Counsel for the Appellant — Solicitor-General (Fenton, K.C.) — Burn Murdoch, A.-D. Agent—John Prosser, W.S., Crown Agent.

Counsel for the Respondents—Dean of Faculty (Sandeman, K.C.)—R. M. Mitchell, K.C.—Wallace. Agents — Wallace, Begg, & Company, W.S.

COURT OF SESSION.

Friday, June 27.

FIRST DIVISION.

[Sheriff Court at Portree.

LONDON, MIDLAND, AND SCOTTISH RAILWAY COMPANY *v.* MACDONALD.

Interdict — Trespass — Title to Sue — Infringement of Right of Property—Right to Interdict de plano without Proof of Possession.

Property — Regalia minora — Rights of Public—Whether Proprietor's Right Exclusive as against the Public Generally —Ferry.

In an action of interdict against interference with a right of ferry at the instance of pursuers who produced as their titles *ex facie* valid conveyances of the right of ferry in their favour, against a defender who produced no competing titles and made no specific challenge of the right of the pursuers' authors, *held* (1) that the pursuers' titles were sufficient without proof of possession to entitle them to interdict; (2) that the right of ferry being *regalia minora*, and as such a proprietary right in the Crown or in those deriving right therefrom, the defence that the right of the pursuers was not exclusive of the rights of the public was irrelevant.

The London, Midland, and Scottish Railway Company, *pursuers*, brought an action in the Sheriff Court of Inverness at Portree against Lachlan Macdonald, Kyleakin, *defender*, in which they craved the Court "to interdict the defender from conveying passengers for hire by boat over the stretch of water between the village of Kyleakin in the parish of Strath and county of Inverness, and the village known as Kyle of Lochalsh in the parish of Lochalsh and county of Ross and Cromarty, and bounded on the east and west by imaginary lines drawn between Castle Moil, Kyleakin, and the Railway Pier on the mainland, and between the King's Arms Hotel, Kyleakin, and a point on the mainland half a mile west of the Road Ferry Pier respectively, being the limits of the pursuers' right of ferry, or in any way interfering with the pursuers in the possession of their said right of ferry, and to grant interim interdict."

The parties averred, *inter alia*—"(Cond. 1) The pursuers are heritable proprietors of the right of ferry of the Kyle of Lochalsh, and have been in possession of said right of ferry for a considerable number of years. Under the Highland Railway Act 1893 (section 15) the pursuers were authorised to purchase the ferry between Kyle of Lochalsh and Kyleakin in the island of Skye and did purchase said ferry. The limits of the said rights of ferry are on the east an imaginary line drawn between Castle Moil, Kyleakin, and the Railway Pier on the mainland, and on the west an imaginary line drawn between the King's Arms Hotel, Kyleakin, and a point on the mainland half-a-mile to the west of the Road Ferry Pier. The pursuers' titles are produced. (*Ans.* 1) Denied that the pursuers have or have exercised any exclusive right of ferry. (Cond. 3) The defender persists in unlawfully interfering with the right of ferrying members of the public across the ferry between Kyleakin and Kyle of Lochalsh. . . . He uses as points of arrival and departure the County Council slips at the termination of the public roads on either shore, which are the points between which the boats operated by the pursuers' lessee John Clark are plied. The averments in answer of the defender in so far as not coinciding with the averments of the pursuers are denied. No ferry service has been established by the defender or others. Any ferrying of passengers by others has been of the nature of 'poaching' by local boatmen at irregular intervals during the summer season. Defender never directly interfered with the ferry until this year, when his persistence in ferrying members of the public in opposition to the pursuers' lessee, and in defiance of all warnings from the pursuers and their lessee, was the immediate cause of this action being raised by the pursuers. . . . (*Ans.* 3) Denied that the defender has unlawfully interfered with any existing right of ferry vested in the pursuers. He does not make use of the pursuers' slips, but uses the public slips on both shores. Explained that others have ferried passengers for many years, and that defender has done so for at least five years without interference or protest by the pursuers or others. In particular the following parties, amongst others, have from time to time made regular use of said ferry by conveying passengers for hire, namely,"—[The defender set forth the names and designations of people whom he alleged had conducted the ferry during the previous twenty-five years].

