

that it may be assumed—it can never be a matter of absolute proof—that the fuse has not been effectually lit. Up to that time that cannot be assumed. That, I think, is the meaning of the rule, and I entirely agree with and adopt the reasoning of the Lord President in the case of *Smith* when he so decided, and gave what is to us an authoritative decision upon the true construction of this rule which has given rise to so much controversy in the past.

LORD ORMDALE did not hear the case.

The Court answered the question of law in the negative, sustained the appeal, reversed the determination of the Sheriff-Substitute as arbitrator, and remitted to him to dismiss the claim.

Counsel for the Appellants—Sandeman, K.C.—Graham Robertson. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—Fenton—Keith. Agents—Simpson & Marwick, W.S.

Wednesday, January 5.

FIRST DIVISION.

[Sheriff Court at Ayr.]

MARQUIS OF BUTE v. PRENDERLEITH.

Master and Servant—Landlord and Tenant—Ejection—Occupancy of House in virtue of Contract of Service—Termination of Service—Increase of Rent and Mortgage Interest (Restrictions) Act 1920 (10 and 11 Geo. V, cap. 17), sec. 5 (1) (d), and proviso (i).

The Increase of Rent and Mortgage Interest (Restrictions) Act 1920 (10 and 11 Geo. V, cap. 17) enacts:—Section 5—“(1) No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejection of a tenant therefrom, shall be made or given unless . . . (d) the dwelling-house is reasonably required by the landlord for occupation as a residence for . . . some person in his whole time employment . . . , and . . . the Court is satisfied that alternative accommodation, reasonably equivalent as regards rent and suitability in all respects, is available. . . . The existence of alternative accommodation shall not be a condition of an order or judgment on any of the grounds specified in paragraph (d) of this sub-section—(i) where the tenant was in the employment of the landlord or a former landlord, and the dwelling-house was let to him in consequence of that employment and he has ceased to be in that employment. . . .”

A gamekeeper whose contract of service had come to an end refused to vacate the house which he had occupied solely in virtue of his employment, and the occupation of which composed part of the remuneration paid to him for his

services, basing his right to remain on the Increase of Rent and Mortgage Interest (Restrictions) Act 1920. *Held* that as he had occupied the house *qua* servant and not *qua* tenant, the Act had no application to his occupancy of the house, and warrant of ejection *granted*.

The Marquis of Bute brought an action in the Sheriff Court at Ayr against Andrew Prenderleith, craving warrant to summarily eject him from a house known as Pennylands, Auchinleck.

The parties averred, *inter alia*—“(Cond. 1) The defender was till 10th November 1919 in the employment of pursuer as a gamekeeper at a weekly wage of 35s., and in addition he occupied in virtue of his employment the house known as Pennylands foresaid belonging to pursuer, with fuel and cow's grass. Defender's answer is denied so far as inconsistent herewith. (Ans. 1) Admitted that the defender was in the employment of the pursuer as a gamekeeper from July 1907 till 10th November 1919, latterly at the weekly wage stated, and with fuel and cow's grass. Admitted further that the house Pennylands was let to him in virtue of his employment, and the rent thereof was counted in his remuneration. Explained that the said house is a dwelling-house to which the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 applies. The rateable value of said dwelling-house is £4 per annum. (Cond. 2) On or about 26th August 1919 the pursuer, through his head gamekeeper Andrew Law, gave verbal notice to the defender that in view of the sale of a large proportion of the farms on the estate his services would not be required after 10th November 1919, and that his occupancy of said house would terminate with his employment. (Ans. 2) Admitted that the head gamekeeper Andrew Law on or about the date mentioned intimated to the defender that his services would probably be dispensed with at 10th November 1919. Nothing, however, was said as to terminating the occupancy of house. (Cond. 3) The defender's employment with pursuer accordingly terminated on said 10th November 1919, although the pursuer paid him wages up till the end of November 1919. Defender's answer is denied so far as inconsistent herewith. (Ans. 3) Admitted that on 7th November 1919 the said Andrew Law intimated to the defender that his employment would cease on 10th November 1919. Admitted that wages were paid up till end of November 1919. Explained that on and after 11th November 1919 the defender continued to occupy said house. Averred that from and after said date defender became a yearly tenant of said house.”

The pursuer pleaded—“1. The defences are irrelevant. 2. The defender's possession of the said subjects having been incident solely to his service with pursuer, now terminated, and defender having no title to possess said subjects otherwise, pursuer is entitled to warrant with expenses as craved.”

