

I can judge very exceptional circumstances do exist in this case, for it appears that one of the co-owners of the "Kimberley" actually disclaims the action, and has come forward—no doubt after evidence was given and judgment pronounced—to say that he was on the outlook on his own ship at the time when the collision took place, and that according to his view of the situation his own ship was in the wrong. I do not think that under these circumstances the owners of the other ship should even now be precluded from having the opportunity of obtaining his evidence. They cannot be blamed for negligence or want of due assiduity in the preparation of their case in that they did not attempt to precognosce the owner of the other ship.

With regard to the case of William Kewley, the second person it is desired to examine, I should not for my own part under ordinary circumstances have granted any authority for his examination. But here again the circumstances are very exceptional. The owners of the "Spartan" could not, I think, be blamed for any negligence or want of due care in the preparation of their case in that they did not precognosce, or attempt to precognosce, William Kewley. They could not, I think, reasonably have anticipated that the cook or the steward would be on the outlook or on the deck of their opponents' ship at the time the collision took place; and in the very exceptional circumstances of this case I think we ought to grant leave to have William Kewley examined also.

It is obvious, of course, that the case of William Hutchison Leask stands in a totally different position, and if we had been asked to open up the proof in order to examine him alone I do not think your Lordships could have had any doubt. We would certainly have refused the motion. But it appears to me that if we propose to grant authority to examine William Falconer and William Kewley no good end could be served by excluding the evidence of Mr Leask. On the contrary, I think it desirable in the interests of justice that he should under these exceptional circumstances be examined.

Accordingly I am for granting the prayer of this note.

LORD JOHNSTON and LORD SKERRINGTON concurred.

LORD MACKENZIE was not present.

The Court opened up the proof, and allowed the defender and appellant to tender the three witnesses named in the note.

Counsel for the Pursuer (Respondent)—Murray, K.C.—C. H. Brown. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Defender (Appellant)—Sandeman, K.C.—Lippe. Agents—Alex. Morison & Company, W.S.

Tuesday, January 26.

FIRST DIVISION.

[Lord Ordinary on the Bills.]

COWDENBEATH GAS COMPANY,
LIMITED, AND ANOTHER v. PROVOST
OF COWDENBEATH AND ANOTHER.

Burgh—Statute—Construction—Burghs Gas Supply (Scotland) Act 1876 (39 and 40 Vict. cap. 49), sec. 5—General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. cap. 101)—General Police and Improvement (Scotland) Act 1862 Amendment Act 1868 (31 and 32 Vict. cap. 102)—Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), secs. 5 (2) and 6—Burgh Police (Scotland) Act 1893 (56 and 57 Vict. cap. 25), sec. 2—Interpretation Act 1889 (52 and 53 Vict. cap. 63), sec. 38 (1).

The Burghs Gas Supply (Scotland) Act 1876, sections 4 and 5, directs that in certain circumstances a poll of the ratepayers in a burgh shall be taken "in the manner prescribed in regard to polls of householders taken with reference to the adoption of the General Police and Improvement (Scotland) Act 1862." The last-mentioned Act is repealed by the Burgh Police (Scotland) Act 1892, which, however, makes no provision for taking a poll of the ratepayers. The Burgh Police (Scotland) Act 1893 gives the method of taking such a poll. *Held* that section 38 (1) of the Interpretation Act 1889 applied, and that the reference in the Burghs Gas Supply (Scotland) Act 1876 to the General Police and Improvement (Scotland) Act 1862 must be construed as a reference to the Burgh Police (Scotland) Acts 1892 and 1893.

The Burghs Gas Supply (Scotland) Act 1876 (39 and 40 Vict. cap. 49), sec. 5, enacts—". . . And if before the expiration of such month [i.e., from date of second meeting of Council, when resolution to adopt the Act is approved] a remonstrance in writing by twenty or more ratepayers against carrying into effect such resolution or any part thereof be lodged with the town clerk, . . . such resolution shall not be carried into effect unless confirmed by a majority of the ratepayers qualified and voting at a poll to be taken, and upon such remonstrance being lodged as aforesaid the chief or senior magistrate of such burgh shall be bound to direct a poll to be taken in the manner prescribed in regard to polls of householders taken with reference to the adoption of the General Police and Improvement (Scotland) Act 1862."

