

Friday, March 15.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

DALGLEISH, &c. v. LIVINGSTON, &c.

*Crofter—Sub-Tenant—Reduction of Order by Crofters Commission—Plea of Bar—Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict. cap. 27), secs. 20, 21, and 25.*

By the Crofters Holdings (Scotland) Act 1886, it is enacted (section 20)—“When an application is made to the Crofters Commission to fix a fair rent, intimation thereof shall be given to the other party interested in the holding, landlord or tenant as the case may be.” (Section 21)—“In the event of any dispute arising as to whether a person is a “crofter” within the meaning of this Act, it shall be competent for the Commissioners to determine such question summarily.” (Section 25)—“The decision of the Crofters Commission in regard to any of the matters committed to their determination shall be final.”

A person calling himself a crofter applied to the Crofters Commission to fix a fair rent for his holding. He described himself as holding of the tenant of a farm, who was set forth in the schedule to the application as “the landlord.” No intimation of the application was made to the proprietor, but he was aware of the application, and his factor was present when it was dealt with by the Commissioners. The tenant stated certain objections to the application being granted, but no question was raised as to whether or not the applicant was a crofter in the meaning of the Act. The Commissioners fixed a fair rent for the holding. In an action by the proprietor and the tenant against the applicant for reduction of the Commissioners’ order and of the decree of the Sheriff following thereon, held (1) that, as the commissioners had not considered the question whether the applicant was a crofter, their decision could not be regarded as final upon this point; (2) (following *Livingstone v. Beattie*, March 19, 1891, 18 R. 735) that the defender was proved to be a sub-tenant, and was therefore not a crofter in the sense of the Act, and was not entitled to its benefits; and (3) that neither of the pursuers were barred from challenging the order of the Commissioners on this ground, and decree of reduction granted.

Question whether, if the Crofters Commission had decided that the applicant was a crofter in the meaning of the Act, their decision would have been final upon this point.

By application dated 14th April 1890, Peter Livingston, Archibald Henderson, and James Henderson, as crofters on the farms of Ardslnignish and Camus-na-gaul in the

parish of Ardnamurchan, Argyllshire, applied to the Crofters Commissioners for an order fixing fair rents for their respective holdings. They described themselves as holding of Angus M’Millan, the tenant of the farms of Ardslnignish and Camus-na-gaul, whom they set forth in the schedule as “the landlord,” and who was the only party called as respondent. No intimation was made to John James Dalglish, the proprietor, or Lawrence Dalglish, the liferenter, of the said farms, and neither of them made any appearance in the proceedings.

The Crofters Commission, consisting of one of the Commissioners and two assessors acting under the powers delegated in virtue of the Act 51 and 52 Vict. cap. 63, sat at Tobermory in June 1890 and inquired, *inter alia*, into the said applications. The tenant M’Millan was represented by Mr Scott of Messrs Scott & Craig, writers, Glasgow, who appeared in some other applications by crofters for J. Dalglish, the proprietor. Mr Armstrong, factor for the estate of Ardnamurchan, was present during the inquiry.

The tenant M’Millan objected to the applications on two grounds, (1) that the applicants did not reside on their holdings, and (2) that they did not possess any right of grazing on Ardslnignish or Camus-na-gaul. These objections were on 27th August 1890 both repelled, and it was found that the applicants had the right of grazing which they claimed. Accordingly, by order in each case of same date, the Commissioners fixed and determined a fair rent for each of the applicants. On 16th June 1892 the Sheriff of Argyllshire interposed authority to each of said orders, and decerned in terms thereof.

In these circumstances Laurence Dalglish, the liferenter, and Hugh M’Millan, the tenant of the farm of Ardslnignish and Camus-na-gaul, as eldest son and heir of his father, Angus M’Millan, who had died, raised an action against Peter Livingston, Archibald Henderson, and James Henderson for reduction of (1) the order of the Crofters Commissioners, and (2) the decree of the Sheriff pronounced conform thereto, and for decree ordaining the defenders to remove from the said farm.

