

past eight), went to the Court for the purpose of trying the case instantly or adjourning it to a future day as the suspender might elect; 3d, that the suspender was distinctly and repeatedly offered the alternative of an immediate trial or of an adjournment on the (I think in the circumstances proper) condition of either going to prison or giving larger bail than that which he had previously forfeited, and that he deliberately chose the former. Considering the petty character of the charge, and the probable punishment on conviction, it is not surprising that he should have elected for immediate trial in preference to an adjournment on bail or interim custody. But having so elected, and the trial having resulted in a conviction and a trifling fine, I am unable to entertain his complaint that he was oppressively or unfairly treated because the trial took place at a late hour, in the absence of his agent, or because the witnesses brought to the door by his wife were, without the knowledge of the court or the prosecutor, refused admittance by a police-officer.

I am therefore for refusing the suspension, with expenses.

LORD JUSTICE-CLERK and LORD NEAVES concurred.

Appeal refused.

Counsel for Suspender—Scott and McKechnie
Agent—A. Morrison, S.S.C.

Counsel for Respondent—Moncreiff. Agents—
Morton, Neilson & Smart, W.S.

COURT OF SESSION.

Tuesday, March 10.

FIRST DIVISION.

GRANFELT v. LORD ADVOCATE (FOR BOARD OF TRADE).

Merchant Shipping Act 1873, sec. 12, (36 & 37 Vict., c. 88)—Ship—Detention of Ship—Sale—Registry.

Circumstances in which it was held that a ship detained by the Board of Trade in terms of sec. 12 of the "Merchant Shipping Act, 1873," was a British ship at the time of detention, and therefore was not released by being subsequently sold to a foreigner.

Opinions—that a sale to a foreigner does not change the nationality of a vessel unless the Registry is cancelled.

This was a note of suspension and interdict at the instance of A. E. Granfelt & Company, ship brokers in Aberdeen, against the Lord Advocate, (for the Board of Trade), in the following circumstances:—

The petitioner, A. E. Granfelt, only partner of the firm of Granfelt & Company, purchased the "Florida" of Banff, then a registered British ship, from Thomas Adam, shipowner, Aberdeen. The petitioner was a Swedish subject, not naturalised in this country, and not capable of holding British shipping.

On 10th November 1873 the "Florida," which was then lying in the port of Aberdeen, was, under section 12 of the "Merchant Shipping Act, 1873," ordered by the Board of Trade to be detained for the purpose of being surveyed. The result of the

survey was that the ship was reported to be unseaworthy, and was detained until she should be properly repaired.

This note of suspension and interdict was brought by A. E. Granfelt to have the proceedings of the Board of Trade suspended, and to have them interdicted from detaining the ship.

The petitioner averred that before the detention by the Board of Trade the sale to him was completed, and the ship no longer a British ship. The sale was instructed by the following offers and acceptance and bill of sale:—

"56 Marischal Street,
Aberdeen, 20th Oct. 1873.

"Thomas Adam, Esq.
"Florida."

"Sir—Subject to inspection of the ship's bottom, we herewith offer you the sum of £1200, say one thousand and two hundred pounds sterling, for the 'Florida,' with all her inventory, whether on board or ashore, along with all provisions, &c., now on board.

"Payment on or before the 1st April 1873, and the vessel to remain in Aberdeen harbour until payment is made.

"It is understood that a commission of one per cent. on the amount is due to us on signing B/sale if this offer is accepted.

"This offer is binding until 25th instant. Awaiting your reply, we remain, yours respectfully,
"A. E. Granfelt & Co."

"56 Marischal Street,
Aberdeen, 6th Novr. 1873.

"Thomas Adam, Esqre.,
National Bank of Scotland.

"Florida."

"Dear Sir—We cannot get our friends to offer more than £1200 for above vessel. If you agree to accept that sum the payment of the price could easily be arranged.

"It would be desirable to have an inventory taken, and it would not take Captain Donald long to make one, as blank forms can be had from Daniel, printer.

"Awaiting to hear from you, we remain, yours truly,

"p. A. E. Granfelt & Co.,
C. Hilson."

"National Bank of Scotland's Office,
Aberdeen, 7 November 1873.

"Messrs A. Granfelt & Co.,
Aberdeen.

"Dear Sirs—I am authorised now to accept your offer of twelve hundred pounds stg. for the barque 'Florida' of Banff, as she presently lies in this harbour, with all her stores, in terms of your letter to me of the 6th inst.

"The vessel will be immediately handed over to your care on payment of a deposit of one hundred and twenty pounds stg., the balance to be paid in cash by end of this month, or on receipt of transfer within that period, in your option. I remain, yours truly,

"Thomas Adam."

