The Court pronounced the following interlocutor:—

"Finds that it has not yet been determined whether the sum of £28, 0s. 5d. sued for cannot still be imposed as a private improvement assessment on David Sommerville, and received by the pursuers from him, and that the pursuers have not as yet proved that any loss has been sustained by them through fault on the part of the defender: Therefore sustain the appeal, and recal the interlocutor appealed against, as also the interlocutor of the Sheriff-Substitute dated 8th January 1894; dismiss the action, and decern."

Counsel for the Pursuers — Lees—Deas. Agents—Campbell & Smith, S.S.C.

Counsel for the Defender—Strachan—A. S. D. Thomson. Agent — John Veitch, Solicitor.

Tuesday, June 12.

FIRST DIVISION.

[Sheriff of Argyll.

MACDONALD AND OTHERS *v.* CAMERON AND ANOTHER.

Crofter—Heritor—March Fence—Act 1661, *cap.* 41—*Title to Sue.*

Held that crofters, notwithstanding the Crofters Act of 1886, are not heritors within the meaning of the Act 1661, cap. 41, and have no title to sue an action to have their landlord ordained to unite with them in erecting a march fence between the common pasturage of the crofting township and another part of the estate.

The Act 1661, cap. 41 (ratified by the Acts 1669, cap. 17, and 1685, cap. 39), provides that "Where enclosures fall to be upon the border of any person's inheritance, the next adjacent heritor shall be at equal pains in building, ditching, and planting that dike which parteth their inheritance."

In 1893 James Macdonald and others, all crofters in Plocaig, Ardnamurchan, within the meaning of the Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict cap. 29), and occupying their holdings under John James Dalgleish, Esquire of Ardnamurchan, brought an action in the Sheriff Court at Oban against James and Allan Cameron, tenants of the farm of Glendryen, Ardnamurchan, and against the said J. J. Dalgleish, Esquire. In said action they craved the Court "to ordain the defenders jointly and severally, or severally, to unite with the pursuers in erecting a march fence or dyke between the common pasture of the township of Plocaig and the farm of Glendryen on the estate of Ardnamurchan, and that to the extent of one-half thereof; and failing the defenders, jointly and severally, or severally, complying with the above prayer within such period as the Court may appoint, to grant warrant to and authorise the pursuers to erect the said march fence or dyke at the sight of such skilled person as the Court may appoint, and on said march fence or dyke being erected, to ordain the defenders, jointly and severally, or severally, to pay to the pursuers one-half of the cost thereof."

The pursuers averred that there was no march fence between the farm of Glendryen and the common pasture of the township of Plocaig, that in consequence cattle strayed across the march, and that it was for the interests of all parties that a march fence should be erected. They pleaded, *inter alia*—"(3) The pursuers being crofters within the meaning of the Crofters Holdings (Scotland) Act 1886, are proprietors of their respective holdings within the meaning of the March Fence Acts, and the defenders, jointly and severally, or severally, are bound to concur with the pursuers in the erection of a march fence as craved.

The defenders pleaded—"(2) The action being incompetent and irrelevant, ought to be dismissed, with costs. (3) The pursuers being merely crofters or tenants have no title to sue either by statute or common law, and the action ought to be dismissed, with expenses."

Upon 21st November 1893 the Sheriff-Substitute (MACLACHLAN) pronounced the following interlocutor — "Finds that the pursuers are crofters within the meaning of the Crofters Holdings (Scotland) Act 1886, and occupy holdings on the estate of Ardnamurchan, the property of the defender John James Dalgleish, including common grazing ground adjoining the farm of Glendryen, also on said estate but not separated from it by a march fence: Finds that this action is one calling upon the said John James Dalgleish as proprietor and the other defender as tenants of the said farm of Glendryen to unite with the pursuers in erecting a march fence or dyke bounding the said common pasture, but finds that neither by statute, nor by common law have the pursuers any right or title to make this demand: Therefore finds the action irrelevant and dismisses the same; finds the pursuers liable in expenses."

