dismiss a person by resolution it must be by a resolution in writing duly recorded and authenticated. In the absence of any authority for the view that a verbal resolution is sufficient I should suppose that 'resolution' must mean a resolution made and recorded in the ordinary way. In this case, for some reason which was unexplained, there was no recorded resolution dismissing the master of the school, and in these circumstances I think the Lord Ordinary was right in refusing to interdict him from discharging his duties.

LORD KINNEAR concurred.

The Court adhered.

Counsel for Complainers and Reclaimers —Salvesen, K.C.—W. Thomson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Counsel for Respondent—T. B. Morison —J. G. Jameson. Agents—Kirk, Mackie, & Elliot, S.S.C.

Friday, February 17.

FIRST DIVISION.

[Sheriff Court at Stornoway.

MACKENZIE *v.* MACKENZIE (MACKENZIE'S TRUSTEE).

Crofter—Forfeiture of Tenancy—Renunciation of Tenancy -- Renunciation by Bankrupt Crofter with a View to Trustee in Bankruptcy Claiming Compensation for Improvements--Bankruptcy--Crofters Holdings (Scotland) Act 1886 (49 *and* 50 *Vict. c.* 29), *secs.* 1, 3, 7, *and* 8.

The Crofters Holdings (Scotland) Act 1886, sec. 3, provides that a crofter's tenancy shall be forfeited upon breach of any of certain statutory conditions—one of these conditions being the doing of "any act whereby he becomes notour bankrupt." Section 7 gives a crofter a right to renounce his tenancy, and section 8 a right on such renunciation to compensation for any permanent improvements.

A crofter's estate having been sequestrated, but his landlord having taken no steps to have him removed as in breach of the statutory conditions, the trustee applied to the bankrupt to execute a renunciation of the tenancy with a view to a claim to compensation for improvements. The bankrupt refused, and the trustee applied to the Sheriff to grant a warrant to compel the bankrupt to execute a renunciation of his tenancy.

Held that the bankrupt had no power to renounce his tenancy under section 7, inasmuch as it was already forfeited under section 3.

The Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict. c. 29), sec. 1, provides—"A crofter shall not be removed from the holding of which he is tenant except in consequence of the breach of one or more of the conditions following (in this Act referred to as statutory conditions), but he shall have no power to assign his tenancy—(1) The crofter shall pay his rent at the terms at which it is due and payable. (2) The crofter shall not execute any deed purporting to assign his tenancy. . . . (6) The crofter shall not do any act whereby he becomes notour bankrupt within the meaning of the Bankruptcy (Scotland) Act 1856 and the Debtors (Scotland) Act 1880, and shall not execute a trust-deed for behoof of creditors." . . . Section 3 . . . — "When two years' rent of the holding is due and unpaid, or when the crofter has broken any other of the statutory conditions, he shall forfeit his tenancy, and shall be liable to be removed in manner provided by the 4th section of the Act of Sederunt anent removing of the 14th December 1756." Section 7—"A crofter shall be entitled upon one year's notice in writing to the landlord to renounce his tenancy as at any term of Whitsunday or Martinmas." Section 8—"When a crofter renounces his tenancy, or is removed from his holding, he shall be entitled to compensation for any permanent improvements, provided that" . . . . Section 16—"A crofter may by will or other testamentary writing bequeath his right to his holding to one person, being a member of the same family—that is to say, . . . subject to the following provisions"—. . .

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79), sec. 4, provides— . . . "The words 'property' and 'estate' shall, when not expressly restricted, include every kind of property, heritable or moveable, wherever situated, and all rights, powers, and interests therein capable of legal alienation, or of being affected by diligence or attached for debt." . . . Section 81— . . . "And the bankrupt shall at all times give every information and assistance necessary to enable the trustee to execute his duty, and if the bankrupt fail to do so, or to grant any deed which may be requisite for the recovery or disposal of his estate, the trustee may apply to the sheriff to compel him to give such information and assistance and to grant such deeds under the penalty of imprisonment and of forfeiture of the benefit of this Act, and unless cause be shown to the contrary the sheriff shall issue a warrant of imprisonment accordingly." Section 102—"The act and warrant of confirmation in favour of the trustee shall *ipso jure* transfer and vest in him or any succeeding trustee for behoof of the creditors heritably and irredeemably as at the date of the sequestration, with all right, title, and interest, the whole property of the debtor to the effect following"— . . .