The titles produced by the pursuers consisted of (1) a disposition by Sir Kenneth James Matheson, Bart., proprietor in fee-simple of the lands and estate of Lochalsh, to the Highland Railway Company, dated 10th May and recorded 15th May 1902, "according to the true intent and meaning" of the Highland Railway Act 1893, of "all and whole the right of ferry belonging to me between Kyle of Lochalsh . . . and Kyleakin . . . together with all my rights, powers, and privileges of every kind connected with the said ferry"; and (2) a disposition by the Right Honourable Louisa Jane Hamilton Ross or Macdonald, Lady Macdonald, as *curator bonis* to the Right Honourable Ronald Archibald Bosvile Mac-

donald, Baron Macdonald, heritable proprietor of the subjects disponed, to the Highland Railway Company, dated 4th November and recorded 27th November 1903, "according to the true intent and meaning" of the said Highland Railway Act 1893 and other Acts mentioned in the disposition of "all and whole that piece of ground at Kyleakin . . . together with the said . . . Baron Macdonald's rights in the foreshore *ex adverso* of the said piece of ground, and also the right of ferry appertaining to the lands of Kyleakin belonging to him, with all his rights, powers, and privileges of every kind connected with the subjects."

The pursuers pleaded, *inter alia* — "4. The defences being irrelevant should be repelled."

The defender pleaded, *inter alia* — "2. The pursuers not being vested in an exclusive right of ferry are not entitled to the interdict craved. 4. No title to sue."

On 14th February 1924 the Sheriff-Substitute (VALENTINE) repelled, *inter alia*, the fourth plea-in-law for the pursuers, and the fourth plea-in-law for the defender, and allowed a proof.

The pursuers appealed to the Sheriff (WATT), who on 3rd April 1924 adhered to the interlocutor of the Sheriff-Substitute.

The pursuers and appellants having obtained leave appealed to the Court of Session, and argued — The defence was irrelevant. The pursuers' title was unchallenged in the record, and being *prima facie* valid was sufficient in the absence of any competing title to entitle the pursuers to interdict. The denial of the pursuers' exclusive possession and the averment of possession by the defender and by the public could not help the defender. The pursuers' right was a proprietary and therefore an exclusive one as against the public and any person without a title, and it was not necessary for the pursuers to prove possession — *Campbell* v. *Campbell*, 18th January 1815, F.C.; *Ferguson* v. *Dowall*, 18th January 1815, F.C.; *Martin* v. *Thomson*, 16th June 1818, F.C.; *Duke of Montrose* v. *Macintyre*, 1848, 10 D. 896, *per* the Lord Justice-Clerk at p. 901 and Lord Cunningham at p. 906; *Colquhoun* v. *Paton*, 1859, 21 D. 996, *per* Lord Cowan at p. 1001; *Warrand* v. *Watson*, 1905, 8 F. 253, *per* the Lord President at p. 261, 43 S.L.R. 252; Rankine, Land Ownership, pp. 13, 300, 301; Bell's Prin., secs. 652, 653; Ersk. Inst., ii, 6, 17, iv, 1, 50. Where possession had been pleaded in defence the defenders had always alleged some title—*Porterfield* v. *M'Millan*, 1847, 9 D. 1424. But the defender here had neither alleged a title nor possession for seven years. The infringement was admitted, and interdict should therefore be granted *de plano*. [LORD SKERRINGTON referred to *Paterson* v. *Marquis of Ailsa*, 1846, 8 D. 752.]

