

adopt this course) it is perhaps better to have the facts ascertained before any operative finding or decree is pronounced.

LORD GUTHRIE concurred.

The Court recalled the interlocutor of the Lord Ordinary, repelled the defenders' first plea-in-law, and allowed the limited proof as craved by the defenders.

Counsel for Defenders and Reclaimers—The Dean of Faculty (Clyde, K.C., M.P.)—Horne, K.C.—C. H. Brown. Agents—Beveridge, Sutherland & Smith, W.S.

Counsel for Pursuers and Respondents—A. O. M. Mackenzie, K.C.—Hon. William Watson, K.C., M.P.—C. E. Lippe. Agents—Macpherson & Mackay, S.S.C.

Wednesday, July 12.

COURT OF SEVEN JUDGES.

[Scottish Land Court.]

MARQUIS OF ABERDEEN AND OTHERS v. SMITH.

Landlord and Tenant—Small Holding—Improvement—Proof to the Satisfaction of the Land Court—Discharge of Claim to Compensation Dated Prior to 1911—Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), secs. 1 and 2 (iii) (a)—Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict. cap. 29), sec. 8.

In 1861 began the occupation of a piece of ground which the occupier, sitting rent free, reclaimed and on which he erected buildings. In 1875 he became tenant under general conditions of let which provided—"All claims for past meliorations are held to be extinguished, and the tenants are to have no claim on the landlord either previous to or at their removal in respect of any improvements which they make after the commencement of the bargain." In 1894 the tenancy was renewed for nineteen years. The original tenant died in 1910 and his son completed the lease and thereafter continued sitting from year to year down to Whitsunday 1915, when he renounced the tenancy and claimed compensation for improvements. He—and he was the only witness—deponed, speaking from his own knowledge and from what his father had told him, that with the exception of some contributions in material from the estate, admitted in cross-examination, all the improvements had been executed by his father and himself. The estate led no evidence, and did not allege that it, save as admitted by the tenant, had executed any of the improvements. An inspection of the holding was made by the Land Court.

Held, in a Special Case (*dub.* Lord Johnston), (1) that the Land Court could competently find it "proved" to their satisfaction that the greater part

of the permanent improvements had been executed by the tenant and his predecessor in the same family without receiving payment or fair consideration therefor from the proprietors; and (2) that the conditions of let of 1875 did not preclude the Land Court from giving consideration to and assessing compensation for improvements executed prior to 1894 or prior to 1875.

The Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict. cap. 29) enacts, section 8—"When a crofter renounces his tenancy or is removed from his holding, he shall be entitled to compensation for any permanent improvements, provided that—(a) The improvements are suitable to the holding. (b) The improvements have been executed or paid for by the crofter or his predecessors in the same family. (c) The improvements have not been executed in virtue of any specific agreement in writing under which the crofter was bound to execute such improvements."

The Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49) enacts—Section 1—"From and after the commencement of this Act and subject to the provisions thereof, the Crofters Acts shall be read and construed as if the expression 'landholder' were substituted for the expression 'crofter' occurring therein, and shall have effect throughout Scotland." Section 2—"In the Crofters Acts and in this Act . . . the word 'holding' means and includes . . . (iii) As from the termination of the lease, and subject as hereinafter provided, every holding which at the commencement of this Act is held under a lease for a term longer than one year by a tenant who resides on or within two miles from the holding, and by himself or his family cultivates the holding with or without hired labour (such tenant or his heir or successor, as the case may be, holding under the lease at the termination thereof being hereinafter referred to as a qualified leaseholder): Provided that such . . . leaseholder (a) shall . . . be held . . . a qualified leaseholder within the meaning of this section in every case where it is . . . in the event of dispute proved to the satisfaction of the Land Court that such tenant or leaseholder or his predecessor in the same family has provided or paid for the whole or the greater part of the buildings or other permanent improvements on the holding without receiving from the landlord or any predecessor in title payment or fair consideration therefor."

The Marquis of Aberdeen and others, proprietors of the holding after mentioned, *appellants*, being dissatisfied with an order of the Scottish Land Court in an application by George Smith, tenant of a holding at Hillhead, Tarland, Aberdeenshire, *respondent*, for an order fixing the amount of compensation to which he was entitled in respect of the improvements executed or paid for by him and his predecessor in the same family on and suitable to the said holding, presented a Special Case for the opinion of the Court of Session.

The respondent's father first began occupation of the holding about the year 1861, and,

with others in other holdings, became at Whitsunday 1875 tenant under the following conditions of let:—"We, the undersigned, agree to take the possessions occupied by us at the rents stated against each, and on the conditions hereto prefixed, and generally in accordance with the regulations of the estate, as embodied in the printed form of lease now in use on said estate. . . . 74. Hillhead. George Smith. £5.—GEORGE SMITH."

