

therefore as I do that this policy was only intended to cover risks under the statute, and this not being one of that class, I think that the defenders are entitled to be assoilzied.

LORD ADAM—The sum for which the pursuers seek indemnity was a sum of damages for which they became liable at common law, and not in any way under the statute. That being so, it is impossible to bring the claim now sought to be established in any way under the words of the policy. Certain difficulties arise on the construction of this policy owing to the unfortunate selection of language used to express the intentions of the parties, and various readings of these words have been submitted to us. As was pointed out by your Lordship, a new risk was introduced into the law by the Employers Liability Act, and it seems to me, that although badly expressed, what the parties intended by the language of this policy was to indemnify the employer of labour for all sums which he became liable for under the statute, and that not being the nature of the present claim, the pursuer here cannot prevail.

The Court adhered.

Counsel for the Pursuers—D. F. Mackintosh, Q. C.—Guy. Agents—Macandrew, Wright, & Murray, W. S.

Counsel for the Defenders—R. Johnstone—Shaw. Agents—Macpherson & Mackay, W. S.

Friday, December 14.

SECOND DIVISION.

[Sheriff of Ross, &c.

MACFARLANE v. MATHESON.

Public Rates—Assessment—Liability for Rates on Unpaid Rents—Valuation (Scotland) Act 1849 (17 and 18 Vict. c. 91), secs. 31, 33—The Crofters Holdings (Scotland) Acts 1886 and 1887, 49 and 50 Vict. c. 29, sec. 6, and 50 and 51 Vict. c. 24, sec. 2.

A landed proprietor refused to pay certain public rates on the ground that the rents to which they were applicable had not been paid by her tenants. In an action at the instance of the collector of public rates for the parish, *held (diss. Lord Lee)* that as the assessment had been duly levied on the basis of the valuation roll the proprietor was liable to pay them.

The Crofters Holdings (Scotland) Act 1886, sec. 6, sub-sec. (4), provides—“When an application is lodged with the Crofters Commission to fix a fair rent, it shall be in the power of the Crofters Commission, either under the same or under another application of the crofter, to sist all proceedings for the removal of the crofter in respect of non-payment of rent until the said application is finally determined, upon such terms as to payment of rent, or otherwise as they shall think fit.”

The Crofters Holdings (Scotland) Act 1887, sec. 2, provides—“Any crofter who has made or shall make an application to the Crofters Commission to fix a fair rent for his holding, and against

whom legal proceedings have been taken for payment of rent, may apply under the same or any subsequent application to the Crofters Commission for an order prohibiting the sale of the crofter's effects upon the said holding by virtue of any decree for payment of such rent, and the Crofters Commission, if satisfied that such sale would have the effect of defeating, in the case of such crofter, the intention of the principal Act (the Crofters Act 1886), may, upon such terms as to payment of rent or otherwise as they shall think fit, grant an order prohibiting such sale till the application to fix a fair rent has been finally determined.”

The Lands Valuation (Scotland) Act 1854 (17 and 18 Vict. c. 91), sec. 31, provides—“In all cases where any lands or heritages shall be separately let at a rent not amounting to four pounds per annum, and the names of the occupiers thereof shall not have been inserted in the valuation roll, the proprietor of such lands and heritages shall be charged with and have to pay the whole of the assessments on such lands and heritages separately let as aforesaid, but every such proprietor charged with and paying such assessments shall have relief against the tenants and occupiers of such lands and heritages for reimbursement thereof if and so far as such assessments may by law be properly chargeable upon such tenants or occupiers.”

Section 33—“Where in any county, burgh, or town, any county, municipal, parochial or other public assessment, or any assessment, rate, or tax under any Act of Parliament is authorised to be imposed or made upon or according to the real rent of lands and heritages, the yearly rent or value of such lands and heritages as appearing from the valuation roll in force for the time under this Act in each county, burgh, or town shall from and after the establishment of such valuation therein be always deemed and taken to be the just amount of real rent for the purposes of such county, municipal, parochial, or other assessment, rate or tax, and the same shall be assessed and levied according to such yearly rent or value accordingly.”

