having to decide a difficult legal question between two competitors, both customers, and they took the only course open to them when they raised the multiplepoinding.

At advising—

LORD YOUNG—I read this case and the judgment of the Lord Ordinary carefully, and the impression I formed then has been confirmed by all I have heard. That impression is that this action cannot be sustained, and that for the reasons so lucidly stated by the Lord Ordinary. His Lordship points out that this is an action for damages for misconduct on the part of the bank towards one of its customers. Without giving any opinion upon the merits of the question between the bank and its customers, I am of opinion that not only was there no misconduct on the part of the bank, but that they acted with perfect propriety. I am not sure if it would not have been a wise thing for the bank to have intimated to the pursuer the names of Lawrie & Ker, who were claiming in their own right and on plausible grounds the shares said to have been allotted to him, although he never gave any orders to have the stock bought. I think Lawrie & Ker had plausible grounds for their claim, but I think that the conduct of the bank in declining to obey the pursuer's order to sell, sent in a telegram, is irreproachable. Not only do I think that they were not bound to obey the order, but that they would have acted very indiscreetly if they had done so with the probable result of an action of damages. I think it was proper that they should not judge themselves between two competing customers, and they took the course which is one that would have been recommended by sensible advisers, and told the competitors to go into Court. For these reasons, and indeed for the reasons so clearly stated by the Lord Ordinary, I think we should adhere to this interlecutor.

LORD RUTHERFURD CLARK, LORD TRAYNER, and the LORD JUSTICE-CLERK concurred.

The Court adhered.

Counsel for the Reclaimer—Jameson—M'Phail. Agents—J. K. & W. P. Lindsay, W.S.

Counsel for the Respondent—Dundas. Agents—Mackenzie, Innes, & Logan, W.S.

Tuesday, November 1.

FIRST DIVISION.

SINCLAIR v. MACMILLAN.

Process—Suspension—Caution—Juratory Caution.

A suspension of a charge upon a decree of removing pronounced by the Sheriff was brought on the grounds (1) that the complainer was a crofter, and so protected from removal except for breach of the conditions enumerated in the Crofters Holdings Act 1886, and (2) alternatively, that if not a crofter, she was a tenant under the Agricultural Holdings Act, and had not received one year's notice as required by that Act. This second plea had not been stated in the Sheriff Court.

Held (1) that *prima facie* the complainer was not a crofter but tenant under an informal missive of lease granted by the proprietor; (2) that having received ample notice from the proceedings in the action of removing, she could have suffered no prejudice from the want of the statutory notice—by Lord Adam, that the subjects which she occupied appeared *prima facie* not to be a holding under the Agricultural Holdings Act, and therefore that there was nothing to take the case out of the ordinary rule, and that the complainer must find caution in common form as a condition of the note being passed.

By letter dated in April 1876 Alexander Allan of Aros, in the island of Mull, offered James Sinclair a lease of a house, smithy, croft, and grazings at the annual rent of £20 for either seven or fifteen years. Without sending a formal acceptance of this offer, Sinclair entered into possession of the subjects, and continued to occupy them at the stipulated rent until his death in July 1880. After his death his widow and son continued to occupy the subjects. In May 1891 Archibald Macmillan, who had got a lease of the subjects from Mr Allan, with his consent presented a petition in the Sheriff Court at Oban craving to have Mrs Sinclair and her son removed from said subjects at Whitsunday 1892. In defence to this petition Mrs Sinclair and her son pleaded that Mrs Sinclair occupied the subjects from year to year, and was a crofter within the meaning of the Crofters Holdings Act 1886, and could not be removed except by reason of the breach of one or other of the conditions therein enumerated. The Sheriff-Substitute, holding that Mrs Sinclair was not a crofter, granted the prayer of the petition, and on appeal his interlocutor was affirmed by the Sheriff. Upon this decree Mrs Sinclair and her son were charged to remove.

Mrs Sinclair and her son thereupon brought a suspension of the charge.

The complainers averred—"(Cond. 2) . . . Since 1882 she (Mrs Sinclair) has been sole tenant from year to year of the subjects, and in particular, she was sole tenant

thereof at the passing of the Crofters Act 1866, and was uniformly returned as such by the landlord Mr Allan to the assessor of the county. . . . She can only be removed subject to the conditions enumerated in said Act. (Cond. 3) But if it be held that she (Mrs Sinclair) was not entitled to the privileges of the Crofters Act, but was tenant under a lease as averred by respondents, then she is tenant in the sense of the Agricultural Holdings Act 1883, and is entitled to receive the statutory notice there provided for. She has not received said notice, and the said decree and charge are therefore invalid and inept."