"Aberdeen, 8 Novemb. 1873.

"£120 stg.

"Received from Messrs A. E. Granfelt & Co., Aberdeen, the sum of one hundred and twenty pounds sterling, as a deposit on part of purchase
NO. XXII.

price of barque 'Florida' of Banff, in terms of his letter addressed to me of the 6 inst., and my reply to him of 7 inst."

(Description of Ship.)

Official number of ship, 10,430.

Name of ship, "Florida."

"We, John Clayton, owner of eight shares, Alexander Simpson, owner of four shares, Thomas Adam, owner of thirty-two shares, Thomas Adam junior, owner of eight shares, Alexander Scott, owner of six shares, Francis John Diggins, owner of two shares, and James Simpson, owner of four shares, in consideration of the sum of twelve hundred pounds sterling paid to us by Axel Edward Granfelt, the receipt whereof is hereby acknowledged, transfer sixty-four shares in the ship above particularly described, and in her boats, guns, ammunition, small arms, and appurtenances, to the said Axel Edward Granfelt: Further, we, the said John Clayton, Alexander Simpson, Thomas Adam, Thomas Adam jr., Alex. Scott, Francis John Diggins, for ourselves and our heirs, covenant with the said Axel Edward Granfelt and his assigns, that we and James Simpson have power to transfer in manner aforesaid the premises hereinbefore expressed to be transferred, and that the same are free from incumbrances.

"In witness whereof we have hereunto subscribed our names and affixed our seal this eighth day of November One thousand eight hundred and seventy-three.

(Signed) John Clayton.
" Francis John Diggins.
" Alexander Simpson.
" James Simpson.
" A. Scott.
" Thomas Adam.
" Thomas Adam jr.

"Executed by the abovenamed John Clayton, Francis John Diggins, and Alex. Simpson, in the presence of (Signed) Alex. Simpson jr., clerk to Nisbet & Co., Merchants, Banff; and by James Simpson, Alex. Scott, Thomas Adam, and Thomas Adam jr., in presence of (Signed) William Collie, clerk, Aberdeen."

The bill of sale, although dated the 8th November, was not delivered until the 20th November, when the balance of the price was paid.

On 4th December Mr Adam wrote the following letter to the Collector of Customs at Banff:—

"Aberdeen, 4th December 1873.

"Dear Sir—I send you herewith the register of the 'Florida' to be cancelled, also bill of sale, showing the owners, as registered in your books, have transferred this vessel on the 8th ulto. to Mr A. E. Granfelt, a foreigner, who, I may mention, has purchased 'Florida' for clients in Norway; and this vessel will henceforth sail under the Norwegian flag.—I remain, yours truly,

"Thomas Adam."

Upon receipt of this letter the Collector of Customs cancelled the registry, and the Board of Trade sent the following telegram to him:—

"10th Decr. 1873.

"Assistant Secretary, Collector of Customs,
Marine Department, Custom House, Banff.
Board of Trade.

"You had no power to cancel the register of the 'Florida.' She was under detention as unseaworthy at Aberdeen."

The complainer pleaded—" (1) On a sound con-

struction of the Merchant Shipping Act of 1873 the provisions thereof applicable to ships alleged to be unfit to go to sea apply only to ships enjoying the privileges of the British flag; at least do not apply to ships the property of foreigners; and did not and do not apply to the vessel in question.

(2) A full and valid contract of sale to foreigners having been completed by the suspenders Granfelt and Company's letter of offer of 20th October 1873 and Mr Thomas Adam's acceptance of 7th November 1873 founded on, which was confirmed by the payment of the deposit of £120, the subsequent proceedings of the respondents were *ultra vires* and illegal. (3) The said sale having taken place prior to the order of detention by the Board of Trade, and the purchasers being foreigners, not qualified to hold British shipping, and the vessel having thereby *ipso facto* ceased to be a British ship in virtue of the provisions of the Merchant Shipping Act of 1854, the respondents were not entitled to interfere with the same. (4) The beneficial interest in the said ship, and also all risk therein, having from and after the date of the sale thereof passed to the petitioners, foreigners not naturalised in this country, it was incompetent under the provisions of the said Act to hold out or represent said ship as a British ship; and the doing in the contrary would, under the said statute, have rendered any person so holding out the said ship liable to the penalties provided by the said statute. (5) The said ship, by her sale on 7th November 1873 to a foreigner, ceased to have the privileges of the British flag, and also to be subject to the obligations peculiar to shipping enjoying that privilege. (6) The respondents having illegally interfered with and interrupted the petitioners in the use of the foresaid ship, and threatening to detain the said ship, and to prevent the free use thereof by the petitioners, the interdict craved should be granted; and further, the decree sought for should also be granted."

