

himself in the character which he professes in the obligatory document. I think there is here a perfectly clear obligation by the defender to pay the premiums, and that it is unnecessary for the pursuers to set out that the debt intended to be secured has not been paid.

It is also said that the three documents, viz., the letter, the contract between Tagg and the pursuers, and the policy, do not follow the natural order of execution, but, in my opinion, when documents are intended to be contemporaneous and have a relation to each other, there is no materiality in any variation of dates. It would be impossible for persons at a distance from each other to carry on business if it were necessary that all documents should be signed on the day of settlement. It is therefore immaterial, if the documents are identified as those referred to, which of them was signed first and which last. So much for the pursuers' case, which I think is quite a relevant one.

The defence is that the defender was induced to grant the obligation by false representations made to him by Tagg "for himself and on behalf of the pursuers." I think that on a fair construction the averment only means that this was Tagg's motive in making the representations. I cannot read it as an averment that the pursuers knew that certain representations were to be made and authorised them. No doubt there exists in our law a right of rescission of a contract on extrinsic grounds, such as error or fraud, but that right we know is strictly limited and defined, and any extension of those limits would tend to impair the validity and efficacy of contracts. I think there are good reasons for strictly construing the relevancy of averments in cases such as this, because the hypothesis on which relief is granted is that the party has subsequently found out facts which had he known them would have prevented him from entering into the contract. It follows that he who seeks for equitable relief must disclose the circumstances under which his claim of relief arises. I see here no statement which satisfies that condition on which alone equitable relief can be given.

I therefore agree with your Lordships that the judgment of the Sheriff is correct.

LORD KINNEAR concurred.

The Court affirmed the interlocutor of the Sheriff dated 5th February 1900, and refused the appeal.

Counsel for the Pursuers—Salvesen, Q.C.—Younger. Agent—G. A. Munro, S.S.C.

Counsel for the Defender—W. Campbell, Q.C.—Hunter. Agent—D. Hill Murray, S.S.C.

Saturday, November 24.

SECOND DIVISION.

[Sheriff of Caithness.

DUNBAR'S TRUSTEES v. BRUCE.

Lease—Tenant or Servant—Subjects Held as Part Remuneration for Services—Termination—Removing—Summary Ejection—Warning—Notice to Quit Part of Subjects only.

The proprietors of an estate engaged a gardener to keep in order the policy grounds, his remuneration being £15 of yearly wages, the occupation of the garden for his own use and profit, and the occupation of a cottage situated in the garden which was proved to be necessary to the occupation of the garden as a market garden. To enable him to work the garden as a market garden he took over at a valuation a horse and van, certain garden tools, and flower-pots. In certain advertisements relative to the estate the proprietors described the gardener as tenant of the cottage; he was also entered in the valuation roll by their factor as tenant of the garden, and paid the rates effecting thereto. On 25th August the proprietors gave him notice of dismissal as at the ensuing term of Martinmas, and intimated that he "would require to remove without further notice from the gardener's cottage." On his refusal to do so they raised an action for summary ejection.

Held (diss. Lord Moncreiff) that warrant for summary ejection must be refused, in respect (1) that the defender's tenure of the garden and cottage was that of a tenant, and not a condition of his service as gardener; and that as the cottage and garden were occupied by him as a single subject, notice to quit the cottage only was ineffectual; and also (2), *per* Lord Trayner, that the pursuers in any view had failed to show a *prima facie* case of occupation by the defender without any right or title.

Mrs Jane Louisa Duff Dunbar and others, the trustees of the late Garden Duff Dunbar, proprietors of the estate of Hemp-riggs, Caithness, raised an action against Donald Bruce, gardener, Ackergill, Wick, in the Sheriff Court at Wick, in which they prayed the Court summarily to eject the defender "from the gardener's cottage at Ackergill, occupied by him as part of the consideration for his services as gardener foresaid."

The pursuers pleaded—"(1) The service of the defender to the pursuers having terminated at Martinmas 1899 (28th November), and his right to occupy the subjects above specified having thereupon ceased, and he now being in vitious and precarious possession, and having refused to remove therefrom, the pursuers are entitled to warrant and decree as craved."