The pursuers pleaded—“(1) The said defenders being merely sub-tenants on the said farms of Ardslnignish and Camus-na-gaul, were not crofters in the sense of the Crofters Holdings (Scotland) Act 1886, and were therefore not entitled to apply for or to obtain the benefits of that Act.

The defenders pleaded, *inter alia*—“(1) The action is irrelevant and incompetent. (2) The Crofters’ Commission having decided that the defenders are crofters, the present action is excluded by the finality clause of the statute under which the proceedings challenged were taken. (3) The pursuer Dalglish having authorised or permitted his said tenant to represent his interest before the Crofters Commission, is barred by personal exception from now objecting to the said proceedings complained of. (4) The said Angus M’Millan, the predecessor

of the pursuer M'Millan, having made himself a party to the said proceedings without maintaining the question now raised, has no title to insist in this action."

A proof was heard, which brought out the above mentioned facts, and showed that the defenders were sub-tenants holding of the principal tenant, M'Millan.

By section 20 of the Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict. cap. 29) it is enacted—"When an application is made to the Crofters Commission to fix a fair rent, intimation thereof shall be given to the other party interested in the holding, landlord or tenant as the case may be, and the Crofters Commission shall appoint a time and place at which parties shall be heard in reference to the matter of the application."

By section 21 of the said Act it is enacted, *inter alia*—"In the event of any dispute arising as to whether a person is a 'crofter' within the meaning of this Act, it shall be competent for the Commissioners to determine such question summarily."

Section 25 of the said Act enacts—"The decision of the Crofters Commission in regard to any of the matters committed to their determination shall be final."

On 28th November 1894 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor—"Finds (1) that the orders of the Crofters Commission, dated 27th August 1890, are not subject to reduction at the instance of the pursuers; (2) that the pursuers are barred from denying that the defenders are crofters in the sense of the Crofters Act; (3) that the pursuers are therefore not entitled to decree of removing; Therefore assolizies the defenders from the conclusions of the summons." . . .

"*Note.*—The pursuer, Laurence Dalglish, is liferenter of the farm Ardslnignish, forming part of the estate of Ardnamurchan, belonging to John James Dalglish, and the pursuer, Hugh M'Millan, is tenant of the farm. The three defenders—Peter Livingston, Archibald Henderson, and James Henderson—are in possession of holdings on that farm, either as crofters or sub-tenants, that being a point in dispute in this case. The pursuers now seek to reduce certain orders obtained by the defenders from the Crofters Commission fixing rents for their holdings, and decrees conform by the Sheriff of Argyllshire, and they conclude for decree of removing of the defenders from their holdings on the ground that the defenders were not crofters but sub-tenants.

"The Crofters Commission, consisting of one of the Commissioners and two assessors—acting under the powers delegated in virtue of the Act 51 and 52 Vict. cap. 63—sat at Tobermory in June 1890, and inquired into the cases of the crofters on the Ardnamurchan estate, of which 141—including the defenders' application—were laid before them. Mr Armstrong, factor of the estate of Ardnamurchan, including Ardslnignish, was present during the whole inquiry; and the proprietor, John James Dalglish, was also represented by Messrs Scott & Craig, writers, Glasgow. These gentlemen took

their instructions from Dalglish & Bell, W.S., agents for John James Dalglish and the pursuer, Laurence Dalglish. It is in evidence that the pursuer, Laurence Dalglish, was constantly in that office, and transacted factory business for the firm.

