Friday, March 4.

SECOND DIVISION.

[Sheriff Court at Stirling.

HUTCHISON'S TRUSTEES *v.* ALEXANDER.

Right in Security—Lease—Summary Ejection—Maills and Duties—Beneficiary in Possession without Title.

Trustees under a marriage-contract, by which they were directed to pay the free rents of a heritable subject to A, allowed him to occupy the subject without any express title, and without paying rent.

After A had thus been in possession for more than seven years the creditor in a bond over the subject in question obtained decree in an action of maills and duties against the trustees, and thereafter presented a petition for warrant of summary ejection against A.

Held that A was in possession without a title, and that the creditor was entitled summarily to eject him,

In an action raised in the Sheriff Court at Stirling by George Aitken Clark Hutchison and others against John Alexander, Cornton, Bridge-of-Allan, the pursuers asked the Court to grant warrant summarily to eject the defender, his servants and effects, from the house and lands of Cornton.

The pursuers averred that they were in right of several bonds and dispositions in security over Cornton Villa, which belonged to the trustees under the marriage-contract between the defender and his deceased wife, that the interest on the bonds being in arrear, and the principal sums when called up not being paid, the pursuers raised an action of maills and duties against the marriage-contract trustees, and obtained decree in absence in said action on 14th April 1903; that the defender, who had occupied the subjects for a number of years under the marriage-contract trustees, but without paying them any rent therefor, or without any lease, had no right or title to possess the premises, and that the pursuers had called on the defender either to pay rent to them or to vacate the premises, but he had refused to remove.

The defender averred that he had full management and civil possession of the subjects for twenty-two years by virtue of the marriage-contract, which conferred on him the right to the rents and annual proceeds of the subjects during his lifetime; that the marriage-contract had been recognised by the pursuers and their author for at least seven years as a good title of possession by the defender: that he was entitled to retain possession for at least one year on the principle of tacit relocation; that he had never been warned to remove from the subjects; that the decree of maills and duties was not binding on him, he not having been called as a defender in that action; and that he was entitled to reap the crop sown by him and be recompensed for permanent meliorations on the lands.

By the marriage-contract, which was produced, the subjects of Cornton, consisting of thirty-four acres of land, with houses and market gardens, were conveyed by Mrs Alexander to the marriage-contract trustees. The trustees were directed to pay the free rents to Mrs Alexander during the subsistence of the marriage, or alternatively in their option to allow her to uplift them herself, the husband's *jus mariti* being in either case excluded, and they were further directed in the event of the dissolution of the marriage by the death of Mrs Alexander, to pay the free rents to Mr Alexander as an alimentary provision.

The pursuers pleaded—"(1) The defender having no title to possess the subjects libelled on, the pursuers, as in right of the rents, maills, and duties thereof, are entitled to have him ejected therefrom. (2) The defender's statements regarding meliorations, crop sown, and value of work done on the land, but not sown, are irrelevant, and are no defence against the pursuer's title."

The defender pleaded—"(1) No title to sue. (2) The application for summary ejection against the defender in possession under an *ex facie* good title is incompetent. (3) The pursuers' statements are irrelevant and insufficient to support the prayer of the petition. (4) The defender never having been legally warned to remove, and no separate obligation to remove being averred or founded on, the action ought to be dismissed. (5) The pursuers' alleged decree in the action of maills and duties having been pronounced in an action to which the defender and others interested were not called as defenders, is not *res judicata* against the defender, and this petition ought to be dismissed, with expenses. (6) In respect of his previous occupancy of the subjects for seven years, the defender is entitled to retain possession for one year on the principle of tacit relocation. (7) The defender is entitled to reap the crop sown by him, and to be recompensed for work done by him on land not sown."

On 15th August 1903 the Sheriff-Substitute (BUNTINE) repelled all the defenders' pleas, and granted warrant in terms of the prayer of the petition.

Note.—"The pursuers in this action of ejection are in right of certain bonds and dispositions in security over subjects situated at Cornton. They produce a decree of maills and duties dated 14th April last against the present owners of these lands, viz., the marriage-contract trustees of the defender.

"They asked that the defender should be asked summarily to remove therefrom.

"The defender pleads — [*The Sheriff narrated the pleas ut supra*].

"The title upon which he founds is his marriage-contract with his deceased wife.

"By that deed the subjects in question, which consist of thirty-four acres of land, upon which there are houses, one of which with a market garden has been in the occu-

pation of the defender for the past twenty-two years, are conveyed in trust to trustees for certain purposes.