The defender pleaded—"(1) The defender being tenant of the subjects in question, and having received no legal notice of the

termination of his tenancy, his right to occupy same has not ceased, and the pursuers are not entitled to warrant of ejection. (2) The defender's occupancy being that of a market gardener, he is entitled to receive the notice of termination of tenancy provided by the Market Gardeners Compensation (Scotland) Act 1897, and the Agricultural Holdings (Scotland) Act 1893."

Prior to March 1889 the defender had been employed for a number of years as gardener at Ackergill. In or about that date Mr Dalgleish, who was at that time the sole trustee on the estate, contracted with the defender that he was to keep in order the policy grounds, garden, and avenue at Ackergill Tower, for which services he was to receive the sum of £20, also to have the occupancy of the cottage referred to in the prayer of the petition, and to have the occupancy and use for his own profit of the garden, with his cow's keep. The cottage referred to was situated in the garden. The defender entered upon the occupancy of the garden and cottage, and took over at a valuation from the pursuers a horse and van, and also certain garden tools, and a quantity of flower pots, for the purpose of working the garden as a market garden.

In consequence of differences between the parties, the pursuers in February 1890, inserted the following advertisement in the local newspaper—"To let, Ackergill garden, entry at 1st March 1890. Conditions of let can be seen," &c. In advertisements of the estate shootings they stated that the garden was let to a tenant, who was obliged to supply what was required at market prices.

After some negotiation the defender's engagement was continued, the money payment to him being reduced to £15, but the other conditions remaining unaltered.

On 8th April 1898 Alexander Dunnet, the pursuers' land steward, wrote to the defender in these terms—"I am instructed by Mrs Duff Dunbar to ask if you will remain on in your present place on the following terms, viz., that you get the garden as at present . . . that you get the same money as at present for keeping the policy grounds in good order, . . . and that you bind yourself to remove yourself and family, goods and gear, from your house and garden at Ackergill on one week's notice, to be given at the pleasure of Mrs Duff Dunbar."

On the same date the defender replied—"I received yours of the 8. I agree to keep the gardens and grounds on your terms, and to get valuation for all growing stuff belonging to me at my out going, also for manures which I put on, also for all implements which I have in working the gardens at Ackergill Tower."

On 25th August 1899 Mr Smith, the pursuer's law-agent at Wick, sent a registered post letter to the defender in these terms—"As factor for the trustees of the late Garden Duff Dunbar, Esquire of Hempriggs, I now give you notice that your services as gardener at Ackergill gardens and policy grounds will not be required by them after Martinmas next (28th Novem-

ber) 1899, and will then be dispensed with. You will therefore require to remove at that term, without further notice, from the gardener's cottage at Ackergill presently occupied by you."

It appeared from the valuation rolls for the years 1889 to 1899 that the defender was entered as tenant of the subjects in question, and it was proved that he had paid the assessments levied on him as such. The returns for the valuation rolls were signed by the pursuer's factor. It was proved that the cottage was necessary to the defender's occupation as a market gardener, but there was no evidence that it was necessary to the service.

