was accordingly left in a state of uncertainty varying from time to time according as the respondent might be able for more or less work and earn more or less wages. This case differs entirely from the cases of *Beath*, 1903, 6 F. 168, and *Nimmo* v. *Fisher*, 1907, S.C. 890, in both of which the workman endeavoured to go back over a past period and to obtain more compensation than he could possibly be entitled to on a sound construction of the Act had the ordinary proceedings under the Act been adopted. In the present case all that the respondent gave a charge for was compensation at the rate fixed by the agreement from the time when the parties fell out, and if that was in the circumstances too high it was a very simple matter for the complainers to have gone before the Sheriff, as I have already explained, and got the rate varied, but this they failed to do.

On these grounds I think the note ought to be refused.

LORD STORMONTH DARLING was absent.

The Court adhered.

Counsel for the Complainers (Reclaimers)—Hunter, K.C.—R. S. Horne. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—George Watt, K.C.—Wilton. Agent—D. R. Tullo, S.S.C.

Tuesday, January 14.

FIRST DIVISION.

[Lord Johnston, Ordinary.

PAXTON AND OTHERS *v.* BROWN.

Process—Summons—Competency—Several Pursuers — Community of Interest — Amendment.

An action was brought against a defender by (1) her former tutors and curators, who claimed repayment of sums which they alleged they had paid her in excess of her income prior to her majority, and (2) her factor, who claimed repayment of sums he alleged he had paid her in excess of her income after she attained majority.

Held (1) that the action was incompetent, inasmuch as the pursuers were independent pursuers suing in the same action on separate and independent grounds of debt; but (2) that the action might be competently amended.

By his settlement the late James Brown of Tweedhill, Berwickshire, who died on 3rd November 1893, appointed John Paxton, physician and surgeon, Norham-on-Tweed, and William Crawford, Sheriff-Clerk of Berwickshire, to be tutors and curators to his daughter. Dr Paxton and Mr Crawford accepted office, and appointed James Herriot, solicitor, Duns, to be their factor. Miss Brown attained majority on 19th May 1904.

On 23rd May 1907 Paxton and Crawford, as "the tutors and curators nominated by and lately acting under" the said settlement, "with consent and concurrence of James Herriot, solicitor, Duns, for any interest he may have," and Herriot "as an individual," raised an action against Miss Brown in which they sued (1) for "payment to the pursuers, the said John Paxton and William Crawford," of £245, 15s., and (2) for "payment to the pursuer the said James Herriot" of £204, 4s. 7d. Both claims were in respect of advances which the pursuers alleged they had made to Miss Brown.

The defender, who denied that the sums sued for were due, pleaded, *inter alia*—"(1) The action is incompetent, in respect that it is laid at the instance of separate and unconnected pursuers upon separate and independent claims of debt."

On 4th December 1907 the Lord Ordinary (JOHNSTON) repelled the defenders' first plea-in-law and ordained her to lodge objections to certain accounts produced.

Opinion.—". . [*After dealing with the provisions of the settlement*] . . . Dr Paxton and Mr Crawford accepted office and appointed James Herriot, solicitor, Duns, their factor.

"The history of the administration of the provision for Miss Brown is to be found in a series of accounts of charge and discharge, at first between the curators of Miss Brown and Mr Herriot, their factor, and afterwards between Miss Brown herself and Mr Herriot as her law agent. But though there is this distinction made in the heading of the accounts, owing to the young lady having attained majority at 19th May 1904, the accounts are really consecutive, and carry on the balance due by Miss Brown on the curatorial account into the personal account. There were over-advances made to or on behalf of Miss Brown, both during the later period of the curatory and afterwards. These advances were out of the pocket of Mr Herriot during both periods. The curators and Mr Herriot want now to recover these advances from Miss Brown, and as their accounts and actings are disputed, it has become necessary to clear up matters in Court. Had the alleged balance been the other way, the young lady would have sued her curators and Mr Herriot for accounting and payment of the balance due to her; but in the circumstances as they stand the curators and Mr Herriot can only sue for the amount of the advances they allege, and the accounting arises on Miss Brown's counter claim. But the action is none the less in substance, though not in form, an action of accounting. I lay stress upon this, because it appears to me materially to affect the question with which I have at present to deal.

