Counsel for the Pursuer and Respondent —W. T. Watson—Douglas Jameson. Agents —Galbraith Stewart & Reid, S.S.C.

Counsel for the Defenders and Appellants —D.-F. Dickson—Carmont. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Thursday, May 20.

SECOND DIVISION.

(SINGLE BILLS.)

DAWSON *v.* REID'S TRUSTEES.

(*Ante*, p. 543.)

Process—Appeal to House of Lords—Petition to Apply Judgment—Competency—Expenses—Special Case.

A petition by the successful appellant in a Special Case to apply the judgment of the House of Lords, which reversed the interlocutor appealed against, ordered that the questions be answered in a certain way, and remitted the case to the Court of Session to do therein as should be just and consistent with this judgment, *held* unnecessary though competent, and petitioner found liable in expenses.

Miss Christina Dawson, 66 Braid Road, Edinburgh, *petitioner*, presented a petition to the Second Division of the Court of Session to apply the judgment of the House of Lords in a Special Case in which she had been the appellant and in which the testamentary trustees of the late Robert Reid, manufacturer, Dunfermline, were the first parties, and she was the second party.

On 17th March 1915 the Lords reversed the interlocutor appealed against and pronounced the following judgment:—"It is ordered and adjudged by the Lords Spiritual and Temporal in the Court of Parliament of His Majesty the King assembled, that the said interlocutor of the 28th day of October 1913 so far as complained of in the said appeal, be, and the same is hereby, reversed, and that question 3 (*a*) of the Special Case be answered in the affirmative, and questions 3 (*b*) and 4 (*b*) in the negative, and that question 4 (*a*) be answered by declaring that the first parties have a duty, as soon as they conveniently can, to pay to the second party a capital sum of £3000. And it is further ordered that the said cause be, and the same is hereby, remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment" (*v. ante*, p. 543).

The prayer of the petition was as follows —"May it therefore please your Lordships to apply the judgment of the House of Lords; to alter the interlocutor appealed against by answering the following questions in law in the Special Case as follows, viz., No. 3 (*a*) in the affirmative, and Nos. 3 (*b*), 4 (*b*), and 4 (*c*) in the negative, and to answer 4 (*a*) by declaring that the first parties have a duty as soon as they conveniently can to pay to the second party a capital sum of £3000; *quoad ultra* to reaffirm the said interlocutor in its whole remaining terms and to decern; to find the petitioner entitled to the expenses of this petition and relative procedure; to remit the account thereof when lodged to the Auditor to tax and report, and to do further or otherwise in the premises as to your Lordships shall seem just."

Argued for the petitioner—The petitioner was entitled to an extractable judgment—*General Assembly of the Free Church of Scotland* v. *Lord Overtoun and Others*, October 22, 1904, 7 F. 202, *per* Lord Young at p. 203, 42 S.L.R. 6. In the present case the cause had been remitted to the Court of Session to do something, viz., to answer the questions in a particular way, and the petitioner was entitled to have these answers recorded in the Books of Council and Session—*Ricketts*, June 12, 1861, 23 D. 1014, *per* the Lord President; *Anstruther* v. *Anstruther's Trustees*, July 19, 1873, 11 Macph. 955. The petitioner's procedure had been in accordance with practice—Mackay, Manual of Practice, p. 582.

Argued for the respondents—The petition was unnecessary. The rule was that a petition was only required where in consequence of the judgment of the House of Lords something remained to be done—*Ricketts, cit.*; *Peters* v. *Magistrates of Greenock*, July 6, 1893, 20 R. 924. In the present case nothing remained to be done.

LORD SALVESEN—This petition has been presented to us to apply a judgment of the House of Lords in a Special Case. We answered certain questions that were put by the parties in a certain way, but on appeal the House of Lords have reversed our judgment and answered them in a different way. The petitioner, who was the successful appellant, now brings an application before us to have the judgment applied by us, and to have the questions answered as the House of Lords answered them.

It is to be noted that the House of Lords have not remitted to us to answer the questions. Their judgment orders that the interlocutor appealed from be reversed and that the questions be answered in the way they have specified. The only remit to us is to do as shall be just and consistent with that judgment—a remit entirely in general terms. A Special Case differs from an ordinary process in respect that an extract proceeding upon the judgment in a special case can never, so far as I can see, warrant diligence of any kind. In certain cases an extract may be useful where a question of heritable title is involved, and an extract of the judgment in a special case which submits a question as to heritable title, may be required in order to be put up with the titles of the successful party.