After a proof, the material facts established by which are narrated above, the Sheriff-Substitute (MACKENZIE), on 27th February 1900, pronounced the following interlocutor:—(1) Finds that the pursuers are heritable proprietors in trust of the estate of Hempriggs, and that the defender is a gardener: (2) Finds that in or about March 1889 the pursuers contracted and agreed with the defender that he was to keep in order the policy grounds, garden, and avenue at Ackergill Tower, for which services he was to receive £20 in money, and also to have the occupancy of the cottage referred to in the prayer of the petition, and was to have the occupancy and use for his own profit of what is known as the upper garden, besides a cow's keep: (3) That the defender entered upon the occupancy of the upper garden and cottage as a market-gardener: (4) That the pursuers in February 1890 advertised the garden to let in terms of the advertisement quoted in the second answer for the defender, but that after some negotiation the defender's occupancy thereof was continued, the money payment to him being reduced to £15, and the other conditions remaining as before: (5) That the defender has since occupied the cottage and garden on these terms: (6) That on 25th August 1899 the law-agent for the pursuers wrote the letter No. 26 of process, by which the defender's services as gardener were dispensed with by the pursuers: (7) Finds that at his entry the defender purchased from the pursuers a horse and van, gardening tools, and flower-pots, for the purpose of working the said garden as a market-garden: (8) Finds that the defender has been entered as tenant by the pursuers in the valuation roll from the year 1889 to the year 1899, and has paid all assessments levied on him as such: (9) That it is not proved that the said cottage is necessary to the service, but that it is proved to be necessary to the defender's occupation as a market-gardener: Finds in law that the defender, besides being a servant of the pursuers, occupies the cottage in question as a tenant, and that the said tenancy of the cottage in question, although forming part of the defender's remuneration, was not held during his continuance in any office, appointment, or employment of the landlord: Finds that said tenancy has not been competently brought to an end, and that the

pursuers are not entitled to the warrant craved for in the petition: Therefore sustains the defences; assolizies the defender from the conclusions of the petition; finds the pursuers liable to the defender in the expenses of process." &c.

The pursuers appealed to the Sheriff (WILSON), who on 30th April 1900 recalled the Sheriff-Substitute's interlocutor, found in fact that the defender's occupation of the subjects was conditional on his continuance in the pursuers' service as their gardener, and was part of his remuneration in that capacity; found in law that the defender having been discharged from the pursuers' service as at Martinmas 1899, was not entitled to remain in possession of the subjects, and granted decree of ejection.

The defender appealed to the Court of Session, and argued—The whole circumstances pointed to the conclusion reached by the Sheriff-Substitute, viz., that the defender's occupation was that of a tenant and not of a servant. His tenure was that of a verbal lease for one year, which had been renewed by tacit relocation. It was essential that the defender should have possession of the garden all the year round, otherwise he would lose the labour and money that he had put into it; and the cottage was an inseparable part of the subjects let. It was, proved to be essential to the defender's occupation as a market gardener, while on the other hand it was not shown to be essential to the service. That was sufficient to determine the question of tenancy or service—Fraser, Master and Servant, p. 7; *Reg. v. Spurrell*, 1865, L.R., 1 Q.B. 72, per Cockburn, L.C.J. Further, the fact that the defender supplied his own tools and horse and van pointed to tenancy and not service. It was important to notice that the defender's letter of 8th April 1898, in which he made claims which were competent to him only as a tenant, was not repudiated by the pursuers. The pursuers were barred, *personali exceptione*, from pleading that the defender was not a tenant by causing him to be entered as such in the valuation roll and allowing him to pay the rates. 2. If the defender was a tenant he was entitled to six months' notice, under section 28 of the Agricultural Holdings Act 1883. The letter of 25th August 1899 giving him notice to quit at Martinmas was therefore bad. Besides, it was incompetent to give notice to quit a part of the subject let. The subject let was a *unum quid*, and to eject him from part was to make a new contract without the consent of one of the parties to it. 3. In any view, summary ejection was incompetent, except when the defender was occupying without any title at all—*Gibson v. Gibson*, March 8, 1899, 36 S.L.R. 522; *Robb v. Brearton*, July 11, 1895, 22 R. 885.

Argued for the pursuers and respondents—The Sheriff was right in holding that the contract was one of service and not of tenancy. No money rent was ever fixed, so that one essential term of a lease was wanting. If the subjects had been actually let the rent would have been much higher. The contract was indivisible, and

