

reasonable that she should pay the taxes payable by the occupant of the house, including inhabited-house-duty, and her share of those taxes which are divisible between landlord and tenant.

I would therefore propose that we should answer the questions by finding that the first parties must pay the feu-duty, property assessments, and repairs, and that the second party must pay the assessments in respect of occupancy, including the proportion of ordinary taxes payable by an occupant.

LORD YOUNG—Your Lordship's judgment goes to sustain the view on which the parties have been acting for a great many years, and I am not disposed to interpose any expression of disagreement on my part. I should, however, have been inclined to agree with the view that, as the second party got the house for her own benefit, not merely to occupy it but to take rent or even sell it when she pleased, the costs and charges connected with it should fall on herself.

LORD RUTHERFURD CLARK—I think we should follow the case of *Clark*, which I think is the same as the present.

LORD TRAYNER—I agree.

The Court pronounced the following interlocutor:—

“Answer the first question by declaring that the first parties are bound to make payment of the annual charges numbered (1), (2), and (4), and that they are not bound to pay the charges numbered (3) and (5): Find it unnecessary to answer the second question.”

Counsel for First Parties—Macfarlane. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for Second Party—Dewar. Agents—Cornillon, Craig, & Thomas, S.S.C.

Saturday November 3.

SECOND DIVISION.

[Sheriff of Inverness.

COLQUHOUN AND ANOTHER v. MACKENZIE.

Process—Possession—Interdict—Competency—Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict. c. 29), sec. 16—Legatee.

Section 16 of the Crofters Holdings Act 1886 provides that a crofter may bequeath his holding to any one person of a specified class, hereinafter called the “legatee;” that, if the landlord objects to receive the legatee, the latter may present a petition to the sheriff praying for decree that he is crofter in the holding, in which petition the landlord may appear and state his ground of objection; and that, pending the proceedings in such peti-

tion, the legatee shall have possession of the croft unless the sheriff otherwise direct.

A crofter died leaving a general settlement in A B's favour, by which he bequeathed to A B, *inter alia*, his whole right and interest in his croft. The proprietor of the croft intimated that he objected to receive A B as crofter in the holding. Thereafter A B reaped the crop belonging to the testator, and continued to keep on the holding certain cattle which had belonged to the testator, but, on his attempting to break up the land for the purpose of sowing another crop, the proprietor raised an action to have him interdicted from taking possession of or interfering with the croft.

During the dependence of the action of interdict A B presented a petition to the Sheriff for decree that he was crofter in the holding, and the action of interdict was sisted to await the result of the proceedings in the petition, which was ultimately refused on the ground that A B was not a legatee in the sense of the Act.

The proceedings in the process of interdict having been resumed, the Court held that an action in that form was the pursuer's proper remedy, A B having had no right or title to interfere with the croft, and granted interdict.

By section 16 of the Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict. c. 29) it is enacted—“A crofter may by will or other testamentary writing bequeath his right to his holding to one person, being a member of the same family—that is to say, his wife or any person who failing nearer heirs would succeed to him in case of intestacy (hereinafter called the ‘legatee’) subject to the following provisions:—(a) The legatee shall intimate the testamentary bequest to the landlord or his known agent within twenty-one days . . . (d) If the landlord or his known agent intimates that he objects to receive the legatee as crofter in the holding, the legatee may present a petition to the sheriff praying for decree that he is the crofter therein from the date of the death of the deceased crofter, of which petition due notice shall be given to the landlord, who may enter appearance and state his ground of objection, and if any reasonable ground of objection is established to the satisfaction of the sheriff, he shall declare the bequest to be null and void, but otherwise he shall discern and declare in terms of the prayer of the petition. . . . (f) Where the legatee shall have presented a petition to the sheriff as aforesaid, the legatee, pending any proceedings, shall have possession of the holding, unless the sheriff shall otherwise direct, on cause shown.” . . .

Donald M'Innes, tenant of a small croft at North Ballachulish, died on 9th May 1892 leaving a general disposition and settlement dated 27th August 1891 in favour of John Mackenzie, the son of his mother's sister, whereby, *inter alia*, he specially bequeathed his whole right, title,

and interest in and to his croft to John Mackenzie.

On 17th May 1892 John Mackenzie intimated the bequest to the proprietor of the croft, Donald Cameron of Lochiel.

By letter dated 26th May 1892 Lochiel's law-agent intimated that he objected to receive John Mackenzie as tenant in the holding, on the ground that he was not heir to the deceased within the meaning of the Crofters Holdings (Scotland) Act 1886, and at the same time intimated that the croft had been given to the adjoining crofter David Colquhoun.

