said wife amounting to one hundred and twenty pounds sterling annually so long as she remains my widow, and after her decease the said sureties may be realised and divided equally between my nephews and nieces, or, if agreed to amongst themselves, the said sureties may be held on their joint account, and the interest arising therefrom divided amongst them till the youngest of them attains their majority." The residue of his estate he bequeathed to his brothers equally amongst them.

After this will was discovered Mrs Munro elected to abide by the provisions in the marriage-contract which gave her the life-rent of her husband's whole estate, and thus the provision for an annuity to her of £120 contained in the will was not acted on. She died on 1st July 1898, and down to the date of her death the marriage-contract trustees continued to manage and administer the whole trust estate.

After Mrs Munro's death questions arose as to the amount carried by the bequest to the testator's nephews and nieces of the capital funds which in his will he directed to be set aside to meet the annuity of £120.

For the settlement of the point a special case was presented to the Court by (1) the marriage-contract trustees, (2) the nephews and nieces of the testator, and (3) John Munro, one of the testator's brothers. The second parties maintained that their bequest under the will amounted to £4000, which the parties were agreed was the capital required to yield £120 per annum at the lowest rate of interest on trust investments prevailing during the viduity of Mrs Munro, and which was obtainable at her death. Alternatively, they maintained that said bequest amounted to £3521, 4s. 7d., which the parties were agreed was the capital required to yield £120 per annum upon trust investments according to an average of the rates of interest current during the viduity of Mrs Munro. On the other hand, the third party maintained that the provision to the nephews and nieces should not exceed the sum of £3500, which the parties were agreed was the capital required to yield £120 per annum upon trust investments according to current rates of interest at the decease of William Munro.

The questions at law were—(1) Is the amount of the bequest to the nephews and nieces of the testator the said sum of £4000? or, Is it the said sum of £3521, 4s. 7d.? or, Is it the said sum of £3500?

Lord Justice-Clerk—I am of opinion that the first alternative of the first question must be answered in the affirmative. I think that the trustees were bound during the widow's viduity to set apart and safely invest a sum sufficient to yield year after year an annuity of £120. It might happen that in some years the interest would exceed that sum, but if such a thing occurred, then the surplus would just accrue to residue. The trustees could not tell the exact rate of interest money would yield from year to year, and they were bound to consider what sum would require to be set aside in order on a fair calculation to secure a yield of £120. In setting aside £4000 I think that they would have acted with perfect propriety.

Lord Young, Lord Trayner, and Lord Moncreiff concurred.

The Court answered the first alternative of the first question in the affirmative, and the second and third alternatives in the negative.

Counsel for the First and Second Parties — Cullen. Agents — Macrae, Flett, & Rennie, W.S.

Counsel for the Third Party — Cochran Patrick. Agents — Calder Marshall & Walker, W.S.

Wednesday, June 21.

FIRST DIVISION.

[Lord Kincairney, Ordinary

SITWELL *v.* MACLEOD.

Process—Appeal to Court of Session—Exclusion by Statute—Crofter—Competency of Reduction—Crofters Holdings (Scotland) Act 1880 (49 *and* 50 *Vict. cap.* 29), *secs.* 21 *and* 25.

By the 21st section of the Crofters Holdings Act 1886, which deals with the procedure for enlarging holdings, it is provided that "In the event of any dispute arising as to whether a person is a 'crofter' within the meaning of this Act, it shall be competent for the Commissioners to determine such question summarily." Section 25 enacts that the Commissioners' decision "in regard to any of the matters committed to their determination shall be final."

In an application to the Commissioners for an order to fix a fair rent on a holding, the landlord objected to the competency of the application on the ground that the applicant was not a crofter within the meaning of the Act. The Commissioners pronounced an order finding and declaring that the applicant was a crofter, and by a further order fixed a rent for the holding.

In an action at the instance of the landlord for the reduction of these two orders, and for the removal of the defender from his holding — *held* that while the question whether an applicant was a crofter was one which the Commissioners had power to decide summarily, as incidental to matters properly committed to their determination, it was not itself such a matter, and that accordingly the limited jurisdiction in regard to it conferred upon the Commissioners was not exclusive of the general jurisdiction of the Court of Session.

Question, whether the conclusions for

reduction of the two orders constituted an appropriate or competent remedy for the pursuer.

