

fact that the burn is a stream in which the defenders have a right and interest. If the sewage in it should at any time become a nuisance to the burgh the Commissioners have their remedy and can put a stop to it.

I therefore think that the interlocutor of the Lord Ordinary is right, and should be affirmed.

I observe, however, that he is of opinion that this stream or water-course does not fall within the 215th section of the Act, because it is not an *opus manufactum*.

I think that the grounds which I have indicated above are sufficient for the judgment in this case, and I have not found it necessary to form an opinion as to whether his Lordship's views in this respect are sound or not.

LORD M'LAREN—I consider that this is a case of the construction of an Act of Parliament expressed in ordinary language. There is no need of any interpretation clause, because Parliament has considered that the courts of law are quite capable of distinguishing between a sewer and a running stream. Casuists may suggest that there is some resemblance between the two when a stream becomes polluted, but they are essentially distinct, and I agree with your Lordship that a sewer must be a thing either constructed for the purpose of removing waste matter, or appropriated to that purpose in some way. It is not at all likely that there should be found existing a natural channel in all respects suitable for the purpose of a sewer. When one comes to consider too curiously the effect of pollution, there is hardly anything in nature not more or less polluted; but the mere fact that a stream is polluted will never entitle it to be treated in a question of property or administration as in any way identical with a sewer.

LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers—Dundas—Grierson. Agents—W. & J. Burness, W.S.

Counsel for the Defenders Macindoe and Others—Jameson—Guthrie. Agents—Maconochie & Hare, W.S.

Tuesday, November 10.

SECOND DIVISION.

[Lord Pearson, Ordinary.]

THE MIDDLE WARD OF LANARK DISTRICT COMMITTEE v. MARSHALL.

Lands Clauses Acts—Acquisition of Land by County Council—Public Health (Scotland) Act 1867 (30 and 31 Vict. cap. 101), secs. 39 and 116.

A County Council, by private agreement with the proprietor, feued five and a-half acres of land in order that the District Committee might, as authorised

by the Public Health (Scotland) Act 1867, section 39, erect a hospital upon it. The land feued formed part of a farm held by a tenant on lease for nineteen years, subject to a right in the landlord to resume for feuing, it being provided that the annual value of any ground thereby taken should be paid to the tenants at the rate of £4 per acre. The landlord had resumed the five and a-half acres under this power, and had feued it to the County Council, the tenant receiving an abatement of rent equivalent to £4 per acre. The tenant served upon the District Committee a claim of damages for unexhausted manure, improvements, &c., founding on the Public Health Act 1867, section 116.

Held that the claim was invalid, the tenant's right to compensation, if any, being against his landlord and not against the County Council.

Opinions (per the Lord Justice-Clerk, Lord Young, and Lord Moncreiff) that the Public Health (Scotland) Act 1867, section 116, only applies where there is a statutory power of acquiring land compulsorily.

Question whether the County Council or the District Committee was the proper party to be served with a claim for damages caused by the exercise of the powers of the Public Health Act 1867.

Title to Sue—Assignment pendente processu.

One of two joint-tenants under a lease, who has the real interest therein, is entitled to found on an assignation by the other, granted *pendente processu*, to complete his formal title to sue.

By lease dated 5th July and 26th August 1886, entered into between Mr J. G. Carter Hamilton of Dalzell on the one part, and James Marshall and David Marshall, both farmers at Airbles, on the other part, Mr Hamilton let to Messrs James and David Marshall the farm of Airbles for a period of nineteen years, from Martinmas 1881 as to the arable land, and from Whitsunday 1882 as to the houses and grass, at the rent of £246, 10s.

