

The 84th section provides in substance that whenever it should appear to the Queen in Council that the tonnage regulations of the Merchant Shipping Act have been adopted by any foreign country, an Order in Council may be made to the effect that the ships of that country shall be deemed to be of the tonnage denoted in their certificates of registry or other national papers. Such an Order in Council has been made applicable to Danish ships.

Now, if this question had arisen for decision for the first time, I should have come without doubt or hesitation to the conclusion that what was meant (in the 84th section) by the tonnage regulations of the United Kingdom being adopted by any foreign country was not that the foreign vessels were to be sent to London or Leith to be measured by a British surveyor, or that a British surveyor was to be sent to Copenhagen whenever a Danish ship was to be measured, but that the ships were to be measured in their own country according to the rules of the Merchant Shipping Act 1894, and that the necessary certificates were to be granted by qualified surveyors licensed by the proper authority in the country of the ship's nationality.

Keeping in view that the carrying trade of the United Kingdom is the greatest in the world, and that very great attention has been given by our Parliament and Government to the regulation of merchant shipping, it was not unnatural that we should in a manner invite foreign nations to adopt our tonnage regulations in the only way in which such regulations could be adopted, viz., by equivalent enactments or regulations of the foreign country. But it could not be supposed that English surveyors would be employed for the purpose, and I do not think it is sound construction to say that in the case of a foreign vessel the certificate of an English surveyor is a condition of the right to a deduction for crew space.

But further, I think this question is not left to the decision of courts of law, because the provision of the 84th section is that when it appears to Her Majesty in Council that the tonnage regulations have been adopted, then an Order may be made. I think therefore that it was for the Privy Council, in the execution of the powers of the 84th section, to consider whether the Danish regulations were equivalent to the British regulations, allowing for necessary geographical and personal variations, and as the Privy Council were satisfied and the Order was made, the Court must assume that the spaces measured and described in the ship's registry are those to which the Merchant Shipping Act applies.

I am, however, much impressed by the inconvenience of having different interpretations of the same enactment in force in different parts of the United Kingdom, and as I understand that the majority of the Court are prepared to adopt the interpretation of the clause which has the support of a judgment of the Court of Appeal of England, I shall not withhold my assent. But in case any similar ques-

tion should be carried to a higher Court, I should wish it to be understood that I only concur in the judgment proposed out of deference to the judgment of the Court of Appeal, and the practice which has followed upon it.

The LORD JUSTICE-CLERK concurred.

On this question the Court pronounced this interlocutor:—

"Refuse to allow the petitioners to amend the petition as proposed, and find that the sum for which the petitioners are liable in respect of the collision mentioned in the petition is £6215, 4s., with interest at 4 per cent. from 18th February 1903: Find the petitioners liable to the claimants in the expenses relating to the discussion on the said minute, as for one appearance, and remit the same to the Auditor to tax and to report: Order the petitioners to consign in bank the sum of £6125, 4s., with interest at 4 per cent. from 18th February 1903, and on the petitioners consigning said sum with interest, limit the liability in respect of said collision to the sum of £6215, 4s., with interest thereon as aforesaid."

Counsel for the Petitioners—M'Clure. Agents—Alex. Morison & Co., W.S.

Counsel for the Owners of "*Anglia*"—The Lord Advocate (Dickson), K.C.—Wilson, K.C.—Younger. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Owners of Cargo on "*Anglia*"—The Solicitor-General (Salvesen) K.C.—Spens. Agents—Boyd, Jameson, & Young, W.S.

Thursday, March 16.

## SECOND DIVISION.

[Sheriff Court of Inverness-shire at Lochmaddy.

MACKINNON AND OTHERS v.  
MACDONALD AND OTHERS.

*Process*—"All Parties not Called"—*Interdict Proceedings between Crofters as to Taking Seaweed—Landlord not Called as Defender—Nature of Crofters' Rights to Seaweed—Crofters' Holdings (Scotland) Act 1886 (49 and 50 Vict. c. 29).*

In an action for interdict certain crofters, who were in occupation of their holdings at the date of the passing of the Crofters' Holdings (Scotland) Act 1886, sought to interdict the tenants of certain neighbouring holdings, held from the same landlord under agreements made in 1898 between the tenants, the trustees of the late landlord, and the Congested Districts (Scotland) Commissioners, from infringing certain rights which the pursuers alleged they possessed of winning seaweed on the shore. The landlord was not called as

a defender. The defenders pleaded "All parties not called."

The Court *sustained* the plea and *dismissed* the action

*Questioned* by Lord Kyllachy, whether pertinential privileges of the kind in question held by crofting tenants at the passing of the Crofters' Act were then or are now legal rights, or merely privileges held at the landlord's pleasure.