"At the time of the inquiry, there prevailed an opinion on the part of the Crofters Commissioners, and they had so decided, that sub-tenants of holdings of the character described in the Crofters Act were, as such, crofters in the sense of the Act. Applications by sub-tenants were entertained by them without question; and in these cases it was the practice to insert the name of the principal tenant in the blank left for the name of the landlord in the form of application issued by the Commissioners. This practice was sanctioned and recognised by the Commissioners. In accordance with this practice, in each of the applications presented by the defenders, Angus M'Millan, now deceased (father and predecessor in the farm of the pursuer Hugh M'Millan), is stated to be the landlord. The inquiry into these three applications took place at the same time as the inquiry into the similar applications from the Ardnamurchan crofters. Nointimation of them was made to the pursuer, and no instructions to attend to them were sent from the office of Dalglish & Bell. Appearance was entered in them however by Mr Scott as agent for Angus M'Millan, the principal tenant. But Mr Armstrong, the factor, was present during the proceedings. Mr Scott reported to Dalglish & Bell the result of these inquiries, along with the result of other inquiries about the Ardnamurchan crofters. They are included in a synopsis of the decisions of the Commissioners, relating to the Ardnamurchan estate, made up by Mr Craig, and transmitted to Dalglish & Bell; and charges in reference to them are entered in an account rendered by Scott & Craig for the services rendered by them in connection with the Ardnamurchan inquiries to Dalglish & Bell, and were paid by them.

"All parties connected with the inquiry supposed that sub-tenants might petition as crofters; and that in these cases it was proper that the principal tenant should be entered as landlord. It was decided in the case of *Livingston v. Beattie*, March 19, 1891, 18 R. 735, that that view was erroneous, and that sub-tenants were not, as such, crofters under this Act.

"I am fully satisfied on the evidence that no misapprehension as to the ownership of these holdings was occasioned by the form of the defenders' application, or by the statement in them that Mr M'Millan was landlord. I am satisfied that it was fully understood by all parties concerned, including the Commissioners, that they were sub-tenants' applications, and that the holdings formed part of the estate of Ardnamurchan. I do not say that there is any direct evidence as to this knowledge or understanding of the Commission, but the contrary was not suggested, and I think it is deducible from the evidence. No proposal was made to examine the Commis-

sioner or his assessors, and it is proper here to notice that the pursuer Laurence Dalgleish did not give evidence, and did not call as witnesses either the tenant M'Millan or Mr Scott or Mr Craig. His only witnesses were Mr Robertson, managing clerk in the office of Dalgleish & Bell, whose evidence was unusually complete, distinct, and satisfactory, and Mr Armstrong, the factor.

"In each of the applications certain objections were stated on behalf of the tenant M'Millan, and were minuted. It is not necessary to particularise them. They do not bear on the point now made by the pursuers, viz., that the defenders were not crofters *qua* sub-tenants. That point was not taken. The objections were all overruled by the Commission, and no special objection has been stated to these deliverances.

"Besides overruling these objections the Commission fixed the fair rents of the holdings, and in one case the amount of arrears payable. The orders under reduction do nothing more, and, in particular, they do not expressly find or declare that the applicants are crofters.

"The first question is, whether these orders are now open to reduction? There are two pursuers—the landlord and the tenant—and they stand in different positions in regard to this question, and I think it necessary, or at least convenient, to consider them separately.

"I take first the case of the tenant, which was presented in argument as if the pursuer Hugh M'Millan had been the tenant who appeared at the inquiry, or as if Angus M'Millan, who appeared at the inquiry had been pursuer, and I take the case so.

"I have formed the opinion that the orders are not reducible at the tenant's instance, and that because of the provisions in section 25 of the Act, which enacts that 'the decision of the Crofters Commission in regard to any of the matters committed to their determination by this Act shall be final.' Although the orders contain no express declaration or affirmation that the defenders were crofters, yet it was assumed at the debate that that must be held to be their import and effect, and probably that is so, and adopting that view I am of opinion that these orders are protected from challenge. It was contended for the pursuers that, if an order determining whether an applicant was a crofter or not were held to be final, that was in effect determining that the Commission was entitled by a final deliverance to interpret the statute and to decide as to its own jurisdiction. It was maintained that it was never held to be committed to a judge to determine as to his own jurisdiction, that the 25th section could only protect from challenge orders within the jurisdiction of the Commission, and that the clause did not apply to an order beyond the jurisdiction, nor to an order purporting to determine the jurisdiction. But assuming that argument to be sound, the answer to it is, that the power to decide whether an applicant is a crofter or not is expressly con-

ferred on the Commission, and that they are therefore competent to determine finally to this effect the extent of their own jurisdiction, because it is expressly provided at the close of section 21, that 'in the event of any dispute arising as to whether a person is a crofter within the meaning of this Act, it shall be competent for the Commissioners to determine such question summarily.' These words are unambiguous, and I am unable to limit them as contended for by the pursuers to questions arising incidentally in the course of the inquiry. It appears to me that they unambiguously commit to the Commission the power of disposing of the question whether an applicant is a crofter summarily, and according to section 25 finally.

