

some other conclusions which are not here material. We thus have a third action raising precisely the same question of the testator's domicile and the pursuer's right to legitim. Now, the result of the Court of Session action was this—the reductive conclusions were abandoned by the pursuer, and on 15th November 1890 their Lordships of the Second Division held that the Court in England was the *forum conveniens* for determining the question of the testator's domicile and the consequent right of the pursuer to legitim. The Court of Session action having thus been disposed of, the Sheriff-Substitute recalled the interim interdict and dismissed the action before him. The whole trust funds were then transmitted to the receiver in Chancery in England, and the proceedings in the action there went on, with the result that after an inquiry before Mr Justice Chitty, at which the pursuer might have appeared but did not, the deceased was found to have died domiciled in England. We are now asked to disregard all these proceedings, and to revive the Sheriff Court action which the pursuer herself seems to have superseded when she brought the action of reduction in the Supreme Court. In my opinion we cannot do so. I think that we are precluded by the judgment of the Second Division from taking that course. I think we cannot disregard that judgment, and it was determined that the Court in England is the proper Court for settling the questions between the parties. I am of opinion, therefore, that we should refuse the appeal and affirm the interlocutor of the Sheriff-Substitute.

LORD M'LAREN—I am of the same opinion. The pursuer's claim is as a creditor on her father's estate for the amount of her legitim, and if she had been content to raise an action against her father's trustees for payment of her legitim, and had used arrestments on the dependence, it is not unlikely that the courts of this country would have entertained the action, for I do not think it can be disputed that the courts of Scotland have a concurrent jurisdiction to entertain such an action against trustees who are all residents in Scotland, where also the bulk of the trust funds were locally situated. But that is not the course which the pursuer has seen fit to follow, and she has her own advisers to blame for the somewhat pretentious claim which she has made to interfere with the entire trust management, by seeking to have the trustees interdicted from removing any part of the moveable property belonging to the trust out of the jurisdiction of the Sheriff of Lanarkshire, and from following out administrative proceedings of any sort in England, until her right to legitim is settled. Be that however as it may, the Court of Session has already determined, in the action in the other Division, that the court in England is the *forum conveniens* for the determination of the questions between the parties. It is said that the Second Division would not have arrived at the conclusion they

did if they had had before them the fact that the Sheriff Court action was prior in date to the suit in Chancery; but I think we must assume that the pursuer there urged everything which she regarded as favourable to her case, and the question having been determined by the Second Division, I am of opinion that we cannot disturb that judgment.

LORD KINNEAR—I also concur. If I thought the question here was, whether the proceedings in Chancery were in themselves such as to preclude the pursuer from bringing an action of any sort in Scotland for payment of her legitim, I should have desired to take time for consideration. But that is not the question with which we have here to deal, for it has been decided by the Second Division that the Court of Chancery is the convenient *forum* for the determination of the question between the parties, and it was only after that decision that Mr Justice Chitty pronounced the judgment finding that the domicile of the testator was in England. The question therefore is, whether we are to pronounce a judgment opposed to that of the other Division? and I agree with your Lordships that it is in vain to ask us to reconsider that judgment.

The LORD PRESIDENT was absent.

The Court dismissed the appeal.

Counsel for the Pursuer—D.-F. Balfour, Q.C.—Guthrie Smith—Salvesen. Agents—Gill & Pringle, W.S.

Counsel for the Defenders—Asher, Q.C.—A. S. D. Thomson. Agents—Simpson & Marwick, W.S.

Thursday, March 19.

FIRST DIVISION.

[Lord Kincairney, Ordinary.]

LIVINGSTONE v. BEATTIE.

(*Ante*, vol. xxvii., p. 562, and 17 R. 702.)

Crofter—Sub-Tenant—Crofters Holdings Act 1886 (49 and 50 Vict. cap. 29), sec. 34.

Held that the sub-tenant of a tenant-farmer was not a "tenant" in the sense of the 34th section of the Crofters Holdings Act 1886, and was accordingly not entitled to the benefits of that Act as a crofter.

Landlord and Tenant—Sub-Tenant—Agricultural Holdings Act 1883 (46 and 47 Vict. cap. 62), sec. 42.

Opinions by Lord Adam and Lord M'Laren that in the Agricultural Holdings Act "tenant" does not include sub-tenant except where the principal tenant holds under a lease of extraordinary duration.

Opinion *contra* by Lord Kincairney.

Crofter—Requisite Residence on Holding—Crofters Holdings Act 1886 (49 and 50 Vict. cap. 29), sec. 34.