This was an action at the instance of Mr Robert Sitwell of Strathkyle, Ross-shire, against William Macleod, Easter Kilmachalmack, on the estate of Strathkyle, concluding for reduction of "(first) an order or pretended order bearing to be pronounced and issued by the Commissioners appointed and acting under and by virtue of the Crofters Holdings (Scotland) Act 1886, and the application presented to the said Commissioners for and in name of the said defender on which the said order was pronounced and issued, by which the said Commissioners sustained the competency of the said application, and found and declared the defender to be a crofter in terms of the said Act; and (second) an order or pretended order bearing to be pronounced and issued by the said Commissioners, by which order the said Commissioners fixed and determined a fair rent for his alleged holding, all in terms of his said application, or of whatever other date, tenor, or contents the said pretended orders may be;" and for declarator that the orders had from the beginning been null and void. There was a further conclusion for the removal of the defender from the farm and lands of Easter Kilmachalmack. The orders in question were in the following form:—"*Dingwall, 20th May* 1897.—The Commissioners having heard parties, and considered the parole and documentary evidence adduced, Finds the competency of the application objected to on the ground (1) that the applicant held under lease for a term of years current at the passing of the principal Act; and (2) that his application is excluded by section 33 of the said Act, in respect he was an estate servant, and that the tenure of his holding depended upon his tenure of service: Repel both objections under reference to the annexed note: Sustain the competency of the application, and find and declare that the applicant is a crofter within the meaning of the principal Act: Find no expenses due to or by either party." "*Eo die et loco.*—The Commissioners having resumed consideration of this application, and having considered all the circumstances of the case, holding, and district, including any permanent or unexhausted improvement on the holding, and suitable thereto, executed or paid for by the applicant or his predecessors in the same family, have determined, and hereby fix and determine that the fair rent of the holding is the annual sum of five pounds sterling: Find no expenses due to or by either party."

The pursuer averred that the defender held the lands from 1874 to 1893 as tenant under a nineteen years' lease granted by the former proprietor of Strathkyle, and that since the expiry of the lease he had held under tacit relocation; that on 11th February 1897 the defender presented an application to the Crofter Commissioners for an order to fix a fair rent for these subjects; that the pursuer objected to the competency of the application on the grounds specified in the first order. The pursuer further averred that on 20th May 1897 the Commissioners repelled his objection and issued the two orders which he sought to reduce in the present action, and that he had served the defender with a notice of removal as at Whitsunday 1897, but that he had refused to remove.

The defender averred that he did not possess under the lease, and that notwithstanding it he was a crofter.

He pleaded—"(2) *Res judicata.* (3) The Crofters Commission having decided that the defender is a crofter, and having fixed the value of his holding, the present action is excluded by the finality clause of the said statute."

By section 34 of the Crofters Holdings Act 1886 (49 and 50 Vict. c. 29) it is provided—"In this Act 'crofter' means any person who at the passing of this Act is tenant of a holding from year to year, who resides on his holding, the annual rent of which does not exceed thirty pounds in money, and which is situated in a crofting parish, and the successors of such person in the holding being his heirs or legatees." Section 1 of the Act provides that "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." . . . Section 20 provides that "when an application is made to the Crofters Commission to fix a fair rent, intimation thereof shall be given to the other party interested in the holding, landlord or crofter as the case may be, and the Crofters Commission shall appoint a time and place at which parties shall be heard in reference to the matter of the application." In section 21, which provides for the procedure in enlarging holdings, it is enacted— . . . "It shall also be competent to the Commissioners to decide summarily any questions relating to the boundaries or marches between crofters' holdings, including grazings, or between crofters' holdings, including grazings and adjoining lands. In the event of any dispute arising as to whether a person is a 'crofter' within the meaning of this Act, it shall be competent for the Commissioners to determine such question summarily." Section 25 provides that "The decision of the Crofters Commission in regard to any of the matters committed to their determination by this Act shall be final."

On 14th July 1898 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Finds in terms of the defender's third plea-in-law that 'the Crofters Commission having decided that the defender is a crofter, and having fixed the value of his holding, the present action is excluded by the finality clause of the said statute:' Dismisses the action, and decerns," &c.

Opinion.—"This action of reduction of (1) an order by the Commissioners under the Crofters Act finding and declaring that the defender is a crofter; and (2) an order fixing his rent for his holding, has been brought, I understand, for the purpose of obtaining a decision on the questions

whether it falls within the competency of the Commissioners to pronounce the former finding, and whether their determination as to both findings is final. No order has been taken to satisfy the production, and therefore the defences must be regarded as preliminary.