Donald Mackenzie, fisherman, Shader Point, Stornoway, was the holder of a croft under Major Duncan Matheson of Achany and the Lews, upon which he had erected a dwelling-house and other buildings of the value of about £300. His estates were sequestrated upon the 5th April 1904, and in due course James Murdo Mackenzie, law-clerk, Stornoway, was confirmed trustee thereon. With a view to making a claim upon the landlord for com-

pensation for permanent improvements, the trustee requested the bankrupt to grant a renunciation of his tenancy of the holding. This the bankrupt declined to do, and the trustee therefore presented a petition in the Sheriff Court at Stornoway, in which he asked the Court to decern the bankrupt to execute in favour of Major Duncan Matheson a renunciation or other conveyance of his tenancy of the croft in terms of the deed to be lodged in the course of the proceedings, and in the event of his refusing or delaying to do so, to grant warrant to officers of Court to apprehend and imprison him; and also to find and declare that the bankrupt had forfeited the benefits of the Bankruptcy (Scotland) Act 1856 and Acts explaining and amending it.

Upon 28th November 1904 the Sheriff-Substitute (SQUAIR) ordained the defender to execute the renunciation sought, and granted warrant as craved in the event of his refusing or delaying to do so.

Note.—"This is an application by the trustee on a sequestrated estate, under the bankruptcy statutes, against the bankrupt, craving the Court to grant a warrant to compel the bankrupt to execute a deed, which he refuses to do.

"The petition is founded on the 81st section of the Bankruptcy (Scotland) Act 1856, which provides—[*the Sheriff quoted the section*].

"The bankrupt is the holder of a croft under the Crofters Holdings (Scotland) Act 1886. On that croft he built a dwelling-house and other buildings, the trustee says, of the value of about £300; and the trustee further says that these buildings were erected with money or materials got from creditors who now claim for them in the sequestration.

"This is not altogether denied by the bankrupt; so that the crofter having erected buildings on his croft, partly at least with materials got on credit, he has become bankrupt, occupies the house and croft, and defies the creditors to interfere with either.

"What the trustee in substance says is that the bankrupt having erected buildings on his croft, they are what are termed in the Crofters Act, section 8, 'permanent improvements,' and give rise to a claim for compensation. This right, though co-existent with the placing of the improvements on the ground, became incorporated with the tenancy, and lies in abeyance till the tenancy be brought to an end, either by the landlord or by the crofter. On that happening the demand of a settlement of it becomes exigible. To bring this about it is necessary that a renunciation of the tenancy should be granted in favour of the landlord, and this is the deed which he has called on the bankrupt to sign, and which on his refusal the trustee asks the Court to compel the bankrupt to execute.

"The bankrupt challenges the competency of the application on the ground that the claim for compensation is not an asset of the bankrupt estate, and that the terms of the Crofters Act and of the Bankruptcy Acts do not warrant the trustee in making the demand. . . .

"The case of *Mackenzie* v. *Munro*, 1894, 22 R. 45, was referred to at the debate, but the questions raised in that case were as to the title of a trustee in a cessio to eject the crofter without having obtained a disposition *omnium bonorum*, and as to the procedure on the trustees' application in the Sheriff Court. The Lord Ordinary found that the trustee so circumstanced had no title to sue, and ultimately the Second Division held that there had been such an irregularity in the procedure in obtaining the decree that it could not stand. In considering that case it should be kept in mind that a cessio is in a very different position to a sequestration; while a cessio requires a disposition *omnium bonorum* to vest heritage, a sequestration contains vesting provisions of the most comprehensive description. And while the Lord Ordinary did express doubts whether a trustee in a sequestration could go the length of removing the crofter, the pursuer in arguing the title before the Inner House presented it as a fact that if the cessio were converted into a sequestration the trustee would get the heritage, which would in that case be the tenancy of the croft, into his possession. Nor does it appear that the decisions in *Macallister*, 22nd February 1859, 21 D. 560, and *Bain* v. *Mackenzie*, 25th February 1896, 23 R. 528, or the Sheriff Court cases of *Macdonald* v. *MacRae*, and *Polson* v. *Stewart*, in any way touch the question now under consideration. The question in these Sheriff Court cases was whether if a crofter did not exercise his right of renunciation during his lifetime his heir would be liable for his debts after his decease. Of course the equitable principle that a power or faculty must be exercised during the lifetime of the party possessing it, if it is to be exercised at all, was quite a good answer in these cases, and therefore they do not in any way touch the question now being considered.

