. An examination of the members' pass-book shows that the defender received the sum of £44, 10s. under this head. The defender made no entry of the said sums in the Society's books, but misappropriated the same to his own purposes. In order to conceal the said misappropriation, the defender in his quarterly statements of 12th April, 12th July, and 11th October, did not disclose the full extent of the Society's liabilities to merchants, while in the said statements of 12th July and 11th October he understated the amount of his credit sales. In particular, the defender in the account made up by him at 12th April 1904, understated the Society's liabilities by the sum of £254, 5s. 5d., and in the account made up by him at 12th July 1904 understated the Society's liabilities by the sum of £24, 19s. 1d. . . . . Admitted that quarterly statements were made up as at 12th April, 12th July, and 11th October 1904, and that said statements were initialled and passed by the committee. Explained that the whole of said statements, including that of 12th January 1904, were prepared by the defender and were represented by him to be accurate. The said statement of April 1903 referred to in the answer was also prepared by the defender, and represented by him to be accurate. The defender also prepared the stock-sheets showing the amount of stock belonging to the Society. If the amount of such stock as entered in any of said statements shows an apparent inflation, this was done by the defender for the purpose of concealing his defalcations. Explained further that these stock-sheets remained in the defender's possession, and that after he left the pursuers' service it was found he had either removed or destroyed them. The pursuers now believe and aver that said statements of 12th April, 12th July, and 11th October did not accurately set forth the defender's intromissions with the pursuers' property."

The pursuers pleaded—"(1) The defender being bound to render to the pursuers a just and true account of his intromissions, and having failed to do so, he should now be ordained to count and reckon with the pursuers. (2) Failing an accounting, decree for payment should be pronounced with interest and expenses as concluded for. (3) Or otherwise, the sum alternatively sued for being justly due and resting-owing by the defender to the pursuers, decree should be granted in terms of the alternative conclusion of the summons with expenses."

The defender pleaded, *inter alia*—"(1) The action is incompetent. (2) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons. (3) *Res judicata.* (4) Settled accounts having been periodically adjusted between the parties as required by the terms of defender's employment, he is not now liable to render any other accounts. (5) The defender not being, in the circumstances set forth, liable to produce any accounts other than those appearing in the pursuers' books and vouchers in their own possession, and under their sole control, or to render further accounts than he has already done, should be assoilzied from the conclusions for accounting."

Prior to the raising of the present action, the pursuers had, in February 1905, raised an action against the defender in the Sheriff Court of Lanarkshire in which the conclusions and averments were precisely similar, with the following exceptions. The period over which the accounting was asked for was, in the Sheriff Court action, a somewhat longer one, and the summons did not contain the alternative simple petitory conclusion for the payment of £2500.

The Sheriff-Substitute dismissed the action as incompetent, and the Sheriff dismissed it as both incompetent and irrelevant.

The Lord Ordinary on 9th February 1906 pronounced the following interlocutor:—"The Lord Ordinary having considered the cause as regards the first alternative conclusion of the summons, sustains the first and second pleas-in-law for the defender, and dismisses said conclusion; as regards the second alternative conclusion of the summons, allows the pursuers to lodge, if so advised, a statement of any errors, omissions, or charges to which the quarterly and annual balance and accounts provided for by their rules, for the year embracing the period from 12th January to 6th December 1904, are exposed, that it may be considered whether these fall to be inquired into in questions with the defender."

Opinion.—"The Govan Old Victualling Society, Limited, which is registered under the Industrial and Provident Societies Act 1893, sues its former treasurer and chief salesman, Archibald Wagstaff (*first*) (as the summons is restricted) for an accounting for his whole intromissions as such treasurer and chief salesman, for the period from 12th January 1904 to 6th December 1904, when he left their service.

"I shall deal first and separately with this conclusion. It and the statement of facts by which it is supported (not at present allowing for the restriction of the summons) are precisely the same as are to

be found in the action which the Society raised against Wagstaff in the Sheriff Court of Lanarkshire on 24th February 1905. The Sheriff-Substitute found the action incompetent, and the Sheriff found it both incompetent and irrelevant. It was maintained before me that their judgment was *res judicata*, while it was answered that a judgment of an inferior court on a preliminary plea could not be *res judicata*, as it could only result in dismissal of the action, and not in absolvitor from its conclusions.

