and masterly review of the relative positions of the heritor's valuation and the minister's modification and locality as appearing from the statutes, legal decisions, and institutional writers. It seems to me that whether the "explanation" in the interlocutor in the *Lamington* case (1798, Mor. 14,827) be a mere declarator of an existing right, or an expedient specially devised in the exercise by the Court of quasi-legislative functions to meet an exceptional inequity, the phrase in the interlocutor "as the stock cannot be encroached on" merely means that "the Court of Teinds can never encroach upon the stock, whether by a payment in money or grain," as is said in the report of the *Eddleston* case, 1805, Mor. Teinds, App. 28. But heritors rather than surrender their rights may allow such encroachment, and are in the regular habit of doing so. And I agree with his conclusion that in this case the defender, as a continuing heritor or intromitter with the teinds, must make payment for the year 1917 of more than the whole of his teind valued or unvalued, and that he can only escape such payment by surrendering the teinds (in the case of the unvalued teinds first obtaining a valuation) and thus ceasing to be a heritor or intromitter with them, which he neither proposed or now proposes to do. It is said that the heritor's proposal to tender his valued teind as the measure of his liability has never been made before, because on no previous occasion has there been such an abnormal increase in the fiars prices. But it is not denied that heritors have been in use to pay in excess of their valued teind. Indeed, in answer 9 in this very case the defender, dealing with the unvalued teinds of Hassendean and Cockersheugh, seems to admit his obligation to pay more than the value of his teinds, because he avers that the one-fifth of the rental which he offers "is in excess of the whole teinds of the lands of Hassendean Bank and Cockersheugh for crop and year 1917."

The individual excess sums in such cases may have been small, but in aggregate down the generations they must have amounted to a vast sum, and at such times as the Napoleonic wars even the individual sums must in many cases have been considerable. While I can, although with difficulty, conceive it possible that the argument now maintained for the defender might have been omitted through the ignorance or remissness of the eminent counsel for the heritor in the *Lamington* case (Henry Erskine, Charles Hay, afterwards Lord Newton, and Adam Gillies, afterwards Lord Gillies), I cannot imagine that the Bailie Macwheebles of the past and present acting for impecunious lairds, to whom every copper, especially an annually recurring copper, was of importance, lairds (like the Baron of Bradwardine in Waverley, whose wily "doer" was Bailie Macwheeble) of a litigious turn, and politically and ecclesiastically hostile to the Church of Scotland, would not long ago have claimed the option now claimed by the defender. They did not do so, because they knew they had one option, and one option only—"the option," it was so put in the *Eddleston* case (1805, Mor. Teinds, App. 28), "either to pay or to surrender," as was said by the Lord President (Hope) in *Williamson* v. *Campbell*, 1821, Shaw's Teind Cases, p. 21. In other words, adapted from another connection, "Your money, or—your teinds."

LORD SALVESEN was absent.

The Court adhered.

Counsel for the Pursuer and Respondent—Hon. Wm. Watson, K.C.—A. M. Mackay. Agents—Menzies & Thomson, W.S.

Counsel for the Defender and Reclaimer—Macphail, K.C.—J. S. C. Reid. Agents—Tods, Murray, & Jamieson, W.S.

COURT OF SESSION.

Tuesday, March 9.

FIRST DIVISION.

[Scottish Land Court.

M'COLL *v.* BERESFORD'S TRUSTEES.

Landlord and Tenant — Process — Small Holding — Competency — Motion for Rehearing after Special Case Applied for— Small Landholders (Scotland) Act 1911 (1 *and* 2 *Geo. V, cap.* 49) — *Rules of the Scottish Land Court, Rules* 90, 95, *and* 98.

An application was presented to the Land Court to have the applicant declared a landholder or a statutory small tenant and to have his rent fixed accordingly. The Land Court refused the application. The applicant presented a requisition for a special case and lodged a draft case. Thereafter he lodged an application for a re-hearing on the ground that he desired to lead further evidence which had not hitherto been brought before the Court. He refused to withdraw his requisition, but stated that pending the re-hearing he did not intend to proceed with the special case. The landlord opposed the motion for re-hearing as incompetent standing the requisition. The Land Court refused it as incompetent on the grounds that having disposed of the application by a final judgment it was *functus* and in view of the appeal there was no longer any case before it, and that if the motion were granted two courts would be considering the same point concurrently. *Held* that the motion was competent.

The rules of the Scottish Land Court provide:—Rule 90—"Any party whose interests are directly affected by a final order pronounced in an application may move the Court on one or more of the grounds enumerated in rule 95 to order that the application shall be re-heard, in whole or in part, upon such terms and conditions or otherwise as the Court shall think right."