"The Crofters Act itself, section 19, declares that it shall apply in the same manner as if the tenancy were a lease. This assimilation enables the position of the crofter to be considered from the point of view of a tenant under a lease containing the conditions embodied in the Crofters Act. The crofter would accordingly be in the position of a tenant holding a lease for life, with a right of succession in his heir, the existing tenant, however, having the power to defeat this right by diverting it to some other member of his family, or by renouncing the tenancy during his lifetime, but without any right in the crofter to assign the tenancy. Although the Crofters Act does not deal with the rights of creditors, I see no reason for holding that because it is silent in regard to these rights the Legislature meant that silence to exclude any rights creditors had. Such an inference would lead to this, that a crofter might erect on his croft valuable buildings on credit, refuse to pay for them, and when made bankrupt, unless his landlord took steps to declare his tenancy at an end, could, as attempted in the present instance, sit in defiance of his creditors. That does not appear to be in harmony with the rules

of justice. In the special case of *White's Trustees* (June 1, 1877, 4 R. 786) the Lord President said—'It is quite against all legal principle that a party should be able to place her property beyond the reach of creditors *extra commercium*, and yet herself enjoy the full benefit of it.' It must therefore be surprising if anything in the Crofters Act can be found which in any way lends countenance to such an idea. On the contrary, the Act provides what appears to be the very means of obviating such a result. While the anxiety of the Legislature was no doubt expended in dealing with the rights of landlord and tenant, care was taken to prevent room for the anomaly of permitting a debtor to occupy the position figured. This can be effected by the debtor renouncing the tenancy of his croft, which would then revert to the landlord without any violation of his rights to choose his own tenant, but insuring to the crofter or his creditors repayment in name of compensation for such buildings in so far as they have been placed there according to the terms of the Act and have enhanced the value of the holding.

"The alleged asset which the trustee proposes to recover is, in the words of the Act, 'compensation for any permanent improvements.' Now, the value of this can only be set free on the crofter renouncing his tenancy or being removed from his holding. The crofter having violated one of the conditions of his tenancy in respect that he has 'become notour bankrupt,' the landlord has the right to have it declared that the bankrupt has forfeited his right to the tenancy and so set free the claim. But he has not moved in the matter, and it is assumed that he does not wish to interfere. The only alternative, then, for the trustee, if he wishes to recover that fund, is to get the renunciation carried out. The cases of *Trappes* v. *Meredith*, November 3, 1871, 10 Macph. 38; *Kirkland* v. *Kirkland's Trustees*, March 18, 1886, 13 R. 809; *Morison* v. *Reid*, March 10, 1893, 20 R. 510; and *Obers* v. *Paton's Trustees*, March 17, 1897, 24 R. 719, afford an excellent view of the constructions which the vesting and interpretation clauses of the Bankruptcy (1856) Act are susceptible of, but do not render much aid otherwise in connection with this case.

"By the first of these decisions it has been settled that a *spes successionis*—a mere expectancy—does not come under the sequestration while it continues to be in the region of hope, but that it does when it vests, if the bankrupt be then undischarged, the reason being, as explained by Lord Rutherfurd Clark, that before vesting an 'expectancy' is not property at all, nor anything of the nature of property, and only assumes the nature of property when it becomes vested in the bankrupt. Nothing in these cases seems to affect anything of the nature of property, or estate, which is vested or is in the possession of the bankrupt. On the contrary, the decision in the case of *Obers* v. *Paton's Trustees* demonstrates that while even a mere expectancy is in suspension, the bankrupt must not do anything which tends to prevent it vesting in him, which might interfere with its course in falling to the creditors; and Lord Shand, in the case of *Kirkland*, while agreeing that property in expectancy was not carried by the vesting clauses of the statute, explained that 'the case here is not the same as it would have been if the bankrupt had been in possession of the interest to which he is entitled under the settlement.' The subject claimed by the trustee, and which he demands should be renounced by the bankrupt, is in the bankrupt's possession now, and there does not appear to be any legal impediment in the way of his doing what is required. His right of tenancy is, according to the Lord Ordinary in *Mackenzie* v. *Munro*, 'a heritable right in the same way as the right of a tenant to a lease (to which the right of a crofter is assimilated by the Crofters Holdings Act) is heritage.' The effect of the sequestration in transferring the estate to the trustee may be considered in two ways—(1) In regard to the effect of the provisions of clause 102 alone, and (2) reading that clause along with clause 81 in the light of the interpretation clauses. When the attention is confined to the words contained in section 102 exclusively, it will be seen, as regards moveables, that it only transfers property so far as attachable for debt. It could hardly do otherwise, as it is scarcely conceivable that a person could be in the ownership and enjoyment of a moveable subject while it retains that character purely, and it not be subject to the diligence of his creditors. The only means of placing such a fund *extra commercium* would be by the creation of a trust, but if that fund become incorporated with a heritable subject, or if there be a heritable subject pure and simple, then the position is very different. . . .

