

Friday, March 16.

FIRST DIVISION.

[Sheriff of Inverness.

LORD ABINGER v. CAMERON.

Lease—Landlord and Tenant—Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict. c. 29), sec. 1, sub-sec. 4—Sub-division of Croft.

The Crofters Holdings (Scotland) Act 1886, sec. 1, provides that "a crofter shall not be removed from the holding of which he is tenant except in consequence of the breach of one or more of the conditions following— . . . (4) The crofter shall not, without the consent of his landlord in writing, sub-divide his holding or sub-let the same, or any part thereof."

For six years before the passing of the Act a crofter allowed his servant, who was engaged from Whitsunday to Whitsunday, to occupy, as part of his remuneration, a house on the croft with part of the pasture and potato ground. In an action at the landlord's instance, after the passing of the Act, to have it found that the crofter had without his consent sub-divided the holding, and to have him removed—*held* (1) that as the sub-division had taken place before the date of the Act, its continuance after that date was no violation of the statute; and (2) that as the house and ground were occupied by a servant, and not a sub-tenant, of the crofter, there was no room for tacit relocation, and therefore there was no sub-lease in the sense of the statute.

Lord Abinger raised this action against Ewen Cameron, crofter, Unachan, Inverness, to have it found "that the defender having, without the consent of the pursuer in writing, sub-divided the holding occupied by him under the pursuer, or otherwise having sub-let the same or part thereof, has thereby forfeited his tenancy of the croft at Unachan occupied by him on the pursuer's estate of Inverloch, and is liable to be removed in manner provided by the fourth section of the Act of Sederunt anent removing, of the 14th day of December 1756, and to ordain the defender summarily to fit and remove himself from the said croft."

The defender's croft was in the parish of Kilmonivaig, which had been declared a crofting parish in terms of the Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict. c. 29), and it was admitted that the defender was a crofter in terms of the Act. By section 1 of said Act it is enacted, *inter alia*, that a crofter shall "not be removed from the holding of which he is tenant, except in consequence of the breach of one or more of the conditions following (in this Act referred to as statutory conditions)," among which statutory conditions it is, *inter alia*, enacted by sub-section 4 of section 1, as follows:—"The crofter shall not, without the consent of his landlord in writing, sub-divide his holding or sub-let the same, or any part thereof, or erect, or suffer to be erected thereon, any dwelling-house otherwise than in substitution for those already upon the holding at the time of the passing of this

Act." By section 3 of the Act it is, *inter alia*, provided that when the crofter has broken any of the statutory conditions "he shall forfeit his tenancy, and shall be liable to be removed in manner provided by the 4th section of the Act of Sederunt anent removing, of the 14th day of December 1756." Section 33 of the Act provides—"Nothing in this Act shall apply to any holding or building let to a person during his continuance in any office, appointment, or employment by the landlord, or of any tenant of the landlord." In this Act the interpretation of the word "tenant" is the same as in the Agricultural Holdings (Scotland) Act 1883 (46 and 47 Vict. c. 62), which defines the expression to mean "the holder of land under a lease." Section 34 of the Crofters Holdings Act provides—"In this Act 'crofter' means any person who at the passing of this Act is tenant of a holding from year to year, who resides on his holding, the annual rent of which does not exceed £30 in money, and which is situated in a crofting parish, and the successors of such person in the holding being his heirs or legatees."

The pursuer averred—"Angus MacIntyre, road contractor, presently occupies a dwelling-house and pertinents on said croft other than the house which is occupied by the defender, and also a piece of ground forming part of said croft. The defender has, without the consent of the pursuer in writing, sub-divided his holding, or otherwise the said defender has sub-let the same or part thereof, in contravention of the said section 1, sub-section 4, of the said Act, to the said Angus MacIntyre."

The defender denied this, and explained that he occupied his croft at and prior to the date of the Crofters Act, and that he had not sub-divided or sub-let his holding to MacIntyre, who, he averred, was his servant.

The pursuer pleaded—" (1) The defender having, without the consent of his landlord (the pursuer) in writing, sub-divided his holding, or otherwise sub-let the same, or part thereof, and having thereby contravened one of the statutory conditions of the Crofters Holdings (Scotland) Act 1886, his tenancy has been forfeited, and decree of removing should be granted as craved, with expenses."