"A number of authorities were quoted to me by counsel, but I do not propose to examine them in detail. I think that a judgment of an inferior court not appealed against is as much *res judicata* between the parties as though it had been pronounced by the superior court. I think, further, that Lord Watson's statement in *Menzies* v. *Menzies*, 20 R. (H.L.), at p. 110, to the effect that 'The dismissal of an action upon relevancy, without inquiry into the merits, can never be *res judicata*,' must be understood as meaning this only, that the dismissal does not preclude the raising of another action containing the same conclusions, provided the *media concludendi* are different. Such is clearly what was decided in the case to which his Lordship referred, *Gillespie* v. *Russell*, 3 Macq. App. 759. It does not mean that another judgment can be taken on precisely the same *media concludendi*. What the pursuers ask here is truly a second judgment on the same conclusions for accounting, though restricted to a briefer period of time, based on the same *media concludendi*. To this, as I do not think the question affected by the restriction, I cannot hold that they are entitled.

"But it was also held by the Sheriff that the pursuers' action was incompetent because the defender was not alleged to have been in such relation to the pursuers that he could be called upon now to account. Though this plea also results in dismissal of the action, I think that its disposal is *res judicata*. The case is different from a dismissal upon relevancy. But I do not find it necessary to rest my judgment on these points, because, agreeing with the Sheriff's reasoning, I hold this action *quoad* the conclusion for accounting to be both irrelevant and incompetent.

"But the summons concludes (*second*), and alternatively, for payment of a random sum of £2500, and that (importing the words of the minute of restriction) as the balance due on the defender's intromissions as pursuers' treasurer and chief salesman during the period from 12th January to 6th December 1904. There was no such alternative conclusion in the Sheriff Court action, and therefore there is no question of *res judicata* here. The question is, are the averments relevant to support this conclusion?"

[*His Lordship dealt at length with the record.*]

"I shall therefore sustain the plea of irrelevancy and incompetency as regards the first alternative conclusion of the summons, and dismiss the same. As regards the second alternative conclusion, I think that the averments supporting it are so wanting in specification that I could not sustain their relevancy as they stand. But having regard to the mode in which the Court dealt with *Laing* v. *Laing*, July 17, 1862, 24 D. 1362, I do not think that I should be justified in dismissing the conclusion *de plano*, but must give the pursuers an opportunity of lodging, if they are able, a state of any palpable error, omissions, or charges to which their quarterly balances and annual accounts for the year 1904, as audited and docqueted by their auditors, are exposed, that it may be considered whether these fall justly to be inquired into in a question with the defender."

The pursuers thereafter lodged an amended record in the terms set forth *supra*.

On 2nd April the Lord Ordinary (JOHNSTON) pronounced the following interlocutor—"Refuses the proposed amendment: Sustains the defender's second plea-in-law: Dismisses the second alternative conclusion of the summons, and decerns."

Opinion.—"The pursuers have availed themselves of the opportunity which I gave them by my last interlocutor, and I have heard parties on their proposed amendments of record. But I do not think that the pursuers have cured the defect in their original record, and they certainly have not met what, rightly or wrongly, I desiderated in the opinion which I formerly expressed.

[*His Lordship dealt at some length with the minute of amendment.*]

"I shall therefore refuse the proposed amendments, and now sustain the defender's second plea-in-law as regards the second or alternative conclusion of the summons, and dismiss the same, with expenses to the defender in the whole cause."

The pursuers reclaimed, and argued—The action was both competent and relevant, and a conclusion for accounting was an appropriate remedy—*Tyler* v. *Logan*, November 23, 1904, 7 F. 123, 42 S.L.R. 88.

Argued for the defender and respondent—The action fell to be dismissed as irrelevant, the pursuers' averments being entirely vague and lacking in specification. [The Court stated that they required no argument on the appropriateness of the conclusion for accounting as a remedy.]

LORD PRESIDENT—This is a case raised by a friendly society against a former member who was in the position of chief salesman and treasurer. The object of the friendly society was to provide various articles to its members, which it did by having one or more shops in which these articles were sold. These shops were provided with the goods in much the same way as ordinary merchants' shops, either by money belonging to the society or possibly by money borrowed. The goods were retailed to members, who had a number of advantages, one of which was that they got a share of the profits at the end of the year.