"Now, objections were stated by M'Millan challenging the right of the defenders to make application as crofters, and these objections were repelled. I am disposed to hold that it follows that the Commission thereby decided that the applicants were crofters.

"I have pointed out that the orders do not decide that expressly, and there was certainly no decision on the question whether sub-tenants were crofters. Presumably on this occasion the Commissioners did not apply their minds to that question because it was not raised. Apart from the special objections stated, it was conceded that the defenders were crofters, and the case is in the same position as if M'Millan and the defenders had come before the Commission expressly admitting that the defenders were crofters. In my opinion the pursuer M'Millan is bound by that tacit admission, and is not entitled now to go back on it.

"But it is said that Laurence Dalgleish, the liferenter, is in a different position, and cannot be bound by the orders of the Commission, because he was not a party to the proceedings in which they were pronounced, and because as regards him they are *res inter alios acta*. A question might be raised whether in that view he, the pursuer, would have a title to challenge decrees pronounced in actions to which he was not a party. But it is maintained that he has a title, because they affect his estate. I do not find it necessary to solve this point, but assume the landlord's title to pursue the reduction. But I think he is not entitled to prevail. If the Crofters Commission were a court of law, and if this were a question of legal process, or a question about the decree of a court of law, there might be much force in the contention. But I apprehend that the Crofters Commission is not a court of law, as seems clear from the case of the *Duke of Argyll v. Cameron*, 24th November 1888, 16 R. 139, and that the proceedings before the Commission were not litigations. The Commission was making a local inquiry, not determining a law suit, and I think that the rule that a decree cannot affect one who is not a party, to the litigation in which it is pronounced has no application. There is no such technical rule or difficulty, and the question comes to be whether the pursuer, L. Dalgleish, suffered injustice or

disadvantage by the application not having been intimated to him by the Commission. If it could be said that the essential principles of justice had been disregarded, as, for instance, that orders had been pronounced behind the back and without the knowledge of the proprietor, or that the proprietor had not been allowed to take part in the inquiry, I think that he might perhaps be relieved from the orders by a reduction, or might be entitled to plead that they did not affect him. But nothing of that kind can be said or has been said. The pursuers have not come forward as witnesses, but plainly, and I think admittedly, Mr L. Dagleish was as fully aware of these applications as of any of the other applications about which, as the person who attended to the factory business in the office of Dagleish & Bell, he must have been personally fully informed. Besides, he was represented at the inquiry by Mr Armstrong, the factor, and of course he was not only aware of these applications, but was necessarily aware that they purported to affect his interests in the lands after the expiry of M'Millan's lease. No doubt he might have intervened if he had chosen, and he might have appealed to the three Commissioners under the 27th article of the rules and regulations framed and approved of under the Act. (See C. N. Johnston's Crofters Holdings Act, p. 63.) The pursuer's letter of 11th November 1893 shows that he was quite aware of his right to appeal, and was also aware of the decision in the Outer House in the case of *Livingstone v. Beattie*.

"In these circumstances I cannot see how the pursuer, the proprietor, can escape the effect of the 25th section of the statute unless he can maintain that the proceedings before the Commission were in a strict sense litigious, and that their orders were decrees of a court of law, which—as already said—is not, in my opinion, the character of the proceedings or of the orders.

"For these reasons I am of opinion that Laurence Dagleish, the proprietor, cannot, any more than M'Millan, the tenant, be heard to maintain that the defenders are not crofters. I hold that it has been finally determined that they are, and that in any view the pursuers are barred from pleading that they are not.

"It is admitted that if the orders of the Commission cannot be reduced, the decrees conform by the Sheriff are unobjectionable.

