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WINTER SESSION, 1918–1919.

COURT OF SESSION.

Saturday, October 19.

SECOND DIVISION.

[Sheriff Court at Kirkcudbright.

SCOTT *v.* LIVINGSTONE AND ANOTHER.

Landlord and Tenant — Removing — Description of Subjects—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 36, *First Schedule, Rule* 111, *Form H.*

A tenant who occupied under a yearly tenancy from a farmer a cottage on the farm, with garden, byre, and a field of five acres, received from him notice to remove in the following terms:—"I beg to serve formal notice to quit at Whitsunday (28th May) 1918, as I shall be requiring the cottage for an employee." In an action of removal following thereon, *held* that the letter in question did not comply with the Sheriff Courts (Scotland) Act 1907 in respect that it did not sufficiently describe the subjects.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), section 36, enacts—"*Notice to Remove.*—Where lands exceeding two acres in extent are occupied by a tenant without any written lease and the tenant has given to the proprietor or his agent no letter of removal, the lease shall terminate on written notice being given to the tenant by or on behalf of the proprietor . . . not less than six months before the determination of the tenancy, and such notice shall entitle the proprietor in the event of the tenant failing to remove to apply for and obtain a summary warrant of ejection against the tenant and everyone deriving right from him."

The First Schedule, Rule 111, enacts—"*Form of Notice of Removal.*—Notices under sections 34, 35, and 36 of this Act shall be as nearly as may be in the Form H annexed hereto. . . ." Form H is in the following terms:—"To [*name, designation, and address of party in possession*]. You are required to remove from [*describe subjects*] at the term of [*or if different terms, state them and the subjects to which they apply*] in terms of lease [*describe it*] or [*in terms of your letter of removal of date*] or [*otherwise as case may be.*]."

John Scott, farmer, Drumhumphrey, Dalbeattie, *pursuer*, brought an action in the Sheriff Court at Kirkcudbright against Mrs Janet Livingstone, residing in a cottage at Drumhumphrey, wife of John Livingstone, and against John Livingstone as her curator and administrator-in-law, *defenders*, in which he craved the Court summarily to eject the defender Mrs Livingstone and her family "from the cottage and garden, byre, and field of five acres or thereby occupied by her on the farm of Drumhumphrey."

In November 1917 the defender received from the pursuer a letter in the following terms: — "Drumhumphrey, Corsock, Dalbeattie, 7th November 1917. Mrs Livingstone. Dear Madam, — I beg to serve formal notice to quit at Whitsunday (28th May) 1918 as I shall be requiring the cottage for an employee. Yours truly, (Sgd.) J. SCOTT."

The pursuer averred that the defender Mrs Livingstone accepted the letter "as formal notice of removal and acted upon it as such, and soon afterwards took a house at Kirkmahoe for the year from Whitsunday 1918, and so informed pursuer, . . . but on 17th April 1918 through her agents [she] intimated that she intended to remain." . . .

The defender pleaded—"2. The pursuer's averments are irrelevant and insufficient to support the conclusions of the writ. 3. The defender being tenant of the subjects to Whitsunday 1918, and not having received notice in terms of law to remove therefrom, decree of absolvitor with expenses should be pronounced. 4. The letter, intimation, or notice founded upon by pursuer not having been made or given in the form and manner required by law, pursuer is not entitled to the warrant craved."

On 21st June 1918 the Sheriff-Substitute (NAPIER) sustained the defender's second,

third, and fourth pleas-in-law and dismissed the action.

The pursuer appealed to the Sheriff (MORTON), who on 21st August 1918 refused the appeal.

The pursuer appealed, and argued—The description of the subjects was sufficient. The rule must be interpreted reasonably. This was a transaction *inter rusticos*, and slavish adherence to the form was not intended. The entire subjects (cottage, field, and byre) were held as a *unum quid*, and the tenant must have understood that the whole was meant. The word "quit" in the letter must apply to something, and could only apply to the tenancy. The position of the word "cottage" in the letter was immaterial. In any event the tenant had suffered no prejudice—*Campbell's Trustees* v. *O'Neill*, 1911 S.C. 188, 48 S.L.R. 115. The tenant had acted on the assumption that the notice was good, and the pursuer was entitled to proof of those actings as barring the defenders from objecting to the notice.