"The subjects are of the annual value of £298.

"The trustees are directed by the deed to uplift the rents of the subjects and to pay the free rents and other annual proceeds after paying the interest of the bonds and dispositions in security, to which the pursuers are in right, to the defender's wife during the subsistence of the marriage, or alternatively in their option to allow the defender's wife to uplift the rents herself.

"By the fifth clause of the deed, in the event of the dissolution of the mariage by the death of defender's wife, the trustees shall account for and pay over to the defender during all the days of his life the free rents and other annual produce of the estate.

"The defender avers that for twenty-two years he has possessed the subjects, occupying part of them himself and letting part to tenants. His wife died a few years ago, and he still possesses the subjects, and has no lease or other title from the marriage-contract trustees.

"It is plain, on consideration of these facts, that the defender is in possession of the subjects in question not in virtue of the provisions of the deed, but by the goodwill of the marriage-contract trustees.

"Accordingly he has no *ex facie* valid title, and his possession is of no avail.

"He is thus, on the authority of *Blair*, 16 D. 291, liable to summary ejection at the instance of the pursuers.

"This view disposes of the first three pleas for the defender.

"With regard to the fourth plea under the provisions of section 3 of the Heritable Securities Act 1894, the creditor in a heritable security is not bound to call anyone in an action of maills and duties except the proprietor of the subjects.

"Tne fifth plea, which is founded on the precept *messis sementem sequitur*, is irrelevant in the present question.

"I give no opinion as to whether or not the defender in the circumstances of the case has a good claim for ameliorations on the property while in his possession, or has a right to reap the crop which he has sown.

"That must be settled in another action, but in the meantime he is bound to give up possession of the subjects. See *Stewart*, M. 13,853.

"Accordingly, the pursuers, in my judgment, are entitled to the decree which they crave."

On 15th October 1903 the Sheriff (LEES) adhered.

Note.—"This is an action of ejection, not a summary removing; and the defender's agent ably maintained that it was in the circumstances incompetent. Now, it is quite true that, as decided in *Wylie* v. *Heritable Security Company*, 10 Macph. 253, 9 S.L.R. 184; and *Scottish Property, &c., Company* v. *Horne*, 8 R. 737, 18 S.L.R. 525, where it is sought to oust a proprietor who has *prima facie* a good right to the property, the remedy must be sought by declarator of the irritancy and removing; and where such an action is brought, as in *Blair* v. *Galloway*, 16 D. 291, decree will be given, but none of these actions touch the present case. The defender founded on the case of *Hally* v. *Lang*, 5 Macph. 951, which settles that in an action of ejection the pursuer must aver vitious or precarious possession by the defender. But here the pursuers distinctly set forth the defender's position. He is occupying only at the pleasure of their debtors—that is, of his marriage-contract trustees. Under his marriage his wife is entitled to receive the rents of the property, and he on her death. But their only right is to receive the fruits of the subjects. Neither of them has any title to occupy in her or his right. Now, what the trustees have done is, instead of letting the subjects, and paying over the rents to the defender, or letting his wife or him draw them, they have allowed the defender and his wife during her lifetime to occupy the subjects for many years.

"In these circumstances the defender is plainly occupying without any definite right, and only at the pleasure of the trustees. His right is, therefore, no higher than theirs, and in law they occupy through him. The question therefore is, could the pursuers eject the trustees? And the answer to that question is not doubtful. The pursuers are heritable creditors, with a decree of maills and duties, and section 5 of the Heritable Securities Act of 1894, provides that 'where a creditor desires to enter into possession of the lands disponed in security, and the proprietor thereof is in personal occupation of the same or any part thereof, such proprietor shall be deemed to be an occupant without a title, and the creditors may take proceedings to eject him in all respects in the same way as if he were such occupant.' This right comes into operation when the debtor is in default as to payment. Here such default has occurred and the defender refuses to pay any rent.

"Now, if the trustees could themselves be ejected, it would seem anomalous to hold that a person occupying at their pleasure, and who refuses to pay rent, is not liable to be ejected also. His occupation is in lieu of the rents, and the rents are primarily due to the pursuers, and only any free balance to him.

"I think, therefore, the Sheriff-Substitute has done right to grant the pursuers the remedy they ask."