"The defender presented an application dated 11th February 1897 in ordinary form for an order to fix a fair rent on the holding specified. The pursuer states that he objected to the competency of the application on the grounds (1) that the defender was not a crofter, being a tenant under lease at the date of the Act; and (2) that the Act did not apply because the defender had been the pursuer's servant, and the case fell under section 33 of the Act, and the pursuer sets forth that the Commissioners repelled these objections and pronounced the orders under reduction.

"It is provided by the 21st section of the Crofters Holdings Act that 'in the event of any dispute arising as to whether a person is a crofter within the meaning of this Act, it shall be competent for the Commissioners to determine that question summarily.'

"I apprehend that when the dispute between the pursuer and defender came before the Commissioners, it was their duty to decide it in one way or the other, or at all events, it was competent for them to do so. It seems to me that they were under no obligation, and that it was not their duty to refuse to decide the question. It may be within their right and discretion in exceptional cases to take that course, and to decline to deal with the petitioner's application until the question whether he was a crofter or not was tried in the Court of Session. I suspect that if the Commissioners took that course habitually it would hardly be possible to carry the Act into effect. Therefore I think that the orders complained of were competently pronounced.

"The 25th section of the Act provides—'The decision of the Crofters Commission in regard to any of the matters committed to their determination by this Act shall be final.

"I think that the questions determined by the orders under reduction were matters committed to the determination of the Commissioners, and I see no escape from the conclusion that their decision is final. Whether it was in accordance with our customary principles and practice to commit such matters to the determination of the Commissioners is a point with which I am not concerned.

"The pursuer referred to the opinion of Lord M'Laren in the case of *Stuart & Stuart* v. *Macleod*, December 8, 1891, 19 R. 223, in which his Lordship expresses the opinion that if a dispute arises with the landlord on the point whether the applicant is a crofter, that cannot be decided by the Commissioners, but only by the ordinary courts of the country. With much respect I am unable to reconcile that opinion with what appears to me to be the unambiguous language of the Act.

"In *Dalgleish* v. *Livingstone*, June 12, 1895, 22 R. 646, I, as Lord Ordinary, held that a deliverance of the Crofters Commission, which I thought involved a finding that the defender was a crofter, was final. My judgment was recalled, because the Court held that the point had not been decided by the Commissioners. Lord Rutherfurd Clark, who delivered the judgment of the Court, expressly reserves the question in his opinion. At the same time, at the close of his judgment, he indicates a doubt which certainly is not favourable to the opinion which the words of the Act appear to me to necessitate.

"I may say, to prevent misapprehension, that my judgment decides nothing except that the orders of the Commissioners cannot be reduced, and must stand for what they are worth, and does not decide one way or the other whether these orders could be pleaded as *res judicata*, or as a conclusive defence to an action of declarator that the defender was not a crofter."

The pursuer reclaimed, and argued—It was not a question remitted to the Commissioners to decide directly whether A B was or was not a crofter, but they had taken upon themselves to say that the defender was a crofter. As a rule the question was never raised, and the Commissioners did not require to pronounce a formal interlocutor. It was only incidentally in the discharge of the administrative functions entrusted to them, that is, under sec. 21, that they might have to decide the question whether an applicant was or was not a crofter. Accordingly, the finality clause would not apply so as to prevent review of a decision upon a point which was only incidentally determined by the Commissioners in an application for a specific purpose—*Traill's Trustees* v. *Grieve*, July 11, 1890, 17 R. 1115, at 1120; *Livingston* v. *Beattie*, March 19, 1891, 18 R. 735; *Stuart & Stuart* v. *MacLeod*, December 8, 1891, 19 R. 223; *Dalgleish* v. *Livingston*, June 12, 1895, 22 R. 646. But if there were two fair readings of the statute, and that taken by the respondent ousted the jurisdiction of the ordinary courts of the country, the Court should adopt the view of the reclaimer, and not grant to the Commissioners the very wide powers claimed for them.