The Interpretation Act 1889 (52 and 53 Vict. cap. 63), section 38 (1), enacts—"Where this Act or any Act passed after the commencement of this Act repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted."

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 5 (2), enacts—"In the burghs to which this Act applies, this Act . . . shall supersede and come in the place of the general or local Police Acts. . . ." Sec. 6—"The General Police Acts enumerated and set forth in Schedule I of this Act . . . are hereby repealed." Schedule I includes the General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. cap. 101), and the General Police and Improvement (Scotland) Act 1862 Amendment Act 1868 (31 and 32 Vict. cap. 102).

The Burgh Police (Scotland) Act 1893 (56 and 57 Vict. cap. 25) enacts, sec. 1—"This Act . . . shall be read and construed along with the Burgh Police (Scotland) Act 1892." Section 2 contains the provisions as to the mode of resolving to adopt the Act.

On 20th January 1915 the Cowdenbeath Gas Company, Limited, and James B. Scott, a ratepayer in the burgh, *complainers*, presented a note of suspension and interdict against the Provost of the burgh, *respondent*, to prohibit him from taking the poll after mentioned "in the manner and with the qualification prescribed in regard to polls of householders taken with reference to the adoption of the Burgh Police (Scotland) Act 1892, as amended by the Burgh Police (Scotland) Act 1893," and against the Sheriff of the County of Fife, to prohibit him "from authorising any resolution confirmed by the ratepayers at such a poll to be registered in the Sheriff Court books of the County of Fife."

The Town Council of Cowdenbeath, at a meeting specially called for the purpose held on 4th June 1914, unanimously passed the following resolutions—" (1) That the Burghs Gas Supply (Scotland) Act 1876 be adopted in and applied to the burgh of Cowdenbeath, and (2) that Thursday the 19th day of November 1914 be now appointed as the date for holding a second special meeting to resume consideration of the resolution to adopt the said Act in and apply it to the burgh; and that the said second special meeting be held on that day at seven o'clock afternoon in the Council Chamber, Corporation Buildings, Cowdenbeath." A copy of the minute of the Town Council containing these resolutions was published on 26th September 1914 in the *Cowdenbeath Mail* newspaper of that date. The *Cowdenbeath Mail* was at that date the only newspaper published in the burgh of Cowdenbeath. At a second special meeting of the Town Council held in accordance with the second resolution on 19th November 1914, the said resolution that the Burghs Gas Supply (Scotland) Act 1876 be adopted in and applied to the burgh of Cowdenbeath was unanimously approved of and confirmed by the Town Council. During the month which followed said meeting on 19th November 1914, at which said resolution was approved of and confirmed, the said resolution to adopt said Act as approved of was advertised in the *Dunfermline Journal* newspaper on 21st and 28th November and 5th, 12th, and 19th December 1914, being once in each week during the said month. The said *Cowden-*

