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Wednesday, December 10.

SECOND DIVISION.

(BEFORE SEVEN JUDGES.)

[Sheriff Court at Edinburgh.

SMITH *v.* BARCLAY AND ANOTHER.

Landlord and Tenant—Emergency Legislation—Removing—Increase of Rent and Mortgage Interest (War Restrictions) Act 1915 (5 *and* 6 *Geo. V, cap.* 97), *sec.* 1 (3)—*"Satisfactory Ground" for Ejection Order.*

The Increase of Rent and Mortgage Interest (War Restrictions) Act 1915, section 1 (3), enacts—"No order for the recovery of possession of a dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made so long as the tenant continues to pay rent at the agreed rate as modified by this Act and performs the other conditions of the tenancy, except on the ground that the tenant has committed waste, or has been guilty of conduct which is a nuisance or an annoyance to adjoining or neighbouring occupiers, or that the premises are reasonably required by the landlord for the occupation of himself or some other person in his employ or in the employ of some tenant from him, or on some other ground which may be deemed satisfactory by the court making such order. . . ."

The tenant of a dwelling-house to which the Act applied gave notice to the landlord on 26th February 1919 that she intended to vacate the house at the following Whitsunday term and recommended a new tenant. The landlord let the house to the new tenant as from the Whitsunday term. The old tenant refused to vacate the house, but the new tenant held the landlord to his contract with her, whereupon the landlord brought an action of ejection against the old tenant. The Court *granted* decree of ejection, *holding* that if the Act applied the circumstances of the case constituted a "satisfactory ground" within the meaning of the sub-section for making the order.

Opinion reserved per the Lord President, Lord Dundas, Lord Guthrie, Lord Mackenzie, and Lord Cullen as to whether the Act applied.

Opinion per Lord Mackenzie that it was not competent for a tenant to contract himself out of the Act *ab ante*, and contract that he was to have none of the benefits of the Act, but it was competent for him to prevent tacit relocation.

Opinion per Lord Guthrie that in a case to which the Act applied, and in which the discretion of the Court to grant ejectment did not apply, contracting out could not be sustained.

The Increase of Rent and Mortgage Interest (War Restrictions) Act 1915 (5 and 6 Geo. V, cap. 97), section 1 (3), is *quoted supra in rubric*], . . ."

Sydney Scope Shedden Smith, Moness, St Ninian's Road, Corstorphine, *pursuer*, brought an action in the Sheriff Court at Edinburgh against Mrs Margaret Barclay and her husband George Barclay, 34 Comely Bank Avenue, Edinburgh, *defenders*, in which the pursuer craved a warrant of summary ejection against the defenders.

The following narrative of the *facts* is taken from the note of the Sheriff-Substitute, *infra*:—"The house in question belongs to the pursuer, who let it to the defender Mrs Barclay on a yearly lease from Whitsunday 1916 to Whitsunday 1917, subsequently renewed each year. The rent is £19, 19s. The said defender admittedly intimated in writing on 26th February 1919 that the let was to be terminated and the house vacated at the term of Whitsunday 1919. The pursuer accepted this intimation, and in consequence thereof considered himself free to let the house to another tenant, and did let the house to another tenant with entry at the said term. But defender now refuses to leave the house, and pleads that she is entitled to continue in occupation. She explains that a lease of other premises which her husband, the defender George Barclay, entered into has fallen through, and that they have failed to find accommodation elsewhere."

The pursuer *pleaded*—"1. It being reasonable and necessary in the circumstances condescended on that the pursuer should obtain immediate possession of the house, decree should be pronounced as craved, with expenses. 2. The defences being irrelevant, ought to be repelled. 3. The defenders having given notice to terminate the said lease, and the pursuer having accepted and acted thereon, the defenders are barred *personali exceptione* from founding on the said Act."

The defenders pleaded—"1. The action is incompetent as laid. 2. The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons. 3. The said house not being required by pursuer for his own occupation or for an employee, or on any ground which can be deemed satisfactory in the circumstances stated, decree of absolvitor should be granted with expenses. 4. It being reasonable in the circumstances that the defenders should be allowed to retain possession of the subjects the defenders should be assoilzied."

On 1st August 1919 the Sheriff-Substitute (ORR) pronounced an interlocutor in which he repelled the first and second pleas-in-law for the defenders, sustained the pursuer's second and third pleas-in-law, and granted warrant as craved.

Note.—[*After the narrative quoted supra*]—"Pursuer does not say he warned out the defender; his case is founded on the fact that defender voluntarily and uncondi-

tionally undertook in writing to vacate the house at Whitsunday 1919, that he accepted that intimation and let the house to another tenant, who now insists on getting possession.

"The case therefore raises the question whether the defender can lawfully contract out, and has contracted out, of the provisions of the Increase of Rent, &c. (War Restrictions) Act of 1915, which would otherwise govern the question. As the pursuer did not purchase the house after 30th September 1917 the provisions of the later Acts do not apply.

"The question which thus arises sharply in this case has apparently not been made matter of decision and it is one of some importance. I am of opinion that it is open to a tenant in the position of defender to contract himself out of the right to remain in occupation of a house, and that the said defender has effectually done so in regard to this house.