The respondents pleaded—" (1) The 'Florida' having been detained by the Board of Trade in the exercise and in terms of the statutory powers conferred on the Board by the 'Merchant Shipping Act, 1873,' the present application should be dismissed. (2) There not having been a completed or valid transfer of the 'Florida' prior to the date of her detention by the Board of Trade, she remained at that date her nationality as a British ship. (3) The register of the 'Florida' as a British ship not having been cancelled prior to her detention by the Board of Trade, she was at that time subject to the laws applicable to British ships. (4) When a ship has been detained by the Board of Trade under the 12th section of the 'Merchant Shipping Act, 1873,' she shall not be released by reason of her British register having been closed."

The Lord Ordinary pronounced this interlocutor:—

"Edinburgh, 23d February 1874.—The Lord Ordinary having considered the cause,—Finds that on the 11th November 1873, when notice was given by the Board of Trade of their resolution under the powers conferred on them by section 12 of the statute, 36 and 37 Vict. c. 85, to have a survey made of the ship Florida of Banff, then lying in the port of Aberdeen, and on 13th November 1873, when the survey was made, the said ship was a British ship within the meaning of the said statute, and particularly the 12th section thereof: Finds that the said survey and the

subsequent detention of the ship were lawful, and within the powers of the Board of Trade, and that no relevant grounds in support of the present process of suspension and interdict have been stated, and *separatim*, that no such grounds exist: Therefore repels the reasons of suspension, and refuses the note, and decerns: Finds the suspenders liable in expenses: Allows an account thereof to be given in, and remits the same, when lodged, to the Auditor to tax and report.

“*Note*.—The question raised by the present application is one entirely of law. The respondents, the Board of Trade, on 11th November last served the notice No. 9 of process, intimating that having reason to believe that the ship Florida, then lying in Aberdeen harbour, was unfit to proceed to sea without danger to life, they had ordered her detention until she could be surveyed. Two days thereafter the survey was made, and the opinion expressed by the surveyors was that the vessel ‘should not be permitted to go to sea before being thoroughly overhauled,’ and she has been detained accordingly since that time. The owner of the vessel is entitled, under section 14 of the Act, to apply in the Sheriff-court to have another survey made, and this may result in the release of the ship. The complainers have not adopted this course, but have in this process raised the question whether the proceedings of the Board of Trade were lawful.

“The provisions of section 12 of the statute 36 and 37 Vict. c. 85, giving to the Board of Trade the power to survey and detain ships which they have reason to believe are unfit to proceed to sea without serious danger to human life, apply to British ships only, as appears not only from the terms used in that section itself, but by contrast, from the language employed in the 23d and immediately following sections of the Act; and the suspenders complain of the proceedings of the Board on the ground that the ship Florida was not a British ship when the proceedings above mentioned were adopted.

“The facts on which the suspender’s contention is founded are stated in the note, and are not disputed by the respondents. Down to 7th November 1873 the ship was admittedly the property of Mr Thomas Adam, Aberdeen, and others, all persons qualified to be owners of British ships. On that day it is stated that a concluded contract of sale was entered into between the complainers, Granfelt & Company, shipbrokers in Aberdeen, the only partner of which firm is a foreigner, not naturalised, and not capable of holding a British ship, on behalf of the other complainers, Nickelsen & Company, shipowners, Christiania, Norway, foreigners, also incapable of holding a British ship, by which Mr Adam, on behalf of himself and the other owners, accepted of Messrs Granfelt & Company’s offer of £1200 for the vessel. In Mr Adam’s letter of that date it was stated, ‘the vessel will be immediately handed over to your care on payment of a deposit of one hundred and twenty pounds sterling, the balance to be paid in cash by end of this month, or on receipt of transfer within that period in your option.’ On the following day the deposit of £120 was paid by the complainers, and the vessel handed over accordingly, in terms of Mr Adam’s letter to Messrs Granfelt & Company. A transfer of the vessel in favour of Mr Granfelt was signed by the owners, Mr Adam and others, on that day, but it was not delivered till the 20th

of November, when the remainder of the price was paid. In the meantime, on 11th and 13th November, before the payment of the price and delivery of the transfer, the vessel had been surveyed and detained by the respondents on the footing that she was a British ship within the meaning of the statute.

