plea-in-law founded on the doctrine of fellow-workman or *collaborateur*. [*His Lordship having dealt with the question continued*]—The second part of the case relates to the point raised by the pursuer's third plea-in-law, that she was entitled to take benefit from the fact that the Parish Council had effected a policy of insurance which in terms appeared to cover the lost articles belonging to her. The Sheriff-Substitute allowed her a proof of her averments relative to that matter. After carefully considering the averments I think the Sheriff-Substitute has read into them more than they can be held to contain. He says in his note—"It seems to me clear both in law and in equity that if the defenders recovered from the insurance company a proportion of the proceeds of the policy in respect of the pursuer's personal loss, they are bound to hand it over to her."

I do not express any opinion whether that would have been so or not, for I confess that, having regard to the case of *Dalgleish* v. *Buchanan & Company*, 16 D. 332, I think there is considerable doubt upon the point. But the pursuer has made no averment that the Parish Council received from the insurance company such a sum as, after deducting the value of the property they themselves lost, would leave any surplus. There is not even an averment that a claim was made on behalf of the pursuer by the Parish Council against the insurance company. I think the authorities cited establish the proposition that if an insurance be effected by A on the goods of B without the knowledge of B, B cannot adopt the contract of insurance after a loss has occurred. Accordingly in my opinion the Sheriff-Substitute has gone wrong in this part of the case, and we should find that the pursuer has not made any relevant averment in support of her third plea-in-law.

LORD DUNDAS concurred.

LORD SALVESEN—[*After dealing with the first branch of the case*]—On the other branch of the case, which raises an interesting question of law, I agree with your Lordship in the chair. The defenders took out this policy in their own name. They throughout paid all the premiums. The pursuer was never made acquainted with the fact that they had included in the contents which they insured the property belonging to their servants. It is not said, as I read the pursuer's averments, that the defenders recovered any more under the policy than the loss which they themselves sustained.

Now that being so I think it is quite an unfounded proposition in law that a person who insures for his own benefit, and incidentally and gratuitously includes in the insurance the property of some other person in whose goods he has no insurable interest, is bound to subordinate his own claim of loss to the claim of the third party, who could not, as your Lordship has said, adopt or ratify the policy after a loss had been incurred. Even if the defenders had recovered in respect of the pursuer's property from the insurance company any sum, I share the doubts of Lord Ivory in *Dalgleish's* case, 16 D. 332, at p. 336, as to whether the defenders would be bound to hand over the amount to the pursuer.

We are familiar in another department of insurance law with honour policies. When the defenders, having no insurable interest, insured their servants' property it was a mere honour policy, and if the insurance company chose to honour it the defenders would get the benefit. But to say that the pursuer can demand payment of an indemnity under a contract the pecuniary part of which has always been discharged by the defenders is entirely out of the question. I have not the least doubt that if these defenders had insured for their servant's benefit and had recovered in respect of the servant's loss they would have been only too glad to have handed over the money to her. But it is a very different thing to say that in such circumstances there is a legal right or even a title on the part of the pursuer to recover any sum which the insurance company, knowing the facts and having no legal liability to pay at all, have in fact paid.

I do not think the Sheriff-Substitute's attention could have been called to the case of *Dalgleish*, which in my judgment is conclusive against the pursuer on this second branch of the case.

LORD GUTHRIE concurred.

The Court recalled the interlocutor of the Sheriff-Substitute and repelled the third plea-in-law for the pursuer.

Counsel for the Pursuer—Chisholm, K.C.—A. M. Mackay. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for the Defenders—Sandeman, K.C.—Lippe. Agents—Alex. Morison & Company, W.S.

Tuesday, June 27.

FIRST DIVISION.

[Scottish Land Court.

SCOTT *v.* DUFF.

Landlord and Tenant—Property—Small Holding—Small Landholders (Scotland) Act 1911 (1 *and* 2 *Geo. V, cap.* 49), *secs.* 26 (3) (*a*)—"*Present Rent.*"

A tenant on a nineteen years' lease of a farm at a rent of over £50 received in respect of a piece of land resumed a deduction which made the rent less than £50. This deduction came into operation from Whitsunday 1912, and continued till the end of the lease. The Small Landholders (Scotland) Act 1911 came into operation on 1st April 1912. *Held* (*dub.* Lord Johnston) that the right of the tenant to apply to the Scottish Land Court as a statutory small tenant depended upon the rent actually paid by him for the last year of his lease, not the rent payable as provided for at the commencement of the Act.

