SUMMER SESSION, 1919.

COURT OF SESSION.

Tuesday, May 20, 1919.

FIRST DIVISION.

BURRELL *v.* MAASHAVEN STEAMSHIP COMPANY, LIMITED.

War—Trading with the Enemy—Enemy Property—Vesting Order—Trading with the Enemy (Amendment) Act 1914 (5 *Geo. V, cap.* 12), *sec.* 4—*Trading with the Enemy (Amendment) Act* 1918 (8 *and* 9 *Geo. V, cap.* 31), *sec.* 9—*Relevancy.*

The Trading with the Enemy (Amendment) Act 1914 (5 Geo. V, cap. 12), section 4 (1), as applied to Scotland by the Trading with the Enemy Act 1914 (4 and 5 Geo. V, cap. 87), section 4, enacts—"[The Court of Session] or a judge thereof may, on the application of any person who appears to the Court to be a creditor of an enemy, or entitled to recover damages against an enemy, or to be interested in any property, real or personal (including any rights, whether legal or equitable, in or arising out of property, real or personal), belonging to or held or managed for or on behalf of an enemy . . . by order vest in the Custodian any such real or personal property as aforesaid, if the Court or the judge is satisfied that such vesting is expedient for the purposes of this Act, and may by the order confer on the Custodian such powers of selling, managing, or otherwise dealing with the property as to the Court or judge may seem proper."

A British subject, alleging that he had claims against an enemy firm and an enemy subject, one of its partners, brought an application to the Court to make a vesting order vesting in the Custodian for Scotland a ship then lying in harbour in England, and also a sum of £20,000, being the freight earned by the ship while under requisition of the Admiralty. He averred that the enemy firm, and the two partners thereof, were "the owners or at least part owners of the" ship in question. *Held* that the application was irrelevant in respect that the applicant had failed to aver a sufficient interest of the enemy firm and its partners in the ship to make the provisions of section 4 (1) of the Act of 1914 applicable.

The Trading with the Enemy (Amendment) Act 1914 (5 Geo. V, cap. 12), section 4, is quoted *supra* in rubric.

The Trading with the Enemy (Amendment) Act 1918 (8 and 9 Geo. V, cap. 31), section 9 (1) enacts—". . . the power of the Court under section 4 of the Trading with the Enemy (Amendment) Act 1914, and of the Board of Trade under section 4 of the principal Act, of making orders vesting property in the Custodian extends . . . so as to enable such orders to be made vesting any property in the Custodian of any part of the United Kingdom, notwithstanding that the property is situate in another part of the United Kingdom."

Henry Burrell, shipowner, Glasgow, *applicant*, brought an application in the Bill Chamber under the Trading with the Enemy (Amendment) Act 1914, craving the Court—"(1) To make an order vesting the said s.s. 'Maashaven' in . . . Joseph Campbell Penney, Accountant of Court, the Custodian for Scotland appointed by the before-mentioned statute; (2) to authorise the Ministry of Shipping of His Majesty's Government to pay over to the said Joseph Campbell Penney, as Custodian aforesaid, the sum of £20,000, or such other sum as may be found due in respect of the requisitioning by the Shipping Controller of the s.s. 'Maashaven'; (3) to authorise the said Custodian, out of the proceeds of the sale and of the moneys paid over to him as aforesaid by the Ministry of Shipping, to pay to the applicant" [various sums of money hereinafter referred to]; "and (4) to hold the balance of the price and hire, after deducting therefrom the expense of the sale and the Custodian's charges, until the termination of the war, the same to be thereafter dealt with in such manner as His Majesty may by Order in Council direct, all as provided by the said statute."