Argued for respondent — The Commissioners were in no worse position even apart from the finality clause than the Railway Commissioners. The Court might correct any excess of jurisdiction by them, so if the pursuer could bring his case up to this, that the Commissioners could not determine whether either of the litigants had the *status* claimed by him, he might come here to correct such determination. But he could not state his case as high as that, since under sec. 21 the Commissioners were expressly empowered to decide this question. Nor was their power limited to applications under that section. When therefore the dispute between the parties came before the Commissioners, it was their duty to decide the question whether the defender was a crofter. That question

having been competently decided by them, it was one of the matters committed to their determination by the Act, and accordingly review was excluded by sec. 25. The Act must not be treated as if it were divided into small sections, and as if the finality clause only applied to one part of it—*Nelson* v. *M'Phee*, October 17, 1889, 17 R. (J.C.) 1. Moreover, the pursuer having submitted himself to the jurisdiction of the Commissioners, had prorogated jurisdiction and was barred from trying to reduce the two orders. The declaratory conclusions in the summons here were quite superfluous and inapplicable—*Duke of Argyle* v. *Cameron*, November 24, 1888, 16 R. 139.

Lord President—The pursuer seeks to remove the defender from a small farm on his estate. The pursuer alleges that the defender held the lands from 1874 to 1893 as tenant under a nineteen years' lease, and that since its expiry he has held under tacit relocation. The lease founded on is produced, and is signed by the defender.

To this the answer is that the defender did not possess under the lease, that the defender is a crofter having fixity of tenure, and that this has been finally determined by the Crofters Commission by certain orders which are now produced. The application to the Crofters Commission, in which those orders were pronounced, was an application to fix a fair rent, and a fair rent was fixed. In the course of this proceeding the question was raised whether the defender was a crofter, and the Commissioners, before fixing the fair rent, decided that he was a crofter, and pronounced and signed a deliverance declaring him to be a crofter. The defender says that this is final, and that it is incompetent for this Court, for any purpose, to open the question whether the defender is a crofter. The validity of this plea has now to be considered, and it must be considered with reference to the question raised by the pursuer.

Under the Crofters Act 1886 a crofter is defined to be (I omit the conditions not affecting the present question) a person who at the passing of the Crofters Act was tenant of a holding from year to year. A leaseholder is therefore not a crofter, because he holds for a term of years, and not from year to year. Now, the pursuer alleges that in 1886, when the Act passed, the defender was a leaseholder holding his farm under a lease; and if this be the fact, the defender was certainly not a crofter, and accordingly is not protected against removal by the 1st section of the Crofters Act. It follows also (although from the pursuer's point of view this is merely historical) that the defender was not entitled to have a fair rent fixed. The fact, says the pursuer, that the defender got from the Crofters Commission what he was not entitled to, viz., a fair rent, does not give him fixity of tenure. The question thus raised requires some attention.

It may be convenient to start from the finality clause founded on by the defender. "The decision of the Crofters Commission in regard to any matters committed to their determination by this Act shall be final." What, in the sense of this section, are the matters committed to the determination of the Commission? and to what effect are the determinations final?

Now, there are certain matters about which the Act directly confers privileges on the objects of its beneficence, and others on which it allows them to approach the Commissioners, and directs the Commissioners to administer. Take the subject of the first clause—fixity of tenure. Here the privilege is conferred directly on the crofter; and no intervention of the Commission in the case of the individual crofter is required. It is true that the Commission had first of all to settle what were the crofting parishes; but the area of the Act's application being ascertained, the Act works automatically so far as fixity of tenure is concerned. The Act itself defines "crofters," and itself confers on crofters the right to remain on their holdings on certain conditions.

So completely clear of the interference of the Commission is this part of the Act, that if the crofter violates one of the statutory conditions, the jurisdiction to remove him, and therefore to determine whether he has lost his fixity of tenure, is with the Sheriff.

If, then, the Act had consisted solely of the sections conferring fixity of tenure, it is perfectly plain that the question whether a man is a crofter or not would be for the courts of law.

The other two leading privileges conferred on the crofters do require the intervention of the Commission—fair rent and enlargement of holdings. From the nature of the things, and from the description of them given in the Act, the duties of the Commission are, in those matters, of an administrative character. They have to act as the fair and benevolent landlord or land agent would act in estate management, are to take into account all sorts of circumstances, and then fix what shall be the rent or what shall be the holding.

When we turn to the composition of the Commission we find that it is fitted to deal with matters of estate-management in the Highlands. One of the Commissioners requires to speak Gaelic; one must have had such an experience as presumes some knowledge of law; no other qualifications are prescribed, and, as matter of fact, the two lay Commissioners have been gentlemen accustomed to country matters. There is no provision (such as we have seen in other statutes) that the opinion of the lawyer shall prevail in matters of law, and no provision (such as again we have seen in other statutes) for questions of law being settled on stated cases. All this is quite in accordance with what one would expect if the Commission has administrative work to do and only incidentally touches legal questions.