Angus Mackinnon and others, crofters at Middlequarter in North Uist, brought a petition in the Sheriff Court at Lochmaddy against Donald Macdonald and others, crofters at Grenitote, North Uist, in which they sought to interdict the defenders from infringing their alleged right of taking seaweed from the shore. The pursuers and their predecessors were at the date of the Crofters' Holdings (Scotland) Act 1886 in occupation of their crofts or holdings, and they averred that by the operation of that Act they were confirmed in and obtained an inalienable right in certain rights of taking seaweed which they had long exercised. The defenders were tenants of certain holdings adjacent to the township of Middlequarter, and occupied their holdings under and in virtue of agreements entered into by and between them and the trustees of their late landlord (who was also the landlord of the pursuers) and the Congested Districts (Scotland) Commissioners in 1898. The defenders contended that as a pertinent to their holdings they enjoyed the right of taking seaweed of which the pursuers complained.

The facts of the case are sufficiently set forth in the Sheriff's interlocutor of 10th December 1904.

The pursuers did not call the landlord as a defender, and the defenders pleaded, *inter alia*, "All parties not called," maintaining that a question of the kind involved in the present action could not be decided in the absence of the landlord.

The Sheriff-Substitute (CAMPBELL) on 2nd March 1903 granted interim interdict, and on 23rd July 1904, after a proof, recalled the interim interdict and refused the prayer of the petition, holding that the pursuers had failed to prove their averments.

The pursuers appealed to the Sheriff (C. N. JOHNSTON), who on 10th December 1904 dismissed the action, sustaining the plea of the defenders "all parties not called." He pronounced the following interlocutor:—"Finds (1) that the defenders are tenants of certain holdings in the island of North Uist formed out of the farms of Sollas and Grenitote, and occupy their holdings under and in virtue of agreements entered into by and between them and the trustees of the late Sir John William Powlett Campbell Orde, Bart., of North Uist and the Congested Districts (Scotland) Commissioners in 1898; (2) that the defenders enjoy as a pertinent of their holdings certain rights of winning seaweed on certain portions of the shore of the estate of North Uist; (3) that the defenders have exercised and propose to exercise these rights at the places, in the manner, and to the extent pointed out to

them by the estate factor; (4) that the pursuers are crofters in the township of Malaglate and Middlequarter on the said estate adjoining the said farms of Sollas and Grenitote; (5) that the pursuers claim as pertinents of their crofts certain joint rights along with the defenders of winning seaweed on the said portions of the shore; (6) that the extent of pursuers' rights is not fixed or defined by any written contract, judicial decree, or finding of the Crofters Commission, or by any written estate regulations upon which the pursuers found, and that the pursuers have failed to prove that it is fixed or defined by any immemorial usage; (7) that the pursuers base their claims upon (a) the state of possession at the date of the passing of the Crofters Act; (b) an alleged modification thereof under a verbal arrangement with the factor in 1888; (c) the state of possession when their fair rents were fixed in 1889; (d) the state of possession subsequent thereto; and (e) the alleged disability of the proprietor in respect of the foregoing considerations to make any re-arrangement or now to enforce any estate regulation of older date: Finds in law that the grounds of claim upon which pursuers rely cannot conveniently be adjudicated upon in the absence of the proprietor, and that the defenders, in the absence of the proprietor, ought not to be called upon to answer or discuss them with the pursuers: Therefore sustains the second plea-in-law for the defenders; of new recalls the interim interdict; dismisses the action, and decerns," &c.

The pursuers appealed to the Court of Session, arguing—They were not bound to call the landlord. The present was purely an action to regulate possession as between the pursuers and defenders, and no decision in it could prejudice or in any way bind the landlord—*Earl of Moray v. Magistrates of Wigtown*, July 8, 1870, 8 Macph. 959, 7 S.L.R. 612; *Macdonald v. Macdougall*, July 2, 1896, 23 D. 941, 33 S.L.R. 705; Mackay's Manual of Practice, 222.

Argued for the respondents—Although a decision in the present case might not be *res judicata* against the landlord, it was impossible to maintain that the matter was not one which affected his property, and that he should not have been called. Crofters were very much in the position of leaseholders, and in an action of the nature of the present action between leaseholders the landlord's presence would be indispensable.

On 16th February 1905 the Court pronounced the following interlocutor:—"The Lords sist the cause meantime to allow the landlord to sist himself as a party to the cause, adopting the proof already led, and direct the pursuer to make intimation to him accordingly."