The application, after narrating various proceedings between the applicant and

Gebroeder van Uden and their mandatories, and the provisions of the Trading with the Enemy Proclamation No. 2 dated 9th September 1914, set forth—"That the said firm of Gebroeder van Uden and the two partners thereof viz., J. van t'Hoff and C. van t'Hoff, are accordingly decreed alien enemies of His Majesty, and as such they or any body of persons with whom they are connected—no matter of what nationality or number they may be—have no right to ask the aid of or to approach any of the King's Courts or to obtain delivery of any property or require payment of any money belonging to them within the United Kingdom." [Then followed a narrative of the claims of the applicant against C. van t'Hoff as an individual and against the Gebroeder van Uden.] "That the said Gebroeder van Uden and the two partners thereof, viz., J. van t'Hoff and C. van t'Hoff, are the owners or at least part owners of the s.s. 'Maashaven,' presently under requisition by the Shipping Ministry of His Majesty's Government. In this connection it is explained that the s.s. 'Maashaven,' while being towed from Dunkirk to Rotterdam, struck a mine, and was ultimately beached at Mucking Flats in the Thames estuary. The vessel then lay within the jurisdiction of the Marine Department of the Board of Trade, but on account of the enemy nationality of the owners they were refused any facilities for having the vessel repaired. Ultimately the s.s. 'Maashaven' was repaired at the instance of His Majesty's Government, and was requisitioned by the Ministry of Shipping. Prior to being so requisitioned the Shipping Controller undertook (1) that notice would be given to the applicant before action was taken with regard to the payment of any moneys in respect of the requisition of the vessel, so that he might have an opportunity of taking such steps as he might think fit to protect his interests; (2) that the vessel would not be delivered to the owners on release from requisition without similar notice; and (3) that in the event of the applicant obtaining any order of Court directing payment to him out of moneys payable to the owner in respect of the requisition, such order would be obeyed by the Ministry. That the said s.s. 'Maashaven' has been under requisition by his Majesty's Ministry of Shipping for four months or thereby, and has earned hire on a dead weight capacity of 4200 tons at the rate of at least 30s. per ton, and the applicant believes that there is a sum of considerably over £20,000 payable to the owners, among whom are included the decreed alien enemies J. van t'Hoff and C. van t'Hoff, the individual partners of Gebroeder van Uden. By letter dated 8th April 1919 the Shipping Controller has intimated to the applicant that the s.s. 'Maashaven' is to be released from Government service on the completion of her present voyage in the United Kingdom, which will terminate before the end of the current month. That the applicant desires to be ensured that funds belonging to these alien enemies will be available to meet his claims, and he therefore submits that an order should be made vesting the said s.s. 'Maashaven,' and the hire due by the Shipping Ministry of His Majesty's Government, in respect of the said vessel being requisitioned, and amounting to the sum of £20,000 or thereby, in Joseph Campbell Penney, Accountant of Court, the Custodian in Scotland appointed under the Trading with the Enemy Act 1914; that the said Custodian should be authorised to sell the said vessel, and out of the proceeds thereof, and of the hire which may be due and paid to him in respect of the requisition of said vessel as aforesaid, pay to the applicant" [the sums claimed by him]; "and (*g*) the expenses of and incident to this application, the balance remaining, after deducting the Custodian's charges, to be held by him until the termination of the war, and thereafter to be dealt with in such manner as His Majesty may by Order in Council direct."

On 24th April 1919 the Lord Ordinary (ANDERSON) officiating on the Bills pronounced this interlocutor—"Orders that the s.s. 'Maashaven,' mentioned in the application, be and is hereby vested in Joseph Campbell Penney, Accountant of Court, the Custodian for Scotland appointed by the Trading with the Enemy Act 1914: Further, authorises the Ministry of Shipping of His Majesty's Government to pay over to the said Joseph Campbell Penney, as Custodian foresaid, the sum of £20,000 mentioned in the application, or such other sum as may be found due in respect of the requisitioning by the Shipping Controller of the said s.s. 'Maashaven'; and decerns: *Quoad ultra* continues the Application."

On 1st May 1919 the Maashaven Steamship Company, Limited, Rotterdam, *respondents*, obtained leave to reclaim and brought a reclaiming note. On 14th May 1919 the Court appointed the respondents to lodge answers to the Application within three days.

The *answers*, after admitting that Gebroeder van Uden had been held to be alien enemies in the sense of the Trading with the Enemy Act 1914, set forth—"Explained further that Gebroeder van Uden and the two partners thereof, namely, J. van t'Hoff and C. van t'Hoff, are not the owners nor part owners of the s.s. 'Maashaven.' The said vessel is owned by the respondents The Naamlooze Vennootschap Maatschappij Stoomschip Maashaven, Rotterdam, which is a limited company incorporated in Holland according to Dutch law. The capital of the said company consists of 200,000 guilders divided into 200 bearer shares of 1000 guilders each. The said company have been owners of the said vessel ever since 1906, and subject to the requisition of the vessel by the Shipping Controller they have remained and still remain owners of the vessel. Prior to the requisition by the Shipping Controller she was registered in Holland and sailed under the Dutch flag, and since the requisition she has been registered in London and has sailed under the British flag. The partners of the firm of Gebroeder van Uden are shareholders in the said limited company, and the total number of shares held by them and their

said firm is less than one-half of the shares of the company. The remaining shares of the company are held by shareholders who are not in any way connected with the partners of Gebroeder van Uden or with that firm. As the whole of the shares of the said company are payable to bearer, there is no register of shareholders, meetings are called by advertisement, and holders of shares exhibit their share certificates for voting purposes. The said company was and still is managed by the firm of Gebroeder van Uden of Rotterdam.