Now, it is in matters committed to their determination by the Act that the Commission are to be final. The main matters so committed are matters which no Court

of law could profitably or successfully deal with—questions as to what shall in future be the rent of this farm, and what shall in future be the boundaries of the other.

It is true that incidentally to the settlement of those matters the Commissioners may have to encounter and to decide legal questions; and decide them they must if they are to accomplish the matter in hand. Thus this very question, Is A B a crofter? may quite naturally arise, either in an application to fix a fair rent or in an application to enlarge holdings. Apart from any specific enactment, and reading section 20 as it stands, I should say it was necessarily within the competency of the Commissioners, in dealing with an application for fixing a fair rent, that they should make up their minds, if the question arose, whether the applicant was a crofter or not. But then in section 21, which relates, primarily at least, to enlargement of holdings, the Commissioners are expressly authorised in the event of any dispute arising as to whether a person is a crofter within the meaning of the Act, to determine such question summarily. I think this power would have been inferred from the context, as regards enlargement of holdings, equally as in the case of fixing fair rent. As the section stands there is the express power, evidently intended to encourage the Commissioners not to be deterred by this question being raised, bidding them not to wait till it is settled in a law court but to go on and settle it summarily for themselves, and proceed with the application. The enactment in question is merely in aid of the administrative work of the Commission, and this is its place in the scheme of the Act, whether it be read with reference to section 21, or with reference to sections 20 and 21.

The contention of the defender is based on an opposite view. In order to apply the finality clause to the summary determinations of the Commissioners as to whether a man is a crofter or not, they require to rear up the subjects of those incidental and summary determinations into matters separately, substantively, and for all purposes committed to their determination in the sense of section 25. They say that because, incidentally to fixing his rent, the Commissioners held the defender to be a crofter, this has the effect of finally bringing him within the Act and giving him fixity of tenure.

I am unable to accept this view. I think, in the first place, that section 25, in its widest extension has no such effect. Primarily the matters committed to the determination of the Commission are the administrative duties which I have already described. On these they are final. But even allowing the words of section 25 to apply to the incidental matters which are committed to the summary determination of the Commissioners, that finality can only apply to those incidental determinations in their place as steps to the conclusions arrived at, viz., a certain fair rent, or a certain enlarged holding.

The matter may be illustrated in this way. Suppose a man was quite content with his rent and wanted no enlargement of his holding and yet went to the Commission and asked them neither to fix his rent nor to enlarge his holding, but solely and baldly to declare him to be a crofter, I say that the Commissioners have no jurisdiction to entertain his application and would be bound to refuse it. There is no warrant for it in the statute. Suppose they did entertain it and declared the applicant a crofter, I say their declaration is worth nothing. Now, it would be very singular if the incidental determination of this same question in an application for a specific purpose had an absolute and universal effect.

Accordingly, on a review of the statute I find that the enactments founded on by the defender are satisfied by a construction which leaves open to decision in a court of law whether a man is a crofter or not, the question being whether he has fixity of tenure or not. The Commissioners are authorised to deal with the question whether a man is a crofter or not only when it occurs in the course of their work and for the purposes of their work. The fact that they are expressly told to deal with it summarily seems to me to add to the difficulty of holding that, for all purposes, and purposes external to the ambit of their duties, they, substantially a lay body, are the final judges of the many serious legal questions concerning rights of long duration which may arise under these sections.

My opinion is, therefore, that the fact that the Crofters Commission have, in a proceeding before them, held the defender to be a crofter does not preclude a court of law from considering that question when it is raised in an action of removing, brought on the averment that at the date of the Crofters Act the defender was a leaseholder and therefore not a crofter. This opinion will be given effect to if your Lordships repel the defender's second and third pleas-in-law. The case will then go back to the Lord Ordinary. It may be well, however, to point out that the summons as it stands is ill adapted to give effect to the pursuers' rights, assuming him to be well founded in asserting that the defender was in fact a leaseholder in 1886. Upon that theory his natural action was a removing prefaced or not by a declaration that in 1886 the defender held the farm under the lease and was not and is not now a crofter under the sense of this Act. He might indeed quite well (according to a well-known and convenient practice) have inserted reductive conclusions, if he deemed such necessary, introduced by such words "and if need be," which would manifest that those conclusions were intended merely to parry a possible defence. The pursuer has however made his action primarily one of reduction, and his conclusion for removing reads as if this were only asked if decree of reduction were first obtained. Now, I say no more than that I see no room for argument as to whether both or either of the orders require reduc-

tion for the pursuer's purposes, and whether the present averments infer their reduction. The pursuer will probably consider whether he can competently amend the summons so as to avoid such questions which there is no occasion to raise, or if he cannot amend the summons whether he should not abandon this action and bring one which will try the question without unnecessary complication and prejudice. If, however, the action goes on as it stands, all such questions will be for the Lord Ordinary to decide.

