stand are, in my opinion, enough to bring the case especially within what was decided in *Suzor* v. *M'Lachlan*, 1914 S.C. 306, 51 S.L.R. 313. Therefore I think we should recal the Lord Ordinary's interlocutor and approve of the issue.

LORD HUNTER—Looking to the averments made by the pursuer in this case, I do not think it is possible to say whether or not a slander was uttered by the defenders against him. That could be decided only after proof, and it is for the jury to say when the whole facts are before them whether or not the pursuer was slandered. One of the two occasions on which the alleged slander was uttered was a privileged occasion, and the question is whether there is sufficient averment of malice. In my opinion there is. A question is raised between the pursuer and the defenders with reference to whether the pursuer made any statement at all. One of the defenders states that the information on which he proceeded came from the pursuer himself. There is thus a sharp controversy, and it is for the jury to say which of the two parties is telling the truth. I cannot imagine any better case of malice than if a defender makes a slanderous statement of a pursuer and then says, "I made it because the pursuer told me that it was in accordance with fact." If it turns out that that was a mere invention, then it appears to me it must be inferred against the defender that he was acting maliciously; but that is a matter on which the jury can judge. If the jury were to come to be of opinion that something was said by the pursuer that warranted the inference, that would be a different question. But that cannot be decided until the proof is concluded.

LORD ORMIDALE—I concur.

The Court pronounced this interlocutor—

"Recal the said interlocutor: Approve of the issues proposed by the pursuer as now altered and adjusted; appoint the same as now authenticated to be the issues for the trial of the cause; and remit the cause to Lord Ashmore, Ordinary, to proceed therein as accords."

Counsel for the Reclaimer (Pursuer)—D. P. Fleming, K.C.—Thom. Agents—Pairman, Miller, & Murray, S.S.C.

Counsel for the Respondents (Defenders)—Solicitor-General (Constable, K.C.)—Graham Robertson. Agents—J. Douglas Gardiner & Mill, S.S.C.

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*Saturday, June 24.*

## FIRST DIVISION.

[Sheriff Court at Dumbarton.

## KERR *v.* BRYDE.

*Landlord and Tenant — Increase of Rent and Mortgage Interest (Restrictions) Act* 1920 (10 *and* 11 *Geo. V, cap.* 17), *sec.* 3 (1)—*Notice of Intention to Increase Rent — Failure to Give Notice of Removal — "Period during which but for this Act the Landlord would be Entitled to Obtain Possession"—Tacit Relocation.*

The Increase of Rent and Mortgage Interest (Restrictions) Act 1920 enacts—Section 3 (1)—"Nothing in this Act shall be taken to authorise any increase of rent except in respect of a period during which but for this Act the landlord would be entitled to obtain possession. . . ."

A house was let on 28th August 1916 for a period of one month at the standard rent, and thereafter the tenancy was renewed from time to time by tacit relocation. On 27th July 1920 and subsequent dates the landlord served on the tenant the statutory notice of his intention to increase the rent but did not serve a notice of removal. The tenant paid the increased rent for a time and then got into arrears. In an action by the landlord for recovery of the arrears, *held* that in the absence of notice terminating the tenancy the periods in respect of which increases of rent were asked were not "periods during which but for the Act" pursuer "would be entitled to obtain possession"; that accordingly the increase of rent had not been authorised by the Act, and action *dismissed.*

Richard Kerr, proprietor of a tenement of dwelling-houses at Clydebank, and James Stewart & Sons, his factors, brought an action in the Small-Debt Court at Dumbarton against Dougald Bryde, tenant of one of the houses, for payment of £4, 11s. 9d. arrears of rent.

