which the Sheriff refers and to which the defenders appeal. I am not sure that I quite follow the reasoning by which in that case the majority of the Court reached the conclusion that the alternative remedy provided by the Sale of Goods Act 1893 was barred to the pursuers by their previous ineffective rejection. But not being in the circumstances prepared to propose to your Lordships that the point of law there and here involved should be submitted to the whole Court, I consider that as the two cases are not distinguishable we ought to follow the decision referred to. In that view I am not prepared to dissent from the judgment which I understand your Lordships propose, viz., that we should affirm the Sheriff-Substitute's interlocutor. I should have proposed, for the reasons I have explained, that in place of the second paragraph of the Sheriff's third finding in fact, which is I think not well founded, there should be substituted a finding to the effect that the pursuers have failed to establish that the sanitary inspector's complaint was due to any improper working or other default of the defenders, while on the other hand we should alter the finding in law so as to read, "Finds, however, in law that inasmuch as after intimating their rejection of the defenders' apparatus in September 1902 the defenders continued to use the same until the end of 1902, they (the defenders) are barred from claiming damages in respect of the apparatus being disconform to contract." But agreeing with the Sheriff-Substitute's result, I do not think it necessary to dissent from the judgment which your Lordships propose.

The Lord Justice-Clerk intimated that Lord Young, who was absent, concurred in the judgment proposed.

Lord Kincairney, who was absent at the hearing, delivered no opinion.

The Court adhered.

Counsel for the Pursuers and Respondents—Campbell, K.C.—Spens. Agent—James G. Bryson, Solicitor.

Counsel for the Defenders and Appellants—Guthrie, K.C.—Hunter. Agent—Alex. Ross, S.S.C.

Thursday, March 16.

SECOND DIVISION.

DET FORENEDE DAMPSKIBS SELSKAB (OWNERS OF S.S. "OLGA") *v.* SOMERVILLE & GIBSON (OWNERS OF S.S. "ANGLIA") AND VAN EIJCK & ZOON AND OTHERS (OWNERS OF CARGO ON BOARD S.S. "ANGLIA").

Ship — Collision — Cross Actions between Owners — Damages — Decree in Favour of Owners of One Vessel — Petition by Owners of Other for Limitation of Liability and Distribution among Various Claimants — Competency of Reopening at instance of Another Claimant — Averment that Question of Amount of Damages not Properly Contested in Former Action—Merchant Shipping Act 1894 (57 *and* 58 *Vict. cap.* 60), *secs.* 503, 504.

In conjoined actions for damages for collision between the owners of the "Olga" and the owners of the "Anglia," the Court granted decree to the latter for a sum which considerably exceeded the amount for which the former were liable, having regard to the limits set to the liability of shipowners by the provisions of section 503 of the Merchant Shipping Act 1894.

In a subsequent petition to the Court for limitation of liability and for distribution, brought by the owners of the "Olga" under sections 503 and 504 of the Act, claims were lodged by the owners of the "Anglia" and the owners of the "Anglia's" cargo, the former claiming to be ranked for the sum for which they held decree. The owners of the cargo, who had not been parties to the former action, sought to be allowed in the petition to reopen and reinvestigate the claim of the owners of the "Anglia," stating that the damage to the "Anglia" had been grossly overestimated and had not been properly contested in the former action. They did not, however, aver that the decree had been obtained collusively or of consent or by way of compromise.

Held that the claim of the owners of the "Anglia," having been duly constituted by a decree *in foro* obtained in a competent Court, *causa cognita*, and upon evidence, must be taken at the amount fixed in the former process.

Ship — Collision — Limitation of Liability according to Tonnage—Ascertainment of Tonnage—Deduction for Crew Space—Certificate of Board of Trade Surveyor—Foreign Vessel—Merchant Shipping Act 1894 (57 *and* 58 *Vict. cap.* 60), *sections* 84, 503, *and Schedule VI* (3)—*Order in Council,* 21*st November* 1895.

