yet as regards the next heir be no security at all, or very inadequate security. In my view 'proper security' means adequate or sufficient security—security to the heir which is as good as money. In the ordinary case the lands to be disentailed will afford such adequate security, because the expectancy being calculated on the ascertained value of the lands, and being of necessity less than the value of the lands, the lands will afford security for a sum less considerably than they are worth. But it may be otherwise, and accordingly, if the Court is not satisfied with the security of the lands, it may order consignation of the value of the expectancy in bank. The question therefore is, whether the lands now sought to be disentailed afford proper, that is, adequate security for the amount of the heir's expectancy. The curator says they do not, and the reporter to whom the petition was remitted agrees with him. I think they are right. The lands are worth £48,500, but burdened with a first bond for £21,000 they are only worth £27,500 as security to the next heir. Now, no prudent lender will give a loan to the extent of £21,930 (the amount of the heir's expectancy) on a subject worth £27,500, even on a first bond, much less on a postponed security. There are other reasons against the security in respect of the rental, but on this matter I refer to the objections stated by the curator.

"It is right, however, to notice that the £21,000 bond already existing is one which affects not only the lands in question, but also the whole entailed estate, and it is said by the petitioner that if the creditors in that bond were to do diligence upon it and operate payment out of the disentailed lands, the next heir would have his relief against the other lands. I feel the force of this; but it appears to me to be the duty of the Court, imposed upon it by statute, to give the next heir in such a case as this an actual and adequate security, which he can make immediately available, if necessary, for the amount ascertained to be due to him. He is not to be paid, in whole or in part, by a right of relief. Even if such a right of relief were regarded as a security it would not be the security provided by the statute. It would not be a security over the lands disentailed, but over other and different lands.

"I regard the next heir as a creditor, in the amount of his expectancy, who cannot be compelled to take as a security therefor subjects upon which no prudent lender would advance on loan the amount of that expectancy.

"At the discussion before me I suggested that the petitioner should endeavour to satisfy the curator *ad litem* by the offer of some security additional to the lands to be disentailed. Acting upon that suggestion, the petitioner has offered the farther security of the lands of Auchallater. But I agree with the curator that the offer made does not afford any additional security, or at least such as the curator should accept. The lands of Auchallater (as valued in 1884) are said to be worth £32,000. They are already burdened to the extent of £21,700, and are therefore burdened to the full amount (two-thirds of their value) which any prudent lender would advance. Besides, I cannot compel the curator to accept any such additional security if he is unwilling to accept it. By the statute the Court has only two courses open to it—(1) To order consignation in bank of the amount of the expectancy, or (2) to see that expectancy properly secured over the lands to be disentailed. As I think that the lands to be disentailed do not afford 'proper security' for the amount of the heir's expectancy, I have ordered the amount to be paid into bank."

The petitioner reclaimed, and argued—It was admitted that the question was ruled by sec. 13 of 45 and 46 Vict. c. 53, above quoted, and the terms of which were on this point practically the same as those of the Act of 1875. The matter at issue was the adequacy of the security offered by Colonel Farquharson to his son and heir-apparent. 1. It was the best security which the estate to be disentailed would yield, and that was what section 13 allowed. It was true that there was a burden of £21,000, which affected both the lands to be disentailed and the rest of the estate, but this was a burden under which the heir-apparent would have to take the lands in question if they were not disentailed under the present petition. 2. It was in itself a good security that was offered, for as the burden of £21,000 affected the whole estate of Invercauld, which was worth £100,000, the heir-apparent would have a right of relief against the estate.

At advising—

LORD PRESIDENT—I think that the interlocutor of the Lord Ordinary is right. The heir is a creditor, and need not take worse security than any other creditor. And the estate of Auchallater, which is offered to him in additional security, is burdened to the extent of two-thirds of its value, which is all that a prudent lender would advance. The order of the Lord Ordinary that the money must be paid into bank is right.

LORD SHAND—The security is not a "proper security" unless it is good and sufficient security. The Court must see that the security is really good, and if it is not, then the money must be paid into bank. The Court is bound to make this choice in favour of the heir.

LORD ADAM concurred.

LORD MURE was absent.

The Court adhered.

Counsel for Petitioner—Graham Murray—C. N. Johnston. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Curator *ad litem*—Sol.-Gen. Robertson, Q.C.—Blair. Agents — Hunter, Blair, & Cowan, W.S.

Friday, December 17.

FIRST DIVISION.

MACKINTOSH *v.* LORD LOVAT.

Lease—Landlord and Tenant—Removing—Agricultural Holdings Act 1883, *secs* 28, 35, *and* 42.

Held that the Agricultural Holdings Act 1883 did not apply to subjects which consisted of a hotel and offices with a farm of 28 acres adjoining, such subjects not being in the words of section 35 of that Act "wholly agricultural

or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden."

