

modifications to the enlargement of existing holdings, and by it to supersede the provisions of the Act of 1886, with the overriding condition that the applicant is no longer to be the individual but the Board of Agriculture. When these provisions for the constitution of new holdings are connected to apply to the extension of a holding, it is, I think, apparent that the contemplation of the whole scheme compels to the restriction of extension to the case where the enlargement and the original holding are part of the same estate. This restriction is express (section 26 (2)) in the case of a new holding. The necessity is, I think, *a fortiori*, and the restriction to be implied, in the case of the enlargement.

The enlargement and the original holding become not separate holdings but one holding and are so treated. It is inconceivable to me that a "holding" should be held in severalty from two landlords. The provisions regarding rent—regarding vacating, renouncing, and resuming holdings—the rights *hinc inde* to compensation—the powers to relet, and the restrictions on those powers—the rights and securities of the Board of Agriculture to recover their advances and many more *indicia*—render it impossible to conclude that the Legislature really contemplated anything beyond the enlargement of an existing holding by the addition of land to be held from the same landlord. I do not propose to examine these *indicia* in detail, as it would unduly occupy your Lordships' time, but I point to section 8 regulating loans to landholders as a specially pregnant example.

Against this clear indication of the scope of the legislation there is no express provision one way or the other, and where I experience my difficulty lies in this, that I hesitate to make the provision of the Act, as I think, unworkable by reason only of two indirect and negative provisions. These are, *first*, that in the repeal (section 16 (2)) of section 13 of the Act of 1886 is included without re-enactment the repeal of the provision that land to be available for extension must belong to the same landlord as the original holding, and *second*, the declaration (also in section 16 (2)) that land shall not be deemed available land for enlargement of a holding unless it is land in respect of which a person would be admissible for registration as a new holder. That is but a negative declaration, and is susceptible of interpretation and application without necessarily converting it into a positive provision. I cannot readily accept such conversion in the light of the general purview of the statute and of the provisions in section 26 (2).

For these reasons I hesitate to accept the conclusion to which your Lordships have come, and which your Lordship in the chair has now expressed.

LORD MACKENZIE—I agree in the result reached by the Land Court and by your Lordship in the chair. In reaching that conclusion I am far from being insensible of the difficulties that may arise in adminis-

tration and of the possible injustice that may be done, which may be inadequately met by the compensation clauses. But I am unable to hold that those difficulties, which are a matter for the Legislature, entitle this Court to refuse to give effect to the enactment of the statute.

LORD SKERRINGTON—I agree with your Lordships because I think the judgment of the Land Court was right.

The Court answered the question of law in the affirmative.

Counsel for Appellants—Johnston, K.C.—A. R. Brown. Agent—Alex. Ross, S.S.C.

Counsel for Respondents—The Solicitor-General (Morison, K.C.)—W. T. Watson. Agent—Sir Henry Cook, W.S.

Saturday, May 23.

OUTER HOUSE.

[Lord Anderson, Ordinary.

MATHIESON v. MATHIESON.

Husband and Wife—Divorce—Adultery—Proof—Evidence of Successful Action by Co-Defender against Defender for Alimant of Illegitimate Child without Oral Evidence, as to Adultery, where no Appearance for Defender or Co-Defender.

In an action of divorce by a wife against her husband, on the ground of adultery with a woman named in the summons, no defence was entered by the defender or co-defender, and neither of them appeared at the proof. The pursuer led no oral evidence of the adultery alleged, but proved that there had been personal service of the summons on the defender, and intimation to the co-defender, who had also been cited as a witness in the cause. There was produced in evidence an extract sheriff court decree against the defender in an action of affiliation and aliment at the instance of the co-defender.

Decree of divorce was granted.

Mrs Bridgett M'Arcy or Mathieson raised an action of divorce against John Mathieson on the ground of adultery with Joanna M'Cormack.

After proof had been led, counsel for the pursuer referred to *Duncan v. Duncan*, February 18, 1893, 30 S.L.R. 435.

The facts of the case sufficiently appear from the opinion of the Lord Ordinary, *infra*.

LORD ANDERSON—I think I am in a position to grant the decree sought on the evidence which has been led to-day.