Section 503 of the Merchant Shipping Act 1894 provides, *inter alia*, that for the purposes of the section the tonnage of a steamship shall be her gross ton-

nage, not including any space occupied by seamen or apprentices "which is certified under the regulations scheduled to this Act with regard thereto."

Schedule VI provides that every such space shall be inspected by one of the surveyors of ships under the Act, who is empowered to grant a certificate, and "if the certificate is obtained, but not otherwise, the space shall be deducted from the register tonnage."

An Order in Council of 21st November 1895, issued under section 84 of the Act decrees "that the merchant ships of the kingdom of Denmark, the measurement whereof shall . . . have been ascertained and denoted in the certificates of registry or other national papers of such ships, shall be deemed to be of the tonnage denoted in their certificates of registry or other national papers, in the same manner, to the same extent, and for the same purposes as the tonnage denoted in the certificate of registry of a British ship is deemed to be the tonnage of that ship."

Held (*following* "*The Franconia*," 1878, 3 P.D. 164, Lord M'Laren, however, expressing an opinion that that decision was unsound) that the owners of a Danish vessel with a Danish certificate setting forth her measurements, including the tonnage taken up by crew space, were not entitled, in ascertaining the tonnage of their vessel for the purposes of section 503 of the Act, to deduct the tonnage taken up by crew space, in respect that the space had not been certified by one of the surveyors under the Act as required by Schedule VI of the Act.

The Merchant Shipping Act 1894, section 503, provides—(1) "The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity (that is to say) . . . (*b*) where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board that ship; . . . (*d*) where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel by reason of the improper navigation of the ship, be liable to damages beyond the following amounts (that is to say) . . . (ii) in respect of loss of or damage to vessels, goods, merchandise, or other things . . . an aggregate amount not exceeding £8 for each ton of their ship's tonnage." . . . Section 504—"Where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of loss of life, personal injury, or loss of or damage to vessels or goods, and several claims are made or apprehended in respect of that liability, then the owner may apply . . . in Scotland to the Court of Session . . . and that Court may determine the amount of the owner's liability and may distribute that amount rateably among the several claimants, and may stay any proceedings pending in any Court in relation to the same matter, and may proceed in such manner and subject to such regulations as to making persons interested parties to the proceedings, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of any costs, as the Court thinks just."

On 18th February 1903 the s.s. "Olga," of a gross tonnage of 776·90 tons, and the s.s. "Anglia" collided, the latter vessel foundering, and the former sustaining damage to her bow. No loss of life or personal injury was caused by the collision. In cross actions for damages between the owners of the two vessels the Lord Ordinary (Low), on 28th January 1904, and afterwards the Second Division, on 31st May 1904, found that the collision resulted from fault on the part of those in charge of both vessels, and that the total amount of the losses sustained by the owners fell to be borne by them in equal proportions. The value of the "Anglia," as stated by the owners in the process, and as admitted by the owners of the "Olga," was £14,687. The owners of the "Anglia" thereupon obtained a decree against the owners of the "Olga" for the sum of £7149, 14s. 7d., being the balance due to them on an accounting between the respective claims of damages. The collision occurred without "the actual fault and privity" of the owners of either vessel.

On September 29th 1904 the owners of the "Olga" presented a petition under sections 503 and 504 of the Merchant Shipping Act 1894, craving the Court "to appoint all parties having, or pretending to have, any right or claim in the premises to lodge their claims, . . . to stop all actions or suits pending, or to be hereinafter instituted in this or any other Court in relation to your petitioners' liability as owners of said ship 'Olga' in respect of said collision, and to limit the liability of your petitioners, as owners of the said ship 'Olga,' in respect of said collision, to a sum not exceeding £6215, 4s. sterling (*i.e.*, £8 per ton on the gross tonnage of the 'Olga'), and thereafter to distribute the same rateably among the several claimants, and to discharge your petitioners." . . . In the petition they stated that they "admit liability on account of said collision to the extent indicated in said interlocutors'' (28th January and 31st May 1904)", and they also admit liability for a proportion of the loss of cargo on board the 'Anglia' at the date of the collision, but their liability is, under the 503rd section of the Merchant Shipping Act 1894, limited to a sum not exceeding £6215, 4s., being £8 per ton on 776·90 tons, the gross tonnage of said steamship 'Olga.' "