John Mackenzie reaped the crop of the year 1892, and received the wintering rent of the croft. Certain cattle, a cow and its follower, which had belonged to Donald M'Innes, were allowed to graze on the holding during the winter.

In March 1893 John Mackenzie entered the holding and attempted to break up the land for the planting of a new crop. Lochiel and David Colquhoun objected to his doing so, and in April 1893 brought an action against him in the Sheriff Court at Fort-William praying the Court to interdict the defender from taking possession of or attempting to take possession of or interfering in any way with the croft in question.

Mackenzie lodged defences, and pleaded—“(2) The defender having acquired the croft by bequest from a crofter of whose family he was a member, and being in possession of the croft, is entitled to the full beneficial use and enjoyment thereof, ought not to be restrained in the exercise of his rights, and the action ought to be dismissed.”

During the dependence of the process of interdict, the defender, in July 1893, brought an action in the Sheriff Court against Lochiel, craving declarator that he was crofter of and in the croft lately occupied by Donald M'Innes in virtue of the latter's disposition in his favour, and of the provisions of the Crofters Holdings (Scotland) Act 1886.

On 23rd October 1893 the Sheriff-Substitute (BAILLIE), after hearing proof, pronounced the following interlocutor in the process for interdict—“Finds in fact (1) that Duncan M'Innes, a crofter who died on 9th May 1892, bequeathed, *inter alia*, the right to his holding to John Mackenzie, the defender; (2) that the testator's mother and the defender's mother were sisters; (3) that the defender on 17th May 1892 intimated said bequest to Donald Cameron the landlord and one of the pursuers, and that by letter of 26th May 1892 the said Donald Cameron's law-agent objected to receive the defender as tenant in the holding; (4) that the said Donald Cameron on the same date let the said holding to David Colquhoun, the other pursuer; (5) that the defender reaped the crop of the year 1892, and received the wintering rent of that holding; that certain cattle which had belonged to the testator, were allowed to graze on the township during the winter, and that on the defender attempting in March 1893 to break up the land of said

holding, the pursuers objected to his doing so: Finds in law (1) that the defender is not a member of the same family as the testator within the meaning of section 16 of the Crofters Act (49 and 50 Vict. cap. 29); (2) that the said bequest is, *quoad* the right to the holding, null and void; (3) that the letter written to the defender on 26th May 1892 was a sufficient declaration of Donald Cameron's refusal to receive him as a crofter in the holding; (4) that there has not been any possession of the holding by the defender since 26th May 1892, sufficient to infer that Donald Cameron had acquiesced in his becoming a crofter in it; (5) that the defender has no right or title to interfere with the said holding: Therefore repels the defences: Interdicts the defender from taking possession of or attempting to take possession of, or interfering in any way with, the croft No. 13 North Ballachulish, in the parish of Kilmallie and county of Inverness, and from cropping or attempting to crop the same,” &c.

On the same date the Sheriff-Substitute pronounced judgment in the defenders' action of declarator, finding that M'Innes' bequest to the defender was null and void, as Mackenzie was not a member of the same family as the testator within the meaning of section 16 of the Crofters Holdings (Scotland) Act 1886.

The defender appealed to the Sheriff (IVORY) in the action of interdict, and on 16th December 1893 the Sheriff recalled the interlocutor of the Sheriff-Substitute in respect of the dependency of the petition under the Crofters Act, which the defender had appealed to the Court of Session, and sisted procedure in the action of interdict until the petition under the Act was finally determined.

On 25th January 1894 the Second Division of the Court of Session affirmed the judgment of the Sheriff-Substitute in the action of declarator (reported 31 S.L.R. 347, and 21 R. 427).

The proceedings in the action of interdict were thereafter resumed, and on 14th September 1894 the Sheriff pronounced an interlocutor in the following terms—“Finds in point of fact (1) that Duncan M'Innes, tenant of the croft No. 13 North Ballachulish, died on 9th May 1892, and by his trust-disposition and settlement, dated 7th August 1891, bequeathed his right to said croft to the defender; (2) That the defender accepted the said bequest, and immediately after the death of Duncan M'Innes entered as legatee into possession of the croft, and on 17th May 1892 intimated said bequest to the landlord Donald Cameron, one of the pursuers; (3) That by letter dated 26th May 1892 the agent of the said Donald Cameron objected, on the part of the latter, to receive the defender as tenant in the holding, and at the same time intimated to the defender that the croft had been given to the adjoining crofter David Colquhoun; (4) That, notwithstanding, the defender, as legatee under the said bequest, continued in possession of the croft, reaping the crop for 1892, keeping his stock thereon, getting the

