HOUSE OF LORDS.

Thursday, May 9.

(Before the Lord Chancellor (Halsbury), and Lords Ashbourne, Shand, Davey, Brampton, and Robertson.)

CALLANDER *v.* SMITH.

(*Ante*, July 7, 1900, vol. xxxvii. p. 890; and 2 F. 1140).

Landlord and Tenant — Outgoing — Compensation for Improvements — Market Garden—Lease—Statute—Construction—Effect—Retrospective Effect—Market Gardeners Compensation (Scotland) Act 1897 (60 *and* 61 *Vict. c.* 22), *sec.* 4—"*Has then Executed thereon.*"

Held (*aff.* judgment of the Second Division, but by the majority upon different grounds) that section 4 of the Market Gardeners' Compensation (Scotland) Act 1897 does not entitle a tenant under a lease current at the commencement of the Act to claim compensation in respect of market garden improvements executed prior to the commencement of the Act.

Held, per the Lord Chancellor, Lord Shand, Lord Davey, and Lord Brampton, and *opinion per* Lord Ashbourne, that in the Market Gardeners Compensation (Scotland) Act 1897, section 4, the word "then" in the context "has then executed thereon . . . improvements in respect of which a right of compensation or removal is given to a tenant by this Act," means "thereafter" and not, as held by the Second Division, "prior to the commencement of the Act."

This case is reported *ante, ut supra.*

Mr Smith, the defender and reclaimer, appealed.

At delivering judgment—

LORD CHANCELLOR—I cannot say that much doubt has been infused into my mind upon the subject of this case, which appears to me to be capable of very easy solution.

It appears to me that the effect of the Act of 1897 is very plain. In the first place, I think no rights were intended to be conferred upon anybody retrospectively. The language of the 3rd section seems to me to have a very plain meaning—"Where after the commencement of this Act it is agreed in writing that a holding shall be let or treated as a market garden," then certain "provisions shall have effect," and one of them is the 3rd sub-section, which enlarges Part III. of the Schedule of the former Act. The effect of clause 4 also appears to me to be very plain. The Legislature is providing anew for the condition of things as applicable to market gardens, and it says, after the commencement of this Act, where you have a written agreement then certain conditions shall apply—this is all beyond the commencement of the Act; and then, apart from a written agreement, the case is provided for where, although there is no written agreement, "a holding is at that date" (that is to say, "at the commencement of this Act;" the word "then" follows immediately after, but I make no distinction between "the commencement of this Act" and the time referred to by "then") "in use or cultivation as a market garden," then without the intervention of a written agreement, which is the first case provided for, a tenant under a lease, unless he has received notice of dissent from his landlord, shall have the same right of compensation in respect of improvements as if there had been a written agreement—"the provisions of this Act shall apply in respect of such holding as if it had been agreed in writing after the commencement of this Act that the holding should be let or treated as a market garden." What is the effect of that? It does not say that he shall have compensation for everything that has been done upon the land since the commencement of the lease—what it says is, that the provisions of the Act which have been specified shall apply as if it had been agreed in writing after the commencement of the Act that the holding should be let or treated as a market garden. Then what is the tenant to get? I turn back and I find what is to happen in the event thus contemplated. Clause 3 says—"The following provisions shall have effect." Those "following provisions" apply only (the contrary is hardly susceptible of argument) to improvements made since the date of the commencement of the Act, and that is the whole of the controversy.

I entirely agree with the Lord Ordinary in his construction of the statute. It seems to me to be simply hopeless to attempt to read the language otherwise than as I have read it. One case contemplated by the framers of the statute is the case of a written agreement. The other case is that at the time of the passing of the statute the thing has already been done, and the condition of things is such that the tenant has already, with the knowledge of the landlord, cultivated the land as a market garden; the Act says that then "the same provisions shall apply," that is to say, that for all future improvements, although the landlord has not given his consent in writing, there shall be compensation at the end of the lease. That seems to me to be intelligible, reading the mere words as they stand, and I confess, that having listened to the long and ingenious argument submitted to us by Mr Haldane, I have been unable to find anything that requires exposition or that is difficult of interpretation in the language of the statute so read. It appears to me that there is great difficulty in the construction which Mr Haldane has suggested, and I think as a mere matter of language and the construction of the words in the Act it would be impossible to maintain it.