The lease contained a clause reserving to the proprietor the mines and minerals, with power to "search for, work, win, and carry away the same." It then proceeded as follows:—"Allowance being always given to the said tenants and their foresaids for the ground so to be resumed for the above purposes, or for any surface or other damage which may be done to the said lands by the said operations at the rate of £4 sterling per imperial acre for all ground so to be resumed or damaged to the west of the Muckle Burn, and at the rate of £3 sterling per imperial acre for all ground so to be resumed or damaged to the east thereof; as also reserving to the proprietor and his foresaids full power, liberty, and privilege, at any time during the currency hereof, to take off such part of the lands hereby let as may be considered expedient for the purpose of feuing

or letting out on building leases, making excambions, planting, making roads or erecting public works, straightening or making alterations of the marches of the said lands and those adjoining, or for any other purpose that may be thought proper; it being hereby provided that the annual value of any ground thereby taken from the said lands shall be paid to the tenants and their foresaids at the foresaid rates."

In 1893 the landlord resumed five and a-half acres of the farm of Airbles, for the purpose of feuing it to the County Council of Lanarkshire, who by private agreement with him had arranged to take the land for the erection thereon of a hospital by the District Committee of the Middle Ward of Lanarkshire.

The minute of agreement, dated 9th November 1893, by which the County Council agreed to feu the five and a-half acres in question, bore that they did so "on the above conditions," being the general conditions on which feus were granted on the estates of Dalzell and Jerviston. The second of these conditions was as follows:—"The feu on entry to pay to the tenant of the land for the time being such damage (if any) as the latter may sustain in consequence of the feu taking possession, such as for loss of crop, manure, &c."

The County Council also became bound "to pay annually during the first nine years of the feu the sum of £20 as compensation to the present tenant of Airbles for the loss of the land."

Thereafter a feu-charter was granted in favour of the County Council, dated 17th November 1893, and recorded in the appropriate division of the Register of Sasines 10th July 1894, the entry being as at Whitsunday 1893. The feu-charter did not contain any clause binding the feuars to pay damages to the tenant, or to pay £20 as compensation to the tenant of Airbles, as provided by the minute of agreement referred to above.

The tenants made no objection to the District Committee entering upon the lands, and shortly after the transaction with the landlord (now Lord Hamilton of Dalzell), they proceeded to erect a hospital thereon.

The annual value of the lands resumed was in terms of the lease £4 an acre per annum, and the tenants had received for each year subsequent to the resumption an abatement of rent from the landlord equivalent to that sum per acre for the lands embraced in the feu.

On 24th March 1896 James Marshall, as lessee and occupier of the farm of Airbles, served upon the District Committee a notice of claim "for loss, damage, and expense to his said farm, in respect of and in connection with the taking of the said part of said farm, and the erection of said hospital thereon," videlicet:—"For unexhausted manure and improvements on the portions of the said farm taken as aforesaid; for ploughing and labour which had been incurred in connection therewith; for severance damages and inconvenience; for loss of crops and pasture; re-forming headriggs and loss of ground and crops—both on the

portion of ground taken from said farm and on the ground adjoining the same, the sum of One hundred and eighty pounds sterling, with interest thereon at the rate of five pounds per centum per annum from the term of Whitsunday Eighteen hundred and ninety-three till paid."

The claimant intimated that in the event of the District Committee not being willing to pay the compensation claimed, he desired "to have the same settled by arbitration in the terms of The Lands Clauses Consolidation (Scotland) Act 1845."

The Public Health (Scotland) Act 1867 (30 and 31 Vict. c. 101) enacts, sec. 39—"The local authority may provide within their district hospitals or temporary places for the reception of the sick for the use of the inhabitants. Such authority may build such hospitals or places of reception provided the board approve of the situation and construction thereof, or they may make contracts for the use of any existing hospital or part of an hospital, or for the temporary use of any place for the reception of the sick." There is no provision in the Act for the compulsory acquisition of land for the purpose of building hospitals.

Section 116 provides—"Full compensation shall be made out of any fund or assessment applicable to the purposes of this Act to all persons sustaining any damage by reason of the exercise of any of the powers of this Act, except when otherwise specially provided, and in case of dispute, if the sum claimed do not exceed the sum of fifty pounds sterling, the same may be ascertained on a summary application by either party to the Sheriff, whose decision shall be final and not subject to review unless when pronounced by the Sheriff-Substitute, in which case it may be reviewed by the Sheriff on appeal, and when the sum claimed exceeds £50 sterling such compensation shall be ascertained and disposed of in terms of the Lands Clauses Acts."