This was a suspension of a decree of removing obtained in the Sheriff Court of Inverness-shire.

The suspender Coll Mackintosh had for a number of years occupied the hotel at Fort Augustus, holding first the old, and afterwards the new hotel there, and also certain ground thereto adjoining. These subjects were the property of the respondent Lord Lovat.

By a written agreement, dated 23d March 1878, Lord Lovat let to the suspender for seven years, from Whitsunday 1878, the hotel and the lands then possessed by him (suspender), and the new hotel which had been built adjoining the old hotel. The lands in connection with the hotel were about 33 acres, four of which were during the lease resumed by Lord Lovat, a deduction from the rent of £2 for each of these acres being allowed. There thus remained the old hotel and the new hotel and 28 acres of ground. The lease expired at Whitsunday 1885, and the suspender continued in occupation by tacit relocation for one year.

The question in this suspension was whether the Agricultural Holdings Act 1883 applied to these subjects. Lord Lovat gave the suspender the notice which would be requisite for a removing from such subjects at common law, but not the notice which would apply if the Agricultural Holdings Act 1883 applied. If that Act applied the suspender would have been entitled to six months' notice of removal.

The Act provides by section 28 — "Notwithstanding the expiration of the stipulated endurance of any lease, the tenancy shall not come to an end unless written notice has been given by either party to the other of his intention to bring the tenancy to an end—(*a*) In the cases of leases for three years and upwards, not less than one year, nor more than two years before the termination of the lease; (*b*) in the case of leases from year to year, or for any other period less than three years, not less than six months before the termination of the lease. Failing such notice by either party, the lease shall be held to be renewed by tacit relocation for another year, and thereafter from year to year." Section 35 provides — "Nothing in this Act shall apply to a holding that is not either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, or to any holding let to the tenant during his continuance in any office, appointment, or employment of the landlord." And section 42 provides that "holding" means "any piece of land held by a tenant."

In December 1885 Lord Lovat presented a petition to the Sheriff of Inverness to have the suspender ordained to remove at Whitsunday 1886.

After certain litigation the decree of removing was obtained, and a charge given thereon. These it was now sought to suspend.

The suspender stated that he was a farmer, and a hotel business was only practically carried on a short time during summer, and that the hotel was a mere adjunct of the farm. He pleaded that being tenant of a holding within the meaning of the Act he was entitled to notice of removal in terms of it.

The respondent maintained that he was not such a tenant and had been duly warned to remove.

The Lord Ordinary (M'Laren) found the charge to remove, which had been given on the Sheriff's decree, orderly proceeded.

"*Opinion.*—This is a note of suspension at the instance of a tenant praying for the suspension of a decree of removing obtained by the respondent Lord Lovat before the Sheriff Court of Inverness-shire at Inverness.

"In the Sheriff Court the action of removing was defended on various grounds which are set forth in the note of suspension. But in the argument before me only one question was raised, namely, whether the suspender's lease gives him the benefit of the Agricultural Holdings (Scotland) Act 1883, so that notice of removal has to be given not less than one year 'before the termination of the lease.' If the statute applies, it is not disputed that the decree must be suspended, because it is a condition of the argument that the suspender did not receive the prescribed notice of removal, but only such notice as is sufficient at common law.

"The subject of the lease is described as the hotel at Fort-Augustus, and lands then possessed by the suspender, and also the new hotel built adjoining to the old hotel. The rent is £160 per annum, which, however, has been reduced in consequence of land being resumed by the proprietor, or made over by arrangement to other parties. The extent of the holding is stated by the suspender to be 33 acres.

"The question is, as I have said, whether the suspender's holding is a holding entitling him to the benefit of the Act of 1883.

"By section 35 of that Act it is provided—'Nothing in this Act shall apply to a holding that is not either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, or to any holding let to the tenant during his continuance in any office, appointment, or employment of the landlord.' Further, by section 42 of the said Act it is provided that 'holding' means 'any piece of land held by a tenant.'

"Now, the subject let to the suspender is a hotel and land, and the subject cannot be described as being either 'wholly agricultural,' 'wholly pastoral,' or 'in part agricultural, and as to the residue pastoral.' Nor is it a market garden. The subject is therefore not a holding falling under any of the descriptions contemplated by the Act. I understand that the suspender relies entirely upon the words of section 42. But it is clear (so far as any enactment can be clear) that the more comprehensive definition of a holding contained in section 42 is controlled by the words of exclusion contained in section 35. The form of the proposition in section 35 is that of a universal negative, subject to certain exceptions. The suspender must be able to place his holding under one of the excepted categories, otherwise he takes no benefit from the statute.

"No other reason of suspension having been maintained at the bar, I shall recal the sist already granted and refuse the prayer of the note, with expenses."