The conditions prefixed to the above were:—"CONDITIONS of LET of Crofts belonging to the Right Honourable The Earl of Aberdeen. 1865.—The crofts are let on the understanding that it is not intended that the possession of the tenants shall be disturbed for nineteen years from the commencement of the bargain, provided they pay their rents regularly and conform to the general regulations of the estate; but power is reserved to the Earl of Aberdeen to resume possession at any term of Whitsunday on giving six months' notice, when the rearranging of adjoining lands or any other cause may appear to his Lordship to render such a proceeding necessary or desirable. All claims for past meliorations are held to be extinguished, and the tenants are to have no claim on the landlord, either previous to or at their removal, for compensation in respect of any improvements which they may make after the commencement of the bargain."

The Case stated—"1. . . . The hearing upon the application took place before Mr Dewar, a member of the Land Court, on 8th July 1915. The subjects were inspected on the same day by Mr Dewar.

"2. The following facts were found by the Court to have been proved to their satisfaction:—The tenant's father became the first tenant of the holding about the year 1861. The area of the holding is 12·453 acres, of which 11·469 is arable, and the remainder, apart from the sites of buildings, &c., pastoral. On his entry the land was mostly under heather, and there were no buildings on the holding. The land was wholly reclaimed by the tenant's father, who also erected all the buildings with the assistance of certain contributions from the proprietors, who supplied rough wood for repairs to the buildings in 1894, cement for the repair of the kitchen floor in 1901, and some sawn timber about twelve years ago. The buildings on the holding consist of a dwelling-house, stable, barn, byre, cart shed, and turnip shed. These are suitable to the holding. The tenant's father sat rent free for about twelve or fourteen years after his entry, and at Whitsunday 1875 he continued his tenancy at a rent of £5 under the conditions of let, which also applied to other tenants. These conditions endured for nineteen years. Attached to the signed conditions of let was a printed form containing general conditions for the letting of crofts belonging to the Earl of Aberdeen, dated 1865. These general conditions were not signed by the tenants, but by the signed conditions of let the signatories agreed to take their holdings on the conditions thereto prefixed. . . . The tenant's father

became tenant of the holding for a period of nineteen years, from Whitsunday 1894 to Whitsunday 1913, at a rent of £6 per annum. The tenant's father died in 1910, and the tenant completed the tenancy under the lease. He sat thereafter as tenant from year to year, and so continued until he renounced the tenancy as at Whitsunday 1915, when the holding was let by the landlord to a new tenant. Subject to the contributions made by the proprietors above mentioned, and to the consideration received by the tenant's father in being allowed to sit rent free for the first period of the tenancy, the whole buildings and other permanent improvements upon the holding have been provided or paid for by the tenant and his father. The tenant resided with his father on the holding till he was seventeen years of age. He then left the holding, but returned in 1900, from which time onward he worked on the holding helping his father till the latter's death in 1910, when as before stated he took up the tenancy.

"3. On the facts before stated, and after inspection of the holding, the Court held that, as at the termination of the lease before mentioned, the tenant was a leaseholder of a holding on which he resided, and which he cultivated by himself and his family, within the meaning of section 2 (1) (ii) of said Act. They further held that it had been proved to their satisfaction that the greater part of the permanent improvements had been provided or paid for by the tenant or his predecessor in the same family without receiving from the landlord or any predecessor in title payment or fair consideration therefor, and that the applicant was therefore a landholder, and as such entitled on renunciation of his holding to compensation for permanent improvements executed in terms of sections 8 and 10 of the Crofters Holdings (Scotland) Act 1886. The Court took into consideration the terms of the conditions of let above referred to as part of the circumstances of the case in determining whether or to what extent fair consideration had been received for improvements made by the tenant or his father before the conditions of let were entered into, but they held that these conditions did not in any way bar or limit the right of the landholder to receive compensation in accordance with the statutory provisions, in respect that they could not be read as a written agreement binding the landholder to execute specific improvements, or indeed any improvements, during the currency of these conditions.

"4. The only witness examined in support of the application was the tenant (aged 50). He deposed to the facts stated in article 2 of this Case, which in so far as they were not within his knowledge, or obtained from the documents produced in process, had been communicated to him by his deceased father. The proprietors did not allege that, apart from the contributions of material before enumerated, they had constructed any of the buildings or executed any of the permanent improvements before stated, and they led no oral evidence. The statement of the contributions made by the

proprietors to the buildings or improvements was obtained from the tenant by admission in cross-examination. In these circumstances the Court held that they were entitled to find that the facts stated in this case had been proved.