In this case, however, it is obvious that the procedure which has been resorted to, whether competent or not—and I shall proceed to consider its competency—is wholly unnecessary. The judgment of the House of Lords, if it is resisted by the trustees, can only be enforced by an action. The main point that was decided was that

it was their duty, as soon as they conveniently could, to pay to the second party a capital sum of £3000, and if they delay unduly to make that payment the petitioner will be entitled to bring an action in this Court to have them compelled to pay the £3000, on the footing that they have now funds conveniently available for that purpose. But it would be quite sufficient in such an action for the petitioner to lodge an official copy of the House of Lords' judgment which has already been obtained and to base his demand upon that judgment. Accordingly I think here that the petition was entirely unnecessary, and I am very unwilling indeed to encourage by an award of expenses, which is what the petitioner prays for, any superfluous procedure.

I am inclined to hold that it is a competent petition, and I do so because of the terms of section 63 of the Court of Session Act, and that we must, if we are asked, apply the judgment, which was a judgment of reversal, and of new answer the questions in accordance with the decision of the House of Lords. A judgment in a special case is expressly declared by that section to be extractable; and if anybody wants to get a judgment extracted I do not see why he should not be entitled to get the extract. It may be of purely historical or archæological interest. In this case I cannot see what purpose an extract will serve, because the trustees would never dispute the judgment of the House of Lords, and the extract cannot facilitate the petitioner in having effect given to the judgment. In some cases an extract does form a useful record of the whole material proceedings in a case, because it gathers up in narrative form the proceedings upon which a final judgment has been pronounced.

I am therefore of opinion that as the petitioner desires an extract we should grant the prayer of the petition by applying the judgment, not in the form in which the prayer is framed—because it asks us to alter the interlocutor appealed against, which we cannot do, that interlocutor having already been reversed—but by setting forth, in accordance with the judgment of the House of Lords, that we answer the questions of law in the Special Case as they have done.

But then I do not think that the expenses of this quite unnecessary and, as far as I know, absolutely novel procedure—because we were not referred to a single case in which a petition had been brought for the purpose of applying a judgment of reversal in a special case—should be borne by the respondents. I think if people wish to indulge in unnecessary procedure they must bear the expense of that procedure themselves; and what is more, when they ask that that expense shall be borne by their opponents, I think it is only fair that they should bear the expenses of their opponents in coming here to resist the application so far as the expenses are concerned.

Mr Aitchison has no interest whatever in preventing Mr Ingram from getting the judgment applied, but he does object to having to bear the expense of what he regards as unnecessary procedure. I think his attitude is absolutely justified, and we should give him an award of expenses in respect of his appearance here to-day, modified at the sum of three guineas, or whatever other sum your Lordship in the chair may name.

LORD GUTHRIE — I agree. Mr Ingram admitted that he could not ask that the prayer should be granted in terms of the petition, because the petition proposes that we should alter the interlocutor which we previously pronounced—a proceeding which is manifestly incompetent. He proposes to alter the petition by deleting these words and asking that the judgment should be applied and that certain questions should be answered in a certain manner. In the case of *Anstruther*, 11 Macph. 955, the Lord President said — "In all ordinary cases, where anything remains to be done after or in consequence of the judgment of the House of Lords, the proceeding in this Court must begin by a petition." In saying so the Lord President does not decide that the petition is incompetent even if nothing remains to be done.

In this case there is no specific remit, and nothing, in the sense in which the Lord President uses these words, remains to be done, because the Lords order the interlocutor to be reversed and certain questions to be answered in a certain manner. It is not said that we can reverse our own interlocutor. The two things seem to me to be in the same position, and therefore we have no power to answer the questions in a particular manner, that having been already done in the House of Lords.

I agree with your Lordship, however, that if this petition is competent, the question of expenses remains a separate question to be considered, and on that question the case of *Peters* v. *Magistrates of Greenock*, 20 R. 924, to which we were referred, is instructive. In that case a petition to apply the judgment of the House of Lords was held unnecessary, but Lord Young said that although he thought the petition quite unnecessary he did not go the length of saying it was incompetent. In the circumstances he was of opinion, and I think rightly, that the party who opposed the part of the prayer dealing with expenses—there having been no opposition apparently to the granting of the petition—should be found entitled to expenses. For some reason which does not appear, Lord Rutherfurd Clark and Lord Trayner thought there should be no expenses to either party. I think expenses would naturally have followed in that case. In the present proceedings Mr Aitchison would not have appeared here but for the crave for expenses against him, and having appeared and having convinced us that this petition was quite unnecessary, although technically competent, it seems to me he is entitled to his expenses.