The respondents denied these averments, under the explanation that as the complainer Colin Sinclair was a mere child at his father's death, the respondent Alexander Allan returned the complainer Mrs Sinclair as tenant.

The respondents pleaded that the complainers should, *ante omnia*, be ordained to find caution in common form.

On 16th July 1892 the Lord Ordinary on the Bills (Low) passed the note on juratory caution, and granted commission to the Sheriff-Substitute, Oban, to take the suspender's oath anent juratory caution.

The respondents reclaimed, and at the hearing it was remarked from the bench that the proceedings had not been strictly in accordance with the Act of Sederunt of 11th July 1828, sec. 3, in respect that the note was passed before the deposition of the complainer was received.

Argued for the respondents—The rule in suspensions of removings was that "sufficient caution" must be found—Act of Sederunt 1756 (anent removings). The ordinary application of that rule was that the suspender was required to find caution in ordinary form. In some cases no doubt notes had been passed on juratory caution, but only where there was special reason to believe that injustice would be done by requiring caution to be found in ordinary form—*Logan* v. *Weir*, July 16, 1870, 8 Macph. 1009; *Livingstone* v. *Beattie*, March 19, 1890, 17 R. 702. Here there was no special reason for departing from the ordinary rule. The Sheriffs had both decided that the complainer Mrs Sinclair was not a crofter, but that she possessed the subjects under the lease, and *prima facie* that view was right. The point now stated in regard to the want of the necessary notice under the Agricultural Holdings Act was a technical one; it had not been taken before the Sheriff, though it might competently have been pleaded; and the subjects seemed not to be of the nature of a holding under that Act—*Taylor* v. *Earl of Moray*, January 23, 1892, 19 R. 399. The respondents did not wish to found on the irregularity in the procedure, but desired to have the question as to caution settled by the Court.

Argued for the complainers—There was here a question to be decided upon the construction of the Crofters Act as in *Livingstone's* case. The fact that the landlord had returned Mrs Sinclair as a yearly tenant to the valuation roll was important. In a question with the landlord, or anyone deriving right from him, that return was proof of the tenant's position—*Elmslie* v. *Duff*, June 2, 1865, 3 Macph. 854. If Mrs Sinclair was not a crofter, then the complainers were tenants under the Agricultural Holdings Act, and entitled to the statutory notice, and the want of that notice rendered the decree of removal invalid. In either view, injustice might be done by requiring caution to be found in ordinary form. The question of what caution should be required was not one as to which the Court would be inclined to interfere with the Lord Ordinary's discretion.

At advising—

LORD PRESIDENT — Some important observations have been made by Lord Adam as to the proper course of procedure where a Lord Ordinary is asked to pass a note on juratory caution, but the view I take renders it unnecessary for me to enter into that, because I am of opinion that no case has been made out why the complainer should not find caution in ordinary form as a condition of the note being passed. The Sheriff and Sheriff-Substitute have both decided that the complainer is not a crofter, but a tenant under a lease, and we have to consider what *prima facie* is the nature of the question which is thus sought to be retried. I cannot say that I have heard anything to lead me to regard the conclusion of the Sheriffs as at all probably wrong. *Prima facie*, the case appears to me to be one of a tenant holding under a lease. I give this not as my deliberate and final opinion, but as my impression on the evidence before us. The fact that the missives of lease are informal is of no importance, since possession has followed upon them, and continued for more than seven years, and I can see that there would be great difficulty in holding that the tenant was treated as a yearly tenant after the seven years had expired. So far, accordingly, I think no reason has been given to take the case out of the ordinary rule. The case of *Livingstone* was quite different, and affords no support to the complainer's contention.

Upon the second point it is to be observed that it is stated for the first time on record. It was a perfectly competent defence in the Court below, but it is only now mooted, and now that it is mooted, it seems to have no other merit than belongs to a technical objection. I cannot say that there has been disclosed to us a case in which injustice might be done by the want of the statutory notice, because long and full notice was given to the complainer by the proceedings taken to effect the removing.

