the fact that the tenant's father was allowed to sit rent free for the fourteen years from 1861 to 1875. The Land Court was bound to weigh this along with other elements in the case. But having considered it, it was within their right to hold that the discharge had been granted *sine causa* and that fair consideration for the buildings had not been given, even though the tenant had the subjects rent free for fourteen years. It is stated that when the tenant's father entered in 1861 the land was mostly heather, and there were no buildings. The land was wholly reclaimed by the tenant's father, who also erected all the buildings, with the assistances stated in the case from the proprietors. I assume the buildings were erected at the beginning. Some criticism was offered on the point that the date the buildings were erected is not stated, and that it is not set out in the case to what extent the evidence given by the tenant was hearsay from his father. The subjects were, however, inspected by a member of the Land Court. The proprietors did not allege that, apart from the contributions of material, they had constructed any of the buildings or executed any of the permanent improvements, and they led no oral evidence. In these circumstances I think the Land Court were entitled to come to the conclusion that nothing had ever been given by the landlord in respect of the value of buildings, and that they were therefore entitled to hold it proved to their satisfaction that the applicant is a landholder within the meaning of the Landholders Acts.

The next question turns upon the effect to be given to the discharge already referred to granted by the applicant's father in the lease of 1875. It is in these terms—"All claims for past meliorations are held to be extinguished, and the tenants are to have no claim on the landlord, either previous to or at their removal, for compensation in respect of any improvements which they may make after the commencement of the bargain." It is said that this is a bargain and that the applicant cannot get behind it. It is no doubt somewhat remarkable that there is no clause in the Landholders Act of 1911 or the Crofters Act of 1886 to prevent contracting out except as regards vacant holdings and under section 52 (4) of the Act of 1911. In this respect these enactments are to be contrasted with the Agricultural Holdings Acts of 1883, section 36, and 1908, section 5. The duty imposed upon the Land Court in the case of a landholder is defined by the Crofters Act of 1886, section 8, which provides—[*His Lordship quoted the section, supra*].

Now the improvements in question comply with the conditions in (*a*) and (*b*), and were not executed in virtue of any specific agreement. An important provision is contained in section 10, which provides—"Improvements shall be valued under this Act at such sum as fairly represents the value of the improvement to an incoming tenant, provided that in fixing the amount of compensation payable the value of any assistance or consideration which may be proved to have been given by the landlord or his predecessors in title, in respect of such improvements, shall be taken into account, and deducted from such compensation, and the value of any deterioration committed or permitted by the tenant within the four years preceding shall also be deducted from the said compensation." Credit is therefore to be given for whatever has been done by the landlord or his predecessors in title in fixing the amount to be paid to the tenant. This payment of compensation to the tenant is the result of a new right created by the Act of 1911. It did not exist in 1875 when the discharge was granted. And the terms of the discharge are not such as to exclude what is the result of supervenient legislation. In my opinion the Land Court were entitled to take the view that the discharge was not a bar to their performing the duty put upon them by positive enactment.

LORD GUTHRIE—I agree with your Lordship in the chair.

LORD SKERRINGTON—I also agree with your Lordship.

The Court answered the first question in the affirmative and the second in the negative.

Counsel for the Appellants—Watson, K.C.—C. H. Brown. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Respondent—Gentles. Agents—Macpherson & Mackay, S.S.C.

Thursday, July 13.

FIRST DIVISION.

(SINGLE BILLS.)

SMELLIE *v.* CALEDONIAN RAILWAY COMPANY.

(See *ante*, p. 336.)

Expenses—Taxation—Preliminary Investigations of Defenders in Action Dismissed as Irrelevant—C.A.S., 1913, *K*, *iv*, *Appendix ii*, *Rule* 3.

The C.A.S., 1913, K, iv, Appendix ii, enacts—Rule 3—"The expenses to be charged against an opposite party shall be limited to proper 'expenses of process' without any allowance (beyond that indicated in the table) for preliminary investigations, subject to this proviso, that precognitions (so far as relevant and necessary for the proof of the matters in the record between the parties), although taken before the raising of an action or the preparation of defences, and although the case may not proceed to trial or proof, may be allowed when eventually an interlocutor shall be pronounced either approving of issues or allowing a proof."