Rule 95—"A motion for re-hearing may be made upon one or more of the following grounds— . . . (3) That the party moving was prepared to adduce pertinent and im-

portant evidence of the tenor set forth in his statement (*a*) which was unknown to, and could not reasonably have been discovered by, him before the hearing of the application, (*b*) or which because of want of means to prepare his case, or of his absence from Scotland, or other excusable cause, he had been unable to adduce at the proper time. . . . (5) Any other ground essential to the justice of the case."

Rule 98—"When the Court are satisfied that if an order or orders complained of are allowed to stand, a substantial wrong or miscarriage of justice which cannot by any other process be so conveniently remedied or set right is likely to be thereby occasioned, they may order a re-hearing of the application, before answer or otherwise, in whole or in part, in such manner and on such terms and conditions as they shall think just."

John M'Coll, 14 West Laroch, Ballachulish, *appellant*, presented an application to the Scottish Land Court craving an order to find and declare that he was a landholder or a statutory small tenant of certain subjects of which F. C. Beresford and others, trustees of Sir George de la Poer Beresford *respondents*, were proprietors, and to fix a fair or alternatively an equitable rent for his holding.

By *joint minutes* the parties agreed that certain evidence given before the Crofters Commission in the cases of certain other holders of land on the same estate, so far as relevant, should be incorporated as evidence in the present case.

The *procedure* in the case was—On 11th June 1917 a single member of the Land Court having heard the cause found that the subjects occupied by the appellant were not a holding within the meaning of the Small Landholders (Scotland) Acts 1886 to 1911, either under the Act of 1886 or under the Act of 1911. The appellant appealed to the full Land Court, which on 6th December 1918 refused the appeal. On 27th December 1918 the appellant presented a requisition for a Special Case and lodged a draft case. The respondents lodged proposed alterations thereupon. On 25th January 1919 the appellant moved for a re-hearing on the ground that he desired to lead further evidence which had not hitherto been brought before the Court. The respondents opposed the motion for a re-hearing as incompetent in respect that a requisition for a Special Case had been taken upon the question upon which it was proposed to submit fresh evidence. The appellant refused to withdraw his requisition. The Land Court refused the motion for a re-hearing on the ground that it was incompetent for them to deal with it so long as the requisition was not withdrawn and the appeal to the Court of Session stood, and on 1st March 1919 pronounced an order refusing the motion.

Thereafter a Special Case was adjusted by the Land Court. The Special Case after narrating, *inter alia*, the procedure and orders above referred to set forth—"The [appellant] further contends that the Land Court was wrong in refusing to grant the re-hearing applied for as incompetent, or to allow him to lead further evidence in respect that under the statutory rules regulating procedure in the Land Court the requisition for a Stated Case did not remove the process from the Land Court, and did not stay procedure in the application unless it had been so ordered. . . . The respondents contend . . . that the Land Court was right in refusing the application for a re-hearing as incompetent."

The *questions of law* included — "(2) Standing the requisition for a Stated Case was the Land Court right in refusing the appellant's application for a re-hearing as incompetent?"

The *note* of the Land Court appended to the Order of 6th December 1918 contained the following:—"On a careful consideration of the evidence adduced we are of opinion that it is not proved that the [appellant] held the subjects on a yearly tenancy. From 1883 to 1893 the rents were paid direct to Dr Campbell and were entered in rent books, one of which belonging to the [appellant] is produced. It covers the period from 1876 to 1893, and it appears from it that the practice of entering the rents in pass-books prevailed in the time of Dr Campbell's predecessors. But the period covered by Dr Campbell's agency is the important one as it was both prior and subsequent to 1886. The rent-books show that the rents were paid every six weeks. It was proved that in the great majority of cases where removals had taken place during Dr Campbell's period of occupancy the tenants had removed not at the terms of Whitsunday or Martinmas but at various periods throughout the year corresponding to the six weekly terms at which the rents were payable. There is no substantive evidence to the contrary, and it seems to us that the import of the evidence accordingly is that these houses, including that of the [appellant], were not let upon a yearly tenancy but that the tenants could be, and in fact were, removed for non-payment of rent and for other causes between terms."

The *note* of the Land Court appended to the Order of 1st March 1919 was—"In this case the Land Court dismissed the application on various grounds of fact. The [appellant] then lodged a requisition for a Special Case to the Court of Session, and subsequently the respondents lodged proposed alterations or observations on the draft case. All that remained for the Land Court to do at that stage was to adjust the case for the Court of Session.