"The curators and Mr Herriot sue as joint pursuers in the same action. The instance is as follows:—Dr Paxton and Mr Crawford, as tutors and curators nominated by the settlement of the late James Brown of Tweedhill to his daughter Isabella Annie Brown, 'with consent and concurrence of James Herriot, solicitor Duns,

for any interest he may have, and the said James Herriot as an individual,' pursuers, against the said Isabella Annie Brown, defender. The conclusions, however, are separate—*First*, to make payment to the pursuers Dr Paxton and Mr Crawford of the sum of £245, 15s., being the alleged balance in their favour on their curatorial intromissions with Miss Brown's income from her father's death in 1893 to her majority in 1904; and *second*, to make payment to the pursuer Mr Herriot of the sum of £204, 4s. 7d., being the alleged balance on his intromissions as law agent with the young lady's income from the Whitsunday when she attained majority to Whitsunday 1906, when I understand her affairs were taken out of Mr Herriot's hands.

"The defender pleads '(1) . . . [*quotes, supra*]. . . .

"I asked the defender's counsel whether the defender had any interest to press a plea, which, if sustained, and assuming liability to be established, could only be the occasion of increased expense to their client. They candidly admitted, as I think must be apparent, that there was no inconvenience in taking the accounting in this form, but they indicated that the defender had a tactical reason for stating the plea, and they pressed for a judgment. This the defender is entitled to, whatever may be her reasons for stating the plea. The defender's counsel in particular referred me to the recent cases of *Killin* v. *Weir*, 7 Fr. 526, and *Brims & Mackay* v. *M'Neill & Sime*, July 2, 1907, 44 S.L.R. 819, and they maintained that these authorities determined that it was only competent to conjoin two or more unconnected persons as pursuers of an action where they have a joint interest in the matter libelled, or have been injured by the same act—*Orkney Feuars* v. *Stewart of Burray*, 1741, M. 11,986. The precise terms used by the Court in that case as descriptive of the two classes of cases were—'had connection with one another in the matter pursued for,' and 'being aggrieved by the same act;' and the Lord President, in disposing of the case of *Killin* v. *Weir*, *supra*, expresses his opinion that all the cases quoted to the Court fall quite distinctly under one or other of these two categories. This may be so as a generalisation, and it was quite sufficient and appropriate for the disposal of the two cases in question, which clearly came under the above descriptions of the two classes of cases. But there are other cases to which it is not so easy to apply the above rule in its generality. In *Killin* v. *Weir*, *supra*, four pursuers sued in one action for separate sums of damages, on the allegation that they had each been induced to purchase shares in a mining syndicate by false and fraudulent statements, made to each of them separately, at different times and places, though admittedly of a similar nature. They had neither a joint interest in the matter libelled, nor had they been aggrieved by the same act. But I think that the reason of the decision is not so much any technical rule as practical convenience. It would clearly be extremely inconvenient, as was very fully shown by the Lord Chancellor in *Duke of Buccleuch* v. *Cowan*, 4 R. (H. L.) 14, at p. 16, to try four different cases of damages, arising out of different circumstances, however much these might be related, in one action. But had the misrepresentations alleged been confined to the contents of a prospectus on which all four pursuers had relied, the inconvenience would have disappeared, and the action would, I think, have been sustained on the analogy of cases of slander, where though two persons cannot conclude jointly and severally for the same sum as damages for the same slander (*Fleshers of Dumfries*, December 10, 1816, F.C.), they may competently do so for separate sums (*Harkes* v. *Mowat*, 24 D. 701).

"In *Brims & Mackay's* case, again, the pursuers, being the parties in right of a dissolved firm, and the new firm which carried on the business in succession, sued an individual and the firm which he afterwards joined for one sum, conjunctly and severally, or otherwise severally. On the *media concludendi*, into which I need not go, it was apparent that the whole sum could neither be due to both sets of pursuers nor by both sets of defenders. It is therefore at once apparent that decree could not on such a summons be competently pronounced either in favour of the pursuers or against the defenders, nor could it be competently enforced.