I. The first question dealt with under the petition arose out of the claims lodged.

Claims were lodged by (1) the owners of the "Anglia," who claimed (*a*) on their own behalf to be ranked and preferred on the fund for the sum of £7149, 14s. 7d. awarded to them by the interlocutors of the Court of 28th January and 31st May 1904; (*b*) on behalf of the master and crew of the "Anglia" to be ranked and preferred on the fund for £80, 10s., being the value of their effects lost in the collision, with in

both cases interest at 5 per cent. per annum from 18th February 1903, the date of the collision, and by (2) the owners of cargo on board the "Anglia," who claimed to be ranked and preferred to the sum of £4669, 12s. 3d., being one half of the total value of the cargo, with interest from 18th February at 5 per cent.

In the claim lodged by the cargo owners they made the following statement—"The sole question between the parties to the conjoined actions referred to in the petition, to which the present claimants were not called, was whether or not the owners of the 'Anglia' were solely to blame. Once it was decided that the 'Olga' was even jointly to blame, the question of exact values became immaterial to the owners of the 'Olga,' whose limit of £8 per ton of liability was reached by the finding of both vessels to blame. The damages resultant on the finding of both to blame were therefore admitted at the full amount claimed by the owners of the 'Anglia' without further evidence or discussion. These claimants are, therefore, not prepared to admit on the information at present before them that the claimants, the owners of the 'Anglia,' are entitled to rank on the fund for the full amount contained in their decree. These claimants believe and aver that the true value of the 'Anglia' was not £14,687 as admitted by the petitioners, but £7000 or thereby, and submit that the claimants, the owners of the 'Anglia' fall to be ranked on the fund for the sum of £3693, 15s. 6d. or thereby, less the sum of £387, 10s. 11d., being the damage found to have been sustained by the 'Olga' in said collision. These claimants further submit that the collision having been partly caused by the fault of the master and crew of the 'Anglia' they are not entitled to rank on the fund for the value of their effects, or, at the most, are only entitled to rank for one-half of the value of the same." They accordingly contended that they were entitled to have the question of the damage suffered by the "Anglia" reassessed in the present process, on the ground that the question had not been contested in the former action by the owners of the "Olga," to whom in the circumstances it was a matter of little or no interest, and that they, as cargo owners, who were unrepresented in the former action, could not be precluded from reopening the question by what was to all intents and purposes a decree in absence.

The owners of the "Anglia" contended that the question was *res judicata*, and that the decree of the Court was final and could not be reopened.

The following authorities were cited at the hearing—*Currie* v. *M'Knight*, November 16, 1896, 24 R. (H.L.) 1, 34 S.L.R. 93; *Ballantine* v. *Mackinnon*, 1896, 2 Q.B. 455; *The Alne Holme*, 1882, 4 Asp. M.C. 591.

LORD KYLLACHY—This is a statutory proceeding under the 503rd and 504th sections of the Merchant Shipping Act 1894. It has been initiated by petition to the Court under the latter section, and in that petition an order for claims was lately pronounced. Claims having been lodged, we had the other day a discussion upon certain questions raised by these claims.

The first question is a very short one, and was hardly, I think, contested. It is whether the petitioners have to add to the fund *in medio* interest at 4 per cent. from the date of the collision. As to that, all I need say is that I see no reason why such interest should not be added. It seems to have been so decided in England in the case of "*The Crathie*," 1 Probate, 183.

The second question is also a very short one. It relates to a claim made by the owners of the "Anglia" on behalf of the master and crew, for the sum of £80, 10s., being the alleged value of effects lost in the collision. I rather understood at the discussion that the objection to this claim was not pressed.