According to the pursuers' statements, which at this stage we are bound to accept, the defender was practically in the day-to-day management of the business, and, having the unrestrained conduct of the business in his hands, used his position to the effect of misappropriating the proceeds of the business. That, in a rough way, is the averment which is made against him. It may be untrue, but it is what the pursuers say. Upon that state of the facts the pursuers bring an action with two conclusions. The first is a conclusion for count and reckoning—that is to say, a conclusion in ordinary form that he should count and reckon, and failing count and reckoning he should pay a slump sum which should be held to be the balance of his intromissions. They have also as an alternative a single petitory conclusion.

Now, it seems that an action of the same sort was raised in the Sheriff Court, which was dismissed with the pursuers' acquiescence. Accordingly the plea was taken by the defender in this action of *res judicata*. That plea was not dealt with by the Lord Ordinary so far as technically to pronounce any interlocutor upon it. I am clearly of opinion that *res judicata* in the circumstances was a bad plea. I do not see how an action which was dismissed in the Sheriff Court can ever be *res judicata* in an action in the Supreme Court, because it is, I think, impossible, as Lord Watson said (*Menzies* v. *Menzies*, 20 R. (H.L) at p. 110) to conceive how the dismissal of an action upon relevancy could found a proper plea of *res judicata*.

The defender, however, raised another plea, which was that a conclusion for count and reckoning in the circumstances was inappropriate. That was the plea on which the Sheriff dismissed the Sheriff Court action. We have the Sheriff's judgment in the case, and I entirely agree with everything the Sheriff there says. It seems to me that the idea of count and reckoning as such is quite inappropriate to the subject-matter in hand. The whole notion of count and reckoning is that you have got a person in a position in which he is bound to account—that is to say, in other words, you have got your charge side of the account which it is his duty to account for. Now, the respondent never was charged in an accounting sense with any of the goods of this Society. He no doubt had access to them, and had full control over them, but he had so, not as an independent person, but as manager of the Society's affairs, and the books that he kept with which the charges are involved were books not of himself but of the Society. Therefore I am quite clear that the Lord Ordinary was right in sustaining that plea.

But then comes the second conclusion. Now, the second conclusion is a pure petitory conclusion, and the averments which are put forward in support of it are those alleging that the defender, taking advantage of the position which he held, appropriated goods to himself. The pursuers were allowed an opportunity of further specification, and they have put in a minute of amendment. The Lord Ordinary here again has held that the statements put in are irrelevant, and accordingly has dismissed this conclusion of the action also.

I am unable to agree with his Lordship, because I think it would be unsafe to dismiss the action at this stage. There may be nothing in all that is said against the defender for aught I know. A case of this sort is always, I think, well tested by supposing, for the sake of argument, that the defender is guilty. Supposing that a man in this position of being an absolutely trusted and unfettered manager of a business takes advantage of his position to realise goods for his own benefit, to take cash payments, and to put the money into his own pockets instead of into the books, surely there is some process by which he can be got at. Extreme and particular specification cannot be expected in such a case, because naturally from the very position of parties, the parties injured do not know precisely what goods he has stolen and realised for himself, and what particular payments he has suppressed. Therefore I cannot help thinking that the Lord Ordinary has really criticised the averments with greater severity than is fair in the circumstances in which the parties are here placed. There is here a perfectly distinct averment that there were certain cash payments made by members which are vouched as between the members and the Society by the members' pass-books, and that these cash payments, instead of being allowed to enter the books of the Society were put into the defender's pockets. There is some estimate made of the decrease, not of the value, but of the bulk of the stock during the last year of management. I am very far from saying that even although the pursuer proved every word he says about the calculation as to the value of the stock, that that without anything else will charge the defender with the stock. All that will depend upon what comes out at the proof; but if there was nothing shown against the defender more than that, I think the case would certainly fail. I do not think it advisable to speculate or to lay down precisely what proof the pursuers must go upon. All I say is that I think there is enough for inquiry; and I think therefore the proper procedure would be to recal the Lord Ordinary's last interlocutor, allow the amendment to be made and to be answered, reclose the record, and allow a proof of the averments. In allowing the amendment to be made I agree with one criticism of Mr Christie. I think before the amendment is allowed upon the record, it is quite fair to argue that dates should be affixed to the various items in the document No. 20 of process, which is a note of money received for new shares which were said to be misappropriated. This would give the defender perfectly good notice.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court pronounced this interlocutor—

"The Lords having considered the reclaiming note for the pursuers against the interlocutor of Lord Johnston dated 2nd April 1906, and heard counsel for the parties, Recal the said interlocutor, open up the record, allow the amendments for the pursuers and for the defender contained in their minutes of amendment, and said amendment having been made, of new close the record and remit to the Lord Ordinary to allow a proof, and to proceed as accords, reserving all questions of expenses, including the expenses of the reclaiming note, with power to the Lord Ordinary to dispose of said expenses."

