LORD TRAYNER—I am of opinion that the action is irrelevant, but like Lord Young I am unwilling to go the full length of giving effect to that view. I think the Lord Ordinary acted wisely, and that we should affirm the course he has adopted, which is certainly the most favourable possible to the pursuer.

The Court adhered.

Counsel for the Pursuer and Respondent —Young — A. S. D. Thomson. Agents— Henry Wakelin & Hamilton, S.S.C.

Counsel for the Defenders and Reclaimers —Lorimer. Agent—George Inglis, S.S.C.

Wednesday, January 7.

FIRST DIVISION.

[Lord Trayner, Ordinary.

SWANSON *v.* GRIEVE AND OTHERS.

(*Ante*, July 11, 1890, 27 S.L.R. 884; 17 R. 1115.)

Crofters Holdings (Scotland) Act 1886 (49 *and* 50 *Vict. cap.* 29)—*Enlargement of Holdings—Entry to Assigned Lands—Bona fide Possession.*

In April 1889, by order of the Crofters Commissioners, certain lands—being part of a farm held under a lease dated subsequent to the passing of the Crofters Act 1886 — were assigned to certain crofters for the enlargement of their holdings. The landlord and tenant of the farm thereafter brought a suspension and interdict to have the crofters interdicted from entering upon the assigned lands, on the ground that they had no title, as they had not obtained from the Sheriff, in terms of the Act, a decree-conform to the order of the Commissioners. After certain procedure the Sheriff pronounced decree-conform on 3rd March 1890, and the interim interdict which had been granted was recalled. The landlord and tenant then brought a second note of suspension and interdict seeking to have the crofters interdicted from entering on the assigned lands, on the ground that the Commissioners had gone beyond their powers in making the order in question, the lands assigned being part of a farm held under a lease. In July 1890 the reasons for suspension were repelled, but in the meantime the tenant had sown the assigned lands with seed for crop 1890. To this crop the crofters claimed right, and they obtained decree of ejection against the tenant.

In a suspension by the tenant—*held* that the complainer having sold the crop in *bona fides*, had exclusive right thereto, and was only bound to cede possession of the subjects under reservation of that right.

Held by Lord Trayner (Ordinary), that the crofters not being proprietors of the land, could have no claim for a crop which they had neither sowed nor worked, though they might have a claim for damages for being kept wrongously out of possession.

Observations by the Lord President and Lord Adam to same effect.

This is a sequel to the case of *Traill's Trustees* v. *Grieve*, reported *ante*, July 11, 1890, 27 S.L.R. 884, and 17 R. 1115.

By order dated 24th April 1889 the Crofters Commissioners assigned certain subjects amounting to 65 acres arable land and 22 acres pasture to John Grieve and others, crofters, in enlargement of their holdings, with possession at 11th November following. The land assigned formed part of the farm of Elsness, Orkney, then occupied by Mr James Swanson as agricultural tenant of the proprietors, the trustees of Mr Traill of Rattar. In November following the proprietors and tenant brought a suspension and interdict in order to have the crofters prevented from taking possession, on the ground that decree-conform had not been obtained from the Sheriff under the 28th section of the Crofters Holdings Act 1886. Interim interdict was granted, but on 3rd March 1890 decree-conform was pronounced by the Sheriff, and thereafter the interim interdict was recalled.

On 13th March 1890 the proprietors and tenant presented a second note of suspension and interdict, praying the Court to suspend the order of the Commissioners and the decree following upon it, on the ground that the Commissioners had acted *ultra vires* in pronouncing the order in question. The note was refused by the Lord Ordinary (TRAYNER), and the complainers having reclaimed, the First Division adhered to the Lord Ordinary's decision on 11th July 1890—*ante*, vol. xxvii. p. 884, and 17 R. 1115.

In the meantime the tenant Mr Swanson had sown the necessary seed for crop 1890 on his farm, including the lands assigned to the crofters. The crops so sown on the assigned lands amounted to 14 acres of bere, 3 acres of potatoes, and 16 acres of turnips.

On 25th July 1890 the crofters—John Grieve and others—raised an action against Swanson in the Sheriff Court at Kirkwall for warrant to eject him from the assigned lands. Decree of ejection was granted on 2nd August 1890 by the Sheriff-Substitute (ARMOUR), and the defender having appealed, the Sheriff (THOMS) on 26th August adhered to the interlocutor of the Sheriff-Substitute.

On 4th September Swanson, in order to preserve his right to the crops sown by him, presented this note of suspension, praying the Court to suspend the ejection with which he was threatened by John Grieve and the other crofters, and the whole grounds thereof.