"A consideration of these two cases leads me to the conclusion that the rule above stated in general terms is based upon two considerations—*first*, on the consideration of convenience; and *second*, on the consideration of whether the conclusion can be competently deduced from the *media concludendi*, and the decree ensuing be competently enforced. In truth, the term incompetency, strictly speaking, is hardly descriptive of all the cases in which the objection to combining pursuers or defenders may be taken. It is truly a question of convenience in some cases, and of competency only in others. If it were not so, I do *not* think that the case of the *Duke of Buccleuch, &c.* v. *Cowan, &c.*, above referred to, could have resulted in the decision which was then pronounced. The Lord Chancellor (Cairns) and the other Lords who took part in the decision rest particularly upon the question of convenience, and the Lord Chancellor even goes so far as to say that it is in part a question of the Court's discretion, and he makes a very pertinent reference to the provision for remits *ob contingentiam*. The general rule above expressed must, I think, when it comes to be applied, be read and applied in the light of the reason or principle upon which it is based.

"Now here it is perfectly clear, and is indeed admitted, that it would be eminently convenient to make this consecutive accounting the subject of the same action, and that had two actions been raised, a remit *ob contingentiam*, and even a conjunction for the purpose of inquiry, would

have been appropriate. In these circumstances I should hesitate to throw out the action because it had been commenced in conjunction, unless I felt myself compelled, merely on a theoretical objection. Had Miss Brown been pursuer she could competently and conveniently have called upon her curators and her law agent to account for their several consecutive intromissions in the same action, provided she had a several conclusion against them, and I do not see why it should be less convenient and less competent for them to bring about the same accounting by such an action as the present, in which they each reduce their demand to a several conclusion. The convenience and economy is manifest, and the conclusions follow competently on the *media concludendi*, and the ensuing decree can, I think, be competently pronounced and enforced.

"There is an incidental point which gave me at first some trouble, though from one point of view it supports the conclusion to which I have come. In this matter Mr Herriot is the real creditor, and had I been drawing the summons I think that I should have sued in his name against (*first*) Miss Brown and her curators for the period of her minority; and (*second*) against Miss Brown herself for the period of her majority, in which case there could have been, I think, no doubt about the convenience and competency of the action. But Mr Herriot has gone on the footing that he was the factor of the curators during Miss Brown's minority, and that he is entitled to be kept *indemnis* by them for advances which were made on their responsibility and on their account, and that they are therefore the proper parties to sue Miss Brown with a view to the adjustment of the curatorial accounts between them and her. Though I do not think that the mode of proceeding is so direct and simple as the one which I would have adopted, it is, I think, equally consistent with the legal situation; and as the curators sue with consent and concurrence of Mr Herriot for his interest, no question can arise. The case bears to be distinguished from *Hislop* v. *MacRitchie*, 8 R. (H.L.) 95. Mr Herriot's interest throughout the whole period creates indeed such a bond between the two ostensible sets of pursuers that they cannot truly be said to be unconnected. I think that I am entitled to look at the substance of the action, and in so doing I find it one to obtain an accounting with Miss Brown for a consecutive series of intromissions which are consecutive in fact and only broken in theory by her coming of age, and the ultimate interest in which is in Mr Herriot on the one side and Miss Brown on the other. There is every convenience in trying that question of accounting in one action, and having regard to the conclusions there is no incompetency in entertaining them, and no difficulty in giving effect to the decree which would ensue whatever the result of the accounting may be.

"I shall therefore repel the first plea-in-law for the defender and appoint her to lodge objections to the accounts which the pursuers produce and found upon."

