The form of the verdict is unusual, and as I presided at the trial I think it proper that I should state its origin. It is explained by the course of the trial. The pursuer came into Court on a record which, while it alleged a blow on the head from a piece of falling coal and attributed the fall of that piece of coal and the consequent blow to the negligence of the defenders and the faulty system of the defenders' pit, deduced the pursuer's present symptoms and condition from that blow and nothing else, and based his claim to compensation solely upon the present symptoms and condition. The evidence was led wholly to support that case, and counsel addressed themselves solely to the case made on record and supported or endeavoured to be supported by the evidence. Naturally in my charge to the jury I followed the same course, and looking to the extent and variety of the evidence I thought it my duty to try and assist the jury in arriving at their verdict by asking their consideration, *inter alia*, of certain definite questions, and amongst them—(1) Was the pursuer struck by any piece of coal at all? (2) If he was so struck, was the blow the cause of the physical condition of which he now complains? And (5) Was it due to any negligence of the defenders?

This explains the exceptional form of the verdict, which I accepted in the form it was tendered instead of directing the jury to find generally for the pursuer, as I thought the defenders entitled to have recorded the real mind of the jury.

The first of the questions which I suggested to them the jury have answered in the affirmative. While I had doubts at the time whether the blow from a piece of coal was not entirely imaginary, there was evidence to go to the jury, and on this point their verdict cannot be disturbed.

The second question the jury answered in the negative, and in my opinion they could do nothing else. It was proved to demonstration that from a time anterior to the alleged accident the pursuer had been suffering from what was diagnosed by the only doctor who saw him contemporaneously to be a severe chill followed by influenza, which left in their train most disastrous effects on his nervous system, and which entirely accounted for his present condition. It was impossible after the evidence for the jury to find that the accident had anything to do with the pursuer's present condition.

The last question the jury answered in the affirmative, and I suppose it is the imputation thus cast upon their system of working which has justified in the eyes of the defenders their motion for a new trial.

I should, I think, have had more difficulty in disposing of this matter in favour of the defenders than your Lordships entertain. But I accept your Lordships' conclusions.

But the jury have tacked on to their answer to the second question a finding evolved for themselves, to the effect that the blow from the falling piece of coal, though it was not the cause of the condition of which the pursuer complained on record, and to which his evidence and his counsel's speech were entirely directed, yet did him injury at the time. For this I think the jury had no warrant in the evidence. I thought so at the time, and on a careful perusal of the evidence I am confirmed in the view I then held. And had I been sitting alone I should have made this matter my ground for allowing a new trial.

But as your Lordships have determined to grant a new trial on other and more general grounds, I shall not occupy the time of the Court by stating my reasons in detail. It is sufficient that I say that while I think the pursuer's present condition has affected both his memory and his judgment, and that he is not intentionally misstating the circumstances of and surrounding his accident, I am satisfied that at every point he is contradicted by overwhelming independent evidence, and that in finding that the blow from the falling piece of coal did pursuer injury at the time the jury have gone so against the weight of the evidence that their verdict ought not to stand.

The Court set aside the verdict and granted a new trial.

Counsel for Pursuer—Anderson, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for Defenders—Watt, K.C.—R. S. Horne. Agents—W. & J. Burness, W.S.

Friday, February 19.

FIRST DIVISION.

[Sheriff Court at Stornoway.

MACIVER *v.* MACIVER.

Crofter — Succession to Croft — Implied Abandonment by Heir—Acquiescence—Crofters Holdings (Scotland) Act 1886 (49 *and* 50 *Vict. cap.* 29), *secs.* 3 *and* 34.

D, the tenant of a croft, died on 23rd July 1887 intestate. A, an eldest son, was then 40 years of age and tenant of the adjacent croft. After D's death his widow occupied the croft, and at Whitsunday 1888 the landlord, within A's knowledge, entered her name as tenant thereof. She, also within A's knowledge, on 16th November 1889 applied to the Crofters Commission to fix a fair rent for the croft, which was done, and on 28th September 1905 A applied to the Commissioners to settle the boundaries between the two crofts. After D's widow had been in possession of his croft for 17 years, during which time A had intimated no claim either to the widow or the landlord, A brought an action to have it declared that he was its lawful tenant and possessor, and to have her removed therefrom.

Held that the pursuer was barred by acquiescence and delay from insisting in his claim.

The Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict. cap. 29) enacts—section 3—". . . . When two years' rent of the holding is due and unpaid, or when the crofter has broken any other of the statutory conditions, he shall forfeit his tenancy, . . ." Section 34—"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. . ."