"The defenders further maintained that admitting that sub-tenants were not as such crofters, yet that the Commission in deciding them to be crofters had arrived at a sound conclusion, because the tenure of their holdings was really that of a crofter, and because they held directly of the proprietor. They say that they were in error in applying as sub-tenants; but that they should not be prejudiced by that error, seeing that according to the law administered by the Crofters Commission it was indifferent in which character they applied, and they were not put to consider their

true legal position. In the view which I have taken of the preliminary question it is not necessary for me to decide this point. But as proof was led about it, and as it was fully argued, it is perhaps proper that I should indicate very briefly the views which occur to me on the point. When the evidence is examined it will be found that there is very little of it which throws much light on this question, and very few considerations which affect it.

"The holdings are traced back to 1849 by the lease dated in that year. Mr Dagleish purchased the estate in 1856, and from the rentals of the estate from that date until 1872 it appears that no rent was paid to the proprietors for these holdings. But from 1872 to 1875 the farm of Ardslnish went out of lease, and during that period rent for the holdings was paid to the landlord under a written contract. The pursuers did not dispute that if the Crofters Act had then been in force the holdings must during these three years have been held to have been crofts and the tenants of them crofters, because they were holding of no one but the proprietor. But the Crofters Act was not passed till June 1886, and the pursuers contended that the question was whether the defenders were crofters at that date; if they were, they were crofters still; if they were not, they were not crofters now.

"For the pursuers it is contended that seeing that since 1875 the rent for the holdings was always paid to the tenant, and that there was no proof of any contractual relation subsisting between them and the landlord during that period, it must be concluded that they held under the tenant and not directly under the proprietor; and further it was submitted to be important and suggestive that when they had no motive one way or the other they presented their applications to the Commission as sub-tenants.

"The defenders contended that there was nothing which brought to an end the relation of landlord and tenant, which admittedly subsisted between them and the proprietor from 1872 to 1875; that they had never been treated as sub-tenants who were excluded by the leases; that it appeared that when questions as to erecting buildings arose, the permission of the proprietor was asked; and that, looking to the long period during which their holdings had been possessed, they ought to be regarded as being in the position referred to in the opinion of Lord Kinnear, concurred in by Lord M'Laren, in the case of *Livingstone v. Beattie*, to the effect that it might be that an occupier might be a tenant of the proprietor, notwithstanding the facts that his holding lay within the bounds of a farm, and that he paid rent to some one else than the landlord.

"My own impression on a consideration of the evidence is, that it has not been made out that the defenders were truly crofters. I think that at 1875 the occupants of these holdings ceased to be tenants of the landlord, and were thereafter sub-tenants of the principal tenant, removable by him and by

him alone unless under the clause of the lease excluding sub-tenants; and I have great difficulty in seeing how an application could be directed against a landlord for reduction of a rent which was not payable to him, and—as in one of the cases—for relief from arrears due not to him, but to the tenant. But my opinion is that the question cannot be raised now. It has been settled by the Crofters Commission; and—if erroneously—the error I apprehend cannot now be rectified.

“With regard to the conclusions for removing, it is enough to say that these cannot be granted on the demand of the tenant, because in a question with him it has been finally decided that the defenders are crofters; nor in a question with the proprietor, because he is equally met by the orders of the Commission, and for the further reason that if he were held not bound by these orders, the defenders in that view would not be his tenants, but sub-tenants in whose sub-tenancy he acquired.”