"The Act in question encroaches upon and restricts in an anomalous fashion the rights of owners of certain dwelling-houses. It prevents them from ejecting tenants in certain cases, although the tenant's lease has expired and no new lease has been entered into. The provisions of such an Act should, I think, be strictly construed. The presumption is in favour of freedom of contract. The Act itself presents a striking and suggestive contrast in its provisions anent increase of rent or rate of mortgage interest, as compared with its provisions anent ejectment of a tenant. In the former case provision is made by section 1 (1) striking at raising of rent or mortgage interest as therein set forth, and it is enacted that these provisions are to have effect 'notwithstanding any agreement to the contrary.' In other words, landlords and tenants, lenders and borrowers, cannot contract themselves out of the Act so far as increase of rent or rate of interest is concerned. But the section of the Act dealing with recovery of possession of a dwelling-house, or the ejectment of a tenant therefrom (section 1 (3)), has no corresponding provision. In other words there is no enactment that a tenant may not lawfully contract himself out of the right to remain in occupation of his house. Whatever be the law in regard to cases to which the Act of 1919 applies, it appears to me that in the present case landlord and tenant remain free in the matter of contracting out.

"In the case of *Artizans Dwellings Company* v. *Whitaker*, 35 T.L.R. 521 (No. 27), the tenant gave a notice to quit, but it was held that the notice was only a provisional notice which was to be regarded by plaintiffs as withdrawn unless confirmed by the tenant before a certain date and that the notice was not so confirmed. Such a provisional notice Mr Justice Astbury refused to regard as a ground satisfactory to the Court within the meaning of the section. 'As the defendant,' his Lordship says, 'rightly or wrongly did not intend in this case to give other than a provisional notice in June 1918, I do not think any such ground exists.' That case stands in marked contrast to the present where the notice given by the tenant was a wholly unqualified and unconditional notice to leave the house at Whitsunday 1919, accepted by the landlord and acted upon by his letting the house to another party. I think that is a ground which ought to be regarded as satisfactory within the meaning of the section of the Act of 1915 for granting the warrant craved. In the view I take the defender's other averments are irrelevant."

The defender appealed to the Sheriff.

On 29th October 1919 the Sheriff (CROLE) pronounced an interlocutor in which he sustained the appeal, recalled the interlocutor appealed against, sustained the second and third pleas-in-law for the defenders, repelled the whole pleas-in-law for the pursuer, and dismissed the action.

Note.—"The pursuer, who is the owner of a dwelling-house at 34 Comely Bank Avenue, Edinburgh, let the house to Mrs Barclay, one of the defenders, on a yearly lease from Whitsunday 1916 to Whitsunday 1917, at a rent of £19, 19s. The lease was renewed at the same rent for the year from Whitsunday 1917 to Whitsunday 1918, and again from Whitsunday 1918 to Whitsunday 1919. By letter dated 26th February 1919, Mrs Barclay intimated to the pursuer that she intended to vacate the house at Whitsunday 1919. The pursuer acted on this intimation and let the house to a Mrs Watson. Mrs Barclay now declines to vacate the house as the lease of other premises which had been entered into by her husband, the defender George Barclay, has fallen through, and the defenders cannot obtain other accommodation. The pursuer founds on the notice given by Mrs Barclay, and seeks in this action to have the defenders ejected from the house in question. He contends that by the notice given by Mrs Barclay and the acceptance by him an agreement was entered into by the parties outwith the Increase of Rent and Mortgage Interest Act 1915, which entitles him to the warrant craved, or alternatively that he having let the house to another person, the defender is barred *personali exceptione*, and that the fact that he has so let the house constitutes a ground which should justify the Court in granting such a warrant.

"I am of opinion that none of these contentions is sound. Section 1 (3) of the Act above referred to provides that 'no order for recovery of possession of a dwelling-house to which this Act applies or for the ejectment of a tenant therefrom shall be made so long as the tenant continues to pay rent at the agreed rate and performs the other conditions of the tenancy,' except on certain grounds specified in the sub-section, which admittedly do not apply to this case, 'or on some other ground which may be deemed satisfactory by the Court making such order.' In my opinion Mrs Barclay is a tenant of a dwelling-house in the sense of this sub-section who has paid her rent and performed the other conditions of her tenancy, and that the Court is precluded by the terms of the sub-section from granting an order of ejectment merely on the ground that she has given notice to quit. In the case of the

Artizan Labourers and General Dwellings Company v. *Whittaker*, 35 T.L.R. p. 521, Mr Justice Astbury, while disposing of the case before him in favour of the tenant on the ground that the notice to quit given by him was only a provisional notice and could be withdrawn if not confirmed before a certain date, expressed the opinion that in the case where a tenant had given an unqualified notice such a notice would be in the same position as one given by the landlord, and goes on to say—'It may seem whimsical that an Act passed for the relief of the tenant should apply when the tenant has himself put an end to the demise, but the language (of the sub-section) seems to me to admit of no other construction unless the provision in question is inoperative when the landlord has given notice, in which case the section would be more or less of a nullity.'

"It was pointed out at the debate that 1 (3) in contrast with section 1 (1) does not in terms prevent parties contracting themselves out of the Act, but in my opinion the latter section in effect prevents the Court from enforcing such an agreement by granting a warrant of ejectment, though it may be that an action of damages would lie for a breach thereof.

"Looking to the terms of sub-section 1 (3) I think there is no room in this case for the plea of personal bar.