Held that a person who between 1885 and 1888 lived at a distance of several hours' journey from his holding, and only paid it periodic visits to do the necessary farm work, was not resident on his holding in the sense of sec. 34 of the Crofters Holdings Act 1886, and was accordingly not entitled to the benefits of that Act.

On 3rd April 1889 Miss Beattie, heiress-of-entail in possession of the lands of Glenmorven, in the county of Argyll, brought an action of removing in the Sheriff Court of Argyllshire against Robert Stewart Livingstone, who occupied a house and a portion of arable land at Tornain, on the farm of Barr, being part of the estate of Glenmorven. The action was defended on the ground that the defender was a crofter, and not liable to be removed from his holding except on breach of the statutory conditions enumerated in the 1st section of the Crofters Holdings Act 1886.

After various proceedings proof was taken in the Sheriff Court, and on 8th August 1889 the Sheriff-Substitute (M'LACHLAN) found that at the date of the passing of the Crofters Act the defender was not resident on the holding, and was not a crofter in the sense of the Act, and granted decree of removal in terms of the prayer of the petition.

On appeal the Sheriff (FORBES IRVINE) adhered to this interlocutor.

Livingstone having been charged on this decree, brought the present note of suspension, which was passed on juratory caution (*vide ante*, vol. xxvii., p. 562), and a record was thereafter closed on the note of suspension, and answers for Miss Beattie.

The complainer averred, *inter alia*—(Stat. 1) "The complainer has for many years been occupant of a dwelling-house and arable land, with right of pasturage, situated at Tornain, on the farm of Barr in the parish of Morven and county of Argyll, being part of the entailed estate of Glenmorven in said parish and county in which the respondent is in possession as institute of entail. The complainer paid a rent of £6 therefor. The said rent, down to and including Whitsunday 1889, has been duly paid. The complainer also duly tendered the half-year's rent due at Martinmas last, but it was not accepted by the respondent." (Stat. 2) "The complainer is a crofter within the meaning of the Crofters Holdings (Scotland) Act 1886, which applies to the dwelling-house, land, and right of pasturage held by him as aforesaid, and can only be removed therefrom in terms of the provisions of that statute." (Stat. 3) "The respondent nevertheless, on or about 3rd April 1889, raised an action of removing against the complainer in the Sheriff Court of Argyllshire to have him ordained to flit and remove from the said houses and land and right of pasturage at and against the term of Whitsunday 1889 under pain of ejection. Defences were duly lodged for the complainer, which are referred to for their terms, and here held as repeated *brevitatis causa*." In the defences referred

to the complainer averred—"At the date of the passing of said Act the defender was a yearly sub-tenant, under the said James Thomas Shaw, of a holding at Tornain on the said farm of Barr consisting of two acres or thereby arable land, and a right of pasturage in common with three other sub-tenants of the said James Thomas Shaw together with a dwelling-house. In respect of said holding the defender paid to the said James Thomas Shaw a rent of £7."

The respondent submitted that the suspension should be refused, in respect that "the suspender was not resident on the said ground at the date of the passing of the Crofters Holdings Act 1886," and that "any right possessed by him was that of sub-tenant under James Thomas Shaw, the former tenant of the farm."

The parties agreed to hold the proof led in the action of removing as the proof in the action of suspension.

With regard to his tenure the complainer's evidence was as follows:—"The croft is two acres, arable land and common pasture land. It was never measured. When I became sub-tenant of the holding Mr Oliver was the principal tenant. I continued in the holding on the same conditions as my father had held it. Mr Oliver was principal tenant for twenty-eight years, and continued to be principal tenant for about fifteen years after I got the holding. Captain Shaw had the farm after Mr Oliver for seven years. He entered in 1880 and held it till 1887. I continued my holding under Captain Shaw on same conditions as under Mr Oliver. There was no change made in the conditions of holding when my father ceased to be Miss Stewart's tenant. The rent when I first took possession was £7. Captain Shaw reduced it in 1887 to £6. It is now £6."

With regard to the question of residence the evidence was to this effect—Down to Whitsunday 1884 the complainer lived on the croft with two sisters. At that date one of his sisters—Mrs MacVicar—went to Oban with her two sons and took up her residence there. From Oban to Tornain was a journey of four and a-half hours. At Whitsunday 1885 the complainer with his other sister—Mary—followed Mrs MacVicar to Oban, and they all lived together till January 1888, when he returned to Tornain. During this period the complainer or his sister Mary, or both together, went at various times in the year to attend to the farm at Tornain. Their visits generally speaking were as follows—At Whitsunday and Martinmas for a few days to pay the rent and repair fences; a visit of a few days some time during the winter; in spring for some weeks to cut "wreck" and plant potatoes; in June for a week or ten days to clean the potatoes; in August and September for five or six weeks or even longer to reap the hay and corn; and in October for a few days to lift the potatoes. During these visits the complainer and his sister lived in the dwelling-house on the holding, which had been left furnished. The complainer also deponed that his object in going to Oban was to assist his sister, and

that he lived with her as her lodger; that he never intended to give up the croft, but always intended to return to it; and that Captain Shaw never found fault with him for his absence.