Angus MacIver, crofter, 24 Upper Carloway, Lewis, raised an action in the Sheriff Court at Stornoway against (Poor) Mrs Catherine MacIver, his stepmother, in which he prayed the Court to find and declare that he was "the true and lawful tenant and possessor and holder of the croft . . . and to ordain the defender Catherine MacIver to flit and remove herself therefrom."

The facts as found by the First Division on appeal were:—"(1) That the pursuer's father Donald MacIver, at his death on 23rd July 1887, was tenant of the croft No. 25 Upper Carloway mentioned in the summons; (2) that the said Donald MacIver died intestate; (3) that at the time of the said Donald MacIver's death the pursuer was his eldest son and heir-at-law, and was upwards of forty years of age, being tenant of the croft No. 24, adjacent to the croft in question; (4) that the pursuer's stepmother, widow of the said Donald MacIver, after his death occupied the croft No. 25, and at Whitsunday 1888 the landlord, within the knowledge of the pursuer, entered her name as tenant thereof; (5) that also within pursuer's knowledge she on 16th November 1889 applied to the Crofters Commission to fix a fair rent for the croft, and after sundry procedure a fair rent was fixed by the Commissioners, and on 26th September 1905 the pursuer applied to the Commissioners to settle the boundaries between his croft No. 24 and that of his stepmother No. 25; and (6) that the pursuer did not at the time of his father's death, or until quite recently, and after his stepmother had been in possession as tenant for seventeen years, make or intimate to his stepmother or to the landlord any claim to the occupancy of said croft No. 25, but has acquiesced in its occupancy by his stepmother."

On 11th December 1906 the Sheriff-Substitute (CAMPBELL) found that the pursuer was lawful tenant and possessor and holder of the said croft, but refused *hoc statu* the prayer for the removal of Mrs Catherine MacIver.

Mrs MacIver appealed to the Court of Session, but as she died before the hearing of the appeal, Donald MacIver, her son, was on 17th February 1909 sisted as defender in her stead.

Argued for the defender and appellant—As the pursuer did not reside on the croft he was not, so far as regarded the croft in question, a crofter within the sense of section 34 of the Act—*Livingstone* v. *Beattie*, March 19, 1891, 18 R. 735, 28 S.L.R. 518. His present claim was barred by acquiescence in his stepmother's tenancy of the croft for 17 years. His conduct in allowing her to be entered as tenant, in acquiescing in her application to the Commissioners for a fair rent, and in applying to the Commissioners to have the boundaries of the two crofts fixed, inferred an abandonment of any rights he had to the croft in question—Rankine on Leases, p. 161. In any case, as more than two years' rent was due by him and unpaid, he had, under section 3 of the Act, forfeited his tenancy.

Argued for the pursuer (respondent)—The claim was made as heir of the last holder, and against him abandonment could not be pleaded—*Duff* v. *Lady Keith*, March 11, 1857, 19 D. 713. He had not forfeited the holding through non-payment of rent as the appellant must be held to have paid rent on his behalf. That objection in any case was open only to the landlord.

LORD PRESIDENT—The facts of this case are exceedingly simple. A crofter, a widower of the name of Donald MacIver, had a croft under the Matheson estate in Lewis. He divided that croft into two and gave one bit of it to his eldest son. Upon the other bit he continued to reside himself, and took unto himself a second wife. That was the state of affairs when the Crofters Act was passed. The old man then died, and the widow continued to reside in the portion which he had retained for himself. The eldest son, who had got the other portion, went to the Crofters Commission and got a fair rent fixed. That he was undoubtedly entitled to do, because he was the crofter in the sense of the Act—he was in possession, residing upon the ground. The widow, in the same way, went before the Crofters Commission and got a fair rent fixed; probably, indeed certainly, if the landlord had objected to that he could have objected successfully, because we are told that, as a matter of fact, there was no testamentary instrument executed by the old man, leaving, as he might have done, the ground of which he was the crofter at the time of the Act to his widow. Accordingly, the widow, no doubt, might have been turned out for want of title. The landlord taking no such objection, she had her rent fixed. Then the affairs go on for about sixteen or seventeen years, and then there is a dispute as to boundaries, and again the eldest son and his stepmother go to the Crofters Commission and have the boundaries fixed; and now, at the end of all things, the eldest son suddenly wakes up to the fact that when his father died he might as a matter of right have claimed to succeed to the ground of which his father died possessed. Whether he could have kept both crofts is another matter, but undoubtedly he could have made that claim and, subject to the possibility of having to give up the other part, made the claim successfully. But he did not do it, and he stayed out all this time, and now at the end of all things he wishes to turn out his stepmother. No

