sisting himself to the process and adopting the proof already led. Intimation was made to him accordingly, but he has not chosen to enter appearance. In these circumstances I think we ought to affirm the judgment appealed against.

LORD KYLLACHY—I concur in thinking that we must affirm the Sheriff Principal's interlocutor. And I may say I do so with less reluctance because I greatly doubt whether, even if the landlord had appeared and adopted the proof, any final or really useful decision could have been obtained under this action. It would, whatever is decided, have, I am afraid, been always open to either party to bring a declarator so as to try over again and determine finally the question of right. What I really regret is that the present action was not at an early stage sisted of consent so as to enable such a declarator to be brought.

As it is, the present action is, I think, well ended and out of Court. And the only thing I should like to add is this, that I hope if the pursuers should contemplate further legal proceedings they will at least consider whether pertinential privileges of this kind held by crofting tenants at the passing of the Crofters' Act were then or are now of the nature of legal rights; or were not and are not rather (apart from express title falling under some recognised legal category) privileges held necessarily at the landlord's pleasure and subject always to estate regulations. I express, of course, no opinion on that or any other question involved, but it does occur to me to doubt whether crofters in the pursuers' position have, if deprived of such privileges, any other redress than that of having their fair rent revised by the Crofters Commission on the first opportunity which the Act gives for that being done. Until such opportunity offers, the Crofters Commission may not under the Act have power to interfere. But, if not common knowledge, it is at least generally supposed that on the joint application by both parties, or even on the application of the landlord, they, the Commissioners, frequently do settle and regulate such matters, generally at inconsiderable cost and in a quite satisfactory manner.

After LORD KYLLACHY *had delivered his opinion, the* LORD JUSTICE-CLERK *added*—Lord Adam desires me to say that he concurs in the result of the judgment proposed.

I wish to add that I entirely agree with what has fallen from Lord Kyllachy as to the inexpediency of further legal proceedings. It would be a lamentable thing if any additional expense were to be incurred which might practically mean the ruin of many of those interested.

The Court pronounced this interlocutor:—

". . . Dismiss the appeal and affirm the said interlocutor appealed against: Find in fact and in law in terms of the findings in fact and in law in the said interlocutor; of new dismiss the action and decern."

Counsel for the Appellants—H. Johnston, K.C.—T. Trotter. Agent—Malcolm Graham Yooll, S.S.C.

Counsel for the Respondents—Wilson, K.C.—Sandeman. Agent—Arthur Morgan, Law Agent.

Friday, March 17.

FIRST DIVISION.

[Sheriff Court at Ayr.

BOYD AND OTHERS (THE FREEMEN OF PRESTWICK) *v.* THE PROVOST, MAGISTRATES, AND COUNCILLORS OF PRESTWICK.

Jurisdiction — Sheriff — Burgh — Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 27 — "*Right or Privilege Exercised*"—*Heritable Right.*

An ancient burgh of barony was formed into a police burgh under the Burgh Police (Scotland) Act 1892 and the Town Councils (Scotland) Act 1900. The freemen of the burgh of barony subsequently presented a petition in the Sheriff Court for declarator that they had a private and patrimonial right to certain heritable properties of the old burgh.

Held that the Sheriff had no jurisdiction, in respect (1) that the heritable rights in question were not of the nature of a "right or privilege exercised" by the freemen of the old burgh, disputes as to which are appropriated to the jurisdiction of the Sheriff by section 27 of the Burgh Police (Scotland) Act 1892, and (2) that the value of the rights claimed exceeded the limit of the Sheriff's jurisdiction in questions of heritable right, as defined in section 8 of the Sheriff Courts (Scotland) Act 1877.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 27, enacts—"(1) Where by the operation of this Act the right to elect the municipal authority is transferred and taken away from the existing body of electors, and any dispute arises as to whether any right or privilege exercised by all or any of such is a public or a private and patrimonial right, such dispute shall be decided by the Sheriff, but an appeal shall lie to the Court of Session."

The Sheriff Courts (Scotland) Act 1877 (40 and 41 Vict. cap. 50), sec. 8, enacts—"The jurisdictions, powers, and authorities of the Sheriffs and Sheriff-Substitutes of Scotland shall be, and the same are hereby extended to (1) All actions (including actions of declarator, but excluding actions of adjudication, save in so far as now competent, and excluding actions of reduction) relating to a question of heritable right or title where the value of the subject in dispute does not exceed the sum of fifty pounds by the year or one thousand pounds value."