The Crofters Holdings Act became law on 25th June 1886. Section 34 of that Act provides, *inter alia*—"In this Act 'crofter' means any person who at the passing of this Act is tenant of a holding from year to year, who resides on his holding, the annual rent of which does not exceed £30 in money, and which is situated in a crofting parish, and the successors of such person in the holding, being his heirs or legatees." The section does not define either "landlord" or "tenant," but after defining various other terms used in the Act, concludes thus—"Other expressions have the same meanings as in the Agricultural Holdings Act 1883 (46 and 47 Vict. c. 62)."

The Agricultural Holdings Act 1886, in section 42, contains, *inter alia*, the following definitions:—"Landlord" in relation to a holding means any person for the time being entitled to receive the rents and profits of, or to take possession of any holding. 'Tenant' means the holder of land under a lease. 'Lease' means a letting of or agreement for the letting of land for a term of years, or for lives, or for lives and years, or from year to year." Section 24 of the same Act provides that a landlord on paying compensation under the Act to a tenant shall be entitled to obtain from the Sheriff authority to charge the holding or the estate of which it forms part in respect thereof, and continues—"The Sheriff shall have power, on proof of the payment, and on being satisfied of the observance in good faith by the parties of the conditions imposed by this Act, to grant authority to the landlord to charge the holding or the estate of which it forms part, by executing and registering in the Register of Sasines a bond and disposition in security over it for repayment of the amount paid or any part thereof, with such interest and by such instalments as the Sheriff may determine; or if the landlord has only a leasehold interest in the holding, by executing and duly registering in the Register of Sasines an assignation of the lease in security and for repayment of the amount paid, or any part thereof, with such interest and by such instalments as the Sheriff may determine."

On 5th August 1890 the Lord Ordinary (KINCAID) pronounced the following interlocutor:—"Finds (1) that at the date of the passing of the Crofters Holdings Act the complainer occupied a croft or holding at Tornain on the farm of Barr, which was then under lease to Captain James Thomas Shaw; (2) that he was not then a tenant of said croft or holding in the sense of the Crofters Holdings Act; (3) that he did not at said date reside on the said holding: Therefore finds that he is not a crofter, and that he was duly removed from said croft or holding at the instance of the respondent: Repels the reasons of suspension, and decerns, &c.

"Opinion.—[After a narrative of the pro-

ceedings in the case, and of the facts bearing on the questions raised]—A crofter is defined by the 34th section of the Act as 'any person who at the passing of this Act is tenant of a holding from year to year, who resides on the holding, the annual rent of which does not exceed £30 in money, and which is in a crofting parish.'

"There is no doubt that all the particulars of that definition are satisfied in this case, except that it is questioned (1) whether the complainer was a tenant, and (2) whether he resided on his croft.

"It will be further observed that the question is, whether he was a crofter at the date of the passing of the Act—that is, on 25th June 1886—because it cannot be maintained, and I do not think that it has been maintained, that if he was not a crofter then he can possibly have become a crofter since.

"The questions then are—(1) Was the complainer a tenant of his holding on 25th June 1886? and (2) Did he then reside on the holding?

"(1) Was the complainant a tenant of his holding on 25th June 1886?

"He was not at that time the respondent's tenant, but he was Captain Shaw's tenant—that is to say, he was a sub-tenant. Nothing was said about this question in the Sheriff Court, because it was assumed that the word 'tenant' in the sense of the Act included sub-tenant. It was quite natural that this should have been assumed, because in one case the Crofter Commissioners decided that the term 'landlord' included a principal tenant or middleman—*Keith v. Mackay*, First Report, 103. This determination was, I understand, founded on the last paragraph of the interpretation clause, which runs thus—"Other expressions have the same meanings as in the Agricultural Holdings Act 1883"—language which appears to incorporate the latter interpretation clause in the Crofters Act; and I think it must be admitted that in the Agricultural Holdings Act the word tenant may mean sub-tenant. The second paragraph of section 24 of that Act seems conclusive to that effect.

"I ought probably to mention that in the case of *M'Dougall v. M'Allister*, March 6, 1890, 17 R. 555, I decided that the word tenant or crofter used in the Act did not include sub-tenant, holding that the Act related only to the proprietor and his immediate tenant. My judgment was affirmed by the Second Division, but that part of the judgment was not questioned, because the party in the Inner House claimed only to be a cottar. I suppose, therefore, it was not considered. Their Lordships do not allude to it, and on that account that case cannot be quoted as a judgment on the point.