In these circumstances the District Committee, with consent of the County Council, and the County Council for their interest, presented a note of suspension and interdict against the claimant James Marshall following out the arbitration.

The complainers pleaded, *inter alia*—" (2) The complainers are entitled to suspension and interdict as craved, in respect (a) that no claim for damages to the respondent, the said James Marshall, in consequence of the acquisition of said feu lies against the complainers the District Committee; (b) that no claim lies against either the District Committee or the County Council, in respect that they have no contract with said respondent, and that his remedy, if any, is against his landlord; (c) that as the feu was acquired by agreement and not by the exercise of the powers of acquisition conferred by the Public Health (Scotland) Act 1867, the said respondent cannot insist upon arbitration under the Lands Clauses Act; (d) that any claim competent to the said respondent under his lease, in respect of the resumption of ground for feuing, is met by the allowance or abatement of rent made by the landlord in terms of said

lease; (e) that the claim now preferred is not a proper claim for compensation within the meaning of the Lands Clauses or Public Health Acts. (3) The respondent, the said James Marshall, being only a joint tenant of the lands, is not *in titulo* by himself alone to make or proceed with said claim."

The respondent Marshall set forth the provisions of the minute of agreement to feu referred to above. He also maintained that the stipulation in the lease regarding abatement to be allowed to the tenant for land resumed by the landlord related only to the annual value of the land taken, all other damage sustained by the tenant being left to be dealt with as it arose in each particular case. He averred—"According to the lease itself, and the intention of the parties as interpreted by their actings since the lease was granted, the said stipulation does not restrict this respondent's compensation to £4 an acre for all damage suffered. During the respondent's tenancy a large number of feus have been given off the farm by the landlord. In every case the feus were given on the same general conditions as those incorporated in the agreement mentioned *supra*, and in every case, in accordance with said conditions, the respondent received, in addition to an abatement of rent equivalent to £4 an acre for the land taken off, compensation for such items of damage as those embraced in his present notice of claim." He also averred (Ans. 4)—"Though the lease purports to be granted in favour of the present respondent and his brother David Marshall, the name of David Marshall was inserted simply for family purposes. He went abroad shortly after the lease was granted, and has not resided at Airbles since. He is engaged in business in England on his own account, and neither had nor has any interest in the lease. The present respondent is the sole tenant of the farm, and has the sole interest therein."

The respondent Marshall pleaded—" (1) The complainer's averments are irrelevant and insufficient to support the prayer of the note. (2) This respondent having sustained damage by reason of the complainers' exercise of the powers of the Public Health (Scotland) Act 1867, the complainers are bound, in terms of section 116 of the said Act, to make compensation therefor under the Lands Clauses Acts, and the note should be refused with expenses to the respondent."

On 19th May 1896 the Lord Ordinary (PEARSON) passed the note and granted interim interdict.

Thereafter the case was discussed in the Procedure Roll. An assignation to the effect set forth by the Lord Ordinary in his opinion *infra* was lodged by the respondent James Marshall, granted by his brother David Marshall in his favour.

By interlocutor dated 3rd August 1896 the Lord Ordinary sustained the third plea-in-law for the complainers, suspended the proceedings complained of, and granted interdict against the respondent James Marshall as craved.

Opinion.—"The tenant's claim is founded on section 116 of the Public Health Act

1867. That section provides, *inter alia*, that 'full compensation shall be made out of any fund or assessment applicable to the purposes of this Act, to all persons sustaining any damage by reason of the exercise of any of the powers of this Act.' It further provides that 'when the sum claimed exceeds £50 sterling, such compensation shall be ascertained and disposed of in terms of the Lands Clauses Acts.'