"The only remaining question is whether the fact that the pursuer let the house in question to another party on the faith of the notice given by the defender Mrs Barclay should be deemed a satisfactory ground in terms of the sub-section for pronouncing the order craved. I am of opinion that this fact is not a reason which would justify the Court in pronouncing such an order. It is not averred that the pursuer has suffered any loss or damage by the action of the defender. The only person who seems to have suffered inconvenience is Mrs Watson, the person to whom the house was let, and I do not think that the averment regarding the inconvenience suffered by her and the condition of her present house is relevant. Moreover, I think the ground upon which the Court can proceed must be a ground consistent with the grounds specified in the sub-section. It has been held in England that the discretion conferred upon the Court by the sub-section did not include a discretion inconsistent with the earlier provisions thereof. (*Stovin* v. *Farebrass*, 35 T.L.R. 659; *Price* v. *Pritchard*, *ibid*, 672.)"

The pursuer appealed to the Second Division of the Court of Session.

On 28th November 1919 the Court appointed the case to be heard before Seven Judges.

Argued for the appellant—The respondents were not entitled to claim the protection of the Acts. (1) The only one of the Acts which seemed to have any bearing on the present case was the Act of 1915 (5 and 6 Geo. V, cap. 97), but in reality that Act did not apply. The Act did not extend universal protection to all occupants of houses. For example, it did not protect squatters who sat without a title, *vi aut clam aut precario*, and could be removed by a warrant of summary ejection, nor did it protect tenants who paid their rent partly by services instead of in money, and it was inapplicable to the present case, because the respondents having given notice of termination of the let, it could not be said that after the termination of the let there was any longer an "agreed-on" rent within the meaning of section 1 (3). The Act implied a tenant who was such at his own will. The parties to the let had validly contracted out of the Act, even if its provisions were held to be applicable. Where it was intended to bar contracting out, contracting out was expressly forbidden as in the case of the provisions of section 1 (1). That sub-section said that its provisions should apply "notwithstanding any agreement to the contrary," but section 1 (3) contained no such declaration, and accordingly contracting out of its provisions was valid. (2) Even if section 1 (3) applied, the Court had power in its discretion to grant the warrant of ejection "on some other ground which may be deemed satisfactory by the Court making such order." In the present case the giving of the notice might be regarded as a wrong committed against the landlord and a satisfactory ground of ejection. Moreover, the removal of the respondent in this case might also be regarded as falling within the requirements of a landlord and a satisfactory ground of ejection. The grounds of ejection which might be deemed satisfactory to the Court were not necessarily *ejusdem generis* with those specially mentioned in the sub-section, but even if the principle of *ejusdem generis* applied, the giving of the notice was *ejusdem generis* with the other grounds specially mentioned in the sub-section. The following cases were referred to—*Artizans, Labourers and General Dwellings Co.* v. *Whittaker*, [1919], 2 K.B. 301; *Stovin* v. *Farebrass*, 1919, 35 T.L.R. 659, *per* Scrutton, L.J., at p. 662; *Green-Price* v. *Webb*, 1919, 36 T.L.R. 29; *Grandison* v. *Mackay*, 1919, 1 S.L.T. 95; *Price* v. *Pritchard*, 1919, 35 T.L.R. 672, *per* M'Cardie, J., at p. 673; *Flannagan* v. *Shaw*, 1919, 36 T.L.R. 34; and *Hunt* v. *Bliss*, Times newspaper, 21st November 1919.

Argued for the respondents—It was open to the appellant to bring an action of damages, but the remedy sought in the present action, viz., ejection, was contrary to the Act. The rents restriction legislation was legislation in favour of sitting tenants, and it was illegal to contract out of section 1 (3). Where it was intended to make contracting out legal the Act expressly said so. Thus in section 1 (4) contracting out was permitted "where the mortgagor consents." The English cases showed that personal bar did not enter into the question. The Court could under section 1 (3) grant the order of ejectment if the premises were "reasonably required by the landlord," but in order to determine whether the premises were "reasonably required by the landlord" it was necessary

to take into consideration "the alternative accommodation available for the tenant" referred to in section 5 (2) of the Act of 1919 (9 Geo. V, cap. 7). Section 11 of the Act of 1919 enacted that that Act should be construed as one with the principal Act of 1915, and accordingly section 5 (2) of the Act of 1919 provided a canon of interpretation of the words "reasonably required by the landlord" occurring in the principal Act. Admittedly the Court could under section 1 (3) grant the order of ejectment "on some other ground which may be deemed satisfactory by the Court making such order," but the "other ground" must be *ejusdem generis* with the grounds specially mentioned in the section. The code was an exclusive and not an inclusive one. The Act created a species of statutory conditional fixity of tenure—*Flannagan* v. *Shaw* (*cit.*), *per* Scrutton, L.J., at p. 35; *Hunt* v. *Bliss* (*cit.*), *per* Coleridge, J. The cases of *Artizans, Labourers and General Dwellings Co.* v. *Whittaker*, *per* Astbury, J.; *Stovin* v. *Farebrass* (*cit.*); and *Green-Price* v. *Webb* (*cit.*), *per* Lush, J., were also referred to.

At advising—

LORD PRESIDENT—I am of opinion that an order of ejectment may be made in this case.