For these reasons I move your Lordships that the interlocutors appealed from be

affirmed, and the appeal dismissed with costs.

LORD ASHBOURNE — I entirely concur. Of course it is obviously competent for the Legislature if it pleases in its wisdom to make the provisions of an Act of Parliament retrospective; but before giving such a construction to an Act of Parliament one would require that it should either appear very clearly in the terms of the Act or arise by necessary and distinct implication. Now, such reading as I have given to this short statute suggests to my mind that it conveys very clearly that the provision on which the controversy arises is not retrospective. It has been suggested that clause 3 only comes into operation where holdings are let as market gardens after the commencement of the Act, and that the 4th section deals with the cases which are not covered by the 3rd section, that is, leases current at the date of the commencement of the Act. But to prevent all misconception, and to show that it was not intended to go the least further in that direction, it says at the end of it that although the provisions of the Act are to attach to current leases under certain conditions, they are to do so as if there had been an agreement in writing made after the commencement of the Act, showing that the governing words all through are "after the commencement of the Act," as my noble and learned friend on the woolsack said.

It is not necessary to go into any discussion of the meaning of the word "then," or any of the other topics that have been introduced. I agree with the construction given by the Lord Ordinary, and I assent to the motion which has been made by my noble and learned friend.

LORD SHAND—I am of the same opinion.

It is not necessary in my view of this case to invoke the rule or principle under which a right to claim payment on the part of a tenant for improvements made prior to the passing of an Act of Parliament, and so to give so improbable a retrospective effect to the Act, must be given expressly or by necessary implication by the provisions of the statute. It seems to me there is here no ground to support the tenant's claim even by ingenious and strained interpretation of the sections of the statute.

For the reasons stated by the noble and learned Lord on the woolsack, and by the Lord Ordinary in the note to his judgment, I agree that the meaning of the word "then" in section 4 of the Statute of 1897 is "thereupon" or "thereafter," and that the clause includes and refers only to improvements made by the tenant after the date of the Act. But if this were not so, I think the result would be the same as found by the learned Judges of the Second Division.

LORD DAVEY—I am of the same opinion. I think it is important to observe that market gardens, as was pointed out by Mr Haldane, are within the Act of 1883, and this Act of 1897 makes further and more beneficial provisions for market gardens by way of amendment of the I. and III. parts of the schedule to the previous Act. But those amendments are only made under certain conditions and in certain cases, and the question is, in what cases are those amendments to be made. Now, under section 3 of the Act it is very clearly pointed out that the provisions of that section apply only "where after the commencement of this Act" there is an agreement in writing that a holding shall be let or treated as a market-garden—that is to say, that so far as the landlord is concerned he does for the first time treat or let the land as a market-garden after the commencement of the Act. There, necessarily, the amendment can only come into operation as regards improvements which are made after the commencement of the Act.

Then under section 4 the case is contemplated where there is "a lease current at the date of the commencement of the Act," under which land has in fact with the knowledge of the landlord, but without his written consent or under a written agreement, been treated as market garden, and the tenant "has then executed thereon, without having received previously to the execution thereof any written notice of dissent by the landlord, any of the improvements in respect of which a right of compensation" is given to a tenant by this Act, then the provisions of the Act shall apply as if there had been a written agreement. I should have thought that the meaning of that clause was sufficiently obvious. It puts a market garden, which has been allowed by the landlord to be treated as a market garden in the same position as regards this Act as if a written agreement had been made after the commencement of the Act to treat it as a market garden, but only on the condition that the tenant has "then executed thereon" improvements without having received from the landlord written notice of dissent. I construe the word "then" in that clause as meaning "thereafter." "Then," of course, "is at the commencement of the Act," and "at that date," and I construe it to mean that "thereafter" or "thereupon" he has executed improvements. It may be that the other meaning which Mr Haldane attached to it, and which the Inner House have favoured, is more like the *prima facie* meaning, but it is clearly capable of meaning "has thereupon," and I think the structure of the section requires it to mean that.