Argued for the reclaimer—He was entitled to six months' notice of removal under sec-

tion 35 of the Agricultural Holdings Act 1883. Was he to be deprived of the benefit of the Act because with his farm of 33 acres he held another and separate subject, namely, the hotel? Neither farm nor hotel was an adjunct to the other. They were each independent and separate subjects, though held under one agreement.

At advising—

LORD PRESIDENT—The subject let is the hotel at Fort-Augustus, with the new hotel adjoining it, and certain lands. The question is, does the 35th section of the Agricultural Holdings Act 1883 apply? By that section it is provided that in certain cases six months' notice of removal must be given. The 35th section makes it clear to what the Act is to apply and to what it is not to apply. It is not to apply to urban property. This is an hotel and some fields, originally of 33 acres, now extending only to 28 acres. I do not think it is possible to say that this case falls under the terms of section 35? Nor do I think that the 42d section gives any aid to the argument of the reclaimer. It requires explanation itself though an explanatory section. There is nothing contradictory between sections 42 and 35 when read together.

LORD MURE and LORD ADAM concurred.

LORD SHAND was absent.

The Court refused the reclaiming-note.

Counsel for Suspender — Asher — Strachan. Agent—W. Officer, S.S.C.

Counsel for Lord Lovat—Guthrie. Agents—J. C. Brodie & Sons, W.S.

Friday, December 17.

FIRST DIVISION.

[Sheriff of Dumfries.

KERR (HALLIDAY'S EXECUTOR) *v.* HALLIDAY'S EXECUTORS.

Sheriff—Jurisdiction—Executor—Whether fact of Confirmation confers Jurisdiction?

The executors of a deceased person took out confirmation in the Sheriffdom of his domicile, Dumfries. Neither of them lived in that Sheriffdom, one of them being resident in Ayrshire and the other in Glasgow, to which latter place the executry funds were removed. *Held* that they were not subject as executors, by reason of the confirmation, to the jurisdiction of the Sheriff of Dumfries.

William Halliday and his sister Mary Halliday died domiciled in the county of Dumfries. Mary Halliday's executor raised an action in the Sheriff Court of Dumfries for the sum of £200 against the executors of William Halliday. The pursuer averred that for a number of years previous "to his death the said William Halliday had been accustomed at his sister's request to uplift periodically the interest upon a deposit-receipt in name of the deceased Mary Halliday for £200 sterling at the British Linen Company Bank, Sanquhar, and he paid the interest to her for her own behoof. On 8th January 1885 the said William Halliday uplifted the interest on said deposit and re-deposited the principal sum of £200 in his own name, along with a sum of £586 which had been previously in deposit in his own name." It was to recover this sum of £200, with interest from 8th January 1885, that this action was raised. The defenders, the two executors-dative *qua* next-of-kin of William Halliday, had taken out confirmation in the Sheriff Court of Dumfries. One of them lived in Ayrshire and the other in Glasgow, and they had transferred to the British Linen Company Bank in Glasgow all the funds which stood at the late William Halliday's credit in the branch of that bank in Sanquhar, and which formed the bulk of the executry estate.

The defenders denied the pursuer's averments, and pleaded, *inter alia*—"(1) The defenders not being subject to or under the jurisdiction of this Sheriff Court, the action falls to be dismissed with costs."

The Sheriff-Substitute (HOPE) repelled these pleas and allowed a proof.

"*Note.*—. . . The executors have, I consider, subjected themselves to the jurisdiction of this Court in matters pertaining to the executry estate. They have applied for and received from this Court the office they hold, and they have obtained confirmation, and have recorded in the books of the Sheriffdom an inventory of the estate. I do not see to what tribunal they are more made amenable.

"Mr [Dove] Wilson, after noticing the case of *Black* v. *Duncan* [December 18, 1827, 6 S. 261], remarks—'In the same way it is thought that executors would be liable to the jurisdiction of Sheriffdom where the deceased lived, where the executors were confirmed, and where the estate was being wound up, though the majority of them should be actually resident without the Sheriffdom.'

"I go further than this, and would say, 'though they be all resident without the Sheriffdom.'

"I think that support for this view can be obtained by a consideration of the terms of the bond of caution which cautioners for executors have to sign, and which must have been signed by the cautioners for the defenders. The form, after stating that the cautioner binds and obliges himself that the sum contained in the testament 'shall be made free and furthcoming to all parties having interest therein as law will,' contains the following clause—'and I subject myself, my heirs and successors, to the jurisdiction of the Sheriff of Dumfries and Galloway in this particular.'

"I never heard of a cautioner being subjected to greater liability than the principal, and if an executor is not subject to the jurisdiction of the Court which appointed him, I cannot see why his cautioner should be required to subject himself to it."

On 21st October 1886 the Sheriff (MACPHERSON), on appeal, adhered.

"*Note.*—The defenders live in different counties, neither of them in Dumfriesshire. The jurisdiction of this Sheriffdom is that to which the late William Halliday was subject when he died—he was domiciled and he left his property