Clyne v. *Sharp's Trustees*, 1913 S.C. 907, 50 S.L.R. 688, dictum of Lord Dunedin *considered.*

The Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49) enacts—Section 2—"*Who to be Landholders*—(1) In the Crofters Acts and this Act . . . the word 'holding' means and includes . . . (iii) as from the termination of the lease . . . every holding which at the commencement of this Act is held under a lease for a term longer than one year by a tenant who resides on or within two miles from the holding and by himself or his family cultivates the holding with or without hired labour (such tenant or his heir or successor, as the case may be, holding under the lease at the termination thereof being hereinafter referred to as a qualified leaseholder) . . . (2) in the Landholders Acts the word 'landholder' means and includes as from the respective dates above mentioned . . . every qualified leaseholder . . . and the successors of every such person in the holding being his heirs or legatees." Section 13—"*Present Rent*—The rent payable by a landholder as one of the statutory conditions shall be the present rent, that is to say, the yearly rent, including money and any prestations other than money . . . (*c*) in the case of qualified leaseholders or statutory small tenants becoming landholders . . . payable or fixed in respect of the last year of the lease or tenancy . . ." Section 26—"*Supplementary Provisions and Restrictions*— . . . (3) A person shall not be held an existing yearly tenant or a qualified leaseholder under this Act in respect of (*a*) any land the present rent of which within the meaning of this Act exceeds fifty pounds in money."

Thomas Duff Gordon Duff, of Drummuir, *appellant*, being dissatisfied with an order of the Scottish Land Court in an application by William Scott, tenant of Pickielaw, *respondent*, for an order fixing (1) a first equitable rent for, and (2) the period of renewal of his tenancy of, the said farm, presented a Special Case for the opinion of the Court of Session.

The *lease* of the farm was constituted by missives, endorsed under conditions of let, which were in the following terms—"Elgin, Fourth December Eighteen hundred and ninety-three.—I, Alexander Scott, merchant, Hopeman, hereby offer the sum of Fifty-one pounds of rent for a lease of the foregoing subjects for nineteen years, with a break at the option of either party at the end of seven years on six months' previous notice in writing. The cropping of the land to be left to myself, excepting that at the outgoing I shall leave it in a regular five-shift course.

"ALEXANDER SCOTT.

"Alexander Anderson, of Fifty-four High Street, Elgin, Law Clerk, *witness.*

"James Colin Murray, of Fifty-four High Street, Elgin, Law Clerk, *witness.*

"Drummuir, Jan. 27, 1894.—I accept this offer by Alex. Scott.

"THOMAS GORDON DUFF."

The *conditions of let* contained, *inter alia*, the following provisions—"*First*—The lands will be let for the period of nineteen years from the term of Whitsunday 1894, or for such period as may be agreed on, with entry to the houses at that term, and to the lands at the separation of the crop from the ground. *Sixth*—The rent to be agreed on shall be payable at Martinmas and Whitsunday by equal portions, excepting the rent of the last crop, which shall be payable in one sum at Martinmas after ingathering the crop. The first half-year's rent under this lease to be payable at the term of Martinmas 1895. The tenant to pay one-half the cost of insuring the buildings against fire. *Ninth*—The proprietor reserves power to resume possession of the small park in front of Hopeman Lodge to the east of the approach thereto on giving six months' notice of his intention to that effect, the tenant to receive a deduction from his rent at the valuation of two men mutually chosen, and by an oversman to be named by them in the event of their differing in opinion."

The Case stated—" . . . 2. Answers to the said application were lodged for the proprietor. In said answers it was, *inter alia*, averred that the rent of the holding was at the commencement of the Small Landholders (Scotland) Act 1911 (1st April 1912) over £50 per annum, and it was accordingly maintained that the application was incompetent under section 26 (3) (*a*) of the said Act of 1911. Proof was led on 14th May 1914, parties were heard, and the said farm was inspected by the Court on the same day.

