afterwards. They may be and generally are delivered without the presence of any persons with opposite interests. The returning officer may be quite unable to determine as to their validity at the moment. I am not prepared to say that he may not decide as to the validity of a nomination when the nomination paper is presented. But I think it must be within his power to accept nomination papers, and consider as to their validity afterwards at such leisure as the statute allows. There is nothing against that expressed or implied in the regulations. Three days may elapse before he is required to publish the names of the candidates. There seems no reason why he should not during that time make such inquiries as he considers desirable to enable him to determine as to the validity of the nominations, and there is no direction that even in publishing the list of candidates he shall affirm the validity of the nominations. It is not clear that he may not declare a nomination invalid even up to the date of the election. Suppose that he were imposed on by a forgery, I am not prepared to say that he could not reject a nomination at any time if he discovered it. The rules give him a general power to decide, and I see no good ground for restricting him as to the time of his decision.

"The first question here is, whether it is or is not averred that the returning officer ever decided that the pursuer's nomination was valid. Whether he decided or not is not a matter of law but of fact, and it must be averred as a fact, of which perhaps the most important evidence would be that of the returning officer himself as to whether he did or did not intend to decide. I have come to the conclusion that there is no relevant averment to that effect. It is not expressly averred that the returning officer 'decided:' What is averred is that he said that the nomination paper was all in order, and accepted the same as valid. I think the pursuer's counsel gave no satisfactory answer to the question why in stating what had happened he had deviated from the language of the regulations. I asked him more than once whether he desired to amend his record, and to aver explicitly that the returning officer decided that his paper was valid, and he deliberately declined to do so. The reason must be that he was conscious that what he could prove to have been said or done by the returning officer would not amount to a decision. In short, I hold that his averment falls short of what is necessary, and that therefore the School Board should not be put to the expense of a proof of this averment.

"Further, I hold that if the truth of the pursuer's statements were assumed, this would not be enough for his case. Assume that the returning officer examined the valuation roll and said that the nomination papers were in order and accepted them, that would not foreclose him, if he had committed himself no further, from afterwards rejecting them, unless he himself had intended thereby to decide that they were valid, which is what the pursuer has failed to aver. Therefore if I accept the pursuer's averments I still consider them irrelevant.

"I am not satisfied that if the pursuer or his nominators imposed on the returning officer by a false or even a mistaken representation, express or tacit, the pursuer would be entitled to plead the finality of a decision obtained in that manner.

"Whether the returning officer could correct his own decision, if deliberately and distinctly announced with the intention of deciding, that is to say, whether his decision would be final against himself, is a point which I do not require to decide, and on which I reserve my opinion.

"It was not maintained on either side that the returning officer was not required to decide at all unless a nomination paper was objected to, and I do not require to determine that here. It occurred to me at the debate that that was suggested by the use of the word 'decide,' but on consideration I incline to think that that view could not be sustained.

"On the whole, I think there is no relevant averment that the returning officer ever so decided that the nomination paper was valid as to put it out of his power to decide afterwards when more fully informed that it was invalid, and there seems to be no doubt that he did so decide, and, as I have said, that this ultimate decision was correct."

Counsel for the Pursuer — Constable. Agent — John Veitch, Solicitor.

Counsel for the Defenders — Galloway. Agent—W. J. Lewis, S.S.C.

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*Friday, November 5.*

## OUTER HOUSE.

[Lord Kyllachy.

## POLL *v.* LORD ADVOCATE.

*International Law — Alien — Sovereign — Official Authority — Right of Alien to Question Administrative Acts of Sovereign.*

An alien is not entitled to question in the Courts of this country an administrative act of the Sovereign, even assuming that that act is a violation of international law and of the municipal law of Scotland.

An alien has no right enforceable by action to enter the territories of another country.

Certain officials under the Fishery Board prevented the landing of fish, which had been caught by a trawler outside territorial waters but inside a line within which trawling is prohibited by the Fishery Board, at the port of Aberdeen. The master of the trawler, a German subject, brought an interdict against the officials in question and against the Lord Advocate. The respondents averred that in preventing

the landing of the fish they were acting under the direct authority of the Secretary for Scotland. *Held* (*per* Lord Kyllachy) that the complainer was not entitled to question acts of the Secretary for Scotland as a minister of the Crown.

*Fishing — Trawling — Foreign Trawler — Right to Land Fish—Herring Fishery (Scotland) Act* 1889 (52 *and* 53 *Vict. c.* 23), *sec.* 8.