This was an action at the instance of John Finlayson Macfarlane, inspector of poor for the parish of Stornoway, and collector of public rates there, for the sum of £222, 7s. 7d., against Lady Mary Jane Matheson, Lewis Castle, Stornoway, proprietrix in liferent of the Island of Lewis. He averred that for the year from Whitsunday 1887 to Whitsunday 1888 the defender was duly assessed by the parochial board in the sum of £764, 7s. 7d. public rates in respect of her proprietorship and occupancy of various subjects. To account of this sum the defender on 14th May 1888 paid a sum of £542, 0s. 3d., leaving a balance still due by her to the pursuer of £222, 7s. 4d., which was the sum sued for.

The defender admitted these statements, and averred that she had been assessed in rates on the assumption that the rental of her tenants who paid less than £4 per annum would produce a sum of £168, 2s. 6d. sterling, but she had only recovered £102, 2s. of that sum; with regard to tenants who pay rents of £4 per annum and upwards, she had been assessed on the assumption that the rates applicable thereto would amount to £508, 16s. 8d., but notwithstanding all her efforts she had only been able to collect

rents representing an assessment of £352, 9s. 10d.

It was admitted that she had paid the assessments applicable to the rents collected, and that these were included in the sum of £542, 0s. 3d. She further averred that any legal proceedings she might adopt against her tenants who were in arrear of rent would, in terms of the Crofters Holdings (Scotland) Act 1887, be liable to be prohibited till the crofter's application to fix a fair rent had been determined. There was no immediate prospect of their application to fix fair rents being entertained and determined.

The pursuer admitted this statement, with the explanation that the defender had not attempted to sue any of her tenants who were in arrear of rent, and that until she did so the Crofters Commission had no power to sist the proceedings.

The defender pleaded—"The defender not having recovered payment of the sums sued for in respect of rates from her tenants who pay less than £4 per annum, and in respect of rents from those who pay £4 per annum and upwards, she is not bound to pay rates in respect of the sums not recovered by her as aforesaid, and she is entitled to be assoilzied with expenses."

The Sheriff-Substitute (FRASER) decerned against the defender for the sum sued for.

"*Note.*—The defender duly paid the rates effeiring to the amount of rents received by her as well as those exigible from her as proprietrix and occupant of the different subjects mentioned in the account appended to the petition. The rates due and now sought to be recovered are those effeiring to rents not paid, and the only question between the parties is whether she is bound to pay rates on or in respect of these unpaid rents. In my opinion she is. The rates unpaid were, along with those which have been already paid, duly and timeously assessed. No objection was then made by or on her behalf, and it appears to me that it is now too late to object or resist payment.

"The parochial board is not responsible for, and indeed has nothing to do with, the collection or payment of any rents. If the defender has from any cause failed to obtain payment of any portion of those due to her, the loss must, so far as the board and the other ratepayers are concerned, fall upon her. There may be hardship in having thus to pay rates on rents not received, and which probably never will be wholly received, but in the interest of the general ratepayers the pursuer cannot take that into account. He is bound to recover if he can, and has no alternative but to use the means for enforcing payment. If he were to fail in this—his duty—or if the defender were relieved, the result would necessarily be increased rates for the following year, of which she would have to bear her share.

"It is said that under the Crofters Act the defender's unpaid rents are liable to be in part reduced or entirely swept away. That is true, but it is one of the risks which as a proprietrix she runs. It does not appear, however, that she has yet attempted by legal measures to recover, or that the Crofters Commission have reduced or swept off or interfered with the past year's unpaid rents.

"On the grounds above indicated I am reluctantly obliged to hold that in law the defender is

bound to pay, and I give decree accordingly."

The defender appealed to the Court of Session.