The parties averred, *inter alia*—"(Cond. 2) The house was let to defender on 28th August 1916 at a rent of £1, 2s. 6d. for a period of one month, including occupier's rates, the rent being 18s. 3d. and the occupier's rates 4s. 3d. per month. At the time when the let was entered upon, the said house was a house to which the Increase of Rent and Mortgage Interest War Restriction Act 1915 applied, and the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 now applies. The standard rent within the meaning of said Increase of Rent and Mortgage Interest (Restrictions) Act 1920 of said house is £1, 2s. 6d. per month, and the net rent 18s. 3d. per month. (*Ans.* 2) Admitted. (Cond. 3) The defender entered into occupation and is still in occupation of said house. (*Ans.* 3) Admitted. (Cond. 4) On 27th July 1920 the pursuers James Stewart & Sons, Clydebank, as factors foresaid, under said Increase of Rent and Mortgage Interest (Restrictions) Act 1920 gave

notice in writing in the form prescribed by the First Schedule of said Act to the defender of their intention to increase the rent payable by him by 7s. 7d. per month, and that the increase would be payable from and after 28th August 1920. (*Ans.* 4) Admitted that on 27th July 1920 the pursuers gave notice in writing in the form of the First Schedule of said Act intimating an intention to increase the rent as stated. (Cond. 5) On 26th April 1921 the pursuers James Stewart & Sons, as factors foresaid, under the same Act gave further notice in writing in the form prescribed by the First Schedule of said Act to the defender of their intention to increase the rent payable by the defender by an additional 10 per cent. of the net rent from and after 14th July 1921, raising the rent to the sum of £2, 0s. 1d. per month. (*Ans.* 5) Admitted that on 26th April 1921 the pursuers gave notice in the form of the First Schedule of said Act of the intention to increase the rent as stated. (Cond. 6) The rent payable by the defender per month in consequence of the above statutory increase is now £2, 0s. 1d., of which £1, 9s. 10d. represents rent and 10s. 3d. occupier's rates. The defender's averments in answer are denied. Explained that the increases made over the standard rent were such as are allowed by the said Act and were made in the manner therein provided, and that defender acquiesced therein, and that no notice to quit or remove was given or was necessary. . . . (*Ans.* 6) Denied. Averred that the rent payable per month during the year to May 1921 was £1, 6s. 8d. per month, the standard rent of £1, 2s. 6d. having been increased to that amount in respect of increased rates payable by pursuers. Also averred that the rent payable per month for the year to May 1922 was and is £1, 9s. 9d. per month, the standard rent of £1, 2s. 6d. having been increased to that amount in respect of rates payable by the landlord. Averred that the monthly periods from July 1920 to October 1921 inclusive were not periods during which but for said Act pursuers were entitled to possession. Averred that pursuers have not by notice to remove or otherwise terminated the contract made in July 1920, which contract has been continued to date by tacit relocation, except that the rent has been increased by the amount of rates payable by the landlord."

The pursuers pleaded, *inter alia* — "1. The defences being irrelevant should be repelled and decree granted as craved. 3. The increases over the standard rent sued for being amounts not exceeding the amounts and for the periods permitted by the said Act of 1920, and notices of said increases having been given in the manner therein provided, decree should be granted as craved."

The defender pleaded, *inter alia*—"1. The action is irrelevant and the defender should be assoilzied with expenses. 2. The periods in respect of which increases under said Act of 1920 are asked by pursuers, not being periods during which but for said Act pursuers were entitled to obtain possession, the said increases are not due by the defender."

The Sheriff-Substitute (MENZIES) having transferred the case to his ordinary roll, sustained the defender's first and second pleas-in-law and dismissed the action.

The following passages are taken from his *note:*—"The question arises upon the interpretation of the words 'Nothing in this Act shall be taken to authorise any increase of rent except in respect of a period during which but for this Act the landlord would be entitled to obtain possession,' occurring in section 3, sub-section 1, of the Act. As the pursuer reads this clause the period opens at latest in all cases to which the Act applies upon the expiry of the expressed term of let current at the date when the Act came into operation. The defender contends that the period opens only at the date when the landlord is entitled 'but for this Act' to claim from the Court *ex debito justitiæ* an order for the recovery of the possession, which in this case would be the date at which his tenancy was legally determined by the service upon him of a valid notice to that effect by the landlord. . . .