"I think, however, that when so deciding that point I had not sufficiently considered the effect of the reference to the Agricultural Holdings Act, and I do not think I was referred to the deliverance of the Crofters Commissioners.

"The reference to the Agricultural Hold-

ings Act gives certainly strong support to the view that a sub-tenant may as well be a crofter, and the opinion of the Crofters Commissioners is no doubt of great weight. Nevertheless, on a consideration of the question, and a renewed study of the Act, I have still great difficulty in holding that the words 'landlord' and 'crofter' can be read as meaning principal tenant and sub-tenant.

"But for the reference to the Agricultural Holdings Act, I would hardly have thought it not doubtful that the Act dealt only with proprietors and their tenants. The interpretation clause defines a crofter as a tenant, but contains no express interpretation of the word tenant, but the word tenant may be substituted throughout the Act for crofter. Now, the various sections of the Act speak of two persons only—landlord and crofter or tenant—and none of them contemplates three possible persons—landlord, tenant and sub-tenant. The landlord mentioned is the crofter's landlord. The crofter is the landlord's tenant; so that if in any section the meaning of either word is certain, the meaning of the relative word in that clause is also ascertained. It is not, I think, possible in any clause to understand proprietor by the word landlord, and sub-tenant by the word crofter.

"Now, if the Act be read giving the word landlord its usual meaning, and interpreting crofter as meaning the landlord's immediate tenant, there is no difficulty in so reading the Act. No contradiction or confusion or anomaly arises, at least no anomaly except what necessarily arises from the novel conception embodied in the Act. But if the attempt be made to substitute principal tenant for landlord, and sub-tenant for crofter, the difficulty of so reading the Act will be found to be very great.

"Section 1 specifies the statutory conditions of the crofter's permanency of tenure. Some of the sub-sections may be read intelligibly in whichever way the words landlord and crofter be understood, but in sub-section 4 landlord can only mean proprietor, and if so, tenant can only mean principal tenant, otherwise a sub-tenant might, with consent of the immediate tenant, sub-divide or sub-let his holding, or erect buildings on it without regard to the wishes or interests of the proprietor, which, it is to be supposed, was not intended.

"The purposes for which the landlord is authorised by sub-section 7 to enter on the croft, are proprietary purposes.

"If crofter in sub-section 8 can mean sub-tenant, then a house for the sale of intoxicating liquors might be opened against the proprietor's wishes if the consent of the principal tenant were obtained.

"Section 3 provides for resumption by the landlord, and the purposes mentioned are plainly purposes which only a proprietor could entertain, and it is almost impossible to imagine a case in which a tenant could resume land from a sub-tenant under that section.

"Under section 5 the existing rent seems

to be stereotyped, unless altered by the Commission or by subsequent agreement, but it would, it is thought, be strange to empower a tenant with a merely temporary right, which might be expiring, to fix by agreement with a sub-tenant the rent which would be payable to the proprietor after the principal lease had run out, without the landlord having anything to say in the matter.

"By section 7 a crofter may renounce his croft on intimation to his landlord, and by section 8 he is entitled to compensation for permanent improvements. If he were a sub-tenant, he would intimate his renunciation to the principal tenant, and not to the proprietor, and I suppose the tenant would have to pay the compensation for permanent improvements for which he might obtain no benefit, and the landlord, who might be greatly benefited, would escape. None of these difficulties arise if the words landlord and tenant be understood in their ordinary sense.

"The provisions in Division V. of the Act in regard to enlargement of holdings appear manifestly to refer only to proprietors and principal tenants. For it is surely very difficult to hold that it was intended to empower a sub-tenant to claim from the principal tenant an additional portion of the land held under lease. (Section 13).

"These remarks illustrate the difficulty of holding sub-tenants to be within the scope of the Act.

"Taking a more general view, it appears to me that it would be very odd to hold that a tenant with a mere temporary right could put a sub-tenant in a position to acquire a permanent right, and that against the proprietor with whom he had no contract or relation of any kind.

"It appears to me, besides, that the Act does not contemplate that the crofter shall have a right more permanent in its character than that of the landlord from whom it is derived. It is only, I consider, a proprietor's land, and not a tenant's, which the Act appropriates.

"But no doubt the reference to the Agricultural Holdings Act creates considerable difficulty. The contention is that the interpretation clause in the Crofters Act is itself to be interpreted by the interpretation clause in the Agricultural Holdings Act. That is surely a very rough and dangerous method of construing an interpretation clause.