LORD ADAM—On the 19th February 1897 the defender presented an application to the Crofter Commission to have a fair rent fixed for a certain holding of which he was in possession. The pursuer appeared in the application and objected to its competency, in respect, as he alleged, that the defender was not a crofter in the sense of the Crofters Act. In the course of the proceedings which followed, the Commissioners pronounced two orders, both dated 20th May 1897.

By the first of these orders they found and declared that the applicant was a crofter in the sense of the principal Act, and by the second they fixed and determined that the fair rent of the holding was the annual sum of £5 sterling.

By the present action the pursuer seeks to have reduction of both of these orders. The Lord Ordinary has dismissed the action on the ground that the determination of the Commissioners as regards both of them is final and not subject to review.

This judgment is founded on the 25th section of the Crofters Act, which provides that the decision of the Crofters Commissioners in regard to any of the matters committed to their determination by the Act shall be final.

The question therefore is, whether these orders are in regard to matters committed to the determination of the Commissioners, in the sense of the 25th section of the Act. As regards the matter of fair rent for the holding, that is a matter committed to the determination of the Commissioners, and, assuming the defender to be a crofter, their decision as regards that matter is certainly final. But the question remains whether the decision of the Commissioners that the defender is a crofter is final.

Now, there are various matters committed to the determination of the Commissioners by the Act, such as the resumption of land by the landlord, the fixing of a fair rent, the enlarging of holdings, with regard to which it is declared that an application may be made to the Commissioners, but nowhere do I find in the Act that a person may apply to the Commissioners to have it found and declared that he is a crofter within the meaning of the Act. No doubt there is a clause in the 21st section of the Act, which provides that, in the event of any dispute arising as to whether a person is a crofter within the meaning of the Act, it should be competent for the Commissioners to determine such question summarily. But this clause appears to me to refer to procedure, and merely to empower the Commissioners, for the purposes of the case before them, to determine whether an applicant is a crofter or not, So in this case the Commissioners had power, for the purpose of fixing a fair rent, to determine that the defender was a crofter. But this does not imply that this was a matter committed to their determination in the sense of the 25th section of the Act, in regard to which only is their decision final. As I have already said, the Act does not authorise an application to the Commissioners for any such purpose. If that be so, then it is sufficiently clear that the jurisdiction of the ordinary courts to determine whether a person is or is not a crofter, is not ousted, and I agree that the case should be disposed of as your Lordship proposes.

LORD M'LAREN—I am also of opinion that power has not been given to the Crofter Commissioners to determine finally whether an individual occupier of land is a crofter or an ordinary tenant, although for the purposes of performing the duties assigned to them by the statute the Commissioners necessarily have power to consider and form an opinion upon which they are to act as to whether the case is one falling within their statutory powers. I come to this opinion, first, upon the consideration that to a very large extent the rights given by the statute to persons designed as crofters are given independently of the exercise of the Commissioners' powers; secondly, from a consideration of the character of the Commission, which is not a court of law but an executive Commission, and constituted with reference to executive duties, and again, because in more than one of the cases which have come before the Court, and particularly in the cases of *Traill's Trustees* and *Stewart* v. *Macleod*, it has been assumed or stated that the Commissioners are not vested with any legal authority to determine whether a tenant is a leaseholder or a crofter. The most important consideration of course is that depending upon the construction of the Act. Now, this statute is divided into various sub-divisions to which appropriate sub-titles are prefixed. Under a recent decision of the House of Lords in a case upon the Factors Act these sub-titles are to be considered as part of the Act. Under the first sub-title, "Security of Tenure as Crofter," a person fulfilling the definition of a crofter is declared to be irremovable provided he complies with certain conditions, and it is perfectly clear that the Commissioners have nothing to do with the right thereby conferred. Provided the crofter is satisfied with his rent, and does not desire any enlargement of his holding, then he has security of tenure, independently of the Commission, under the first sub-title. But this is not all. Under the second sub-title, which is headed "Rent," there is a clause which gives a crofter an important right independently of the Commissioners, and that is, that (section 5) if his rent is altered by agreement between