"I am unable to give any value to the words 'but for this Act' if the period in question is taken as opening at the date contended for by the pursuers, viz., the expiry of the express term of let current at the date when the Act came into operation. In the present case the landlord can only be entitled to obtain possession at that date by an appeal to the effect of the Act of 1920, as altering the law obtaining before that Act as to the landlord's right to possession, and that in favour of the pursuer. But any appeal to the Act for the purpose of fixing the opening date of the period in question is expressly excluded by the Act itself. You must find the date as if the Act had never been passed. If that is so it is not doubtful that the date in question is the date contended for by the defender. That date has not yet arrived as no valid notice determining the tenancy has yet been given. The only notice given is that under the Act 1920 increasing the rent, but as that is under that Act it cannot affect the opening date of the period which has to be determined altogether apart from that Act. The introduction into the clause to be interpreted of the words 'but for this Act' seems to me conclusive of the question and that in favour of the contention of the defender. . . .

"In debate the pursuer raised the point that the defender had 'acquiesced' in the notice given in terms of the Act of 1920 that the rent was to be increased and had thus brought himself into the position of being a statutory tenant under that Act and subject to its provisions as to increase of rent.

"The attempt to raise this question is a violent breach of the understanding between parties upon which alone the case was transferred by me to the ordinary roll, and I should upon that ground alone have declined to treat the point as properly before me for decision upon its merits. But it is unnecessary to pursue this aspect of the debate. Upon record in condescendence 6 there is to be found the only basis of averment for

this argument. The averment is—'The increases made over the standard rent were such as are allowed by the said Act and were made in the manner therein provided, and defender acquiesced therein.' I am not sure that I understand what 'therein' refers to. In any case it is an irrelevant averment of such acquiescence on the part of the defender as would bar him from pleading in these proceedings that the pursuer notified the increases in question during a period when he was not authorised by the Act to make such increases. . . .

"I desire to make it clear that I am deciding nothing further here than that a valid notice determining the tenancy is in this case a condition-precedent to the opening of the period during which a statutory increase of rent can be legally made, and that condition-precedent not being fulfilled the increase made is not a valid increase under the Act. . . ."

The pursuer appealed to the Sheriff (MACPHAIL) who on 25th April 1922 adhered to the judgment of the Sheriff-Substitute.

The Sheriff's *note* was as follows:—"The question for decision is whether but for the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 the pursuer was entitled to obtain possession of the house occupied by the defender at No. 6 Union Street, Clydebank, for the period from 28th August 1920 onwards.

"The case was so fully and carefully argued that instead of merely saying that I agree with the result at which the Sheriff-Substitute has arrived it is right that I should state the grounds on which I have come to the same conclusion.

"The proprietor of a heritable subject is always entitled to possession thereof unless (1) he is debarred therefrom by statute, or (2) the possession has by himself or his author been validly ceded to some other person whose right still exists. In the present case the only statutory obstacle is that created by the Act of 1920, and it therefore remains to consider whether since 28th August 1920 the defender had a right flowing from the pursuer or his author.

"The house was let to the defender by the pursuer on 28th August 1916 for a period of one month, and at the expiry of that month the tenancy was from time to time renewed by tacit relocation until at all events 28th August 1920. On 27th July 1920 the pursuer served on the defender a notice [of increase of rent], and this was followed later by several other notices. This notice was plainly not a notice of removal under section 38 and rule 113 of the Sheriff Court Act of 1907, and it could not have been made the foundation of an action of summary removing. But that is not decisive of the question whether it had the effect of preventing tacit relocation. A number of English cases were cited, and though these are not binding authorities the views of the learned Judges by whom they were decided are entitled to the greatest weight. It was argued that these cases decided that before a landlord can obtain possession he must have served a notice to quit, and that a notice to quit was the English equivalent of our notice of removal. It appears, however, that a notice to quit, which appears elsewhere in this statute, is a term of English law, and it is thus defined in Stroud's Judicial Dictionary—'A "notice to quit" is a notice (which, generally speaking, may be written or verbal) which on its expiry does of itself and in accordance with the subsisting contract put an end to the relationship of landlord and tenant.'

"From this definition it is obvious that though every Scots notice of removal includes or implies a notice to quit, there may be other notices to quit which while terminating the contract yet do not warrant proceedings for removal. It therefore does not appear that even if the English cases were to be regarded as binding they decide anything more than that where there is tacit relocation the landlord cannot obtain possession till the end of the period for which the tenancy endures, and that therefore an increase of rent in respect of such period is illegal.

