

Argued for the pursuer—*Fergusson's case* (*cit.*) was distinguished, for here the debt was mature before the outbreak of war. Further, the reason for the sist in that case was that there were a number of questions, *e.g.*, of exchange, which had not been dealt with in the Court of Session, and that had led to the sist. The debt in question had to be returned to the Custodian as enemy property, and the Court could have ordered it to be vested in the Custodian—Trading with the Enemy Amendment Act 1914 (5 Geo. V, cap. 12), sections 3 and 4. Upon the order of the Court such money vested in the Custodian and could be made available to satisfy the claims of British subjects against enemy subjects (section 5 (2)). The debt here had not been vested in the Custodian, but it was unreasonable to hold that the pursuer's right to get payment of it was any the less because of that. The only impediment to recovery was that leave to proceed to execution must be obtained—Courts (Emergency Powers) Act (4 and 5 Geo. V, cap. 78), section 1—and there was nothing to prevent British subjects from recovering from enemy subjects (section 1 (7)). The Trading with the Enemy Proclamation, No. 2, dated September 9, 1914, Article 5, was referred to (Manual of Emergency Legislation, vol. i, p. 378) as showing what was forbidden. There was no suggestion of a defence available against the defenders, so that Ersk. Inst. iii, 6, 16, did not apply.

At advising—

LORD PRESIDENT—Had it not been for the decision of the House of Lords in the case of *Fergusson & Company v. Brown & Tawse*, 1918, 55 S.L.R. 437, I should have been prepared in this case to follow the course taken by the Lord Ordinary, for I freely allow that there are material points of difference between the two cases which would have led probably to that result. But in affirming our judgment in the case of *Fergusson & Company* their Lordships proceeded upon general grounds of public convenience, and expressly refrained from offering any opinion upon the grounds of judgment upon which we in this Court proceeded. What these grounds of general public convenience were their Lordships did not say, but I think that in the case before us we are bound to assume that they are clearly applicable.

Under these circumstances I think we ought to follow the course taken by the House of Lords in the case of *Fergusson & Company*, and sist procedure in this case on the arrestees finding caution. But it would be well, I think, to limit the sist to the first sederunt day in the coming Winter Session, and meantime appoint the proceedings to be laid before the Custodian under the Trading with the Enemy (Amendment) Act 1914 in order that he may, if so advised, compare.

LORD MACKENZIE—I think that this is a case in which it would be advisable to sist procedure until the first sederunt day in October, and that intimation be made as proposed to the Public Custodian of the dependence of these proceedings.

LORD SKERRINGTON—I concur in the course which your Lordships suggest.

LORD JOHNSTON was absent.

The Court on the arrestees finding caution sisted procedure until the first sederunt day of the ensuing Winter Session; meantime appointed the proceedings to be laid before the Custodian under the Trading with the Enemy Amendment Act 1914 in order that he might, if so advised, compare therein.

Counsel for the Arrestees—Macphail, K.C.
—C. H. Brown. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Pursuer—Moncrieff, K.C.
—Scott. Agents—Crawford & Crawford, S.S.C.

Wednesday, July 17.

FIRST DIVISION.

[Scottish Land Court.]

FORDYCE v. TAYLOR.

*Landlord and Tenant—Small Holdings—
—Holding—Tenant Carrying on Business
under Beer-House Licence or Public-House
Certificate in House on Holding—Crofters
Holdings (Scotland) Act 1886 (49 and 50
Vict. cap. 29), sec. 33—Agricultural Hold-
ings (Scotland) Act 1908 (8 Edw. VII, cap.
64), sec. 35 (1)—Small Landholders (Scot-
land) Act 1911 (1 and 2 Geo. V, cap. 49),
secs. 26 (7) and 33 (2).*

The tenant of a small holding sold porter and ale to occasional customers under a beer-house licence, and he held a public-house certificate applying to the house on the holding as at 1st April 1912. He was otherwise qualified as a small landholder. Held (1) that the tenant was not an innkeeper in the sense of the Crofters Holdings Act 1886, section 33, and (2) that the holding was a small holding in the sense of the Small Landholders Act 1911.

Opinion per the Lord President that in section 33 of the Crofters Holdings Act 1886 the words "placed in the district by the landlord for the benefit of the neighbourhood" applied to innkeepers as well as tradesmen.

The Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict. cap. 29) enacts—Section 1—"A crofter shall not be removed from the holding of which he is tenant except in consequence of the breach of one or more of the conditions following (in this Act referred to as statutory conditions). . . (8) The crofter shall not on his holding, without the consent of his landlord, open any house for the sale of intoxicating liquors." Section 33—"Nothing in this Act shall apply to . . . any innkeeper or tradesman placed in the district by the landlord for the benefit of the neighbourhood."

The Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64) enacts—Section 35 (1)—"In this Act, unless the context otherwise requires, . . . 'Holding' means

any piece of land held by a tenant which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral. . . .”

The Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49) enacts—Section 26 (7)—“A person shall not be held an existing yearly tenant or a qualified leaseholder under this Act in respect of a holding referred to in section 33 of the Act of 1886. . . .” Section 33 (2)—“For the purposes of this section the expression ‘small holding’ means any holding within the meaning of the Agricultural Holdings (Scotland) Act 1908, which either does not exceed fifty acres, or if exceeding fifty acres is of an annual value as entered in the valuation roll not exceeding fifty pounds.”

Alexander Dingwall Fordyce of Brucklay, *appellant*, being dissatisfied with a decision of the Scottish Land Court in an application by William Taylor, *respondent*, to be declared a landholder or statutory small tenant, took a Case for appeal.

The Case set forth—“1. The *facts* admitted or proved in this case, so far as necessary for the determination of the present questions, are as follows:—(1) The [respondent] William Taylor was a yearly tenant at a rent of £10, 10s. of subjects at Oldwhat, Brucklay, belonging to the [appellant] Alexander Dingwall Fordyce of Brucklay, and he made application to the Land Court on May 28, 1914, to be declared a landholder or a statutory small tenant and for consequent Orders, in terms of the Small Landholders (Scotland) Acts 1886-1911. (2) The said William Taylor and his father had since 1858 been tenants in succession of the holding specified in the application, which at the date of the application consisted of a dwelling-house and offices and 10½ acres or thereby of arable land. In the year 1858 the holding, consisting of 3 roods of arable land and about 10 to 11 acres of moorland, was let to the tenant's father on condition that he should reclaim this moorland and erect the necessary buildings on his holding. The tenant's father reclaimed nearly the whole of the moorland and erected the original buildings on the holding. The rent for the first eight years was 10s. per annum and for the next eleven years 5s. per acre per annum, amounting for 10 acres to £2, 10s. The sum of £10 was paid by the proprietor to the tenant's father to assist him with the erection of the buildings. In 1903 a new dwelling-house was erected by the proprietor, part of the walls of the old dwelling-house being utilised, and the tenant carrying out the carting and the excavations. Since then the rent of the holding has been £10, 10s. The greater part of the permanent improvements on the holding have been provided by the [respondent] and his father without receiving payment or fair consideration therefor. (3) The existing dwelling-house contains a room, closet, and kitchen downstairs, and two small bedrooms upstairs, the latter being occupied by two lodgers who are school teachers in the district where the holding is situated. The dwelling-house is not larger than would be

required as a dwelling-house for the holding in accordance with modern standards of comfort. (4) At the commencement of the Act of 1911 the tenant held and had held for many (probably forty) years a six-days' licence for the sale in the house (which is situated on and forms part of the holding) of porter, ale, beer, cider, and perry. The licence was described by the Commissioners of Customs and Excise as a ‘beer-house licence,’ and the certificate by the local authority was described as a ‘certificate for a public-house.’ No part of the house was or is specially adapted or fitted up for the purpose of an inn or hotel or public-house of any kind. Porter and ale were kept and sold to occasional customers. The amount of business done was very slight. There was a small signboard indicating the sale of porter and ale only. The dwelling-house contains no accommodation for entertaining or lodging travellers. The [respondent] has never entertained or lodged travellers or held himself out as entertaining or lodging travellers except in so far as selling porter or ale in terms of his licence and certificate may be called entertainment. There was nothing in the use or appearance of the house to suggest that a traveller could be accommodated with food or lodgings. Sale of porter and ale under licence and certificate had been carried on with the full knowledge and consent of the landlord, both in the older dwelling-house and in the existing dwelling-house. It was not maintained on behalf of the landlord and there was no evidence led to show that the tenant, assuming him to have been an innkeeper, had been placed in the district by the landlord for the benefit of the neighbourhood. For the purposes of the valuation roll and of the licence-duty the house and the land are separately assessed, the house at £4 per annum and the land at £6, 10s. per annum. The Court also held, as stated in their note, that ‘The partial and occasional use of part of the dwelling-house for what was an auxiliary or subsidiary occupation was both reasonable and entirely consistent with the cultivation of the holding.’

