

should be perfectly willing to allow him to resign, and I put that to his counsel, but his counsel says he has instructions to give no such undertaking, and I am afraid, therefore, there is nothing for us to do but to remove him.

LORD KINNEAR—I think the respondent has taken an action which is incompatible with his performance of the trust duties, and therefore he must either resign or be removed. The two positions of pursuer of an action of this kind against the trustees and defender of that action in the character of trustee are absolutely conflicting, and in my opinion the respondent cannot be allowed to continue in the trust.

LORD JOHNSTON concurred.

LORD M'LAREN was absent.

The Court granted the prayer of the petition.

Counsel for the Petitioners—Morton. Agent—John N. Rae, S.S.C.

Counsel for the Respondent—Sandeman, K.C.—D. Anderson. Agents—Macpherson & Mackay, S.S.C.

Thursday, June 24.

OUTER HOUSE.

[Lord Salvesen.

ABERCROMBY AND OTHERS v. BADENOCH AND OTHERS.

Valuation Roll—Finality—Erroneous Entry in Roll—Action in Court of Session for Relief from Assessment—Reduction of Entry in Roll—Competency—Valuation of Lands (Scotland) Act 1854 (17 and 18 Vict. cap. 91), sec. 30.

The Valuation of Lands (Scotland) Act 1854, sec. 30, enacts—"No valuation of any lands or heritages contained in any valuation roll under this Act shall be rendered void or be affected by reason of any mistake or variance in the names of such lands or heritages, or in the Christian or Surname or Designation of any proprietor or tenant or occupier thereof, and no valuation roll which shall be made up and authenticated in terms of this Act, and no valuation which shall be contained therein, shall be challengeable, or be capable of being set aside or rendered ineffectual, by reason of any informality, or of any want of compliance with the provisions of this Act, in the proceedings for making of such valuation or valuation roll."

A body of trustees were entered in the valuation roll as proprietors, tenants, and occupiers of salmon fishings, and on appeal to the magistrates the entry in the roll was sustained. They brought an action in the Court of Session concluding for reduction of the

entry in the roll, and also for declarator that they were not liable to assessments in respect thereof, and for interdict to restrain any proceedings against them for recovery.

Held (per Lord Salvesen, Ordinary) that the action was competent as regards the conclusions for declarator and interdict. *Sharp v. Parochial Board of Lathron*, July 12, 1883, 10 R. 1163, 20 S.L.R. 771, *followed*.

Observations as to the competency of the reductive conclusion of the summons.

Valuation Roll—Subjects Entered—Persons "in the Actual Receipt of Rents and Profits of Lands and Heritages"—Mid-Superior of Salmon Fishings who has Imposed Restriction on Method of Fishing by His Donee—The Valuation of Lands (Scotland) Act 1854 (17 and 18 Vict. cap. 91), sec. 42.

The Valuation of Lands (Scotland) Act 1854, sec. 42, enacts—" . . . The word 'proprietor' shall apply to life-renters as well as fiars, and to tutors, curators, commissioners, trustees, adjudgers, wadsetters, or other persons who shall be in the actual receipt of the rents and profits of lands and heritages. . . ."

The proprietor of certain salmon fishings in the sea, disposed them by feu-disposition to trustees, who by feu-disposition disposed them to a third party, but under burden of a restriction prohibiting such third party from fishing with net and coble. The trustees were entered in the valuation roll as proprietors of fishings.

Held (per Lord Salvesen, Ordinary), in an action of declarator and interdict, that the trustees were not proprietors of fishings within the meaning of the Valuation of Lands (Scotland) Act 1854, and were not liable to be assessed in respect thereof.

This was an action at the instance of Sir George William Abercromby of Birkenbog and Forglie, Bart., and others, as trustees on behalf of the riparian proprietors of the river Deveron, acting under a deed and declaration of trust executed by them, and dated 1st, 2nd, 5th, and 7th November 1907, against (1) John A. Badenoch, assessor of the burgh of Banff, (2) James Morrison, solicitor, Banff, clerk and treasurer of the District Board of the river Deveron, for himself and as representing the District Fishery Board, (3) the Parish Council of Banff, (4) C. W. Cosser, collector of poor and school rates of the parish of Banff, (5) the Provost, Magistrates, and Councillors of the Royal Burgh of Banff, and (6) Alexander Simpson, burgh collector.

The summons concluded (1) for reduction of an entry in the valuation roll of the burgh and parish of Banff for the year ending Whitsunday 1907, whereby the pursuers were entered as proprietors, tenants, and occupiers of "salmon fishings in sea *ex adverso* of burgh of Banff," (2) for declarator that the pursuers were not proprietors,

tenants, or occupiers of the said salmon fishings, and were not liable to be rated or assessed in respect thereof, and (3) for interdict against the defenders from taking any proceedings against the pursuers for recovery of any rates or assessments leviable in respect of these salmon fishings.