"*Note.*—This is an action by four crofters in the township of Plocaig, on the estate of John James Dalgleish of Ardnamurchan, against the tenants of the farm of Glendryen on said estate, and also against the proprietor, to have them ordained to unite with the pursuers in erecting a march fence or dyke between the common pasture of the township and the said farm. The farm adjoins or marches with the common pasture ground, but there is no march fence, so that, as the pursuers say, the cattle both of the pursuers and defenders stray into each other's territory, and not only cause damage, but are liable to be cruelly ill-used and even maimed in being driven back to their own ground. If this is true it shows a very unfortunate and unpleasant state of matters, which I have no doubt the erection of a good strong and substantial march fence would go a long way to remedy,

and it might be thought desirable that all the parties interested should combine in erecting such a fence, but as I am of opinion that neither at common law nor by statute have I the power of ordering this to be done, I must dismiss the action as irrelevant. In the first place, there is no common law of march fence in the law of Scotland (see rubric in the case of *Strang* v. *Stewart*, March 31, 1864, 2 Macph. 1015), and secondly the statutes regarding march fences, in particular the Acts 1661, c. 41, 1669, c. 17, and 1685, c. 39, apply only to proprietors and not to tenants. A proprietor may be compelled by a neighbouring proprietor to erect a march fence or to concur with him in erecting it, and when the march fence is erected the tenants must preserve it, that is to say, the obligation of keeping it up devolves on the tenants — *Dudgeon* v. *Howden*, November 23, 1813, 17 F.C. 458. The pursuers are crofters on the estate of the defender Mr Dalgleish, or, according to the definition in the Crofters Holdings (Scotland) Act 1886, they were at the date of the passing of that Act tenants of holdings from year to year and Mr Dalgleish is their landlord, and I cannot give them any rights other than those which they had as yearly tenants that are not given by the Act. Their position may, popularly speaking, be considered equivalent to and perhaps in some respects even better than that of proprietors or owners, but they are nowhere in the Act treated or alluded to as proprietors. The only rights given to them analogous to those of proprietors are their fixity of tenure or indefeasibility of title, and a limited power of bequeathing the holding to members of their families, but these are hedged about by very stringent conditions none of which are applicable to proprietors, and on violation of these conditions they may be removed by the landlord in the same way as ordinary tenants. They cannot sell, assign, sublet, or subdivide their holdings, neither can they borrow money on the security of their holdings, because if the creditors attempt to attack their holdings and thus make them notour bankrupt the holdings are forfeited and the landlord may resume possession. These are a few of the considerations which make it perfectly clear to me that it was never intended by this Act to put crofters in the position of heritors in the sense of the old Acts regarding march fences, and enable them to put forward a claim such as that in the present action. Though the Act does not expressly say it, I would infer from section 8 that it was contemplated that the crofter should erect these fences for himself, for it provides that on renouncing his tenancy or being removed from his holding he shall be entitled to compensation for any permanent improvements provided "they have been executed or paid for by the crofter or his predecessors in the same family," and in these permanent improvements are included walls and fences as mentioned in the schedule appended to the Act. I may add that in fixing a fair rent the commissioners under the Act took the value of the crofts as they stood, and I cannot order the landlord to put any expenditure upon them for which he is to get no return, either in the shape of additional rent or interest from his tenants, nor can I order the tenants to make any improvements on their holdings which they are not bound to make either by law or by their leases."

The pursuers appealed to the Sheriff (M'KECHNIE), who on 13th April 1894 recalled the interlocutor of the Sheriff-Substitute in so far as it found the action as directed against Mr Dalgleish to be irrelevant, found it relevant against that defender, and remitted to the Sheriff-Substitute to proceed.

Mr Dalgleish appealed to the Court of Session for jury trial, where it was again argued for the appellant that the pursuers had no title to sue. Doubtless the Crofters Act 1886 conferred certain privileges upon crofter-tenants, and laid certain restrictions upon the landlord's rights in dealing with their tenants, but notwithstanding these privileges and limitations the crofters still remained tenants and the landlord remained sole proprietor. The right conferred upon heritors by the Act of 1661 could only be exercised by proprietors, and could not, as even the Sheriff had held, be exercised by tenants. It was therefore not available to the pursuers.

Argued for the respondents — In the reasons stated by the Sheriff crofters were to be regarded as heritors within the meaning of the Act 1661, c. 41.

At advising—

LORD PRESIDENT—I think the Sheriff-Substitute's judgment here is right, and his note is a very intelligent and lucid statement of his views. The question really is this — Are the petitioners in a position to enforce against their own landlord the provisions of the Act of 1661? I call the defenders their own landlord because the Crofters Act, upon which the whole argument turned, uses that language. Mr Dalgleish, then, is the petitioner's landlord; does the Act of 1661 apply to such a case? It is clear that the object of that Act was to encourage proprietors in developing the full resources of their estates and primarily by planting. Heritors were therefore to have the right of obtaining an order upon neighbouring heritors to share in the expense of a benefit which accrues equally to the man who does not initiate the improvement as to the man who does. The petitioners here seek to take advantage of this Act as heritors. Now, they are tenants—the Crofters Act says so—although they are not removable if they pay their rents, and they have the privilege also of having their rents fixed by commissioners. Beyond that it is impossible to say that they have the rights of *dominium* postulated of proprietors in the Act of 1661. I am not disposed to take it from their own hands that they are in a position contemplated by the old Act, and indeed I am clear that that Act does not apply to them at all. It is not necessary to go into an exhaustive

consideration of all the rights which crofters may or may not have. At any rate they are not proprietors, and it would be difficult to hold they were, looking to the whole scheme as well as to the phraseology of the Crofters Act.

