Thursday, July 2.

SECOND DIVISION.

[Sheriff of Inverness-shire.

MACDONALD *v.* MACDOUGALL.

Crofter—Right of Crofter to Seaware—Validity of Right against Singular Successor—Crofters Holdings (Scotland) Act 1886 (49 *and* 50 *Vict. cap.* 29), *sec.* 12.

By section 12 of the Crofters Holdings (Scotland) Act 1886 it is, *inter alia*, enacted—"It shall be competent for the Crofters Commission to draw up a scheme regulating the use by crofters on the same estate, of seaweed, for the reasonable purposes of their holdings, peat bogs, and heather or grass, used for thatching purposes, and to include the charge for all these in the fixed rent."

A proprietor sold part of his estate, and the buyer sought to interdict crofters upon the remaining portion of the seller's estate from trespassing upon the lands acquired by him, and collecting seaware on the shore *ex adverso* of them.

Held that it was a relevant defence to the action of interdict that the right to take seaware from the shore *ex adverso* of these lands was part of the defenders' holding and that prior to the sale of the lands to the pursuer, the rents paid by the defenders were fixed by the Crofters Commission, in terms of the above section, on that footing.

Prior to 1894 Sir John Campbell Orde was proprietor both of the estate of Balranald, comprehending the farms of Balranald, Paiblesgarry, and Penimore, and of the township of Knockantorran, which adjoined the farm of Paiblesgarry, all in the parish of North Uist. The crofters of Knockantorran were in the habit of removing seaware from the shore *ex adverso* of the farm of Paiblesgarry for the purpose of manuring their arable lands, and, on the other hand, the tenant of Paiblesgarry was in the habit of removing seaware from the shore *ex adverso* of Knockantorran.

In 1894 Sir John Campbell Orde sold the estate of Balranald to Alexander Macdonald. Thereafter the latter raised an action in the Sheriff Court at Lochmaddy against Donald Macdougall and other twenty-three crofters of the township of Knockantorran to have them interdicted "(*First*) From collecting or carrying away or interfering with any seaware, tangle, or other growth or substance which may be growing or thrown upon any part of the farms and lands of Balranald, Paiblesgarry, and Penimore, in the Parish of North Uist and county of Inverness, belonging to and occupied by the pursuer, or upon the seashores *ex adverso* thereof; and (*secondly*) from entering upon, passing through, or using any part of said farms and lands, or the roads or paths thereon, or the seashore *ex adverso* of said lands for the purpose of collecting, carrying away, or interfering with any such seaware, tangle, or others foresaid." He averred that the taking of seaware by the crofters of Knockantorran from the shore *ex adverso* of Paiblesgarry and by the tenant of Paiblesgarry from the shore *ex adverso* of Knockantorran was "merely a temporary arrangement affecting tenants on the same estate, and was brought to an end when the pursuer became proprietor of the estate of Balranald."

The defenders averred "that at the date of the alleged sale of the lands of Balranald from Sir John Powlett Campbell Orde to the pursuer, the crofter defenders were all crofters holding their lands, under and in virtue of the Crofters Holdings (Scotland) Act 1886, from the said Sir John William Powlett Campbell Orde, and having an inalienable right to certain shares in the seaware and tangle cast on the shore *ex adverso* of Paiblesgarry, on Balranald lands as far north as Hunglam, as parts and pertinents of their holdings, and they still hold their lands, and the right to gather, collect, and take away the drift seaware and tangle from *ex adverso* the shores of Paiblesgarry and Balranald, with right of access to the seashore there, across the lands of Paiblesgarry, by themselves or their servants, and with carts and horses, for exercising said right, and they cannot be deprived thereof so long as they continue tenants of their said holdings under said Act. It is also averred that, when having fair rents fixed for their holdings by the Crofters Commission in the year 1887, it was expressly stated to the Commissioners, and admitted as correct by Sir John Orde, the then proprietor of both Balranald and Knockantorran lands, that the crofter defenders had the rights to seaware and tangle, as here set forth, on Paiblesgarry shore, and as far north as Hunglam on Balranald shore, as part of their holdings, and their rents were accordingly fixed on that footing, and still remain as then fixed. . . . It is averred that, without the right to the seaware and tangle in question, the holdings of the crofter defenders would be valueless as agricultural subjects, and the defenders, by the deprivation of their immemorial rights, would be starved out of their holdings."

On 22nd April 1896 the Sheriff-Substitute (WEBSTER) pronounced the following interlocutor:—"Before answer, allows the pursuer a proof of his averments, and to the crofter defenders Donald Macdougall (Archy's son) and others a conjunct probation: Allows to these defenders a proof of their averments as to their rights as tenants of the township farm of Knockantorran to collect and carry away seaware, tangle, or other growth or substance of a seaweed nature, which may be growing or thrown upon the lands of pursuer, and of entering or passing over said lands for these purposes, and to the pursuer a conjunct probation."