The pursuers reclaimed, and argued—The Lord Ordinary had reached an erroneous conclusion. (1) No intimation of the applications had been made to Mr Dalglish. Angus Macmillan had not been called as representing or agent for the landlord, but as the landlord himself. The defenders had thereby admitted they were sub-tenants. Section 20 of the Crofters Act 1886 required intimation to be made to the proprietor, and no intimation having been made to Mr Dalglish, and he not being a party to the proceedings, the whole proceedings were invalid and must be reduced—*M'Laren v. Finlay*, December 12, 1835, 14 S. 143; *Wallace v. Hume*, July 3, 1835, 13 S. 1034; *Brown v. Heritors of Killenry*, November 15, 1825, 4 S. 174. (2) It was clear from the decision in *Livingstone v. Beattie*, March 19, 1891, 18 R. 735, that the defenders as matter of fact were sub-tenants, and not crofters within the meaning of the Act. No dispute had arisen before the Commission as to whether the defenders were crofters or not. So even if it was assumed that all parties interested were represented before the Commission, no decision upon the point had been given by the Commissioners, and therefore sections 21 and 25 of the Act did not apply. (3) Even if sections 21 and 25 did apply, these sections only referred to the form of procedure before the Commission; they did not extend the jurisdiction of the Commission. The Commissioners had no jurisdiction, if a dispute arose between a landlord and a tenant as to whether the latter was a crofter, to construe the statute so as to determine whether the tenant was or was not a crofter in the sense of the Act—opinion of Lord M'Laren in *Stuart & Stuart v. Macleod*, December 8, 1891, 19 R. 231. A clause such as section 25, giving finality to the decision of a Commission which was not a court of law, must not be construed so as to give power to that Commission to determine whether in law a certain class fell or did not fall within the statute; it merely entitled them to de-

cide on matters of fact and detail—*Lord Advocate v. Perth Police Commissioners*, December 7, 1869, 8 Macph. 244; *Traill's Trustees v. Grieve*, July 11, 1890, 17 R. 1115.

Argued for the defenders, *inter alia*—The decision of the Lord Ordinary with regard to the finality of the decision of the Commissioners was right, and the reasoning in his note was sound.

During the hearing of the case John James Dalglish was sisted as a pursuer in the action.

At advising—

LORD RUTHERFURD CLARK—The pursuers are respectively the proprietor, the liferenter, and the tenant of the farm of Ardslnignish in the county of Argyll. The proprietor was not originally a pursuer, but he has been sisted as such. They seek to reduce an order of the Crofter Commission by which a fair rent was fixed for the holdings of the defenders on the farm above mentioned, and the decree of the Sheriff Court which followed thereon. That order was pronounced on the footing that the defenders are crofters within the meaning of the Act. They maintain that it decides finally that they possess that character, and that they have all the security of tenure which is given to Crofters. The decree of the Sheriff Court was pronounced simply in aid of the order. It does not add to it any legal force.

The proceedings before the Commission originated in an application on the part of the defenders to have a fair rent fixed. They described themselves as holding of the tenant, whom they set forth in the schedule as “the landlord.” The tenant was the only respondent. No intimation was given to the proprietor or to the liferenter, and they made no appearance in the proceedings.

The tenant objected to the applications on two grounds, and on two only—(1) that the applicants did “not at the passing of the Act, and do not now, reside on” their holdings, and (2) that they did not possess any right of grazing on Ardslnignish. They were both repelled, and it was found that the defenders had the right of grazing which they claimed. Thereafter on 27th August 1890 the Commissioners pronounced an order fixing a fair rent. They did nothing more. To this order the Sheriff pronounced a decree conform.

The ground of reduction is that the defenders are not crofters within the meaning of the Act, inasmuch as they are not tenants of the proprietor but sub-tenants only. As I read the judgment of the Lord Ordinary, he is of opinion that they are not crofters, but he has assolized them (1) because the order of the Commission is not subject to reduction at the instance of the pursuers, and (2) because the pursuers are barred from denying that the defenders are crofters in the sense of the Crofters Acts. In giving this judgment he assumes the order to be binding on all the pursuers and to have the effect which the defenders attribute to it. It is on that view alone that the action is of any importance. For

if the right of the defenders could endure no longer than the tenant's lease their security of tenure would not be of much value.

In the case of *Livingstone v. Beattie* it was decided that a sub-tenant is not a crofter within the meaning of the Act. The defenders did not challenge that decision, and I accept it as an accurate statement of the law. Their only effort was to bring themselves within the class of occupiers referred to in the observations of Lord Kinnear—a class, however, which according to the words of his Lordship includes no persons other than tenants of the landlord, though there may be some peculiarity in the tenure. In this they have in my opinion entirely failed. They describe themselves in the proceedings as holding of the tenant, and the proof shows that they possess no other character.