"In the latest and most authoritative of these cases—*Newell* v. *Cranford Cottage Society, Limited.* decided by the Court of Appeal on 13th February 1922 (38 T.L.R. 355)—the rubric is as follows—'Where a tenancy does not expire till a notice to quit has been given, the effect of section 3 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 is that a notice to quit is necessary before a landlord can enforce a claim to the increase of rent permitted by the Act.' Different views seem to have been entertained by the eminent Judges who composed the Court as to whether it was sufficient for the landlord to have the legal right to possession or whether he must actually have taken proper steps to obtain possession—which in Scotland would appear to mean not merely the service of a notice of removal, but also a decree of the Court following thereon. But the decision itself is as I have stated.

"The pursuer maintained that the service of the notice [of increase] had the effect of terminating the tenancy at twelve noon on 28th August 1920, and that this being so he was but for the Act of 1920 entitled to obtain possession whether he saw fit to take the further necessary legal steps or not. With the second part of this argument I am disposed to agree, especially in view of a decision on the effect of the second part of section 1 (3) by the Sheriff of Lanarkshire in the case of *Dewar* v. *Stewart*, 1921, 37 S. L. Review, p. 201. But it becomes of importance only if the first part is accepted.

"What then was this notice? The increase of rent is sanctioned by section 2 of the Act, and section 3 (2) provides that no such increase shall be lawful unless, *inter alia*, the landlord has served a notice in writing of his intention to increase the rent in or substantially in the form contained in the First Schedule to the Act. It is therefore a notice of a special kind, introduced for a special purpose, and must be in a special form. *Prima facie* it is not a notice terminating the tenancy. No doubt the rent is one of the essentials of the contract, and apart from this Act a notice by either

party that the rent was to be altered might prevent tacit relocation at the termination of the existing contract—see *Macfarlane* v. *Mitchell*, 2 F. 901. But I am not prepared to hold that this statutory notice was intended to have or had that effect in the present case, especially in view of the light thrown on its character and effect by the last sentence of section 3 (2) and (3).

"I express no opinion as to what might have been the rights of parties if the notice had contained such a sentence as that appearing in the notice of 23rd October 1920 [and repeated in the notice of 24th October 1921], viz., 'The arrangement made between us by missive or otherwise for let of your tenancy continues on the basis thereof, except as hereby altered.'"

The pursuers appealed, and argued—The increases of rent were such as were authorised by the Act. The defender's case depended on tacit relocation; but the effect of the Increase of Rent Acts was from the first to exclude the conditions under which alone tacit relocation could operate. Accordingly on 28th September 1916 when the period of original consensual tenancy expired, the defender automatically became a statutory tenant. If statutory provisions so curtailed the landlord's liberty of action that he was free neither to select his tenant nor to fix the rent, and if the tenant was aware of this, it was impossible to suggest that the landlord, who was no longer a free agent and who had no alternative but to acquiesce in the curtailment of his right, must be presumed merely by reason of such acquiescence to have agreed to a renewal of the consensual contract. Section 3 (2) made detailed provision with regard to the formalities to be observed in connection with the increase of rent, and if it had been intended to prescribe further formalities, and in particular to require that notices of increase of rent should be preceded or accompanied by formal notices of removal, it was to be presumed that this matter would have been dealt with specifically. Tacit relocation was not excluded only by notice of removal. It could be competently excluded by evidence of contrary intention. Here the admitted facts afforded ample evidence of such contrary intention. Admittedly recent English decisions were unfavourable to pursuer's contention—*Peizer* v. *Federman*, [1921] W.N. 320, 38 T.L.R. 54; *Hill* v. *Hasler*, [1921] 3 K.B. 643; *Shuter* v. *Hersh*, [1922] 1 K.B. 438; *Newell* v. *Crayford Cottage Society*, [1922] 1 K.B. 656 (Younger, L.J., reluctantly assenting to the judgment). But the principles of English real property law and the law of Scottish heritable rights were fundamentally different, and this difference was specially marked in relation to the position at the expiry of a term of a lease. In England the original contract persisted until the landlord (or the tenant) by a positive act took advantage of the right to terminate the tenancy. Not so in Scotland. Applying defender's construction to the second part of the sub-section it would follow that a bond must be called up before the rate of interest could be raised—*Dewar* v. *Stewart*, 1921, 37 S. L. Review, 201. The defender had by payments made acquiesced in the increased rent—*M'Farlane* v. *Mitchell*, 2 F. 901; *Morrison* v. *Campbell*, 1842, 4 D. 1426. Counsel also referred to sections 15 (1) and 18 (1) (*d*) of the Act, and the House Letting and Rating (Scotland) Act 1911 (1 and 2 Geo. V, cap. 53), sec. 4.