*Opinion* (*per* Lord Kyllachy) that the Herring Fishery (Scotland) Act 1889, section 8, forbids the landing of fish caught in contravention of the Act, whether by British subjects or by foreigners.

This was a note of suspension and interdict at the instance of Ernst Otto Ferdinand Poll, master of the steam trawler "Alster," of the port of Altona, near Hamburg, Germany, directed against the Lord Advocate, Armitage A. Lucas, R.N., commander of H.M. s.s. "Jackal," and William Couper, Fishery Board officer, Aberdeen. The facts of the case are fully set forth in the opinion of the Lord Ordinary.

On 5th November 1897 the Lord Ordinary (KYLLACHY) refused the note.

*Opinion.*—"The complainer here is a German subject, and is master of a steam trawler registered and owned in Germany. The respondents are (1) the Lord Advocate as representing Her Majesty, (2) Commander Lucas of H.M. ship "Jackal," and Mr Couper, Fishery Board officer, Aberdeen. The question to be decided is, whether the complainer can obtain interdict as against the respondents or any of them, so as to prevent their interference with his landing on the coast of Scotland fish caught by the method of trawling in the German Ocean outside the territorial waters of Great Britain. The complainer avers that on a recent occasion he was so interfered with by the two last named respondents, acting (as they allege, but as he does not admit) with the authority of Her Majesty. And the interdict sought is against the repetition of this proceeding. As expressed in the prayer, the interdict is asked against the whole respondents, and all others acting by their instructions or with their authority. But at the discussion the demand was (as I understood) not pressed as against the leading respondent, viz., the Lord Advocate as representing the Crown.

"The answers lodged are in the name of the whole respondents, and in these answers the Lord Advocate, as representing Her Majesty, endorses and justifies the action complained of, and states that the same was in fact authorised and ordered by Her Majesty's Government—that is to say, by Her Majesty acting upon the advice of Her responsible ministers. The averment is contained in the ninth article of the respondents' statement, and is thus expressed—'The Secretary for Scotland is a member of Her Majesty's Government. The said Government resolved, in the interest of the State, and as an act of State, that the fish in question, and other fish caught by beam or otter trawling in the waters referred to in the note, should not be allowed to be landed in Scotland, and acting on this resolution, and as a member of and instructed to that effect by Her Majesty's Government, and in concert with Her Majesty's Advocate, the Secretary for Scotland ordered the respondents Lucas and Couper to prevent the landing of the said fish. The respondents Lucas and Couper, in acting as they did, were obeying, as they were bound to do, special orders given to them by the Secretary for Scotland on behalf of Her Majesty and Her Majesty's Government, and the respondent Her Majesty's Advocate was aware of and concurred in said orders being given.'

"Following on this statement the respondents plead *in limine* as follows—'The note is incompetent and the statements of the complainer irrelevant in respect that the act complained of was and is an act of State by and on behalf of and by the command of Her Majesty and Her Majesty's Government, and no action lies in the Courts of this country at the suit of a foreigner, either against the Crown or the servants of the Crown in respect of such an act.'

"What I have now to decide is, whether this plea is well founded in point of law, and if so, whether it can be sustained upon a consideration of the record, and without proof or other inquiry.

"Having given the matter all the attention which its importance demands, I am of opinion that my judgment must on both points be in the affirmative.

"As to the necessity of proof, I may state my opinion very shortly. I do not inquire whether it is open to the complainer (who is an alien, although a friendly alien) to raise and try the question whether persons in the position of Messrs Lucas and Couper—admittedly acting not in their private capacities but officially—were duly authorised by their official superiors, and whether these again were duly authorised by the head of the State. There is weighty authority in the negative (*Musgrove*, App. Cases, 1891, p. 272), as to which I am not to be held as expressing any doubt. But it seems to me to be here enough to foreclose inquiry that Her Majesty by Her Advocate appears in the process, and states to the Court that the act here complained of was duly authorised, and was in fact done by Her Majesty's orders. I am of opinion that in this—one of Her Majesty's Courts—that statement officially made must be accepted as true. It is, indeed, in my opinion, enough that Her Majesty appears by Her Advocate and adopts and ratifies the act of Her officers. That is, I think, a proposition which, especially in an action for interdict, does not require authority. But it is supported by sufficient authority if that were required—*Buson* v. *Denman*, February 1848, 2 Exch. Reports, 167.