beath Mail newspaper had ceased to be published before 19th November 1914, and there was during the month following that date no newspaper published in the burgh of Cowdenbeath. The said *Dunfermline Journal* newspaper is a newspaper circulating in the county of Fife, in which the said burgh is situated. Public notice of the approval of the said resolution to adopt said Act was also given by means of placards posted in public places within the burgh. On 18th December 1914 a remonstrance signed by twenty-two ratepayers of Cowdenbeath was lodged with the town clerk of Cowdenbeath. In consequence of this remonstrance the Provost of the burgh directed a poll of ratepayers to be taken in terms of section 5 of the Burghs Gas Supply (Scotland) Act 1876 on Thursday, 21st January 1915. The said section directs that the poll shall be taken "in the manner prescribed in regard to polls of householders taken with reference to the adoption of the General Police and Improvement (Scotland) Act 1862." The Provost did not take the poll in the said manner, but in the manner prescribed in regard to polls of householders taken with reference to the adoption of the Burgh Police (Scotland) Act 1892, as amended by the Burgh Police (Scotland) Act 1893. The manner of taking the poll and the persons qualified to vote under the said Acts of 1892 and 1893 are entirely different from those provided for by the Act of 1862. At the said poll 629 ratepayers voted in favour of the adoption of the Act, and 74 ratepayers voted against adoption. The Provost accordingly declared that the resolution to adopt the Act had been confirmed by the ratepayers by a majority of 555 votes. The Town Council of Cowdenbeath thereafter applied, in accordance with section 5 of the Burghs Gas Supply (Scotland) Act 1876, for the authority of the Sheriff for the registration in the Sheriff Court books of the county of Fife of the said resolution "that the Burghs Gas Supply (Scotland) Act 1876 be adopted in and applied to the burgh of Cowdenbeath."

On 20th January 1915 the Lord Ordinary (ANDERSON) in the Bill Chamber allowed answers and refused interim interdict.

The complainers reclaimed.

At the hearing in the Inner House on 26th January 1915 the note so far as directed against the Sheriff of Fife was of consent of parties refused.

The reclaimers argued—The Burghs Gas Supply (Scotland) Act 1876 (39 and 40 Vict. cap. 49) conferred on the Provost the power to take a poll of the ratepayers, and directed him to take it in the manner prescribed in the General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. cap. 49). This importation by reference of the provisions of the General Police Act of 1862 was equivalent to their enactment in the Act of 1876. The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 58) repealed the General Police Act 1862, but that was only for police purposes. The right to take the poll given by the Act of 1876 was unaltered, and the method of taking the poll enacted by reference was also unaltered.

This was clear from the fact that the Burgh Police Act 1892 contained no provisions for taking a poll of ratepayers. The Interpretation Act 1889 (52 and 53 Vict. cap. 63), sec. 38 (1), did not apply. It contained the phrase "unless the contrary intention appears," and the Burgh Police Act 1892 did not intend to repeal the Gas Supply Act 1876 as to the taking of polls. The method of taking a poll for police purposes was found in the Burgh Police (Scotland) Act 1893 (56 and 57 Vict. cap. 25), which (section 1) was to be read along with but not as part of the Burgh Police Act 1892. There was therefore in the Burgh Police Acts of 1892 and 1893 no repeal and re-enactment of the provisions of the General Police Act of 1862 as to the method of taking a poll of ratepayers—*Magistrates of Cumnock v. Murdoch*, 1910 S.C. 571, 47 S.L.R. 460. The Burgh Police Act 1893 was a new enactment.

The respondents argued—The Gas Supply Act 1876 did not enact a stereotyped constituency and method of consulting it. The constituency of the General Police Act 1862 was modified by the Gas Supply Act 1876 itself (section 3). The ratepayers entitled to vote were not those of the General Police Act 1862, but those of the General Police Act 1862 as amended by the General Police (Scotland) Act 1862 Amendment Act 1868 (31 and 32 Vict. cap. 102). This showed that the reference was to a progressive code, *i.e.*, to the methods recognised by the Legislature as appropriate for police purposes from time to time. The Burgh Police Act 1892, sec. 5 (2), superseded all earlier Police Acts. There was a lacuna in the Burgh Police Act 1892, but it was filled up by the Burgh Police Act 1893, and in these Acts read together there was found the method of taking the poll. The Interpretation Act 1889, sec. 38 (1), therefore applied, and the Gas Supply Act 1876, sec. 5, must be construed as referring to the Burgh Police Acts 1892 and 1893.

LORD PRESIDENT—The 1st sub-section of the 38th section of the Interpretation Act of 1889 appears to me to apply in terms to this case.

