Friday, January 20.

SECOND DIVISION.

[Sheriff of Inverness.

BAILLIE *v.* MACKINTOSH.

Landlord and Tenant—Notice to Remove.

A tenant occupied a plot of ground from year to year with Martinmas entry. At the term of Whitsunday, after intimation to the landlord's factor of his intention to quit the district permanently, he gave over the half-year's occupancy from that date to Martinmas following to another person and removed elsewhere till the next term of Martinmas, when he returned and claimed the ground for another year on the ground that he had received no warning. The Court *granted interdict* at the instance of his landlord to prohibit him from entering on the ground.

In this case Evan Baillie of Dochfour, Inverness, sought to interdict John Mackintosh, flesher, Kingussie, and all others employed by him and for whom he was responsible, from entering upon or occupying a piece of land, the property of the pursuer, or in any way interfering with the pursuer in the possession of the same. The ground of action as stated in the condescendence was as follows:—For some time prior to Whitsunday 1880 the defender occupied a plot of ground on the lands of Ardbroilach of and under the pursuer, the proprietor, from year to year, with a Martinmas entry, paying therefor to the pursuer in name of rent the sum of £3 yearly. At the term of Whitsunday 1880 the defender gave over the half-year's right of occupancy from that date to Martinmas following to John Dott, residing in Kingussie, and removed with his family to Forfar, at the same time intimating to the pursuer that he did not intend to return to Kingussie and occupy the said plot of ground, and that his occupancy thereof would cease at the said term of Martinmas 1880. The pursuer accordingly at the term of Martinmas 1880, let the said ground to John Hossack, feuar in Kingussie; the defender subsequently returned to Kingussie and threatened to enter upon and occupy and keep possession of the said plot of ground in spite of the pursuer, and persisted in keeping the pursuer's present tenant from cultivating the said plot of ground.

The pursuer pleaded that "the defender having no right to enter upon, or occupy, or in any other way interfere with or disturb the pursuer in the possession of the said plot of ground, and having threatened to enter upon and occupy it, and prevent the present tenant from cultivating it, the pursuer was entitled to decree in terms of the prayer of the petition, with expenses."

The defender denied that he had made over his right to the piece of land to John Dott, or to any other person, and he averred that he had never received notice to quit.

He pleaded—"The defender being tenant of the said piece of land in question for a period still unexpired, the prayer of the petition ought to be refused, and the defender assoilzied, with expenses."

The import of the proof will sufficiently appear in the findings in fact of the Sheriff-Principal.

The Sheriff-Substitute (BLAIR) found in point of fact—"*First*, That for some years prior to Martinmas 1880 the defender was the tenant from year to year of a piece of ground, part of the lands of Ardbroilach, the property of the pursuer; *Second*, That no formal warning to remove at the term of Martinmas 1880 was given by the pursuer to the defender, and no sufficient facts and circumstances had been proved by which the defender was barred from objecting to want of notice to remove; and *Third*, That no notice of renunciation by the defender was made to the pursuer or to those having power to receive a renunciation; Found in law that the defender was in the circumstances entitled to regard the piece of ground as re-let to him for the year from Martinmas 1880 to Martinmas 1881 by tacit relocation: Therefore sustained the defences; recalled the interim interdict; and refused the prayer of the petition."

On appeal the Sheriff-Principal (IVORY) recalled the interlocuter appealed against, and found "in point of fact—(1) that for some time prior to March 1880 the defender occupied a plot of ground under the pursuer on the lands of Ardbroilach from year to year, with a Martinmas entry, paying a rent of £3 yearly; (2) that on 29th March 1880 the defender intimated to Mr Maclennan, the pursuer's local factor at Kingussie, that he intended to leave the place for good and all to start business for himself in Forfar (where in fact he had taken a shop in lease for two years), and stated that he would like as a special favour to give the plot of ground to John Dott, who was present at the interview; (3) that Mr Maclennan then told the defender and John Dott that he had no objections to such an arrangement for the season up to Martinmas, but that he could not promise it for longer until he had the consent of Mr Mollison, the pursuer's principal factor; (4) that on 14th April 1880 the defender sold the goodwill of, and his whole right and interest in, the plot of ground to John Dott for £10, the latter undertaking at the same time to pay the rent due for the year ending Martinmas 1880, and shortly thereafter left Kingussie with his wife and family, and went to reside permanently in Forfar; (5) that John Dott thereafter entered into possession of the plot of ground as tenant, in place of the defender, and on 10th June 1880 paid to the pursuer, by the hands of Mr Mollison, the half-year's rent due at the preceding Whitsunday, Mr Mollison at the same time intimating to him that he would not be allowed to occupy the land after Martinmas; (6) that John Dott continued in possession of the plot of ground till Martinmas, paying to Mr Mollison the half-year's rent due at that term, and then left without objection, the plot of ground having since been occupied by John Hossack, to whom it had been previously let by the pursuer; (7) that in October the defender gave up his business in Forfar and returned to Kingussie, and finding that John Dott had lost the plot of ground (for which he expressed great regret, seeing that the latter had paid so heavy a goodwill for it), he claimed the plot of ground himself for another year, on the ground that he had received no legal warning to quit, and at the same time threatened to enter upon and occupy it: Found in these circumstances, in point of law, that the defender must be held to have abandoned, with consent of the pursuer, all right and interest in

the said plot of ground, and that he had not at Martinmas, and had not now, any right to enter upon or occupy the same, or to interfere therewith in any manner of way; therefore declared the interim interdict formerly granted to be perpetual, and decerned in terms of the prayer of the petition."