"This being so, the complainer's proposition is and must be, that an alien is entitled to complain to the courts of this country of an act of the Sovereign—that is

to say, of an act of the State—conceived in the interest of the State and carried out by the officers of the State. I confess that at the debate I desiderated authority for this proposition, and was not surprised that none was produced. The proposition seems to me to rest upon a radical fallacy. It may be true that for the purposes of this argument it has to be assumed that the supposed act of the Sovereign is in breach of international law, and is even, as suggested here, contrary to municipal law or municipal statute. But international wrongs can only be redressed by diplomacy or by war. They cannot possibly be redressed by the municipal tribunals of the countries concerned. Nor can it make any difference that the alleged wrong may affect the interests of individuals. The individual alien can no more enforce international obligations by an action at law than can the State to which he belongs. International law is therefore out of the question. But let it be taken that the thing done is (though done to an alien) contrary to municipal law. Assume—for example—(because it is said to be the case here) that by a British statute it is expressed or implied that all foreign fishermen shall have free and unqualified access to British territory, it has still to be asked by what right can a foreigner plead that or any other limitation of the royal prerogative? British subjects may do so. For the laws and usages which form our constitution have been established for their benefit. But if they acquiesce, on what principle can foreigners object? The truth is that, except in a question with its own subjects, the sovereign power—the supreme executive—of every State must be held to be absolute. Its acts are, till disavowed, the acts of the State, and must be treated as such. An alien—or at least a friendly alien—is allowed by our customs (as by those of most civilised States) to sue in our courts actions against private individuals. But he cannot sue the State or the head of the State. At least he cannot do so in respect of wrong done or threatened in the national interest. Whether and under what limitations he may be permitted to sue upon contracts made between the State and him as an individual is a question which it is not here necessary to consider.

"If I am right in what I have now said, I am, I think, in a position to sustain the first plea-in-law for the respondents without going further into the merits of the complaint. But as other points have been argued, and as the case may go further, I may state my opinion on at least some of them.

"In the first place, I do not at present see how, if I had to try the question of international law, I could hold it doubtful that by that law each nation may close its territory against the citizens of other nations to such extent, and for such time, and under such conditions, as it thinks fit. Certainly no writer on international law has—so far as I know—suggested that an alien has a right enforceable by action to enter the territory of another country, and numerous authorities were cited to the contrary — (Puffendorf, iii., 3, 9; Blackstone's Commentaries, i, p. 338; Vattel, ii, 7, 94-100; Hansard, vol. xxxiv, p. 1065 (Lord Eldon), and 1069 (Lord Ellenborough); *Musgrove* v. *Chun Tlong Toy* [1891] A.C. 272).

"In the second place, I cannot accede to the, I think, extreme suggestion that upon a just construction of certain municipal statutes, by the Fisheries Act of 1883, the Herring Fisheries Act of 1889, and the International Convention scheduled in the former of these Acts, the right of foreigners to land in Scotland fish caught by trawling outside territorial waters has been affirmed or recognised. It is of course true that the statutory prohibition as to fishing by the trawl, so far as it covers extra-territorial waters, is — as against foreigners—ineffectual. It may, therefore (although expressed in general terms), fall as matter of construction to be read as inapplicable to foreigners. But it does not follow that because, in this view, fishing by foreigners within the area now in question is not prohibited, there is thereby implied a permission to land in Scotland all fish lawfully caught within that area. That was a matter which might quite well have been left to be regulated by the British Government, no statutory provision about it being required. It may, however, be pointed out that so far as general language can do it, the Act of 1889 does in terms prohibit 'the landing or selling in Scotland of any fish caught in contravention of this Act or of any bye-law made thereunder.' The section is the 8th section of the Act of 1889, and it is quoted on record. And there being no ground for restricting the generality of the enactment, I can, I confess, see no reason why it should not be read as applicable as well to foreigners as to British subjects. In short, I fail to discover that the complainer takes any benefit from his appeal to our Fishery Statutes; and I have only to add that I equally fail to see how he takes any benefit from the tenor or terms of the International Convention of 1883. That Convention dealt with the "policing" of the North Sea fishing inside and outside territorial waters; but while recognising and protecting the rights of fishing belonging by international law to the contracting States, it is entirely silent as to the totally different matter here in question, viz., the right of landing and selling fish on the coasts of the contracting States.

"Altogether, I am of opinion that the complainer's case fails in every view which can be taken of it, but, as I have already indicated, I shall confine myself to sustaining the first plea-in-law for the respondents, and refusing the note of suspension with expenses."

Counsel for the Complainer—Johnston, Q.C.—Salvesen. Agent—Alexander Morison, S.S.C.

Counsel for the Respondents—Sol.-Gen. Dickson, Q.C.—C. N. Johnston. Agent—Thomas Carmichael, S.S.C.