Prestwick, in Ayrshire, was a burgh of barony of ancient date, holding of the Prince and Steward of Scotland. Its territory consisted of about 700 acres of land, and it had thirty-six freemen. In November 1901 a petition was presented to the Sheriff of Ayrshire in terms of the Burgh Police (Scotland) Act 1892 and the Town Councils (Scotland) Act 1900 by several of the freemen for the purpose of having Prestwick formed into a police burgh. The petition was granted, and a council was duly elected in terms of these Acts.

In April 1904 a petition was presented in the Sheriff Court at Ayr by Hugh Boyd, residing at Maida, Prestwick, and others, all freemen of Prestwick, for and on behalf of themselves and the thirty-six freemen of the burgh of Prestwick, against the Provost, Magistrates, and Councillors of the burgh of Prestwick, in which they sought to have it found and declared that the petitioners had a private and patrimonial right in the property of the burgh of Prestwick and the whole revenues derived therefrom. The particular conclusions of the petition are narrated in Lord M'Laren's opinion. The subjects in question were of very considerable value.

Upon 13th October 1904 the Sheriff-Substitute (SHAIRP) issued an interlocutor whereby he found in fact that the value of the heritable subjects in dispute largely exceeded the sum of £50 by the year or £1000 value, and found in law that in terms of the Sheriff Courts (Scotland) Act 1877, sec. 8 (1), the Sheriff Court had no jurisdiction to entertain the action, and accordingly dismissed it.

Note—"By section 8 of the Sheriff Courts (Scotland) Act of 1877 the jurisdiction of the Sheriff Court is limited in questions of heritable right to those cases where the value of the subject in dispute does not exceed £50 by the year or £1000 value. In the present case the heritable rights in question far exceed these sums, and indeed, in a mineral county such as Ayrshire it is difficult to name a figure which will certainly cover the value of these rights. The pursuers' contention, however, is that the present action is competent under section 27 of the Burgh Police (Scotland) Act 1892, and that in the present instance section 8 of the Sheriff Courts (Scotland) Act of 1877 does not apply. I am unable to give effect to the pursuers' contention, for I cannot hold that the Legislature, under section 27 of the Burgh Police (Scotland) Act 1892, intended by implication to confer an unlimited heritable jurisdiction on the Sheriff Court in such cases as the present. On the contrary, I am of opinion that section 8 of the Sheriff Court (Scotland) Act 1877 applies here, and that in terms of that section the Sheriff Court has no jurisdiction to adjudicate in the present action."

The pursuers appealed, and argued—The 27th section of the Burgh Police (Scotland) Act 1892 conferred on the Sheriff a new jurisdiction over disputes as to the character of any right or privilege exercised by the existing body of electors. That was the nature of the dispute here, for undoubtedly the freemen had had possession of the lands. It was the holding of "rights and privileges" which formerly gave the right to be an elector, and the privilege here was the possession of the lands. "Exercised" was equivalent to enjoyed, and the title might not be in the individual, as the Act recognised by using the words "exercised by all or any." What the Sheriffs had to decide was whether the privilege was enjoyed as a community, in which case it must be transferred, or as an individual, in which case it would be retained.

The defenders argued—The Burgh Police (Scotland) Act 1892, sec. 27, did not apply. That Act was transferring the right to vote, and care was taken to transfer only what went with that. Hence this provision. The right to the use of a seat in church would be the kind of question to go to the Sheriff. The word "exercised" clearly showed the class of questions intended. Had there been an undoubted right in the property it might have been a question whether that was a public or a private right for the Sheriff to consider. But this case was brought to establish the right in the property, and was simply a declaratory action of right in heritable property of great value, which was outside the limits of the Sheriff's jurisdiction.

At advising—

LORD M'LAREN—The case raises some interesting questions as to the rights of the freemen of this ancient burgh of barony in relation to the burgh property. But the only question with which we are concerned is that of jurisdiction. The action was instituted in the Sheriff Court of Ayrshire; the Sheriff-Substitute, by his interlocutor of 13th October 1904 (appealed from), has held that the Sheriff Court has no jurisdiction to entertain the action, and I (in common with your Lordships who heard the case) am of opinion that this finding is well founded and that the action was rightly dismissed.

The argument for the appellants is founded on the 27th section of the Burgh Police (Scotland) Act 1892, which provides—[*His Lordship quoted the section of the Act, cit. supra.*]

Now, it is common ground that by the operation of the Burgh Police Act 1892 the right to elect a town council was taken away from the freemen of Prestwick, and that in the execution of that Act and the Town Councils (Scotland) Act 1900 Prestwick has been formed into a police burgh of the ordinary type. The question then remains, whether the rights which are sought to be established in favour of the freemen by the declaratory conclusions of this petition are rights or privileges of the nature indicated in the 27th section, and appropriated by that section to the jurisdiction of the Sheriff?