The defender pleaded—" (1) The defender, not having sub-divided his holding, or any part thereof, and not having made any change in his occupation or possession of the same, the present action is unfounded, and the pursuer is not entitled to remove him from his holding."

The facts of the case appear from the evidence of the defender quoted in the opinion of the Lord President *infra*.

The Sheriff-Substitute (SIMPSON) allowed a proof, and thereafter on 15th September 1887 pronounced the following interlocutor:—"Finds that the defender, who is a 'crofter' within the meaning of the Crofters Holdings (Scotland) Act 1886, has, without the consent in writing of his landlord, the pursuer, sub-divided the holding occupied by him, the defender, under the pursuer at Unachan, Inverloch, in contravention of the statutory condition, or the part thereof relating to sub-division of holdings set forth in sub-section four, section first, of the said Act, and has thereby forfeited his tenancy of the said holding: Therefore repels the defences,

and ordains the defender to remove from his holding under the authority of the third section of the statute, and in terms of the conclusions of the petition, and decerns."

On appeal the Sheriff (Ivory) on 19th October 1887 pronounced the following interlocutor:—"Recalls the interlocutor appealed against: Finds in point of fact (1) that in 1875 Angus MacIntyre was engaged as a servant by the defender's father to assist him in working the croft in question, which the defender's father then held as tenant of the pursuer, his wages being then £24 a-year and his board; and that for a period of about two years he lived in the same house with the defender and his father, and worked upon the croft; (2) that in 1877 MacIntyre married, and was then allowed by the defender's father to enter into possession of the house he now occupies, while he at the same time got the use of a cow's grass on the hill; but in consequence of these privileges his wages as a servant were reduced to £20; (3) that in 1879 the defender's father died, and the defender succeeded to the croft, and that for two years thereafter MacIntyre continued to occupy the house, and to work on the croft as the defender's servant, for the same wages and on the same terms as during the two previous years; (4) that in 1881 there was less work for MacIntyre on the croft, in consequence of a part of the latter having been taken from the defender by the pursuer, and a new arrangement was entered into, under which MacIntyre engaged to serve the defender for a year, from Whitsunday to Whitsunday, at the reduced wages of £14, with the house and cow's grass as before, while he was to get in addition a small piece of the croft, consisting of arable ground of two acres or thereby, on part of which he planted potatoes and oats, and the remainder was kept in grass; that it was part of this arrangement that MacIntyre was to work on the defender's remaining portion of the croft all the year round whenever the defender required him; that when not working there, he was to work for the defender on the roads, for which the latter was contractor; and that when the defender had no work for him either on his croft or on the roads, he was to be allowed to work for himself where he pleased; (5) that at the date of the passing of the Crofters Act, viz., 25th June 1886, the said small piece of arable ground did not form part of the defender's holding in the sense of the Act, but the same was then held, occupied, and used by MacIntyre, as it had been since 1881, as part of the privileges enjoyed by him as servant of the defender; (6) that from the year 1881, when the said arrangement was entered into, down to 30th June 1887, when the present action was raised, MacIntyre continued to act as defender's servant from year to year under the arrangement entered into in 1881, and enjoyed the privileges thereby conferred on him, the only difference being that at Whitsunday 1886 MacIntyre himself, with the defender's consent, became contractor for a small portion of the roads in the neighbourhood, but he had another man assisting him in carrying out his own contract, so that the latter did not interfere in any way with his duly carrying out his contract of service with the defender: Finds in law, in the circumstances above stated, that the pursuer is not entitled to remove the defender from his holding, in respect

that the latter has not sub-divided or sub-let his holding, or any part thereof, since the date of the passing of the Crofters Holdings (Scotland) Act 1886, and has not contravened any of the statutory conditions of the said Act, and *separatim*, in respect that, even if the defender had so sub-divided or sub-let his holding or any part thereof, the same having been let to a person in the employment of the defender (who was a tenant of the landlord), is especially exempted from the application of the Act by the 33rd section thereof: Therefore sustains the defences, assoilzies the defender, and decerns: Finds the pursuer liable in expenses," &c.