3. At the commencement of the Small Landholders (Scotland) Act 1911 the said William Scott was, in succession to his father, tenant under the proprietor of the said farm upon missives of lease [*v. sup.*]. . . . The tenant paid 5s. 3d. of insurance annually. The said lease terminated by the running out of the stipulated term of endurance.

"4. The area of said farm, both at the tenant's entry and after the resumption of the park in front of Hopeman Lodge after mentioned, exceeded 50 acres.

"5. . . . In the end of November 1911 the proprietor intimated that he was to exercise the right of resumption, and in order to facilitate the work of additional ploughing and preparing the land for laying out as part of the policies of Hopeman Lodge, the proprietor subsequently arranged with the tenant to get, and did get, possession of the said park in the spring of 1912. The said park extends to between 4 and 5 acres of arable land, and is valued at 5s. per acre. The proprietor, by letter dated 10th January 1913, offered to give the tenant a reduction of £5 per annum off his rent during his tenancy under the lease in consideration of the proprietor resuming the said park. The offer was accepted by the tenant. Accordingly the tenant was allowed a reduction of £2, 10s. from the half-year's rent which he paid at Martinmas 1913 for the half-year Whitsunday to Martinmas 1912. The reduction of £5 per annum agreed to be allowed to the tenant as above stated included not only deduction from rent in respect of land resumed but also compensation to the tenant for unexhausted

manures, ploughing done by him, &c. The parties made no apportionment of the said allowance as between the various items covered by it. But the Court held that if such apportionment fell to be made the sum in respect of deduction of rent exceeded £1. The rent payable for crop and year 1912 was entered in the proprietor's rental books thus :—

To rent crop 1912 . .	£51	5 3
Less allowance for half-year for field taken off . .	2	10 0
	£48	15 3

and was paid by the tenant in two sums, viz.—£20, 10s. on 6th June 1913, and the balance of £28 (with 5s. 3d. of insurance) on 12th December 1913. The receipts granted to the tenant therefor acknowledged receipt of the said sum of £20, 10s., 'being to account of land rent for crop and year 1912,' and of the said sum of £28, 5s. 3d., 'being balance of land rent for crop and year 1912.' The sum paid by the tenant for crop and year 1913 (being the last year of the stipulated term of endurance of the lease) was £46 (being £51 less the said deduction of £5).

"6. The proprietor objected that the application was not competent, on the ground that the acreage being more than 50 acres, the rent of Pickielaw at the commencement of the Act of 1911 was over £50."

On 13th November 1914 the Land Court issued the following order:—". . . Having inspected the holding and resumed consideration of the application and the evidence adduced, find and declare that the applicant is a statutory small tenant within the meaning of the Small Landholders (Scotland) Act 1911 in and of the holding specified in the application, and that no ground of objection to him as tenant has been stated under section 32 (4) of the said Act: Therefore find that he is entitled, in virtue of the said section, to a renewal of his tenancy and to have an equitable rent fixed; and having considered all the circumstances of the case, holding, and district, including the condition and value of the improvements made by the applicant and respondent respectively or their predecessors in title, have determined and do hereby fix and determine the period of renewal at seven years, and the equitable annual rent payable during said period by the applicant at £35 sterling, each to run from the term of Whitsunday 1913: Find the applicant entitled to expenses, modify the same at three guineas, and decern for payment of the said sum against the respondent.—N. J. D. KENNEDY; ALEX. DEWAR."

Note.—". . . The preliminary objection has been taken that the rent payable at 1st April 1912, the commencement of the Act, was £51, and therefore that this farm is not a holding under the Act of 1911 because of the disqualification in section 26 (3) (*a*) of the Act of 1911.

"Section 26 (3) (*a*) provides that a person shall not be held an existing yearly tenant or a qualified leaseholder in respect of 'any land the present rent of which within the meaning of this Act exceeds fifty pounds in money' unless such land, exclusive of common pasture or grazing held therewith, does not exceed 50 acres.

"This limitation is applied to statutory small tenants by sub-section (10) of this section and section 32 (1) of the Act of 1911.

"It is clear that if the rent had continued till the termination of the lease to be £51 this farm would not be a holding under the Act.