Argued for the defender—There had been no "period during which but for this Act the landlord would be entitled to obtain possession." Tacit relocation always applied unless there was either a warning to remove by the landlord or a renunciation by the tenant at the appropriate time. The notice of removal was not futile; it had this vital effect that it turned the tenant who refused to go and pled the Act into a statutory tenant upon whom alone increases of rent could be legally imposed. Here no such notice was given, and accordingly the defender's occupation was attributable to a renewal of the original contract by tacit relocation. The case of *M'Farlane* v. *Mitchell* (*cit.*) was special and had no application to the facts of the case. Counsel founded on the English cases referred to by the pursuer, and also cited the following authorities:—*Glossop* v. *Ashley*, [1921] 2 K.B. 451, *per* M'Cardie, J., at p. 455; *Connolly* v. *Whelan*, (1919) 54 Ir. L.T. 18, *per* Samuels, J., at p. 20; *Cork Improved Dwellings* v. *Barry*, [1919] 2 I.R. 244; *Crook* v. *Whitbread*, (1919) 35 T.L.R. 522; *Vernon Investment Association* v. *Welch*, (1919) 35 T.L.R. 511; *Remon* v. *City of London Real Property Company*, [1921] 1 K.B. 49; Wilkinson's Guide to the Increase of Rent and Mortgage Interest (Restrictions) Act, p. 35.

At advising—

LORD PRESIDENT—The defender's occupation of the dwelling-house at 6 Union Street, Clydebank, began on 28th August 1916 under a contract of let for one month. The defender still continues to occupy it.

The dwelling-house was one to which at the date of the let the Increase of Rent (War Restrictious) Act 1915 applied. Accordingly (1) although the let was contractually for a month only, the defender's right of occupation was from the first capable of indefinite extension at the tenant's option so long as he paid the stipulated rent as modified by the War Restrictions Acts—that is to say, subject to any increase made in accordance with the terms of those Acts; (2) the rent fixed by the contract was from the first the standard rent of the dwelling-house, and could not at any time in future be increased (except as to permitted increases) while the Acts continue in force, either as against the defender or as against any subsequent tenant who might take the dwelling-house in the event of the defender choosing to leave it; and further, (3) the conditions of let became for all practical purposes stereotyped until the Acts referred to are repealed or expire (1915 Act, sec. 1 (i) (iii), and 1920 Act, sec. 2 (3).

Nevertheless the defender's occupation was at the commencement truly and wholly attributable to contract with the owner of the dwelling-house and not to statute, how-

ever serious the statutory consequences which flowed from the making of the contract might prove to the owner. In fact the defender's right of occupation for the first month was that of a tenant in possession supported entirely by the contract of let, and the defender during that month was really nothing but a contractual tenant. Then how did matters stand in the next and in succeeding months? In answering this question it is crucial to observe that the Acts contained, and contain, nothing to prevent the landlord and the tenant from making a consensual renewal of the monthly tenancy for another month by tacit relocation, for such is not the consequence of creating a statutory right in the tenant to continue in occupation on failure of a consensual renewal. The point may be illustrated by the reflection that the parties were perfectly free so far as the statutes went not to renew the original contract for one month but to make another for a week or a year, provided the terms as to rent, liability for burdens, and so on were not altered. If they did so—or (which amounts for the purposes of the argument to the same thing) if they consensually renewed the monthly tenancy for another month by tacit relocation — the tenant's occupation would continue to be attributable to and to be supported by contract and not to or by anything in the statutes. There is nothing in the case to show that the monthly let to the defender was not continued by tacit relocation.