The action is an action of divorce at the instance of the wife on the ground of the adultery of her husband with a woman who is named in the summons. The wife herself is now resident abroad in Canada, and her evidence was taken on commission or interrogatories, and I have read it, and the

report of it is in process. She herself can give no direct testimony as to the alleged misconduct of her husband with the woman Joanna M'Cormack, because when she is asked about that matter the evidence she gives relating to it is hearsay evidence. She says, for example, when asked under question 21—"After leaving the defender did you learn that he was associating with a woman named Joanna M'Cormack, who resides at 11 Shepherd's Loan, Dundee?"—(A) I knew this before I left him on the first occasion. Her mother told me."

That evidence is incompetent evidence and I attach no importance to it.

Accordingly there is really no oral testimony substantiating the allegation in the summons that the defender and M'Cormack committed adultery with one another. But then the averment which the pursuer makes in the summons is this—"That the defender frequently committed adultery with M'Cormack, and in particular on 4th January 1910 the said Joanna M'Cormack gave birth to an illegitimate female child, of which the defender is the father."

Now the summons containing that averment was served personally on the defender, and I attach the greatest importance to that fact. Indeed, had it not been that there had been personal service on the defender, I should have been unable to give the decree which is sought, but I regard it as a vital part of the proof that personal service was made on the defender. He was thereby certiorated that these averments were to be adjudicated upon in this Court, and he has stated no defence to the action.

Further, it is proved that he had intimation given by the Edinburgh agent that this case would be determined by me on this date, and he has not appeared here. Furthermore, the woman Joanna M'Cormack had intimation made in the ordinary way that this charge was made against her, and she had an opportunity of appearing here and repudiating it if it were not true. She has not appeared here and stated any defence to the action, and on being cited through the post to come here and give evidence on the matter she returned the citation to the agent, marking it "refused." She was then personally cited to appear as a witness by messenger-at-arms, and had tendered to her the amount of her expenses and railway fare, and refused to come.

The other evidence in the case is documentary evidence, but it seems to me that it connects the defender John Mathieson with the birth of the illegitimate child which undoubtedly M'Cormack bore on 4th January 1910, the date libelled in the summons.

No. 7 of process is an extract of the birth certificate of that child, a female child born on 4th January 1910, of which Joanna M'Cormack is said to be the mother. There is nothing on the face of this certificate connecting Mathieson with the child, but it appears from an extract of a decree of the Sheriff Court of Forfarshire, which is No. 12 of process, that this woman Joanna M'Cormack raised an action of affiliation and aliment against a defender who is

described as John Mathieson, broker, 52 West Port, Dundee.

Now that is undoubtedly the address of John Mathieson as stated in the summons in this case, and the only difference is that he is described in this summons as a commission agent carrying on business at that address and not as a broker; but the solicitor from Dundee explained that Mathieson had been a broker but had recently started in business as a commission agent.

I have therefore no difficulty in holding that the defender against whom the Sheriff at Dundee pronounced the decree in the action of affiliation and aliment at the instance of Joanna M'Cormack in respect of this illegitimate child borne by her on 4th January 1910 was the defender in this action, John Mathieson, the husband of the pursuer.

On the Sheriff reaching the conclusion in that affiliation action at which he arrived, it is the duty of the Sheriff Clerk under the statute which regulates registration of births to send a notice to the registrar, and on that being done the registrar's duty is to make certain alterations on the register and to put on the extract certificate of birth a docquet, which has been done and which is now before me. That docquet states—"In the fourth column of entry No. 50 in the register book of births for the year 1910, before the name of the child's mother insert John Mathieson, broker, on the authority of a certificate in the form of Schedule (F) to the following effect."

Then he quotes the said certificate, which is that of the Sheriff Clerk, and which in effect sets forth the history of the affiliation action and the fact that a decree was arrived at by the Sheriff finding that the defender in this consistorial action was the father of the illegitimate child. Accordingly I hold that the documentary evidence connects conclusively the defender Mathieson with this woman M'Cormack, and establishes the fact that he was the father of that illegitimate child. When I give effect to the documentary evidence and take into account the circumstance that the defender and M'Cormack are charged with committing adultery with one another, and although they had ample notice of these proceedings they refused to appear, I think I have sufficient evidence on which to hold the case proved, and I shall accordingly grant decree, with expenses.

The Lord Ordinary granted decree of divorce.

Counsel for the Pursuer—Garson. Agents—Weir & Macgregor, S.S.C.