therefore the defender's service having come to an end, he could no longer claim to remain in occupation of the subjects—*Young v. Paton*, 1808, Hume 582. If the contract was divisible, the cottage was separate from the garden, and was an essential part of the offices attached to the mansionhouse. There was a presumption against its being let separately. The circumstances relied on by the defender as showing tenancy were not conclusive. The entry of the defender in the valuation roll as tenant was the act of the pursuers' agent Mr Smith, who was unaware of the terms of the contract. Even if the pursuers were bound by their agent's act, the entry in the valuation roll could not be used to contradict the terms of the contract—*Ratray v. Leslie's Trustees*, June 11, 1892, 19 R. 853. The advertisements in which the defender was described as tenant were also framed by Mr Smith. The description was of no importance for the purpose of the advertisement. Besides, it was not shown that the proposal to let applied to the cottage—the advertisement mentioned only the garden. The terms of Dunnet's letter of 8th April 1898, asking if the defender would "remain on in his present place," were inconsistent with the idea of tenancy. 2. But if the defender should be held to be a tenant, then he had received legal notice to quit in Mr Smith's letter of 25th August 1899. That was sufficient notice after the defender's acceptance of the terms of Dunnet's letter of 8th April 1898, one condition of which was that he should remove on a week's notice. But it was well settled that where subjects of small value were held under a verbal lease 40 days' notice, however informal, was sufficient—*Brown v. Hill*, July 3, 1798, Hume, 563; *Morris v. Allan*, March 8, 1839, 1 D. 667; *Chirnside v. Park*, March 8, 1843, 5 D. 864; *Lambert v. Smith*, November 11, 1864, 3 Macph. 43. In any view, the Agricultural Holdings Act 1883 did not apply to the cottage, from which alone the pursuers sought to eject the defender, but only to the garden.

LORD JUSTICE-CLERK—It is certain that the defender in this case held the occupation of the cottage from which the pursuers desire to eject him as part of an arrangement whereby for a certain sum of money annually paid, and for the right to cultivate for his own profit certain garden ground on the Ackergill estate, he undertook to do gardening work in the gardens and policies of the estate. He was dismissed from the service, and the pursuers desire to eject him from the cottage, as at the date of his dismissal, while he still remains in possession of the garden ground cultivated for his own profit. Such a case, where the incidents of service and occupation of lands as part remuneration for service go together, must be considered as to its circumstances and surroundings in order to arrive at the conclusion of the question whether there is tenancy or only an absolutely precarious occupation which ceases to be of right whenever the service is brought to an end.

The facts are, that when the defender entered to the duties and took over the occupation of the cottage, the tools, flower-pots, and a pony and van, formerly used for taking produce to the market for the estate, were taken over at a valuation by him—a proceeding not very consistent with the idea of service, and pointing to a contract which, although involving services, had more in it than a relation of master and servant. It is certain here that to some extent the defender's remuneration was precarious, depending upon successful cropping and a good market. It is, I think, established by the evidence, that the cottage from which it is sought to eject the defender is a necessary appanage of the upper garden, in which it is situated, and that without it the defender cannot work the garden properly. Yet, strangely enough, although there is no difference between the tenure of the one and the other, they being held as under the same bargain, the pursuers appear to hold that he was not truly the tenant of the cottage while he was tenant of the garden. Their position in this matter is not easy to understand. To hold that they are separable is not, in my opinion, possible. He held the cottage as part of his holding of a market-garden which under the agreement he was certainly carrying on upon his own account. The two must be taken as going together. These, which are the main circumstances of the case, point with considerable directness to the justice of the defence stated. And there is real evidence under the pursuers' own official's hand that tends strongly to support the view, that in entering into the arrangement tenancy, and not service occupation, was the true nature of the transaction. For the pursuers have themselves regularly returned the defender in the valuation roll schedules as "tenant" as well as occupant, and have thus caused him to be assessed as such, with the result that the tenant's taxes have been taken off the pursuers' burdens and have been exacted from the defender. Thus they have, by writing in a statutory return, false statement in which is punishable by law, held him out as being the tenant to their own advantage. This continued during the first years of the occupancy, and the defender has been no party to any alteration. Indeed, the change was not made till about the very time when the first step was taken to oust him from his possession. Further, the pursuers themselves in negotiation writings regarding let of shooting, held the defender out as a tenant, and as such under agreement bound to supply vegetables at market prices to the shooting tenant.