"The title of the right vested in the bankrupt here is limited by the condition not to assign, and is not therefore subject to diligence, but he has power to 'convey.' Now, a subject may be conveyed by different kinds of ways, but undoubtedly one of these ways is by means of a renunciation. The Lord President, in the case of *White's Trustees*, *supra*, says, 'For a renunciation is really a conveyance,' so that the bankrupt having here a right to convey by means of a renunciation this interest in the croft, it must be held to be transferred to that extent to the trustee. It does not, however, appear to me that although the vesting clause by itself might be sufficient for the present purpose it is right to confine the attention to it alone. In connection with this matter section 102 must be read along with section 81, and that in the light of the interpretation clause. To keep out of view the 81st section would be to exclude the very powers vested in the trustee, which not only furnish the machinery for putting the trustee's power in operation, but points out what he has to use that machinery for, namely, to compel the bankrupt 'to grant any deed which may be necessary for the recovery or disposal of his estate.' There can be no doubt that the renunciation is requisite for the recovery of the compensation. But what is estate? According

to the interpretation clause the words 'property' and 'estate' shall, when not expressly restricted, include every kind of property, heritable or moveable, wherever situated, and all rights, powers, and interest therein capable of legal alienation, &c. Whether this be applied to the bankrupt's right to the croft as a whole, including the right to compensation or to the latter alone, they are included, because if applied to the croft, which is heritage, the interest in it which the bankrupt can legally convey is thus transferred to the trustee, and if applied only to the compensation it is equally so, because that being a right to property capable of legal alienation vests in the trustee, for there can be no difficulty in seeing that all the crofter would have to do if he wanted to alienate his right to compensation is to renounce the croft and at the same time alienate his claim to the compensation. The respective positions of a bankrupt and the trustee on his sequestrated estate were pretty fully considered in the case of *Dobbie and Another* v. *Marquis of Lothian and Bowie*, March 2, 1864, 2 Macph. 788. The lease being one which excluded assignees and sub-tenants without the consent of the landlord, the trustee entered into an agreement with the landlord whereby the lease was to be renounced to him for a consideration. The bankrupt challenged this on the ground 'that the lease was not carried by the sequestration,' and other reasons, but the whole Court, confirming the Lord Ordinary's decision, held that the exclusion of assignees only operated in favour of the landlord, and did not prevent the lease from vesting in the trustee, providing the landlord did not object. The arguments of parties in that case were very similar to those of the trustee and the bankrupt in the case now under consideration. In the united opinion of the whole of the Judges the following appears:—'When, as in the present case, the question is between a sequestrated bankrupt and his creditors we think it clear that the bankrupt cannot be heard to state an objection to the title of the trustee to any part of his estate. The whole of it he is bound to give up for payment of his debts. The whole argument of the pursuer (the bankrupt) proceeds on a fallacy. It was argued that because the lease did not pass to the trustee it formed no part of the bankrupt's estate. But it did pass, subject to the landlord's challenge. It is *jus tertii* to the bankrupt to challenge or object to the lease going to the trustee. No party can challenge but the landlord. Even the heir of the tenant could not challenge much less the tenant himself.' It appears from this that even the lease itself would go to the trustee, subject to the landlord's challenge.