The pursuer appealed, and argued—The contravention of the Act was clear. There was here both sub-division and sub-letting without consent of the landlord. The condition of the defender's holding forbade this. He could not argue that the statute which dealt with such a wrong did not apply to a wrong begun before the Act passed. To keep MacIntyre on his croft was as bad as putting him there after the Act passed. There was sub-letting. This was a year to year holding, and to suffer tacit relocation after the expiry of the first term was equal to giving a new lease. The defender said that there was no contract of lease. It was, then, inconsistent to rely on section 33 of the Act, which defined a tenant to mean the holder of land under a lease. To benefit by section 33 he must show that "tenant" was equivalent to "crofter," whereas all throughout the statute the two terms were distinguished from each other. To apply section 33 to such a case would only be to legalise the sub-division of crofts which the rest of the Act forbade. Besides, section 33 was merely a disabling section, and could not be relied on by the defender for the purposes of this case. In point of fact the so-called servant was in an independent position. He had a man to assist him, and besides, he made use of his separate house by boarding a pauper lunatic. [LORD PRESIDENT—The difficulty I have is in regard to the previous occupation of MacIntyre. Suppose the croft was sub-divided with the landlord's consent, what then?] Before the statute passed he had no fixity of tenure as he had under it. In regard to the pursuer, all that was said of him was that before the Act he connived at this separate occupation. But the defender could not plead that he carried into what was a new transaction under the Act all the elements of what formerly was simply a precarious tenure. The Act required writing, and the defender had no writing to show.

Argued for the defender—There was no sub-division here; that meant partition among the members of a family. There was no lease here, and therefore it was not a case of sub-lease. The circumstances were outside the Act altogether. If the pursuer prevailed, no crofter could remunerate a servant in what was in Scotland a usual manner, and this would be a great hardship. Since 1881 there had been no change in the relations of the defender and MacIntyre. The landlord had known them all along. The Act put him in no better position, and he was barred by his previous acquiescence.

At advising—

LORD PRESIDENT—This is an application to the Sheriff to find that the defender "having,

without the consent of the pursuer in writing, sub-divided the holding occupied by him under the pursuer, or otherwise having sub-let the same, or part thereof, has thereby forfeited his tenancy of the croft at Unachan occupied by him on the pursuer's estate of Inverloch, and is liable to be removed in manner provided by the fourth section of the Act of Sederunt anent removing, of the 14th day of December 1756, and to ordain the defender summarily to flit and remove himself from the said croft." Now, that application is founded on the first section of the Crofters Act 1886, and sub-section 4 thereof, which provides—"The crofter shall not, without the consent of his landlord in writing, sub-divide his holding, or sub-let the same, or any part thereof, or erect, or suffer to be erected thereon, any dwelling-house otherwise than in substitution for those already upon the holding at the time of the passing of this Act." Now, if what is complained of in the present application had taken place after the passing of the Act, I should have been inclined, and that without difficulty, to hold that there was a case of sub-division of the holding. But the circumstances of this case are peculiar, for the sub-division, if it was one, took place before the passing of the Act, and the question comes to be, whether when the Act finds a croft in a particular state, it is intended by sub-section 4 of section 1 to provide that the crofter should forfeit his right to the croft because something was done before the Act which by the Act is made a ground of objection.

The facts of the case appear very clearly from the cross-examination of the defender, who says—"My father had the croft for about twenty years before his death. MacIntyre was engaged as a servant for my father through me in or about the year 1875. His wages were £24 a-year. They were paid in cash, and he lived in the same house with my father and myself. About two years afterwards MacIntyre married, and we gave him the house that he now occupies. After his marriage we gave him £20 wages together with the house he now occupies, and also a cow's grass on the hill. He, however, did not use the privilege of cow's grass for sometime after his marriage, because he had not the means to purchase a cow. He did not get the arable land till about six years ago. Till that time, namely, six years ago, the money wages continued to be £20. Up till 1881 he planted his potatoes along with my own. Up to that time he did all the work of the croft. When the work of the croft would permit I employed him to work for me on the roads. At one time we had the whole of Macarthur's croft, but in 1881 part of it, namely, one-third, was taken from us, and given to the inspector of the poor. This reduced the work of the croft, and the rent was reduced by fifty shillings, leaving the rent as at present, £17, 16s. There being thus less work to do, MacIntyre and myself agreed that the wages should be reduced from £20 to £14, at which sum they stand at present. He is bound to work for me on the croft whenever I require him all the year round, and when he is not working at the croft, he is bound to work for me at the roads. When I have no work for him on the croft or on the roads, MacIntyre is allowed to work for himself where he pleases. He has had the arable ground above referred to during these six years. His engagement with me