"This seems simple enough, but the tenant is met with an array of pleas, founded partly on the lease, and partly on an anxious criticism of the statutory provisions intended to show that his claim fails for want of relevancy, and that proceedings on it should be stopped on that ground. These pleas are set forth in heads *b, c, d,* and *e* of the complainers' second plea-in-law. It does not appear to me that any or all of them afford sufficient ground for withdrawing this claim from arbitration on the score of irrelevancy or incompetency. Indeed, in point of law, my opinion upon all of them is against the complainers; but it is not necessary for me to deal with them, as I hold the complainers are entitled to succeed on other grounds.

"There are other three pleas stated for the complainers which deserve attention.

"One is, that the respondent, being only a joint tenant in the lands, is not *in titulo* to proceed with the claim by himself alone. The lease is taken in favour of 'James Marshall and David Marshall, both farmers at Airbles,' and their heirs, but expressly secluding assignees and sub-tenants, legal and voluntary, unless specially approved of by the landlord in writing; and the tenants' obligations are undertaken by James Marshall and David Marshall, 'and their heirs, executors, and successors whomsoever, all jointly and severally.' There is nothing in the lease to suggest that they are not equally interested in the tenants' part of the lease. This being so, I think that, both on principle and as a matter of ordinary fairness, the Public Health Authority are not bound to have the amount of compensation settled in a proceeding to which only one of the co-tenants is a party.

"The respondent, however, avers in answer 4 that the name of his brother David was inserted simply for family purposes; that David Marshall went abroad shortly after the lease was granted, and has not resided in Airbles since; and that he is engaged in business in England on his own account, 'and neither had nor has any interest in the lease.' It was urged that these averments of pure fact which it is for the arbiters to inquire into and dispose of. But I see no reason why the complainers should be forced into a prejudicial inquiry of this nature before the arbiters, when the difficulty can be obviated by a joint claim on the part of both tenants, in conformity with the lease which is their only title. I do not say there may not be cases where a tenant in the respondent's position would be allowed to claim alone, as (possibly) where his co-tenant has disappeared and cannot be found. But so

little difficulty has the respondent on that score, that, in conformity with a request made by him during the discussion, he has been allowed to lodge an assignation (dated 10th July 1896), whereby his brother David Marshall, on the narrative of the facts averred in answer 4, assigns to the respondent his whole interest (if any) in and to the lease, with power to uplift claims connected therewith. While this comes too late to be of any avail in this process, it shows that the respondent has, and has all along had, the means at hand of presenting a claim in accordance with the terms of the lease.

“The other two pleas for the complainers are not, I think, well founded. The one is, that the County Council, and not the District Committee, is the body on which the claim should have been served, and with whom issue should have been joined in the arbitration. If this be so, the correspondence which preceded this suspension, and which was carried on at intervals for nearly two years, was most misleading; for it was carried on by the District Committee through their clerk without any hint that the claim was not at their disposal. But if this should be insufficient to commit a statutory body, I may say further that I think the Public Health Authority is the proper respondent in a claim such as this, grounded on an administrative act within the scope of their statutory powers.

“As the complainers say in statement 2, the feu was acquired by the County Council for the purposes of the District Committee in the administration of the Public Health Acts within their district.”

“I sustain the third plea-in-law for the complainers, and in respect thereof grant suspension and interdict as craved, with expenses to the District Committee against the comparing respondent.”

On 13th October the respondent obtained the landlord's consent to the assignation granted by David Marshall in his favour.