The defender reclaimed, and argued—The action as laid was incompetent. Two separate and independent pursuers could not sue in the same action unless there was some connection between them in the matter sued for, or unless they were aggrieved by the same act—*Orkney Feuars* v. *Stewart of Burray*, 1741, M. 11,986; Ersk. Inst. iv, 1, 65; Shand's Practice, 203-4; *Harkes* v. *Mowat*, March 4, 1862, 24 D. 701; *Killin* v. *Weir*, February 22, 1905, 7 F. 526, 42 S.L.R. 393. The case did not fall within either of the exceptions mentioned. Both claims were entirely independent, and the defence pleadable against the claim of the curators was entirely different from that available against Herriot. Had the claims been made in separate actions the defender could successfully have objected to a remit *ob contingentiam*. As to the test of contingency, reference was made to *Duke of Athole* v. *Robertson*, December 16, 1869, 8 Macph. 304, 7 S.L.R. 182. The Lord Ordinary was in error in thinking that considerations of convenience could overrule settled practice. "Convenience" could not interfere with competency — *Cowan & Sons* v. *Duke of Buccleuch*, November 30 1876, 4 R. (H.L.) 14, at pp. 18, 21, 27, 14 S.L.R. 189. An incompetent summons could not be amended—*Fischer & Co.* v. *Andersen*, January 15, 1896, 23 R. 395, 33 S.L.R. 306—and the action ought therefore to be dismissed. The Act of Sederunt cited by the respondent was not applicable to the case of a defective instance.

Argued for respondents—The objection taken was a very technical one. The present form of action had been adopted in the interests of the defender and to save expense. The action fell within the exceptions above referred to. The sums sued for were alike in this respect, that both were advances; both could be dealt with conveniently in the same process; and both involved really one action of accounting. Justice could best be done by trying both claims in the one action, and that was enough to make this action competent—*Cowan* (*cit. sup.*), *per* Lord Blackburn, at p. 27. The defender would suffer no prejudice and no inconvenience if the action were allowed to proceed. In *Brims & Mackay* v. *M'Neill & Sime*, 1907, S.C. 1106, 44 S.L.R. 819, the pursuers sued conjunctly and severally on separate and distinct claims. Had they sued individually in the one action, as here, the action would not have been dismissed. In *Mitchell* v. *Grierson*, January 13, 1894, 21 R. 367, 31 S.L.R. 301, two pursuers were allowed to sue on separate claims in the one action. In any event the respondents were prepared to amend. Amendment was clearly competent—A.S., 20th March 1907, sec. 2.

LORD PRESIDENT—In this case the defender Miss Brown was, under the settlement of her father, given certain tutors and curators for the period of pupillarity and minority which ensued owing to the death of her father taking place while she was still

a pupil. Her fortune consisted of heritable property only, and it became the duty of the tutors and curators to administer that property, to draw the profits therefrom, and to provide for Miss Brown's maintenance. The tutors and curators, who are the first pursuers in this action, appointed a Mr Herriot, a solicitor, to act as their factor, and they fulfilled the office of tutors and curators during the pupillarity and minority of Miss Brown, and in particular they paid over certain moneys for her maintenance, and also paid certain sums to herself. After she became major the practical management of the property remained, as it had been all along, in the hands of Mr Herriot, and from time to time he too made payments to Miss Brown.

Now, the present action is brought by the tutors and curators, and also by Mr Herriot, and it concludes for separate sums as due to these different pursuers. The ground of action on which the tutors and curators base their claim is that an accounting for the period from their assumption of office until the majority of Miss Brown would show that Miss Brown is indebted to them in a certain sum, representing payments made to her during that period in excess of the income drawn from the property. The ground of Mr Herriot's claim is that during the period after she became of age he made certain payments to her in excess of the income from the property.

The defences to the two claims are also different. There is, of course, the general defence, which may be described as putting the pursuers to a strict accounting as regards the due vouching of all the payments stated. But there are also defences which are quite different. With regard to the claim of the tutors and curators she says—"You as tutors and curators had no right to advance to me more than the bare income amounted to. If you did so it was your own fault, and you cannot recover such advances as a debt due by me." As to the factor's claim, that defence is not available, and the defence there put forward is that he ought to have informed her that he was making payments to her in excess of her income, and that having failed to do so he is not entitled to recover them. I do not express any opinion as to the relative cogency of these two defences; I merely point out that they are different.