The facts of the case appear from the following opinion of the Lord Ordinary:—

LORD SALVESEN—"The pursuers in this action seek to reduce an entry in the valuation roll of the burgh and parish of Banff for the year ending Whitsunday 1909, whereby they are entered as proprietors, tenants, and occupiers of salmon fishings in the sea *ex adverso* of the burgh of Banff, on the ground that they are not such proprietors, and are not liable to be rated or assessed as such. They also—and this is the more practical conclusion—seek interdict against the defenders proceeding against them on summary warrant or otherwise for recovery of rates or assessments leviable in respect of said salmon fishings.

"Prior to 1907 the whole salmon and other fishings in the sea *ex adverso* of Banff belonged to the Duke of Fife. In that year he disposed them by feu-disposition to the pursuers as trustees on behalf of the riparian proprietors of the river Deveron, which falls into Banff Bay. Their object in acquiring these fishings was to enable them to control the fishing so as to allow a larger proportion of the salmon to run up the river. Accordingly, immediately after they had acquired the fishings in question they by feu-disposition conveyed the whole salmon and other fishings in the sea which they had acquired from the Duke to Messrs J. Sellar & Sons, but under the restriction that the disponees were not to be entitled to fish by net or net and coble in any part of the sea lying to the south of a line drawn from the head of Banff harbour on the west to the head of Macduff harbour on the east, which declaration and condition was created a real and preferable burden affecting the subjects. That this restriction was regarded by the pursuers as of value is plain from the fact that they accepted nearly £5000 less from Messrs Sellar than they had paid to the Duke of even date, and the result has been to reduce materially the assessable value of the fishings in the sea. It must, however, be kept in view that the difference in price is not represented wholly by the restriction upon the sea fishings, for in conveying back the river fishings in the Deveron and estuary of the Deveron, which they had also acquired from the Duke as part of the same transaction, they put him under the restriction that he should only be entitled to exercise in the river and estuary the right of fishing by rod and line, and in no event by net or net and coble, which condition was likewise declared to be a real burden. The difference of £5000 accordingly represents the price that the pursuers paid to enable them to put the owners of the sea fishings under a disability to fish with net and coble in the part of the sea

already referred to, together with the restriction of the Duke's fishing rights to rod and line.

"The effect of the various conveyances is that the pursuers at present hold the position of mid-superiors of the sea fishings, and are thus technically proprietors of an estate in land. They, however, maintain that they are not liable to be entered in the valuation roll, as they draw no income or revenue from that estate, and have besides conveyed the right of beneficial occupation to others. They are now vested with nothing more than a right to prevent the owners of the sea fishings from fishing in a particular manner in a part of the subjects disposed.

"The pursuers having been entered in the valuation roll for the year ending Whitsunday 1909 as proprietors of subjects valued at a yearly rent of £100, appealed against the proposed entry to the Magistrates of Banff as the Valuation Court, but the appeal was refused. On the authority of the case of *The British Linen Company*, 1906, 8 F. 503, 43 S.L.R. 442, they assumed—and I think rightly—that they had no other right of appeal, the Valuation Judges of the Court of Session having decided that the only kind of appeal which they can entertain is one relating to questions of value. They have accordingly brought this action to negative their liability for an assessment not merely for the current year but also for the future.

"The first objection taken is that the action is incompetent, on the ground that the decision of the magistrates as to the entries in the valuation roll, in so far as not altered by the Appeal Judges, is final. In support of this contention it was pointed out that there is no precedent for correcting the valuation roll by an action of reduction in the Court of Session. The argument is formidable so far as the reductive conclusions are concerned, but it does not appear to me to have the same weight in reference to the conclusions for interdict. Where a person has been erroneously entered on the valuation roll as the proprietor of subjects with which *de facto* he has no connection, one would be disposed to think that some remedy must be open to him; and if he cannot obtain this by an appeal to the Valuation Judges his only recourse would seem to be an ordinary action. As I read it, the decision in the case of *Sharp*, 10 R. 1163, 20 S.L.R. 771, expressly settles that this remedy is competent. The complainer there was the proprietor of subjects which had been twice entered in the valuation roll, with the result that if the mistake could not be corrected he could be compelled to pay double assessments; and the Court held that they were entitled to give relief, not by way of correcting the roll, but by restraining the collector from levying more than one assessment. In my opinion this decision is in point here, for no distinction can be taken between a man being entered twice in the roll and his being erroneously put upon it. The defenders maintained that *Sharp's* case was ill decided, but it is