“2. Questions have arisen on these facts as to (1) whether the [respondent's] holding as being a holding let to an innkeeper is excluded from the Small Landholders (Scotland) Acts 1886 to 1911 by section 33 of the Crofters Holdings (Scotland) Act 1886, as amended by the Small Landholders (Scotland) Act 1911, section 26 (7), and (2) whether the holding is a ‘holding’ to which the Small Landholders Acts apply as such ‘holding’ is defined in the Agricultural Holdings (Scotland) Act 1908, section 35. . . .”

“3. The first of these questions involved the determination by the Land Court of the question whether the [respondent] was on the facts stated an ‘innkeeper’ in the sense of the Small Landholders Acts. On these facts as stated a single member of the Land Court (sitting as the Land Court) found by order, dated 9th December 1915, that section 33 of the Crofters Holdings (Scotland) Act 1886, as amended by section 26 (7) of the Act of 1911, excluded from its operation not only the keeper of an inn or hotel, but also the

keeper of a public-house or beer-house whether or not such house satisfied the Licensing Act definition of an inn or hotel, and accordingly refused the application. On appeal by the [respondent] the Full Court reversed the decision of its single member, and found in law by order, dated 31st July 1917, that he was not an 'innkeeper' within the meaning of section 33 of the Act of 1886 and section 26 (7) of the Act of 1911. On the second question whether the holding is a 'holding' as defined by the Agricultural Holdings (Scotland) Act 1908, section 35, the Land Court held that it was such a holding. The Land Court found and declared that the [respondent] was a landholder.

"4. The Land Court pronounced the following order:—*Edinburgh, 31st July 1917.*—The Land Court having heard parties and resumed consideration of the appeal, sustain the appeal: Recal the order of 9th December 1915 appealed against: Find that the applicant [respondent] is not an 'innkeeper': Find that the holding is not excluded from the operation of the Small Landholders (Scotland) Acts 1886 to 1911: Find and declare that the applicant [respondent] is a landholder in and of the said holding and entitled to have a fair rent fixed therefor, and before determining such fair rent continue the application in order that parties, if either of them so desire, should be heard as to the amount of the fair rent to be fixed: Find the appellant [respondent] entitled to expenses in the Court below and this Court until the date of this interlocutor, modified to seven guineas.—N. J. D. KENNEDY, ALEX. DEWAR, E. E. MORRISON.

"5. The [appellant] contends (1) that the said findings are erroneous in law in respect that the tenant was at the commencement of the Act of 1911 an innkeeper within the meaning of section 33 of the said Act of 1886 as amended by section 26 (7) of the said Act of 1911, and (2) that the fact that the tenant held and carried on the said licensed business on the holding makes the holding one to which the provisions of the Small Landholders Acts do not apply, in respect that the use of the house as an inn or beer-house makes the holding not either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, and that therefore the [respondent] cannot be legally declared a landholder or statutory small tenant under the said Small Landholders Acts.

"6. Section 33 of the said Act of 1886, as amended by section 26 (7) of the said Act of 1911, reads as follows, viz.—'Nothing in the Landholders Acts shall apply to any holding or building let . . . to any innkeeper or tradesman placed in the district by the landlord for the benefit of the neighbourhood.' It was maintained on behalf of the landlord that the words occurring after 'tradesman' qualified that word, but did not qualify the word 'innkeeper.' The Court, in view of their finding that the [respondent] was not an 'innkeeper,' did not find it necessary for the determination of the case to decide that question, but indi-

cated that they would, if necessary, have held that the word 'innkeeper' was so qualified.