doubt his stepmother herself has died during the currency of this process, and her own son has been sisted in her place, but we may take the case exactly as if the mother was alive, because the son has got the rights of his mother in so far as this pursuer is concerned. The landlord may have something to say to that again. Now I think that is a most untenable proposition. I rather think the learned Sheriff-Substitute's attention was devoted to a series of cases which had really nothing to do with it, about the question of acquisition of heritable property by acquiescence, and the cases he quotes are familiar in another branch of the law, but I think have no application to this. I do not hesitate to say that the rights of the heir of a crofter to assert possession of the croft of which his ancestor died possessed must, like any other right, be exercised *debito tempore*, and that if the heir does not choose to come forward and go through the operation, which is equivalent to what you would call taking up the lease where there is a lease, he must be held to have abandoned his rights. The landlord is not bound to allow the land to be derelict and to get no rent from it. There are no provisions actually in the Crofters Act for any declaratory process at the instance of the landlord, but I think it comes to the same thing under the sub-section, which provides that "when two years' rent of the holding is due and unpaid the crofter shall forfeit his tenancy." Now it seems to me, therefore, that that provision puts a two years' limit upon it, because if a crofter does not come forward and assert his right to be in the position of his ancestor and proceed to pay his rent, then indubitably two years' rent remains unpaid and the tenancy is forfeited. Accordingly, I hold upon the facts that this man clearly renounced his tenancy and acquiesced in the landlord making other arrangements, which he did by acknowledging the stepmother as the crofter. Whether she was a crofter in the true sense of the word is a different matter. I think, upon the facts, she obviously was not, but I do not think there is any objection to that expression in the mouth of the landlord, and if he chooses to treat her as a crofter and allow her to go to the Crofters Commission, I do not know who can say nay. Accordingly, I am of opinion that the pursuer here has utterly failed to show a title—to vindicate any right to this croft at all. He has never been a crofter in possession of this croft. He has lived long past the period at which he might have asserted the right, a right of which it is impossible to say that he is ignorant, looking to the Act of Parliament, and of which I do not think for one minute he was ignorant, because people in this position commonly know what rights are due to them. Therefore I think the appeal ought to be allowed, that the defender ought to be assoilzied, and that the appellant should be found entitled to expenses.

LORD M'LAREN—The claim of the heir which the Sheriff-Substitute has allowed is founded upon the thirty-fourth section of the Crofters Holdings Act of 1886. He could not make a claim under the earlier section, section 16 (*h*), because that only applies in respect of there being a sale. But under the thirty-fourth section one of a crofter's ways of holding is as a successor, and I quite think that under the word successor it is implied that a tenant's right in a croft is, under the Act, just like any other ordinary tenant's right in a farm of larger extent. Now, nobody says that this right has to be taken up by service, and there is no other proceeding in writing which operates as *additio hereditatis*. There is, however, one very important requisite to the establishment of the crofter's right, and that is, that he must be in possession, because all through the Act it is contemplated that a crofter must be in possession, and indeed it is expressly provided in this thirty-fourth section that he is to be in possession of the croft. Well then, if he does not enter into possession, or in case of dispute ask the landlord to give him possession, I should imagine that the inference is that he does not desire to take up the succession and come under the necessary obligations. Anyone who knows the parts of the Highlands in which the Crofters Acts operate must be aware that a large number of the younger people go south in search of employment, and that they very often succeed in getting better wages and are able to live in a more comfortable way than they could do upon their little crofts at home. Thus it must be an everyday occurrence that when a crofter dies the eldest son and heir is working at a trade or industry in Glasgow, and does not desire to return to the family home. The Act of Parliament, as I think rightly, does not regulate these matters by legal process, the whole object being to make everything as inexpensive as possible; but if an heir who is working at a trade in Glasgow does not go home, and the landlord, who naturally does not wish his land to remain uncultivated, puts some other person into the croft, whether it be the widow, another son, or a stranger, the idea of the heir dispossessing the new tenant with the landlord's consent appears to me to involve an impossible condition, that he must have a right founded on possession, when in point of fact he never has had any possession. Now, I do not know that we can fix upon an absolute limitation of time, though I think it was admitted, and I do not see that the admission could have been withheld by Mr Forbes, that a claim by the heir must be established within a reasonable time. I should have thought a reasonable time could not in any case exceed a year, because, considering the value of the subject it is not worth more that a year's deliberation, and also because the landlord has a right to receive his rent, and he can only get that if he is enabled to put in a tenant before the land has gone out of cultivation. I also think that it is the duty of every heir who desires to take up the possession of a croft to let the landlord know whether or not he is going to reside