"The said vessel was traded by the respondents both before the war and during the war until she struck a mine as stated in the application. In March 1918 while she lay on the Mucking Flats she was requisitioned by the British Government under the law of Angary. The terms of this requisition, which applied as well to other Dutch ships as to the s.s. 'Maashaven,' are contained in a letter dated 13th April 1918 addressed by the British Ambassador at The Hague to the Dutch Minister for Foreign Affairs. It expressly recognises the character of the s.s. 'Maashaven' as a Dutch vessel and contains an undertaking on the part of His Majesty's Government that the vessel will be returned to her owners on the termination of the emergency in respect of which she was requisitioned, and in no event later than the completion of the voyage on which the vessel might be engaged at the date of the signature of the Treaty of Peace. It further provided that during the requisition the vessel would be placed under the British flag and manned, victualled, and equipped by His Majesty's Government (which was in fact done), and that the resumption of the Dutch flag would be facilitated. Down to the date of the said requisition the vessel was entered in Lloyds' Register of Shipping as registered at the port of Rotterdam and owned by the respondent company. Since the date of the said requisition she has been and she still is entered in Lloyds' Register as registered at London and owned by the British Shipping Controller. The vessel was and still is similarly registered in the official Register of Shipping at the Customs' House, London. A certified copy of extract from the Customs Register, dated 15th May 1919, showing the ownership of the vessel as on 25th April 1919 is produced herewith.

"Both before and after the said vessel was requisitioned as aforesaid, the applicant was in frequent communication with various departments and officials of H.M. Government, including the Admiralty, the Marine Department of the Board of Trade, the Ministry of Shipping, and the Procurator General in Prize, and he made statements to the said departments and officials as to the alleged enemy ownership of the vessel similar to those contained in the application under answer. The whole averments of the applicant were thus brought to the knowledge of the said departments and officials, and, moreover, it is believed that they made independent investigations into the matter. In the result, however, the vessel was requisitioned, as already stated, as a Dutch vessel, and no steps were taken by any department of the Government or official thereof, either to have the vessel condemned in prize or vested in the Custodian under the Trading with the Enemy Acts. Towards the end of last year the respondents' managers received a telegram from a firm of solicitors who were then acting for the applicant, stating that he was about to have the said vessel put into prize 'under aegis Government.' Thereupon the respondents' solicitors made inquiries of the Legal Department of the Ministry of Shipping, and received in reply a letter dated 8th November 1918 stating that no proceedings in the Prize Court against the said vessel were in contemplation.

"At the date when the application under answer was presented the vessel remained in the ownership of the Shipping Controller under the foresaid requisition, the entries in Lloyds' Register and the Official Register of Shipping being as already stated; and at the date when the order under review was pronounced by the Lord Ordinary officiating on the Bills the vessel lay at the port of Middlesborough. No intimation of the application under answer was given to the respondents, nor to their known mandatories Messrs Howarth & Stewart, writers, Glasgow, nor was any such intimation given to the Shipping Controller, and neither the respondents nor their known mandatories, nor the Shipping Controller, were heard prior to the issue of the order in which the vessel was vested in the Accountant of Court.

"Following on the order now under review the respondents believe that the Accountant of Court has assumed control of the s.s. 'Maashaven,' but that she still stands registered in name of the Shipping Controller. In anticipation of the de-requisitioning of the vessel, which was about to take place when the order under review was pronounced, the respondents entered into a charter-party chartering the vessel for a voyage from the Tyne to Marseilles with a cargo of coal, but as the vessel has not been handed over to them they have not been able to take up the charter, which is open to cancellation by the charterers after 15th May. The respondents further brought a Dutch crew to this country for the said vessel, and they are at present in this country at the costs of the respondents, who are unable to utilise their services. A copy of the foresaid charter-party is produced herewith. Having in view the urgency of the matter, and the fact that the Court was in vacation, the respondents, after 30th April, on which date the issue of the order under review came to their knowledge, obtained the issue of a writ on 3rd May from the High Court of Justice in England in which they craved, *inter alia*, an injunction restraining the Accountant of Court from setting up any claim to or taking possession of or exercising any rights of ownership in respect of said vessel, and such other relief as the Court might be prepared to give. In connection with the said proceedings in England they lodged an affidavit sworn by Henry Millican Cleminson, solici-