"7. The [respondent] contends that his having held the said licence does not exclude him from being a landholder in respect, *inter alia*, that (a) he was not an innkeeper within the meaning of section 33 of the said Act of 1886 as amended as aforesaid, (b) that he was entitled as a landholder to carry on the said business as an auxiliary or subsidiary occupation, and (c) that in any case the word 'innkeeper' in the said section is qualified by the words following 'tradesman' in the said section, and that accordingly no proof having been led on that point it does not apply to him."

The note of the Land Court appended to the order of 31st July 1917 was as follows:— "The main point argued in this appeal was whether the applicant's holding is excluded from the Small Landholders (Scotland) Acts 1886-1911 by section 33 (as amended by the Act of 1911) of the Act of 1886 referred to in section 26 (7) of the Act of 1911. It involves three questions—1. Was the applicant at the date when the Act of 1911 would otherwise have applied to his holding an 'innkeeper' within the meaning of that section? 2. If he was, was the holding, or only the building or part of it in which liquors were sold, let to him as an 'innkeeper'? 3. Is it sufficient to exclude the holding or such building or part of such building that the applicant was an 'innkeeper' at the said date, or does the section also require that he shall have been 'placed' by the landlord in the district for the benefit 'of the neighbourhood'?"

"If the applicant is not an 'innkeeper' it is unnecessary to decide either the second question or either part of the third question whether the words last quoted govern 'innkeeper' as they certainly govern tradesman, or whether if they do it is proved that the applicant was placed by the landlord in the district for the benefit of the neighbourhood.

"The other point argued though not so much pressed was whether, apart from section 33, the subjects are not excluded from being a holding under the Act of 1911 by reason of the fact that the dwelling-house is used, not only for the primary purposes of a dwelling-house of a farm, but is also partially used for the sale under a beer-house licence or public-house certificate of porter and ale.

"The facts on which these points arise are as follows:— . . . [*vide Case supra*]. . .

"I. We may deal first with the point last mentioned. We think that if this holding is not excluded from the Act of 1911 by section 33 of the Act of 1886, the applicant is a landholder. It is not doubtful that as a landholder he would be entitled in a question with the landlord to continue selling porter and ale as he has been in the habit of doing, in virtue of both section 1 (8) of the Act of 1886 after mentioned and section 10 of the Act of 1911—which sections contain all the conditions of tenure of every landholder, old or new, under the Acts 1886-1911 (except such additional written conditions as the Land Court may find reasonable in

terms of section 1 (5) of the Act of 1886, or may sanction under section 7 (11) of the Act of 1911).

"If an inn or hotel were the principal subjects let and the land merely an auxiliary or subsidiary subject mainly for the use of the inn or hotel, the subjects would not be a holding under any of the Agricultural Holdings Acts 1883-1908, or under the Act of 1911, apart altogether from section 33. The case of *Mackintosh v. Lord Lovat*, 1886, 14 R. 282, 24 S.L.R. 202 (Agricultural Holdings Act 1883), is the best illustration of this class of case.

"But we are satisfied that this secondary, and more or less occasional, use of part of the dwelling-house for the sale of liquors excludes neither the holding nor the dwelling-house or any part of it from the operation of the Acts 1886-1911.

"If there had been on this holding a building fitted up for and appropriated to the sale of porter and ale in terms of the licence and certificate, the opinions of the Supreme Court in the cases of *Yool v. Shepherd*, 1914, S.C. 689, 51 S.L.R. 639, and *Young v. Marquis of Lothian's Curator*, 1915 S.C. 44, 52 S.L.R. 35, might have constrained us to hold either (1) that the applicant was thereby completely excluded from any benefit whatever under the Small Landholders Acts or under the general Agricultural Holdings Act 1908—in short, that he remained as liable to eviction and to confiscation of all improvements as any tenant before the first Agricultural Holdings Act (1883) passed; or possibly (2) that the applicant was so excluded only so far as the particular building with its site was concerned—an alternative which has found favour in some of the most recent opinions of the Supreme Court.

"But the facts in the applicant's case are quite different from the facts in *Yool v. Shepherd* and *Young v. Marquis of Lothian's Curator*.

"The 'Weaving Mill' in the former case was a separate and substantial building fitted up with looms at the commencement of the Act of 1911, used for no other purpose, separately specified in the tenant's lease, and not erected in whole or in part by the tenant or any statutory predecessor.