“After the transfer had been delivered, and on 4th December 1873, the complainers transmitted it to the registrar at the port of Banff, the vessel’s port of registry, who, as requested, cancelled the registry of the vessel, ‘in consequence of the sale to a foreigner.’ It is not maintained by the complainers that this proceeding could avail them as a release of the vessel; for the statute, in the concluding words of section 12th, above referred to, provides—‘When a ship has been detained under this section she shall not be released by reason of her British register having been closed.’ The meaning, apparently, of this provision is that a vessel having been detained shall not be released by reason of her British register being thereafter closed, and the obvious purpose was to prevent a ship which had been detained as unseaworthy being afterwards sold and transferred to foreign owners, who might be unaffected by the proceedings of the Board of Trade, the danger being, if this were allowed, that a ready means of escaping from the obligations of the Act of Parliament would be afforded, as a fraudulent or merely nominal transfer to the names of foreigners might not be easily detected.

“The true question for decision then is, Whether the Florida was a British ship in the meaning of the statute on the 11th and 13th November? for if this be answered affirmatively, it is not contended that the complainers are entitled to have the vessel released by this Court in consequence of what subsequently occurred.

“The Lord Ordinary holds that the vessel was a British ship at the time of the survey, because he is of opinion that she was at that time the property of Mr Adam and others, British owners, and whose names as owners stood on the register, nothing having occurred to divest them of their right of ownership under the statutes. He thinks that under the provisions of the statutes referred to in the argument, and particularly the provisions of the Merchant Shipping Act of 1854 (17 and 18 Vict. c. 104), on which this question mainly depends, that a ship held by British owners, who are on the statutory register as such, is to be regarded as a British ship in a question like the present as to the effect of a mere contract of sale with foreigners, as distinguished from a transfer in their favour, and that the ship retains her national character until at least a transfer in the statutory form has been executed and delivered. The transfer founded on in the present case was not delivered for nine days after the notice of detention was given.

“The statutes regulating the acquisition of property in British ships, and the conditions under which alone such property can be held, have for many years prescribed the only form in which a registered British ship can be transferred so as to change the ownership, whether in favour of a British subject or of a foreigner, who, being incapable of holding British shipping, must immediately on obtaining a transfer have the register closed. That form is by a *de presenti* bill of sale or transfer, according to the form of schedule E,

annexed to the Act of 1854, referred to in section 55 of the statute, by which deed the registered owner actually transfers his shares in the ship to the purchaser or transferee; and under section 43 of the same Act all notice of any trust, express or implied, or constructive, is excluded from the register, and until a new transfer be registered the owner whose name appears on the register has power absolutely to dispose of the ship by transfer, and to give an effectual receipt for the purchase money.

“The Lord Ordinary is relieved from the necessity of going over the various provisions of the Merchant Shipping statutes with the view of showing that an executory contract, or such a contract even if followed by delivery of the vessel, will not transfer the property, and that nothing short of a transfer in the statutory form will have that effect, for the subject has been very fully considered in three English cases of authority,—viz., *Hughes v. Morris*, June 1852, 21 Law Journal (Chancery) 761; *Duncan v. Tindal*, Jan. 1853, 22 Law Journal (Common Pleas) 187, and the *Liverpool Borough Bank v. Turner*, July 1860, 29 Law Journal (Chancery) 827, affirmed on appeal, 30 Law Journal (Chancery) 379. Reference may also be made to the Scotch cases of *Macarthurs v. Macbair* and *Johnston's Trustee*, June 20, 1844, 6 D. 1174; *Scott v. Robertson*, Feb. 22, 1862, 24 D. 572, and *Duffus v. Mackay*, 19 D. 430. The Lord Ordinary holds it to be clear from the provisions of the statute of 1854, and the decisions just referred to, that neither the contract alleged to have been entered into in the present case between Adam and others, the registered owners of the ‘Florida,’ and the complainers, nor the possession which followed on that contract, had any effect in transferring the ownership of the vessel. Mr Adam and others remained the owners undivested, and thus, if the element of ownership is to determine the question, the ship continued to hold the character of a British ship, liable to be detained for survey by the Board of Trade.

“It is maintained for the complainers, however, that by virtue of the contract founded on they acquired a beneficial interest in the ship, and that the mere existence of this interest destroyed the national character of the vessel, so that she was no longer a British ship. It would be remarkable and anomalous that a mere contract of sale, with an obligation to transfer a vessel, or even a sixty-fourth share of a vessel, at a future and it may be a distant date, to a foreigner, should have this immediate effect, while, in the meantime, and until the execution of a conveyance or transfer, the property of the vessel remains as before with the registered owner, a British subject. The contract might be the subject of dispute, and never result in a concluded transfer, or might be given up of mutual consent after the lapse of a certain time, the vessel in the meantime being continued on the register; and, if the complainer's argument be sound, her national character might thus vary from time to time, and be made to depend on fluctuating and latent agreements entered into by individual partners, with no certain or fixed test of a public kind to which an appeal could be made. This would certainly be a most unfortunate state of the law. But the Lord Ordinary is of opinion that the complainers' contention is not well-founded.