"5. The Court pronounced the following order:—*Edinburgh, 4th August 1915.*—The Land Court having resumed consideration of the application and the evidence adduced, and having inspected the subjects in respect of which compensation is claimed, Find that it is proved to the satisfaction of the Court that the greater part of the permanent improvements on the holding have been provided or paid for by the applicant and his father without receiving from the landlords or any predecessor in title payment or fair consideration therefor: Therefore find that the applicant is a landholder within the meaning of the Landholders Acts, and repel the respondents' objections that the applicant is not a landholder and is not entitled to compensation: Find in terms of section 7 of the Crofters' Holdings (Scotland) Act 1886, as amended by section 18 of the Small Landholders Act 1911, that the notice of renunciation given by the applicant is effective: Find that the applicant is entitled to compensation for improvements executed or paid for by him or his predecessors in the same family under and in terms of sections 8 and 10 of the Act of 1886, in so far as the said improvements are suitable to the holding and have not been executed in virtue of any specific agreement in writing under which he was bound to execute the same: Assess the compensation to which the applicant is so entitled at the sum of £65 sterling as representing the value of such improvements to an incoming tenant: Ordain the respondents to make payment to the applicant of the said sum, and decern. ALEX. DEWAR."

"8. The proprietors object to the said order in respect that it is incompetent and invalid, because it was pronounced by the Land Court in the absence of any legal evidence justifying its findings, in respect (1) that it proceeded upon the evidence of the applicant alone, and (2) that the applicant did not prove that either he or his father had not received from the proprietor or his predecessors payment or fair consideration for the improvements in respect of which he claims. The proprietors also maintain that in any event the Land Court were not entitled to have regard to improvements executed prior to 1894, or alternatively prior to 1875, because of the conditions under which the holdings were possessed up to that date, and the proprietors also maintain, *subsidiarie*, that if it be competent to consider the said improvements, if proved, in deciding whether the tenant was or was not a landholder, the Land Court were not entitled to assess compensation for them, seeing that all claims for such compensation had been discharged by the tenant's father.

"9. It is maintained for the tenant (*First*) . . . that the findings, assessment of compensation, and order of the Land Court are right, and ought to be affirmed

with expenses, and that the tenant should also be found entitled to expenses in his said application; (*Second*) that the Land Court did not in making their said findings proceed on the evidence of the witness alone, but on the whole facts and circumstances ascertained by them in course of the inquiry and inspection, as they were entitled to do under the provisions of the Small Landholders (Scotland) Act 1911; and (*Third*) that in any event the Land Court were entitled to proceed upon the evidence of the applicant alone, and there being no evidence in rebuttal of the evidence of the applicant, the said order is right."

The Land Court appended to its order of 4th August 1915 the following

Note.—" . . . A landholder is entitled by imperative statutory enactment to compensation for improvements suitable to the holding executed or paid for by him or his predecessors in the same family, except such improvements as have been executed in virtue of any specific agreement in writing under which the landholder was bound to execute such improvements. The conditions of let have been taken into account, along with the other circumstances of the case, in determining whether or to what extent fair consideration has been received for improvements made by the applicant or his father before the conditions were entered into; but the conditions do not in any way limit or bar the right of the landholder to receive compensation in accordance with the statutory provisions because they cannot be read as a written agreement binding the landholder to execute specific improvements, or indeed any improvements, during the currency of these conditions.

"Under the lease the applicant's father became tenant of the holding for a period of nineteen years from Whitsunday 1894 to Whitsunday 1913 at a rent of £6 per annum. The applicant's father died in 1910, and the applicant completed the tenancy under the lease, and sat thereafter as tenant from year to year.

"The landlord supplied cement for the repair of the kitchen floor in 1901, and also supplied rough wood for repairs to the buildings in 1894, and some sawn timber about twelve years ago. Subject to these contributions and to the consideration received in being allowed to sit rent-free for the first period of the tenancy, the whole buildings and other permanent improvements upon the holding have been provided or paid for by the applicant and his father. The Court is satisfied that the greater part of the permanent improvements has been provided or paid for without payment or fair consideration received, and it follows in virtue of section 2 (1) (iii) of the Act of 1911 that as from the termination of the lease the applicant became the landholder in and of the holding. . . .

"The buildings upon the holding are old and in bad tenable condition, and this has been taken into account in fixing the amount of compensation."