"In the latter case the building was a smithy, also separate and substantial, fitted up and used for no other purpose, and erected by the landlord.

"We had thought that, both in law and common sense and by general usage, the buildings in these cases were used for auxiliary or subsidiary occupation, such as were usual and reasonable among small farmers, beneficial to the neighbourhood, and in no way inconsistent with the cultivation of the holding, and therefore that the Act of 1911 clearly did not intend that such buildings, which the landlord is expressly authorised by section 10 of the Act of 1911 to use for any auxiliary or subsidiary occupation, and was so using with the landlord's consent at the date when the Act applied, should cut the whole holding out of the Small Landholders Acts and the Agricultural Holdings Act.

"But whether we were right or wrong in these two cases there is no law or decision or usage to forbid the use of any building on a holding, required and used for the primary purposes of the holding, for any usual or reasonable secondary purpose. So we have invariably held. Even if such secondary use were forbidden it would be in the highest degree unjust that the law should be stretched further and penalise such secondary use by exclusion of the tenant from all rights to a fair or equitable rent or to any compensation for any improvements, or other rights under any of the Acts passed for the benefit and relief of tenants.

"We are quite aware from our experience of the lengths to which some landlords have striven to extend their real or supposed legal rights, so as to shut out tenants, especially those who have made at their own expense extensive permanent improvements, from every benefit of these Acts.

"The argument presented, though not strongly pressed, in this case would logically exclude entirely from the Acts any holding on which the tenant or his family served tea or milk or light refreshments to wayfarers or other casual guests for money in the house or garden of the holding—a practice which has long prevailed without objection or reason for objection specially on holdings near holiday resorts or on routes much frequented by travellers. It has in some other cases been argued that if any farmer, large or small, does anything not directly connected with agricultural or pastoral purposes on his holding or in any building on it, which brings him profit, he is excluded from the Acts which would otherwise apply to the holding. If he takes a paying guest, or boarder, or pupil, or uses his dwelling-house for business as an insurance agent or agent for manures, or doctor, or we suppose if, like Burns or Hogg, he writes songs in his dwelling-house or any other building on the holding which bring him profit, it is argued, or follows from the argument, that he has thereby shut himself (by some implication or other) out of the statutory right to compensation for any permanent improvement, or security of tenure, or any right conferred by any Act on tenants of agricultural or pastoral or mixed holdings. In some other cases the landlord has claimed only a share of the profit derived from such secondary use. In a large number of the cases we are glad to say the landlord has not thought it right or just to make either a claim for exclusion of the whole holding or the lesser claim for a share of any such profits.

"II. On the main question argued we have after careful consideration come to be of opinion that the applicant is not an 'inn-keeper' within the meaning of section 33 of the Act of 1886 referred to in section 26 (7) of the Act of 1911.

"This is sufficient to dispose of the objection under section 33 and section 26 (7) of the Acts.

"If necessary for the decision of this case, which it is not, we should have been inclined to hold that the following and qualifying

words in section 33 apply to the 'innkeeper' as well as to the 'tradesman.' Nor is it necessary to determine whether if the applicant were an 'innkeeper' the holding was 'let' to him as an innkeeper or only the 'building' or the part of the building in which liquors were sold. Section 33 expressly distinguishes between 'holding' and 'building.'

"In the first place the Act of 1911 imperatively requires by section 36 that the Acts of 1886-1911 are to be read and construed together.

"Now it is clear that the Act of 1886 has expressly distinguished between an 'innkeeper' (section 33) and the tenant of a holding who uses 'any house on his holding for the sale of intoxicating liquors' (section 1 (8)). He cannot, after the Act of 1886 or the Act of 1911 (as the case may be) has first applied to his holding, 'open' any house on his holding for the sale of intoxicating liquors without his landlord's consent. But if at the commencement of the Act of 1886 (in the northern counties) or the commencement of the Act of 1911, or on the termination of his lease (if he was then a leaseholder under the Act of 1911), he is using 'any house' on the holding 'for the sale of intoxicating liquors,' then, according to section 1 (8), he is not by reason of such use either excluded from becoming a landlord or prohibited after he has become a landlord from continuing to use the house for such sale with or without his landlord's consent.