"In that state of matters, the judgment of the Land Court having disposed of the appeal by the [appellant] to them, the effect of the requisition was to withdraw from the Land Court the power to deal with the case until it had been disposed of by the Court of Session. Thereafter the [appellant] lodged a motion for re-hearing in which he stated that certain facts had since come to his knowledge which were not put before the Court, and he desired a re-hearing on these facts. It is clear that the question which he now desires to raise is involved in, if it is not exactly one of the questions

which the Court of Session will have to decide.

"In these circumstances it appears to us that the [appellant] must withdraw the requisition for a Special Case before we can consider the question raised in his motion for re-hearing, because it is impossible according to ordinary procedure that two Courts should be considering the same point at the same time and perhaps come to contradictory judgments.

"Accordingly, standing the requisition for a Special Case, we do not think it competent to grant the motion for a re-hearing. The Land Court having disposed of the case by a final judgment they are *functus*, and there is nothing before us to which, in view of the appeal to the Court of Session on that judgment, any further proceedings in this Court can apply. It is of course for the [appellant] to consider what his future procedure may be if he desires proof of new facts. It is for him to judge what steps he should take with regard to that."

Argued for the appellant—The application for a re-hearing was competent and should have been granted. The appellant desired to lead evidence to prove that the instances founded upon by the Land Court against him were not cases of crofts at all, but with two exceptions were cottages and garden ground; in the other two cases crofts were involved, but they had ruinous cottages and the removals had been by agreement of parties, the landlord giving the crofters in exchange for those crofts others with usable houses. The evidence before the Crofters Commission on that matter was irrelevant, but until it was founded on in judgment by the Land Court the appellant could not know that it would be used against him. The joint minute incorporated the evidence only so far as relevant. In those circumstances the application was within the terms of the Rules of the Scottish Land Court, Rule 95 (3) and (5) and Rule 98. The Land Court had a discretion to grant or refuse a re-hearing but they had refused to exercise it. Neither the motion for a re-hearing nor the requisition for the Special Case stayed proceedings—Rules 99 and 106—but the Land Court could, pending the re-hearing, have sisted the Special Case. In any event the Land Court had stated all the facts as to the application for the re-hearing in the Special Case. If they were *functus* and had no control over the case after the requisition, such a statement was not competent—Rules 90 to 98 were referred to.

Argued for the respondents—The Land Court was right. The requisition for a Special Case proceeded on the assumption that the Land Court had finally disposed of the matter. Once proceedings had been initiated by the requisition they must go on. The appellant was really approbating and reprobating, for under rule 102 he was bound to lodge a statement of facts for the Special Case. It must be assumed that such a statement was correct; the appellant now repudiated that statement of facts.

LORD PRESIDENT—The appellant in this case timeously, according to the rules of the Land Court, made application for a re-hearing. I am of opinion that the Land Court ought to have considered and decided the question raised by that application notwithstanding the fact that the appellant had also lodged a requisition for a special case.

The Land Court have held that it was incompetent for them to consider the motion for a re-hearing standing the requisition for a special case. I see nothing in the rules to preclude them from considering the motion for a re-hearing even although there was a requisition for a special case. If the motion for a re-hearing had been refused the requisition would have stood, and the adjustment of the case in ordinary course would have followed. If on the other hand the motion for a re-hearing had been entertained and granted, it appears to me that the requisition for a special case would naturally fall to the ground, because if the case had been re-heard the Land Court would presumably have pronounced a final judgment, and thereafter an opportunity would arise, to be availed of or not as the appellant or respondents thought fit, of lodging a requisition for a special case within fifteen days after the final judgment which the Land Court would pronounce after the additional evidence had been led.

The Land Court seem to have thought that if they did not insist on the requisition being withdrawn the result might be that two courts would consider the same points at the same time and perhaps give contradictory judgments. It does not appear to me that that would follow. They seem also to have thought that having disposed of the case by a final judgment they were *functus*. But they are not *functus*, because according to their own rules the appellant is entitled to a re-hearing if an application is made within three months of the final judgment.

On these grounds I have come to the conclusion that this application ought to have been considered and decided by the Land Court, and therefore that we ought to answer the second question of law in the negative.

LORD SKERRINGTON—I agree with your Lordship that it is the duty of the Land Court to consider on its merits a motion for a re-hearing, and that it is not a good reason for refusal that there stands unwithdrawn a requisition for a special case. As your Lordship pointed out, the fate of the requisition would depend on the manner in which the Land Court dealt with the motion for a re-hearing. If the Court granted the motion, either unconditionally or upon conditions with which the applicant complies, there would be no need for any further procedure upon the requisition. The Court would after the re-hearing pronounce an interlocutor disposing of the case, and any party aggrieved could then require the Court to state a special case. On the other hand, if the motion for a re-hearing was refused, then the original requisition would have to be proceeded with. The procedure followed by the Land Court placed the appellant in a

difficulty to which he ought not to have been subjected.