Argued for the defender and respondent —The pursuers had produced no title upon which they could obtain interdict. Before they could do so they were bound to libel and instruct a Crown grant, or a barony title with parts and pertinents and prescriptive possession—Rankine, Land Ownership, p. 301; Stair, Inst., iv, 26, 2, 3. The titles produced, however, did not even show that the right of ferry claimed by pursuers had ever existed. But in any event a proof was necessary to make clear what was the pursuers' right, and defender's averments of use, contrary to the alleged right of the pursuers, by himself and other members of the public was sufficient to entitle him to an inquiry—*Fife Ferry Trustees* v. *Magistrates of Dysart*, 6 S. 265; Rankine, Land Ownership, p. 302. Although the pursuers might have the right to ferry, it might be shared by others—*Giles* v. *Groves*, 1848, 12 A. & E. (N.S.) 721.

LORD PRESIDENT (CLYDE) — This is a process of interdict in the Sheriff Court in which the Railway Company (pursuers and appellants), as proprietors of the right of ferry between Kyleakin and Kyle of Lochalsh, seek to interdict the defender (and respondent) from ferrying passengers for hire between the two *termini* of the ferry, namely, Kyleakin and Kyle of Lochalsh. The defender pleads that the pursuers have no title to sue. The pursuers plead that the defender has stated no relevant defence.

The Sheriff-Substitute repelled the defender's plea to title, but the defender has availed himself of this appeal, as he is entitled to do by section 29 of the Sheriff Court Act 1907, to bring the Sheriff's disposal of his plea under review. By the Highland Railway Act 1893 the Railway Company was authorised and empowered to purchase the right of ferry between Kyleakin and Kyle of Lochalsh and to operate the ferry. This ferry is a link in a line of communication by road between Skye and the mainland. Kyleakin lies in the barony of Strathwordel, belonging to Lord Macdonald, and Kyle of Lochalsh in the lands and estates of Lochalsh, belonging Sir Kenneth James Matheson, Bart. In 1902 Sir Kenneth James Matheson conveyed to the Railway Company all and whole the right of ferry belonging to him between Kyle of Lochalsh and Kyleakin, and in 1903 Lord Macdonald's *curator bonis* conveyed to them a piece of ground on the Kyleakin side together with his Lordship's rights in the foreshore *ex adverso* of said ground, and also the right of ferry appertaining to the lands of Kyleakin belonging to him. In the circumstances of this particular ferry, as above explained, it is nothing extraordinary that the proprietors on both sides should have the right. It is enough on this head to refer to the observations made by Lord Justice-Clerk Hope in the case of the *Duke of Montrose* v. *Macintyre*, 10 D. 896, at pp. 901-2. It is clear that both proprietors made over to the Railway Company all their rights in the ferry. The Railway Company produces and founds on these dispositions as the grounds of their title to sue. So far as an interdict against trespass is concerned, the title required by the law of Scotland as a foundation for interdict in the absence of a competing title is any lawful title which *ex facie* applies to the subject encroached upon. The titles produced by

the Railway Company are *prima facie* at anyrate sufficient. It is in vain for the defender to suggest (as he did suggest in argument)—in the absence of any specific averment to that effect—that the proprietors did not have a good title to the ferry rights which they purported to sell to the company and which they warranted in their dispositions. The suggestion made was that an investigation of the titles of the Railway Company's authors might disclose that they were founded neither on Crown grants nor on a course of prescription upon barony titles, and it was contended that without establishing such a foundation the company had no sufficient title to sue. But the title produced is a perfectly lawful title as it stands. It certainly applies to the ferry in question, and the defender produces no competing title. It was also argued that the pursuer's title was insufficient unless they averred possession on their title. But this is an interdict for preventing infringement of a right of property, not a mere possessory action brought for the regulation of interim possession in view of a disputed title. I think therefore the Sheriff was right in repelling the defender's plea that the pursuers had no title to sue. It may be added that, as appears from the defences, the Railway Company has regularly leased the ferry to a tenant.