The respondent James Marshall reclaimed, and argued—(1) A joint-tenant was entitled to claim if he could prove, as was the case here, that the whole real interest in the farm was in him only—*Kilpatrick v. Kilpatrick*, November 27, 1841, 4 D. 109; *M'Vean v. M'Vean*, June 4, 1864, 2 Macph. 1150. A *locus standi* had been granted to one of two joint-tenants by the Court of Referees. (2) The tenant had a good claim for the damage complained of under his lease, which not only did not exclude, but, as intended and meant by the parties, gave a right to the compensation now claimed. (3) The County Council could not acquire land for building an hospital except under the powers conferred upon them by the Public Health Act 1867, and section 116 of that Act applied to all persons sustaining any damage by reason of the exercise of any of the powers of this Act. That was the position of the respondent here. The right to have the amount of compensation due settled by arbitration under the Lands Clauses Act conferred by section 116 was not confined

to cases where land was acquired under compulsory powers—*Peterhead Granite Polishing Company v. Parochial Board of Peterhead*, January 24, 1880, 7 R. 536, which had not been overruled on this point. See *Commissioners of Peterhead v. Forbes*, July 4, 1895, 22 R. 852. See also *Burgess v. Northwich Local Board*, December 21, 1880, 6 Q.B.D. 264; and *Pearsall v. Brierley Hill Local Board*, May 30, 1883, 11 Q.B.D. 735, and March 17, 1884, 9 App. Cas. 595, from which it appeared that under the corresponding section of the English Act (Public Health Act 1875, sec. 308) the method of fixing compensation prescribed by that section was held in England to be applicable to damage arising incidentally from the exercise of powers although no land had been taken compulsorily. (4) The District Committee, as local authority under the Public Health Act, were the proper body to be served with the claim, and not the County Council—Local Government (Scotland) Act 1889, secs. 11 and 17; *Northern District Committee of the County Council of Ayr v. Knox and Others*, March 20, 1895, 2 S.L.T. 568 (Outer House, Lord Kyllachy).

Argued for the complainers—(1) The Lord Ordinary's interlocutor was well founded. The complainers were not bound to go to arbitration with one of two joint-tenants on the chance of getting a discharge from both if ultimately ordered to make payment. As to the assignation, the rule was *pendente lite nihil innovandum*, and if the respondent's title to claim was originally bad, it could not be cured by an assignation *pendente processu*—*Hislop v. MacKitchie's Trustees*, June 23, 1881, 8 R. (H. of L.) 95; *Symington v. Campbell*, January 31, 1894, 21 R. 434. (2) The complainers were entitled to suspension and interdict as craved, for (a) even if the respondent had a good claim, it was against his landlord, and not against the feu. The agreement to feu was *ius tertii* as regards the respondent. His right under his lease was restricted to the sum of £4 per acre which he had received; (b) Even if the respondent had a perfectly good claim against the complainers, it was one which he was bound to establish by ordinary action, and he was not entitled to have it decided by arbitration under the Lands Clauses Acts. Section 116 of the Public Health Act 1867 did not apply to the case of land taken by private agreement, but only to the case of land taken under compulsory powers. The section required construction, for it could not have been intended to mean that whenever damage was done by a local authority acting within its powers, the aggrieved party was entitled to have the amount of his damage settled by arbitration under the Lands Clauses Act. The procedure under that Act was only applicable where lands were taken under compulsory powers. The local authority had no power to take land compulsorily for the erection of an hospital—Public Health Act 1867, sec. 39. The proper party to be served with the claim, if otherwise unobjectionable, would have been the County Council, and not the District Committee. The land was feued by the County Council, and

the hospital belonged to them. The District Committee had no power to hold land. If the hospital had been built before the Local Government Act 1889 came into operation, it would have passed in property to the County Council, and not to the District Committee—Local Government (Scotland) Act 1889, secs. 11 and 25. The district committee had no power of raising money by loan or rate—Local Government (Scotland) Act 1889, sec. 17, (2) (a). It had therefore no means of satisfying the claim if upheld. It was the County Council and not the District Committee which was bound under the agreement to feu to make the payments therein provided for.