The facts, which are few and simple, are accurately and fully narrated in the notes of the learned Sheriffs. I repeat them only so far as necessary to make clear my ground of judgment. The tenant of a dwelling-house in Edinburgh let at a rent of 19 guineas per annum gave due notice in writing to her landlord that she intended to vacate the house at Whitsunday 1919. She recommended a friend as tenant. The landlord accepted the notice and let the house to this friend, who now desires to occupy it. The tenant who gave the notice now says she will not go and means to stay. The question is, Can she insist on remaining as tenant of the house, or may she be ejected? In my judgment there exists here a ground "which may be deemed satisfactory by the Court" for making an order of ejectment. The ground alleged by the landlord is that the tenant herself said she was minded to go and recommended her successor, and that he, acting upon the intimation, let the house to the tenant recommended, who now desires to occupy it. That is, in my judgment, a satisfactory reason for granting warrant of ejectment.

It is common ground that the controversy turns upon the proper construction to be placed on section 1 (3) of the Increase of Rent and Mortgage Interest Act 1915. That sub-section provides—[*His Lordship quoted the sub-section*]. It is clear that none of the exceptions specified in the sub-section apply to the case before us, and reliance is placed by the landlord "on some other ground which may be deemed satisfactory by the Court." That ground is notice of intention to vacate given by the tenant, accepted by the landlord, and followed by a let to another tenant who desires to occupy the house. I am at a loss to conceive any reason more satisfactory than that for ejecting the sitting tenant. To refuse ejection in such a case as this would in my judgment be to frustrate the purpose of the enactment, for no landlord to whom such a notice was given could ever act upon it with certain effect, and no incoming tenant could count upon getting entry to the house. This seems to have been the view taken by Lush, J., in the only case cited to us which is directly in point. I respectfully agree. But we were urged on behalf of the defender to give a narrow and limited interpretation to the words "some other ground which may be deemed satisfactory by the Court," and to confine the landlord's right to put in another tenant to the specific instances given in the sub-section. In no other case, it was contended, could the landlord oust the sitting tenant in favour of another. This argument was buttressed by no decision, but was supported by the reasoning of Bankes, L.J., and Atkin, L.J., in the case of *Stovin* v. *Farebrass*, (1919) 35 T.L.R. 659. The passage from the judgment of Bankes, L.J., on which reliance was placed is as follows—"In face of this very definite enumeration of the grounds which the Legislature is prepared to recognise as grounds upon which an exception may be made to the general rule, I cannot think that it was intended that any ground which any Court might consider satisfactory should be included in the general words 'other grounds' which follow the specified exceptions. I realise that there is an insuperable difficulty in defining the limitation which ought to be placed upon these general words. I must content myself with saying that I do not consider that the general discretion conferred upon the Court by the sub-section can be held to include the exercise of a discretion which is inconsistent with the earlier provisions of the sub-section. . . . This construction of the sub-section does not deprive the general words conferring a discretion upon the Court of all meaning, because there may be cases other than those specifically dealt with in which the exercise of the discretion may not be inconsistent with the earlier provisions of the sub-section. For instance, a landlord may require possession of premises not for occupation at all. He may require them in order to pull them down, because they are dangerous or unfit for habitation. Other instances could easily be given."

I am unable to agree in thinking that the very general words used in the sub-section ought to be so limited. And I am fortified in that view by the fact that the ingenuity of counsel failed to suggest, and I cannot myself conceive, any other instances to which the general words could refer when thus narrowly limited. Instances certainly cannot be easily given. At all events no one has yet given them. My mind goes rather with Lord Justice Scrutton when in the same case he says—"It appears to me impossible to limit these words so as to define certain grounds which the Court must not and cannot deem satisfactory. An

attempt to limit them by the doctrine of *ejusdem generis* in the Court below was abandoned before us, for it seems impossible on the specified grounds to find a common *genus*, and the limitation *ejusdem generis*, if possible, would rather hurt than help the tenant in this case. When the Court may make the order on specified grounds, it may also make the order on grounds other than those specified, if it deems them satisfactory, and it appears to me that no limit is put on the discretion of the Court. . . .

"It (Parliament) has apparently foreseen that every variety of different facts may arise in a particular case, and has felt itself unable to lay down general rules covering every individual case, and has remitted the matter to the discretion of the Court as to what action should be allowed on the particular facts of the case before it." I do not stand alone in preferring this construction of the words of the statute. In the subsequent case of *Price* v. *Pritchard*, (1919) 35 T.L.R. 672, Mr Justice M'Cardie, and I rather think Mr Justice Sankey, lean to the same view—a view which I understand is shared by your Lordships. If this wider, and as I think natural, construction be adopted, it could scarcely be contended that we have not present in the case before us a satisfactory ground to warrant an ejectment order.

The question whether by giving notice to the landlord of her intention to vacate the house, the tenant had placed herself outside the statute altogether and hence was not entitled to claim its protection, although mooted, was not argued. I desire expressly to reserve my opinion upon this question, merely pointing out that in the case of *Hunt* v. *Bliss*, (1919) 36 T.L.R. 74, a Divisional Court in England, composed of Coleridge and M'Cardie, JJ., appears to have decided the question adversely to the landlord. Proceeding, however, on the ground I have stated, which is sufficient for our decision in this case, I propose that we should recal the interlocutor of the Sheriff and grant warrant of ejection as craved.

The LORD JUSTICE-CLERK concurred.