“It must be considered, first, with reference to

the Act of 1854 alone. By sections 18 and 19 it is provided that ships shall only be deemed British ships which belong wholly to British subjects, and which have been duly registered; and sections 38, 39, 56, 58, and 59 require a declaration to be made at the time of the first registration of the vessel, and on the occasion of the registration of each transfer of shares, or transmission of shares by death, bankruptcy, or marriage, containing *inter alia* a denial that any unqualified person, or body of persons, is entitled as owner ‘to any legal or beneficial interest in the ship, or any share therein.’ ‘The exclusion of any person not qualified to be the owner of British ships’ from the register, when the right has been acquired by succession or marriage, and the continuance, notwithstanding that event, of the British character of the ship, are secured by the provisions of sections 62, 63, and 64 of the statute; and by section 58 and section 81, sub-sections 10 and 11, provision is made for closing the ship's register where the ship has been acquired by a foreigner by transfer or bill of sale from the registered owner. There is nothing in these provisions, or in the terms of section 103, sub-division 3, which in the view of the Lord Ordinary can have the effect contended for by the complainers.

“The last mentioned of these sections provides for the case of an unqualified person (except in the cases before mentioned of an interest transmitted through death, bankruptcy, or marriage), acquiring, as owner, an interest in a ship which continues to use and assume the British character, and declares that such interest shall be forfeited to Her Majesty. It appears to the Lord Ordinary, looking to the provisions of the Act of 1854 as a whole, that the interest as owner there recognised and referred to must be an interest acquired by transfer duly registered, or at least acquired by transfer, because this is the only way in which a title of ownership can be acquired under the statute. But even if the words of this section be held to include an interest acquired under contract, the effect of the enactment is not thereby to operate at once a change in the national character of the ship, but to prevent by a penalty the continued use of the British flag and the continuance of the assumption of the British character, and so to compel the unqualified person who has acquired an interest to have the ship's register at once closed and the national character of the vessel openly changed.

“The interest which the Crown is entitled to declare forfeited is not necessarily the whole interest or right in the ship. It may be but a few shares of the whole. It does not seem reasonable to infer from this provision of the statute what its language certainly does not express—viz., that the national character of the ship is lost if a contract be made by one of several owners, by which he agrees to sell his share of a ship then at sea, and sailing under the British flag, to a foreigner, and that this character, it is presumed, is again regained by the Crown taking the benefit of its right of forfeiture.

“The 11th sub-division of section 81 appears to have an important bearing on the meaning of section 103, sub-section 3, for it provides that if on a sale being made to an unqualified person default occurs in producing the necessary documents to the registrar, so as to have the register closed, the result is not that the ship loses her British character, but, on the contrary, that the ‘unqualified person shall be considered as having acquired no title to or in-

terest in the ship,'—a provision which seems to be inconsistent with a change in the vessel's character; and even in that case a penalty is also due in respect of the default.

"The argument on the various clauses in the statutes in which beneficial interests are recognised was very fully considered by the Vice-Chancellor (afterwards Lord Hatherly) and by Lord Chancellor Campbell on appeal in the case of the *Liverpool Borough Bank*, and it seems to have been there held that nothing contained in these clauses could lead to the property or national character of a registered British ship being changed or affected by a mere contract of sale.

"The only clause in the Statute of 1854 which in its terms expressly refers to the case of a ship registered as a British ship ceasing to hold her national character is the 53d, and the fact there mentioned as producing this result is 'a transfer to any persons not qualified to be owners of British ships.' If a mere contract of sale, or anything short of a transfer, was to have this result in the view of the Legislature, it would have been here stated. The Lord Ordinary strongly doubts whether, notwithstanding the expression here used, the registration of the transfer is not also necessary to effect the change. He rather thinks this must be so when the whole provisions of the statute, which leave the property of the vessel in the owners on the register receive their due effect, and this view is strongly corroborated by the terms of section 81 just noticed, and by the closing words of section 12 of the Act of 1873, already referred to, which provide that a ship once detained under this section shall not be released by reason of her British register having been closed—words which indicate that the closing of the register makes the change in the national character of the ship. But it is unnecessary to decide this question in the present case, for the complainers had not even got a transfer of the ship at the date when the detention and survey by the Board of Trade took place.

