

of counsel: Direct the said Sheriff-Substitute to append his decision to the said motion."

Counsel for the Pursuers—Crawford. Agents—Simpson & Marwick, W.S.

Counsel for the Defenders—Duffes. Agents—J. S. & J. W. Fraser-Tytler, W.S.

Friday, January 22.

## FIRST DIVISION.

(SINGLE BILLS.)

MITCHELL AND OTHERS v. SELLAR.

*Process—Proof—Appeal—Additional Evidence—Re-opening of Proof After Judgment Pronounced—One of Pursuers Disclaiming Action.*

*Circumstances in which one of the pursuers in an action in the Sheriff Court having disclaimed the action after judgment was pronounced and an appeal taken to the Court of Session, and offered his evidence in support of the defender, the Court allowed the proof to be opened up and this pursuer tendered as a witness for the defender, along with two other witnesses who corroborated his evidence.*

John Mitchell, residing at 92 Queen Street, Peterhead, John Falconer, fisherman, Portnockie, and William Falconer, fisherman, Portnockie, registered owners of the steam-drifter "Kimberley," BF 965, and Alexander Stuart, Alexander Murray, and Angus Murray, all fishermen residing in Lewis, *pursuers and respondents*, brought an action in the Sheriff Court at Aberdeen against Colin Reid Sellar, residing in Boddam, registered owner of the steam-drifter "Spartan," PD 206, *defender and appellant*, for damages in respect of a collision which occurred in the South Bay of Peterhead on 22nd July 1913 between the said steam-drifter "Kimberley" and the said steam-drifter "Spartan." The Sheriff-Substitute having granted decree against the defender, the defender on June 1, 1914, appealed to the Court of Session.

On January 22, 1915, the defender and appellant presented a note to the Lord President in Single Bills craving his Lordship to move the Court to open up the proof, and allow the defender and appellant to tender as witnesses in the case the said William Falconer, William Kewley, surfaceman, residing in Cullen, and William Hutchison Leask, shipowner and Provost of Peterhead.

The note, *inter alia*, stated—"In the view of the Sheriff, if the collision happened at the point alleged by the pursuers, it was brought about in the manner averred by them, whereas if it occurred at or about the point alleged by the defender the explanation given by the defender may be accepted. On a review of the evidence the Sheriff affirmed the contention of the pursuers.

The pursuer John Falconer, who was skipper of the "Kimberley," stated in evidence that the pursuer Alexander Stuart

was the outlook, and that he was at his post. The said Alexander Stuart stated in evidence that he was not the outlook on the day of the collision, but that the mate was forward. The mate of the "Kimberley" was the pursuer William Falconer, and he was not examined as a witness for the pursuers, nor was any explanation of his absence offered.

"Of this date (Dec. 31, 1914) the said William Falconer addressed a letter to the defender's solicitors in Peterhead in the following terms:—'Dear Sirs—In the case of the "Kimberley" against the "Spartan" I have to inform you that I never gave instructions nor permitted my name to be used as a pursuer. In fact I was never asked to do so. Accordingly I disclaim the case altogether. I have all along said that the "Kimberley" was solely to blame, and I have told my co-owners repeatedly this, as I was the only man on deck at the time of the collision who could have seen the whole of it. Will you please see that my name is withdrawn from the case as I now withdraw it.—Yours truly, WILLIAM FALCONER, fisherman, 267 Portnockie, part owner of "Kimberley," BF 965.'

"The defender's solicitors were subsequently informed by the said William Falconer that he was on the lookout when the collision occurred, that it took place in the manner and about the point alleged by the defender, and that it was caused by the helm of the 'Kimberley' having without warning been put hard-a-port in order to avoid a sailing vessel in front, with the result that the 'Kimberley' went round to starboard and attempted to cross the line of vessels going into the harbour.

"In consequence of the information received from the said William Falconer the defender has also interviewed William Kewley, surfaceman, residing in Cullen, who was engaged as cook on the 'Kimberley' and who was on deck at the time of the collision, but who was not examined as a witness for the pursuers. The said William Kewley is prepared to support the statements of the said William Falconer.

"Further, since the judgment was pronounced by the Sheriff the defender's solicitors have been informed by William Hutchison Leask, shipowner and Provost of Peterhead, that on the day in question he was sitting at his office window which overlooks the South Harbour of Peterhead, and that he saw the collision take place at or about the place spoken to by the said William Falconer and William Kewley."

Counsel for the defender and appellant referred to the following cases:—*Taylor v. Provan*, June 16, 1864, 2 Macph. 1226, Lord Justice-Clerk at 1230; *Allan v. Stott*, June 14, 1893, 20 R. 804, 30 S.L.R. 728; *Gtengarnock Iron and Steel Company, Limited v. Cooper & Company*, June 12, 1895, 22 R. 672, 32 S.L.R. 546; *Coul v. Agr. County Council*, 1909 S.C. 422, 46 S.L.R. 338.

**LORD PRESIDENT**—This is one of a class of cases in which the Court has certainly a very wide discretion—at the same time a discretion which is only exercised under very exceptional circumstances. So far as

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."