jure relicti the same interest in his wife's estate as a widow *jure relictæ* takes in the goods in communion.

The order of executors has long been settled. The universal legatee is preferred to the office; 2, the next of kin; 3, the widow; 4, a creditor; 5, a legatee; 6, the procurator-fiscal of court. It will be observed that all persons who have an interest in the estate are not conjoined in the office, and that the next of kin are preferred to the widow.

By force of the statutes of 1877 and 1881 the moveable estate of a married woman does not pass under the *jus mariti*, but remains her separate property. If she dies intestate her next of kin are entitled to be preferred to the office of executor. The question is whether the husband, by virtue of the interest which he takes in his wife's estate, is to be considered as one of the next of kin? He is certainly not within the class at common law, nor does the statute so declare. His interest in his wife's estate is the same as the interest of a widow in the goods in communion. But having that interest, the widow is postponed to the next of kin in a competition for the office of executor. By parity of reasoning the husband, whose interest is identical, can have no higher right, and he is in my opinion not entitled to be conjoined in the office of executor with the next of kin.

The interlocutor of the Sheriff-Substitute will be affirmed.

The LORD JUSTICE-CLERK, LORD YOUNG, and LORD LEE concurred.

The Court affirmed the judgment of the Sheriff-Substitute.

Counsel for the Appellant—G. W. Burnet. Agents—Carmichael & Miller, W.S.

Counsel for the Respondent—Guthrie. Agents—Morton, Smart, & Macdonald, W.S.

Wednesday, March 19.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

LIVINGSTONE *v.* BEATTIE.

Process—Removing Crofter—Suspension—Caution—A.S., Dec. 14, 1756.

A tenant against whom decree of removing had been pronounced by the Sheriff, and who had been charged on said decree to remove, brought a suspension of the decree and charge on the ground that the decree was erroneous in respect that he was a crofter, and could only be removed for some of the reasons specified in the Crofters Holdings Act. The Court *passed* the note on juratory caution.

In April 1889 Miss Beattie of Glenmorven brought an action of removing against Robert Livingstone, a tenant on her estate, in the Sheriff Court of Argyllshire, to have him ordained to flit and remove from the houses and land and right of pasturage occupied by him at the term of Whitsunday 1889 under pain of ejection. Defences were lodged for Livingstone, and a record was made up in the action, upon considering which the Sheriff-Substitute on 1st June 1889 found that Livingstone was a crofter within the meaning of the Crofters Holdings (Scotland) Act 1886, and could not be removed from his holding except in consequence of a breach of one or more of the conditions enumerated in that Act, and therefore dismissed the action. Miss Beattie appealed against this judgment to the Court of Session, and the First Division of the Court in July 1889 allowed the parties a proof of their averments in common form, and remitted to the Sheriff to take the proof and proceed in the action accordingly. Evidence was thereafter led by the parties respectively, and the Sheriff-Substitute thereafter on 8th August 1889 pronounced decree of removing against Livingstone, which judgment was on appeal affirmed by the Sheriff-Principal on 19th October 1889.

The question before the Sheriff turned very much on whether or not Livingstone was resident on his holding at the passing of the Crofters Holdings Act.

On 27th November Miss Beattie gave Livingstone a charge to remove.

On 6th December Robert Livingstone brought the present note of suspension of the decree and charge.

The complainer averred that he was a crofter within the meaning of the Crofters Holdings Act 1886, and could only be removed in terms of that Act, and that the decree was erroneous in fact and law.

He pleaded—"(1) The decrees sought to be suspended, being unfounded in fact and erroneous in point of law, cannot be the foundation of legal diligence, and the same, together with the charge given thereon, ought to be suspended as craved."

Miss Beattie lodged answers denying the complainer's averments.

The respondent pleaded—"(3) In any case the note should only be passed on caution being found for violent profits, and for payment of the expenses already found due, for which a charge has been given."

The Lord Ordinary on 30th January 1890 passed the note on juratory caution, and remitted to Mr M'Lachlan, Sheriff-Substitute, Oban, to take the suspender's oath anent juratory caution, and to report.

"*Note.*—This case has already been under the notice of the Court of Session, and their Lordships of the First Division, I understand, sent it back for further inquiry. The decision in the Sheriff-Court has now been against the defender, but it rather appears to me that the case raises certain novel questions in reference to and arising out of the Crofters Holdings Act, and that injustice might be done if the defender were not permitted to submit these questions to the Court of Session."