Counsel for the Pursuers and Reclaimers Hunter, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defender and Respondent —Guthrie, K.C.—J. R. Christie. Agents—Macpherson & Mackay, S.S.C.

Saturday, January 12.

SECOND DIVISION.

[Lord Dundas, Ordinary.

KER (LIQUIDATOR OF THE MILLHALL FLOCK AND FIBRE MANUFACTURING COMPANY, LIMITED) *v.* HUGHES.

Company — Winding-up — Contumacy — Refusal of Secretary to Deliver Documents—Warrant to Search for and Seize Books and Papers.

The official liquidator of a company ordered to be wound up by the Court under the provisions of the Companies Acts 1862 to 1900, presented a note to the Lord Ordinary, to whom the liquidation proceedings were remitted, stating that he was unable to obtain possession of the books and papers of the company.

Circumstances in which the Lord Ordinary reported the case to the Court, who *granted* warrant and authority to officers of Court to search for and seize the books and papers of the company.

By the Companies Act 1862, section 115, it is provided—"The Court may, after it has made an order for winding-up the company, summon before it any officer of the company, or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the Court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company; and the Court may require any such officer or person to produce any books, papers, deeds, writings, or other documents in his custody or power relating to the company, and if any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, having no lawful impediment (made known to the Court at the time of its sitting, and allowed by it), the Court may cause such person to be apprehended and brought before the Court for examination; nevertheless, in cases where any person claims any lien on papers, deeds, or writings, or documents produced by him, such production shall be without prejudice to such lien, and the Court shall have jurisdiction in the winding-up to determine all questions relating to such lien."

Charles Ker, chartered accountant, Glasgow, presented a note to Lord Dundas, Ordinary, in circumstances which he thus narrated—"On August 2, 1906, the Millhall Flock and Fibre Manufacturing Company, Limited, Eaglesham, by Glasgow, was, upon the petition of the Calico Printers' Association, Limited, Mosley Street, Manchester, ordered to be wound up by the Court under the provisions of the Companies Acts 1862 to 1900, and the applicant was appointed official liquidator of the company, with all powers conferred by statutes. The official liquidator found caution and extracted his appointment. Thereafter on September 28, 1906, he wrote to Mr Thomas B. Hughes, 34 Circus Drive, Dennistoun, Glasgow, the secretary of the Millhall Flock and Fibre Manufacturing Company, Limited, in the following terms:—

'Glasgow, 28th September 1906.

'*The Millhall Flock and Fibre Manufacturing Company, Limited.*

'Dear Sir—I have been appointed official liquidator of the above company, and I am informed that you acted as secretary. I shall be obliged if you will let me know by return where the books and other documents of the company are to be found, so that I may obtain possession of them.—Yours truly, CHARLES KER, *Liquidator.*'

"The official liquidator having received no answer to the foregoing letter, of this other date again wrote to the said Thomas B. Hughes in the following terms:—

'Glasgow, 3rd October 1906.

'*The Millhall Flock and Fibre Manufacturing Company, Limited.*

'Dear Sir—I have had no reply to my letter of 28th ult., asking you as secretary of the company for information regarding its books, &c. I have now to inform you that unless I hear from you satisfactorily before Monday the 8th inst., it will be my duty to take steps under the Companies Acts to obtain the necessary information, and you will be good enough to note that unless the information is forthcoming no further notice will be given you before instructing the law agents accordingly.—Yours truly, CHARLES KER, *Liquidator.*'

"Beyond a telephone message from Mr Hughes stating that he had received the last-mentioned letter, no further notice has been taken of either of the letters, and the request for information has not been acceded to.

"On October 17, 1906, the liquidation proceedings were remitted to your Lordship."

The note then set forth section 115 of the Companies Act 1862, above quoted, and