"The complainers further founded on the 3d section of the Act 25 and 26 Victoria, cap. 63 (1862), passed after the cases above noticed, which enacts 'that the expression "beneficial interest," whenever used in the second part of the principal Act, includes interests arising under contract, and other equitable interests; and the intention of the said Act is, that without prejudice to the provisions contained in the said Act for preventing notice of trusts from being entered in the register book, or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by the said Act on registered owners and mortgagees, and without prejudice to the provisions contained in the said Act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interests therein, in the same manner as equities may be enforced against them in respect of any other personal property.'

"The purpose of this section is to be gathered from its closing terms, that equities may be enforced against owners and mortgagees of ships in respect of their interest therein in the same way as in respect of any other personal property, and it appears to the Lord Ordinary that, with reference to the law of this country at least, the statute does not give to contracts, as distinguished from transfers, any force which they did not previously pos-

sess. For without deciding whether according to the law of Scotland a contract of sale would form a valid ground for an action of implement to compel the execution and delivery of a transfer by the registered owner of a ship undivested of his title, or for an action of damages for breach of contract where he had transferred the ship to another, the Lord Ordinary, notwithstanding the English decisions, which were arrived at with reference to some extent to the principle of the English law, that a contract of sale passes the property of the thing sold, is disposed to hold that such an action for implement or for damages would be competent in this country, and would have been so even under the Act of 1854. Even on this assumption, however, which is the utmost which in the view of the Lord Ordinary the complainers can ask, it does not in the least follow that the existence of such a contract will alter the national character of the ship to which it relates; and on this subject the Lord Ordinary has merely to refer to what he has already stated.

"The complainers cannot, it is thought, successfully maintain that the provision of section 3d of the Act of 1862 goes farther than to give them in this country such rights of action as have been just referred to; and it may be assumed, without affecting the judgment of the Lord Ordinary, that the first member of the section gave them such a right of action under their contract with Mr Adam, with a view to their getting a title which would not only carry the property of the ship to them, but would enable them to close the register, and so to avoid all penalties of forfeiture or otherwise under section 81 (sub-section 11), section 108 (sub-section 3), or other sections of the Act of 1854. In regard, however, to the last member of the section under consideration, which provides that equities may be enforced against owners of ships, it is to be observed that this provision can have no effect in the present question, because it is by the Statute expressly declared to be 'without prejudice to the provisions contained in the said Act relating to the exclusion of unqualified persons from the ownership of British ships.' In the words of Mr Maclachlan, in the Supplement to his work On Shipping, by way of commentary on the Act of 1862, p. 6, it seems to follow 'that no unqualified person may acquire any equity in respect of the ownership of a British ship,' and at least this is certainly true unless such equities existed or could be acquired under the previous statute.

"The Lord Ordinary, in conclusion, may observe that it is evident from the language used in the 3d section of the Act of 1862 that it was intended to provide for some of those principles or rules which exist in the law of England, but which do not exist in this country. The effect of this section on the law of England, as regards 'interests arising under contract, and other equitable interests,' has not yet been determined by legal decision, so far as the Lord Ordinary is aware, and the subject is one evidently attended with considerable difficulty, as appears from the interesting and exhaustive commentary on the clause contained in Mr Maclachlan's work just referred to. This difficulty to a considerable extent arises from the different jurisdictions of the Courts of Law and Equity in England, and the remedies and forms of remedy peculiar to these Courts respectively. The Lord Ordinary has endeavoured to decide the present question with reference to the principles of the law of

Scotland only, and has adopted the English decisions on the statutes referred to in the argument only in so far as they seem to bear on the sound interpretation of the statutes, as these must receive effect with due regard to the principles of the law of sale of this country."

The complainers appealed, and argued—(1) A complete and valid sale of the vessel was effected by the offers of 20th October and 6th November, and the acceptance of the 7th November; and (2) the sale of a vessel to a foreign owner changes the character of the vessel *ipso facto* although the registry is not cancelled.

Authorities—*Stapleton v. Hayman*, Jan. 12, 1864, 33 L. J. Exch., 170; *Lacon v. Liffen*, Nov. 19, 1862, 32 L. J. Chan., 25; *Nostra Senora de Dolores*, June 28, 1813, 1 Dodgson's Admiralty Rep., 290.

The respondents argued that there was no completed sale till the delivery of the bill of sale.

At advising—

LORD PRESIDENT—The procedure of the Board of Trade complained of in this Note of Suspension took place under the 12th section of the Act of last session, amending the Merchant Shipping Act. The provisions of the 12th section, so far as it is necessary to consider them in reference to this case, are as follows:—"When the Board of Trade have received a complaint or have reason to believe that any British ship is, by reason of the defective condition of her hull, equipments, or machinery, or by reason of overloading or improper loading, unfit to proceed to sea without serious danger to human life, they may, if they think fit, appoint some competent person or persons to survey such ship, and the equipments, machinery, and cargo thereof, and to report thereon to the Board. The Board of Trade may, if they think fit, order that any ship be detained for the purpose of being surveyed under this section, and thereupon any officer of customs may detain such ship until her release be ordered either by the Board of Trade or by any court to which an appeal is given by this Act."