"It is maintained for the proprietor that if at the commencement of the Act of 1911 (1st April 1912) the rent under a lease for a term of years exceeded £50 (the acreage exclusive of common pasture exceeding 50 acres), then the holding cannot be a holding under the Act in virtue of sub-section (3) (*a*) of section 26 above quoted.

"Now by section 2 (1) (iii) a holding held under lease at the commencement of the Act for a term longer than a year does not become a holding under the Act until the 'termination of the lease' (defined in section 31), as distinguished from the holding of a 'tenant from year to year,' which becomes a holding under the Act as from the commencement of the Act. The leaseholder, like the yearly tenant, must be resident and cultivating tenant at the commencement of the Act. No other condition relates to the commencement of the Act so far as the leaseholder is concerned. Further, he or his heir or successor must be the holder under the lease at the termination of the lease.

"The question is, At what point of time is the rent under the lease to be ascertained for the purpose of determining whether the limitation enacted by section 26 (3) (*a*) does not or does apply? That sub-section itself indicates the point of time by the words, 'the present rent within the meaning of this Act.'

"This refers us to section 13 of the Act of 1911, the only other section of the Act of 1911 in which this expression 'present rent' occurs. What under section 13 is the 'present rent' in the case of the yearly tenant and the leaseholder?

"In the case of the existing yearly tenant present rent is defined as the rent 'payable for the year current at the commencement of this Act,' the date at which the Act if the statutory conditions are satisfied applies to the holding. In the case of qualified leaseholders present rent is defined as 'the rent payable or fixed in respect of the last year of the lease,' the end of the last year of the lease being the date at which if the statutory conditions are satisfied the Act applies to the holding. Changes in rent or extent either in the direction of increase or decrease may take place between the commencement of the Act and the termination of a lease which was in force at 1st April 1912.

"Apart from the aid of section 13 in interpreting the meaning of sub-section (3) (*a*) of section 26, the date at which the existence or non-existence of the disqualifications enacted by section 26 would naturally fall to be ascertained is the date at which unless some disqualification is established the leaseholder becomes entitled to exercise the rights conferred by the Act.

"If, then, the present rent referred to in

sub-section (3) (*a*) is in the case of the leaseholder the rent payable for the last year of the lease the 'present rent' of this holding was £46 and not £51. (We leave out of account for the purposes of this sub-section (3) (*a*) the insurance premium of 5s. 3d., which is not 'rent' as has been decided.) Even if the rent payable for crop and year 1912 (the year current at the commencement of the Act) be taken, this deduction of £5 a-year in respect of the land resumed first began to be made from the rent payable for that crop and year to the extent of £2, 10s.

"The rental books of the estate show that the rent payable for crop and year 1912 (the penultimate year of the lease) was £48, 10s., being £51 less deduction for half-year in respect of the field resumed, viz., £2, 10s. The rent payable for crop and year 1913, the last year of the lease, was £46, being £51 less the deduction for the whole year in respect of the field resumed, viz., £5, which it had been agreed should take effect 'during the remainder of the lease.'

"Accordingly we repel the objection to the competency. . . ."

The *questions of law* were—"1. Were the Land Court entitled to hold that the conditions determining the right of the tenant to apply to the Land Court as a statutory small tenant under the Small Landholders (Scotland) Act 1911 fell to be ascertained as at the termination of the said lease? or 2. Were the Land Court bound to hold that the conditions determining the tenant's right fell to be ascertained as at the commencement of the Landholders (Scotland) Act 1911? 3. Were the Land Court entitled to hold that the rent of the tenant's holding was under £50, either (*a*) at the date of the commencement of the Small Landholders (Scotland) Act 1911, or (*b*) at the termination of the lease? 4. Were the Land Court entitled to fix the period of renewal and the payment of a first equitable rent as at and from Whitsunday 1913?"