LORD JUSTICE-CLERK—The Lord Ordinary in this case has sustained the third plea-in-law for the complainers. That is the plea which is based on the fact that the respondent is only joint-tenant of the lands in regard to which he claims compensation from the complainers. The difficulty caused by this fact could have been easily got rid of, for although for family reasons, which do not appear, the name of the respondent's brother was put into the lease, the whole substantial interest was in the respondent only. But even were it otherwise I should not be inclined to decide the case upon such a narrow ground. But the respondent here, Marshall, even supposing him to be the only person interested in the lease, proposes to have an arbitration under the Lands Clauses Act as to a claim for damages caused to him by the taking of part of the lands leased to him, for the purpose of feuing it to the County Council in order that they might build a hospital. The circumstances in which that land was resumed were these. The lease contains a very distinct clause to the effect that the proprietor shall have power at any time during the currency of the lease (and curiously enough without apparently giving the tenant any notice) to take off such part of the lands let as may be considered expedient for the purpose, *inter alia*, of feuing, it being provided that the annual value of any ground taken should be paid to the tenants at certain rates, in this case £4 per acre. The County Council by private agreement with the landlord obtained a site for a hospital, which, in pursuance of these powers, they desired to erect. In order to carry out the agreement the landlord, in exercise of the power reserved to him by the lease, resumed five and a half acres of the land leased to the respondent. The County Council then acquired the land by private agreement with the landlord. They had no power to acquire land compulsorily for this purpose. If they had not been able to obtain it by private agreement they would have had to adopt the procedure of obtaining a provisional order. Now, the compensation which was to be paid to the tenant for the loss of the land leased to him and resumed by the landlord for feuing was settled by the lease. It may be that more was due to the tenant than the £4 per acre, which is expressly mentioned, but in any view the compensation is com-

ensation due to the tenant for land resumed into the landlord's hands, by the act of the landlord, proceeding on the reserved power contained in the lease. It is compensation due by the landlord to the tenant in respect of resumption. It is difficult to see how a clause relating to compulsory purchase of land under statutory powers can be held to apply to such a case.

The respondents' counsel quoted some cases indicating that although land has been obtained by a public authority by private agreement and not compulsorily, a claim by a party injured by their taking the land, or their operations thereon when taken, can have his claim settled by arbitration under the Lands Clauses Act. The cases quoted are all cases where the public authority had taken something from the owner of land. The *Peterhead* case is a strong instance of this. There the water, to which an inferior heritor had right, was taken away from him in consequence of the operations of the public authority on lands which they had acquired by private bargain. The lower heritor was thus injuriously affected by their proceedings. They had no agreement with him. They had no right to do what they did, nor to divert the water flowing down to him, except under their compulsory powers. These cases have no bearing upon the present.

I do not wish to give any judgment upon the question whether the claim was validly made against the District Committee of the County Council, or whether it ought to have been made against the County Council itself. That question would require careful consideration. It may be that although the County Council has the ultimate control financially and otherwise, and is consequently the party ultimately responsible, still it may be that the District Committee can be claimed against or sued as having the direct local authority over the hospital. However, I give no opinion upon that point.

The Lord Ordinary's judgment will not be altered in the result. I arrive at the same conclusion that he has done, but on somewhat different grounds.

LORD YOUNG—The facts here are simple. The lease under which the respondent possesses is in favour of himself and his brother. The brother was only put in for family purposes, and he has now left the country, and the complainer has the whole substantial interest in it.

By the lease which the respondent Marshall holds, he is tenant of his farm till the beginning of next century. The lease is for nineteen years. It contains the following clause—[*His Lordship quoted the clause reserving power to the landlord to resume for feuing*]. It is stated that at Whitsunday 1893 the landlord exercised this power by taking 5½ acres off the respondent's farm. It is not necessary to say more. The landlord took the land for the purposes of feuing it to the local authority, and he did feu it to them, with entry at Whitsunday 1893. It is admitted that this