The pursuer appealed to the Sheriff (IVORY), who on 28th May pronounced the following interlocutor:—"Recals the interlocutor appealed against: Finds that the

defenders have not averred any relevant right to collect or carry away seaware or tangle from the lands of Balranald, Paiblesgarry, and Penimore, belonging to the pursuer, or from the seashore *ex adverso* thereof: Therefore interdicts the defenders, and all others acting for them or under their instructions, from collecting or carrying away any seaware or tangle from the lands of Balranald, Paiblesgarry, and Penimore, belonging to the pursuer, or from the seashore *ex adverso* thereof; and also from entering upon, passing through, or using any part of the said lands for the purpose of collecting or carrying away such seaware or tangle."

The defenders appealed to the Court of Session, and argued—The Crofters Commission fixed their rents on the ground that their right to take seaware from the shore *ex adverso* of Paiblesgarry was part of their holding. This they were entitled to do under section 12 of the Crofters Act 1886 (quoted in rubric). If this was denied by the pursuer, it was impossible to determine the question without a proof. The judgment of the Sheriff-Substitute should be reverted to.

Argued for pursuer—The interlocutor of the Sheriff was right on two grounds: (1) the title from which the pursuer derived his right was a barony title, bounded by the sea giving him exclusive right to the seaware opposite his lands—*Pirie* v. *Rose*, February 1, 1884, 11 R. 490; (2) the defenders had failed to instruct a relevant title either under the Crofters Act or otherwise. Section 12 of the Act did not apply, it only dealt with the power of enlarging a croft, and in any event it did not give any right as regards the collecting of seaweed *ex adverso* of another man's land. A right to take seaware *ex adverso* of another's land was not good against singular successors in the ownership of the land — *Duncan* v. *Brooks*, May 17, 1894, 21 R. 760. There was no averment here of anything but a permission given by the landlord which he was entitled to withdraw — *Carr* v. *Maclean*, June 19, 1889, 16 R. 810.

LORD JUSTICE-CLERK — The defenders here aver that under an arrangement with their landlord they have a right to take seaweed from the shore opposite the pursuer's land as long as their tenancy exists. Of course if they could be removed from their holdings their rights would expire. But under the Crofters Acts they have obtained fixity of tenure, and they cannot be turned out as long as they pay the rent fixed by the Crofters Commission. Now, in considering what rent to fix, it was part of the duty of the Crofters Commission, under section 12 of the Act of 1886, to deal with seaware to be used by crofters for the reasonable purposes of their holdings, and to include the charge for this in the fixed rent. It is quite obvious that if crofters are to be held entitled to get seaware for the reasonable purposes of their holdings, this question cannot be settled by merely saying that the seaware is not *ex adverso* of their holdings. Some holdings may not be opposite the sea at all, others may be so situated that the drift of the sea will not allow the seaware to settle upon the shore opposite the holding. It was in view of all this that section 12 was passed. The defenders aver that they have a right to the seaware, and that their rent is fixed on that footing. They are entitled to have this submitted to proof. I therefore think we should recal the interlocutor of the Sheriff and revert to that of the Sheriff-Substitute.

LORD YOUNG—I am of the same opinion. At present, whatever may be the result after the evidence is taken, the case appears very clear. Sir John Orde was proprietor of the whole island, including Balranald and Knockantorran. In 1894 he sold Balranald to the pursuer Macdonald. Macdonald thereafter raised these proceedings before the Sheriff complaining of trespass by Sir John Orde's crofter tenants in Knockantorran across the lands of Balranald, giving access to the seashore, and of their taking away the seaware *ex adverso* of these lands. If the pursuer establishes that trespass without right on the part of the defenders he will succeed and interdict will be granted. But the alleged trespassers say that the right to take seaware *ex adverso* of these lands is a part of their croft, with reference to which their rents as crofters were fixed, and that this part of their croft cannot be taken away any more than any other. This is the dispute, and the Sheriff-Substitute very properly allowed a proof, on the one hand to the pursuer to prove the trespass by showing that the defenders were in use to take this seaware by permission of the proprietor—a permission which could be withdrawn—and on the other hand to the defenders to prove that what they did was really in exercise of their rights.

LORD TRAYNER—*Prima facie*, the pursuer, by reason of his title, has the exclusive property of the seaware opposite his lands. But the defenders have averred —and this, I think, the Sheriff must have omitted to notice—that the right to take seaware from the shore opposite the pursuer's lands was a part of their holdings as crofters, and was regarded as such by the Crofters Commission in fixing their rents. If that is so, Mr Macdonald cannot take away any right which the Crofters Commission has held to be a part of the defenders' crofts, for statute has given to the crofters fixity of tenure. The pursuer and defenders being thus at variance in regard to material facts, this question falls to be decided by proof whether the right to take seaware from opposite the pursuer's land was given to the defenders by the former owner of the property and was taken into account by the Crofters Commission in fixing their rents.