The third question, however, is one which involves a considerable sum of money, and it is desired that we should decide it before making the usual remit. The question is this. The owners of the "Anglia" claim to be ranked for the sum of £7149, 14s. 7d., being the damages found to be due to them by the petitioners—the owners of the "Olga" —in the recent action before this Court which determined the liability for the collision. In that action the collision was found to have been caused by the fault of both ships, and accordingly the damage to each had to be ascertained and divided. After a proof it was found by a decree *in foro* that a balance of damages was due to the owners of the "Anglia" and that this balance amounted to the sum I have mentioned. It is said, however, by certain other claimants—the owners of the cargo on board the "Anglia" who were not parties to the former action, but have appeared here—that the damage awarded to the "Anglia" in the action referred to was overestimated; that the owners of the "Olga" had (in view of their limited liability) only a slight interest to contest the amount; and (as I understood the suggestion) that they did not contest it in an adequate manner. In consequence, they (the cargo owners) contend that they are entitled to have the damage in question reassessed in this process, just in the same way as if it had never been constituted. They do not allege that the decree of constitution was obtained collusively, or of consent, or by way of compromise. But they say that for the purposes of the present proceeding all questions are open.

As to this matter, I think we may disregard some arguments with which we were favoured with respect to collision claims involving questions of maritime lien, and enforceable by actions *in rem*. For, when the present case is examined, it does not appear to involve any such questions. The claims arising from this collision are all of them—so far as appears—personal claims against the owners of the two vessels, and there is no suggestion that anybody has done diligence or taken action *in rem*, or that anybody is here claiming otherwise than for an ordinary debt. In particular,

the only liability with which we are here concerned is the personal liability of the owners of the "Olga" for certain sums of damages—a liability with only this peculiarity, that it is by statute limited to £8 per ton on the gross tonnage of the vessel. This limited liability makes a process of distribution necessary, but so far as I can discover there is no statutory enactment or doctrine of maritime law which introduces into such process of distribution any novel or special rules. It has to be conducted, I apprehend, upon the same principles as we are accustomed to apply in other processes of distribution—some of them very familiar—as, for instance, sequestrations in bankruptcy, rankings and sale, multiplepoindings by executors who allege insolvency, and similar proceedings.

In these circumstances it appears to me to be a quite untenable proposition that the owners of the "Anglia" should be bound at the instance of other creditors to forego the benefit (such as it is) of having had their claim duly constituted (as it has been) against the debtor, by a decree *in foro* obtained in a competent court, *causa cognita*, and upon evidence led, with which the parties to the case and the judge were satisfied. Such a proposal would be inadmissible in a process of sequestration, and so far as I know in any other process of distribution. It may be that the evidence led by the owners of the "Anglia" was inadequate, or was not sufficiently tested, or that counter evidence might have been led which was not led. But that is a kind of observation which might be made in any case. Of course it would be a different matter if there were averments of collusion, or perhaps even of compromise. But, as I have said, nothing of the kind is suggested, and accordingly it seems to me that the claim of the owners of the "Anglia" must be taken at the amount fixed in the previous process.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

On the first question the Court pronounced this interlocutor:—

"Find (1) that the owners of the 'Olga' are liable in interest at 4 per cent. from the date of the collision; (2) that the owners of the 'Anglia' are not bound to try again in this process the amount of the claim against the petitioners, but that the same falls to be taken at the amount judicially determined in the process the owners of the 'Anglia' against the owners of the 'Olga,' *et e contra*: Find the claimants the owners of the 'Anglia' entitled to expenses as against the claimants the owners of the cargo on board the 'Anglia,' and remit," &c.

II. Subsequently a further question arose on a minute which was lodged in process by the petitioners stating that, for the purposes of ascertaining their liability under section 503, the tonnage of the "Olga" should have been stated at 737·36 tons instead of 776·90 tons, the space occupied by seamen and apprentices, amounting to 39·54 tons, not having been deducted from the gross tonnage as was provided by section 503 (2) (*a*). They accordingly asked leave to amend the petition by substituting 737·36 for 776·90 tons and £5898, 17s. 6d. (the limit of their liability) for £6215, 4s.