LORD CULLEN—I concur. It may be that the Land Court after hearing the motion might have made it a condition of granting a re-hearing that the requisition for a case should be withdrawn, but I am unable to find in the rules any ground for holding that it was incompetent without such withdrawal to entertain the motion.

LORD MACKENZIE was absent.

The Court answered the second question of law in the negative.

Counsel for the Appellant—Macphail, K.C. —Paton. Agents—Maxwell, Gill, & Pringle, W.S.

Counsel for the Respondents—Maitland—Mackintosh. Agents—W. & F. Haldane, W.S.

Thursday, March 11.

FIRST DIVISION.

[Lord Hunter, Ordinary.

GLASGOW CORPORATION AND ANOTHER *v.* LORD BLYTHSWOOD AND OTHERS.

Entail—Statute—Construction—Disentailing—Debts Affecting the Fee or Rents of Entailed Estate and Heir in Possession and his Successors—Entail Amendment Act 1848 (11 *and* 12 *Vict. cap.* 36), *secs.* 6 *and* 32—*Blythswood Act* 1828 (9 *Geo. IV, cap. xxiv*), *sec.* 6—*Blythswood Act* 1844 (7 *and* 8 *Vict, cap x*), *sec.* 20—*Act* 1681, c. 11.

Under the Act 1681, c. 11, writs relating to burgage lands required to be registered in the burgh registers, and town clerks were entitled to charge certain fees for the recording. Heirs of entail holding burgage lands under a strict entail granted them out in feu-farm, and the writs relating thereto were registered in the non-burghal registers. Doubts having arisen as to the validity of the feus a private Act was obtained in 1828 authorising the recording of the writs relating to the feus in the non-burghal registers. It contained a clause that the town clerks and their successors in office should be entitled to the fees to which they would have been entitled under the Act of 1681 for the deeds relating to the lands which should have been recorded in the burgh register but which by the private Act were withdrawn from that register. The debtors in that obligation were declared to be the then heir of entail "and the succeeding heirs of entail." In 1844 another private Act was obtained which reserved to the town clerks and their successors in office the right to "demand and exact from the [then heir of entail] and the heirs of entail hereafter to succeed to him under the deed of entail . . . the rates, fees, and emoluments" referred to in the former private Act. In 1887 the heir of entail in possession disentailed the estate. The obligation in favour of the town clerks and their successors was not inserted in the schedule of debts in terms of section 6 of the Rutherfurd Act and no provision was made to meet it. Thereafter the disentailer re-entailed the estate upon the same succession of heirs as under the former entail with the exception that one brother of the disentailer and his heirs was omitted. The omission accelerated the succession to the estate of another brother of the disentailer and his heirs. That brother while heir in possession refused to pay the fees in question and so did his son who succeeded him. An action was brought by the corporation of the burgh and the town clerk against the executors of the brother who had refused to pay the dues and his son, who was then heir in possession, containing conclusions declaratory of the town clerk's right, and with petitory conclusions. *Held* that the obligation to pay the dues was a right held by a third party and lawfully affected the heir of entail in possession and his successors, and was therefore in terms of section 32 of the Rutherfurd Act unaffected by the disentail and was operative against both defenders, as the disentail and the change in the order of the succession effected in the re-entail did not alter the character in which they took the estate, and (2) that the obligation to pay the dues was several, each heir being liable only for the dues accruing during his period of possession.

The Entail Amendment (Scotland) Act 1848 (the Rutherfurd Act), (11 and 12 Vict. cap. 36), enacts—Section 32—". . . an instrument of disentail . . . when duly executed and recorded . . . shall have the effect of absolutely freeing, relieving, and disencumbering the entailed estate to which such instrument applies, and the heir of entail in possession of the same, and his successors, of all the prohibitions, conditions, restrictions, limitations, and clauses irritant and resolutive, of the tailzie under which such estate is held . . . Provided always that such instrument of disentail shall in no way defeat or affect injuriously any charges, burdens, or encumbrances, or rights or interests of whatsoever kind or description, held by third parties and lawfully affecting the fee or rents of such estate or such heir in possession or his successors, other than the rights and interests of the heirs-substitute of entail in or through the tailzie under which such estate is held, but that all such charges, burdens, and incumbrances, and rights and interests other than as aforesaid shall remain at least as valid and operative in all respects as if no such instrument of disentail had been executed or recorded."

The Act 1681, c. 11, enacts—" . . . Therefore His Majestie with consent of his Estatis of Parliament *Statuts and Ordains* that *in time coming all instruments of sasine of tenements within burgh royal, or*