"The scope and general purposes of the two Acts are perfectly different. The one Act is almost limited to the regulation of the tenant's compensation on the expiry of his lease. The object of the other Act is to make the tenant's right permanent. Now, when in the Agricultural Holdings Act an artificial meaning is put on certain words, and, among others, on the words landlord and tenant, which is supposed to be adapted to the particular provisions and purposes of that Act, it could only be by a lucky chance that these artificial meanings could be appropriate to a totally different Act, which has a totally different and very much wider scope and

purport; and therefore I think that the reference to the Agricultural Holdings Act must really be read with this qualification, that the interpretation clause of that Act is to be adopted only where the context permits; and that where such an interpretation is opposed to the fair scope and meaning of the Act it is not incumbent to adopt it.

"Accordingly the artificial phraseology of the Agricultural Holdings Act, while it does suit that Act, does not appear to square at all with the Crofters Act.

"An illustration may be found in the word 'lease.' It does not occur often in the Crofters Act, but I think it impossible to understand the word lease in section 11 in accordance with the interpretation clause in the Agricultural Holdings Act.

"I have thought it desirable to notice this point at some length, because it is raised directly by the pleadings, and it is a point of great general importance, as to which an authoritative judgment, should this interlocutor be taken to review, might be desirable.

"It is true that the proof has not been specially directed to this point, because it does not seem to have been taken in the Sheriff Court. But the facts seem sufficiently ascertained. The case no doubt presents a certain amount of speciality, because having in view the length of time during which the complainer and his father have occupied this croft their position certainly approximated closely to that of other crofters who were direct tenants of the landlord. But it is fully admitted that the complainer was not at the date of the Act a tenant of the proprietor but of Captain Shaw, and the case must be taken so, and cannot depend on that speciality, but on the general question whether the Act authorises the appropriation of the land of a tenant or only of the land of a proprietor.

"The Sheriffs have, however, decided the case on a totally different ground. They have held that the complainer did not at the date of the Act fulfil the condition of residence on his holding. The case on this point seems to me to be narrow, but on the whole I concur in the judgment in the Sheriff Court. It would be of little use to refer at any length to the evidence. There is little or no discrepancy in it, and the import of it is plain enough.

"From Whitsunday 1885, and for two years or three afterwards, it is quite certain that the complainer lived chiefly in Oban. Oban was no doubt within tolerably easy reach of Tornain, and the complainer visited Tornain whenever the performance of the agricultural operations connected with it was required. During the half-year before the Act passed he spent, I think, between thirty and forty days at Tornain, and the rest of the half-year at Oban. I do not think that it was intended by the Act that a crofter should be always living on his croft. I think it was contemplated that he should sometimes be absent, eking out a livelihood elsewhere—as for example, by fishing or the like. But I think it was

contemplated that he should make his home on the holding, and not anywhere else. It was well remarked at the debate that the statute contemplated occupiers of crofts who did reside on their holdings, and occupiers who did not, and that the complainer was an example of an occupier who did not reside. He used it as an agricultural subject, and he allowed the dwelling-house on it nearly to fall into ruin. He was not absent on a mere occasion or from a temporary cause, but was absent habitually, with only occasional visits to the holding.

"Reference was made to recent poor law cases in which the principle of constructive residence has been carried very far; for example, in the case of *Deas v. Nixon*, June 17, 1884, 11 R. 945, a man was held to have retained a residential settlement in the parish of Port-Glasgow, who had been in Australia for above five years, but who had maintained his wife and family during that time at Port-Glasgow. In the recent case of *Watt v. M'Guire*, December 21, 1888, W.R. 263, the same principle was applied in a question as to a qualification to vote as an inhabitant-occupier. But I do not see any room for the application of that principle here. For when the complainer was absent the house was left empty altogether, and nobody resided in it. I think that a closer analogy is to be found in cases relating to the residence of a tenant on a farm, and reference was made to the case of *Edmund v. Reid*, May 26, 1871, 9 Macph. 782, where an offer by a tenant to keep a furnished house on the farm with a servant therein, and to reside in it for ten days in every two months, was not held an offer to implement an obligation to reside on the farm.

"I do not think that the fact that Captain Shaw made no objection to the complainer's absence is to the purpose, for the question is the mere question of fact, whether the complainer did in fact reside on the croft, and not a question about his reasons for not doing so.

"On the whole, I see no sufficient reason for dissenting from the judgments of the Sheriffs, and think that the suspension must therefore be refused."