This was opposed by the claimants, the owners of the "Anglia" and the owners of the "Anglia's" cargo, who maintained that they were not entitled to make the deduction claimed, the space in question not having been "certified under the regulations scheduled to this Act," inasmuch as it had not been inspected by one of the surveyors of ships under the Act, viz., a surveyor appointed by the Board of Trade. The "Olga" possessed a Danish certificate of registry and nationality of 23rd August 1904, corresponding in all respects to a similar British certificate, and in which her gross register tonnage was entered at 776·90 tons, and the space for the accommodation or use of the crew at 39·54 tons. She had not been inspected by one of the surveyors of ships under the Act.

Section 503 of the Act provides as follows—"(2) For the purposes of this section (*a*) the tonnage of a steamship shall be her gross tonnage without deduction on account of engine-room. . . . Provided that there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use which is certified under the regulations scheduled to this Act with regard thereto."

Schedule VI (3) provides as follows:—"Every place so occupied and appropriated as aforesaid shall, whenever the ship is registered or re-registered, be inspected by one of the surveyors of ships under this Act" (viz., surveyors appointed by the Board of Trade under section 724), "who shall, if satisfied that the same is in all respects such as is required by this Act, give to the collector of customs a certificate to that effect, and if the certificate is obtained, but not otherwise, the space shall be deducted from the register tonnage."

Section 84 provides as follows:—"(1) Whenever it appears to Her Majesty the Queen in Council that the tonnage regulations of this Act have been adopted by any foreign country, and are in force there, Her Majesty in Council may order that the ships of that country shall, without being remeasured in Her Majesty's dominions, be deemed to be of the tonnage denoted in their certificates of registry or other national papers, in the same manner, to the same extent, and for the same purposes as the tonnage denoted in the certificate of registry of a British ship is deemed to be the tonnage of that ship."

On 21st November 1895 an Order in Council was issued in the terms of the above section applying to merchant ships of the kingdom of Denmark, decreeing "that the merchant ships of the kingdom of Denmark, the measurement whereof shall on or after the first day of April 1895 have been ascertained and denoted in the certificates of registry or other national

papers of such ships, shall be deemed to be of the tonnage denoted in their certificates of registry or other national papers in the same manner, to the same extent, and for the same purposes as the tonnage denoted in the certificate of registry of a British ship is deemed to be the tonnage of that ship."

Argued for the petitioners—They were entitled to make the deduction. It was the object of the Legislature to put British and foreign ships on an equality in cases in which foreign governments had adopted the tonnage regulations of the Merchant Shipping Act, and to make a foreign certificate equal to a British certificate. To insist upon the necessity of a British surveyor's certificate upon this special matter in the case of a foreign vessel was an absurdity and contrary to the spirit of the Act. Upon all other matters the foreign surveyor's certificate was equivalent to a British surveyor's, and it was only reasonable to suppose that it was meant to be so on this point too. As a matter of fact it was in the same form as it would have been if granted by a British surveyor. In the case of the "*Cordilleras*," [1904] P. 90, which was somewhat analogous, the English Courts had dispensed with this provision as to the British surveyor. The dicta in the "*Franconia*," 1878, 3 P.D. 164, in so far as adverse, were merely *obiter*, and the case was not an adverse authority.

Argued for the owners of the "Anglia."—The owners of the "Olga" were not entitled to make the deduction. Section 503 (2) (*a*), taken along with the Sixth Schedule (3), were perfectly explicit, and made a British surveyor's certificate necessary. The question had already been settled in England in the "*Franconia*," 1878, 3 P.D. 164, and the "*Cathay*," 1900, 9 Aspinall's Maritime Cases 100, and it would be exceedingly unfortuate if upon so important a matter the law of England and Scotland differed.