tor, of 24 St Mary Axe, in the city of London, a member of the firm of Botterell & Roche of the same address, and also an affidavit sworn by the said C. van t'Hoff. A hearing upon the said writ has been fixed to proceed in London on Friday, 16th May 1919. The respondents believe that representations against the proceedings in which the said vessel has been vested in the Accountant of Court have been made by the Dutch Embassy in London to His Majesty's Foreign Office, under reference to the foresaid agreement whereby His Majesty's Government undertook to return the vessel to the respondents at the termination of the emergency in respect of which she was requisitioned. The respondents submit that the vesting order under review should be recalled, both in so far as it affects the said vessel, and in so far as it affects the sum of £20,000 or such other sum as may be found due in respect of the requisitioning of the said vessel by the Shipping Controller, and that the application under answer should be refused, and that in respect (1) when the said order was pronounced the Scottish Courts did not have, nor do they now have, jurisdiction over the said vessel; (2) the said vessel is not enemy property, but is owned by the respondents, who are a Dutch limited company; (3) the said vessel was, at the date of the order under review, vested and registered, and still is registered, in the name of the Shipping Controller as representing one of His Majesty's Departments of Government; and (4) the said vessel is the subject of an international undertaking whereby His Majesty's Government undertook to restore her to the respondents at the termination of the emergency for which she was requisitioned, the said emergency having now terminated."

Argued for the respondents—There was no jurisdiction to entertain the application. The ship in question was physically situated in England. Hence apart from special legislation the Scots Courts had no jurisdiction over it. The only special legislation was the Trading with the Enemy Acts, and in those Acts the only provision giving the Courts powers over property outwith their jurisdiction was in the Trading with the Enemy (Amendment) Act 1918 (8 and 9 Geo. V, cap. 31), section 9. That section was inapplicable. Such an extension of jurisdiction as was involved in the present application would require to be expressed in clear unambiguous terms. The obvious object of that section was to enable the courts of one country, in the hands of the Custodian of which the bulk of the property of an enemy alien was already vested as a matter of convenience, to recover some trifle of property belonging to the same alien enemy situated elsewhere. But in any event the hypothesis of the power conferred was that the property was enemy. Here the question was whether the property was enemy or not, and upon that question the section conferred no extension of jurisdiction but left that question for the ordinarily appropriate tribunal. Further, apart from that specialty, the sole class of property with regard to which a vesting order was competent was property belonging to or held or managed for or on behalf of an enemy — Trading with the Enemy (Amendment) Act 1914 (5 Geo. V, cap. 12), section 4. The order craved was for vesting the whole ship in the Custodian. But the applicant merely averred that the Gebroeder van Uden and the partners thereof were the "owners or part owners" of the ship. That being so, the applicant could only claim a vesting order applicable to so much of the ship as belonged to them. Further, if the applicant's averment was read as admitting the averments in answer, the mere fact that alien enemies held shares in a neutral company owning and managing the ship did not make the ship enemy property. In any event the *prima facie* evidence was all to the effect that the ship was not enemy property; she had been requisitioned, not seized in prize; the shipping registers in Holland and the correspondence between the Dutch and British Governments showed that she was Dutch; she was registered in this country as British. On such a matter the certificate of registration was good evidence of ownership—*Duffus & Lawson* v. *Mackay and Others*, 1857, 19 D. 430. Further, the applicant had no title to present the Application, for he had failed to aver that the property in question was that of an alien enemy of whom he was a creditor or against whom he was entitled to recover damages or in which he had interests. Further, the applicant had failed to convene the parties having the real interest to object, viz., the owners of the ship or their known mandatories or the Shipping Controller.

The applicant made a statement on his own behalf.

LORD PRESIDENT—I am entirely at a loss to understand how the order of 24th April last came to be pronounced, especially without an order being made for intimation to the known mandatories of the owners of this ship, and to the Shipping Controller, who at that time had requisitioned the ship, and in whose employment at that time it actually was. The Application is made under the authority of the Trading with the Enemy Amendment Act 1914, and particularly section 4 thereof. In order to bring that statutory provision into play it is essential that the applicant should aver that the ship which it is sought to place in the hands of the Custodian is enemy property—she must either belong to an enemy or she must be held or managed for or on behalf of an enemy —and from the beginning to the end of this Application it is nowhere averred that the vessel is either enemy property or is managed or held for or on behalf of the enemy. On the contrary, it is, as I read the averments in the Application, explicitly averred that she is not enemy property, because the applicant sets out quite distinctly that at the date of his Application she was under requisition by the Shipping Ministry of His Majesty's Government, and that necessarily implies that she was not an enemy ship. He goes on to aver that two men called J. van t'Hoff and C. van t'Hoff are enemies, and have been so declared by a judgment of this