The complainer reclaimed, and argued—
(1) In considering the question whether the complainer was a "tenant" in the sense of the first clause of section 34 of the Crofters Act, it was necessary in terms of the last clause of that section to refer to the Agricultural Holdings Act to find out what was the meaning of the term "tenant." There was nothing in the definition of "tenant" there found which did not accord with the complainer's position, or which negated the idea that "tenant" included sub-tenant—Agricultural Holdings Act 1883, section 42. Further, it was plain from section 24 of the same Act that the definitions of "landlord" included a person who held under a lease, and it followed that "lease" included sub-lease, and "tenant" included sub-tenant. (2) The complainer had satisfied the conditions as to residence.

The respondent argued—(1) It was clear

that the complainer was only a sub-tenant, both from his averments on record and from his evidence, and sub-tenants were not entitled to the benefits of the Act. In the Crofters Act "landlord" did not include "tenant," and a sub-tenant was not a tenant in the sense of section 34. The reference to the Agricultural Holdings Act could only be adopted where consistent with the tenor of the Crofters Act, and did not help the complainer, for it was clear from the terms of section 24 of that Act that it only had reference to long leases, which were capable of registration in the Register of Sasines. (2) The complainer had not satisfied the condition of residence on the holding imposed by the Crofters Act.

At advising—

LORD ADAM—The only question before us is, whether the complainer was a crofter in the sense of the Crofters Act at the date of the passing of that Act? The 34th section contains a clear definition of what a crofter is; "he is any person who at the passing of this Act is tenant of a holding from year to year, who resides on the holding, the annual rent of which does not exceed £30 in money, and which is in a crofting parish." Now, among other things, a person to be a crofter must be a tenant from year to year, and must reside on his holding.

The first question therefore is, whether the complainer was a tenant, and it is necessary to look to his averments to see what he says on that subject. In the 1st article of his statement of facts he says:—"The complainer has for many years been occupant of a dwelling-house and arable land with right of pasturage, situated at Tornain, on the farm of Barr . . . being part of the entailed estate of Glenmorven . . . in which the respondent is in possession as institute of entail. The complainer paid a rent of £6 therefor. The said rent down to and including Whitsunday 1889 has been duly paid. The complainer also duly tendered the half-year's rent due at Martinmas last, but it was not accepted by the respondent." In article 3 he says:—"The respondent, nevertheless, on or about 3rd April 1889 raised an action of removing against the complainer in the Sheriff Court of Argyllshire to have him ordained to flit and remove from the said houses and land and right of pasturage at and against the term of Whitsunday 1889 under pain of ejection. Defences were duly lodged for the complainer, which are referred to for their terms, and here held as repeated *brevitatis causa*." That reference makes it necessary to turn to the original record, in which the complainer made the following averment bearing on this point—"At the date of the passing of the said Act the defender was a yearly sub-tenant under the said James Thomas Shaw of a holding at Tornain, on the said farm of Barr, consisting of 2 acres or thereby of arable land and a right of pasturage in common with three other sub-tenants of the said James Thomas Shaw, together with a dwelling-house. In respect of said holding the de-

fender paid to the said James Thomas Shaw a rent of £7." Such are the averments made by the complainer, and it is clear from them that his holding was part of the farm of Barr let to Captain Shaw, and that Captain Shaw was the tenant of the dwelling-house and arable land mentioned, and that the complainer was his sub-tenant. These averments also are in conformity with the facts, for we find in the evidence of the complainer the following statement—"The croft is two acres arable land and common pasture land. It was never measured. When I became sub-tenant of the holding Mr Oliver was the principal tenant. I continued in the holding on the same conditions as my father had held it. Mr Oliver was principal tenant for twenty-eight years, and continued to be principal tenant for about fifteen years after I got the holding. Captain Shaw had the farm after Mr Oliver for seven years. He entered in 1880, and held it till 1887. I continued my holding under Captain Shaw on same conditions as under Mr Oliver. There was no change made in the conditions of holding when my father ceased to be Miss Stewart's tenant. The rent when I first took possession was £7. Captain Shaw reduced it in 1887 to £6. It is now £6."

The position of the complainer, accordingly, is not doubtful. He was a sub-tenant under Captain Shaw, who was tenant of the house in question and the land attached thereto. That is clear from the fact that Captain Shaw regulated the rent payable by him. The question is, who was the tenant of the holding, and I have no doubt that Captain Shaw was the tenant, and that the complainer was merely a sub-tenant under him. I think, further, that there cannot be two separate tenants in the same holding, and that if it be true that Captain Shaw was the tenant, that is sufficient for the decision of the case, because it follows that the complainer was not the tenant.