The conclusions of the petition are—(1) That the revenues derived from feu-duties and casualties of superiority "are the property of the petitioners"; (2) that the minerals underneath the Prestwick freedom lands "are the property of the peti-

tioners" as joint-owners thereof; (3) that the minerals underneath the Prestwick lands, other than freedom lands, "are vested in the petitioners"; (4) that the Town Hall is the "property of the petitioners" as joint-owners; and (5, 6, 7, and 8) that the parcels of land there described are the property of the petitioners. The 9th and only other conclusion is a conclusion in the usual form for expenses.

The petition is, then, neither more nor less than a declaratory action to establish heritable rights of property in the persons of the thirty-six freemen of Prestwick and their heirs against the present administrators of that property, viz., the Town Council of Prestwick.

It may be that the freemen in a competent action will be able to prove their right to these estates, which, according to the Sheriff-Substitute's note, are of very great value, but I do not find in the language of the 27th section evidence of the intention of the Legislature to transfer the decision of questions of heritable right from the ordinary courts to a court of summary jurisdiction, whose methods of procedure are left wholly undefined. The questions to be decided summarily by the Sheriff are described in the 27th section as disputes as to "whether any right or privilege exercised" by the old electors is a public or a private right. I do not think that any lawyer or landed proprietor, in speaking of the purchase of a mineral estate or estate of superiority, would describe it as the exercise of a right or privilege, and I therefore conclude that Parliament in using these words meant to refer to franchises or privileges and not to property.

It is not necessary to elaborate the point, because it is only a question of the meaning of ordinary words in a section of an Act of Parliament which may not be quite clear but is certainly not technical. But I desire to point out that there is more than mere form at stake in this question. If this declaratory action were rightly instituted in the Sheriff Court, then the findings of this Court on questions of fact would be final, but in an action of declarator raised in the Court of Session our findings in fact would not be final. It is plain enough that the rights claimed by the petitioners must depend to some extent on fact, and the defenders have a legitimate interest to insist that the case shall not come before the Court in such a form as may interfere with their right of appeal. I therefore suggest that we should dismiss this appeal and affirm the judgment of the Sheriff-Substitute.

LORD ADAM and LORD KINNEAR concurred.

The Court dismissed the appeal and confirmed the judgment of the Sheriff-Substitute.

Counsel for the Pursuers and Appellants—H. Johnston, K.C.—Hunter. Agents—Kinmont & Maxwell, W.S.

Counsel for the Defenders and Respondents—Clyde, K.C.—R. S. Horne. Agents—Alexander Bowie, S.S.C.

Wednesday, March 15.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

ROBERTSON AND OTHERS *v.* BRUCE.

Property — Right of Access—Servitude or Right of Property—Prescriptive Possession—Parts and Pertinents — Building Restrictions—Common Interest—Acquiescence.

A and B were proprietors of the upper and lower flats respectively in a two-storied tenement with background attached, and derived their rights from a common author. The disposition to A included a right of access to his house on the upper flat by a street door and a staircase contained in an annexe to the tenement. The disposition to B included the *solum* on which the door and staircase were built. A had had the exclusive use of the staircase for 70 years. *Held* that B was entitled to interdict A from making structural alterations on the staircase.

The disposition to A also contained a restriction against any building on the background higher than 12 feet. *Held* that B was barred from insisting on this restriction, in respect that the restriction did not specially apply to the steading in question, but was one of the conditions applicable to all the adjacent steadings, and that he had acquiesced in the violation of it on other adjacent steadings to which it was applicable.

This was an action of declarator and interdict at the instance of James Hinton Robertson and others, as trustees for the firm of J. M. & J. H. Robertson, writers, Glasgow, against John Wilson Bruce, accountant, Glasgow, craving for declarator (1) that the partners as heritable proprietors of the subject 120 Bath Street, Glasgow, have a right of common interest in the subjects disponed to Nathaniel Stevenson, of Braidwood, by Alexander Campbell, of Bedlay, in the year 1830; (2) that the pursuers are entitled to prevent the successors of the said Nathaniel Stevenson from erecting thereon any buildings except to replace existing buildings, or alternatively from erecting any buildings on the ground described as part and pertinent of the upper flat disponed to Nathaniel Stevenson of a greater height than 12 feet; (3) that the staircase No. 144 Wellington Street, Glasgow, belongs in property to the pursuers, subject only to a right of access in favour of the defender to the upper flat of the tenement and the cellar entering thereby, and the defender is not entitled to make any alterations on the staircase or any part thereof.

The summons contained corresponding conclusions for interdict.

The following narrative is quoted from the opinion of the Lord Ordinary (KINCAIRNEY):—"This is an action between two proprietors of a tenement in Glas-