LORD DUNDAS—I am of the same opinion. By letter dated 26th February 1919 the defender gave to the pursuer, her landlord, notice that she intended to vacate the house she occupied as tenant at the ensuing May term. The notice was unequivocal and unconditional. The writer went on to recommend a friend Mrs Watson as an ideal tenant. The pursuer thereupon proceeded to let the house to Mrs Watson as from the May term. On 10th May, however, the defender wrote to the pursuer notifying him that owing to the tenant of the house to which she was removing at the term taking advantage of the Act of 1915 and refusing to move, she was compelled under the circumstances also to avail herself of its protection, and remain the pursuer's tenant until such time as she could get entry to another suitable house. On 9th June Mrs Watson wrote to the pursuer requesting that he should make the defender understand that she must vacate the house on the 30th, and that it was an absolute necessity that she (Mrs Watson) should have the house at that date. The situation thus was that Mrs Barclay declined to go out; Mrs Watson insisted on coming in, and would presumably sue the pursuer for damages in the event of his failure to implement his bargain with her. In these circumstances the pursuer brought this action to compel the defender to leave the house. The Sheriff-Substitute granted decree, but the Sheriff on appeal dismissed the action.

The arguments turned upon the construction of the Act of 1915, and particularly section 1 (3) thereof. That section provides that "no order for the recovery of possession of a dwelling-house to which this Act applies or for the ejectment of a tenant therefrom shall be made so long as the tenant continues to pay rent at the agreed rate as modified by this Act and performs the other conditions of the tenancy, except" as therein provided. The first exception deals with misconduct on the part of the tenant, the second with the case of the landlord reasonably requiring the premises for his own use, or that of some other person in his employ, or in the employ of some tenant from him. These exceptions do not here arise; but the section continues, "or on some other ground which may be deemed satisfactory by the Court making such order." These words seem to me expressly to empower the Court to grant an order for recovery of possession or for ejectment on any ground—it was obviously impossible for the Legislature to describe such grounds by way of anticipation—which it might deem satisfactory. The power so conferred is very wide and ample. The general words above quoted cannot, in my judgment, be read as restricted to grounds *ejusdem generis* with, or otherwise limited in relation to, the exceptions specially mentioned, I sympathise, on this matter of construction, with the views expressed by Lord Sands in *Grandison* (1919, 1 S.L.T. 92) and by Scrutton, L.J., in his dissenting opinion in *Stovin* v. *Farebrass*, 35 T.L.R. 659. Now it seems to me that there could hardly be a clearer case of satisfactory ground for granting an order than is presented by the accumulated circumstances which I summarised at the outset. I agree in result with the decision by Lush, J., in *Green-Price* ((1919) 36 T.L.R. 29), where the facts were substantially identical with those here present. That case was not before the learned Sheriffs, whose judgments are both prior to it in date. For these reasons the pursuer is, in my judgment, entitled to prevail.

If my opinion upon this point is correct, it is sufficient for the disposal of the case. It is unnecessary, therefore, to discuss the question whether or how far a tenant may contract himself out of the Act; or the view, which seems to have been approved by Duke, L.J., in *Flannagan's* case (36 T.L.R. 34, at p. 35), that where a tenant gives and the landlord accepts an unconditional notice to quit, there is thereafter

no tenancy, and no room for application of the Act. These topics were mooted, but barely argued, at the debate before Seven Judges; and I do not express any opinion in regard to them.

LORD SALVESEN—I confess that I never had any doubt as to what ought to be the decision of the Court in this case, and but for the fact that there were expressions of opinion in an opposite sense by English judges on which great reliance was placed, I should not have been a party to sending a case of such small pecuniary importance to Seven Judges. The point raised, however, is one of very great importance, and it is well that there should be an authoritative judgment of the Court of Session in view of the fact that there have been these expressions of opinion elsewhere.

The Act under which the case has arisen was one for the protection and relief of tenants. The double purpose which the Act was intended to serve was in the first place to prevent the landlord disturbing the possession of a tenant who desired to remain, and secondly, to prevent an increase of rent. These were the two main objects of the Legislature, to which they have given very clear effect in the Act with which we are now dealing.

The lay interpretation of the Act seems to have been what I venture to think the common sense one. It is embodied in a quotation that we have from what is known as the Tenants' Emergency Charter, which I understand is a publication in the interests of and for the guidance of tenants who might find themselves in the position of being threatened with ejection. That publication contains this paragraph—"Tenant's Notice to Quit.—There is one case in which the tenant is kept to his bargain, that is, if it is he who has given notice to bring the tenancy to an end. He cannot go back on that but must go out. It makes no difference though he cannot get his intended new house." That exactly expresses my view of the scope and effect of the Act in question, subject always to the condition that the house is reasonably required by the landlord either for purposes of his own or for occupation by some other tenant of his selection.

If it were otherwise, instead of this being an Act for the protection of tenants, it would make it very difficult for a tenant to get away from a house with which he is dissatisfied, because in the present condition of the market for houses, when one knows that every house is taken as soon as it is vacant, you might have a stream of tenants all desiring to remove at a particular term, all of whom would be frustrated in their plans if a single one of them refused to quit when the term arrived. I cannot imagine the Legislature intended to restrict the freedom of tenants in an Act which was intended for their protection and relief.

Your Lordship in the chair has pointed out, and I think it is no exaggeration to say, that under such circumstances no landlord could let his house to an incoming tenant, and no incoming tenant could ever know whether he would get possession, and you might have the appalling spectacle of a dozen people having their furniture in the street, and yet all of them being compelled to take it back into the houses from which they desire to remove because some recalcitrant and obstructive person into whose house one of them was shifting declined to be disturbed.