The complainer thought he derived aid from the interpretation clause of the Agricultural Holdings Act. He founded upon the last section of the interpretation clause of the Crofters Act, which says that "other expressions have the same meanings as in the Agricultural Holdings (Scotland) Act," and argued that, as there is no definition of tenant in the Crofters Act, we must go back for a definition to the Agricultural Holdings Act. That Act defines a "tenant" as "the holder of land under a lease," which is as accurate a definition as could be given of Captain Shaw's position at the date of the Crofters Act. It is not said that "tenant" includes sub-tenant, but it is argued that, if the interpretation clause is construed by reference to the provisions of the Act, "tenant" is shown to include sub-tenant, and the Lord Ordinary in commenting upon a recent decision of the Crofters Commission has made an observation to that effect, to which I may perhaps refer, though I do not think it very material to the present case. His Lordship says—"This determination was, I understand,

founded on the last paragraph of the interpretation clause, which runs thus:—‘Other expressions have the same meanings as in the Agricultural Holdings Act 1883’—language which appears to incorporate the latter interpretation clause in the Crofters Act, and I think it must be admitted that in the Agricultural Holdings Act the word tenant may mean sub-tenant. The second paragraph of section 24 of that Act seems conclusive to that effect.” There seems to me to be a fallacy there, because if one turns to the part of the 24th section of the Agricultural Holdings Act to which the Lord Ordinary refers, we find it to be there provided that the Sheriff may authorise a landlord who has paid compensation to charge the holding therewith by executing and registering a bond and disposition in security over it for repayment, “or, if the landlord has only a leasehold interest in the holding, by executing and duly registering in the Register of Sasines an assignation of the lease in security, and for repayment of the amount paid, or any part thereof, with such interest and by such instalments as the Sheriff may determine.” The Lord Ordinary has, I think, failed to see that this provision does not refer to ordinary leases, but to long leases, and the powers given under the Registration of Long Leases Act 1857 (20 and 21 Vict. cap. 26), which are of the nature of proprietary rights. Therein, I think, probably lay the fallacy which induced the Crofters Commission to adopt a wrong opinion of the effect of the Agricultural Holdings Act, and also led the Lord Ordinary to the conclusion that in that Act the word tenant included sub-tenant.

In my opinion, therefore, the complainer has failed to show that he was a tenant of the holding in question at the passing of the Crofters Act.

There is another question referred to by the Lord Ordinary, namely, the residence necessary to entitle a person to the benefits of the Crofters Act, and this also involves the question of fact whether or not the complainer was resident on his holding at the date of the passing of the Act. The evidence stands thus—At Whitsunday 1885 he and his family left the croft and settled in Oban. He resided there till 1888, when he returned to his holding. During this interval, which included the date of the passing of the Act, no one was left in occupation of the croft, but at various periods when the farm required attendance the complainer returned to the holding, and lived in the house which had been during his absence standing empty. The length of his residence on the holding during these visits varied from a week to a fortnight or even longer, but I cannot say that such occasional visits by the complainer between the years 1885 and 1888 are sufficient to constitute residence upon the holding in the sense of the 34th section of the Crofters Act. During that period his real residence was in Oban. I quite agree with the Lord Ordinary that poor law cases have no bearing on this question.

I therefore move that we adhere to the interlocutor of the Lord Ordinary.

LORD M'LAREN—I have very little to add. It appears to me that the theory on which the Crofters Act proceeded was that a proprietor incurred a responsibility by encouraging persons of small means to live on his estate as annual tenants of small portions of land, and that having brought this class of tenant on to his estate, he was not to be allowed without good cause to deprive them of their tenancy by eviction. I do not know that there was any reason to apprehend that this would be done to any considerable extent, but still it was thought desirable that, within reasonable limits, tenants of this class should have fixity of tenure so long as they fulfilled the obligations of their tenancy. If this is the principle of the Act, it is plain enough that it has no application to the case of sub-tenants, because it is against all reason that a proprietor should be bound to maintain in perpetuity on his land any number of crofters who have been brought there by a tenant holding, it may be, only under a nineteen years' lease. Accordingly, I am not surprised that the Act contains no provision applying to sub-tenants. I agree in thinking that the omission is designed, and I think it is perfectly clear on the statute, whether taken by itself or with the gloss sought to be put upon it from the Agricultural Holdings Act, that a tenant is a person holding direct from the landlord. This, I think, receives indirect confirmation from the special clause in the Agricultural Holdings Act applying to leaseholders. The terms of that clause could not be used with reference to the ordinary tenancy under an agricultural lease, for they show that the manner of holding referred to is capable of registration in the Register of Sasines, and this capacity is used as a security for the payment of money. That a person holding under such leaseholders should have certain rights is certainly no reason for extending these rights to a person holding under an ordinary tenant farmer, and whose tenancy depends on his will, and who in fact are mere labourers brought on to the farm for the sake of their labour.