The sole question now before this Court is, whether upon the evidence decree of ejection from the cottage was the right of the pursuers when the summons was raised. I hold that the pursuers have failed to prove this, and substantially on the ground stated by the Sheriff-Substitute, and therefore that the Court should recal the interlocutor of the Sheriff and sustain the decision of the Sheriff-Substitute.

LORD TRAYNER—The decision of the question raised by this appeal is, I think, attended with considerable difficulty, but on consideration I have come to the conclusion that the Sheriff-Substitute was right, and that the appeal should be sustained. It does not appear necessary to go into any detail of the facts out of which the question has arisen, but I shall state shortly the considerations which have led me to the conclusion I have arrived at.

The application made by the respondents to the Sheriff was for a warrant summarily to eject the appellant from a cottage situated on the respondents' property. The appellant had been in the respondents' service as gardener for many years prior to March 1889. He ceased then, however, to be the gardener—that is to say, a servant on monthly or yearly wages, because, as I understand, the mansion-house ceased to be occupied by the proprietor, and was only occupied during the shooting season by the sporting tenant; and a new arrangement was made at the date I have mentioned between the appellant and the respondents' man of business. The arrangement was that the appellant should keep the avenue and policies in good order, and in return should get £20 a-year in money (subsequently reduced to £15), the use of the garden, and of the gardener's cottage, which is situated in the garden. The respondents have now terminated this arrangement, and they seek to eject the appellant from the gardener's cottage, on the ground that his occupation thereof was part of his remuneration for service, and that as the service has now ceased, the right to occupy the cottage has also ceased.

Now, I observe at the outset that a warrant for summary ejection is not granted unless it is *prima facie* plain that the occupier is one who has and can pretend no title to the occupation challenged. I think that can scarcely be said to be the case here, for the appellant has at all events stated a case which makes it difficult to pronounce off-hand that he is a mere squatter. He might not be able successfully to resist decree in an action of removing, but it seems to me that the defence he here maintains is sufficiently plausible to prevent decree of summary ejection. But I am disposed to go much further than that, and to hold it made out that the appellant's occupancy of the cottage in question is the occupancy of a tenant as distinguished from the occupancy of a servant, and that for the following reasons—(1) The relation between the parties prior to March 1889 then underwent a change. The appellant was formerly a gardener, who not only took charge of the avenue and policies, but cultivated the garden for his employers' benefit and at his employers' expense; but after March 1889 the service rendered was less, and the cultivation of the garden was for his own benefit and at his own cost. The right to occupy the cottage may reasonably be supposed to have also undergone a change, consequent upon the changed relation between the parties; so that he who had ceased to be gardener (in the ordinary sense), and had

become the tenant of the garden, became the tenant of the gardener's cottage—not in respect of his former relation, that is, servant—but in respect of his altered relation, that is, tenant of the garden. (2) When the appellant entered on the new arrangement in 1889, he took over at a valuation and paid for the respondents' horse and van (by which to take the garden produce to market), as well as the garden implements and tools. Now, a servant in the position of a gardener does not supply his own implements and tools—his master supplies them, but a tenant has to supply them for himself. In like manner the gardener does not supply the seeds, &c., each year at his own expense, nor does he receive or take as his own the produce of the garden. A tenant does both. (3) When the respondents thought of terminating their connection with the appellant in 1890 they advertised that the garden in question was "to let"—that is, they advertised for a tenant to take the appellant's place—not for a gardener or servant. And, consistently with this, when advertising for a shooting tenant, they intimated that the garden was let to a tenant who would provide the shooting tenant with garden produce at market rates. (4) From Whitsunday 1890 to Whitsunday 1899 the respondents' local man of business returned the appellant's name as "tenant" of the garden, and he was so entered on the valuation roll of the county for these years. This involved liability by the appellant for tenant's rates, which he paid. If he was not tenant, but servant, then these rates were properly the obligation of the respondents. The respondents (or their agents) must have known this. I cannot suppose that they allowed the appellant to pay rates for which they were alone responsible, and I can only account for their conduct by holding that the appellant was, in their knowledge and belief, the tenant of the garden.