"This challenge must, however, be active. Lord Ardmillan in the same case said—'It is not a correct proposition that the assignation is only good if the landlord consents. The correct proposition is that the assignation is valid if the landlord does not object.'

"I am therefore of opinion that the power of renunciation and the emerging claim for compensation conferred by the 7th and 8th sections of the Crofters Holdings (Scotland) Act 1886 vest in the trustee in a crofter's sequestration during his lifetime, and while he is an undischarged bankrupt, and thus come under his sequestration for distribution amongst his creditors.

"As it appears to me to be clearly 'requisite for the recovery or disposal' of the asset that the bankrupt should grant or concur in the proposed deed of renunciation, his refusal to do so is not a compliance with the requirements of the Bankruptcy Statutes. The trustee's petition must therefore be held competent, and the objection to it on that ground repelled." . . .

The defender, in terms of section 170 of the Bankruptcy (Scotland) Act 1856, brought the Sheriff-Substitute's deliverance under the review of the Inner House of the Court of Session.

Argued for the appellant—The Sheriff had interpreted section 81 of the Bankruptcy Act so as to enable the trustee to get possession of an interest not carried to him by the vesting clause, but section 81 was merely auxiliary and could not be so interpreted. The interest here was not "property" or "estate" and did not answer the requirements of the statute. The trustee could not be put in right of the holding by assignation, and the claim for compensation for improvements was an interest which did not exist but only emerged on removal or renunciation, *i.e.*, on the action of the tenant himself or the landlord. It was therefore a more contingent right than a *spes successionis*, which a trustee could not insist on receiving—*Trappes* v. *Meredith*, November 3, 1871, 10 Macph. 38, 9 S.L.R. 29; *Kirkland* v. *Kirkland's Trustees*, March 18, 1886, 13 R. 796, 23 S.L.R. 546; *Morrison* v. *Reid*, November 10, 1893, 20 R. 510, 30 S.L.R. 477—although he could set aside anything done by the bankrupt to prejudice its eventually falling into the estate—*Obers* v. *Paton's Trustees*, March 17, 1897, 24 R. 719, 34 S.L.R. 538. Here the bankrupt was not doing anything to the prejudice of the estate, and the only property belonged to the landlord. In similar circumstances to the present an action of removal against the crofter had been tried but that had failed—*Mackenzie* v. *Munro*, November 10, 1894, 22 R. 45, 32 S.L.R. 43. The present proceedings were equally unavailing, and were contrary to the policy of the Crofter Act, for that Act was intended to give security of holding and excluded creditors. Whatever right to claim compensation for improvements there might be, it was only to be exercised by a willing tenant or one that was removed.

Argued for the respondent—It would be inequitable were a crofter to be allowed after incurring debt in erecting buildings to go bankrupt, and either to continue to enjoy the use of the buildings or to get compensation as soon as the bankruptcy was ended. The statutes, moreover, did not lead to that result. The Crofters Act, section 7, gave the crofter an absolute right to renounce, and section 8 an absolute right to claim

compensation on renunciation. This right to renounce and claim compensation was a valuable right carried to the trustee by the Bankruptcy Act, for it answered the requirements of that statute being a heritable right of a limited character, capable of legal alienation, *i.e.*, by renunciation — Bankruptcy Act 1856, sections 4 and 102. If it were necessary, it could be maintained that the crofter's interest could be affected by diligence, *i.e.*, could be adjudged — Graham Stewart on Diligence, p. 604; Erskine's Inst. ii. t. 12, section 6—and the rights to the croft could be assigned, subject always to the landlord's challenge. But if the right were not carried by sections 4 and 102, it was at least made available under section 81—*Kirkland* v. *Kirkland's Trustee*, *cit. supra*, at p. 807 and 808. It was a much more tangible right than a *spes successionis*, for it was a vested right, or one which the bankrupt could make available at any moment. The Crofters Act was not directed against creditors, and so was not against the present proceedings; but further, the bankrupt had by breach of one of the conditions lost the security of the Act. He still, however, had a continuing tenancy, and his right to compensation would emerge if at any time the landlord removed him—Crofters Act 1886, section 8. That tenancy he could renounce at any time.

At advising—

LORD ADAM—This is a somewhat peculiar action. The pursuer is trustee on the sequestrated estates of the defender, who is the tenant of a croft under Major Matheson of Achany, and he seeks to have the defender ordained to execute a renunciation of his croft, not in favour of himself, but of Major Matheson, his landlord.