"This applicant at the commencement of the Act of 1911 was using the dwelling-house on his holding 'for the sale of intoxicating liquors,' and for no other purpose outside the primary uses of the dwelling-house on his holding.

"In the next place we think that according to the usual signification of the word 'inn,' both popularly and in Acts of Parliament, the applicant was not and is not the keeper of an 'inn.'

"As far back as this word can be traced in England and Scotland, either in popular or in statutory language, its essential specific character has been that an 'innkeeper' provides food and lodging, and not merely drink, for travellers and other members of the public.

"At one time the word 'inn' also included a special class of houses which provided lodgings and food for a limited class of the public, for example, the old 'Inns of Chancery' and the 'Inns of Court,' and to exclude these the expression 'common inn' began to be used, chiefly in English statutes.

"The word 'inn' came into use earlier in England than in Scotland. The older expression for the same kind of house which it superseded was 'hosterye' or 'hostel' or 'hostelry,' from which the modern 'hotel' is probably derived. 'Hotel' in modern usage, as observed by the Court in *Formby v. Barker*, 1903, 72 L.J. Ch. 716, *per* Vaughan Williams, L.J., at p. 719, means just a genteel inn.

"Until modern times an inn or hostelry or hostel or hotel usually provided accommodation and food, not only for travellers but for their horses. For example, in one

of the earliest Scots Acts, 1424, c. 24, it is ordained that 'in all burrow townes . . . there be . . . hostellares and receipters havand stables and chalmers to riders and gangers, and that men find with them bread and aile and uther fude als weil to horse as men for reasonable price.'

"But for many years before 1886 'inns' or 'hotels' did not always provide accommodation and food for travellers' horses, though men found and still find such accommodation and food in a considerable number of inns and hotels, especially in rural districts and market towns.

"Sometimes 'inn,' when used with reference to the duty to serve the public, is included under the term 'public-house' in its generic sense, both popularly and in statutes. For example in Jamieson's Dictionary of the Scottish language 'public-house' is explained as 'an inn, a tavern, or hotel,' and in Webster's New International Dictionary 'inn' is described as 'a public-house for the lodging and entertainment of travellers or wayfarers for compensation.' But in such cases 'inn' or 'inn and hotel' or 'inn or hotel' is recognised as a distinct species from houses where liquors are sold.

"For example, in the Act of 1853 (16 and 17 Vict. c. 67) for 'better regulation of public-houses,' section 17 defines public-house as including 'a common inn, ale-house, victualling-house, or other premises in which excisable liquors are sold by retail to be drunk.'

"The Act of 1862 (25 and 26 Vict. c. 35) distinguishes, for example, in section 8 between (1) inn and hotel, and (2) public-house, shop or premises for sale therein of spirits, wine, beer, or other excisable liquors. In section 37 it defines 'inn and hotel' as a house containing at least four apartments *set apart exclusively* for sleeping accommodation of travellers if situated in towns and suburbs and at least two such apartments if situated in rural districts and populous places not exceeding 1000 inhabitants.

"All licensing statutes carefully distinguish common inns or inns and hotels from ale-houses or victualling-houses, and the forms of licences and certificates are distinct and different (*e.g.*, 9 Geo. IV, c. 58 (1828), 44 and 45 Vict. c. 58, sections 104-5, and 3 Edw. VII, c. 25 (1903), specially section 107).

"The same distinction between 'inns,' 'inns or hotels,' 'inns and hotels' on the one hand, and ale-houses or houses of sellers of wines and other liquors on the other hand, is carefully observed in the Acts for billeting soldiers—for example, 44 and 45 Vict. c. 58 (sections 104-105).

"Only in one statute, and solely for the purposes of that statute, is a wider meaning assigned to the word 'inn'—the Innkeepers Liability Act for the further limitation of the common law liability for goods and property of guests (1863). Section 4 defines 'inn' as meaning in that Act 'any hotel, inn, tavern, public-house, or other place of refreshment the keeper of which is now by law responsible for the goods and property of his guests.'

"We assent to Mr Campbell's argument that this statute is an emphatic example of the exception which proves the rule. It

limits a liability which the edict and common law imposed for reasons of public policy upon a class which included many distinct kinds of keepers of houses in which refreshment was provided for the public. The Act prefaces its interpretation clause by the warning that the words which are defined for the purposes of the Act have 'in their ordinary signification a more confined or different meaning.'