is from year to year, counting from Whitsunday." This is a fair statement of the facts, and is nowhere contradicted. The position of MacIntyre is, that being a servant of the crofter, he is allowed by him to occupy the house on the croft, and that was the case for six years before the passing of the Act. Along with the house he occupies potato ground, and grass for a cow. He is a servant of the crofter to that extent and so long as the crofter needs him. When he is not employed by the crofter, he is allowed to work for himself.

This, then, was the state of possession at the passing of the Act, and the question is, whether anything can be said to have been done in violation of the Act. It is clear that what happened before the Act is not a violation of it, and the only argument on this head of any force addressed to us was that MacIntyre was a sub-tenant of the crofter, that he possessed his house by tacit relocation from year to year, and that the crofter, by permitting tacit relocation, must be regarded as sub-dividing the croft, or sub-letting a portion of it after the date of the Act. Now, on consideration of the arrangement it does not appear that MacIntyre is really a sub-tenant. I think he occupies the house simply as a servant of the crofter, and when he ceases to be so his right to the house ends. There is no need for presumed relocation of what MacIntyre holds, for his only position is that of a servant of the crofter. No doubt it is fair, if he is a servant, that his occupation should not end at a day's notice. It is quite fair that it should continue till the next term after the dissolution of the engagement between the crofter and him. But this does not make him the sub-tenant of the crofter. It is only an arrangement as to the terms upon which he was engaged. Now, I do not think that this is a violation of sub-section 4 of section 1 of the Act, and it could only be held to be so by a very strained construction of the section. It is plain if a new house were erected now that that would imply a forfeiture, for the section provides that he shall not "erect, or suffer to be erected thereon, any dwelling-house otherwise than in substitution for those already upon the holding at the time of the passing of this Act." These words imply plainly that the erection prohibited is an erection after the date of the Act, and I think, that looking to the way in which "sub-division" and "erection" are slumped together in this section, that both are intended to refer to the same point of time, viz., the passing of the Act.

LORD ADAM—The Sheriff-Substitute and the Sheriff have come to opposite conclusions, and from this we may infer that the case presents some difficulty. The question here is, whether the defender has sub-divided his holding within the meaning of the statute. Now, I do not doubt that this croft has been sub-divided. I think that if a crofter gives to anyone right to a house on the croft and ground upon the croft, and if the person is in possession, then that is equivalent to sub-dividing the croft. I do not think that section 38 has any application whatever to the present question, and I disagree with the Sheriff-Principal on this point. Section 1, sub-section 4, evidently refers to the future and not to the past. The words "shall not" are significant of this.

I therefore think that the fact of this croft having been sub-divided before the date of the Act does not infer the defender's liability to forfeiture. If the mere continuation of a state of things had been enough to infer this result, then forfeiture and the passing of the Act would have been simultaneous, and that is not my view of the intention of the statute. The real difficulty of the case is, whether the defender has done anything since the date of the Act to infer forfeiture. His agreement with MacIntyre was from year to year, and the defender could end it at any term of Whitsunday. He might have ended it at Whitsunday 1887. Is it to be regarded as a new agreement after the passing of the Act that he did not do so? I do not think the statute meant any such thing. I think it meant to prevent evils in future. This arrangement has existed for ten years, and so in my view the defender has done nothing since the Act in the way of sub-dividing his holding.