The grounds on which the action is founded are, that the defender has erected on his croft buildings to the value of £300, that a tenant has under the Crofters Holdings Act, section 7, a right to renounce his tenancy, and when he does so is entitled under section 8 to compensation from his landlord for permanent improvements executed by him on his holding; that the defender has executed such improvements, and is entitled to compensation therefor from his landlord; that the defender is bound under section 81 of the Bankruptcy Act to do all that may be necessary to make this compensation available for his creditors, and that it is necessary for that purpose that he should renounce his tenancy.

The Sheriff is of opinion that he is bound to do so, and on 28th November 1904 pronounced an interlocutor by which he ordained the defender to execute in favour of Major Matheson a renunciation of his holding in terms of a certain deed in process as amended by the interlocutor—and in the event of his refusing or delaying to do so, granted warrant for his apprehension and imprisonment.

It appears to me, however, that before determining whether the defender was bound to renounce his tenancy another question has to be determined, which does not seem to have been considered in the Sheriff Court, and that is, whether the defender was entitled to do so in the circumstances disclosed, or had any right in the tenancy susceptible of being renounced.

Section 1 of the Crofters Act provides that a crofter shall not be removed from the holding of which he is tenant except in consequence of the breach of certain statutory conditions therein set forth. The sixth of these conditions is that the crofter shall not do any act whereby he becomes notour bankrupt within the meaning of the Bankruptcy (Scotland) Act 1856 and the Debtors (Scotland) Act 1880.

The defender is certainly in breach of this statutory condition, and the penalty is to be found in section 3 of the Act, which enacts that when two years' rent of the holding is due and unpaid, or when the crofter has broken any other of the statutory conditions, he shall forfeit his tenancy and shall be liable to be removed in manner provided by the 4th section of the Act of Sederunt anent Removings of 14th December 1756.

Section 7 of the Act enacts that a crofter shall be entitled, upon one year's notice in writing to the landlord, to renounce his tenancy as at any term of Whitsunday or Martinmas. But that seems to me to assume the case of a crofter who has a right to remain for a year in his holding, and has no application to the case of a crofter whose tenancy is already forfeited, and who can be removed at any time by the landlord on giving the requisite notice under the Act of Sederunt.

The Act does not entitle a crofter to claim compensation for permanent improvements on forfeiture of his tenancy. The clause dealing with compensation is the eighth, which enacts that when a crofter renounces his tenancy or is removed he shall be entitled to compensation. Assuming that a crofter who has forfeited his tenancy has any right to compensation at all, which I think very doubtful, it is only when the landlord proceeds to remove him that he is entitled to compensation. The landlord is the only person who has a title to remove him, but I see nothing to compel a landlord to remove a forfeiting crofter, or to prevent him from allowing the crofter to remain as a tenant at will if he so pleases, or on such terms as they may agree upon.

It is said that this result would be very inequitable as regards the defenders' other creditors, who may have, and are said in this case to have, largely contributed to the expense of the buildings of which the defender will be left in the enjoyment. That may be so. But the matter is entirely statutory. The relations between landlord and crofter introduced by the statute are novel and peculiar, and possibly may have produced results which may not appear to be equitable as regards third parties. But however that may be, we must be guided by the statute alone, and for the reasons I have given I think the defender had no power to grant a renunciation of his holding after it had been forfeited. If that be so, it is unnecessary to consider the question which

the Sheriff has dealt with—whether if he had the power he was bound to exercise it? as to which I give no opinion.

Assuming, however, that the Sheriff's interlocutor was right on the merits, I do not see how we could have affirmed it in the terms in which it is expressed. The Sheriff has ordained the defender to execute a deed of renunciation, and "in the event of his refusing or delaying" to do so granted warrant for his apprehension and incarceration, that is to say, he has left it to the messengers of Court to judge whether the defender has refused or delayed to execute the deed. I doubt whether they would have ventured to execute such a warrant. At any rate the defender, after the case had been decided against him on the merits, was entitled to some little time to consider whether he would persist in his refusal. The Sheriff should have ordained him to execute the deed on or before a certain day, and if he had not done so, then have granted warrant *de plano* for his incarceration.

I am of opinion that the appeal should be allowed and the defender assoilzied.