By this application, however, the respondents do not seek to eject the appellant from the garden—only from the cottage. I think the occupancy was one, and included both cottage and garden. There is abundant evidence to show that the cottage was and is necessary for the proper working of the garden as a market garden, and I think the one cannot be severed from the other. In the letter of 22nd March 1889, which sets forth the terms of what I have called the new arrangement, the return to be made to the appellant for keeping the avenue and policies in order is, *inter alia*, "the proceeds of the garden . . . and a labourer's cottage." We were told at the debate that the labourer's cottage referred to is the cottage in question. Now, there is here no distinction drawn between the cottage and the produce of the garden as being remuneration of different kinds, or to be treated on different principles. Was the produce of the garden to cease to be the appellant's on the termination of service at the employers' pleasure? That will hardly be maintained. If not, why should the use of the cottage?

These are the considerations which seem

to me to point somewhat conclusively in favour of the appellant's contention, and in my mind more than outweigh any difficulty arising from the fact that (1) no specific rent was fixed for the cottage; and (2) no definite term or termination assigned to the tenancy. There was no need for the first if the cottage and garden went together; there need be no dubiety about the second. The appellant says he is a yearly tenant, and that his lease began in March. It will therefore terminate in March. This is not the usual term, no doubt; but it is quite a legal term if the parties like to make it so by their agreement. One question only remains, whether, assuming that the appellant was tenant of the cottage, he had been duly warned to quit? I think he was not. The appellant never got notice to quit the garden, and notice to quit the cottage alone would be ineffectual if, as I think, the cottage and garden formed one subject of occupation.

LORD MONCREIFF—I regret to differ from your Lordships, but I am of opinion (though not without hesitation for reasons which I shall afterwards mention) that the Sheriff is right in holding that the defender's occupancy of the gardener's cottage at Ackergill terminated along with his contract of service as gardener at 28th November 1899. The pursuers dismissed the defender as at that date, having given him warning on 25th August 1899 that his services would not be required after Martinmas, and having also warned him to remove at that term from the gardener's cottage. This process was brought in December 1899 to have the defender summarily ejected and removed from the cottage in question on the footing that his occupation of the cottage was merely part of the remuneration for his services as gardener.

Now, what is the defence? It is that the defender occupied the cottage and also the upper garden under a separate and independent contract of lease from year to year; that he was therefore entitled to six months' formal notice of removal under section 28 (B) of the Agricultural Holdings Act 1883, and that as he did not receive such notice six months before 1st March 1900 (the end of the current year) he was entitled by tacit relocation to continue in occupation of the cottage and the garden until 1st March 1901.

If the defender were right in maintaining that he occupied the house and garden under an independent contract of lease, the result would be this—that while he was dismissed—I assume properly—from his position as gardener, he would still be entitled to remain in occupation of the garden and gardener's house of the estate for another year and a-half. And if he had died instead of being dismissed, his heir or legatee would, on the same hypothesis, have had the same right.

He would also be entitled to the benefit of the provisions of the Agricultural Holdings Act 1883 and the Market Gardeners Act 1897.

Is it to be held that such consequences were in view of the parties when the agreement was first entered into in 1889? I think not. In the first place, I may point out that it is by no means clear that even if the defender had a lease of the upper garden the cottage was let along with it. The cottage was the gardener's cottage of the estate—at least it had been occupied by the defender for many years before 1889 in his capacity of gardener. After the new arrangement was made, by which the defender agreed, as part of his remuneration, to accept the produce of the upper garden, he still continued (also as part of his remuneration) to occupy the cottage as gardener of the estate, although no doubt the cottage was convenient for the purpose of working the upper garden to advantage. And therefore I am not satisfied that the cottage, which is the only subject we have to deal with here, stands in the same position as the upper garden.