on the croft, in order that if he does not mean to do so the landlord may put in some other tenant. This seems to me in accordance with common sense and justice, and it is, I think, consistent with the general tenor of the statute. Now, the facts in this case are not quite the same as in the example I have taken of a son going away from home and engaging in some other business. The heir here remained at home but he had a croft provided, and I do not see that he could have given any stronger proof of his assent to the widow becoming tenant of the croft which belonged to her husband than that they went together to the Crofters Commission, and, without any objection or demur on either side, were established in their respective portions of the original divided croft. That then, after a lapse of many years, and in consequence of disagreement or other circumstances, the heir can come forward and claim to dispossess the tenant, is, I think, altogether extravagant. The landlord and the new tenant have entered into mutual obligations on the assumption which they were entitled to make, that the heir had abandoned his right to the croft. The heir had announced his intention, and he cannot consistently with the general principles of law change his mind when the effect of that is to deprive other parties, who have entered into a new contract, of their contract rights, and so to alter their position to their disadvantage. But while I hold these views very strongly, I do not think the heir, if he really means to enter upon the croft when he becomes heir, can ever have a difficulty in doing so, because he has only to intimate his intention to enter to the landlord, and without any expense or process of law he is at once put into possession.

LORD KINNEAR—I am entirely of the same opinion.

LORD PEARSON was absent.

The Court sustained the appeal, recalled the interlocutor of the Sheriff-Substitute, dated 11th December 1906; found in fact in the terms above quoted; found in law that the pursuer was barred by acquiescence and delay from insisting in his present claim; therefore assoilzied the defender from the conclusions of the action; and decerned.

Counsel for the Pursuer (Respondent)—Forbes. Agent—Alex. Ross, S.S.C.

Counsel for the Defender (Appellant)—R. C. Henderson. Agent—John Grieve, W.S.

Friday, March 19.

FIRST DIVISION.

[Lord Johnston, Ordinary.

GOODALL *v.* BILSLAND AND OTHERS. CASSIDY *v.* BILSLAND AND OTHERS.

Licensing — Appeal — Mandate — Construction — Licensing (Scotland) Act 1903 (3 *Edw. VII, c.* 25), *sec.* 22.

Held that a mandate to A to appear and object to a licence "at the forthcoming Licensing Court" did not entitle him to lodge an appeal in his client's name to the Licensing Appeal Court.

Homologation — Appeal — Mandate — Homologation after Expiry of Time within which Appeal might be Taken — Validity.

The holder of a mandate to object on behalf of certain persons to the renewal of a licence at a Licensing Court, lodged, without obtaining his clients' authority, an appeal in their names to the Licensing Appeal Court. *Held* that his clients could not, after the expiry of the time within which an appeal might be taken, ratify, *quoad* the opposite party, the appeal lodged in their name.

Licensing Laws — Administration — Member of Court — Disqualification — Interest — Bias — Subscriber to Society in whose Interest Proceedings Taken.

Certain members of a Licensing Court were subscribers to a society, part of whose work it was to oppose the granting of new licences, and to press for the reduction of existing licences. *Held* that as they were not members of the society, but merely subscribers to its funds, they were not disqualified from acting as members of the Court.

Opinion reserved per the Lord President as to whether membership of such a society would amount to a disqualification.

Licensing Laws — Administration — Absence of Members of Court during Part of Case — Decision Taken Part in by Semi-Absentees — Validity.

Certain members of a Licensing Appeal Court who were absent during a considerable portion of a case took part in its decision. *Held* that the decision was thereby rendered null, and that it could not be validated by deducting the votes of the disqualified members.

On 20th May 1907 Alexander Goodall, wine and spirit merchant, 68 M'Alpine Street, Glasgow, brought an action against (1) Sir William Bilsland and others, the members of the Licensing Appeal Court for the city of Glasgow, acting under the Licensing Scotland Act 1903, and (2) John Green and others, in whose names objections had been lodged against a renewal of the pursuer's licence, first in the Licensing Court and afterwards in the Licensing Appeal Court, in which he sought reduction of a deliverance of the Licensing Appeal Court dated