The defender appealed, and argued:—This process of summary ejection was not a remedy competent to the pursuers in a question with the defender. Summary ejection was only competent when possession had been got by force or fraud, or where occupation was based on mere tolerance. In the present case the defender was in the position of a tenant. He had been recognised by the trustees as their tenant, and the occupant of a house and lands was always presumed to occupy as a

tenant—*Glen* v. *Roy*, November 28, 1882, 10 R. 239, 20 S.L.R. 165. A petition for summary ejection against a tenant was incompetent—*Hally* v. *Lang*, June 26, 1867, 5 Macph. 951, 4 S.L.R. 146; *Robb* v. *Brearton*, July 11, 1885, 22 R. 885. 32 S.L.R. 671; *Blair* v. *Galloway*, *infra*. If the defender was not a tenant he would only be in occupation of the subjects as representing the proprietors. In that case, the action of maills and duties raised by the pursuers against the trustees was incompetent—*Smith's Trustees* v. *D. & J. Chalmers*, July 3, 1890, 17 R. 1088, 27 S.L.R. 988—and the pursuers had no title to sue.

Argued for the pursuers and respondents —They were entitled to eject the pursuers summarily. The defender was not a tenant. There was no lease, either written or verbal, under which he possessed, and his occupancy of the subjects had neither a fixed term of entry nor a fixed ish. In such circumstances the defender was a mere squatter, and must be treated as a precarious possessor—*Campbell* v. *M'Lachlan*, December 6, 1898, 1 F. 212, 36 S.L.R. 188; *Blair* v. *Galloway*, December 21, 1853, 16 D. 291. If the defender was held to be holding the subjects as representing the proprietors, the pursuers were entitled to eject him under section 5 of the Heritable Securities Act 1894.

At advising—

LORD TRAYNER—I have felt some difficulty with this case on account of the fact, not disputed, that the appellant is in possession of the premises in question with the consent of the owner, but on consideration have come to think that the judgment appealed against is right. There appears to be no doubt that the respondents, having entered into possession of the subjects by a summons of maills and duties, have a right to remove the appellant by an ordinary action of removing. The case of *Blair* v. *Galloway* is an authority for that. But the question is whether the respondents are entitled summarily to eject the appellant. Such a warrant (not readily granted) is granted only against one who is in possession of a subject without a title to possess, and who is keeping another out of a beneficial enjoyment to which he is entitled. This the respondents contend is the case before us. The appellant has not a right of liferent of the subjects in question, but he is entitled to claim from the proprietors the whole rents which the subjects yield. The proprietors have the sole right to let the subjects, although they must account to the appellant for the rents received. Now, as the appellant is not a liferenter and is not proprietor, the only other title he can have to possession is that of tenant. Is he a tenant? I think he is not. In the case of *Campbell* v. *M'Lachlan*, 1 F. 212 — a case no doubt, belonging to another branch of our law, but the decision in which has a direct bearing on the question before us—Lord Kinnear said—"The essential characteristic of tenancy, in law, is the right of the tenant by contract of location from the owner to hold the subject during the subsistence of the contract against the owner and against all the world," and added that in that case the person claiming to be a tenant (although in possession with the full consent of the owner) "had no title of possession of any kind, and he had not even any verbal contract upon which he could have maintained his possession during the year if the owner of the land had thought fit to remove him." I think these observations are quite applicable to the present case. They aptly describe the character of the appellants' possession. Not being therefore a tenant (as the law defines that character), and not being a liferenter or owner, he has no title of possession. He occupies the subjects in question absolutely at the will of the owners, and could be removed or ejected by them at any time. I think therefore that he may be ejected at the instance of the respondents, who, as far as the administration of the subjects in letting them and drawing the rents thereof is concerned, have now the same rights as the owners. I am therefore for dismissing the appeal.

LORD MONCREIFF—I am of opinion that the judgment of the Sheriff is right, and that the appeal should be refused. The pursuers are in right of certain bonds and dispositions in security over heritable subjects which are vested in the trustees under the marriage contract between the defender John Alexander and his deceased wife. The interest on the said bonds and dispositions in security was in arrear, and the principal sums were called up but were not paid.

By decree of the Sheriff the pursuers, who had raised an action of maills and duties against the marriage-contract trustees, obtained right to the rents, maills and duties of the subjects to an extent sufficient to satisfy their debt. That decree passed in absence. The only objection taken to it on record by the defender is that he was not called as a defender. But this is not a good objection, because under the 3rd section of the Heritable Securities Act of 1894 it is not necessary that the tenants of lands disponed in security should be called as defenders to such an action; and therefore, even assuming that the defender is a tenant or entitled to the rights of a tenant, he has no right to dispute the title of the creditors.