"When a ship has been detained under this section she shall not be released by reason of her British register having been closed."

Now, in the first place, it is to be observed that the provisions of this section refer entirely to British ships. The object of it is to obtain a survey of the ships in the cases mentioned, and for this purpose the Board of Trade is armed with the power of detaining any ship, and the order of detention remains in force until the ship is released by the Board of Trade or by a court of appeal. In the next place, although the ship cease to be British, that does not affect the validity of the order of detention previously issued, or release the ship. Keeping these provisions in view, the question, and the only one, is, whether at the date of detention the vessel in question was or was not a British ship? for although both parties have stated several pleas in point of form, they all resolve into this main consideration.

The complainer is a foreigner, and if he is owner of the ship at present, it is not a British but a foreign ship, and so it would not now be subject to any such order of detention. But the question is, whether the ship had ceased to be a British ship when the order for detention was actually made, for there is no doubt that before she became the property of the complainer she was a British ship. The averments of the complainer as to the transfer of the ship are in the first article of his statement

of facts.—"The suspenders A. E. Granfelt & Company, on the 7th day of November 1873, after some weeks' previous negotiations, purchased the barque 'Florida' of Banff, then a registered British ship, from Thomas Adam, shipowner, Aberdeen, and others, the owners thereof, conform to letter of offer from the suspenders, dated 20th October 1873, and letter from the said Thomas Adam, acting for himself and his Company, owners, and as duly authorised to do so, to the said suspenders, dated 7th November 1873." Now, there are here two letters referred to as making the contract, but there is also the intervening letter, not referred to, of 6th November, which superseded the offer of October. The true construction of the matter is, that these three letters, taken together, make a personal contract between the parties. The question is, did these letters effect a transfer of the property of the ship? for if they did not do so, there was nothing else that could do so until 20th November, or about a week after the order for detaining the vessel. If the transfer took place on 20th November, then the case falls under the last provision of the 12th section, which provides that when a ship has been detained she shall not be released on account of her British register having been closed.

In the letter of 20th October an offer of £1200 is made by the complainer for the purchaser of the "Florida," with "payment on or before the 1st April 1873, and the vessel to remain in Aberdeen harbour until payment is made." Then there is this clause, "It is understood that a commission of one per cent. on the amount is due to us on signing B/ sale, if this offer is accepted." This shows that the purchaser contemplated obtaining a title by bill of sale. But nothing followed on that letter, and on 6th November the complainers write:—"Dear Sir,—We cannot get our friends to offer more than £1200 for above vessel. If you agree to accept that sum the payment of the price could easily be arranged. It would be desirable to have an inventory taken, and it would not take Captain Donald long to make one, as blank forms can be had from Daniel, printer." This letter brought an acceptance from Mr Adam, the managing owner of the vessel, dated 7th November, in the following terms:—"Dear Sirs,—I am authorised now to accept your offer of twelve hundred pounds stg. for the barque 'Florida' of Banff, as she presently lies in this harbour, with all her stores, in terms of your letter to me of the 6th inst. The vessel will be immediately handed over to your care, on payment of a deposit of one hundred and twenty pounds stg., the balance to be paid in cash by end of this month, or on receipt of transfer within that period, in your option."

Now I do not think it necessary for the respondents to maintain that these letters do not make a good contract between the parties, and I assume that they made a good contract and one enforceable in a court of law. The question is, was the effect of the contract to transfer the property. Now it was obviously in the contemplation of the purchasers in their first letter or offer that there should be a bill of sale, and there is just as clear a suggestion on the part of the sellers in the acceptance that on the price being paid there was to be a transfer, that is to say, a bill of sale. But further, in this letter of acceptance there are two things to be done. In the first place, the vessel is to be immediately handed over to the purchasers' care. The words used suggest that it is not to be

handed over in fulfilment of the contract of sale, but, on the contrary, that the possession is to be conditional and defeasible. The purchasers were to have the ship to take care of, and the possession would come to an end if the other conditions of the contract were not implemented by payment of the balance of the price. In the second place, the balance is to be paid by the end of the month, "or on receipt of transfer within that period," that is to say, the payment of the balance and the delivery of the transfer were to take place *unico contextu*. I think that these letters cannot be held to operate a transfer of the property of the ship. They are not in themselves of such a nature, and it is clear that no transfer was intended until the title in the shape of a bill of sale was delivered and the balance of the price paid. That this was the case is shown by the bill of sale itself, for though dated 8th November it was not actually delivered until the 20th. And the reason of this is abundantly clear, for while it acknowledged payment of the whole price, that did not take place till the latter date. So the ship was not transferred until the 20th November 1873. Whether, when it was so transferred, the ship ceased to be a British ship to all effects and purposes, and whether the vessel could after that have been detained, is a different question, upon which it is not necessary to give an opinion.