LORD KYLLACHY—In this case I have, in common with both your Lordships, been disposed to sustain if possible the deduction for which the petitioners the owners of the "Olga" contend. We all, I think, recognise the anomaly which may result if the petitioners' claim to that deduction is refused.

But the question has to be determined not upon grounds of policy but upon the legal construction of certain clauses of the Merchant Shipping Act of 1894 (sections 77 to 87 and section 503), and as to that statute we find ourselves in this position, that its enactments—or enactments substantially similar contained in previous statutes—have been construed adversely to the claim now made by (1) the Court of Appeal in England in the case of the "*Franconia*," 1878, 3 P.D. 164, and (2) by the present President of the Admiralty Division in the recent case of the "*Cathay*," 9 Aspinall's Maritime Cases 100. The question before us therefore is, whether upon our examination of the statutory enactments we feel compelled to differ from the conclusions and the reasoning of the learned Judges by whom the two cases in question were decided.

Now, speaking for myself, I should in any circumstances have had great diffidence in so differing. For although not binding upon us, the decisions in question must be accepted as decisions of high authority, especially as being decisions upon the construction of a British statute and relating to a subject-matter as to which the laws of the two countries are the same.

As it happens, however, having had the benefit of a full argument, and having examined—I hope carefully—the various sections of the Merchant Shipping Act of 1894 to which our attention was directed, I have come to the same conclusion as the learned Judges in England, and indeed have come to consider that there is no escape from their reasoning.

The broad view of the matter seems to be this. The 503rd section of the statute introduces in favour of shipowners a certain limitation of liability in the case of collision—a limitation which has to be estimated according to tonnage, and which in the case of steamers (the case before us) has to be estimated according to gross tonnage, subject only to a single deduction, viz., the space appropriated to the use of seamen and apprentices, and this single deduction is to be allowed only if and when the space in question has been certified under certain regulations in a schedule annexed to the Act, one of which regulations is this:—"Every place so occupied and appropriated as aforesaid shall, whenever the ship is registered or re-registered, be inspected by one of the surveyors of ships under this Act, who shall, if satisfied that the same is in all respects such as is required by this Act, give to the collector of Customs a certificate to that effect, and if the certificate is obtained, but not otherwise, the space shall be deducted from the register tonnage." Failing compliance with this condition the estimate has to be made on gross tonnage, and that has to be so in case of all steamers, British or foreign, which claim the benefit of the relief conferred by the 503rd section of the statute.

Prima facie therefore there seems no escape from the conclusion that the petitioners' steamer (which it is admitted has not had its seamen's accommodation inspected and certified in terms of the statutory condition) is excluded, not from the benefit of the relief afforded by the enactment but from the benefit of the deduction from gross tonnage which is here claimed, and which somewhat enhances the amount of relief.

The suggestion, however, of the petitioners is this. They say that compliance with the condition required is in the case of foreign vessels practically impossible; and that that being so, the exaction of the condition is inconsistent with the provisions of the 84th section of the statute—provisions applicable to vessels belonging to foreign nations whose tonnage regulations have—as is admitted to be the case here—been approved by Order in Council under the said section.

The 84th section is a short one, and is thus expressed—"(1) Whenever it appears to Her Majesty the Queen in Council that the tonnage regulations of this Act have been adopted by any foreign country, and are in force there, Her Majesty in Council may order that the ships of that country shall, without being remeasured in Her Majesty's dominions, be deemed to be of the tonnage denoted in their certificates of registry or other national papers in the same manner, to the same extent, and for the same purposes as the tonnage denoted in the certificate of registry of a British ship is deemed to be the tonnage of that ship."

Now, I do see what may be called the anomaly of exacting from foreign vessels compliance with a condition which is to them impossible. I can see that that may possibly be a defect in the Act of Parliament, and may possibly have been the result of oversight. But I do not, I confess, see how the application to foreign ships of the condition in question, whatever its merits, involves any inconsistency with the 84th section of the statute or the Order in Council made under it. For, so far as I can discover, the condition involves no distinction between British and Foreign ships with respect to the acceptance for the purposes of the 503rd section of either their gross or registered tonnage as appearing in the certificate of registry. The gross tonnage is in both cases accepted (subject to a single deduction). The registered tonnage is in both cases disregarded. The difference, if there be one, is at best only this, that in estimating a tonnage which is something between gross and registered tonnage—viz., the tonnage of the 503rd section—there is a condition prescribed which, as it happens, foreign vessels cannot in practice fulfil.