The appellant, however, in this Court for the first time objected to the competency of this decree of maills and duties on the ground that, assuming that he (the defender) is not a tenant, an action of maills and duties was inappropriate; and he founded upon the case of *Smith* v. *Chalmers*, 17 R. 1088. It seems, however, to me that if the defender is not a tenant he has no right or title to raise that objection; and, on the other hand, that the marriage-contract trustees, who have taken no objection, have no interest whatever to do so, because as they have made default in payment of interest and principal after formal requisition, the pursuers are entitled, under section 5 of the Act of 1894, to

eject them as occupants without a title, assuming that they are in personal occupation of the subjects.

The only question therefore is whether the defender has set forth any title as tenant under the marriage-contract trustees. If he has not done so he is simply possessing without any title known to the law, and therefore is possessing precariously and can be summarily ejected.

The defender has set forth no title of possession. He says that he has for several years been in full management of the subjects by arrangement with the marriage-contract trustees. But he gives no particulars of the arrangement; and it is quite plain that there is no lease, written or verbal, and no written agreement, and that the defender has really been possessing on sufferance by the permission of the marriage-contract trustees. They could have removed him at pleasure at any time, and the pursuers at least have as high a right. The provisions of the defender's marriage-contract are correctly summarised in the Sheriff-Substitute's note. I have read the deed, and the only additional observation that I have to make is that in the case of the wife, from whom the heritable estate came, the trustees are empowered in their option either to pay the free rents to her or to permit her to uplift, receive, and discharge them; in either case the said proceeds to be payable to or uplifted by her exclusive of the *jus mariti*, right of administration, and curatorial powers of the husband, and not affectable by his debts and deeds. No similar option is given to the trustees in the case of the husband. In his case the only direction is to pay the free rents and annual proceeds of the heritable estate, &c., to him as an alimentary provision.

The case of *Blair* v. *Galloway*, 16 D. 291, was referred to as an authority for both parties; but I think it is an authority for the pursuers. Galloway, who had divested himself of the subjects, was allowed by the disponees to enter into possession and draw the annual proceeds. He had no lease and paid no rent; and the question was whether the heritable creditors were bound by this arrangement. The Court held that they were not; that Galloway was simply a tenant at will paying no rent, and that therefore he was liable to be removed. No question of ejection was raised in that case, because the creditors were content to conclude for summary removing; but the opinions of the Judges in the Inner House would have warranted ejection. The recent case of *Campbell* v. *MacLachlan*, 1 F. 212, is also in point. It was a registration case, and the question was whether the party claiming to be enrolled was a tenant and occupant. The Court held that he was not. He had been allowed to occupy the ground and even to build a house upon it, but there was no lease, no title of possession, not even a verbal contract with the owner. He was allowed to possess on sufferance. Lord Kinnear observed:—"The essential characteristic of tenancy in law is the right of the tenant derived by contract of location from the owner to hold the subject during the subsistence of the contract against the owner and against all the world. But the statement of facts makes it manifest that the claimant had no such right."

The hardship in ejecting the defender after being allowed to remain so long in possession is more apparent than real. In the first place, if he had been full proprietor the pursuers could have ejected him "as an occupant without a title," under the 5th section of the Heritable Securities Act 1894. And secondly, although I assume that he occupied the subjects for several years during his wife's lifetime, the possession, such as it was, was possession by the wife, because the trustees had only power to allow her to uplift and receive the rents, and when they were received the defender's *jus mariti* and right of administration and curatorial powers were excluded.

Since his wife's death the defender has been there merely on sufferance, and the highest title he can claim is that of manager or factor for the proprietors.

I am therefore of opinion that the defender has not stated a relevant defence, and that the pursuers are entitled to warrant of ejection as craved.

LORD JUSTICE-CLERK—The real question in this case is whether the party proposed to be ejected is a tenant. That question I do not think can be answered in any other way than that proposed by your Lordships, the defender having no title of any kind, unless a leasehold right could be spelled out of the facts before us. I am unable to see how it can, and there being no title, the pursuers are entitled to eject the defender. I therefore concur in the judgment proposed.

LORD YOUNG was absent.

The Court dismissed the appeal, and of new granted warrant in terms of the prayer of the petition.

Counsel for the Pursuer and Respondents—Jameson, K.C.—R. Scott Brown. Agent—F. J. Martin, W.S.

Counsel for the Defender and Appellant—Salvesen, K.C.—T. B. Morison. Agent—Andrew Newlands S.S.C.