"In decided cases the popular distinction between (1) 'inns and hotels,' or 'inns or hotels,' and (2) houses where liquor is sold, has been followed. A restaurant is not an inn or hotel. A 'vintner,' a designation still legible on signs in Aberdeenshire, is not an 'innkeeper'—Bankton, vol. i, p. 378.

"For example, in the leading case which raised the question whether the owner of a London tavern and coffee-house was an 'innkeeper' (*Thompson v. Lacy*, 1820, 3 B. & Ald. 283) the main test applied was, 'Did the owner provide beds as well as provisions for travellers in the way in which they are usually provided at inns.' In this case one distinction attempted to be set up between an 'inn' and this tavern and coffee-house was that the latter had no stables attached—an attempt which failed. As one of the judges observed, the owner did not merely furnish tea and coffee as the keeper of a coffee-house does, nor a table as the keeper of a tavern does, but he provided lodgings, and that in the way in which they are provided at inns. An innkeeper was bound, without making any special contract, to provide lodgings and entertainment for all at a reasonable price.

"In short, we think that the definition of an 'inn' in a modern law dictionary accurately expresses its usual signification in popular, legal, and statutory language—'An inn or hostel may be defined to be a house in which travellers, passengers, wayfaring men and other such like casual guests are accommodated with victuals and lodgings and whatever they reasonably desire at a reasonable price while on their way.' This is substantially taken from Wharton's Law Lexicon, *vide* 'innkeeper,' but more briefly expressed.

"If in the Act of 1886 or in the Act of 1911 the Legislature had intended that the word 'innkeeper' should have a wider meaning than its ordinary signification, nothing would have been easier than to omit or repeal section 1 (8) of the Act of 1886 and insert a definition of 'innkeeper,' as was done in the Innkeepers Liability Act 1863.

"Accordingly as the applicant was not at the commencement of the Act of 1911 an 'innkeeper' the objection fails; and the other questions arising under sections 33 and 26 (7) of the Acts of 1886 and 1911 need not be determined, though we rather think that 'innkeeper' as well as 'tradesman' is qualified by the general words following both. That is certainly the grammatical construction of the sections, and we are not convinced that there is any good reason for any other construction.

"We find that nothing has been proved

which excludes this holding from the operation of the Acts 1886-1911.

"As regards the present application and appeal, the question of what 'innkeeper' meant in section 33 of the Act of 1886 was not only a fair question to raise but one which has required some research and consideration before deciding as we have done.

"But as the applicant has succeeded along the whole line, he is entitled to expenses to date both in the Appeal Court and the Court below."

The questions of law for the opinion of the Court were—"1. Was the [respondent] at the commencement of the Act of 1911 an 'innkeeper' in the sense of section 33 of the Crofters Holdings (Scotland) Act 1886, as amended by section 26 (7) of the Small Landholders (Scotland) Act 1911? 2. If the first question be answered in the affirmative, is the [respondent's] holding excluded from the operation of the Small Landholders Acts only if it is proved that he was placed in the district by the landlord for the benefit of the neighbourhood? 3. On the facts stated, did the subjects of the application constitute, at the commencement of the Act of 1911, a holding to which the provisions of the Landholders (Scotland) Acts apply?"

Argued for the appellant—(1) The respondent was an innkeeper and as such was outwith the provisions of the Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict. cap. 29), sections 1 (8) and 33. The word "placed" in section 33 applied to "tradesman" and not to innkeeper. (2) The respondent did not come under the Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), for at 1st April 1911, when that Act came into operation, his holding was not a holding in the sense of that Act, for it was not wholly agricultural or wholly pastoral, or in part one and in part the other—section 33 (2), and Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64), section 35 (1). Section 10 of the Act of 1911 only applied if the holding was at 1st April 1911 a holding in the sense of the Act. *Yoole v. Shepherd*, 1914 S.C. 689, 51 S.L.R. 639; *Stormonth Darling v. Young*, 1915 S.C. 44, 52 S.L.R. 35, and section 26 (1) of the Act of 1911, were referred to.

Counsel for the respondent were not called upon.