LORD M'LAREN—I have had the opportunity of seeing your Lordship's opinion, and I entirely concur. I only wish to add that while our decision relates to the case where the tenant has become bankrupt, it can have no bearing where the tenancy comes to an end by voluntary renunciation, or by the landlord putting in force the statutory machinery for the recovery of his rent. I wish to reserve my opinion as to any future case of that kind which may raise a different question as to the construction of the statute.

LORD KINCAIRNEY—I concur in your Lordship's opinion. I think the case turns on the 7th section of the Crofters Act. If it applied, I would not, as at present advised, be prepared to alter the judgment of the Sheriff, because under the 81st section of the Bankruptcy Act a bankrupt is bound to execute such deeds as would increase his estate for the benefit of his creditors. But I am of opinion that the 7th section does not apply, and there is no other clause in the Act which entitles a crofter to renounce his holding. The appellant is in the predicament of a crofter who is in breach of a condition of his holding, and has forfeited it under section 3 of the Crofters Act; and section 7 cannot apply to a holding which has been forfeited; and we cannot ordain the appellant to execute a renunciation of a holding which has ceased to exist. I think the Act does not confer a right to compensation on a crofter who is in breach of the conditions of his holding.

The Court recalled the interlocutor of the Sheriff-Substitute and assoilzied the defender.

Counsel for the Defender and Appellant—Constable. Agents—Henry & Scott, W.S.

Counsel for the Petitioner and Respondent—M'Lennan—Munro. Agent—Alexander Ross, S.S.C.

HIGH COURT OF JUSTICIARY.

Saturday, February 18.

(Before the Lord Justice-Clerk, Lord Kyllachy, and Lord Kincairney.)

H. M. ADVOCATE *v.* HUNTER AND COWPER.

Justiciary Cases—Criminal Charge—Evidence—Petition by Accused for Commission to Examine Witnesses Abroad—Statute of 1587, *cap.* 91.

The president of an emigration agency, who was indicted on a charge of defrauding certain persons of sums of money by inducing them to emigrate to Canada on false pretences, presented a petition craving the Court to grant a commission to examine witnesses in Canada with a view to their depositions being read to the jury at the trial. The prayer of the petition was *refused* as being contrary to the Act of 1587, cap. 91.

The Act 1587, cap. 91, enacts as follows:—"In all tyme cuming, the haill accusatioun, ressoning, writtis, witnessis, and uthir probatioun and instructioun quhatsumever of the cryme, sall be allegit, resonit, and deducit to the assyze in presence of the partie accusit in face of judgment and na uthirwayes."

Græme Hunter, 6 Kelvinside Gardens, East Glasgow, and Gavin Cowper, 51 Cecil Street, Hillhead, Glasgow, were indicted at the instance of H.M. Advocate and charged with having induced certain persons specified to buy from them, for certain specified sums of money, passages to certain places in Canada by steamship and rail of the Canadian Pacific Railway's system, from which company the panels had obtained an agency and were to receive a commission, and that by advertising themselves in the newspapers as president and secretary respectively of a pretended emigration agency called the "Associated British Canadians," and by guaranteeing to such persons that they would provide suitable work for them immediately on their arrival at their various destinations, well knowing that they could not provide such employment; and with having failed to provide any of the said persons on their arrival at the said places with employment, and so defrauding the said persons of the sums paid by them to the panels as aforesaid.

The trial was fixed to take place before the High Court of Justiciary at Glasgow on December 27, 1904. This diet was, however, deserted *pro loco et tempore*, to allow the panels to bring evidence from Canada. A fresh indictment was served and a diet fixed for February 28, 1904, at Glasgow.

On February 18 the panel Græme Hunter presented a petition to the High Court of Justiciary craving for a commission to examine witnesses in Canada.

For the petitioner it was stated that the commission was required to take evidence

as to the state of the labour market in Canada at the time of the offences libelled, and reference was made to Hume on Crimes, ii, 404–5, for cases where evidence not given in presence of the panel was used. It was argued that the Statute of 1587, cap. 91, was not intended for cases like the present, the conditions and times being quite different; what was struck at by the Act was the private communication of evidence to the assize. The lack of opportunity for observing the manner of giving evidence in the witnesses was here unimportant, since the evidence was not concerning the *res gestæ* of the crime. A witness had been allowed by the Crown to go back to Canada, and it was necessary in the interest of the petitioner that the evidence of that witness should be obtained, and it was desirable to examine him in Canada.