The *questions of law* were—" (1) Was there, in the circumstances stated, evidence on which the Land Court could competently

and were entitled to hold that the greater part of the permanent improvements on the holding had been executed by the tenant and his predecessor in the same family without receiving payment or fair consideration therefor from the proprietors? (2) Did the conditions of let referred to in article 2 of the case, on a sound construction of their terms, preclude the Land Court from (1) giving any consideration to, or (2) assessing any compensation for, improvements executed (a) prior to 1894 or (b) prior to 1875?"

After hearing the parties the First Division appointed the case to be heard before Seven Judges.

Argued for the appellants.—The respondent was not a "landholder," inasmuch as he did not come within the terms of the Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), sec. 2 (iii) (a), it not having been "proved" that he or his predecessors had provided or paid for the buildings or improvements "without receiving from the landlord" or his predecessors "payment or fair consideration" therefor. The respondent's father after 1875 held under a lease embodying conditions of let whereby by writing under his hand he had discharged his claim for past and future meliorations. This was a bilateral contract, and no condition in it could be held to have been without consideration. The buildings were stated to be old, and must be assumed to have been executed before 1875, though the Land Court had not so found. Consequently they fell under the discharge of any claim for past meliorations, but if taken as executed subsequent to 1875 they would fall under the discharge of future claims. This written contract excluded contradictory parole evidence, and a *fortiori* such hearsay evidence as was the only evidence tendered by the respondent. Alternatively the *onus* was on the respondent to prove that he had not received compensation, and that was rendered still heavier by the production of the lease. The only evidence tendered was that of one witness, and that was insufficient to constitute proof.—Dickson on Evidence, vol. ii, secs. 1807 and 1808; *Lees v. Macdonald*, 1893, 20 R. (J) 55, *per* L.J.-C. Macdonald at p. 57, and Lord McLaren at p. 58, 30 S.L.R. 601; *Kinnear v. Brander*, 1914 S.C. (J.) 141, 51 S.L.R. 660. Inspection of the buildings at the present time could not enable the Land Court to decide whether fair consideration was given in 1875, and such expert evidence was of no avail to contradict the lease of 1875. Further, the power of the Land Court to proceed upon their own inspection, conferred by the Small Landholders Act 1911 (*cit.*), sec. 7 (19), was limited to the constitution of new holdings. No doubt wide powers were given to the Land Court by secs. 25 (2) and (3), but sec. 2 (iii) (a) desiderated "proof," which must be proof according to ordinary rules of evidence. Further, if the respondent was a landholder—*i.e.*, his father did not receive compensation in 1875—his father had discharged his right to compensation by the lease of 1875. The right to claim compensation was conferred by the Crofters' Holdings

(Scotland) Act 1886 (49 and 50 Vict. cap. 29), sec. 8, and the mode of measuring the amount of compensation by sec. 10. The lease of 1875 was a complete answer to any claim, for it discharged the right to claim, if any then existed, and any right to claim after emerging, and there was no prohibition of contracting out. The discharge of 1875 necessarily assumed a claim in the respondent's father to discharge; no doubt he had no such claim by common law, yet he might have such a claim by local or estate custom—Hunter's Landlord and Tenant (4th ed.), ii, 239; *Officer v. Nicolson*, 1807, Hume's Decisions, 827; *Bell v. Lamont*, June 14, 1814 F.C.; *Gordon v. Thomson*, 1831, 9 S. 735; *Learmonth v. Sinclair's Trustees*, 1878, 5 R. 548, 15 S.L.R. 304. Here it must be inferred from the incorporation of general conditions applying to the whole estate that there was a right to claim compensation arising out of local custom or special agreement applying generally to the estate. The Crofters' Holdings (Scotland) Act 1886 (*cit.*) could not be construed as giving a new statutory right which could not be extinguished by any prior discharge, because if so the tenant would get double payment. But that Act ought to be construed as giving a right to claim compensation only where no such right existed otherwise. If there was a right to claim compensation, the Land Court was bound to set against the compensation the value of the assistance given by the landlord. This they had not done. Question 1 should be answered in the negative, but if not, question 2 should be answered in the affirmative.