was a good exercise of the power. The feu was granted, and the feu entered into possession. I put the question "Is there any objection to the complainers' feu-charter?" and I got the answer, "No; there is none." There is no objection, then, to the complainers' title. The feu was well granted. If that be so, the tenant can have nothing to say. The local authority thus having obtained their feu entered on possession of the land. It does not occur to me that it can make any difference between this tenant's relation to this feu as compared with his relation to any other feu, that this feu was the local authority. It does not signify to the tenant who the feu is if the landlord has power to resume for the purpose of feuing. The lease provides that if land is resumed for feuing he is to be paid compensation for ground taken "at the foresaid rate." In this case "the foresaid rate" is £4 per acre, and £4 per acre has been paid to him every year since the land was taken. Thus the condition on which the landlord was entitled to resume has been fulfilled. The tenant has been paid, and till the end of his lease will be paid, all that he is entitled to under the lease. But in this year 1896 he makes a claim for £180 and interest, mainly for unexhausted manure and improvements, and the claim is made not against the landlord but against the feu, and he wishes to have that claim settled by arbitration under the Lands Clauses Act. Now, neither the County Council Act nor the Lands Clauses Act nor the Public Health Act have anything to do with the case, any more than they would have to do with a similar claim against any other feu. There is no relation between the landlord and the tenant except the lease, nor between the landlord and the feu except the feu-charter. There is nothing in either of these deeds about the three Acts mentioned. It was suggested in the course of the argument that it would be open to any member of the public to object to anything which was proposed to be done at variance with the statutory powers conferred upon the County Council or the Local Authority. It was not suggested that it was beyond their powers to take this feu. I am very clearly of opinion that so long as the landlord observes the conditions of the lease, and the landlord and the feu observe the conditions of the feu, there can be no claim by this tenant against anyone. But apart from that, I think there can be no doubt that if the tenant has a claim against anyone it must be against his landlord, with whom alone he has any contract. On the merits of the case, apart from the complainers' third plea, I think the case is too clear for argument.

With respect to the question whether the District Committee or the County Council itself should have been claimed against, I think it is too trifling for serious consideration. If there had been any real claim, and a mistake had been made as to the proper party to be claimed against (although I do not say that a mistake was made here), we would have aided the

tenant to bring the whole County Council forward. On the whole matter I think the suspension was well founded, the respondent's claim being ill founded.

LORD TRAYNER—I agree in the result at which your Lordships have arrived. I think the Lord Ordinary's ground of judgment is at the least very doubtful, and if his attention had been directed to the case of *Donald v. Nicol*, 5 Macph. 146, he might probably have taken a different view. I agree, however, in thinking that he reached the correct result. My view may be stated in a few sentences. The complainers hold their property on a good title of feu. No question has been raised as to the landlord's power to grant the feu, or the County Council's power to take it. But if they legally hold the land on a title which the proprietor was entitled to give them, and they have done nothing in contravention of the conditions on which they hold, then no claim of damages can be relevantly stated against them. If there is a claim for damages at all at the pursuers' instance (and I offer no opinion on that question), it can only be against the landlord for having resumed possession of the ground unwarrantably.

Whether the pursuer has here convened the proper defenders is a matter we need not determine. If the pursuer had merely made a mistake in claiming against the District Committee of the County Council, instead of against the County Council itself, we might perhaps have been able to assist him to remedy the mistake.

On the whole matter I agree with your Lordships.

LORD MONCREIFF—I agree in the result at which your Lordships have arrived. It is sufficient for the decision of the case that the respondent's claim, if he has one, is against his own landlord, and not against the complainers. The landlord had power to resume, and having resumed he had power to grant a feu. He alone was directly liable in compensation to the respondent. I prefer to confine myself to that ground of judgment. It is not necessary to decide any of the other questions which arise in the case. I may say, however, that this does not appear to me in any view to be a claim of damages arising out of the exercise by the complainers of statutory powers under the Public Health Act 1867 within the meaning of section 116 of that Act.

The Court pronounced the following interlocutor:—

"Recal the interlocutor reclaimed against: Sustain branches (a) and (b) of the second plea-in-law for the complainers; and in respect thereof, interdict, prohibit, and discharge in terms of the prayer of the note."

Counsel for the Complainers—Salvesen—J. J. Cook. Agents—Bruce, Kerr, & Burns, W.S.

Counsel for the Respondent—Guthrie—Constable. Agents—Purves & Barbour, S.S.C.