It was stated at the bar that the defender was unable to pay the rates, as in spite of all efforts the rents of the estate had not been recovered, and she had no other means by which to pay them. As she was only proprietrix in liferent she could not use the ordinary means of raising money to meet this claim which would be open to a fee-simple proprietor. She had raised fifty-five actions for payment of rent against crofters, her tenants, but on the application of the tenants to have fair rents fixed, the Crofters Commission, without hearing parties, had issued an order in terms of the Crofters Act 1887, sec. 2, under which she was prohibited from recovering by sale any rents for which she might obtain decree. The rates should come out of rent, but there was none. The source of rates had perished. Rent was not exigible for a subject that had perished—*Muir v. M'Intyre*, February 4, 1877, 14 R. 470; and in like manner the assessment which the statute laid upon the subject could not be exacted—*Tod v. Mitchell*, January 26, 1858, 20 D. 449; *Guthrie Smith*, p. 391; *Cassell's Law of Rating*, pp. 35, and 42; *Mayor of Woodstock*, November 10, 1876, L.J., 2 Ex. Div. 49; *Browne on Rating*, p. 516; *Govan Police Commissioners v. Armour*, February 3, 1887, 14 R. 461. The question was, if the subject showed a profit on which it could be rated. The Valuation Act laid the burdens on the value of property as it could be "let from year to year." The valuation roll was the basis on which the Board levied the rates, and in the usual case was conclusive of the rental. But in this case a *vis major* had occurred as truly as if the subject had been swept away by the sea. For after the valuation roll had been made up, the Crofters Commission interposed between the appellant and her tenants, and restrained her from recovering two-thirds of the rents at least for the year to which the roll applied. In this way the value stated in the roll, which was the warrant of the collector, had been reduced. Moreover, if the power to recover rents were arrested, the result might be a destruction of the rental as it entered the roll, and therefore as it afforded the measure of taxation. The crofters applied to have fair rents fixed in June, the roll was made up in September, but if the Commissioners reduced the rents their delivrance would draw back to the date of the crofters' applications. Thus the basis of assessment would be destroyed.

The pursuer argued—No doubt there was hardship in the present case, but the collector was bound to assess according to the roll—*M' Lachlan v. Tennant*, May 4, 1871, 43 Jur. 390. It was admitted that the appellant had not recovered all her rents, but she had not exhausted her remedies. She might have obtained decree, and sold in implement thereof to the extent of one-third of the rent.

At advising—

LORD JUSTICE-CLERK—There is, I am afraid, only one way in which this case can be decided, although it is certainly one of the most deplorable that have come before the Court. Lady Matheson, the liferent proprietrix of the Lewis, is unable to collect enough rents due to her from the

estate to pay the public burdens imposed upon it. The Crofters Act of 1886, with its amendments in 1887, has had this effect, that while the landlord is liable to pay assessment upon rents which had been fixed by open bargain between the landlord and the tenant as a fair rent for the land, the Crofters Commission steps in and says that these rents are not to be paid. But while the law thus prevents the payment of rent to the landlord, it has not said that the obligation on the landlord to pay rates on the rents formerly fixed shall also be stayed. It was argued that the operation of the Crofters Commission was a *vis major* which altered the ordinary position of affairs and stopped the receipt of rents, which was the only real ground upon which the obligation by the landlord to pay rates had rested. But when we look at the statute under which the pursuers, who are the rating authorities for the district, act, we find that they have no option but to do as they have done. They must take the rental of the property as it appears in the valuation roll, and then insert in the rating-book the proper proportion of the whole rate which Lady Matheson has to pay, whether the proportion refers to houses which are valued above £4 per annum or below that sum. This has been done, and I can find nothing in the Crofters Acts to prevent them following the usual course in the present case.

LORD YOUNG—I am of the same opinion, and think that there is here no stateable case. The action is by the duly authorised collector of the poor and other rates in the island of Stornoway, and is for the payment of these rates which have not been paid by the defender. By statute it is required that proprietors shall be duly assessed on their property as it appears in the valuation roll in force at the time the rate is laid on, and the rates were duly assessed upon the defender as the value of the property appeared in the valuation roll. The assessor sends to the various proprietors a notice of what value he intends to put upon their respective properties, and if any proprietor feels aggrieved at this proposed value, then he is able to appeal to the Commissioners, and afterwards to the court of review. That is while the roll is being made up, but when it is amended and made up and authenticated the rating authority is bound to take the values there laid down as the basis for any rates which he may have to lay on.