Argued for the respondent.—The question of whether the respondent was a landholder depended on the Small Landholders (Scotland) Act 1911 (*cit.*), sec. 2 (iii) (a). The test therefore was whether fair consideration was given for the improvements. Proof of that matter was not subject to the ordinary rules, but was governed by the special rules which gave the Land Court peculiar powers as to the means they might use to enable them to form a conclusion. The object of the statute was to protect a class who invariably could not protect themselves, and to secure that substantial justice should be done in each case. The question for the Land Court involved valuation of improvements as at an antecedent date. The competent methods of dealing with that question were to be found in section 25 (3). Anyone of these might be used by the Land Court, and by their use proof to the satisfaction of the Land Court might be accomplished. If the Land Court found that it had been proved to their satisfaction that fair consideration had not been received, the mere fact that only one witness had been adduced did not lead to the inference that it was upon his evidence alone that the Land Court had proceeded, but it must be inferred that their conclusion was based on the evidence of that witness and the other methods of information open to the Land Court—*e.g.*, valuation of experts, production of documents, &c. The conditions of let were quite inconclusive; these were general conditions applicable to the whole estate, and signed

by every tenant quite irrespective of whether he had a claim to discharge or not. If on a particular croft there was a claim to discharge, the conditions would be operative, but if there was no claim to discharge they were otiose. Mere signature of them raised no inference that there was a claim to discharge. The same applied to a right of compensation arising by custom. Custom or implied bargain might have given rise to a claim for compensation in the case of some of the crofts, but there was nothing to show that that had taken place in every case. Consequently the applicant must be held to be a landholder. If so, he had not discharged his right to compensation, for when his father signed the conditions there was no such right to discharge, and none could thereafter arise according to the then existing law. The discharge could only be held to apply to such rights to compensation as existed or could come into existence by the law as at the date of discharge—Bell's Prins., sec. 584. In 1875 there was no right to compensation under the then existing law, and none could emerge. The right to compensation first came into existence under the Crofters' Holdings (Scotland) Act 1886 (*cit.*), and was applied to this applicant, in Aberdeenshire, by the Small Landholders (Scotland) Act 1911 (*cit.*).

At advising—

LORD PRESIDENT—The applicant in this case claimed and was awarded compensation for improvements effected prior to 1875 by his predecessor in the tenancy. The claim was made by virtue of the 8th section of the Act of 1886. The award is challenged on two separate and distinct grounds—(first) because the applicant is not a landholder within the meaning of the statute of 1911, and (second) because on the assumption that he is the claim is discharged.

I am of opinion that the challenge fails on both grounds. First it is conceded that the applicant is a landholder if the Land Court is satisfied that the predecessor in the tenancy, who confessedly made the improvements, did not receive fair consideration therefor. The Land Court has expressed itself satisfied on that head. We are asked to say that the Land Court in the circumstances was not entitled to hold it proved that the predecessor in the tenancy had received no consideration for the improvements.

The circumstances are as follows—At the commencement of the tenancy the land was almost wholly under heather, and there were no buildings on the holding. The predecessor in the tenancy reclaimed the land and erected all the buildings on the holding. He sat rent free for a period of fourteen years. At the end of that term he received a renewal of his tenancy for nineteen years at a rent of £5, and in 1875 the tenant agreed to hold all claims for past meliorations to be extinguished.

It is argued that the effect of that agreement is an acknowledgment on the part of the tenant that he had received fair consideration for the improvements; that if so further evidence or inquiry is inadmissible,

but if further evidence is admissible that none has been forthcoming. I cannot assent to that view. It is true that the agreement is an important element to be kept in view by the Land Court in considering the question whether the tenant did or did not receive fair consideration for the improvements executed by him, but it is not conclusive. It was free to the Land Court to consider the question despite the agreement, and it was the duty of the Land Court if they thought necessary to make further inquiry and to prosecute that inquiry by such mode as they might deem appropriate. They were so empowered by section 25 (3) of the 1911 Act, and if instead of calling expert witnesses for the purpose of satisfying their minds the Land Court thought fit to have resort to an inspection by themselves, they being an expert body, they were well entitled so to do. Section 7 (19) of the statute so authorises them.

There was therefore in my opinion no divergence from the mode of procedure sanctioned by the statute. I am accordingly of opinion that the Land Court was in the circumstances entitled to hold it proved that the predecessor in the tenancy had received no fair consideration for the improvements confessedly made by him.

Second, it is contended that even on the assumption that the applicant is a landholder this claim was discharged in 1875. How a claim unheard of in 1875, which came into existence for the first time in 1886, could be thus discharged I am at a loss to comprehend, and no explanation was offered. I doubt indeed whether there was then any claim to discharge; there was certainly none at common law; there was none by convention; and there is no finding that there was any by custom. The general regulations of let are applicable to all the crofts, and it may very well be that in the case of some crofts there was a stipulation that any improvements made by the tenant should be compensated for by the landlord.

It is undoubted that this claim might have been discharged but it could only have been discharged in express terms. The discharge must have been explicit, not implicit, and there being confessedly no express discharge here the agreement is in my opinion unavailable to bar the claim. It is to be noted that under section 8 of the Statute of 1886 compensation is given under three conditions. These three conditions were confessedly all satisfied in the present case.