It follows, I think, that the defenders are not entitled to the benefit of the Crofters Act, and that the proceedings of the Commissioners have no legal warrant. But it is said that these proceedings cannot be reduced, and that the defenders are crofters, because the pursuers are barred from denying that they are crofters, or, in other words, that they have by virtue of the order, or by personal exception, acquired rights which they do not possess under the Act. Yet the order does no more than fix a fair rent, leaving open, as it seems to me, the question whether the Commissioners were entitled to pronounce it, and in a case of this kind I see no ground for personal bar, which has not as its basis the consent of the pursuers that the defenders shall possess the rights which they claim. I shall, however, examine the two propositions in their order.

1. The case of the defenders is, that the Commissioners determined that they were crofters; that they were empowered to determine that question by the 21st section of the Act; and that by the 25th their decision is final.

The Commissioners did not determine that the defenders though sub-tenants were crofters. They could not do so. The question was neither raised nor considered. If they had decided that point their decision might have been final by virtue of the 21st and 25th sections of the Act; but in the absence of decision I do not see how these sections can avail the defenders. Of course in proceeding with the applications the Commissioners assume that the defenders were crofters. But assumption is not decision. A decision may be final. An assumption can have no such force. The validity of what follows upon it cannot be determined without determining the validity of the assumption. We cannot, therefore, hold that the defenders are entitled to possess their holdings on payment of the fixed rent, unless we are satisfied that the assumption on which the Commission proceeded is well founded. We know that it was not, and therefore we know that their order was beyond their powers. If we can set it aside on that ground we determine a question which has not been and cannot now be decided by the Commissioners,

but which must be decided by this Court.

But again I fail to see how the order of the Commissioners can be binding on the proprietor or liferenter. By the 20th section it is provided that when an application is made by a crofter to fix a fair rent, intimation thereof shall be given to the landlord. That provision was not observed, and the apparent reason was, that the proceedings were intended to be, as they actually were, proceedings between the defenders and the tenant. It seems to have been thought that the proprietor had no interest. It was a strange error if it was intended that the order of the Commissioners was to be binding upon him.

It is said that the Commission is not a court of law. I agree that it is not, but it is not on that account entitled to bind by its proceedings persons who are not called before it. On the contrary it is in my opinion a condition-*precedent* to its right to consider the application of a crofter, that intimation shall be given to the landlord, and consequently its orders cannot bind him unless that intimation be given. I admit that there may be equivalents for the statutory intimation. The landlord could not found on the omission to give it if he became a party to the proceedings. But I can find no equivalent in the fact that the proprietor knew of the proceedings, or that his factor was bodily present when the Commissioners were disposing of the applications. And I attach no value to the circumstances that Mr Scott, who acted for the tenant, received some money from the agents of the proprietor. The money was not paid for services rendered in the proceedings. It could not be, for no such services were rendered. It seems to have been paid for information given of results.

Indeed, it is to my mind questionable whether the proprietor and liferenter were put under any necessity of reducing the order. They might have treated it as an order which did not affect them, inasmuch as it was pronounced in proceedings to which they were not parties, and as having no legal efficacy, inasmuch as the defenders were not crofters within the meaning of the Act. But as it bears to affect their lands, and has been recorded, I do not doubt their title to reduce.

A separate case is made against the tenant, who was a party to the proceedings. I have to inquire, therefore, whether the order is binding on him, so that during his tenancy he shall be only entitled to exact the rent which the Commissioners have fixed, and so that the defenders shall have the statutory security of tenure during the existence of his lease. I may repeat that this means that the defenders shall have a benefit under the Act, though they are not crofters within the meaning of it.

I have shown that the Commissioners did not decide that the defenders were crofters, and the views which I have expressed on that subject are as applicable to the tenant as to the other pursuers. The order, in so far as it assumes that the defenders are crofters, is not less erroneous in a question

with him than it is in a question with the landlord. It is true that he did not maintain that the defenders did not come within the Act, though they made their applications as sub-tenants only. But I do not see why an order which has not the sanction of the statute should thereby be binding on him. The order is not the less illegal because he did not see the illegality of it. Both parties were under a common error; but that error will not enlarge the powers of the Commissioners or the right created by the Act. If it had been embodied in a final decision it might be impossible to give redress. But nothing less will disable the Court from setting aside orders which are beyond the powers of the Commissioners, or prevent the person who has suffered by the error from having it set right. There is no time prescribed within which the objection must be taken.