On the whole, I am of opinion that the case does not present grounds for differentiating it from what is admitted to be the ordinary rule.

LORD ADAM—I do not think it necessary to dwell on the informality which has characterised the procedure in this case, though

if the proper amount of information had been laid before the Lord Ordinary, I am by no means certain that he would have pronounced the interlocutor he has pronounced.

I agree with your Lordship, that in deciding the question whether or not we shall allow the note to pass on juratory caution, we must regard the *prima facie* aspects of the case, and I agree that *prima facie* the complainer is tenant under a lease.

With regard to the question raised under the Agricultual Holdings Act, it is provided by section 35 of that Act that "nothing in the Act shall apply to a holding that is not either wholly agricultural or wholly pastoral, or in part agricultural, and as to the residue pastoral, or in whole or in part cultivated as a market garden." It does not of course follow that the fact of there being a house on the subjects alters the character of the holding, because the house may be a mere adjunct to the land, but in this case can we say that the subjects are either wholly agricultural or wholly pastoral? If I were to express an opinion, I should say that the subjects consisted partly of land and partly of houses, the houses being the major part of the holding, and it appears to me that there is no *prima facie* case made out that they are a holding under the Agricultural Holdings Act.

On the whole matter, therefore, I concur with your Lordship.

LORD M'LAREN—I concur. I am always unwilling to interfere with an interlocutor pronounced by a judge in the exercise of his discretion. I adhere to the opinion I formerly expressed on this point in the case of *Livingstone* v. *Beattie*, and it is only on a strong legal ground that I would interfere with an interlocutor of that kind. I find such a ground here, and I think the interlocutor cannot stand, as the Act of Sederunt has not been complied with. The interlocutor once disposed of, the question of what caution should be found is open for our consideration, and I agree in the views of your Lordships.

LORD KINNEAR—I agree that no sufficient reason has been shown for displacing the ordinary rule applicable to proceedings of this kind.

The Court recalled the Lord Ordinary's interlocutor, and required the complainers to find caution in ordinary form as a condition of the note being passed.

Counsel for Complainers—Dewar. Agent—Thomas M'Naught, S.S.C.

Counsel for Respondents — Jamieson — Salvesen. Agent—F. J. Martin, W.S.

Saturday, November 5.

FIRST DIVISION.

BURNS *v.* ALLAN & SONS.

Reparation—Personal Injury—Master and Servant—Jury Trial—Excess of Damage—Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42).

In an action of damages by a workman against his employers under the Employers Liability Act, the jury awarded the pursuer a sum equal to three years' wages, being the full amount recoverable under the Act. The injuries which the pursuer had sustained were a broken thigh, a broken and disfigured nose, and displacement of the breast-bone. The medical evidence was to the effect that he would probably be able to resume his work in a year from the date of the accident.

Held that, in addition to the actual loss sustained, the jury were entitled to take into account the pain suffered and the chance of the medical opinion not being realised, and that there was no such excess in the award of the jury as to entitle the defenders to a rule on the ground of excess of damage.

Francis Burns brought an action of damages under the Employers Liability Act 1880 against J. & A. Allan & Sons for payment of three years' wages (£234) in respect of injuries sustained in their service.

The case was tried before the Lord President and a jury, and the result of the evidence was to show that the pursuer's injuries were very severe. His thigh was broken, his nose was broken in a way that caused considerable disfigurement, and his breast-bone was displaced. The only medical man examined (a witness for the pursuer) gave it as his opinion that the pursuer would probably be able to resume his ordinary work as a quay labourer in about a year from the date of the accident.

The jury found for the pursuer, and assessed the damage at the full amount claimed.

The defenders applied for a rule, on the ground of excess of damage, and argued—A sum equal to three years' wages was the maximum of damages recoverable under the Employers Liability Act, and that being so, it was evidently excessive for a jury to award such a sum where the injuries sustained only disabled the workman from pursuing his ordinary employment for a single year.

At advising—

LORD PRESIDENT—I see no ground whatever for granting a rule. The pursuer's injuries were very serious. His breastbone was stoved in, his thigh smashed, and his nose broken so as to be altered almost beyond recognition. At the trial—six months after the accident—the pursuer went on crutches, and was a perfect wreck. The jury, I imagine, in estimating the