There remains the question of the relevancy of the defence. The ground on which the defence is rested is an averment by the defender that the right of ferry acquired by the pursuers is not and never has been an "exclusive" right of ferry. It became clear during the debate that this not very self-explanatory averment was intended to mean that there never was a right of ferry at all between Kyleakin and Kyle of Lochalsh. A right of public ferry is one of the *regalia minora* and therefore a proprietary right in the Crown, or in those deriving right from the Crown by grant or prescription recognised by the Scottish feudal law. But if a proprietary right, it is and must be an exclusive right. An exclusive right may be and was in the present case vested in more than one person. But the right of public ferry implies no right of plying for hire on it to the members of the public generally any more than the right to fish for salmon—also one of the *regalia minora*—implies a right to the public generally to exercise it. On the contrary, the right of ferry is exclusively exerciseable by those—be they private persons or public administrators—to whom the right belongs, and there is no such thing as a right of ferry exerciseable by the public at large. Like some other rights derived from the *regalia* it carries with it responsibilities to the public. It is a characteristic of the *regalia minora* that they are rights or powers more or less affecting public interests. It is for that reason that they are primarily reserved to the sovereign power as *pater patriæ*, the natural protector of those interests. For the same reason the grantee of a right of ferry is bound to provide the means of passage across the ferry for the public use at reasonable rates. According to our older conveyancing forms, the right was granted or conveyed in the shape of a grant or conveyance "of the ferry boat," and sometimes—as my brother Lord Sands has reminded me—in the shape of a grant or conveyance of the strait or passage (*fretum*) across which the right of ferry lay. Apart from all this I observe that in his defences the defender himself treats the passage between Kyleakin and the Kyle of Lochalsh as the subject of a right of ferry. He says the right was for some time exercised by the county authority. In short, the defender cannot plead any public right to justify his interference with the rights of ferry formerly vested in the proprietors on either side of the passage, nor does he allege any private right of his own. He does not even aver that he has had possession of any right in the ferry for seven years. At the most he has plied on the ferry for hire for not more than five years.

The result is that the legal title produced by the pursuers is not relevantly challenged by the respondent, and that the respondent does not relevantly allege any title of his own. The pursuers cited the well-known and authoritative dictum of Lord Cowan in *Colquhoun* v. *Paton* (1859, 21 D. 996, at p. 1001) to justify the interposition of the Court in granting an interdict—"The party applying for it must show a *legal title* to the subject, of which his use and enjoyment and right of possession are alleged to be unlawfully interfered with, and further, he must show either that there has been plain invasion of his property by a party having no right or title whatever in or to the subject or its use, or as against a party pleading a competing title that he has had possession (in virtue of his title) for at least seven years prior to that attempt to innovate on it of which he complains, when he will be entitled to interdict *uti possidetis*." As the Railway Company's title has not been relevantly challenged, they are entitled to interdict in accordance with the first alternative branch of this statement of the law. I think the interdict ought to be against carrying passengers for hire by boats between Kyleakin and Kyle of Lochalsh without definition. The titles of the pursuers do not warrant the insertion of any shore limits of the right of ferry, and as the ferry is a link in a line of public communication, it seems unnecessary to define the right of ferry with any greater precision.

LORD SKERRINGTON—I agree that the title produced by the pursuers is sufficient for the purposes of the present action. The defence (as I read the pleadings) is not that no right of ferry ever existed or now exists over the strait in question, but that the pursuers' right of ferry is not exclusive, by which I understand the defender to mean that the pursuers share or have shared the right with various members of the public, including the defender. He does not maintain that either he himself or any of the persons whom he names on record is or was under any duty to carry on the work of errying the p ublic across the strait in question and to provide the necessary accommo-

dation for that purpose. The defences are in my opinion irrelevant. If the defender wishes to challenge the pursuers' alleged right of ferry, he must do so in a different process and with different averments.

LORD CULLEN—I think that the doubts as to the relevancy of the defences expressed by the Sheriff in his opinion relative to the interlocutor appealed against was well founded, and that when the defences are closely examined it is seen that there is no sufficient and relevant challenge of the pursuers' title. As that is so, and as the defender alleges no title whatever of his own, it appears to me clear that the pursuers are entitled to interdict. I also concur regarding the terms in which the interdict should be given.