Argued for the appellant—The application of the respondent was incompetent, as his "present rent" exceeded £50 per annum—Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), sec. 26 (3) (*a*) and (10). The Act came into operation on 1st April 1912 (section 38), and the rent payable then for the last year of the lease was the criterion which fixed whether or not the tenant could appeal to that Act—*Clyne* v. *Sharp's Trustees*, 1913 S.C. 907, *per* Lord President Dunedin at p. 912, and Lord Mackenzie at p. 916, 50 S.L.R. 688. This construction of the Act was preferable to that adopted by the Land Court and the respondent, for it fixed the tenant once and for all, as from 1st April 1912, with the knowledge of whether or not he was within the class favoured by the Act, and it was consistent with the general policy of the Act as expressed in sections 2 and 26 (6). Section 13 did not define "present rent," but in refereence to the Crofters Holding (Scotland) Act 1886 (49 and 50 Vict. cap. 29), sec. 1, which gave rent as one of the statutory conditions showed what items it included. But in any event section 13 (*c*) was not incompatible with the appellant's contention, for "fixed" referred to fixation under the Crofters Holding (Scotland) Act 1886, sec. 6, and "payable" meant fixed in terms of the lease, at the date when the Small Landholders (Scotland) Act 1911 came into operation, as the rent for the last year of the tenancy, so that a subsequent reduction of the rent would not vest the tenant with a right which he did not possess at the date when the Act came into operation, and a subsequent increase of the rent would not divest him of a right which he had then. If so the application was incompetent, as the deduction for resumption of land did not come into operation till after 1st April 1912.

Argued for the respondent—The question of qualification under the Small Landholders (Scotland) Act 1911 depended for its solution on whether or not the rent actually paid by the tenant in the last year of his lease was less than £50. If it was less than £50 the tenant could appeal to the Act, and here the rent was less than £50. The dicta in *Clyne's* case (*cit.*) were *obiter*, and when applied to the present question were inconsistent with the Act. The crucial point of time was the termination of the lease—section 2 (iii) as contrasted with section 2 (i) and (ii). The "present rent" was referred to the last year of the lease by section 13 (*c*), which was the only section dealing with present rent. There was no inconvenience in this, for if the tenant was qualified at 1st April 1912 he could not therefore lose his qualification without being aware of what was happening—Counsel for the respondent intimated that he did not contend that the rent payable when the Small Landholders (Scotland) Act came into operation was less than £50, or that the equitable rent should run from Whitsunday 1913.

At advising—

LORD PRESIDENT—The question raised in this case is whether the applicant is a statutory small tenant within the meaning of the Small Landholders Act 1911. I am of opinion that he is. He held his land under a nineteen years' lease, commencing at Whitsunday 1894, and terminating, so far as regards the buildings, at Whitsunday 1913, and, so far as regards the land, at the separation of the crop. The final rent was payable at Martinmas 1913.

The Small Landholders Act (1 and 2 Geo. V, cap. 49) came into operation at 1st April 1912, and at that date the rent was £51. Accordingly if the amount of the rent is to be judged of as at the date when the Act came into operation the applicant is not qualified to take advantage of the provisions of the statute. But subsequent to 1st April 1912 the rent was lowered, and for crop and year 1913 (the last year of the lease) the rent was £46, or at all events under £50. If, therefore, the amount of the "present rent" is to be judged of as at the termination of the lease, the applicant is qualified to take advantage of the provisions of the Act.

The question at issue turns upon the just interpretation of section 2 (1) (iii), section 13 (*c*), section 26 (3) (*a*), and section 32 (1).

By the last-mentioned section it is provided that a leaseholder not otherwise disqualified, with regard to whom section 2 of the statute provides that he is not to be held a qualified leaseholder within the meaning of the Act, is a statutory small tenant. When I turn to section 2 I find that, as from the termination of his lease, a leaseholder, otherwise not disqualified under section 26 of the Act, who has not made his own permanent improvements, shall not be held to be a qualified leaseholder. This is this applicant's case, and therefore he is a statutory small tenant unless he is otherwise disqualified. Now the only respect in which it is said that he is disqualified is under section 26 (3) (*a*), because his "present rent" within the meaning of the Act exceeds £50 in money. I turn to section 13 (*c*) to ascertain what is the "present rent" within the meaning of the Act, and there I find that it is the rent payable in respect of the last year of the tenancy. The rent payable in respect of the last year of tenancy in the present case was under £50, and therefore the applicant is a statutory small tenant. The argument hostile to that view rested not on the words of the statute but on a dictum of Lord Dunedin in the case of *Clyne* v. *Sharp's Trustees*, 1913 S.C. 907, 50 S.L.R. 688. But that dictum, it appears to me, must be read strictly in relation to the facts of that case, which were different from the facts of this case; and accordingly I come to the conclusion that the Land Court are right in finding that upon a just construction of the terms of the sections to which I have referred the applicant is a statutory small tenant.