The pursuer in an action of damages for breach of contract against a railway company (the contract being for the construction of a line) brought his action long after the work was com-

pleted and paid for, and made most specific and minute averments of breach of contract against the defenders. To enable the defenders to prepare their defences they had to have expert investigations made into the facts alleged by the pursuer. The action having been dismissed as irrelevant, and the pursuer having been found liable in expenses, the Auditor disallowed the accounts for these investigations on the ground that they were preliminary investigations. *Held* (1) that rule 3 might be relaxed in special circumstances, and (2) that the circumstances of this case were special; *remit* to the Auditor to allow the defenders such sum as he might find reasonable.

The Caledonian Railway Company, *defenders*, lodged a note of objections to the Auditor's report on their account of expenses in an action brought against them by John Smellie, *pursuer*. They objected to the disallowance of items incurred for investigations preliminary to the preparation of their defences.

The pursuer had sued the defenders for £49,000 damages for breach of a contract for the construction of a railway line, entered into on 29th March 1899 between the pursuer and the Paisley and Barrhead Railway Company, whose obligations were subsequently taken over by the defenders. The work was completed and paid for in 1906, but the pursuer only brought his action in February 1913. His averments were of great length, and minutely detailed the facts alleged as constituting breach of contract with reference to the various details of the work done. On 27th June 1914 the Lord Ordinary (DEWAR) dismissed the action as irrelevant and found the pursuer liable in expenses. On 1st February 1916 the First Division adhered, and found the pursuer liable in additional expenses since the date of the Lord Ordinary's interlocutor, and remitted to the Auditor to tax and to report. [*See ante*, p. 336.]

The defenders' *account of expenses* contained, *inter alia*, (1) an item amounting to £629, 5s. 2d., being an account incurred by them to Messrs Formans & M'Call, C.E., Glasgow, and (2) an item amounting to £26, 16s. 6d., being an account incurred by them to J. Gilchrist Bennet, C.E., Paisley. Both accounts were for expert investigations to enable the defenders to prepare their defences. The Auditor disallowed items amounting to £497, 19s. 3d. of the former account and the whole of the latter, and annexed to his report the following

Note.—"The Auditor in Messrs Formans & M'Call's account has allowed £105 for plans, &c., as against £183, 15s. charged. *Quoad ultra* the charges in their account have been disallowed, and their outlays of £3, 13s. 3d. sustained.

"In addition to the above sum of £105 for plans the Auditor, in the very exceptional circumstances of the present case, would have allowed Messrs Formans & M'Call a further sum of at least £105 for assistance and information which were essential to enable the defenders to meet the heavy and remarkable claim of over £49,000 made against them, supported by elaborate and detailed statements of fact relating to the execution of railways and relative works many years ago. The defenders, their directors, and salaried officers were necessarily ignorant of the facts, and even their engineers could only supply them with the necessary information as the result of much labour and research.

"The pursuer maintains that no initial expense should be allowed beyond the maximum instruction fee of £3, 3s., and he refers to the case of *Towers-Clark* v. *Wester Moffat Colliery Company*, 1914, 1 S.L.T., p. 371. In that case it was alleged that the defenders had worked and abstracted coal from several hundred yards beyond the boundaries in his lease, with the result that the pursuer's mansion-house had been undermined and rendered uninhabitable. The pursuer had no means personally of knowing the amount or value (1) of coal wrongously abstracted, or (2) of the damage done to the mansion-house. He accordingly employed an engineer and architect to make the necessary investigations, measurements, &c., without which he could not make a relevant or reasonable claim.

"The Auditor in *Towers-Clark's* case allowed what he regarded as fair and reasonable charges to the engineer and architect. He did so in accordance with the settled practice of his predecessors for upwards of thirty years of not applying the £3, 3s. instruction fee to cases where it cannot be reasonably applied or regarded as applicable. A familiar and really frequent example is the case of personal injury by railway or motor car accident and cases of that class. The charge for medical examination and report is invariably allowed, with a fee for further examination and report where a tender is made.