Counsel for the Crown argued that the prayer of the petition should be refused, and quoted Hume on Crimes, ii, 406. Time had already been given and a diet deserted to allow of witnesses being brought from Canada, and in any case the evidence desiderated was irrelevant considering the nature of the indictment.

LORD JUSTICE-CLERK—The law of the land as regards the leading of evidence at criminal trials is fixed by the Act of 1587, c. 91, which declares "that in all tyme cuming, the haill accusatioun, ressoning, writtis, witnessis, and uthir probatioun and instructioun quhatsumever of the cryme, sall be allegit, resonit, and deducit to the assyze in presence of the partie accusit in face of judgment and na uthirwayes."

That law has regulated the practice up to the present day. As Hume expresses it, the witnesses "must be produced to tell their own story themselves, and say what they know concerning those matters of their own proper knowledge." The only exception (which is not truly an exception at all) is that where a person has died before the trial what he said can be proved *quantum valeat*.

The petition now before us asks the Court to grant a commission to examine witnesses abroad with a view to their depositions being read to the jury at the trial. That, it appears to me, would be in direct breach of the statute and contrary to the practice since the establishment of the Court of Justiciary, and accordingly I am of opinion that the prayer must be refused.

I only desire to add this—that it is a different question whether in such a case as this the difficulties of the defence in bringing witnesses from a great distance may not be a legitimate matter for consideration of the jury in making up their minds upon the case.

LORD KYLLACHY and LORD KINCAIRNEY concurred.

The Court refused the petition.

Counsel for the Crown—Younger, A.-D. —Blackburn, A.-D. Agent—W. J. Dundas, Crown Agent.

Counsel for the Panel Hunter — A. J. Young. Agents — St Clair Swanson & Manson, W.S.

Counsel for the Panel Cowper — Spens. Agent—A. C. D. Vert, S.S.C.

Tuesday, February 21.

(Before Lord Adam, Lord M'Laren, and Lord Kinnear.)

PHYN *v.* KENYON AND ANOTHER.

Justiciary Cases — Salmon-Fishing — Solway—Relevancy—Locus of Alleged Illegal Fishing not Specified—"Owner" of Fixed Engine—Accused not Owner—Salmon Fishery Act 1861 (24 *and* 25 *Vict. cap.* 109), *sec.* 11—*Salmon Fisheries (Scotland) Act* 1862 (25 *and* 26 *Vict. cap.* 97), *sec.* 33.

In a summary complaint charging two persons with fishing for salmon in the Solway with a "hang or drift net, being a fixed engine," contrary to section 11 of the Salmon Fishery Act 1861, made applicable to the *locus* libelled by section 33 of the Salmon Fisheries (Scotland) Act 1862, it was proved that both the accused were fishermen in the employment of the tenant of the salmon fishings at the *locus* of the alleged offence, and that when the net was used in the manner complained of it was so used by his instructions.

The Sheriff-Substitute having assoilzied the accused, *held*, in an appeal, that section 11 of the Salmon Fishery Act 1861 applied only to the "owner" of the "engine"; that the accused were not the "owners" of the "engine" in the sense of the statute; and that therefore they had been rightly assoilzied.

Opinion that a complaint, which omitted to state whether the *locus* of the alleged illegal fishing was within a portion of the Solway to which the Commissioners, in terms of section 6 of the Salmon Fisheries (Scotland) Act 1862, had determined that section 11 of the Salmon Fishery Act 1861 should be applicable, was *irrelevant*.

The Salmon Fishery Act 1861 (24 and 25 Vict. cap. 109)—an English Act—section 11, enacts—"No fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters, and any engine placed or used in contravention of this section may be taken possession of or destroyed, and any engine so placed or used, and any salmon taken by such engine, shall be forfeited, and in addition thereto the owner of any engine placed or used in contravention of this section shall, for each day of so placing or using the same, incur a penalty not exceeding ten pounds; and for the purposes of this section a net that is secured by anchors, or otherwise temporarily fixed to the soil, shall be deemed to be a fixed engine; but this section shall not affect any ancient right or mode of fishing as lawfully exer-