LORD SANDS—I agree that there is here no relevant defence. It occurred to me in the course of the argument that a distinction might be drawn between the Crown's property in ferries and the Crown's property in such a subject as salmon fishings. The latter is a patrimonial right, but the former partakes perhaps more of the nature of a fiduciary right in the interests of the public. Further, salmon fishing is in its own nature a *tenementum*. The taking of salmon anywhere within the kingdom without a grant is an invasion of the Crown's right. I doubt if ferry, *i.e.*, the transport of travellers across water between public places, is a *tenementum* until a grant of ferry at the spot has been made by the Crown or the Crown has equipped a ferry. If nothing of the kind has been done it would not, as I am disposed to think, be an invasion of any right of the Crown to transport travellers for hire. In this view it might possibly be a relevant defence in a case of this kind to plead "There is here no ferry. The right of creating a ferry is latent in the Crown, and I am simply exercising the ordinary right of navigation." That, however, is not the defence stated, and the defence which is stated is, I think, irrelevant.

The Court recalled the interlocutors of the Sheriff-Substitute and Sheriff, and granted interdict against the defender from conveying passengers for hire by boat between the village of Kyleakin and the village known as Kyle of Lochalsh, "or in any way interfering with the pursuers in the possession of their right of ferry."

Counsel for the Pursuers and Appellants — Robertson, K.C. — Jamieson. Agents— Hope, Todd, & Kirk, W.S.

Counsel for the Defender and Respondent —MacRobert, K.C.—Macgregor. Agents— Laing & Motherwell, W.S.

Friday, June 27.

SECOND DIVISION.

[Sheriff Court at Hamilton.

MOFFAT *v.* SEWELL.

Process—Removal to Court of Session for Jury Trial — Motion to Retransmit — Whether Motion Timeously Made—Sheriff Courts (Scotland) Act 1907 (*7 Edw. VII, cap.* 51), *sec.* 30—*C.A.S., D,* iv, 5.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51) enacts—Section 30 —"In cases originating in the Sheriff Court . . . where the claim is in amount or value above fifty pounds and an order has been pronounced allowing proof . . . it shall within six days thereafter be competent to either of the parties who may conceive that the cause ought to be tried by jury, to require the cause to be remitted to the Court of Session for that purpose, where it shall be so tried: provided, however, that the Court of Session shall, if it thinks the case unsuitable for jury trial, have power to remit the case back to the Sheriff, or to remit it to a Lord Ordinary, or to send it for proof before a judge of the Division before whom the cause depends."

The Codifying Act of Sederunt enacts —D, iv, 5—"Upon the appearance of the cause in the Single Bills of the Division to which it has been remitted, parties will be heard upon any motion made to retransmit the cause to the Sheriff Court or directed against the competency of the remission, and if the motion to retransmit be refused and the remission held competent, the mode and course of further procedure in the cause (including all questions as to its competency or relevancy) will thereafter be determined by the said Division in the Single Bills or in the summar roll as they may think fit."

An action of damages for personal injuries was removed from the Sheriff Court to the Court of Session for jury trial under section 30 of the Sheriff Courts (Scotland) Act 1907. When the case appeared in the Single Bills the defender took no objection to the suitability of the case for jury trial, but on the case being called in the summar roll the defender moved that it should be remitted back to the Sheriff.

The Court *refused* the motion, in respect that (*per* the Lord Justice-Clerk, Lord Ormidale, and Lord Anderson) the objection had not been taken timeously, and (*per* Lord Hunter) on the ground that the case was not unsuitable for jury trial.

Mrs Margaret Sinclair or Moffat, Uddingston, *pursuer*, brought an action in the Sheriff Court at Hamilton against John George Sewell, writer, Glasgow, *defender*, for £500 damages for personal injuries.

The pursuer alleged that she fell when walking on a foot-pavement which was the private property of the defender and in his possession and control, and that the accident was due to the defective con-