It is, I am afraid, true that the owner of the defender's dwelling-house was, in view of the defender's statutory privilege to continue in occupation notwithstanding the expiry of the original let and against the owner's wishes and interest, easily lulled into indifference as to the true legal source of the defender's right to such continued occupation, and it is easy to understand how he might come to regard the service on his part of a notice to terminate the tenancy as having been reduced to an empty and futile formality. For he could not have got rid of the defender however much he wished to, and however good the reasons he might have for doing so, unless they happened to be statutory grounds for appealing under the Act to the Sheriff for ejectment. But the fact remains that the defender's occupation did not rest on the statutory privileges conferred on the tenant of a dwelling-house to which the Acts applied, so long as it remained attributable to the consensual renewal by tacit relocation of the original contract of let.

The result is that a tenant cannot be said to retain possession of a dwelling-house "by virtue of the provisions of this Act"— within the meaning of section 15 (1) of the Act of 1920—until the tenant's contractual right to possession under the original let, and under the consensual renewals (if any) of that let by tacit relocation, has been brought to an end by notice of termination of the tenancy on the part of either landlord or tenant. But once the landlord has by service of a notice to terminate the tenancy put himself in a position to make a new let on fresh terms, he may do so (in accordance with the provisions of section 3 (1) of the 1920 Act) to the extent permitted by the War Restrictions Acts — in other words, he may make permitted increases of the rent. The reason is that "*but for the Act*" he could after the expiry of his notice have made an entirely fresh let on any terms he could find a tenant willing to accept, and *under the Act* his powers in this respect (though rigidly restricted otherwise) are preserved to him so far as permitted increases of rent are concerned, provided he gives four weeks' notice to the occupier. The conclusion is that until expiry of a notice by the landlord to terminate the contractual tenancy (whether original or renewed by tacit relocation) the landlord is not in a position to raise the rent.

Although the conditions of the argument are not quite the same as those presented by the law of England, the provisions of section 3 (1) compel me to a result similar to that which has already been reached by the Courts in England. I confess to have struggled, as Younger, L.J., says in *Newell* v. *Crayford Cottage Society* ([1922] 1 K.B. 656) he would himself have done — apart from English authority binding upon him — to avoid a result so technical and so liable to misunderstanding. But both the words and the general plan of the statute seem to me to leave no alternative open. I think therefore the Sheriffs were right, and that the appeal must be refused.

LORD MACKENZIE—If it had been the case that but for this Act the mere effluxion of time would have put the landlord into the position of being entitled to obtain possession I should have been of opinion that the pursuers' contention was correct. But that is not so. If due notice to terminate is not given, then according to the law of Scotland landlord and tenant are locked together for a fresh term by virtue of tacit relocation. Take the case of a yearly let which falls within the Act of 1920 with a Whitsunday ish. According to the argument for the landlord he could by giving twenty-eight days' notice raise the rent. But *ex hypothesi* the effect of his failure to give forty days' notice is that the tenant had a vested right to remain on for another year. At what rent? The only answer possible is to say at the old rent. This shows the construction which should be put upon section 3 (1) in Scotland. The landlord must take the preliminary step necessary to work out the dissolution of the contract of lease at its natural termination. This is by notice of removal. After, but not before this has been done, the landlord is entitled *ex debito justitiæ* to an order from the Court for the recovery of possession. Then comes in section 3 (1)—"But for this Act" the landlord would get the order. Having determined the contract it is within the right of the landlord *currente termino* to raise the rent after giving twenty-eight days' notice. He has established his right "in respect of a period," and that period commences from the date of ish. The provisions of section 18 (1) (*d*) which were introduced apparently

because of the date of the Act, 2nd July 1920, do not prevent this construction being put upon section 3 (1). It is evident from what the Sheriff-Substitute says that no question can be raised in this case such as was decided in *Macfarlane* v. *Mitchell*, 2 F. 901. There may be a case in which the circumstances show that if the tenant was not willing to agree to the conditions in the statutory notice, then he had notice to quit. This must depend on the facts of the case. It follows from what has been said that the present ought not to be regarded as one in which the tenant is occupying in virtue of section 15 (1) of the statute. He is occupying—this is the unchallenged assumption of fact in the case—under a contract extended by tacit relocation not yet determined. Until the landlord gives notice to determine the contract the period during which he is entitled to raise the rent has not commenced for he is not entitled to obtain possession. I am therefore of opinion that the judgment of the Sheriff should be affirmed.