LORD JUSTICE-CLERK—I entirely concur in the views which your Lordships have expressed, and agree that we should find

the respondent entitled to three guineas modified expenses.

LORD DUNDAS was absent.

The Court pronounced this interlocutor—"... Apply the judgment of the House of Lords, and in accordance therewith answer the following questions of law in the Special Case as follows, viz.—... and hold the interlocutor of 28th October 1913 to be altered accordingly: Find the petitioner the said second party liable to the first parties in expenses in connection with the discussion of the petition; modify the same at the sum of £3, 3s., and decern against the second party for payment of the said expenses accordingly, and decern."

Counsel for the Petitioner — Ingram. Agent—J. George Reid, Solicitor.

Counsel for the Respondent—Aitchison. Agents—Boyd, Jameson, & Young, W.S.

HIGH COURT OF JUSTICIARY.

Saturday, June 12.

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

M'CALLUM *v.* DOUGHTY.

Justiciary Cases — Statutory Offences — Merchandise Marks Act 1887 (50 *and* 51 *Vict. cap.* 28), *secs.* 2 (2), 3 (1) *and* (3)—*Construction—"False Name" Applied to Goods—False Trade Description—Word "and" Construed as Equivalent to "or."*

(1) Under the Merchandise Marks Act 1887 "false trade description "and "false name" are separate and distinct offences, and a charge of applying a false name to goods is not relevantly libelled in a complaint which states that the accused has applied a false trade description to goods in respect that the name applied thereto is identical with the name of the complainer; and (2) (*diss.* Lord Skerrington) section 3 (3) of the Act falls to be construed disjunctively and not conjunctively as regards its sub-divisions (*b*) and (*c*), and a complaint charging an offence under it is not irrelevant by reason of failure to specify that the name applied to the goods, in addition to being identical with that of the complainer, is also the name "of a fictitious person" or the name "of some person not *bona fide* carrying on business in connection with such goods."

Lipton v. *The Queen*, [1892] L.R. (I.) 32 Q.B.D. 115, *followed.*

The Merchandise Marks Act 1887 (50 and 51 Vict. cap. 28) enacts—Section 2 (2)—"Every person who sells, or exposes for, or has in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any forged trade-mark or false trade description is applied, or to which any trade-mark or mark so nearly resembling a trade-mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves (*a*) that having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade-mark, mark, or trade description, and (*b*) that on demand made by or on behalf of the prosecutor he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or (*c*) that otherwise he had acted innocently—be guilty of an offence against this Act." Section 3 (1)—"For the purposes of this Act— . . . The expression 'trade description' means any description, statement, or other indication, direct or indirect, (*a*) as to the number, quantity, measure, gauge, or weight of any goods, or (*b*) as to the place or country in which any goods were made or produced, or (*c*) as to the mode of manufacturing or producing any goods, or (*d*) as to the material of which any goods are composed, or (*e*) as to any goods being the subject of an existing patent, privilege, or copyright, and the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the meaning of this Act. The expression 'false trade description' means a trade description which is false in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect, and the fact that a trade description is a trade-mark, or part of a trade-mark, shall not prevent such trade description being a false trade description within the meaning of this Act. . . . (3) The provisions of this Act respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, shall extend to the application to goods of any false name or initials of a person, and to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description, and for the purpose of this enactment the expression 'false name or initials' means, as applied to any goods, any name or initials of a person which (*a*) are not a trade-mark or part of a trade-mark, and (*b*) are identical with, or a colourable imitation of, the name or initials of a person carrying on business in connection with goods of the same description, and not having authorised the use of such name or initials, and (*c*) are either those of a fictitious person or of some person not *bona fide* carrying on business in connection with such goods." Section 5 (1)—"A person shall be deemed to apply a trade-mark, or mark, or trade description to goods who (*a*) applies it to the goods themselves, or (*b*) applies it to any covering label, reel, or other thing in or with which the goods are sold or exposed or had in possession for any purpose of sale, trade, or manufacture . . . (2) The expression 'covering' includes any . . . bottle . . ."