Court, and that they are part-owners of this vessel. To what extent they are part-owners it is not said, but unquestionably it is not anywhere alleged that they own this ship. On the contrary, it would appear from an entry in Lloyds' Register, which is *prima facie* evidence at all events of the ownership of the vessel, that at the date when the Order was pronounced she was in the hands of the Shipping Controller and was a British ship. We are told that in point of fact she belonged to a Dutch corporation, and we have before us an extract from the Dutch Registry of Shipping which shows that that is so. But I do not proceed upon the extract from the Dutch Registry of Shipping, for it is not produced, although it has been exhibited to us. I proceed here on the footing that the applicant has failed relevantly to aver that the property which he seeks to have placed in the hands of the Custodian is enemy property, and that that defect in his averments is absolutely fatal to his success. I am of opinion that the Order ought to be recalled.

LORD SKERRINGTON—I agree with your Lordship that the averments of the applicant are irrelevant, but I do not regard it as at all conclusive that the applicant admits that the ship was under requisition and that for the time being she was registered in Britain in name of the Shipping Controller. I think that the applicant would have presented a relevant case if he had explained that though she has been dealt with as a British ship, in point of fact she was owned by alien enemies. Unfortunately for himself the applicant alleges that two gentlemen called van t'Hoff, trading under the name of Gebroeder van Uden, are the owners, or at least part-owners, of the steamship in question. It is familiar law that relevancy must be tested by its weaker limb, and the question comes to be whether it is relevant in an application of this kind to say that alien enemies are part-owners of a steamship. In my judgment that would be a relevant averment if what was asked was that the shares owned by those part-owners should be vested in the Custodian, but that is not what the applicant asks for. He craves that the ship as a whole, and her earnings as a whole, should be vested in the Custodian. That is a *non sequitur*. In other words the averments are irrelevant. That seems to me to be a sufficient ground of judgment.

LORD CULLEN—I think the applicant's averment that "the said Gebroeder van Uden and the two partners thereof, viz., J. van t'Hoff and C. van t'Hoff, are the owners, or at least part-owners, of the s.s. 'Maashaven'" is not relevant to bring the case within section 4 of the Act of 1914, and accordingly that the order made by the Lord Ordinary should be recalled and the application dismissed.

LORD BLACKBURN—I concur.

LORD MACKENZIE was absent.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the application.

For the Applicant—Party.

Counsel for the Respondents—Moncrieff, K.C.—T. G. Robertson. Agents—Gordon, Falconer, & Fairweather, W.S.

Counsel for the Custodian — The Lord Advocate (Clyde, K.C.)—Pitman. Agent—Thomas Carmichael, S.S.C.

COURT OF TEINDS.

Friday, March 7.

SIR ARTHUR NICHOLSON AND OTHERS, PETITIONERS.

Church—Disjunction and Erection—Process—Narration of Statutes.

In a petition for the disjunction and erection of a church and parish *quoad sacra* it is unnecessary to narrate the statutes from which the Court of Teinds derives its constitution and its power to disjoin and erect churches and parishes *quoad sacra*.

Sir Arthur Nicholson and others, *petitioners*, brought a petition for disjunction and erection of Arisaig and Moidart church and parish *quoad sacra*.

The petition was in the usual form (see Juridical Styles, 3rd. ed., vol. iii, p. 867), the Acts anent the constitution of the Court of Teinds and its powers to erect parishes *quoad sacra* being referred to at considerable length.

Upon the motion for a first order for intimation the following opinions were delivered:—

LORD SANDS—The first paragraph of this petition narrates the provision of the Act of 1707, by which the Lords of Council and Session were entrusted with the powers and duties of Commissioners of Teinds. The second paragraph narrates the provisions of the Act of 1844, by which the Court of Teinds was empowered to erect parishes *quoad sacra*. I think that I may venture to assure petitioners that the Court is familiar with the origin of its jurisdiction, and with the powers conferred by the Act of 1844, and that it is therefore unnecessary in every petition to remind the Court of these matters. I do not desire to reflect in any way upon the framers of this and other similar petitions for setting forth these particulars. They have simply followed an ancient tradition of the fathers. The several matters were novel to the Court in 1707, and again in 1844, so it was thought proper to set them forth in the first petitions or applications, and having thus found their way in, there they have remained. But I think that petitioners might very well now take their courage in their hands and drop this practice. It adds a little to the cost of every application, and in the matter of the erection of new parishes alone it must probably have cost at least £750 since 1844, without any profit to petitioners or any assistance to the Court. Similar considerations