That does not mean that express discharges are ruled out, but it does in my opinion mean that anything short of an express discharge is ruled out. Nor does it mean that the agreement of 1875 is to be denied effect. It ought to have effect when the Land Court come to deal with the claim under section 10 of the Act of 1886, because when they are considering the amount of compensation to be paid by the landlord they must keep in view the value of any consideration which may be proved to have been given by the landlord in respect of such improvements, and thus the agreement may afford valuable aid in considering the question of the amount of compensation

to be paid. All I now say is that it cannot present a barrier against this claim and that unless the claim is discharged in express terms the Land Court is not precluded from dealing with it.

LORD DUNDAS—I am of the same opinion.

The first question should, in my judgment, be answered in the affirmative. The Land Court (I use the corporate words, though in fact only one Commissioner heard and decided this application), in reaching their conclusion upon the matters which so far as disputed were “proved to their satisfaction,” appear to have proceeded upon the testimony of the applicant—uncontradicted, and believed by them—the facts of the case, the documents before them, their own expert knowledge, and their skilled inspection of the premises. The Land Court are not, I apprehend, strictly bound by all the ordinary rules of legal evidence. I see no ground on which we should interfere with their determination.

The second question should, in my opinion, be answered in the negative. I do not think that the “conditions of let” could “preclude” the Land Court, as suggested in the query. It seems to me that the claim now put forward in virtue of the Acts of 1886 and 1911 was not discharged in 1875, and could not have been unless by the use of terms apt to cover and include the discharge of claims which might emerge in virtue of supervenient legislation.

LORD JOHNSTON—As your Lordships are agreed that the questions in this case should be answered, the first in the affirmative and the second in the negative, I concur in the judgment, though I do so with some hesitation in respect of two matters:—

First. I agree that if they are supplied with the facts as to the earlier tenure and as to the erection of the buildings, and are also fully informed as to the counter advantages enjoyed, and the circumstances under which these were accorded, the Land Court are at liberty to examine personally, and to use their own skilled experience in determining whether *de facto* such melioration by the tenant has been compensated by counter advantages. In the nature of things they are not confined in their consideration to the period of the expiring lease.

But the functions of the Land Court are various. Some are executive or administrative merely, as in fixing a fair rent, valuing compensation, adjusting matters relating to new holdings, &c. These are mainly committed to the exercise of skilled discretion. But others involve questions which are not merely executive but also judicial, or in part judicial and in part executive, and the present is one of the latter. Personally I am disposed to more than doubt whether the Land Court here has had sufficient knowledge, based on evidence, of the considerations *hinc inde* which induced to the lease of 1875, entered into forty years ago, and has not resorted to mere speculation in their determination of the point involved in the first question, which determination is judicial and not merely execu-

tive. The tenant is *in petitorio*, and I do not think that he discharges the *onus* on him by merely asking the Land Court as men of skill to draw inferences without data. For that is pretty much what the course of procedure amounts to.

This presses on me the more when I consider that the matter at issue in the second question intrudes itself upon the determination canvassed in the first.

Second. I have great difficulty in overriding an agreement come to forty years ago between parties who knew how and where they then stood—an agreement under which all claims for past meliorations were held to be extinguished—on the mere opinion of a member of the Court, however expert, that the agreement was without, or without sufficient, consideration. The present respondent is the successor in title of the tenant who entered into that agreement and stands in his shoes. I doubt whether his predecessor could have been heard to throw over such a discharge granted by himself, which was certainly not without consideration, as he had had fourteen years' occupancy free of rent, and obtained a nineteen years' lease thereafter on the faith, *inter alia*, of that discharge. If his predecessor could not, then neither can he.

I agree that under the Act there is no limit in point of time to inquiry as to tenants' meliorations. But neither, I think, is there anything in this Act to preclude the claim for compensation being found to have been discharged, or anything to warrant a discharge being opened up.

It is said that the discharge was a mere empty form, as there was nothing to discharge at its date, in respect that the claim was only created by the Act of 1911. I cannot accept this as an answer. The Land Court had no judicial knowledge of the circumstances under which this tenure in 1861 was initiated. I may even say no knowledge of any kind except such as was derived from the documents. A new crofting area was admittedly created on the estate about that time. The croft in question is No. 74 of the series of crofts then created, and we do not know how many more there were. In the absence of anything to the contrary I must hold that the estate conditions affecting the tenure of these crofts, recognised as a term of their creation, which might otherwise have grown out of estate custom, that the tenant who broke in the croft and erected the buildings should have a tenant-right involving compensation unless discharged. To what else could the expression “claims for past meliorations” apply?