Now this has been called a whimsical result of the Act by an eminent English Judge. With all deference to him, it seems to me that you may make any Act whimsical if you put a whimsical construction upon it. There is absolutely no ground, as it appears to me, for such a construction. The Act has provided for circumstances in which the Court may grant a warrant to a landlord for ejection of a tenant, but it also provides that in addition to this the Court may consider and decide whether some other ground would be satisfactory for making an order.

The learned Justices to whom your Lordship has referred have read these words entirely out of the Act on the principle of construction that is known as *ejusdem generis*. In the first place I cannot find any reason for applying that principle to a case where there is no genus. But I distrust the application of that doctrine as a rule, and it seems to me to be entirely excluded when you have language such as is contained in the Act—"or on some other ground which may be deemed satisfactory by the Court making such order."

It is not often that the Legislature leaves to the tribunals of the country the working out of modern pieces of legislation, but in this case it has done so, and I cannot understand why we should refuse to consider any other ground than those specifically enumerated when the Act puts upon us the duty of considering in each case whether some other ground than those enumerated is not a satisfactory ground for pronouncing an order of ejectment.

LORD MACKENZIE—The tenant in this case, Mrs Barclay, gave notice on 26th February 1919 to her landlord that she intended to vacate at the May term the house he had let to her. The house was let to her from year to year with a Whitsunday entry. Mrs Barclay recommended a friend—Mrs Watson—who, she said, would make an ideal tenant. Following on this the landlord let the house to Mrs Watson. Mrs Barclay has refused to remove because she was unable to get entry to other premises she had taken. Mrs Watson wishes possession, which the landlord is unable to give owing to Mrs Barclay's refusal to go. Mrs Barclay pleads the statute—"The Increase of Rent, &c. (War Restrictions) Act of 1915," section 1 (3).

I agree in the construction proposed of the words "or on some other ground which may be deemed satisfactory by the Court making such order." This expression ought not in my opinion to be limited by the provisions which precede it. It is, no doubt, necessary that these words should receive construction, and for my own part, though

I should not be prepared to say what they would include, I think I should state what I think they do not include. The purpose of the section is to protect a tenant from proceedings against him at the instance of his landlord. I therefore think it would not be competent for a tenant to contract himself out of the Act *ab ante*, and contract that he was to have none of the benefits of the Act. This, however, does not mean that he should not have liberty to prevent tacit relocation. If he does take the necessary steps by giving notice to prevent tacit relocation, then unless the landlord is entitled to place reliance on the notice he would not be in safety to let to another tenant until the term day had arrived. This would dislocate the whole system of letting houses of this class in Scotland. Not only would the landlord not know whether he could let, but in the event of his letting the incoming tenant would not know whether he was to get possession of the premises. The position of these houses would be uncertain up to the very last minute. The tenant, according to the argument for the respondents, is entitled to give notice, but no one knows until he gives up the key to the landlord on the term day whether he is going to act on it or not. The construction which I adopt obviates the possibility of so unworkable a scheme. In the present case I think the Court ought to grant decree of ejectment, and I do so because the combination of circumstances to which I have adverted constitutes a ground which in my opinion is satisfactory.

There is a possible view of the section which logically comes first, and that is, whether the section applies at all when the tenant has given notice that he is going to quit. It might be argued that thereafter he was no longer a tenant within the meaning of the section. This point was however not argued, and accordingly I express no opinion upon it.

LORD GUTHRIE—It is clear that but for the question arising under the Increase of Rent and Mortgage Interest (War Restrictions) Act of 1915 the defender would have had no answer either in law or in equity to the pursuer's crave for ejectment.

The Sheriff-Substitute assumes that the Act applies, and makes the case turn on whether the tenant could lawfully contract out, and did contract out, of section 1 (3) of the Act. Looking to the form of that subsection—an inhibition not on the individual but on the Court—and the terms of the subsection, I cannot agree with the Sheriff-Substitute that in a case to which the Act applies, and in which the discretion of the Court to grant ejectment does not apply, contracting out can be sustained. The Sheriff considers the question under two heads. The first, although not stated in the same form, seems substantially the question considered by the Sheriff-Substitute. The second is, whether, suppose it be held that the parties cannot contract out, the pursuer can bring himself within the sub-section by showing satisfactory grounds for being allowed to follow out the proposed ejection? On the first question I agree with the Sheriff. On the second question I think it clear, in view of the admissions on record and the documents, that if the pursuer is entitled to ask the Court to inquire into the circumstances, he has shown satisfactory grounds for obtaining the ejection craved. I agree with the Sheriff that no question of personal bar arises.

But it seems to me that these are not the real questions in the case. There seem to me to be two real questions, both of them questions of difficulty, not dependent on power to contract out or on the establishment of satisfactory grounds. The first of these is, whether, the defender's tenancy having been terminated by the pursuer and defender at the Whitsunday term 1919, the Act, which was for the temporary protection of tenants desirous to remain in their houses, has any application to a case when the tenant had arranged to leave. I doubt whether the answer to this question depends either on whether the tenant took the initiative, as in this case, or what were the actings and involvements of the pursuer after the contract was made. My impression is in favour of the pursuer on this question. But the parties did not treat the point so as to enable me to arrive at a satisfactory judgment on it.