The only question in this case, as it appears to me, is, whether the defender was duly rated and assessed for the sum now sued for? The first averment for the pursuer is that he is the proper officer for laying on the rates in the parish, and the second averment is that the defender was duly assessed in the sum of £764, 7s. 7d., and that she had paid to account of said sum £542, 0s. 3d., leaving a balance due to the pursuer of £222, 7s. 4d., which is the sum sued for, and the answer to these averments is "Admitted." It is not possible that there could be a stateable case after that admission. There is no case of *vis major* in the circumstances here. In defence she says that she cannot recover her rents from her tenants. She says—"The defender had been assessed in rates on the assumption that the rental of her tenants who paid less than £4 per annum would produce a sum of £168,

2s. 6d. sterling, but she had only recovered £102, 2s. of that sum; with regard to tenants who pay rents of £4 per annum and upwards, she had been assessed on the assumption that the rates applicable thereto would amount to £508, 16s. 8d., but notwithstanding all her efforts she had only been able to collect rents representing an assessment of £352, 9s. 10d." But she admits that she was duly assessed in the sum, and what has the rating authority to do with the fact that she cannot recover her rents from her tenants. Her next statement is—That any legal proceedings she might adopt against her tenants who were in arrear of rent would, in terms of the Crofters Holdings (Scotland) Act 1887, be liable to be prohibited till the crofter's application to fix a fair rent had been determined; and that there was no immediate prospect of their application to fix fair rents being entertained or determined. And her plea-in-law is—"The defender not having recovered payment of the sums sued for in respect of rates from her tenants who pay less than £4 per annum, and in respect of rents from those who pay £4 per annum and upwards, she is not bound to pay rates in respect of the sums not recovered by her as aforesaid, and she is entitled to be assoilzied with expenses." Is that stateable in argument? No doubt there is this peculiarity and hardship, that the Crofters Commission may consider and reduce the rents which had been agreed upon between the tenants and the proprietor, but what has the rating authority to do with that? At the time the Legislature interfered through this Commission with the rents fixed between the tenants and the proprietors in that part of the country, it might very well have given directions to the rating authorities that they were to take some other basis for their rating than the value of the estate as it appeared in the valuation roll, but it did not do so. The rating authority is a statutory body having a statutory duty to perform under statutory rules, and these rules it has carried out in this case.

It is impossible to avoid sympathising with this lady, and with many other landlords with crofter tenants, who I have no doubt have abused the privileges given them by the Legislature, but all that cannot interfere with the action of the rating authority. The duty of the Crofter Commission is only to settle fair rents, and I suppose Lady Matheson holds and is prepared to maintain before the Commission that the rents on her estate are fair rents, and if no change is made she will then be able to recover the whole rents on which rates have been paid, but while that question is being considered the rates must be paid.

LORD RUTHERFURD CLARK concurred.

LORD LEE—I agree that we have nothing to do with the policy of the statutes referred to at the debate, and that on the record as it stands there is really no question of the defender's liability. But I understood that the record was to be amended so as to raise formally certain questions which were mentioned from the bar. It was stated at the bar that under the Crofters Act the Crofter Commission has *de facto* interfered to suspend action on the defender's part to obtain her rents. It was also, I understood,