But I content myself with drawing attention to those points of doubt which affect both the procedure and determination of the Land Court.

LORD SALVESEN—I agree with your Lordships that the first question falls to be answered in the affirmative. The question whether the evidence of a single witness, however credible, is sufficient to prove a disputed fact to the satisfaction of the Land

Court does not appear to me to arise (although I should hesitate to affirm this), for it is admitted here that the land was wholly reclaimed by the tenant's father, and that he also erected all the buildings. Apart from these admissions the fact that under the original lease the tenant's father sat rent free for about twelve or fourteen years after his entry, and the inferences that may be drawn from this, afford sufficient corroboration of the testimony of the tenant as to what his late father told him.

The question whether the tenant's father received fair consideration for the improvements he executed could in the circumstances only form the subject of evidence by experts who had made themselves familiar with the buildings and knew the annual value in 1875 and at subsequent dates of such land as the holding consists of. Such evidence is unnecessary where the member of the Court to whom the matter is delegated is himself an agriculturist, and presumably knows or has made himself acquainted with the market value of land and its products during the successive tenancies of the applicant and his father. In solving this question, which is one of pure fact, it would of course be the duty of the Court to consider not merely the circumstance that the tenant sat rent free for a period of twelve or fourteen years, but also that he paid only £5 rent for nearly twelve acres of arable land for nineteen years thereafter. I must assume that Mr Dewar considered all the relevant facts of which he acquired knowledge by an inspection of the buildings, and applied them to the conditions of the tenancy from its commencement. On that assumption I hold that the Land Court had sufficient materials from which they could competently deduce the conclusions in fact which have been stated in the case.

The next question is whether the declaration in the conditions of let of 1875 that all claims for past meliorations were held to be extinguished, and that the tenant should have no claim for compensation for meliorations or improvements which he might make after the commencement of the bargain, is sufficient in law, to bar the claim which would otherwise exist. Now it is certain that at common law a tenant in 1875 had no claim against his landlord for such meliorations, and I cannot think that an express discharge by him operates differently from the discharge implied at common law. It was maintained, however, that it must be inferred from the terms of the conditions of let that there was an estate custom under which the tenants were entitled to compensation for meliorations, and that this was a claim which they were free to discharge if they were of opinion that the terms on which the holding was offered constituted fair consideration. No evidence was adduced in support of the alleged estate custom, and I think it may very well be that the clause was inserted so that the tenant might know precisely the footing upon which any meliorations which he chose to make would be dealt with. Before such a discharge could operate as a bar to the present claim I think it would have to

be shown that according to the alleged custom of the estate the tenant would have been as fully compensated as he is entitled to be under existing legislation. While the discharge was an element which the Land Court ought to take into account in determining whether the tenant had in point of fact received fair consideration for his father's improvements, it does not operate as a legal bar to the present claim. It is, no doubt, a hardship on the landlord that he should be called upon to pay for something in respect of which he had received a full discharge under a written contract, but the hardship is no greater than if he had simply relied upon the implied discharge at common law, now abrogated or modified. I accordingly agree that the second question must be answered in the negative.

LORD MACKENZIE—There are two separate questions in this case:—1st, Is the applicant a landholder? and 2nd, If he is, has he discharged his claim for compensation for improvements? In order to establish that he is a landholder the applicant has to get an affirmative answer to the first question of law stated in the case, which is, "Was there, in the circumstances stated, evidence on which the Land Court could competently and was entitled to hold that the greater part of the permanent improvements on the holding had been executed by the tenant and his predecessor in the same family without receiving payment or fair consideration therefor from the proprietors?" This is the test provided by section 2 (1) (iii) (a) for ascertaining whether a qualified leaseholder is a landholder or not. He is to be "in every case where it is agreed between the landlord and the tenant or leaseholder, or in the event of dispute proved to the satisfaction of the Land Court, that such tenant or leaseholder or his predecessor in the same family has provided or paid for the whole or the greater part of the buildings or other permanent improvements on the holding without receiving from the landlord or any predecessor in title payment or fair consideration therefor."