I think, therefore, that the complainer has not made out his claim to be considered a crofter in the sense of the Act.

I am also disposed to think, though I have greater difficulty on this point, that owing to his non-residence he has not fulfilled a condition which is one of the elements in the definition of a crofter.

LORD KINNEAR—I agree on both points. In the first place, that the complainer is not a crofter in the sense of the Crofters Act; and in the second place, that he has not satisfied the condition of residence imposed by the Act.

I only desire to add a single observation with reference to a point mentioned in argument. We are told that there are many places in which crofters' holdings

have been included within the bounds of large farms, and it is said that these occupiers ought not on that account to be deprived of the benefits of the Act. If it is true that there is such a class of occupier, nothing we have now decided will, in my opinion, affect the question between such persons and their landlord. It may be that an occupier of such a kind is a tenant of the proprietor notwithstanding the fact that his holding lies within the bounds of a farm, and notwithstanding even the fact that he pays rent to someone else than the landlord; but if he is a tenant, he must hold of the proprietor, and the ground of our judgment, I conceive, is that the complainer by his own statement negated the idea that he held under the proprietrix at all, because he says that he was "a yearly sub-tenant, under the said James Thomas Shaw, of a holding at Tornain on the said farm of Barr," and the evidence does not in any way displace that averment, but on the contrary confirms that he held under no agreement with the proprietor.

I agree, therefore, that the pursuer has not satisfied this condition, and I also agree that he has not satisfied the condition as to residence.

LORD M'LAREN—I desire to express my concurrence in the additional observations made by Lord Kinnear. There may be such a class of occupiers as has been described holding another position from that with which we have here to deal, and I should not like to say anything to prejudice their case.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Complainer—Jameson—G. W. Burnet. Agent—D. M'Lachlan, S.S.C.

Counsel for the Respondent—Guthrie—Macfarlane. Agents—John C. Brodie & Sons, W.S.

Friday, March 20.

FIRST DIVISION.

[Lord Low, Ordinary.

ALLAN AND ANOTHER v.
GRONMEYER.

*Copartnership—Dissolution of Copartnership—
Realisation of Partnership Property—
Judicial Factor.*

A deed of copartnership provided that on the termination of the contract the stock, property, and debts of the company should be realised by one of the partners named, and the proceeds divided among the partners according to their respective interests.

Three years after the termination of the copartnership it was shown by an accountant's report that during that period the liabilities of the firm had

been increased, the stock-in-trade to a large extent renewed, and the business carried on by the partner named as a going concern.

On the application of the remaining partners, the Court appointed a judicial factor to wind up the copartnership estates.

This was an application for the appointment of a judicial factor on the estates of the now dissolved firm of Scott & Allan, wine and spirit merchants in Leith.

In May 1881 a contract of copartnership was entered into between Thomas Cranstoun Allan, Albert James Allan, and Richard Gronmeyer to carry on the business of the above-named firm. The capital of the firm, consisting of upwards of £22,000, was contributed entirely by the Messrs Allan.

The fourteenth article of the contract provided that on the termination of the copartnership the books were to be balanced, and the value of the stock-in-trade, property, and outstanding debts ascertained, and that the whole might be taken over by any of the partners at a valuation, and if this was not done, the stock, property, and debts were to be realised by Gronmeyer with all convenient speed, and the proceeds divided among the partners according to their respective interests therein.

It was agreed that the copartnership should be dissolved early in 1888, and that the stock should be realised by Gronmeyer. The proof of this fact is set out in the Lord Ordinary's interlocutor.

In October 1890 the Messrs Allan presented this petition, and averred that they were not satisfied with the method of winding-up the business adopted by Gronmeyer; that instead of winding it up he was carrying it on as a going concern; that he had since 1887 increased the liabilities of the company, and almost entirely renewed the stock-in-trade; and that, looking to the large amount of their capital still in Gronmeyer's hands, it was of great importance that the partnership property should be realised with all convenient speed.

Gronmeyer lodged answers in which he denied that the partnership had been dissolved. He averred that he was managing the business with a view to the judicious realisation of the large stock of wines and spirits held by the firm; further, that the appointment of a judicial factor, especially an accountant, would inevitably lead to a sacrifice of the stock, and cause loss to the petitioners.

By minute the respondent undertook that on 15th December 1890 the books of the firm would be submitted to Messrs R. & E. Scott, C.A., for audit, and that the realisation of the stock would be completed not later than Whitsunday 1892.

The substance of Messrs Scott's report, so far as bearing upon the present question, was in these terms—"The accountants were under the impression . . . that the business was only to be continued for the purpose of gradually winding it up, but they find that instead of this having been done, the business has been carried on as