The landlord having intimated that he would not sist himself as a party the Court made *avizandum*.

LORD JUSTICE-CLERK—On 16th February this case was continued in order to give the landlord an opportunity, if he desired, of

sisting himself to the process and adopting the proof already led. Intimation was made to him accordingly, but he has not chosen to enter appearance. In these circumstances I think we ought to affirm the judgment appealed against.

LORD KYLLACHY—I concur in thinking that we must affirm the Sheriff Principal's interlocutor. And I may say I do so with less reluctance because I greatly doubt whether, even if the landlord had appeared and adopted the proof, any final or really useful decision could have been obtained under this action. It would, whatever is decided, have, I am afraid, been always open to either party to bring a declarator so as to try over again and determine finally the question of right. What I really regret is that the present action was not at an early stage sisted of consent so as to enable such a declarator to be brought.

As it is, the present action is, I think, well ended and out of Court. And the only thing I should like to add is this, that I hope if the pursuers should contemplate further legal proceedings they will at least consider whether pertinent privileges of this kind held by crofting tenants at the passing of the Crofters' Act were then or are now of the nature of legal rights; or were not and are not rather (apart from express title falling under some recognised legal category) privileges held necessarily at the landlord's pleasure and subject always to estate regulations. I express, of course, no opinion on that or any other question involved, but it does occur to me to doubt whether crofters in the pursuers' position have, if deprived of such privileges, any other redress than that of having their fair rent revised by the Crofters Commission on the first opportunity which the Act gives for that being done. Until such opportunity offers, the Crofters Commission may not under the Act have power to interfere. But, if not common knowledge, it is at least generally supposed that on the joint application by both parties, or even on the application of the landlord, they, the Commissioners, frequently do settle and regulate such matters, generally at inconsiderable cost and in a quite satisfactory manner.

After LORD KYLLACHY had delivered his opinion, the LORD JUSTICE-CLERK added—Lord Adam desires me to say that he concurs in the result of the judgment proposed.

I wish to add that I entirely agree with what has fallen from Lord Kyllachy as to the inexpediency of further legal proceedings. It would be a lamentable thing if any additional expense were to be incurred which might practically mean the ruin of many of those interested.

The Court pronounced this interlocutor:—

“ . . . Dismiss the appeal and affirm the said interlocutor appealed against: Find in fact and in law in terms of the findings in fact and in law in the said interlocutor; of new dismiss the action and decern.”

Counsel for the Appellants—H. Johnston, K.C.—T. Trotter. Agent—Malcolm Graham Yooll, S.S.C.

Counsel for the Respondents—Wilson, K.C.—Sandeman. Agent—Arthur Morgan, Law Agent.

Friday, March 17.

FIRST DIVISION.

[Sheriff Court at Ayr.]

BOYD AND OTHERS (THE FREEMEN OF PRESTWICK) v. THE PROVOST, MAGISTRATES, AND COUNCILLORS OF PRESTWICK.

*Jurisdiction — Sheriff — Burgh — Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 27 — “Right or Privilege Exercised” — Heritable Right.*

An ancient burgh of barony was formed into a police burgh under the Burgh Police (Scotland) Act 1892 and the Town Councils (Scotland) Act 1900. The freemen of the burgh of barony subsequently presented a petition in the Sheriff Court for declarator that they had a private and patrimonial right to certain heritable properties of the old burgh.

Held that the Sheriff had no jurisdiction, in respect (1) that the heritable rights in question were not of the nature of a “right or privilege exercised” by the freemen of the old burgh, disputes as to which are appropriated to the jurisdiction of the Sheriff by section 27 of the Burgh Police (Scotland) Act 1892, and (2) that the value of the rights claimed exceeded the limit of the Sheriff's jurisdiction in questions of heritable right, as defined in section 8 of the Sheriff Courts (Scotland) Act 1877.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 27, enacts—“(1) Where by the operation of this Act the right to elect the municipal authority is transferred and taken away from the existing body of electors, and any dispute arises as to whether any right or privilege exercised by all or any of such is a public or a private and patrimonial right, such dispute shall be decided by the Sheriff, but an appeal shall lie to the Court of Session.”

The Sheriff Courts (Scotland) Act 1877 (40 and 41 Vict. cap. 50), sec. 8, enacts—“The jurisdictions, powers, and authorities of the Sheriffs and Sheriff-Substitutes of Scotland shall be, and the same are hereby extended to (1) All actions (including actions of declarator, but excluding actions of adjudication, save in so far as now competent, and excluding actions of reduction) relating to a question of heritable right or title where the value of the subject in dispute does not exceed the sum of fifty pounds by the year or one thousand pounds value.”