Upon the facts set out in the case I am clearly of opinion that the Land Court were entitled to come to the conclusion that the predecessor of the applicant did not receive fair consideration. It was argued for the respondent that the *onus* was upon the applicant to prove a negative, and that he had failed to discharge this *onus* as he had only the evidence of one witness, to wit, himself. I hold that when it has been proved to the satisfaction of the Land Court that the tenant or leaseholder or his predecessor in the same family has provided or paid for the whole or the greater part of the buildings or other permanent improvements, it is then for the landlord to lead evidence to show that payment or fair consideration has been received by the tenant from him or any predecessor in title. Upon this branch of the case the discharge granted in 1875 is no doubt an item of evidence, and as such had to be taken into account by the Land Court. So also has

the fact that the tenant's father was allowed to sit rent free for the fourteen years from 1861 to 1875. The Land Court was bound to weigh this along with other elements in the case. But having considered it, it was within their right to hold that the discharge had been granted *sine causa* and that fair consideration for the buildings had not been given, even though the tenant had the subjects rent free for fourteen years. It is stated that when the tenant's father entered in 1861 the land was mostly heather, and there were no buildings. The land was wholly reclaimed by the tenant's father, who also erected all the buildings, with the assistances stated in the case from the proprietors. I assume the buildings were erected at the beginning. Some criticism was offered on the point that the date the buildings were erected is not stated, and that it is not set out in the case to what extent the evidence given by the tenant was hearsay from his father. The subjects were, however, inspected by a member of the Land Court. The proprietors did not allege that, apart from the contributions of material, they had constructed any of the buildings or executed any of the permanent improvements, and they led no oral evidence. In these circumstances I think the Land Court were entitled to come to the conclusion that nothing had ever been given by the landlord in respect of the value of buildings, and that they were therefore entitled to hold it proved to their satisfaction that the applicant is a landholder within the meaning of the Landholders Acts.

The next question turns upon the effect to be given to the discharge already referred to granted by the applicant's father in the lease of 1875. It is in these terms—"All claims for past meliorations are held to be extinguished, and the tenants are to have no claim on the landlord, either previous to or at their removal, for compensation in respect of any improvements which they may make after the commencement of the bargain." It is said that this is a bargain and that the applicant cannot get behind it. It is no doubt somewhat remarkable that there is no clause in the Landholders Act of 1911 or the Crofters Act of 1886 to prevent contracting out except as regards vacant holdings and under section 52 (4) of the Act of 1911. In this respect these enactments are to be contrasted with the Agricultural Holdings Acts of 1883, section 36, and 1908, section 5. The duty imposed upon the Land Court in the case of a landholder is defined by the Crofters Act of 1886, section 8, which provides—[*His Lordship quoted the section, supra*].

Now the improvements in question comply with the conditions in (a) and (b), and were not executed in virtue of any specific agreement. An important provision is contained in section 10, which provides—"Improvements shall be valued under this Act at such sum as fairly represents the value of the improvement to an incoming tenant, provided that in fixing the amount of compensation payable the value of any assistance or consideration which may be proved to have been given by the landlord or his

predecessors in title, in respect of such improvements, shall be taken into account, and deducted from such compensation, and the value of any deterioration committed or permitted by the tenant within the four years preceding shall also be deducted from the said compensation." Credit is therefore to be given for whatever has been done by the landlord or his predecessors in title in fixing the amount to be paid to the tenant. This payment of compensation to the tenant is the result of a new right created by the Act of 1911. It did not exist in 1875 when the discharge was granted. And the terms of the discharge are not such as to exclude what is the result of supervenient legislation. In my opinion the Land Court were entitled to take the view that the discharge was not a bar to their performing the duty put upon them by positive enactment.

LORD GUTHRIE—I agree with your Lordship in the chair.

LORD SKERRINGTON—I also agree with your Lordship.

The Court answered the first question in the affirmative and the second in the negative.

Counsel for the Appellants—Watson, K.C.—C. H. Brown. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Respondent—Gentles. Agents—Macpherson & Mackay, S.S.C.

Thursday, July 13.

FIRST DIVISION.

(SINGLE BILLS.)

SMELLIE v. CALEDONIAN RAILWAY COMPANY.

(See ante, p. 336.)

Expenses—Taxation—Preliminary Investigations of Defenders in Action Dismissed as Irrelevant—C.A.S., 1913, K, iv, Appendix ii, Rule 3.

The C.A.S., 1913, K, iv, Appendix ii, enacts—Rule 3—"The expenses to be charged against an opposite party shall be limited to proper 'expenses of process' without any allowance (beyond that indicated in the table) for preliminary investigations, subject to this proviso, that recognitions (so far as relevant and necessary for the proof of the matters in the record between the parties), although taken before the raising of an action or the preparation of defences, and although the case may not proceed to trial or proof, may be allowed when eventually an interlocutor shall be pronounced either approving of issues or allowing a proof."

The pursuer in an action of damages for breach of contract against a railway company (the contract being for the construction of a line) brought his action long after the work was com-