The respondent proposes to invoke the aid of a certain statutory procedure in order to bring the Burghs Gas Supply Act of 1876 into operation in the burgh of Cowdenbeath, and the questions which we are asked are—Who are to vote, and how, if that procedure is adopted? I answer without hesitation that the persons to vote are those who are defined as householders in the Statute of 1892, and that the method which is to be followed in taking and recording their votes is that prescribed in the Statute of 1893.

The Burghs Gas Supply Act itself prescribes no procedure, but invites those who ask its aid when in search of ratepayers to find them among the householders as defined by the Statute of 1862, and when they are in doubt as to how these ratepayers are to vote to follow the procedure which is prescribed by the Statute of 1862.

Now in 1892, as your Lordships are aware, the Statute of 1862 was repealed, and with

it of course the procedure therein prescribed for taking a poll. No other procedure was substituted for the repealed procedure by the Statute of 1892, but that defect—for defect it certainly was—was remedied by the Statute of 1893, which by its 2nd section repealed certain sections enacted by the Statute of 1892, and directed that the enactments of the Statute of 1893 should be substituted therefor. Further, by the 2nd section it expressly stated that the two Acts were to be read and construed together. In the absence of any indication to the contrary, and in the absence of any discrepancy being revealed, my opinion is that these two Acts are virtually one Act of Parliament, and if that be so, it cannot, I think, be disputed that the Interpretation Act applies in terms, for it expressly sets out "that where any Act passed after the commencement of this Act repeals and re-enacts, with or without modification, any provision of a former Act, reference in any other Act to the provisions so repealed shall, unless the contrary intention appears, be construed as reference to provisions so re-enacted."

That appears to me to substitute the constituency and the procedure of the Statutes of 1892 and 1893 for what Mr Macmillan has characterised as the archaic procedure and also the archaic constituency prescribed by the Statutes of 1862 and 1868.

The respondent therefore appears to me to have adopted the correct statutory procedure here, and I move your Lordships therefore to refuse the interdict sought.

LORD JOHNSTON—Mr Constable, in addressing your Lordship, drew a distinction between two points—the composition of the constituency and the mode of taking the poll. On the first of these points I think that his case is unarguable, because the provisions of the 38th section of the Interpretation Act of 1889 appear to me to apply "unless the contrary intention appears," and I fail to see that Mr Constable has advanced any evidence whatever of a contrary intention.

On the other point there is more difficulty, because of the fact that the repeal is effected by one Act and the re-enactment by another Act—the former repealing without re-enacting, the latter re-enacting without repealing. But when one looks at the 38th section one finds that it says—"Where any Act passed after the commencement of this Act repeals and re-enacts, with or without modification, any provision of a former Act, reference in any other Act to the provisions so repealed shall, unless the contrary intention appears, be construed as reference to provisions so re-enacted." Now I do not think it necessary in applying this section to refer to the well-known rule that the singular may include the plural, and that therefore the section may be read as if it opened with the words "where any Act or Acts passed," &c. For it is only necessary to ask, What is the Act in question? The Act is the Act of 1892. But then what is the Act of 1892. The Act of 1892 is the Act as passed in that year, with a new set of provisions substituted for certain of its original provi-

sions. The case therefore appears to me to be one which is precisely met by the 38th section of the Interpretation Act, and reference in the Gas Act of 1876 to the former Act of 1862 must for the future be read as reference to the later Act of 1892, containing in lieu of certain of its provisions those substituted by the subsequent Act of 1893.

LORD SKERRINGTON—I concur.

LORD MACKENZIE was not present.

The Court refused the note.

Counsel for the Complainers and Reclaimers—Constable, K.C.—Gentles, Agents—J. Miller Thomson & Company, W.S.

Counsel for the Respondent, the Sheriff of Fife—Solicitor-General (Morison, K.C.)—Morton, A.-D. Agent—Sir William S. Haldane, Crown Agent.

Counsel for the Respondent, the Provost of Cowdenbeath—Macmillan, K.C.—W. T. Watson, Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Wednesday, January 27.

FIRST DIVISION.

[Sheriff Court at Glasgow.]