himself and his landlord, even for a definite period, that must remain the rent in all time coming unless and until an application be made to the Crofters Commission to alter it. Then there is a third sub-title — "Renunciation of Tenancies"—under which a crofter is empowered to put an end to his tenure although no corresponding right is given to the landlord. Then, passing over the fourth head, we come to sub-title 5, "Enlargement of Holdings," and under this title we have the clause regulating Bequests of Holdings, where provision is made for the transmission of the perpetual tenure given to the crofter, and the execution of this clause is committed, not to the Crofter Commission but to the Sheriff. It is only when we come to the sixth sub-title, "Crofters Commission," that we find procedure with reference to fixing fair rent and enlarging holdings, in which occurs the paragraph founded upon by the defender, that in the event of any dispute arising as to whether a person is a crofter within the meaning of this Act, it shall be competent for the Commission to determine the question summarily. If this proviso be interpreted with reference to the section in which it occurs, and the immediately preceding section, as being a power given to the Commissioners for the explication of their jurisdiction, the whole statute is intelligible and consistent, but if it is to receive a more extended meaning, then it appears to me that we must face this extraordinary result, that with regard to all the more important rights conferred by the statute, the ordinary courts of law are to determine disputes arising under these rights, but that after the right is established, if the crofter applies to have his rent reduced or his holding enlarged, then what is already determined by the statute, or by the decision of a court of law, may be unsettled by an application to the Crofters Commission, and unsettled not only for the purpose immediately in view but for all purposes. I think that such a construction of the Act is altogether inadmissible. The whole question is one of construction of the provisions of the statute, which can only be determined upon a review of all its clauses, and I am prepared to concur in the judgment proposed.

Lord Kinnear—I agree with your Lordships. The Act of Parliament confers upon the persons whom it defines as crofters certain very special and abnormal rights, which cannot be explicated by any ordinary legal process known to the courts of this country, or in any other way than by the exercise of a discretionary power which has been committed to the statutory tribunal which the Act itself has created for that purpose. But then the statute confers also upon crofters very valuable rights which are perfectly complete and defined by the Act itself, and which are, beyond all question, enforceable by the ordinary courts of law; and the right which we are required to construe in this action—that of fixity of tenure—is one of these. The statute provides that crofters shall not be moved from their holdings except on certain specific grounds, which we do not require to consider at present; and if a crofter has been perfectly satisfied with his rent and title, and withthe extent of his holding, and has had no occasion to apply to the Crofters Commission at all, he, nevertheless, has this valuable right under the statute itself, and I presume there can be no question at all that if it were proposed to turn such a person out of his holding he would be entitled to appeal to the ordinary courts of law to maintain him in it. The statute confides no special powers to the Crofters Commission exclusively or at all for that purpose, and does not, so far as I see, commit to the Crofters Commission any jurisdiction to maintain crofters in their holdings. But, then, in the exercise of the discretionary powers which are committed to them it was inevitable, as your Lordship has pointed out, that the Commissioners should find themselves face to face occasionally with the question whether the person who was applying to them in the exercise of these powers was really entitled to do so or not; and when the question arises, and for the purpose of the application which they have to consider, the statute says that they are to determine the dispute in a summary way. I am disposed to read that clause as extending, not only to the particular application with which the section in which it occurs is concerned, namely, proceedings for enlargement of holding, but also to the provision defining the procedure for fixing a fair rent. I think that when the question arose before the Commissioners, by a dispute between the landlord and the person appealing to them for a fair rent, whether such person was a crofter or not in the sense of the Act, it was essentially necessary for them to decide that question and dismiss the application or go on according to their own judgment. Now, these being the two kinds of questions that may arise under the Act, on the two different kinds of rights which the Act creates, the question is whether the finality clause, by which the decision of the Crofters Commission in regard to matters committed to them is made final, is applicable to one only or to both of these separate kinds of rights. I am of opinion with your Lordship that it applies only to those manifestly committed specially by the Act to the Commissioners, and which are, from the nature of the thing itself, necessarily committed to their exclusive cognisance. Courts of law have no means of determining whether holdings ought to be enlarged or not, or of determining what are the fair rents for any particular crofters to pay; and accordingly the statute which gives the crofters rights of that kind for the first time does not commit the determination of these matters to the courts of law but to thespecialCommission. But thejurisdiction of the ordinary courts, and especially the jurisdiction with which we are concerned—the general jurisdiction of this Court to determine questions of civil right—is in no way in any part of the statute taken away so far as I can find. The effect of the