Argued for the defenders — The description was insufficient. The Legislature had enacted certain definite rules as to removing, a strict compliance with which was required. The words of the section involved a peremptory direction that the statutory form should be followed unless there was something in the circumstances of the case which made modification necessary. If, however, proper statutory notice had not been given it was impossible for the appellant to make out a case on facts and circumstances short of express agreement — *Gordon* v. *Bryden*, 1803, Mor. 13,854; *Blain* v. *Ferguson*, 1840, 2 D. 546. In *Campbell's Trustees* v. *O'Neill* (*cit. sup.*) there was a sufficient description of the subjects and specification of time. On the question of proof there was no relevant averment of facts in dispute.

LORD JUSTICE-CLERK — The objection taken to the letter of 7th November 1917 is undoubtedly a technical objection, as the tenant understood perfectly well what was intended and practically accepted the letter. But then this matter is dealt with by careful provisions in the Statute of 1907 and relative rules, which it is to be observed are not as is often the case rules to be made by an outside party, but are rules contained in the statute itself. They are appended to the statute in a schedule by section 39, and are to be construed and have effect as part of the Act. Rule 111, which is the one we have to deal with here, says that the notice under section 35 shall be as nearly as may be in the Form H annexed thereto, and that form says that the notice is to contain a description of the subjects. I do not think that the letter of 7th November is at all "as nearly as may be" in the form of H. It is as far away from that form as could well be, and so far as a description of the subjects is concerned it only refers to a cottage, and refers to it in such a way as to be rather misleading than guiding as to what was meant, for while the subjects actually let and possessed were a cottage and garden, a byre, and a field of five acres, the only reference in the letter to any subject is to the cottage itself, and I am inclined to agree with the Sheriff that the cottage was mentioned only as an explanation of why the notice was given. Therefore I think that here where we are dealing with statutory provisions relating to a formal matter, namely, the form in which a notice of removal should be given, we have not a notice as nearly as may be to Form H annexed to the statute.

These proceedings are intended to be summary proceedings. In a case to which the Sheriff-Substitute refers—*Blain* v. *Ferguson*, (1840) 2 D. 546—Lord Fullerton says—"In regard to a case of this kind I should fully agree in the opinion ascribed to the learned Judges in the report by Baron Hume in the case referred to in the last page of these papers, that after introducing, whether rightly or not, the rule requiring a formal warning, we should increase the risk of litigation, which it was intended to remove, by letting in facts and circumstances as supplying its place." I think that is a very real danger and ought not to be allowed in practice. I am of opinion that the result arrived at by the Sheriff is correct.

I was at first very much impressed by the case of *Campbell's Trustees* v. *O'Neill*, 1911 S.C. 188, 48 S.L.R. 115, which Mr Leadbetter brought before us, but the circumstances there were very materially different from those we have here. In particular, the divergence from the form was not at all material, and might quite well have fallen within the words "as nearly as may be." It is sufficient, in my judgment, to say that I think the present case differs in its circumstances materially from the case of *Campbell's Trustees* v. *O'Neill*, and I do not feel constrained in giving judgment in the present case to apply the opinion of the majority of the Court in *Campbell's* case to the case before us. I am therefore of opinion that the appeal fails, and that we should affirm the judgment of the Sheriff.

LORD DUNDAS—I am of the same opinion. I do not see my way to do otherwise than to affirm the judgment appealed against. I believe that in the main justice is done by enforcing fairly strict compliance with the statutory provisions in a matter of this sort, and not by any undue relaxation of them by accepting alleged equivalents or otherwise. I cannot hold the letter of 7th November to be a due compliance with Rule 111 and Form H of the Sheriff Courts Act 1907. We must affirm the judgment appealed from.

LORD GUTHRIE — The question is, Does the notice of 7th November 1917 comply substantially with Form H of the Sheriff Courts Act 1907? Concretely that comes to this, Does the notice contain a reasonable description of the subjects in question? That was not the question in the case of *Blain* v. *Ferguson*, (1840) 2 D. 546, where it was proposed to dispense with the provisions of a statute ordering formal warning by evidence of actings. The question is the same as in the case of *Campbell's Trustees*, 1911 S.C. 188, 48 S.L.R. 115. The Court there held that while there was a formal

divergence in that case there was a substantial compliance with it.