In the end it may turn out that the only real question in the case is the second of the two questions I have referred to above, namely, whether, assuming the impossibility of contracting out, assuming that no case of personal exception exists, and assuming that the pursuer cannot claim to exercise his common law rights irrespective of the Act, he is not entitled to ask the Court to consider the grounds alleged by him as grounds which they are entitled to consider, and doing so, to hold the circumstances disclosed on record and in the documents as affording satisfactory grounds to entitle the pursuer to ejection. The *onus* is here on the defender. The grounds are in themselves satisfactory to warrant ejection. There is no presumption against the pursuer's view; on the contrary, looking to the general insecurity which the defender's contention would produce, the probabilities are all in favour of the pursuer's reading of the sub-section.

Does the sub-section then make it impossible for the Court to consider the grounds now put forward by the pursuer and to hold them as satisfactory to warrant ejection? The words are quite general, and the pursuer's grounds for ejection are not expressly excluded. Must they be held inferentially excluded? In the first place it is said that the specific exceptions contain an exhaustive code for the tenant and an exhaustive code for the landlord, and that to consider the grounds put forward by the pursuer and hold them satisfactory would be to add an exception to the landlord's code which is not sanctioned by the statute and would be inconsistent with it. The answer to this argument is that if the codes are exhaustive no case is left for the operation of the general words under which jurisdic-

tion to act is expressly conferred on the Court.

Then it is said that at all events the general words must be read *ejusdem generis* with those previously specified. I am not satisfied that the previous clauses, taking them either separately or together, contain the basis for this argument. But if they do I am of opinion that the grounds put forward by the pursuer are, in the circumstances disclosed, sufficient to bring them within the principle. If the principle be that the landlord's remedy, apart from the specified exceptions, must be confined to cases where he can qualify a reasonably direct interest to obtain the remedy, then I think that his position in relation to Mrs Watson is sufficient to enable him to qualify such an interest.

I am accordingly of opinion that the pursuer is entitled to the decree asked by him.

LORD CULLEN—The "tenant" contemplated in the general provision of sub-section 3, for whose benefit it is intended, is apparently a person who having been tenant of a dwelling-house within the meaning of the Act, desires to remain in occupation of it after and notwithstanding that his lease has been terminated. A lease may be determined by the act of the landlord or by the act of the tenant in giving notice excluding tacit relocation. The legal position of the ex-tenant thereafter as regards absence of title to occupy and obligation to remove is the same in both cases, and I have not been able to find any words in the Act which seem to me capable of being construed as meaning that the former case only is within the general provision. It is, no doubt, true in a general sense that the Act is not intended to protect against removal such tenants as are willing to remove, but it remains a question at what period is a tenant's willingness or unwillingness to be ascertained? As, however, the topic touched on was not fully argued at the hearing I desire to reserve my opinion regarding it.

Assuming that the present case is not excluded from the general provision in subsection 3 by the fact of the tenant having been the party who gave notice, that fact does not stand alone; and I agree with your Lordships in the view that on the facts of the case as a whole the Court is entitled to hold, and should hold, in exercise of the discretionary power committed to it by the Act, that satisfactory grounds are shown for granting the decree of ejection craved by the appellant.

The relevant facts as they appear to me are (1) that the respondent gave notice of her intention to vacate the house at Whitsunday, recommending Mrs Watson for the appellant's acceptance as tenant under a new lease from that term; (2) that the appellant acted in accordance with the respondent's suggestion, and with her knowledge and approval let the house from Whitsunday to Mrs Watson; (3) that Mrs Watson held the appellant to his contract with her, and that the appellant therefore was bound to perform it or to answer for the consequences of his breach. There is here involved more than an expired lease—a tenant desirous to remain, and a landlord desirous to instal a new tenant. There are the facts (1) that a new lease was entered into in reliance on the respondent's notice, on her own suggestion, and with her knowledge and approval, and (2) that thus the appellant with the respondent's participation became fixed with and held by onerous obligations, for performance of which it was necessary that the respondent should vacate the house at Whitsunday in accordance with her undertaking.

Now unless there is something in the Act which precludes us from so holding, I am of opinion that the facts above stated should be held as presenting satisfactory grounds for compelling the respondent to vacate. That course appears to me to be obviously required by all rules of fair dealing. I am unable to see anything in the Act forbidding it. The discretionary power committed to the Court is expressed in the widest terms, and I am unable to find anything in the Act implying such a limitation as would exclude cases like the present.

It was argued for the respondent that the very wide terms of the power committed to the Court are susceptible of limitation derivable from the nature of the statutory exceptions specially enumerated. This proposition stated generally may not be devoid of truth. But on the respondent's argument, and on the best consideration I have been able to give to the matter, I do not see that any limitation relevant to the present case is derivable from the enumerated exceptions. The respondent contended that cases falling within the Court's discretionary power must be *ejusdem generis* with these exceptions. But the exceptions have no common generic quality—beyond that of being cases singled out beforehand as satisfactory in the view of the Legislature. More particularly, the respondent pointed to the branch of the enumerated exceptions which specifies certain kinds of new tenants in whose favour a landlord is given an unqualified right to insist on his ex-tenant vacating the house. This specification the respondent says is exhaustive. It may be. I offer no opinion on the topic, because it does not seem to me relevant to the present case. The appellant here is not founding merely on his desire to instal a new tenant of one kind or another. He founds on a course of transacting to which the respondent was a party, the effect of which is not dependent on the quality of his new intended tenant as compared with the kinds of new tenants mentioned in the above exception.