For these reasons I am of opinion that the order of the Commissioners may be reduced at the instance of the pursuers.

2. But it is urged that the pursuers are barred from denying that the defenders are crofters within the meaning of the Act. From what I have said it will be apparent that, in my opinion, this exception cannot be pleaded against the proprietor and liferenter. They were not called to the proceedings, nor did they take any part in them. I see nothing that can be alleged against them, except that they knew of their existence. But I cannot infer from any such fact that they consented to enlarge the rights of the defenders, and unless there be such consent I can see no foundation for the plea of bar.

Nor in the case of the tenant can I see any evidence of such a consent. Both parties were insisting on what they understood to be their legal rights. The defenders were not asking more, and the tenant was not conceding more. They were under a common error. But I see no reason why the error should not be set right. It is utterly inequitable that one party should suffer, and that the other party should benefit by it. I can conceive a case where the parties have so acted that there could not be *restitutio in integrum*, and in which redress could not be given without injuring one of them. We have no such case before us. In setting aside the order we leave things as they were, and as they have always been. We do nothing more than refuse to the defenders a benefit to which they have no legal claim.

A question has been raised whether a decision of the Commissioners to the effect that the defenders were crofters would be final under the 25th section. I do not enter upon it, because it does not arise. I may say, however, that it is to my mind attended with grave doubt, for I am not willing to construe the Act as giving to a Commission, which is not a court of law, the power of deciding important legal questions without any review. And I may say further that I do not see how any such decision could be binding on persons who were not parties to the proceedings in which it was pronounced.

LORD JUSTICE-CLERK—That is the opinion of the Court.

The Court recalled the interlocutor of the Lord Ordinary, and pronounced decree of reduction and removal in terms of the conclusions of the summons, the decree of removal to take effect at Whitsunday 1895.

Counsel for the Pursuers—H. Johnston—C. N. Johnston. Agents—Dalglish & Bell, W.S.

Counsel for the Defenders—Salvesen—Wilton. Agent—Thomas M'Naught, S.S.C.

Tuesday, November 20, 1894.

OUTER HOUSE.

[Lord Wellwood.

DOCHERTY v. GLASGOW TRAMWAY  
AND OMNIBUS COMPANY,  
LIMITED.

*Reparation—Master and Servant—Master's Responsibility for Act of Servant—Scope of Employment—Ejection from Tramway Car.*

In an action of damages brought against a tramway company, the pursuer, a girl of 13, averred that she had been invited by the driver of one of the defenders' cars to come on to the front of the car; that the driver, after allowing her to remain there for some time ordered her to alight, but refused to stop the car for that purpose; that she was afraid of being pushed off the car, and accordingly jumped down, with the result that she fell and sustained serious injuries. It appeared from the bye-laws of the company that it was against the rules for a driver to allow persons to travel on the front of the car.

Held (by Lord Wellwood) that the action fell to be dismissed, in respect that the driver, having acted contrary to the rules of the company in inviting the pursuer to come upon the front of the car, could not be held to have acted within the scope of his employment in removing her therefrom.

This was an action of damages brought by Jane Docherty, a girl of 13, with consent of her father, against the Glasgow Tramway and Omnibus Company, Limited, concluding for payment of £500 as damages.

The pursuer averred—“(Cond. 2) On the evening of Saturday, 31st March 1894, the pursuer was in Paisley Road, Glasgow, in company with her sister and another girl friend named M'Leod, about her own age. When they were near Clutha Street, one of the defenders' cars came up, going from Ibrox to Paisley Road Toll. The driver of the said car was named Edward Sweeney, and Sweeney, who, it appears, was an acquaintance of the girl M'Leod, invited the three girls to come on to the said car, and asked them to come to the front part of the car, where he himself was. The pur-