A preliminary objection has been taken by the defender, and it is that according to a well-settled rule of law two separate pursuers cannot conjoin in the same action in respect of separate and independent grounds of debt. The Lord Ordinary has repelled that plea, but I must confess that I am unable to follow the reasons which he states for that decision. He first cites the old case of the *Feuars of Orkney* — M. 11,986—which laid down the law long ago that "different parties could not accumulate their actions in one libel unless they had connection with one another in the matter pursued for, or had been aggrieved by the same act." Now, that is a very old authority, and not only so, but it has been carried down through the books to the present day. Erskine was quoted to us as an independent authority, but I take it he was simply following as his authority the decision in the *Feuars of Orkney*, his work being written some sixty years after that decision. That rule has been carried down since then through all the authorities. Ivory and Shand give it in exactly the same words, and your Lordships had an opportunity to reiterate it quite recently in the case of *Killin* v. *Weir*, 7 F. 526. I should have thought that, if anything was settled, that was settled; but yet, says the Lord Ordinary, after referring to *Killin* v. *Weir* and *Brims & Mackay*, 1907, S.C. 1106, "there are other cases to which it is not so easy to apply the above rule in its generality." He does not, however, quote any other cases, and the learned counsel here, who I am sure have made a careful search, have been unable to quote any to us. So, in fact, it comes to this, that there are no other cases. Therefore when the Lord Ordinary goes on to say that "the reason of the decision is not so much any technical rule as practical convenience," he takes upon himself a function that does not belong to him. Convenience is convenience, but a rule remains a rule. I think, then, that the Lord Ordinary's argument is not in accordance with the long line of authority. I only add that the *Duke of Buccleuch* v. *Cowan*, 4 R. (H.L.) 14, leaves, to my mind, the old authority untouched. There is, it is true, much talk of "convenience" in the opinions of the learned Lords in that case, but it must be borne in mind that they were English lawyers, and they begin their opinions by stating that the conjoining of pursuers in these circumstances is unknown in English practice, though it does obtain in Scotland, and they then go on to examine the Scottish authorities. They held in that case that it was possible for the pursuers to conjoin, for of course that case fell within the exceptions, as expressed in the *Feuars of Orkney*, and when they come to use the word "convenience" is when they go forward to consider whether there was any reason arising *ab inconvenienti* to prevent the exceptions applying there, and they found that there was not. But I need hardly say that that case does not trench on the old authorities in any way.

We then come to the question put by Mr Morison, Does this case fall within the exceptions, either (first) that the pursuers are connected with one another in the matter pursued for, or (second) that they are aggrieved by the same act? Clearly they are not aggrieved by the same act—the tutors and curators' advance was one thing, and Mr Herriot's was another. But are they "connected in the matter pursued for?" These are general words, and though they are not the same thing as joint-interest in its legal sense, yet the idea of joint-interest does throw some light on them. I think that the pursuers here are not connected at all; the only suggestion of connection is that, historically, they succeeded one another. In the course of the argument I put the example of a person being sued by

his butcher and his baker. The goods in question there would of course be supplied for the same household, and possibly the principal witness would be the same in each case, namely, the housekeeper or house steward who had ordered the goods. But they would clearly be unconnected accounts, and I think that that example is completely analogous to the present case. I am well aware that the whole tendency of modern times is not to turn an action out of Court on a technical plea, and my whole sympathy, if I could have any sympathy, would be against turning this action out. But where there is a rule of law which has been adhered to for so long as this one has, we must be shown some very weighty reason for not giving effect to it, and no such reason has been advanced here. It appears to me that this is nothing but a case of the parties to two separate actions seeking to enforce their claims in one summons, and therefore I am of opinion that the defender's plea must be sustained.

But the question remains, what is to be done next? I think that here the modern practice of not multiplying actions and not putting parties to unnecessary expense, comes to our help. But I think the pursuers must put their pen through the name of one set of pursuers and also through one set of averments, and if that is done I think it will remain quite a good action at the instance of the remaining pursuer. The defender will not be prejudiced in any way, and the expenses of preparing and serving new actions and paying the fee fund dues will be avoided. I think, then, that Mr Morison should be given time to consider which of the pursuers he is prepared to strike out, for I think that he has that option.