LORD ADAM—I concur. I think these crofters remain tenants, only they cannot be turned out at will. It would be most remarkable to say that the intention of the Crofters Act was to turn them into proprietors. I entirely agree with the judgment of the Sheriff-Substitute.

LORD M'LAREN—This action is instituted under the old Scots Statutes providing in terms for compensation to a proprietor who encloses his land, to the extent of half of the expense incurred, by giving a right to recover it from the adjacent proprietor, who also takes benefit from the erection of the fence.

In considering whether crofters are in a position to exercise the powers conferred by the Acts upon heritors, it is not necessary to consider whether or not they are heritors in the sense of having to contribute to the rates or of having the right to attend church meetings. Heritors in the sense of the Act 1661 are proprietors of heritable estate. They must show that they have a right of property in the subjects which they desire to fence. Now, we find in the Crofters Act a peculiar species of tenure which is said by the Sheriff to amount to a right of property, but I do not think that it has that character. Crofters before the passing of the Act were nothing but annual tenants, and we know that by custom many such families enjoyed the benefits of a tenancy perpetually renewed, and in few cases were they evicted if they paid their rents, although the custom was not enforceable in a Court of law. Now, by statute a crofter has a legal right to remain in possession, because the Act of Parliament provides that he shall not be removed if he complies with certain conditions. In giving this right the Legislature never intended, as is seen from the phraseology of the Act, that the tenure should be essentially different from what it had been, viz., annual tenancy. They are not tenants for a specific number of years, and if they fail to pay their rent, or become bankrupt, or fail to observe certain other conditions, crofters may still be removed, and the landlord may then put in motion the privileges of eviction which he possesses in the case of ordinary annual tenants. This is a very different right from that of property. These crofters have more than an ordinary common law right of tenancy, but they have not enough to give them the right to compel their landlord to join with them in erecting a march fence. I therefore agree with your Lordships.

LORD KINNEAR was absent.

The Court recalled the interlocutor of the Sheriff and dismissed the action.

Counsel for Pursuers and Respondents—G. Watt—Trotter. Agent—M. Graham Yooll, Solicitor.

Counsel for Defenders and Appellant—H. Johnston—C. N. Johnston. Agents—Dalgleish & Bell, W.S.

Thursday, June 7.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

ELIOTT'S TRUSTEES *v.* ELIOTT.

Landlord and Tenant—Contract—Lease—Reduction — Whether Stipulations in Lease Binding on Tenant.

A lease of shootings granted by trustees in possession of an estate was reduced as *ultra vires* of the trustees after the tenant had possessed under it for fourteen years.

Held that the lease having been the tenant's sole title of possession, he was responsible for the due performance o its stipulations, and might be sued for a breach of the same.

Landlord and Tenant—Right of Shooting—Whether Tenant Liable for Damage Caused by Excessive Stock of Game.

A shooting tenant was bound by his lease to relieve the landlord of all claims which might be made by any of the agricultural tenants on the estate on account of damage caused by game, including rabbits. The lease contained no other provision for the protection of the landlord against such damage.

The Court *dismissed* as *irrelevant* an action of damages by the landlord against the shooting tenant on account of damage caused by rabbits to the trees and grass parks on the estate, *holding* that the tenant was placed under no obligation to keep down the stock of game.

Landlord and Tenant—Shooting Tenant—Claim of Damage for Excessive Stock of Game—Mora.

A landlord brought an action against a tenant, who had been in possession of a right of shooting over his estate for a period of fourteen years, on account of damage alleged to have been caused during the whole period of the defender's tenancy, and in particular during the last five years, by the defender permitting an excessive stock of rabbits to exist on the estate. The pursuer averred that he had repeatedly remonstrated with the defender, and applied to him to reduce the stock of rabbits, but without avail.

Held that the pursuer having given no notice to the defender of his intention to claim damages, was barred by *mora* from insisting in the action.

In 1879 the trustees acting under the trust-disposition and settlement of Sir William