binding upon me, and I venture to think it would be very unfortunate if any other result had been arrived at. An administrative body which is not skilled in legal matters, and whose decisions may be influenced by popular considerations, ought not to be final on matters of law which affect the patrimonial rights of individuals, and I do not think that section 30 of the Valuation Act has this effect. The provision is that the valuation contained in the roll, properly made up, shall not be challengeable 'by reason of any informality, or of any want of compliance with the provisions of this Act, in the proceedings for making up such valuation or valuation roll.' This provision does not, in my opinion, exclude a challenge of the valuation roll, or at all events of the assessments depending upon it, where the administrative body who makes it up have acted wholly beyond their powers. I accordingly repel the objection to competency.

"The next question is whether the pursuers have been rightly placed on the valuation roll as proprietors of the fishings in question. This depends upon a construction of section 42 of the Valuation of Lands (Scotland) Act 1854, where the word 'proprietor' is defined as applying to liferenters as well as fiars, &c. 'or other persons who shall be in the actual receipt of the rents and profits of lands and heritages.' Now the pursuers are plainly not fiars, nor are they in receipt of any rents or profits of the salmon fishings in question. The defenders argued that they are constructively in receipt of profits, in the same way as a man who owns a house but refuses to let it. In my opinion the supposed analogy does not hold. No doubt if they chose to withdraw the restriction they might obtain a yearly payment from Messrs Sellar in respect of such withdrawal, but a mid-superior who is in right of a mere burden on another's property cannot, in my opinion, be said to be in the actual receipt of the rents and profits of land. It was admitted that superiors have never been entered in the valuation roll as proprietors of the lands over which the superiority extends, obviously for the very good reason that there cannot be two proprietors and that the Act refers to the proprietor who has the beneficial use of the lands. The pursuers here have no right whatever to fish in any portion of the sea, the salmon fishings in which they have feued to Messrs Sellar, and therefore they are not in the position of the man who owns property but declines to put it to a remunerative use. It was said that the whole series of transactions was a device for increasing the value of the river fishings by partially destroying the assessable valuation of the sea fishings in which the town of Banff is interested. I am not moved by this argument. A proprietor of a house may, if he chooses, allow it to go to ruin or destroy it, and so diminish, at his pleasure, the assessable value of his property, and it appears to me to have been equally in the pursuers' option, as

proprietors of the salmon fishings, so to regulate them as to diminish the value of the fishings in one parish with the object of increasing it in another.

I accordingly reach the conclusion that the pursuers are entitled to have the interdict which they seek. As it is not necessary that the valuation roll should be corrected to give the pursuers a remedy, I shall give decree in terms of the declaratory conclusion and the conclusion for interdict only, and *quoad ultra* shall dismiss the action."

His Lordship gave decree in terms of the declaratory conclusion and conclusion for interdict.

Counsel for the Pursuers—Murray, K.C.—Chree. Agent—F. J. Martin, W.S.

Counsel for the Defenders—Cooper, K.C.—Horne. Agents—Alex. Morison & Company, W.S.

HOUSE OF LORDS.

Tuesday, July 6.

(Before the Lord Chancellor (Loreburn), Lord James of Hereford, Lord Atkinson, Lord Gorell, and Lord Shaw of Dunfermline.)

JOHANNESBURG MUNICIPAL COUNCIL *v.* D. STEWART & COMPANY (1902) LIMITED AND OTHERS.

(In the Court of Session, March 19, 1909, 46 S.L.R. 657, and 1909 S.C. 860.)

Contract—Process—Jurisdiction—Arbitration—Foreign—Breach—Non-fulfilment—Damages—Contract, to be Deemed an English Contract, to be Implemented in the Transvaal, Containing Clause of Reference to Arbitration in England and in the Transvaal, English Law to Govern Arbitration, with Supplementary Contract having Clause for Arbitration in Transvaal, Transvaal Law to Govern.

A contract, declared to be an English contract enforceable in and subject to the jurisdiction of the English Courts, whereby a Scottish company undertook to supply engineering plant to the Johannesburg Municipal Council, contained this clause of reference—"In case any dispute or difference shall arise between the purchasers and the contractors . . . it shall, after the complete delivery of the material, be referred to the arbitration of a single umpire or referee to be mutually agreed upon between the parties, or failing agreement, to be nominated by the president for the time being of the Institution of Civil Engineers of London, or in the case of disputes with local contractors in Johannesburg to be nominated by the Lieutenant-Governor of the Transvaal . . . and the arbitra-