It was agreed that if that were so his equitable rent must run from the termination of the tenancy, that is to say, from Martinmas 1913, and accordingly I propose that we should answer the first question in the affirmative, the second in the negative, the third (*b*) in the affirmative, and the fourth in the negative.

LORD JOHNSTON—I find great difficulty in accepting the interpretation which your Lordship has put upon the sections of this statute with which we are concerned. I should not venture to express myself as I am going to do, but that I cannot ignore the judgment of this Division in the case of *Clyne*, 1913 S.C. 907, 50 S.L.R. 688, which certainly applied to a different point under the statute, but which involved to a large extent the same considerations as apply to this. In that case I found myself obliged to place my judgment, on the detail of the case, upon rather different grounds than those adopted by Lord Dunedin. But that does not mean to say that I do not accept the initial explanation of the Act which his Lordship gave. It is quite true that Lord Dunedin in dealing with that case avowedly stated that it was the first case which had arisen under the statute, and that therefore he had given very full consideration to the general purview of the statute, and that having done so he would give his explanation of the general lines upon which the statute proceeded. It is therefore quite open to say that Lord Dunedin there was possibly going beyond what was necessary for the determination of the case in question. At the same time it is a most weighty deliverance, even if it be taken as *obiter*, in its application to this case.

I am not by any means satisfied that Lord Dunedin was wrong when he said that, so far as a qualified leaseholder or a person who might, if other conditions were fulfilled, be a qualified leaseholder, was concerned, his status, just as that of other parties who come under the statute, was fixed once and for all at the coming into force of the Act. I can see excellent reasons why it should be so. Here the contention is that a man's status under this statute, which as I think was intended to fix everybody's status once and for all, might vary from year to year between the coming into force of the Act and the ish of the lease. I do not think that that was contemplated under the Act, and that the trouble has arisen from the careless use of the words "present rent" in the rubric of section 13 of the statute. If you look at section 13 you find the rubric talks of "present rent," but the section itself is not a general definition of "present rent." It provides that the rent payable by the landholder as one of the statutory conditions shall be the present rent. Then it goes on to say what the word "present" in that collocation means, in the case of crofters, existing yearly tenants, &c. But then what is referred to as statutory conditions? There you must go to the Crofters Act of 1886 (secs. 4, 5, and 6). And there you find that sec. 13 of the Act of 1911 is concerned with defining what is to be understood as the present rent when application is made to the Land Court to fix the fair rent of a holding, and that it has nothing to do with defining the meaning of "present rent" when used in sec. 26 (3).

One thing is certain, and that is that the main qualification in the qualified leaseholder's position, namely, that he shall have been the author of the buildings or improvements on the farm, is undoubtedly fixed as at the date when the Act passes. He cannot make himself, by subsequent proceedings in the way of erections or improvements, a qualified leaseholder which he was not before. But if his position is fixed there and then in that respect, I cannot hold it to be unfixed or to be fixed *de novo* by something which is going to occur between the coming into force of the Act and the date at which he makes his application.

Having the case of *Clyne* (*cit.*) before me I think it right to state the doubts which I have as to your Lordship's ground of judgment.

LORD MACKENZIE—I agree with your Lordship in the chair on the construction to be put on the language used in the Act, and should not have thought it necessary to say anything but for the reference in argument to the case of *Clyne* v. *Sharp's Trustees*, 1913 S.C. 907, 50 S.L.R. 688. In particular, the following passage in the

opinion of the Lord President (Dunedin) was founded on—"But the point which I think is to be noted is this—that the period at which the inquiry is to be made to find out whether people are within the statutory classes of existing yearly tenants or qualified leaseholders is at the commencement of the Act—in other words, it is the date of 1st April 1912 that once and for all fixes the character of existing yearly tenant and qualified leaseholder." But this passage must be read *secundum subjectam materiam*. It was there decided that the Act at the date when it came into operation, 1st April 1912, gave a tenant whose lease expired at Whitsunday 1912 a right to a renewal of his tenancy as from that term. The argument, which was negatived, was that the tenancy was not determined at its ish, having been continued for a year by tacit relocation. The application there was in August 1912, which was held to be timeous. There was, however, in that case no question of a differential rent, and it appears to me that the dictum of the Lord President above quoted is not sufficient foundation for the respondent's argument here. For the judgment recognises that although a right may vest at the commencement of the Act, the period to look to in order to ascertain the practical benefit of that vested right is the date of the termination of the lease. That is the construction of the Act which has been given effect to by the Land Court in the present case, and I do not consider there are sufficient grounds for interfering with what they have done.