The complainer stated that he did not dispute that the respondents were entitled to get possession of the assigned land, but maintained that the decree of ejection

ought to be qualified by a reservation of his right to reap the crops which he had sown in good faith on the land in question. He further stated that the first cutting of hay had been already removed by the respondent.

The crofters—John Grieve and others—lodged answers, in which they stated, *inter alia*—"It is believed and averred that no part of the seeds for crops 1890 were sown until six weeks or thereby after 3rd March 1890, when decree-conform was pronounced by the Sheriff as above narrated. During the period since said terms of entry the complainer has had no title to occupy or enter upon said lands, or to interfere with the crops thereon, and his occupation thereof and interference therewith are and have been vitious and illegal." They further averred—"The real instigators and originators of the present and former proceedings are the proprietors, Mr Traill's trustees, who wish to exhaust the respondents financially by means of a series of expensive litigations. It is believed and averred that the complainer, so far from sowing the crops referred to in good faith, refused to sow said crops on the land which had been assigned to the respondents, in respect he had no longer any right to continue in possession of said land, and that he at last consented to do so only after peremptory orders had been given him to that effect by the proprietors, who at the same time undertook to relieve him of all loss he might suffer thereby."

The complainer pleaded, *inter alia*—"(2) The complainer having sown the crops in said land in *bona fide* is entitled to reap the same, and the decrees of ejection complained of being in prejudice of his said right, he is entitled to suspension thereof as craved."

The respondents pleaded, *inter alia*—"(1) No title to sue. (2) No relevant or sufficient ground of suspension has been stated by the complainer. (3) The respondents having the sole right and title to the possession of the said lands and the crops growing thereon, the complainer is bound to remove therefrom. (4) The complainer having sown said crops in *mala fide*, and at his own risk, is not entitled to suspension of decrees of ejection complained of, and the note should be refused with expenses."

The Lord Ordinary (TRAYNER) on 14th November 1890 pronounced this interlocutor:—"Repels the first and second pleas-in-law for the respondents: Finds that the crops mentioned on record as having been sown by the complainer belong exclusively to him, and that the respondents have no right to the same, and to this effect sustains the second plea-in-law for the complainer, and repels the second plea-in-law for the respondents: *Quoad ultra*, continues the cause: Grants leave to reclaim."

"*Opinion.*—In 1889 the members of the Crofters Commission, by virtue of their statutory powers, assigned to the respondents, in enlargement of their holdings, certain lands then occupied by the complainer. The complainer, thinking himself aggrieved by the action of the Commissioners, raised a suspension of their proceedings, and averred that the order or interlocutor of the Commissioners was *ultra vires*. On 4th June 1890 I refused the complainer's note of suspension, and that judgment was affirmed by the First Division of the Court on 11th July 1890. During the dependence of that suspension the complainer sowed the land assigned to the respondents with the necessary seeds for crop 1890, consisting of bere, turnips, potatoes, and hay.

"It is unnecessary to detail the subsequent litigation which took place between the parties. The question now is, to whom do the crops belong? The respondents claim the crops on the ground (1) that they have the sole right and title to the possession of lands in which the crops were sown, and (2) because the crops in question were sown by the complainer in *mala fide*. The complainer admits that he must now cede the assigned lands to the respondents, but claims the crops because they were sown by him, and that in *bona fide*, while the question was still *sub judice* whether the respondents were entitled to possession of the assigned lands.

"This question does not appear to be attended with any difficulty. The respondents, in my opinion, have no right whatever to the crops in question. The general rule is *messis sementem sequitur*, and according to that the complainer is entitled to the crops he sowed. If the complainer had sowed the crops in *mala fide* in land of which he had no legal possession, I could understand the proprietor of that land claiming the crops as *partes soli*. But the respondents cannot claim the crops on that ground because they are not the owners of the land. They are on their own showing only tenants who have been deprived or disappointed of possession, and may have a claim for damages (if they have a claim at all) for being wrongously kept out of possession. That, however, is a very different thing from a right to claim crops which they neither sowed nor worked. So far as the respondents' present claim is concerned, it does not seem to me to be of any moment whether the crops were sown in good or in bad faith."