LORD KINNEAR—I cannot agree with the Sheriff in finding that the piece of ground occupied by MacIntyre is not part of the defender's croft. I think it was a part thereof, and that section 33 does not apply at all to the present case. But disregarding that ground of decision I agree with your Lordships that section 1, sub-section 4, has not been contravened by the defender. It is a prohibitory section, and the crofter is forbidden to do certain things under penalty of forfeiture. The defender has done nothing since the Act passed to infer forfeiture. I think it might be possible to incur forfeiture by the continuance of arrangements which were permissible before the Act, but not after it. But in the present case I do not think that that has happened.

The Court pronounced the following interlocutor:—

“Refuse the appeal, and adhere to the interlocutor of the Sheriff of 19th October 1887, in so far as regards the first, second, third, and fourth findings in fact: *Quoad ultra* recal the said interlocutor: Find in law that the defender has not sub-divided his croft since the passing of the Crofters Holdings (Scotland) Act 1886 within the meaning of section 1 (4) of the said Act: Therefore of new assoilzie the defender, and decern.”

Counsel for the Pursuer—Sol.-Gen. Robertson—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for the Defender—C. S. Dickson—Salvesen. Agents—Gill & Pringle, W.S.

Saturday, March 17.

FIRST DIVISION.

MACQUAY v. CAMPBELL.

Parent and Child—Custody of Child—Guardianship of Infants Act 1886 (49 and 50 Vict. cap. 27), secs. 2, 3, sub-sec. 3, and sec. 5.

In an application under the Guardianship of Infants Act, 1886, by a mother domiciled abroad for the custody of her two daughters,

both in pupillarity, and residing with their uncle and tutor-nominate in Scotland, by whom the application was opposed, held that as there was no imputation against the character of the petitioner, and as there was nothing in the circumstances in which she was placed to unfit her for the office of guardian, the petition should be granted.

This was an application under the Guardianship of Infants Act, 1886, by Mrs Rosa Elizabeth Maclaine or Rankine or Maquay, widow of the deceased William Macbean Rankine of Dudhope, in the county of Forfar, and wife of William Maquay, banker in Florence, for the custody of the two daughters by her marriage with Mr Rankine, both of whom were in pupillarity, and who were at the date of the application residing with their uncle John Campbell of Kilberry, Argyllshire, the sole surviving tutor nominated by their father in his marriage-contract. Mr Campbell opposed the application, which was made in the following circumstances:—Mr and Mrs Rankine were married on 8th July 1874. By antenuptial contract of marriage, dated 4th July, and recorded 13th August 1874, Mr Rankine appointed tutors and curators to the children of the marriage. At the date of the present application the sole surviving and acting tutor was Mr Campbell. Three children were born of the marriage—Violet Campbell Rankine, born 28th April 1876; Walter Lorne Campbell Rankine, born 4th July 1877; Muriel Campbell Rankine, born 25th September 1878. William Macbean Rankine died on 31st October 1879.

In July 1884 Mrs Rankine married Mr William Maquay, a British subject residing in Florence, a partner in the banking house of Maquay, Hooker, & Co., who carried on business in Florence and elsewhere in Italy. At the date of the petition the children were residing with or under the charge of Mr Campbell of Kilberry, and he refused to allow them to reside with their mother at Florence.

The present petition for the custody of the two girls was presented by Mrs Rosa Rankine or Maquay, in which she averred that owing to Mr Campbell's refusal to allow the children to reside with her she was only able to see them at long intervals; that Kilberry was in a remote district of Argyllshire, where the girls were far from all educational centres, while in Florence they would have every advantage. With regard to the boy, he being at school, all that the petitioner asked in the prayer of the petition was that arrangements should be made for his spending a part of his holidays with her. This part of the petition was not insisted in, as appears from the opinion of the Lord President *infra*.

Mr Campbell in his answers stated that the petitioner was permanently settled in Florence, and that the children were being brought up with his own children, the girls under a resident governess, while the boy was placed at a preparatory school in England along with his own son. The respondent objected in the interest of the girls to their being sent out of the country, and out of the jurisdiction of the Court, and averred that their father had objected to the children, being brought up abroad.

The Guardianship of Infants Act, 1886 (49 and 50 Vict. cap. 27) provides, sec. 2—“On the death of the father of an infant, and in case the