LORD SKERRINGTON—The following points of fact and of law are not now in dispute. So far as they depend on admissions by counsel these concessions were, in my view, proper and indeed inevitable.

(1) The applicant's rent on 1st April 1912, being the date of commencement of the Small Landholders (Scotland) Act 1912, was £51 per annum. His counsel admitted that the Land Court had erred in holding that the rent at that date was £48, 10s.

(2) The applicant's rent in the year 1913, when his lease current at the commencement of the Act expired, was £46 per annum.

(3) The applicant's lease, though badly expressed, was for nineteen years from Whitsunday 1894 as to the houses and from the separation of the crop as to the lands. If the Land Court was right in finding that the applicant was a statutory small tenant and that his lease ought to be renewed, it was admitted that the renewal should have run from the expiry of the lease, and not from Whitsunday 1913 as was determined by the Land Court.

The only question for our decision is whether the Land Court ought to have found that by section 26 (10) of the Small Landholders (Scotland) Act 1911 the applicant was not subject to the provisions of that Act regarding statutory small tenants, because in terms of that section he would be (as the statute quaintly phrases it) "disqualified from being . . . a qualified leaseholder." In plain language—assuming that the applicant had paid for the improvements on his holding (one of more than 50 acres)—would he have been disqualified from becoming a "landholder" because his rent at the commencement of the Act exceeded £50 per annum? In short, is the material date as regards the quantum of the rent the commencement of the Act or the termination of the lease?

The leading enactment of the statute bearing upon the question before us is to be found in section 2, and particularly subsection (1) (iii) and sub-section 2 thereof. I do not quote the clauses, but their effect does not seem to me doubtful. A person who at the commencement of the Act answers the description of "a qualified leaseholder" is entitled at the termination of the lease, and subject to the other provisions of the Act, to develop into a landholder. By the Crofters Act 1886, sec. 1, a landholder cannot be removed from his holding except in consequence of the breach of a statutory condition. One of these conditions is that he shall punctually pay his rent. Hence it was necessary for the Act of 1911 to provide some means of ascertaining the rent which should be payable as one of the statutory conditions by a qualified leaseholder on his becoming a landholder. This was done by section 13 of that Act, which directs that in the case of "qualified leaseholders . . . becoming landholders" the statutory rent shall be the "rent . . . payable in respect of the last year of the lease"—in other words, the rent payable immediately before the qualified leaseholder develops into a landholder. This provision is very natural and very intelligible. Consistently with it, section 13 deals with the case of statutory small tenants who become landholders in terms of section 32 (11), and with new holders and landholders whose holdings are enlarged, the statutory rent being that payable or fixed at the date of registration or enlargement, as the case may be. The statutory rent ascertained in terms of section 13 is there described as "the present rent." It will be noticed that the amount of the rent of the subject as at the commencement of the Act is not material in the case of a qualified leaseholder, though it may be mentioned that by a later clause of the statute (section 26 (6)) the holding of a qualified leaseholder shall not be deemed to include any land which was occupied by a sub-tenant at the commencement of the Act.

The disqualification clause, which is the one that immediately governs the present case, is section 26 (3) (*a*). In the case of holdings which exceed 50 acres a person shall not be held to be a qualified leaseholder if his "present rent" ". . . within the meaning of this Act" exceeds £50. Accordingly it is immaterial if the leaseholder's rent at the commencement of the Act exceeded £50 provided that it did not exceed that sum in the last year of the lease.

From the foregoing statement of the import and effect of the relevant sections of the Act it follows, in my opinion, that the Land Court was right in finding that

the applicant was a statutory small tenant. The statute being, as I think, clear and free from ambiguity, I am not concerned with the inconvenience which counsel suggested might flow from this construction of the statute, nor do I need to consider whether it is or is not in harmony with a passage in the opinion of the Lord President in a case which raised an entirely different question.