But apart from this, the occupation both of the cottage and the garden was given and accepted simply as part of the defender's remuneration. Mr Dalgleish thus states the terms in his letter of 29th March 1899—"That he (the defender) receives the sum of £20 and the proceeds of the garden with his cow's keep as now, and a labourer's cottage, in exchange for his keeping the whole place within the walls and the outside grounds from the top of the avenue to the tower, all as at present falling under his duties." It will be observed that the cottage and garden are not here named together. He was to have the garden for a year, he being a yearly servant. It clearly appears from the passage which I have quoted that the use of the garden and the occupation of the cottage and the cow's keep were all simply part of his remuneration.

And this was plainly so understood by him. On two occasions the agreement nearly came to an end. In February 1890, the defender having been verbally given notice to quit, Mr Dalgleish actually advertised the garden to let. According to the defender's present contention he was entitled as of right to remain in occupation of the garden for another year, but he did not then suggest that he was entitled to formal notice to remove, although the absence of it would have entitled him to remain for another year. On the contrary, he submitted as a condition of his being allowed to remain to accept £15 money wages instead of £20, and on that footing to continue from year to year to act as gardener, and occupy the cottage and garden till 1899.

Again, in April 1898 he was willing on certain terms to remove from the house and garden at Ackergill on one week's notice; and here again he did not draw any distinction between his tenure of those subjects and the duration of his service.

Lastly, if his tenure of the cottage and garden did not terminate at Martinmas 1899, on what terms did he thereafter continue in occupation? Previously the return to his employer for his tenancy,

if such it was, consisted of his services as gardener. These ceased at Martinmas 1899. What rent, if any, was thereafter payable? If the defender's estimate of the value of his services is correct, his occupation of the garden was equivalent to at least £35 in money—that is taking the most moderate figure spoken to in the proof, viz., £50 (the defender I think says £80), as the value of his services. In the few cases in which a dismissed servant has been held entitled to continue in occupation of a house belonging to his employer after dismissal, there has been not merely a fixed term of occupation but a fixed rent which could at once be ascertained notwithstanding the termination of the contract of service. The lease with all its essentials could stand alone. Here that is not the case.

All these considerations satisfy me that there was no independent lease of the cottage. There are considerations on the other side which deserve notice although they are not in my opinion sufficient to counterbalance those which I have mentioned. By far the most formidable are the entries in the valuation roll. It seems that for 10 years—from 1889 to 1898—the witness Mr William Smith, who collected Hempriggs rents for the pursuers, signed the returns for the valuation roll; and he returned the defender as tenant of the garden of Ackergill at a uniform rent of £15, and in respect of that entry the defender has paid county rates and poor rates. This is certainly a strong point against the pursuers and I have been in some doubt whether it was not sufficient to bar them personally from disputing that the defender was an ordinary tenant. If the pursuers are right the defender should have been entered as "inhabitant occupier," and the pursuers must suffer for the carelessness of their official. But when the return is examined, it is far from conclusive. In the first place, it does not refer to the cottage, which in all arrangements with the defender was dealt with as a separate subject. The smallness of the rent inserted indicates this. Secondly, the rent entered, £15, was not, in any view which can be taken, the value which the use of the garden represented in calculating the remuneration to the defender. According to the evidence it was at least £35. And thirdly, although it is true that the defender paid taxes, these in ten years only amounted to £12, 11s. 1d.

The only other matters of importance are that when the agreement was entered into the defender purchased certain garden tools and a horse and van; and that he claims compensation for manures and plants put by him into the garden. As against this it must be considered that he got the full benefit of the fruit trees and plants which were in the garden when he got the use of it, and also, during a certain time, of the manure. It may or may not be that he has a claim for compensation against the pursuers, although in the view I take of his rights I think this more than doubtful. But from all that I can see of

the case I do not think that the defender is much to be pitied. The garden has evidently proved to be a good speculation; and although the pursuers sought to remove him from the cottage summarily they have allowed him to occupy the garden for a full year after he ceased to be in their service. On the whole matter, although I am very much dissatisfied with the way in which the proof has been taken (many matters which could easily have been made clear being left uncertain) and with the carelessness of the returns for the valuation roll, I am satisfied that the good faith of the agreement was that the defender's occupation of the cottage and garden was to terminate with the defender's service as gardener.