The defender appealed, and argued—(1) In point of fact, the defender was the tenant in possession of the piece of ground for the year from Martinmas 1880 to Martinmas 1881 by tacit relocation; and therefore (2), In point of law, the application for interdict was not, on the authority of *Johnston* v. *Thomson*, June 9, 1877, 4 R. 868, a competent process for putting an end to his possession; (3) the circumstances as detailed in the evidence did not so clearly indicate the defender's intention to leave the land at Martinmas 1880 as to be sufficient to supply the want of warning or action of removing.

Authority—*Dunlop & Co.* v. *Meiklem*, October 24, 1876, 4 R. 11.

At advising—

Lord Justice-Clerk—There are two questions for consideration here—First, Whether the landlord agreed to take Dott as his tenant in place of Mackintosh? And this is a question which has an important bearing on the second—Whether the tenant undertook to go away without warning? On this latter question, and quite apart from the first, I am of opinion that it is clear that he did intend to go away altogether, and that he asked his landlord to accept Dott as a *locum tenens* up to the end of that year's possession. It is quite true that in the ordinary case it would not be sufficient to prove by parole proof the want of warning. But this is a case of a regular verbal agreement followed out by both parties, and proved by *rei interventus*. Mackintosh went to Forfar, and understood that so far as there was any obligation after November 1880 he was to be free of the farm. The landlord took Dott as the tenant on payment of £10, and the actings of the parties show that the tenancy was to end on the November following his departure. Whether the landlord absolutely gave up his rent for the possession at Martinmas is another question. I rather think he did, but it is not necessary to decide that, because it is clear that Mackintosh undertook to leave the farm, and actually did so, not intending to return.

Therefore I am of opinion that there is no case for the tenant, who must be taken at his own word; he made his own bargain, which he cannot go back on.

Lord Young—I am of the same opinion, and have no doubt whatever as to our judgment. The facts are quite clear, though two views may be taken with reference to the legal import and effect of the case. There is no question about removing or about warning the tenant to remove. The defender here removed himself. Whether with warning to the landlord or not, he went away, and might have been dealt with by the landlord as one who has deserted his possession. But quite properly and conveniently, when it suits his purpose to remove, he gives his landlord notice, and expresses a hope that he will not resort to legal proceedings on his legal rights against him, but that he will receive Dott for the rest of the term of the tenancy, and renew the lease to the latter thereafter. The landlord's factor acted cautiously in meeting this request. He will not recognise Mackintosh's freedom, but consents to take Dott in his place till the term of Martinmas, but intimates that Dott must leave at that period unless he enters on another bargain with reference to the farm. Now, I have said there are two views of the position—(1) That Dott was received as Mackintosh's assignee. In that view the case is clear against the defender. (2) That the tenant flitted at his own hand, the landlord not interfering, and allowing Dott to come in for the short remaining period. This also leaves no room for the question about removing him, because he is not there to be removed; and so in either view, on the admitted facts of the case, there is no question of removing or warning, but the only question is of keeping out a man who has removed himself. No doubt Dott has some reason to complain, for it is according to the fact that he expected to be allowed to possess from Whitsunday to Martinmas, and to remain on after Martinmas in possession of the farm, and we find that the defender expresses disappointment at finding on his return from Forfar that this was not to be. However, on the whole matter, I am prepared to affirm the findings of the Sheriff which are true in point of fact, and I do not dissent from his legal view on those findings.

Lord Craighill concurred.

Lord Rutherfurd Clark—I am also of the same opinion. The defender was not in possession, and therefore he was not entitled to warning or notice. I think he chose to go off to Forfar for good and all, and just got Dott to take his place in order to prevent the bad consequences of his irregular removing. He was never in possession of the farm again, and therefore he is not entitled to maintain the plea against his landlord that he was entitled to notice.

The Lords therefore dismissed the appeal, and affirmed the judgment.

Counsel for Appellant—Hay. Agent—W. G. Roy, S.S.C.
Counsel for Respondent—Mackintosh—Low. Agents—Horne & Lyell, W.S.

Friday, January 13.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

THE PENNYCOOK PATENT GLAZING COMPANY (LIMITED) AND ANOTHER *v.* MACKENZIE, HARLEY, & COMPANY AND OTHERS.

Patent—Infringement—Combination—Mechanical Equivalent.

The invention claimed under a patent for dispensing with the use of putty in the glazing of station roofs, greenhouses, and similar buildings, consisted in the construction of