The most, I think, that can be said about the enumerated exceptions in relation to the present question is that while they are of various kinds there is an absence from them of any case turning on actual dealings between the parties about the matter of the tenant's removal. This does not seem to me in any way sufficient to found an inference that no cases turning on such dealings were intended to be proper subjects for the exercise of the Court's discretionary power. It would not have been easy to make provision beforehand in the form of defined

exceptions for a class of cases necessarily varying in degree and quality with the facts which each particular case might present for consideration; while for the solution of such cases when they arose the conferring of a wide discretionary power on the Court was a convenient and adequate provision. It is, I think, more easy to reach the conclusion that such cases are included under the power conferred than it is to figure other kinds of cases intended to be included and capable of explaining the amplitude of that power.

The Court pronounced this interlocutor—

". . . [Counsel for the defenders and respondents stating that no objection was offered to the competency of the appeal] in conformity with the unanimous opinions of the whole Judges, Sustain the appeal: Recal the interlocutor of the Sheriff appealed against: Remit to the Sheriff-Substitute to of new grant warrant of ejectment as craved in the initial writ, and to decern. . . ."

Counsel for the Appellant (Pursuer)—Constable, K.C. — Macgregor Mitchell. Agents—J. S. & J. L. Mack, S.S.C.

Counsel for the Respondents (Defenders)—Wilson, K.C.—Ingram. Agent—J. George Reid, S.S C.

HIGH COURT OF JUSTICIARY.

Thursday, December 11.

(Before the Lord Justice-General, Lord Mackenzie and Lord Anderson.)

NEIL *v.* STEVENSON.

Justiciary Cases—Sentence—Amendment—Oppression—Prejudice—Severity of Sentence—Summary Jurisdiction (Scotland) Act 1908 (8 *Edw. VII, cap.* 65), *sec.* 75.

In sentencing an accused for assault committed by him while under the influence of liquor, a Sheriff-Substitute told the accused, against whom there were previous convictions, that if he was again found guilty in his court of a charge of the same kind he would go to prison for six months. The accused on a later occasion pleaded guilty to another similar assault. The Sheriff-Substitute then stated that he had listened to counsel for the accused, and had heard the undertaking given by the accused to go abroad, and the plea for leniency on behalf of his wife and children; that he considered in the interests of all parties the accused should, for at least six months, have no opportunity of touching liquor, and that it was his duty to the public, after the warning he had given the accused and in view of the increase of crimes of violence in the district, to implement the promise he had given the accused on the occasion of his last conviction. The sentence was six months' imprisonment. The accused had, at his own farm, struck a woman two blows with his clenched fist; no serious injury resulted, and it was stated that there was not even a bruise. *Held* that the Sheriff-Substitute had been unduly influenced in sentencing the accused by the promise he had made on the former occasion, and sentence reduced to three months' imprisonment.

Thomas Neil, *complainer*, was charged at the instance of James Pollock Stevenson, Procurator-Fiscal, Kilmarnock, *respondent*, in the Sheriff Court at Kilmarnock, upon a summary complaint in the following terms—"Thomas Neil, farmer, residing at Pisgah Farm, Parish of Craigie, and at present in custody, you are charged at the instance of the respondent that on 14th November 1919, at Pisgah Farm Steading, Craigie aforesaid, occupied by you, you did (1) assault Caroline Lamont or Thomson, wife of Alexander Thomson, assistant dairy keeper, residing at Victoria Dairy, Victoria Street, burgh of Ayr, and did strike her two blows on the body with your fist to the injury of her person, and (2) curse, swear, use obscene language, and commit a breach of the peace, and you have been previously convicted, as in the list annexed. List of previous convictions applying to you—

Date.	Place of Trial and Court.	Offence.	Sentence.
1915.			
14th July.	Kilmarnock Sheriff.	Assault.	£1 or 7 days.
1918.			
26th August.	Do.	Do.	£2
30th September.	Do.	Do.	£2
1919.			
14th April.	Do.	Assault and Breach of Peace.	14 days' impt."

A plea of guilty to the assault libelled was tendered and accepted. The previous convictions were admitted.

The Sheriff-Substitute (J. A. T. ROBERTSON) sentenced the complainer to six months' imprisonment.

The complainer brought a bill of suspension and liberation. Answers were lodged for the respondent.

The bill and answers set forth—"(Stat. 2) Until July 1915, when he was convicted of assault and fined £1 (with the option of seven days' imprisonment), the complainer had never been in trouble of any kind. Three similar convictions were recorded against him thereafter, viz., on 26th August and 30th September 1918, the complainer on each occasion being fined £2, and on 14th April 1919. All the convictions took place in the Sheriff Court of Ayrshire, at Kilmarnock, before Sheriff-Substitute Robertson. (*Ans.* 2) Admitted. Explained that on each occasion the Sheriff-Substitute was informed, as was the fact, that the assault had been committed while the complainer was the worse of liquor. (Stat. 3) For the offence last referred to the sentence imposed was one of fourteen days' imprisonment, the Sheriff-Substitute having promised on the occasion of the complainer's previous conviction that if the complainer was again brought before him on a charge of the same kind he would receive a sentence of imprisonment without the option of a fine. (*Ans.* 3) Admitted