LORD M'LAREN—The rule as to combining different claims in the same action is tersely and epigramatically stated in the case of the *Orkney Feuars* v. *Stewart of Burray* (1741, M. 11,986). The general rule there laid down is that parties cannot accumulate their actions in one libel, and the two exceptions stated are (1) where there is some connection between the parties in the matter pursued for,—which I take to mean some title or interest in common,—and (2) where the parties suing are aggrieved by the same act. Here there are two unconnected pursuers, each suing for his own separate debt, and as the law agent's advances only commenced when those of the curators ended, it cannot be said that these were concurrent accounts. Besides, if the grounds of the action are examined, the questions at issue will be found to be different. For in the first case the question is whether the curators acted within the scope of their duty in making these advances, while the second seems to raise a simple question of debt, viz., a claim by a law agent for advances to his client.

I agree with your Lordship that two such claims cannot be combined in the same action, and that the opinion which the Lord Ordinary has adopted would tend to relax, and indeed to render inoperative, the rule by which we have hitherto been guided. The rule is not merely formal and arbitrary, but has this substance in it, that if an action is brought by a single pursuer, a defender may more easily come to a settlement, and have the case taken out of Court, while if there are several persons suing on different claims, any one of them by holding out (it may be for a just claim) may not only subject the defender to needless expense, but may prevent any settlement being come to at all. In any view, I should be very adverse to relaxing a rule which has worked well in practice, and in which, as I have indicated, there is a good deal of substance. I agree, however, that our modern practice affords a practical remedy, and that by striking out one of the two claims the action thus restricted may be made competent.

LORD KINNEAR and LORD PEARSON concurred.

At the close of advising—

LORD PRESIDENT—I ought to have added with regard to the old case of the *Feuars of Orkney*, M. 11,986, that if, as the Lord Ordinary says, the doctrine of convenience is to be taken as the test, you could not have had a case where convenience pointed more directly to a conjoining of the pursuers, for the subject of proof there was really one continuous course of somewhat nimious doings on the part of Stewart and his men.

The Court recalled the Lord Ordinary's interlocutor, and continued the case so as to enable the respondents to submit the proposed amendment.

On 14th January 1908 the pursuers lodged a minute of amendment by which they proposed to delete from the instance the names of the first set of pursuers, viz., the tutors and curators, leaving the action to proceed at the instance of the pursuer Herriot. They also proposed to amend the conclusions (and so far as necessary the condescendence and pleas-in-law) to the effect of enabling the pursuer Herriot to sue for both the sums concluded for in the original action, averring that he had advanced both sums out of his own funds.

The Court pronounced this interlocutor—

"Recal the Lord Ordinary's interlocutor: Open up the record, and allow the pursuers to amend the summons in terms of the minute of amendment: Find the defender entitled to expenses since the date of closing the record, and remit," &c.

Counsel for Pursuers (Respondents)—Morison, K.C.—Maitland. Agent—Gordon Mason, S.S.C.

Counsel for Defender (Reclaimer)—C. D. Murray—J. Hossell Henderson. Agents—Kelly, Paterson, & Company, S.S.C.

HIGH COURT OF JUSTICIARY.

Friday, January 17.

Before Lord M'Laren, Lord Kinnear, and Lord Pearson.)

GORDON *v.* SHAW.

GORDON *v.* WOOD.

Justiciary Cases—Statutory Offence—Sea Fishery—Master and Servant—Knowledge—Jurisdiction—Trawling within Prohibited Area but outwith Three-Mile Limit—Deck Hand on Board of Foreign Trawler—Sea Fisheries Regulation (Scotland) Act 1895 (58 and 59 *Vict. c.* 42), *sec.* 10—*Bye-Laws of the Fishery Board for Scotland, Nos.* 10 *and* 14.