I see no reason or sense whatever in making the previous execution of the improvements the condition of the Act coming into operation. If it had any meaning at all, it would rather, I think, have the effect of making old improvements within the Act and not new improvements. However that may be, there is this second objection to reading it as Mr Haldane read it, that it would put the landlord in this position, that he would be rendered liable to compensate for improvements by not having given any written notice of dissent when it was not any of his business to give a written notice of dissent at the time

when he knew that his land was being improved, although he could not, unless he gave his consent in writing to the improvements, be made liable for those improvements. Why should he be called upon to have given gratuitously any written notice of dissent? Indeed, as Mr Asquith very pertinently pointed out, it could only have been by the operation of his prophetic soul that he could have done so.

For these reasons I think that those words mean "has thereupon executed," and the scheme of the Act is shortly this, to amend the schedules as regards market gardens in the Act of 1883, first, as to what I may call new market gardens in cases in which there is an agreement in writing made after the commencement of the Act to treat them as market gardens; and secondly, as to all market gardens in respect of subsequent improvements, provided the landlord has not after the passing of the Act given a written notice that he will not be liable for those improvements. That seems to me to render consistent the construction of the Act, and it is the construction which I advise your Lordships to place upon it.

LORD BRAMPTON—I entirely agree.

LORD ROBERTSON—I also agree, for the reasons which have been stated by the learned Judges of the Second Division.

Interlocutors appealed from *affirmed*, and appeal *dismissed*, with costs.

Counsel for the Pursuer and Respondent—Asquith, K.C.—A. O. Deas. Agents—Grahames, Currey, & Spens, for John C. Brodie & Sons, W.S.

Counsel for the Defender and Appellant—Haldane, K.C.—E. H. Coles—Allan Lawrie. Agent—H. C. Haldane, for Buik & Henderson, W.S.

Thursday, May 9.

(Before the Lord Chancellor (Halsbury), and Lords Ashbourne, Shand, Davey, Brampton, and Robertson.)

INTERNATIONAL FIBRE SYNDICATE, LIMITED *v.* DAWSON.

(*Ante*, February 20, 1900, 37 S.L.R. 451, and 2 F. 636).

Assignation—Validity of Assignation—Contract—What Contracts Assignable—Delectus Personæ—Jus Crediti under Contract—Title to Sue.

A, the owner of a patent for a fibre decorticating machine, entered into an agreement with B, the owner of an estate in Borneo, whereby it was stipulated that A should supply and erect one of the machines on B's estate, and if it proved satisfactory that B should pay for it a sum to cover cost, freight, and cost of erection, that terms should be arranged for the use of the decorticators on the estate, and that the area under fibre cultivation should be increased by 25 acres *per* three months up to 1000 acres. A decorticating machine was supplied and erected by A. Within a year after the date of this contract, and after the supply and delivery of the machine, he assigned his patent to a limited liability company, together with "licences, concessions, and the like," receiving certain shares in the company, *inter alia*, for the patent, and for "contracts and concessions." Thereafter the company with consent of A brought an action against B, in which they sued as assignees of the contract between A and B. They ultimately restricted their claim to the sum due for the machine supplied and erected by A. In defence B pleaded "No title to sue." *Held* (*affirming* the judgment of the Second Division) that this plea must be sustained, in respect (1) that the contract between A and B as a whole involved *delectus personæ*, and was consequently not assignable; and (2) that any *jus crediti* for a money payment arising out of the contract, if there was any assignable claim of that kind which had become a complete debt before the date of the assignation, had not in fact been assigned.

This case is reported *ante ut supra*.

The pursuers appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—I think this case is quite clear. I entirely assent to the reasoning of Lord Kincairney, and it appears to me that the whole is summed up in the dilemma which I put to the learned counsel who last addressed your Lordships. Either this was or it was not an entire contract. If it was, it has not been doubted or questioned at the bar that there is a personal element in it which makes the entire contract as referred to in these papers not assignable at all; or if it is treated as something which had become a complete debt before the assignment so that it was practically assigned for £500, then it is clear upon the face of this contract, coupling it with the schedule which is referred to, that there is no assignment at all. Therefore the dilemma is complete—either it was a contract in its entirety, which was not assignable, or if it is treated as a chose-in-action separate from the contract, and separated from it in such a sense that there was a sum then payable, it is not assigned. I think that dilemma is absolutely complete, and it appears to me that that disposes of the case.

I move that the appeal be dismissed with costs.

LORD ASHBOURNE—I entirely concur in the opinion expressed by my noble and learned friend on the woolsack. I do not think under the circumstances the contract, or what is alleged to be the product of the contract, was assignable. And I do not think there was any assignment.