From the report of the Commissioners the following facts appeared:—The complainer's estate, as stated in the inventory produced

by him, amounted to £13, and his debts to £39, 2s. The rent of his holding due at Martinmas 1889, amounting to £3, was also unpaid. It had been offered to the respondent by the complainer, but refused by her. The complainer also deponed that he had about fifteen months before built a substantial cottage on his holding at a cost of £62, 10s. in money, and eleven weeks labour of himself and his nephew. The money had been borrowed from his sister, and was still due. He also produced a bond of caution by Hugh Lemard, fisherman, Tobermory, and deponed that he was the best cautioner he could find, but that he did not know what means he had. He believed he had not much; he did not know that he had any at all.

By the Act of Sederunt 14th December 1756, sec. 6, it is provided with regard to a bill of advocation or suspension of a decree or process of removing, that upon passing such bill, or at least within ten days after the date of the deliverance thereon, the complainer should find "sufficient caution, not only for implement of what shall be decerned as the advocation or suspension," but also for damage and expense in case the same should be found due. If the complainer failed to find such caution the bill of advocation or suspension should be held as refused.

The respondent reclaimed, and argued that the note could only be passed on sufficient caution being found. Juratory caution was here the same as no caution at all. The Court always went on the principle that juratory caution must not be illusory—A.S., December 14, 1756; *Marshall* v. *Gartshore*, May 28, 1850, 12 D. 946; *Logan* v. *Weir*, July 16, 1870, 8 Macph. 1009.

At advising—

LORD PRESIDENT—It is quite impossible to assume that this case falls under the Act of Sederunt of 1756, because to assume that is to assume the whole merits of the case, and if we are not bound by the provisions of that Act, it seems to be a question for the discretion of the Court whether in the circumstances they will allow a suspension to be brought on juratory caution, which apparently is in this case the same as no caution at all. But still that is a question for the discretion of the Court, and on consideration I am led to agree with the Lord Ordinary. I think that it is plain enough that questions are raised as to the construction of the Crofters Act, which is a recent statute, and has not been made the subject of much criticism, at least in this Court, and also as to the matter of fact how far the suspender was resident on his holding. I am not sure that the mere fact of residence or non-residence at the time the Act passed will be altogether conclusive. I therefore have an impression that if we refused to allow the case to be tried, we might be doing an injustice to the defender, and be shutting out from the consideration of this Court questions of great importance under the Crofters Act.

LORD SHAND—I am of the same opinion. Removings of the class we are here dealing with can be readily distinguished from the case of ordinary tenants' removings, where the right of the party against whom decree is sought is merely temporary. The right claimed here is a permanent right subject to certain conditions, and therefore is out of the class of case to which I have just referred.

The Lord Ordinary has stated two grounds for passing the note:—First, that novel questions are raised under the Crofters Holdings Act, and second, that injustice might be done if the defender were not allowed to submit these questions to the Court of Session. My own impression is that the second ground is quite sufficient, but it is certainly an additional reason of some moment that there are matters of some importance to be decided.

LORD ADAM—I am of the same opinion. I do not doubt that difficult questions may be raised under the suspension, and certainly the Sheriff-Substitute first decided the case one way without requiring proof, and when proof was taken, decided the case directly the other way. Altogether, I am of opinion that we should pass the note and allow the case to be tried.

LORD M'LAREN—I concur, and I think that where a question of the character of a tenant is to be tried, it must be a matter for the discretion of the Court on what grounds the tenant is entitled to have the question submitted to this Court. That is, I think, a purely discretionary matter, not capable of being reduced to fixed rules, and therefore unless it were shown that there were clear grounds for holding the Lord Ordinary's decision to be wrong, I should be for adhering.

The Court adhered.

Counsel for the Respondent and Reclaimer—Guthrie—Macfarlane. Agents—John C. Brodie & Sons, W.S.

Counsel for the Suspender and Respondent—G. W. Burnet. Agent—D. Maclachlan, S.S.C.

Thursday, March 13.

SECOND DIVISION.

(Before Seven Judges.)

[Lord Trayner, Ordinary.

THE HOLMES OIL COMPANY (LIMITED) *v.* THE PUMPHERSTON OIL COMPANY (LIMITED).

Contract—Agreement—Decree-Arbitral—Corruption—Fraud—Reduction.

By agreement between the parties in 1884 it was provided that the Holmes Oil Company should sell to the Pumpherston Oil Company the whole crude oil distilled by them for a period of three years; that the price to be paid therefor should be the one-half of the average net naked price received by