TRUSTEES OF THE CLYDE NAVIGATION v. WILHELMSSEN.

Ship—Collision—Narrow Channel—Firth of Clyde—Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60), sec. 418—Regulations for Preventing Collisions at Sea, 1897, Art. 25.

Held that the Firth of Clyde above a line drawn from the Cloch Lighthouse to the Gantocks Beacon is a narrow channel in the sense of Article 25 of the Regulations for Preventing Collisions at Sea, 1897.

The Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60), sec. 418, gives power to His Majesty, on the joint recommendation of the Admiralty and the Board of Trade, by Order in Council, to make regulations for preventing collisions at sea.

The Regulations for Preventing Collisions at Sea, 1897, Art. 25, provides—"In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

The Trustees of the Clyde Navigation, incorporated by Act of Parliament, 16 Robertson Street, Glasgow, *pursuers and appellants*, brought an action of damages in the Sheriff Court of Lanarkshire at Glasgow against W. Wilhelmssen, Tönsberg, Norway, owner of the steamship "Waterloo" of Tönsberg, Norway, *defender and respondent*, in respect of loss and damage sustained by them in consequence of a collision between the steamship "Hopper No. 6" of Glasgow and the said steamship "Waterloo" in the Firth of Clyde off Gourock.

The Sheriff-Substitute (FYFE) having

found both vessels in fault and refused to award damages the *pursuers* appealed to the Court of Session. The case is reported only on the question as to the proper navigation of steamships, in view of Article 25 of the Regulations for Preventing Collisions at Sea, 1897, in the Firth of Clyde.

Counsel for the *pursuers* (*appellants*) referred to the following authorities:—*Zihrul v. Cormack, et e contra*, July 20, 1904, 12 S.L.T. 294; *Screw Collier Company, Limited and Others v. Weir, et e contra*, July 19, 1906, 14 S.L.T. 465; *Kerr v. Screw Collier Company, Limited*, 1909 S.C. 561, 46 S.L.R. 338, and 1910 S.C. (H.L.) 25, 47 S.L.R. 99.

At advising—

LORD PRESIDENT.—. . . I now proceed to consider the question whether the *pursuers* have succeeded in proving the averment made in the sixth article of their condescence to the effect that the Firth of Clyde opposite Fort Matilda Pier is a narrow channel within the meaning of Article 25 of the Regulations for Preventing Collisions at Sea—an averment which is denied. I am of opinion that the averment is proved. The evidence of many skilled and experienced men is to the effect that at this part of the fairway of the Clyde the rule is invariably observed by traders inward bound passing traders outward bound. I should have been amazed had it been otherwise, for, as your Lordships are aware, this part of the fairway of the river is one of the busiest thoroughfares in the world, where innumerable traders inward bound for Glasgow and Greenock pass innumerable traders outward bound for all parts of the navigable globe.

One would think that if there was any channel to which the narrow channel rule ought to be applicable it was to this part of the river Clyde. The safety of the navigation, in my opinion, imperatively demands its application. It is nothing to the purpose to say that small vessels do not, and that vessels which have occasion to cross cannot, observe the rule. The applicability of rule 25 does not exclude the operation of the other rules for preventing collisions at sea. The fact that this is a narrow channel does not to any degree abrogate the rule for crossing vessels when the circumstances demand its application. It was, no doubt, contended to us on behalf of the defender that we could not affirm that the narrow channel rule was applicable to this part of the Firth of Clyde without carrying our finding further down the channel. I do not agree. We can, if we please, affirm that the narrow channel rule applies to this part of the fairway of the river, where the breadth is only half-a-mile from Fort Matilda Pier out to the Rose-neath Patch. But I am prepared now to hold—and I understand that your Lordships agree—that the narrow channel rule applies at least as far down the fairway as to a line drawn from the Cloch Lighthouse to the Gantocks Beacon, where the breadth of the fairway is about one mile and a-third. For my own part I am prepared to hold that the narrow channel extends much further down, and that the fairway of the channel of the