LORD YOUNG was absent.

The Court recalled the interlocutor of the Sheriff, found in fact and in law in terms of the interlocutor of the Sheriff-Substitute, of 27th February 1900, and assoiized the defender.

Counsel for the Pursuers and Respondents — Jameson, Q.C. — M'Lennan. Agents — Mackenzie, Innes, & Logan, W.S.

Counsel for the Defender and Appellant — Campbell, Q.C. — Hunter. Agent — Thomas Liddle, S.S.C.

Saturday, November 24.

SECOND DIVISION.

[Exchequer Cause.

THE SCOTTISH WIDOWS' FUND AND LIFE ASSURANCE SOCIETY v.

ALLAN.

Revenue — Inhabited-House Duty — Exemption of Business Premises — Mutual Insurance Society — Customs and Inland Revenue Act 1878 (41 Vict. cap. 15), sec. 13, sub-sec. 2 — "Profit" — Occupied "Solely."

The Customs and Inland Revenue Act 1878, section 13(2), provides that "Every house or tenement occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, shall be exempted from" inhabited-house duty.

An insurance society, the membership of which consisted exclusively of holders of mutual insurance policies and purchasers of annuities, and which did not itself directly insure or grant annuities in favour of persons other than members, derived a large part of its income from the investment of its accumulated funds, and also did business with strangers to the society by re-insuring the risks of other insurance companies and by the purchase of reversions.

Held that the premises occupied by the society exclusively for the purposes of its business were entitled to exemption from inhabited-house duty.

At a meeting of the Commissioners for General Purposes, acting under the Property and Income-Tax and Inhabited-House Duty Acts for the County of Edinburgh, held at Edinburgh on 26th July 1900, the Scottish Widows' Fund and Life Assurance Society appealed against an assessment for the year 1898-99 of £45, being inhabited-house duty, at the rate of 9d. per £ on £1200, the annual value of the premises at 9 St Andrew Square, Edinburgh, owned and occupied by the Society.

The following facts were stated in the case as admitted:—"The premises, . . . with the exception of the portion used by the caretaker as his residence, are occupied by the Society exclusively for the purposes of its business. The Society is now constituted and regulated by various private Acts of Parliament. "The Society has no share capital and there are no shareholders. Its membership consists of the holders of policies of life insurance effected with the Society, whether these carry a right of participation in the surplus assets of the Society or not, and of the purchasers of annuities. The purchasers of annuities have no right of participation in the surplus assets of the Society. The Society does not insure or grant annuities in favour of persons other than its members, except in the case of re-assurances of other companies. . . . Policy-holders may surrender their policies for a money-payment, or they may assign or transfer their interest in the said Society. . . . In investing its funds the Society, *inter alia*, purchases stock, shares, and securities. At the end of each period of seven years there is an investigation into the affairs of the Society, and if the total sum of the assets exceed the total sum of the liabilities, an amount not more than the excess of the assets is allocated among the holders of participating policies by way of additions to the sums assured, but with the option of accepting the present cash value of these additions, or of having them applied in reduction of future premiums. In the case of policies which become claims during any of the septennial periods, additions may be and actually are made in anticipation of the surplus to be ascertained at the end of the period. The holders of participating policies constitute approximately 95 per cent. of the whole membership of the Society. The non-participating policy-holders constitute rather less than five per cent., and the annuitants rather less than one per cent. At the end of 1898 the funds of the Society amounted to £14,544,766. During the year 1898 the Society received—(1) Income from investments, £558,814; (2) Premiums in respect of policies of assurance, £998,702; (3) Sums paid for the purchase of annuities granted by the Society, £12,811. Income-tax is paid upon the whole of the income received in the United Kingdom from the Society's invested funds. This income, so far as received from the United Kingdom without deduction of income-tax, is the subject of direct assessment. There is no other in-

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