It is no doubt true that compliance with the same condition (the condition as to the surveyor's certificate) is required under the 79th section of the Act before the same deduction (crew space) can be included among the deductions which make up the difference between gross and registered tonnage—deductions which for that purpose are set forth in the certificate of registry. And in view of this circumstance it has been argued (1) that if this were the case of a British steamship, whose certificate of registry set forth and allowed the deduction in question as a deduction affecting registered tonnage, her certificate of registry must have been accepted as conclusive evidence that all statutory conditions had been duly complied with; and (2) that, that being so, the certificate of registry of this Danish ship, setting forth as it does and allowing the same deductions, must, under the 84th section and the Order in Council have the same privilege. But it appears to me that this argument, supposing it to be otherwise sound, is founded upon an assumption which I cannot accept—an assumption which was rejected in the English cases, and in support of which we had really no argument. The assumption is that everything which appears on the register certificate of a British ship is for all purposes, including the special purpose of the 503rd section, to be taken as *probatio probata* and not examinable. I am bound to say that I can find no statutory warrant for such an assumption. In other words, I, as at present advised, see no sufficient ground upon which we could have allowed this deduction although the "Olga" had been a British steamship as to which it was proved that in estimating her register tonnage the deduction made in respect of seamen's accommodation had been improperly made. The certificate of registry may in the case both of British and of Danish ships be *prima facie*, or perhaps even conclusive, evidence of the register tonnage. That is to say, it may be so in all questions (such as liability for dues, &c.) where register tonnage is the rule. I say nothing upon that question, which is not before us, and which may involve different principles. But supposing that point conceded, it does not, I think, follow that the result must be the same in a case like the present where register tonnage is not the rule, and where the question relates, not to register tonnage, but, as I have already said, to a special tonnage, set up for the purposes of the 503rd section — a tonnage intermediate between gross and register tonnage—and which must, as it seems to me, be ascertained just in the manner which the 503rd section prescribes.

LORD M'LAREN—Under the 503rd section of the Merchant Shipping Act 1894, which limits the liability of owners for injury to a ship or cargo to £8 per ton, it is provided, sub-section (2) (*a*), that there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use, "which is certified under the regulations scheduled to this Act with regard thereto." The schedule referred to is the 6th schedule to the Act, which provides, *inter alia*, that every place so occupied and appropriated shall be inspected by one of the surveyors of ships under the Act, who is empowered to grant a certificate, and (the schedule proceeds to say) "if the certificate is obtained, but not otherwise, the space shall be deducted from the register tonnage."

The question in this case is whether the owners of the "Olga" are entitled to have the space which is appropriated to seamen and apprentices deducted from her tonnage in estimating their liability under the limitation to £8 per ton. According to the argument of the claimants it is a condition of the right to such deduction that a certificate shall have been obtained from a surveyor of ships under the Merchant Shipping Act; and in the case of a British ship I do not doubt that the right is so conditioned.

But in the case of the "Olga," which is a Danish ship, the right to a deduction for what has been called crew space does not depend on the 503rd section and relative schedule alone, but depends on the combined effect of that section and the 84th section, and of an Order in Council dated 21st November 1895, made in pursuance of the 84th section.

The 84th section provides in substance that whenever it should appear to the Queen in Council that the tonnage regulations of the Merchant Shipping Act have been adopted by any foreign country, an Order in Council may be made to the effect that the ships of that country shall be deemed to be of the tonnage denoted in their certificates of registry or other national papers. Such an Order in Council has been made applicable to Danish ships.