The defender pleaded—“1. The defender's occupancy of said house being still current, and not having been ended by legal notice,

the present proceedings are incompetent and should be dismissed. 2. Alternatively, the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 being applicable to the dwelling-house in question, it is not, in the circumstances contended on, reasonable to grant the warrant craved; and the action should be dismissed with expenses."

On 22nd July 1920 the Sheriff-Substitute (BROWN) sustained the first plea-in-law for the pursuer and granted warrant of ejection.

Note.—"In this case the agent for the defender admitted that he would have no defence if his client were not protected by the Increase of Rent and Mortgage Interest (Restrictions) Act 1920. He, however, contended that under the terms of that Act a gamekeeper, part of whose remuneration was the use of a house belonging to his master, was entitled to retain possession of the house after his contract of service had been brought to an end, and occupy the house as a yearly tenant as long as he paid the standard rent as defined by the Act.

"In my opinion this contention is untenable. On the termination of a contract of service a servant is bound to quit any house which he occupies as part of his wages. Section 5 of the Act of 1920 only applies to questions between a landlord and tenant. A person in the defender's position 'is not considered as a tenant with a right to tenants' privileges, nor entitled to the usual warning given to them prior to removal from their houses'—Fraser on Master and Servant, 2nd ed., p. 332. As Lord Deas remarks in *Scott v. M'Murdo* (1869, 6 S.L.R. 301), with regard to one in the defender's position—'He was not a tenant. If the place he occupied had been part of the mansion-house the matter would have been clear.' The defender had no longer a title of possession of the house after he ceased to be in the pursuer's service. He became a squatter or trespasser, and could have been removed without any warrant after he had been requested to leave the house and been allowed a reasonable time to remove his goods—*Sinclair v. Todd*, 1907 S.C. 1038, and cases there cited."

The defender appealed to the Sheriff (MACKENZIE), who on 28th October 1920 adhered to the interlocutor of the Sheriff-Substitute.

Note.—"The agent for the appellant and defenders submitted an able argument, which if given effect to would extend the scope of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 far beyond anything to be found in the statute, or, unless all the canons of construction of a statute are to be disregarded, can possibly be construed therefrom.

"He argued that the word 'tenant' in section 5 (1) of the Act must be read in what he called its popular sense, and be construed as equivalent to 'occupier,' and he endeavoured to fortify his contention by a reference to section 12 (1) (g), which provides—"The expression "landlord" also includes in relation to any dwelling-house any person other than the tenant who is or would but for this Act be entitled to possession of the dwelling-house."

"He further contended that even assuming the relation of landlord and tenant did not exist, the pursuer and respondent was not entitled to decree unless the Court was satisfied—(1) that the resumption of the house by him was reasonably required; and (2) that it was reasonable to make the order, and he relied on section 5 (1) (d) of the Act.

"On a consideration of the pleadings and the arguments submitted, I am of opinion that no relevant defence has been stated to the action.

"With regard to the contention that the word 'tenant' as used in the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 must be construed in a wide and popular sense so as to include any 'occupier,' I dismiss it at once as clearly untenable.

"This Act, like all prior legislation of the same category, had for its object the limitation of the commonlawrights of the landlord, and therefore must be strictly construed. Statutes which encroach on the rights of the subject, whether as regards person or property, are subject to a strict construction. It is a recognised rule that they should be interpreted, if possible, so as to respect such rights. It is presumed, when the objects of the Act do not obviously imply such an intention, that the Legislature does not desire to confiscate the property or to encroach upon the rights of persons, and it is therefore expected that if such be its intention it will manifest it plainly, if not in express words, at least by clear implication and beyond reasonable doubt—Maxwell on the Interpretation of Statutes, p. 501. To give effect to the appellant's argument would, it appears to me, violate the rules of construction just quoted.

"The argument for the construction of the word 'tenant' in the Act contended for was further supported by a reference to section 12 (1) (g) of the Act already quoted. This in my opinion has no application to the question at issue.

"The appellant and defender in his defences, answer 1, avers that the house Pennylands was let to him in virtue of his employment, and the rent was counted in his remuneration, and in answer 3, that on and after 11th November 1919 he continued to occupy said house, and that from and after said date he became a yearly tenant of said house. He does not, however, aver what was the rent agreed upon betwixt the parties, without which there could be no completed contract of let.

"I am of opinion that the true relation between the parties was that of master and servant and not landlord and tenant, and that the defender occupied the subjects in virtue solely of his employment as a gamekeeper by the pursuer. This is fully explained by the learned Sheriff-Substitute in the note to his interlocutor, with which I concur and have nothing to add.