averted that the Commission have received and entertained claims for a revision of the rental which if sustained will by the Act draw back to June 1887, prior to the making up of the valuation roll. Now, as to the irrelevancy of these allegations I have the misfortune not to be so clear as your Lordships. I am for one thing not in a position to give an opinion on the extent of the powers of the Crofter Commission. That matter was not fully argued, nor is it competently before us. Then I take the case on the footing that *de facto* the rental has been altered, or rendered subject to alteration by a supervening event since the valuation roll was made up in September. I should have thought that that raised a serious question on the Valuation Act. That Act, I think, is concerned with valuation only, not with the validity or effect of assessment, but with the amount of the rental on which they are to be calculated, and the manner of imposing them if they are effectual. Now, I think that if a subject is destroyed by some fire or flood, or suffers alteration in value from an unforeseen cause, the question of the effect of that upon the finality of the assessment is not necessarily decided by the valuation roll. I take section 31 of the Valuation Act as affording an illustration of the kind of question which arises—"In all cases where any land or heritage shall be separately let at a rent not amounting to £4 per annum, and the names of the occupiers thereof shall not have been inserted in the valuation roll, the proprietor of such lands and heritages shall be charged with and have to pay the whole of the assessments on such land and heritages separately let as aforesaid, but every such proprietor charged with and paying such assessment shall have relief against the tenants and occupiers of such lands and heritages for reimbursement thereof, if and in so far as such assessments may by law be properly chargeable upon such tenants or occupiers." Now, the Crofters Act entitles the crofter to apply to the Crofters Commission both to stay action and diligence and to revise the rental, and the effect of the applications of the defender's crofting tenants have made may draw back to June 1887. It does appear to me that that may affect the landlord's claim against the tenant for relief from the rates paid by him for the tenant under this section. In fact the effect of the Crofters Act has been to make the valuation roll not conclusive of the rental against the tenant, and therefore the right of the landlord to relief is interfered with. I think that raises a serious question, but your Lordships differ from me as to this, and I will only say that I do not see my way to concur.

LORD JUSTICE-CLERK—I only wish to add that if any case had arisen here of the total destruction of the subject, that would have raised a totally different question from the one which we have to decide here, and one on which I wish to reserve my opinion, but in this case the subject has not been touched at all.

The Court pronounced this interlocutor—

"Find in fact that the rates sued for were duly assessed according to the valuation roll in force at the time: Find in law that the pursuer is entitled to insist for payment

thereof accordingly: Therefore dismiss the appeal and affirm the judgment of the Sheriff-Substitute appealed against; of new decern in terms of the prayer of the petition: Find the pursuer entitled to expenses in this Court," &c.

Counsel for Appellant—D. F. Mackintosh, Q.C.—M'Kechnie—Orr. Agents—Stuart & Stuart, W.S.

Counsel for Respondent—A. J. Young—J. P. Grant. Agents—J. Murray Lawson, S.S.C.

Saturday, December 15.

FIRST DIVISION.

[Sheriff-Substitute of Elgin.

ROBERTSON & SONS v. FALCONER.

Bankruptcy—Cessio—Trust-Deed—Discretion of Sheriff—Debtors Act 1880 (43 and 44 Vict. c. 34), sec. 9, sub-sec. 3.

When a petition for *cessio* is presented at the instance of a creditor, the above subsection gives the Sheriff a discretion to grant or refuse decree "as the justice of the case requires."

A tradesman executed a trust-deed for behoof of his creditors, and about a year thereafter became unable to fulfil his obligations to certain fresh creditors who desired him to grant a second trust-deed, but to a different trustee. He declined, and one of them gave notice that he would present a petition for *cessio*. The day after receiving this notice the debtor signed a trust-deed in favour of the former trustee, who at once proceeded to realise and distribute his estate. In the petition for *cessio* at the instance of the creditor, *held* that the petitioner was entitled to obtain decree in respect of the circumstances under which the trust-deed had been granted.

On 21st September 1888 Duncan Robertson & Sons, hat manufacturers, Glasgow, in virtue of a decree obtained in the Sheriff Court of Elgin on 25th July 1888, charged Alexander Falconer, tailor in Elgin, to pay to them the sum of £25, 6s. 7d. of principal and expenses contained in that decree. The days of charge having expired without payment, Robertson & Sons presented a petition in the Sheriff Court of Elgin for decree of *cessio* against Falconer, and served notice thereof upon him on 25th September 1888. The defender deponed that he had got into difficulties about four years before; these had been tided over for a time, but more than a year before he had found it necessary to grant a trust-deed for behoof of his creditors in favour of Mr Craig, C.A., Edinburgh, who was acting for him at the time. His creditors had acceded to the deed, and he had arranged to pay them 15s. or 16s. per £, and had signed bills payable at three, six, and nine months for payment of that composition. He had paid the first instalment, and part of the second, but none of the third. The pursuers were not creditors under that trust-deed,