LORD MONCREIFF was absent.

The Court sustained the appeal, recalled the interlocutor appealed against and remitted the case back to the Sheriff-Sub-

stitute to proceed with the proof in terms of his interlocutor of 22nd April last, and decerned.

Counsel for Pursuer—Jameson—Blair. Agents—J. & A. Peddie & Ivory, W.S.

Counsel for Defenders—Kennedy. Agent—Malcolm Graham Yooll, S.S.C.

Friday, July 3.

FIRST DIVISION.

[Lord Kincairney Ordinary.

TAYLOR'S TRUSTEES *v.* M'GAVIGAN.

(*Ante* p. 569.)

Property—Common Property and Common Interest — Joint Servitude — Common Right to have Back Area kept Open — Acquiescence.

The titles of the proprietors of the ground and upper flats of a tenement, derived from a common author, gave them substantially identical rights in the court or area behind the tenement, including the servitude "that no building shall be erected on the area behind the said tenement nearer the outside wall thereof than 19 feet, and that the said space of 19 feet all along the length of the said tenement shall be kept open and unbuilt upon in all time coming, in order to preserve the back lights of the foresaid shops so disponed." For a long period prior to 1883 the proprietors of an upper flat were in use to hoist goods by means of a block and pulley, in connection with which there was a projecting structure supported by an iron pillar resting on the back area. In 1883 this hoist was replaced by an enclosed hoist, the cage of which ran upon four posts resting on the back area and acting as guides. These posts were connected by cross-bars forming a fence to the hoist.

In 1893 the proprietors of the ground flat brought an action for removal of the hoist, in which the defenders pleaded (1) that the structure did not interfere with the back lights of the pursuers' flat, and (2) that there had been acquiescence in the use of a hoist. *Held* (*reversing* the judgment of Lord Kincairney) that the pursuer was entitled to decree, on the ground (1) (following *Bennett* v. *Playfair*, Jan. 24, 1877, 4 R. 321) that the parties having merely a common interest or servitude, neither was entitled to interfere with the enjoyment of the other; (2) that it was immaterial whether the back lights were interfered with, the servitude being one to have the ground kept open; and (3) that even if any right had been acquired by the use prior to 1883, this did not cover the extended use made subsequent to that date.

Process—Sheriff—Reduction—Competency—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *secs.* 64, 65, 66, 67—*Act of Sederunt* 10*th March* 1870, *sec.* 3, *sub-sec.* 5.

Held (by Lord Kincairney, Ordinary, and acquiesced in) that the Court of Session Act has not made incompetent the reduction of an extracted Sheriff Court decree.

Opinion (by Lord Kincairney) that it was not incompetent to include in the summons of reduction declaratory conclusions other than those in the Sheriff Court petition in order to elucidate more clearly the rights of parties.

Expenses—Sheriff—Decree of Absolvitor—Reduction.

The defenders in a Sheriff Court action having obtained decree of absolvitor, the decree was extracted by them before the pursuers had lodged notice of appeal to the Court of Session. The pursuers thereupon brought an action of reduction of the Sheriff's interlocutors, in which they were defeated before the Lord Ordinary, but were successful in the Inner House. The pursuers maintained that the defenders were only entitled to such expenses as would have been incurred had they appealed under the Court of Session Act 1868.

Held that the pursuers were entitled to their expenses in the Inner House and in the Sheriff Court.

The trustees of the late William Taylor, jeweller, Glasgow, were the proprietors of a shop on the street floor, with sunk shop underneath, at 64 Argyle Street Glasgow. John M'Gavigan and James Carrick were the proprietors of the first and second flats respectively in the same tenement.

The different parties derived their rights under dispositions from a common author in 1803, and in each of their titles there was practically the same clause with regard to an area behind the tenement. The clause in the original dispositions was as follows:—The granter disponed "the right to the use of the pump-well in the back court of the foresaid tenement in common with the other proprietors and possessors thereof: And also the following servitude over the back area to the north of the said tenement, viz., That no buildings shall be erected on the area behind the said tenement nearer the backside wall thereof than 19 feet, and that the said space of 19 feet all along the length of the said tenement shall be kept open and unbuilt upon in all time coming in order to preserve the back lights of the foresaid shops so disponed."

For many years the upper floors were used for business purposes; and, for the raising and lowering of goods, a brick structure—known as a hoist—was provided, which projected outwards above the back window of the lower proprietors' shop, and was supported at one point by an iron column fixed in the ground. In 1881, when Mr Taylor died and his trustees became proprietors of the street and sunk shop, this projection was closed at its base immediately above their property by an extension of the flooring of Mr M'Gavigan's