A deck hand, a British subject, serving on board a foreign vessel engaged in trawling, in contravention of bye-law, within a prohibited area but outwith the three-mile limit, was charged with a contravention of the Sea Fisheries Acts. At the trial the Sheriff-Substitute held it proved that the accused was in a subordinate position on board the vessel, and did not direct or assist in directing the navigation or fishing operations, merely assisting with the trawl under orders of his superior officers, and not proved that he knew or must have known that the vessel was within prohibited waters on the occasion libelled. No evidence was led in defence. The accused was not convicted. On an appeal by stated case, *held* that it was not necessary for the prosecutor to prove knowledge on the part of the accused that he was within prohibited waters, and appeal *sustained.*

Question whether if ignorance had been established by the accused, it would have constituted a defence or merely a plea in mitigation of sentence.

The Sea Fsheries Regulation (Scotland) Act 1895 (58 and 59 Vict, cap. 42), sec. 10, enacts —"(1) The Fishery Board may, by bye-law or bye-laws, direct that the methods of fishing known as beam trawling and otter trawling shall not be used in any area or areas under the jurisdiction of Her Majesty, within thirteen miles of the Scottish coast, to be defined in such bye-law . . . . . (4) Any person who uses any such method of fishing in contravention of any such bye-law, shall be liable on conviction, under the Summary Jurisdiction (Scotland) Acts, to a fine not exceeding one hundred pounds, and failing immediate payment of the fine, to imprisonment for a period not exceeding sixty days. . . ."

Bye-law No. 10, dated 27th September 1892, made by the Fishery Board for Scotland under the powers conferred by the Sea Fisheries (Scotland) Amendment Act 1885, the Herring Fishery (Scotland) Act 1889, and the Herring Fishery (Scotland) Act Amendment Act 1890, prohibits beam trawling and otter trawling in the whole area within a line drawn from Duncansbay Head in Caithness to Rattray Point in Aberdeenshire.

Bye-law No. 14, dated 17th April 1896, made by the Fishery Board for Scotland under the powers conferred by the Herring Fishery (Scotland) Act 1889, amends Bye-law No. 10 in respect of penalties.

John Shaw was charged in the Sheriff Court at Elgin on a summary complaint, which set forth that he, "sometime a trawl fishing master, 122 Orwell Street, Grimsby, has been guilty of a contravention of the Sea Fisheries Acts and the Herring Fishery (Scotland) Acts, in so far as on Saturday, 23rd March 1907, at a part of the Moray Firth, thirteen and one-third miles or thereby south-east by south a half south from Port Gower, Sutherlandshire, and within a line drawn from Duncansbay Head in Caithness to Rattray Point in Aberdeenshire, he being at the time a deck hand on board of the steam trawler 'Zenobia,' S.R. 11 of Stavanger, Norway, and not in the service or possessing the written authority of the Fishery Board for Scotland, did use or assist in using an otter trawl for taking sea fish, contrary to bye-law number ten, made by the Fishery Board for Scotland. . . ."

Charles Wood, also residing in Grimsby, and described as a deck hand on board the steam trawler "Catalonia," was also charged on a similar complaint.

On 11th July 1907 the Sheriff-Substitute (WEBSTER), Shaw having failed to appear and Wood having pleaded not guilty, found the charge against Shaw not proven, and found Wood not guilty.

Robertson Barclay Gordon, Procurator-Fiscal of Court, appealed in both cases to the High Court of Justiciary.

In the stated case with regard to Shaw, the Sheriff-Substitute stated—"It was proved that the said steam trawler 'Zenobia' was on the date libelled engaged in trawling with an otter trawl for taking sea fish at the place mentioned in the complaint. It was further proved that the respondent was on that occasion not in a position of authority for the purpose of directing the navigation, management, or fishing operations of the 'Zenobia.' It was also proved that he did not direct, nor did he assist in directing, such navigation, management, or fishing operations. It was further proved that he occupied a subordinate position as a member of the crew of the 'Zenobia,' and as such member of the crew, acting under orders of his superior officers, he assisted in the trawling operation proved. It was not proved that he knew or must of necessity have known of the position of the said vessel on the occasion specified."

The material facts stated by the Sheriff-Substitute as proved in Wood's case were the same.

The questions of law for the opinion of the Court were—In Shaw's case—"Whether, on finding the facts stated proved, the Sheriff-Substitute was justified in finding the charge against the respondent not proven?" In Wood's case—"Whether on