LORD PRESIDENT—I am satisfied that the judgment of the Land Court and the reasons for it are sound. No flaw in the reasoning was detected, or attempted to be detected, by counsel for the appellant. In the first place I am of opinion that this man was not an innkeeper and that for the reasons stated by the Land Court. In the second place I am of opinion that if he were an innkeeper the words at the close of the 33rd section of the Crofters Holdings Act of 1886—"placed in the district by the landlord for the benefit of the neighbourhood"—apply to innkeepers as well as to tradesmen. In the third place I am of opinion that this is a holding to which the definition of the Act of 1908 applies as being "a piece of land held by a tenant which is either

wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, . . ." for the reasons given by the Land Court. It was a question of fact on which the Court were final.

I therefore propose to your Lordships that we should answer the questions as follows:—Question 1 in the negative; question 2 is superseded—if I were called upon to answer it I should answer it in the way suggested in my opinion; and question 3 in the affirmative.

LORD JOHNSTON—I agree with your Lordship that the applicant here is not either in ordinary parlance or in the sense of the statute an innkeeper. The keeping of an inn involves the providing lodging for customers and not merely the supply of liquors or other refreshments. Accordingly the first query follows to be answered in the negative and the second query is superseded.

In support of his contention on the third query I understood the applicant to maintain that a distinction was to be drawn between the situation before and after April 1911. The applicant, on the facts stated, keeps a public-house, better described by the term alehouse, the custom of which is of the smallest. This business, if it can be dignified by that name, is a subsidiary occupation to that of crofting in the sense of the Act, and it is quite clear that once he is found to be a qualified landholder he is entitled to carry on that subsidiary occupation on his holding provided he retains his licence. But it is maintained that if he has been carrying on that occupation on the subjects forming the holding prior to the Act coming into operation, that fact precludes him taking advantage of the statute, because his holding as at the date of the Act coming into operation does not comply with the definition of the statute. I think that this contention is wholly without foundation and only requires to be stated to be rejected. I think, therefore, that the third question falls to be answered in the affirmative.

LORD MACKENZIE and LORD SKERRINGTON concurred.

The Court answered the first question of law in the negative and the third in the affirmative.

Counsel for the Appellant—Mitchell, Agents—W. & J. Cook, W.S.

Counsel for the Respondent—Macphail, K.C.—A. M. Stuart. Agents—W. Marshall Henderson, S.S.C.

Friday, July 19.

FIRST DIVISION.

[Lord Sands, Ordinary.]

SELLAR v. HIGHLAND RAILWAY COMPANY AND OTHERS.

(*Vide supra* at p. 593.)

Contract—Arbitration—Implied Term—Damages—Obligation of Company Appointing Arbitrator to Satisfy Themselves that Arbitrator not Disqualified—Lands Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 19), secs. 23 and 24.

In an arbitration the arbitrator appointed by one of the parties, a railway company, held stock in that company; the other party reduced the decret-arbitral on the ground that the arbitrator referred to was disqualified, and claimed the expenses incurred by him in the abortive reference. *Held* that he was entitled to recover his expenses *per* Lord Johnston, Lord Mackenzie, and Lord Skerrington in respect that the defenders had failed to satisfy themselves from information in their possession that the arbitrator appointed by them was not disqualified; *per* the Lord President in respect that they did not and could not aver that they were unaware of the disqualification when they appointed the arbitrator.

The Lands Clauses (Scotland) Act 1845 (8 and 9 Vict. cap. 19) enacts—Section 23—"If the compensation claimed or offered in any case shall exceed fifty pounds, and if the party claiming such compensation desire to have the same settled by arbitration and signify such desire to the promoters of the undertaking . . . the same shall be settled by arbitration in the manner hereinafter provided." Section 24—"When any question of disputed compensation . . . required to be settled by arbitration shall have arisen then unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator, to whom such dispute shall be referred, . . . and such appointment shall be delivered to the arbiters and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made, and after any such appointment shall have been made neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as such revocation, and if for the space of fourteen days after such dispute shall have arisen, and after a request in writing, in which shall be stated the matters so required to be referred to arbitration, shall have been served by the one party on the other party to appoint an arbitrator, such other party fail to appoint an arbitrator, then upon such failure the party making the request and having himself appointed an arbitrator may appoint such arbitrator to act on behalf of both parties, and such arbitrator may proceed to hear and determine the matters