Now, if this question had arisen for decision for the first time, I should have come without doubt or hesitation to the conclusion that what was meant (in the 84th section) by the tonnage regulations of the United Kingdom being adopted by any foreign country was not that the foreign vessels were to be sent to London or Leith to be measured by a British surveyor, or that a British surveyor was to be sent to Copenhagen whenever a Danish ship was to be measured, but that the ships were to be measured in their own country according to the rules of the Merchant Shipping Act 1894, and that the necessary certificates were to be granted by qualified surveyors licensed by the proper authority in the country of the ship's nationality.

Keeping in view that the carrying trade of the United Kingdom is the greatest in the world, and that very great attention has been given by our Parliament and Government to the regulation of merchant shipping, it was not unnatural that we should in a manner invite foreign nations to adopt our tonnage regulations in the only way in which such regulations could be adopted, viz., by equivalent enactments or regulations of the foreign country. But it could not be supposed that English surveyors would be employed for the purpose, and I do not think it is sound construction to say that in the case of a foreign vessel the certificate of an English surveyor is a condition of the right to a deduction for crew space.

But further, I think this question is not left to the decision of courts of law, because the provision of the 84th section is that when it appears to Her Majesty in Council that the tonnage regulations have been adopted, then an Order may be made. I think therefore that it was for the Privy Council, in the execution of the powers of the 84th section, to consider whether the Danish regulations were equivalent to the British regulations, allowing for necessary geographical and personal variations, and as the Privy Council were satisfied and the Order was made, the Court must assume that the spaces measured and described in the ship's registry are those to which the Merchant Shipping Act applies.

I am, however, much impressed by the inconvenience of having different interpretations of the same enactment in force in different parts of the United Kingdom, and as I understand that the majority of the Court are prepared to adopt the interpretation of the clause which has the support of a judgment of the Court of Appeal of England, I shall not withhold my assent. But in case any similar question should be carried to a higher Court, I should wish it to be understood that I only concur in the judgment proposed out of deference to the judgment of the Court of Appeal, and the practice which has followed upon it.

The LORD JUSTICE-CLERK concurred.

On this question the Court pronounced this interlocutor:—

"Refuse to allow the petitioners to amend the petition as proposed, and find that the sum for which the petitioners are liable in respect of the collision mentioned in the petition is £6215, 4s., with interest at 4 per cent. from 18th February 1903: Find the petitioners liable to the claimants in the expenses relating to the discussion on the said minute, as for one appearance, and remit the same to the Auditor to tax and to report: Order the petitioners to consign in bank the sum of £6125, 4s., with interest at 4 per cent. from 18th February 1903, and on the petitioners consigning said sum with interest, limit the liability in respect of said collision to the sum of £6215, 4s., with interest thereon as aforesaid."

Counsel for the Petitioners — M'Clure. Agents—Alex. Morison & Co., W.S.

Counsel for the Owners of "Anglia"—The Lord Advocate (Dickson), K.C.—Wilson, K.C.—Younger. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Owners of Cargo on "Anglia"—The Solicitor-General (Salvesen) K.C.—Spens. Agents—Boyd, Jameson, & Young, W.S.

Thursday, March 16.

SECOND DIVISION.

[Sheriff Court of Inverness-shire at Lochmaddy.

MACKINNON AND OTHERS *v.* MACDONALD AND OTHERS.

Process—"All Parties not Called"—Interdict Proceedings between Crofters as to Taking Seaweed—Landlord not Called as Defender—Nature of Crofters' Rights to Seaweed—Crofters' Holdings (Scotland) Act 1886 (49 *and* 50 *Vict. c.* 29).

In an action for interdict certain crofters, who were in occupation of their holdings at the date of the passing of the Crofters' Holdings (Scotland) Act 1886, sought to interdict the tenants of certain neighbouring holdings, held from the same landlord under agreements made in 1898 between the tenants, the trustees of the late landlord, and the Congested Districts (Scotland) Commissioners, from infringing certain rights which the pursuers alleged they possessed of winning seaweed on the shore. The landlord was not called as