"If the relation of landlord and tenant has never existed between the parties, there is no obligation on the pursuer to offer to provide alternative accommodation for the defender.

"I have accordingly refused the appeal with expenses."

The defender appealed, and argued—The appellant was protected from ejection by the Increase of Rent and Mortgage Interest (Restrictions) Act 1920, section 5. The purpose of the Act was to provide security of possession. Payment of rent in services did not exclude its application—section 12 (1) (f) and (g); or prevent the occupier being a tenant—Fraser on Master and Servant, p. 7; and for continued possession, when the services had been made impossible by the act of the landlord, the occupier could pay a money equivalent. Nor was the application of the Act excluded from the case of possession solely under a contract of service. It was apparent from the double expression in section 5 (1), "No order . . . for the recovery of possession . . . or for the ejectment of a tenant," that the Act was intended to apply to all cases of legally obtained possession—*Dobson v. Richards*, 1919, W.N. p. 166. To limit its application to tenants as defined by common law would render the provisions as to employees in section 5 (1) (d) and (i) nugatory.

Argued for the respondent—The Act did not apply to the appellant's case. It applied only to cases of landlord and tenant as defined by common law. This was apparent from the use of the word "restrictions" in the headings and from the provision as to standard rent—section 12 (1) (a). There was no question of a *casus improvisus*, for the Act contained provisions regarding houses let to landlords' employees—section 2 (1) (e), 5 (1) (d) and (i). Section 5 (1) (i) was conclusive against the appellant.

LORD PRESIDENT—The appellant in this case was a gamekeeper in the respondent's employment at a wage of 35s. a-week, with a house and fuel and cow's grass. Owing to the sale of portions of the respondent's estate the appellant's services became unnecessary, and he is no longer in the respondent's employment, but he refuses to leave the house which along with the money wage and perquisites composed the remuneration paid to him for his services. He bases his right to remain on the Increase of Rent and Mortgage Interest (Restrictions) Act of 1920.

If he is to avail himself of the provisions of that Act, it is in the first instance necessary, in my opinion, that he should be able to found his possession of the house on a contract of tenancy, and not solely upon a contract of service with his former employer. The Act deals with the relation of landlord and tenant. It does not except incidentally deal with the relation between master and servant at all. Its purpose was to stabilise conditions of house tenancy during a period of emergency consequent upon the war. Now there are cases of employment which are accompanied by a contract of house tenancy between the employer and the employee. As was pointed out in the course of the debate, sub-head (e) of sub-section (1) of section 2 affords an illustration of the contract of service running side by side with a contract of tenancy. It is quite possible that in such a case the Act will apply so far as the contract of tenancy is concerned. But, as I

have said, in order to bring himself within the Act the first thing the appellant has to do is to show that he occupied this house *qua* tenant and not merely *qua* employee. Now in my opinion he has completely failed to do so. He occupied as a gamekeeper a gamekeeper's house on the estate, his occupancy being part of his remuneration *qua* gamekeeper, and indeed a usual and necessary incident of his service as such. That remuneration consisted partly in cash, partly in house room, and partly in certain perquisites. In these circumstances it seems to me that the Act has no application to his occupancy of the house.

If it had been possible, as in my opinion it is not, to regard him as a tenant, I should still have thought that his case was placed outside the statute by the terms of sub-head (a) of sub-section (1) of section 5, for it appears to me that it is impossible for the appellant to claim the benefits of the Act when he neither does nor can any longer perform the condition on which alone he had any right to occupy the house, namely, that he should discharge the duties of gamekeeper. I am not able to see how under any circumstances this appellant can maintain, as he does on record, that the statute has the effect of converting him into a yearly tenant under (apparently) a substituted form of contractual relation with the respondent. What the Act had in view was the continuance or prolongation, undisturbed, of formerly existing contractual relations between landlord and tenant. I do not think that the Act could have the result of making for the parties a fresh bargain of a kind which they had never made for themselves.

For the rest I am content to say that I agree with the results at which the learned Sheriff and his Substitute arrived, and indeed generally with their grounds of judgment, and I therefore move your Lordships that this appeal should be dismissed.

LORD MACKENZIE—I agree with your Lordship. I think the present proceedings might well have come to an end after the judgment of the Sheriff-Substitute.