What followed the delivery of the bill of sale is material, as showing how completely the seller thought that the completion of the sale; for on 4th December Mr Adam took the necessary steps for having the British Register closed by writing the following letter to the Collector of Customs at Banff:—

"Dear Sir—I send you herewith the register of the 'Florida' to be cancelled, also bill of sale, showing the owners, as registered in your books, have transferred this vessel on the 8th ulto. to Mr A. E. Granfelt, a foreigner, who I may mention has purchased 'Florida' for clients in Norway; and this vessel will henceforth sail under the Norwegian flag.—I remain, yours truly, Thomas Adam."

Adam there mentions 8th November as the date of the transfer. No doubt the bill of sale bears that date, but we are entitled to get behind that and see when it was actually delivered, for it is unnecessary to say that a deed of this sort has no effect—is not a deed at all—until it is delivered.

The Collector of Customs at Banff did cancel the Registry. I think he did quite right, following the course prescribed by the Act of Parliament, and I cannot approve of the telegram sent to him by the Board of Trade. The detention did not prevent the cancellation of the registry, and it certainly was not intended that the subsistence of an order of detention should prevent the transfer by sale of the vessel to a foreign purchaser. But the ship although now transferred and a foreign ship was not so at the date of the order for detention. So I am of opinion that we should adhere to the interlocutor of the Lord Ordinary. I do not think it necessary however to go into the various and nice questions taken up by his Lordship, but I go upon the broad ground that the vessel was not actually transferred when the order of detention was issued.

LORD DEAS—As to the propriety of the telegram sent by the Board of Trade to the Collector of Customs at Banff, I do not give any opinion; but in regard to the detention of the ship I arrive at

the same conclusion as your Lordship, and upon the same grounds.

The material dates in this case are the following: First, there was the offer of the 6th and the acceptance of 7th November; then, upon the 8th November a deposit of £120 of the price was paid by Granfelt & Company to Adam; and upon the same date the bill of sale was executed. On the 13th November the Board of Trade took possession of the ship, and on 20th November the bill of sale was delivered. Now, I think the bargain as to the sale of the ship rests entirely upon the letter of the 6th and the acceptance of 7th November, and that the letter of 20th October does not enter into the matter, having been superseded by the offer on 6th November. This is, however, a point of no importance to the decision of the case.

These letters alone did not transfer the property of the vessel. It was not transferred until the delivery of the bill of sale on 20th November. Although the bill of sale bears the date of 8th November, the date at which it came into operation was the date of delivery. Until delivered there was practically no bill of sale; and in the meantime the Board of Trade had taken possession of the ship. Thus the detention of the ship took place before its transfer to the complainers, and while the ship was still a British vessel. This makes an end of the question, and it is not necessary to consider whether the detention by the Board of Trade might not have been in time up to the closing of the register. I lean very much towards the view of this matter taken by the Lord Ordinary, but it is not necessary to decide the point.

LORD ARDMILLAN—The question here is, whether the detention of the ship by the Board of Trade took place before it ceased to be a British ship, and it is a question of great importance. In November 1873 the ship was surveyed by order of the Board of Trade, in terms of the 12th section of the Merchant Shipping Act of 1873. The result of this survey was, that the ship was reported to be unseaworthy, and was accordingly detained by the Board of Trade, whose duty under the circumstances was obvious. But was the ship at the date of detention a British ship? Nothing can be clearer than that a bill of sale was contemplated by the parties, and the bill of sale between the date which it bears and the date of delivery was of no effect. Until delivered it was inchoate and incomplete, not only in law but in the meaning of parties, and there was no transfer of the property of the ship.

It is true that certain equities may be contemplated by the Act of Parliament as arising out of the relation of buyer and seller, but no authorities have been produced, or principles pointed out, to show that these equities can affect the nationality of the ship. The register is the stamp upon the ship, and so long as that remained the ship was a British ship. I am of opinion that the Lord Ordinary's interlocutor is right and should be adhered to.

LORD JERVISWOODE concurred.

The Court adhered.

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Agents—Renton & Gray, S.S.C.

Counsel for the Respondents—Solicitor-General (Millar) Q.C., and Muirhead. Agent—W. J. Sands, W.S.