I agree as to the technical nature of this objection. There were three objections stated. Two of them have disappeared but the third remains, namely, that the notice does not describe any subjects from which the defender is to remove. I cannot support that objection in its terms. But I think we may fairly hold that objection to include the question whether there is not a separable part of the subjects which is not described. I think there is, and that in that particular the statute has not been complied with, and therefore that the case falls under the decision in *Blain* v. *Ferguson*. Apart from the cottage and garden the notice gives no description of the five-acre field. If it were a question of whether the cottage included the garden I should be disposed to hold that it was a reasonable description of the garden. But the field is entirely separable and is not described at all.

LORD SALVESEN was absent.

The Court dismissed the appeal and affirmed the interlocutors of the Sheriff-Substitute and the Sheriff appealed against.

Counsel for the Pursuer and Appellant—Leadbetter. Agents — Webster, Will, & Company, W.S.

Counsel for the Defenders and Respondents — Watt, K.C. — Mackenzie Stuart. Agents—Hagart & Burn Murdoch, W.S.

Saturday, October 19.

FIRST DIVISION.

[Scottish Land Court.

CAMPBELL *v.* SINCLAIR.

Landlord and Tenant — Process — Small Holdings — Marking of Special Case to Division—Small Landholders (Scotland) Act 1911 (1 *and* 2 *Geo. V, cap.* 49), *sec.* 25 (2).

Held that a party who requested the Scottish Land Court to state a special case had the right to mark the case to whichever of the Divisions he chose.

The Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49) enacts—Section 25 (2)—"For the purposes of the Landholders Acts the Land Court shall have full power and jurisdiction to hear and determine all matters whether of law or fact, and no other court shall review the orders or determinations of the Land Court: Provided that the Land Court may, if they think fit, and shall, on the request of any party, state a special case on any question of law arising in any proceedings pending before them for the opinion of either Division of the Court of Session, who are hereby authorised finally to determine the same."

The Rules of the Scottish Land Court, dated 15th November 1912, provide—Rule 102—"Any party to an application or other proceeding who intends to require that a special case shall be stated on any question or questions of law for the opinion of either Division of the Court of Session, shall, within fifteen days after the date of the receipt by the sheriff-clerk of the decision complained of, lodge with the Principal Clerk at the Edinburgh office of the Court a requisition to that effect, and also a draft statement of the case specifying (*a*) the facts out of which such question or questions of law are alleged to have arisen, (*b*) the decision complained of, (*c*) in what respect and to what extent such decision is maintained to be erroneous in point of law, and (*d*) the question or questions of law proposed to be submitted to the Court of Session." Rule 105—"On the said special case being authenticated . . . the Principal Clerk shall transmit the same with relative productions, if any, which have been made part of the case to the Clerk of the Division of the Court of Session to which it is stated, and shall notify such transmission to the parties thereto."

Sir Archibald Spencer Lindsey Campbell, Bart., *appellant*, being dissatisfied with an order of the Scottish Land Court in an application by Andrew Sinclair, *respondent*, craving the Court to find and declare that the respondent was and had been a landholder from 1st April 1912 as an existing crofter or otherwise as a yearly tenant in a holding of which the appellant was proprietor, requested the Land Court to state a Special Case.

The draft Case as prepared by the appellant and lodged with the Land Court was marked to the Second Division. The Land Court altered the marking to the First Division and issued the Case so marked to the parties.

The Case came out in the Single Bills, when counsel for the appellant moved that the Case should be transferred to the Second Division.

Argued for the appellant—The ordinary rule in appeals from the Sheriff Court was that the appellant had the right to mark the appeal to whichever Division he chose. A pursuer in the Outer House had the same right. There was nothing either in the Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49) or in the Rules of the Land Court to show that the ordinary rule was not to apply to a special case. The appellant had marked the Case to the Second Division, to which it should now be transferred. The Act of 1911, section 25 (2), and the Rules of the Scottish Land Court, rule 102, were referred to.

Argued for the respondent—The obligation to state a case upon request by one of the parties was laid upon the Land Court—section 25 (2) of the Act of 1911—but the party's only right as to the preparation of the case was to submit a draft case by the Land Court containing certain particulars which did not include marking to a Division. The right to choose the Division was reserved to the Land Court—Rule 102. [The LORD PRESIDENT referred to Rule 105.]

The Court intimated that they would consult with the Judges of the Second Division.