The respondents reclaimed, and argued—The assigned lands became part of the holdings to which they were assigned at the date of the Commissioners' order, 24th April 1889—Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict. cap. 29), sections 15 and 28. At that date the respondents were entitled to possession of the subjects, and they were therefore entitled to the crop now claimed. If the complainer, situated as he was, chose to sow a crop on the lands assigned, he was clearly in *mala fides—Houldsworth* v. *Brand's Trustees*, January 8, 1876, 3 R. 304. At all events, from 3rd March 1890, the date on which the Sheriff pronounced decree-conform, the complainer was in *mala fide*. The plea that the Commissioners had acted *ultra vires* in making the order of 24th April 1889

ought to have been put forward in the first, and ought not to have been reserved for a second suspension, and the proper course for the complainer and his landlords to have taken would have been to suspend the order of the Commissioners. The respondents were willing to repay the complainer the amount of the outlay incurred by him in sowing the crop, with the exception of his expenses for labour, as they would have laboured the ground themselves.

The complainer argued—The order of the Commissioners could not have been brought under review until after decree-conform had been obtained—*Duke of Argyll* v. *Cameron*, November 24, 1888, 16 R. 139. The suspension subsequently raised on the ground that the Commissioners had acted *ultra vires* could not have been brought earlier. The complainer had acted in complete *bona fides*, and all that he now asked was that the respondents should pay the expense of sowing and labouring the ground. If the decree of the Sheriff had been granted with that reservation he would have had nothing more to say.

At advising—

LORD PRESIDENT—The proceedings which have given rise to this litigation commenced with an order of the Crofter Commissioners in April 1887, the effect of which was to assign to certain crofters a portion of the farm occupied by the present complainer Mr Swanson, under Mr Traill's trustees, as proprietor. The circumstances of the farm and the relations of the parties are not of much consequence, because it has already been determined by this Court that the Crofter Commissioners were within their powers in assigning a portion of the farm to the crofters. The crofters who obtained the order threatened to enter into possession of the portion of the farm assigned to them without applying to the Sheriff for decree-conform, which alone gave them a legal title to enter. In consequence a suspension and interdict was brought to prevent their doing so, the ground of suspension being that the respondents had failed to obtain the decree-conform, and the objection—being the only objection which was insisted on—was removed when *pendente processu* the necessary decree was obtained. The plea of *mala fides*, which was the prominent question argued in this discussion, was largely founded upon the contention that the landlord and tenant might have raised in the first suspension the other objections to the order of the Crofter Commissioners which were subsequently raised in the second suspension. I shall consider that question afterwards, but meantime I may say that when a party litigant has one good objection to a proceeding of this kind, he is well entitled to make it, and to have effect given to it. That is all that was done. But the objection founded upon the want of the decree-conform having been removed, another suspension was brought in which the proceedings of the Crofter Commissioners were complained of as being *ultra vires* and beyond their statutory powers. That question gave rise to a lengthened discussion, and was decided by this Division of the Court in July last. The question was one certainly not unattended with difficulty; indeed, it appeared to me to be one of considerable nicety and importance, and although ultimately upon an examination of the matter I came to think that the Crofter Commissioners had not exceeded their powers, it still appeared to me that the proceedings had placed both the landlord and tenant in a position of great embarrassment. I came to be of that opinion because the Crofter Act seemed to take no interest and to be absolutely silent in regard to any provision for adjusting or regulating the relations of the original proprietor and tenant of the lands, a slice of which was to be given to the crofters. I cannot accordingly say that the case was a very clear one; it was rather one which any person who was interested was entitled to have seriously considered and decided, and therefore so far as this point is concerned I am not disposed to think that either landlord or tenant was *in mala fide* in litigating it, the effect of the litigation being to suspend the order of the Commissioners. It therefore follows that the crofters who were prevented from getting possession of the subjects are not now entitled to say that they have been treated in any spirit of vindictiveness or ill-will or *mala fides*.

I have made these observations as negativing the existence of *mala fides* on the part of Mr Swanson, but I must guard myself by saying that I am not satisfied that the present question turns upon the existence or non-existence of *mala fides*. It rather appears to me that until the decision of July 1890 the landlord and tenant had no alternative but to continue the state of possession as it previously existed. If the portion of the farm which had been assigned to the crofters had been left uncultivated by the tenant the landlord would not in the circumstances have been disabled from claiming rent, or at least the tenant might have rendered himself subject to an action for failing to cultivate it. *Mala fides* is nothing but a state of feeling, and I think the position of the landlord and tenant was such that pending the litigation they had no course to follow except that which they took.