finality clause, therefore, if your Lordships were to adopt the construction of the defender—the construction the Lord Ordinary has sanctioned—would be that the statute has given to an administrative body an absolute and uncontrolled authority to determine questions of civil right which the statute itself assumes to be proper for the courts of law, and that not merely as incidental to the execution of their own administrative powers, but absolutely and for all purposes. That would appear to me to amount to a deprivation of civil and private rights which we cannot impute to the Legislature unless it is expressed in clearer language than any that can be found in this statute. The Commission is to decide these questions incidentally. It is not a court of law, and it is debarred by the statute itself from using those methods which in the best equipped courts of law are considered to be indispensable for the just determination of disputed rights, because they are to decide the questions summarily, that is, immediately, when they are raised before them in the place where they happen to be when hearing an application for fair rents, and where neither the forms nor the investigation which is necessary for a complete judgment can be at all practicable. I therefore have little difficulty in coming to the conclusion adopted by your Lordships that this final jurisdiction of the Commissioners is not applicable to the absolute determination of questions of civil or private right, but only to the decisions which are incidental to the performance of the duties which are specially committed to them, and which the courts of law are neither fitted nor empowered to discharge.

I must confess I had some difficulty in consequence of the point to which your Lordship has referred, arising from the structure of the present summons. If this were to be read as a summons intended to reduce the decision of the Commissioners in so far as it fixes the fair rent, or in so far as merely incidentally and for the purpose of fixing the fair rent it determines whether the application before it shall be entertained or not, I should be very clearly of opinion that we should not entertain such an action. We cannot interfere with anything that the Commissioners have done in the exercise of their administrative duty from defect of jurisdiction in this Court, and therefore we should throw out an action of reduction such as I have supposed. And if it had been maintained by the defender that on a proper construction of the determination of the Commissioners they had done nothing more than fix the fair rent, and incidentally and for the purpose of fixing it determine that they should entertain the application as the application of a crofter, I think we should have had some difficulty in coming to the conclusion that this summons could be entertained, because I think it might very well be said that in construing that part of the deliverance of the Commission we must assume—if the words they have employed will allow us to do so—that they acted within their jurisdiction and not in excess of it. But the defenders are far from maintaining that position, but, on the contrary, they maintain absolutely that the deliverance of the Commissioners of which the pursuer complains is a final and absolute decision for all purposes of the question of right which the pursuer desires this Court to determine. And they go so far in maintaining that defence as to have taken their stand on the preliminary defence against the satisfying of the production, which means that the deliverance of the Commissioners is so sacred that the Court cannot even look at it for the purpose of considering whether it is within or in excess of their jurisdiction, and the Lord Ordinary gave effect to that plea because he sustained the defence as preliminary, and so in effect decided that it is impossible that the document should be looked at at all. Both parties therefore have concurred in raising before us in the present process the question which your Lordships have thought right to express your opinion upon, and in which I concur. And therefore I think there is quite enough before us to enable us to decide the questions raised by the two pleas which your Lordship proposes to repel. How the action is to be dealt with for other purposes, or what final judgment the pursuer can obtain in this process, either as it stands or if it be amended, is a question for future consideration by the Lord Ordinary. I agree therefore with the course which your Lordship proposes.

The Court pronounced the following interlocutor:—

"Repel the second and third pleas-in-law for the defender, and decern: Find the pursuer, reclaimer, entitled to expenses from the date of the closing of the record, and remit the account thereof to the Auditor to tax and to report to the Lord Ordinary, and remit to his Lordship to proceed as shall be just, with power to decern for the taxed amount of said expenses."

Counsel for Pursuer — Rankine, Q.C. — Macphail. Agents—Mackenzie & Kermack, W.S.

Counsel for Defender—Kennedy—A.-S.-D. Thomson. Agents—W. & J. L. Officer, W.S.

Wednesday, June 21.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

MENZIES *v.* MACDONALD.

Reparation—Slander—Whether Terms of Letter Libellous—Innuendo.

The chief-constable of a burgh wrote to the manager of an hotel within the burgh in the following terms:—"*Special Licenses.*—Sir,—It has come to my knowledge that on two occasions recently in connection with special licenses