wintering rent therefor, and sowing oats and planting potatoes therein prior to 4th April 1893; and that the defender was allowed by the pursuers to continue in undisturbed possession of the croft as aforesaid down to the said date; (5) That on 4th April 1893, when the petition was presented, praying to have the defender interdicted from taking possession of or interfering with the croft, or from cropping the same, and from removing the crop already planted, the defender had been in the full and undisturbed possession of the croft for nearly eleven months, and had already cropped the same; (6) That on 7th July 1893 the defender, as legatee foresaid, presented a petition to the Sheriff, praying for decree declaring that he was the crofter in the said holding as from the date of the death of the said Duncan M'Innes; that it was not until 2nd August 1894 finally decided that the bequest was *quoad* the defender's right to said holding, null and void; and that, pending these proceedings, the defender, under the Crofters Holdings (Scotland) Act 1886, was entitled to have possession of the holding; (7) That, in consequence of the said decision, the right to the said holding has now, in terms of the said Act, descended to Donald M'Innes, the heir of the said Duncan M'Innes, and he is now the party principally interested therein: Finds in law that the petition for interdict was not a competent or appropriate application in the circumstances, and that the pursuers are not entitled to insist in the same: Therefore to the above extent and effect sustains the defences, refuses the prayer of the petition, and decerns." . . .

The pursuers appealed, and argued—Interdict was the proper remedy. The defender had no title to come on the land at all. He had been entitled to reap the crop in the autumn as executor of Duncan M'Innes, but he had no title to possess the subjects for any other purpose, as he was not a "legatee" within the meaning of section 16 of the Crofters Holdings Act 1886. Where a person occupied subjects to which he had no title of possession, interdict was competent and was the proper remedy—*Borrows v. Colquhoun*, May 25, 1852, 14 D. 791. This was not a case for an action of removing, which was only appropriate where the party in possession had a *prima facie* title to possess—*Johnston v. Thomson*, June 9, 1877, 4 R. 868.

Argued for defender—The judgment of the Sheriff was right. (1) Interdict was not a competent or appropriate remedy for recovering possession of subjects. *Borrows v. Colquhoun* was not an authority in favour of the pursuers, the decision in the Court of Session having been reversed in the House of Lords—1 Macq. 691. (2) Under section 16, sub-sec. (f), of the Crofters Holdings Act 1886, the defender was entitled to have possession of the croft pending proceedings, and as he had thus a good title, interdict was incompetent.

At advising—

LORD JUSTICE-CLERK—I think this case

does not present any real difficulty.

The respondent, who was the executor of the deceased tenant, was quite entitled to come on the land in order to realise what belonged to the executry estate. After that was done, it is quite clear that he had no title to come on the land or do anything upon it.

Mr Kennedy suggests that his position is identical with that of a person who is entitled to continue in possession in the character of a legatee until he is found not to be entitled to that character by reason of the reduction of the testator's will. But that is not a parallel case at all. The respondent's case is that he was entitled under the statute to occupy this croft. But it is quite certain that he has under the statute no title at all to occupy this croft, as he does not possess the relationship to the deceased which gives him the position of a legatee in the sense of the Act. Legatee in section 16, sub-section (f), of the statute is to be taken as equivalent to "such legatee," *i.e.*, legatee as defined in the prior part of that section.

That having been settled, the question is, whether this action of interdict is to be decided in favour of the pursuers? Mr Clyde properly said that the Sheriff had followed the proper course in sisting this action until the question of the defender's right to the croft had been judicially determined, but, now that this matter has been judicially decided, I have no hesitation in holding that the action of interdict was properly brought, and that the person who brought it is entitled to our judgment. I cannot agree with the argument of Mr Kennedy that interdict was an unsuitable process. The defender from time to time came illegally upon the land to do work which he had no title to do. I therefore think that in the circumstances an action of interdict was the proper remedy. An action of removing was not a suitable process, as the defender had no title to be on the ground at all.

LORD YOUNG—I adopt your Lordship's views, which are my own. I think the case has been put out of shape from an early period by the Sheriff. It seems to me that the action is competent, and that the pursuer has established a case entitling him to interdict, as the Sheriff-Substitute has found in his interlocutor of 23rd October 1893. I think his findings in that interlocutor are altogether right, and that we should affirm his judgment and recal all the other interlocutors.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The Court sustained the appeal, recalled all the interlocutors pronounced since 23rd October 1893; found in fact and law in terms of the interlocutor of that date; of new interdicted in terms of the interdict granted by that interlocutor, and decerned.

Counsel for the Pursuers—H. Johnston—Clyde. Agents—Lindsay, Howe, & Co., W.S.

Counsel for the Defender—Kennedy. Agent—J. Ross Smith, S.S.C.