LORD SKERRINGTON—It appears from the opinion of the Sheriff-Substitute to have been matter of admission in the Inferior Court that the defender occupied his house not as a tenant but merely as a servant, and that accordingly he would have had no defence but for the Statute of 1920. When that admission was repeated by the appellant's counsel in the debate before us it seemed to me that his client's case was perfectly hopeless, because the Act of Parliament clearly indicates that the class of persons whom it intends to benefit shall be tenants. We heard an ingenious argument to the effect that the statute might be construed as applying to a servant who occupied a house belonging to his employer but did not do so in the character of tenant, but I do not think that it deserves serious consideration. Accordingly in respect of the admission made by the appellant's counsel I think that the judgment of the Sheriffs must be affirmed.

LORD CULLEN—I concur.

The Court refused the appeal and affirmed the interlocutors of the Sheriff and Sheriff-Substitute.

Counsel for the Appellant—Moncrieff, K.C.—Patrick. Agents—Macpherson & Mackay, W.S.

Counsel for Respondent—Hon. W. Watson, K.C.—Gentles. Agents—J. & F. Anderson, W.S.

Thursday, January 6.

FIRST DIVISION.

[Lord Anderson, Ordinary.

SLORACH v. WILLIAM KERR & COMPANY.

Expenses—Process—Separate Actions by Different Pursuers against Same Defendants for Same Negligent Act Leading to the Injury and Death of One Person.

Apart from specialties requiring separate actions to be raised, it is not legitimate to throw on an unsuccessful defender the expense of more than one action in respect of the same negligent act leading to the injury and death of one person.

Observed per the Lord President—“So far as this case is concerned I think we may allow the expenses of the two summonses, but it must be understood that if this practice should become general it may be necessary to lay down some general rule which will bring it to an end, and if necessary penalise it.”

Mrs Frances Mary George or Slorach, Deveron House, Dumbarton, as an individual and as tutrix and administratrix-in-law of her four pupil children, brought an action against Messrs William Kerr & Company, machinery haulage merchants, Glasgow, concluding for damages in respect of the death of her husband, which she alleged to be due to the negligence of the defenders. Charles Slorach and others, the five children of the deceased, who were above the age of pupilarity, with consent of the said Mrs Slorach, brought a separate action against the same defenders, concluding for damages for the death of their father, which they averred was due to the same negligent act. Separate issues having been adjusted, the parties agreed that the two actions should be tried by one jury and on the same evidence, and that the productions lodged in the one action should be held as productions lodged in the other. The jury having awarded damages to the pursuers in each action, the defenders obtained rules upon the pursuers to show cause why a new trial should not be granted.

The Court having discharged the rules, the pursuers moved for expenses in each action up to the date of the trial, and referred to *Karrman v. Crosbie*, 1898, 25 R. 931, 35 S.L.R. 725.

LORD PRESIDENT—The question raised on this motion is whether the expenses of the

two summonses which were raised (1) on behalf of the mother for herself and as tutrix for her pupil children, and (2) by the children who were above pupilarity, should be allowed. The question, of course, relates only to that part of the proceedings which was anterior to the trial.

Now this matter was the subject of a dictum by Lord Watson in the case of *Darling v. William Gray & Sons* (1892, 19 R. (H.L.) 31, 29 S.L.R. 910). He said—“There is not a single instance in which the Court has allowed two actions to be brought in respect of the same negligent act leading to the injury and death of one person. Even in cases where the right of relatives to sue has been recognised they must bring one suit, and one only, in which the damages due to them respectively might be assessed.” I do not understand that dictum to mean that it is incompetent to present separate summonses, but—apart from specialties requiring separate actions to be raised—I understand it to mean that it is not legitimate to throw on the unsuccessful defender the expense of more than one action. I cannot say that in the present case I understand why the course was adopted of serving two summonses and making up two records. It rather appears to me to have been a wholly gratuitous and unnecessary expense, and it suggests that the dictum of Lord Watson requires to be brought to the notice of the profession.

So far as this case is concerned I think we may allow the expenses of the two summonses, but it must be understood that if this practice should become general it may be necessary to lay down some general rule which will bring it to an end and if necessary penalise it.

LORD MACKENZIE—I am of the same opinion.

LORD SKERRINGTON—I concur.

LORD CULLEN—I am of the same opinion.

The Court discharged the rules, of consent applied the verdicts, and in respect thereof decreed against the defenders for payment to each of the pursuers of the sum found due to them, and found the pursuers entitled to expenses.

Counsel for the Pursuers—Watt, K.C.—Aitchison. Agents—J. Miller Thomson & Company, W.S.

Counsel for the Defenders—Sandeman, K.C.—J. A. Christie. Agents—Balfour & Manson, S.S.C.