The Court answered question 1 in the affirmative, question 2 in the negative, question 3 (*b*) in the affirmative, and question 4 in the negative.

Counsel for the Appellant — Macmillan, K.C.—Dykes. Agent—J. Gibson Strachan, Solicitor.

Counsel for the Respondent — Christie — Garrett. Agents—Warden & Grant, S.S.C.

Wednesday, June 28.

FIRST DIVISION.

[Lord Hunter, Ordinary.

HENDERSON *v.* M'GOWN AND ANOTHER.

Process—Proof—Diligence for Recovery of Documents — Income Tax Returns in Custody of Commissioners of Inland Revenue.

In an action of damages for slander the pursuer, who had been in partnership with the two defenders, alleged that they had stated that he while in partnership with them had fraudulently debited the co-partnery with a number of charges with which it did not properly fall to be debited. The defenders pled *veritas*, and lodged a specification of documents calling for, *inter alia*, the income tax returns made by the pursuer while such partner relating to the partnership business. The Commissioners of Inland Revenue objected to diligence being granted on the ground that production of such documents would not be in the public interest. The pursuer also objected on the ground that if the Court had a discretion to order production in exceptional cases this was not an exceptional case in respect that no purpose could be served by granting diligence, the defenders having full information *aliunde*. *Held*, after consultation with the Second Division, (1) that the Court had a discretion to order production, but (2) (*rev.* Lord Hunter) that the circumstances were not such as to call for the exercise of the discretion.

In an action by John Ralston Henderson, wine and spirit merchant, Elderslie Bar, Yoker, *pursuer*, against Andrew M'Gown and Dugald Cameron, both wine and spirit merchants, Clydebank, *defenders*, concluding for £5000 damages for slander, the defenders lodged a specification of documents, including, *inter alia*, certain income tax returns, and moved for a commission and diligence for the recovery thereof.

The seventh article of the *specification* was in the following terms—"7. All income tax returns made by the pursuer so far as bearing upon the Elderslie Bar during the . . . period [from 15th May 1905 to 24th September 1613], and all income tax assessment notices and receipts for income tax received by the pursuer during the said . . . period."

The relevant *facts* and *averments* appear from the opinion of the Lord Ordinary (HUNTER), who on 10th June 1916 granted diligence, *inter alia*, for the recovery of the documents in the seventh article, and granted leave to reclaim.

Opinion.—"This is an action of slander brought by a gentleman who was formerly in partnership with the two defenders. The slander is to the effect that the pursuer when he was a partner made deliberately false statements with reference to the returns that he had received from the business during the subsistence of the co-partnery. There was a reference, under which an award was given, and the award was set aside, but that has not any material bearing upon the present matter.

"The defenders plead *veritas*—that is to say, they allege that the pursuer deliberately falsified statements with reference to the business. In the record they make averments to this effect—'The pursuer has made a return to the surveyor of taxes showing, for income tax purposes, the trading account and profit and loss account of the business carried on at the Elderslie Bar for the year from April 1913 to April 1914. In the said trading account he sets forth that for the said period the gross profit was £2477, 14s. 5d., and the shop drawings were £6942, 18s. 11d. The said gross profit represents 35·6 per cent. of the said shop drawings. These defenders believe and aver that the pursuer has made returns to the surveyor of taxes showing, for income tax purposes, the trading account and profit and loss account of the said business for the year 1914/1915; and they further believe and aver that the gross profits declared in the said returns represent over 36 per cent. of the shop drawings, as therein declared.'

"It is now sought to recover by way of diligence the returns which were made by the pursuer to the surveyor of taxes. So far as I know a diligence on those lines has never been granted by the Court. The Court have allowed receipts for income tax to be recovered. The defenders have been in communication with the income tax authorities, who, although they are not represented here, have intimated that they object to the production of the documents. In their original communication they had adopted the ordinary departmental position, namely, that it was against the public interest that the documents should be produced. On further communication with them they have modified that position to this extent that it appears that they are influenced largely by the circumstance that they regard these returns as confidential.

"The question as to whether a Court of law ought to ordain the production of