That being so, what is the ground of the Lord Ordinary's judgment? Pending the litigation there were three positions in which the farm might have been placed. In the first place, it might have been left uncultivated—an alternative that is not to be entertained after what has been said. In the second place, it might have been handed over to the crofters—an alternative which is quite inconsistent with the pleas of the complainers in the second suspension, and would virtually have amounted to a surrender of the position which the proprietor had taken up. The third alternative was the one which was adopted—that the tenant should continue to cultivate his holding under the lease until the question at issue was finally decided. In adopting

this alternative I think the parties acted rightly; the landlord and tenant were bound to one another—mutually bound to one another—to continue the state of possession so long as the litigation lasted. The Lord Ordinary has accordingly held, and I think rightly, that the crop raised during the interval caused by the litigation—the crop of 1889-90—cannot belong to the crofters. They did not sow it, nor did they labour the ground, and they had no concern with any part of the work necessary to produce the crop.

There may be a further question, how far the crofters who had been found in the end to be right, and who ought to have been in possession of the farm, may not be entitled to the profits of the crop which were sown by Mr Swanson. There is nothing upon this record to raise such a question, which is one of difficulty, and involving some little embarrassment on a ground which has been suggested by Mr Jameson, that in his view it will be necessary to deduct the value of the labour, because if his clients had been in possession they would probably have themselves in person laboured the ground, and would not have hired others to do so as the tenant did. But there is no averment upon this matter on record, and in regard to the only question there raised I agree with the result at which the Lord Ordinary has arrived.

LORD ADAM—The sole question which we have to decide is, whether the respondents have a right to the crops grown during the season 1889-90 on certain parts of the farm of Elsness, which by an order of the Crofter Commissioners dated 24th April 1889 were assigned for the enlargement of the respondents' holdings. The ground upon which the complainer claims the crop is that it was he who sowed it; the respondents, on the other hand, say that the land upon which it was sown was theirs. Both parties have argued the case as if it turned upon the question whether there was or was not *mala fides* on the part of the complainer. It was not disputed, on the one hand, by the respondents that if the crop was sown in *bona fide*, then the general rule *messis sementem sequitur* applies. It was not, on the other hand, disputed by the complainer that if the crop was sown in *mala fide*, then the brocard in question would not apply.

I have a doubt, along with your Lordship, whether that is the true ground upon which the complainer is entitled to defend his rights. But I take the case upon that footing. The order of the Crofter Commissioners was pronounced on the 24th April 1889. A suspension and interdict was brought in November 1889 by Mr Swanson to have the respondents prevented from entering into possession of the subjects assigned to them until they should obtain decree-conform giving them an active title to do so. Mr Swanson's position in that suspension was ultimately admitted by the respondents to be sound, and upon 3rd March 1890 decree-conform was, on their application, pronounced by the Sheriff-Substitute. Accordingly, down to that date there was no *mala fides*, and no reason why Mr Swanson should not have sown the land as usual. That objection was, however, cured by the order being registered as I have said.

Then arose another question under a second suspension, which was brought on the ground that the order of the Crofter Commissioners was *ultra vires*. It was presented on 13th March last, and the Lord Ordinary's interlocutor refusing it was affirmed by this Division of the Court on 11th July following. It is needless to say that the crops were sown during the progress of the litigation, and the question comes to be, was the complainer in *mala fide* when he so sowed the crop? *Mala fides* necessarily implies an improper state of mind on the part of the person with regard to whom the allegation is made. But the respondents' averment in the suspension does not set forth any *mala fides* on the part of Mr Swanson. The averment is—"It is believed and averred that the complainer, so far from sowing the crops referred to in good faith, refused to sow said crops on the land which had been assigned to the respondents, in respect he had no longer any right to continue in possession of said land, and that he at last consented to do so only after peremptory orders had been given him to that effect by the proprietors, who at the same time undertook to relieve him of all loss he might suffer thereby." If it had been averred that Mr Swanson and his landlords had acted in concert, and had sown the crops in pursuance of a scheme to defeat the legal rights of the respondents, it might have been different, but when the tenant was perfectly willing to renounce possession, and the landlords insisted on his sowing a crop in order to retain it, I do not think that such a course can be said to amount to *mala fides* on his part. I think the crop was sown in perfect *bona fides*.

There may be questions behind which are not raised in this record, and which are not now decided, as to whether in an action of damages, or in any other action that may be brought by the respondents, they would be entitled to the profits of the crop. Upon that matter I say nothing.

LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Complainer — Graham Murray — Macfarlane. Agents — John C. Brodie & Sons, W.S.

Counsel for the Respondents—Jameson—Orr. Agent—J. D. Macaulay, S.S.C.