LORD SKERRINGTON—The success of this action for rent depends upon the validity of the theory that an Act of Parliament, primarily intended to protect the tenants of a certain class of dwelling-houses from having their rents increased beyond what was permitted by the statute, ought to be construed as impliedly conferring upon the landlords of such houses a power of an unprecedented and anomalous description, the existence of which would deprive their tenants of a fundamental and valuable right which had previously been enjoyed by every tenant, viz., the right to remain in possession on payment of the agreed-on rent and no other or higher rent until such time as the lease and the tenant's right under it had been brought to an end by the giving of a notice of removal in the form required by law. It was admitted in the present case that the landlord gave no such notice to his tenant, and that the statutory notice which he did give to the tenant of his intention to increase the rent could not be construed as a notice of removal. It follows that during the period in respect of which the landlord attempts in this action to exact an increased rent from his tenant the latter had a contractual right to be in possession of his house on payment of the rent as fixed by agreement between him and his landlord. I can find nothing in the language of section 3 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920, or in the other sections, or in the policy, of that Act which gives any support to such a claim by a landlord. It does not in any way assist the pursuers' contention to point out that in one exceptional case, viz., that of a yearly tenancy ending at Whitsunday 1921, landlords in Scotland are expressly authorised by the statute to increase the rent during the currency of the yearly tenancy (section 18 (1) (*d*)). I am of opinion that the interlocutors of the Sheriffs should be affirmed.

LORD CULLEN—I am of the same opinion. The tenancy began as one under a contract of lease. A notice of removal was required to prevent the contract running on by tacit relocation. No such notice was given. It follows that when the landlord gave his notice to increase the rent the tenant was continuing to possess under a renewal by tacit relocation of the original contract of lease. Not having received any notice of removal he had no occasion to appeal to the statute so as to fix himself with the character of a tenant or occupier possessing *vi statuti*.

Section 3, sub-section (1), of the Act of 1920 disables a landlord from increasing the rent "except in respect of a period during which but for this Act the landlord would be entitled to obtain possession." Now apart from the Act the position of the tenancy would under the general law have stood as above indicated. And so standing the tenancy I am unable to see how it can be predicated that during the period to which the proposed increase of rent applied the landlord was under the general law in the position of being "entitled to obtain possession." A claim to possession by him was excluded by the current lease. It seems beside the point to say that he had it in his power to prevent tacit relocation by giving a notice of removal if he had chosen to do so. No doubt he did have this power, but he never exercised it, with the result that during the period to which the proposed increase of rent applied possession had been validly ceded by him to the tenant and could not, therefore, legally be claimed by him.

The view was much pressed in argument that as a notice of removal by the landlord in such a case is ineffectual to procure removal it is a useless ceremony. This seems to me to be rather begging the question. It is true that if a tenant in response to such a notice founds on the Act and refuses to go the landlord cannot force his removal, but if I am right in what I have already said the giving of the notice of removal has the important effect, when not acceded to, of fixing on the tenant the character of a statutory tenant possessing solely by virtue of and under the conditions of the statute and, *inter alia*, under condition of liability to have his rent increased to the permitted amount without his consent after the expiry of the twenty-eight days' period of notice.

The Court affirmed the interlocutors of the Sheriff and the Sheriff-Substitute appealed against, dismissed the appeal, and remitted the cause to the Sheriff-Substitute to proceed.

Counsel for Pursuers and Appellants—Brown, K.C.—Cooper. Agents—Mackenzie & Fortune, S.S.C.

Counsel for Defender and Respondent—Mackay, K.C.—Aitchison. Agents—Dove, Lockhart & Smart, S.S.C.