"In 1884, in the case of *Macdonell's Trustees* v. *The Oregonian Railway Company*, 11 R. 912, there was a full debate before the Second Division on the question of whether in a petition for the liquidation of the company there should be an order for intimation and service. The Court unanimously dismissed the petition with costs to the company. At taxation the petitioners argued that the agents for the respondents could get only the £3, 3s. fee, but the Auditor (Mr Edmund Baxter) held that this fee was wholly inapplicable, and his judgment was acquiesced in by the petitioners, who paid about £40 of costs.

"In taxing the defenders' account in the present case the Auditor felt that he was bound to follow and apply the Lord Ordinary's judgment in *Towers-Clark's* case and he has done so. He understands, however, that objections to this will probably be lodged by the defenders, and as the question raised is one of importance and of frequent occurrence he has thought it right to deal fully with it with a view to an authoritative judgment."

The case was heard in the Single Bills.

Argued for the defenders—The ordinary rule was contained in C.A.S., 1913, K, iv, Appendix ii, rule 3. But this rule was not

inflexible, but admitted of exceptions in cases in which justice could not be done by a rigid application — *Shirer* v. *Dixon*, 1885, 12 R. 1013, 22 S.L.R. 669; *Govan* v. *J. & W. M'Killop*, 1909 S.C. 562, *per* Lord Low at p. 566, 46 S.L.R. 416. This case was exceptional, for the preliminary investigations were necessary in defence; the action was brought long after the defenders could reasonably be supposed to be conversant with the facts alleged; the contract was originally between the pursuer and another railway. The *Mica Insulator Company, Limited* v. *Bruce Peebles & Company, Limited*, 1907 S.C. 1293, 44 S.L.R. 674, was distinguished, for in it the preliminary investigations were not for the purpose of replying to the pursuers' averments but for a counter attack. *Towers-Clark* v. *Wester Moffat Colliery Company*, 1914, 1 S.L.T. 371, was not in point, for there the action was by a landlord against his tenant, and it was clearly the former's duty to be conversant with the actings of his tenant. Even if an allowance of proof made a difference, *Govan's* case (*cit.*) could not be distinguished on that ground, for there the preliminary investigation was prior to the raising of the action.

Argued for the pursuer—The rule of the C.A.S., 1913, was imperative and must be applied without exception. Expenses of process, therefore, not of preliminary investigations, were all that could be allowed, and the Auditor rightly allowed only the regular fee of £3, 3s. If exceptions to the rule were to be allowed in special circumstances the framers of the rule would have expressed it so as to admit of such exceptions. In *Shirer's* case (*cit.*) the Court was practically in the position of taking a proof and the inquiries were regarded as precognitions, and further, the case came within the special rules applying to husband and wife. *Govan's* case (*cit.*) was distinguished, for a proof was allowed in it, and though Lord Low, at p. 565, thought the rule might be relaxed, he also based his judgment on the fact that the investigations were immediately necessary as the evidence derived therefrom would have deteriorated with lapse of time. *Tower-Clark's* case (*cit.*) was in the pursuer's favour, so was the case of *The Mica Insulator Company, Limited* (*cit.*). The latter case showed that the provision of an Act of Sederunt could not be set aside by one of the Divisions, for it was the act of the Whole Court, *per* Lord President (Dunedin) at 1707 S.C., p. 1301. In any event this case was not special, for though the matters were detailed and technical, the defenders had an expert department which could give all the assistance required. The transference of the railway made no difference, for the defenders must have been fully cognisant of the facts when they took over the railway.

At advising—

LORD PRESIDENT—In this case we are invited to say that the 3rd Regulation for the Taxation of Accounts in the Codifying Act of Sederunt of 1913, C.A.S. 1913 K., iv, App. ii, 3, is inflexible, and must be rigorously applied in the present instance. I think it ought not to be rigorously applied, and that this is a very exceptional and rare case in which the regulation ought to be relaxed in order that justice may be done.

The claim is singular not only in amount but also in character. The pursuer, it appears, was a railway contractor, who, as far back as October 1900, undertook to construct a short line of railway, conform to a written contract with relative plans and specifications. The work was actually commenced in May 1889, and was completed in the autumn of 1906. The estimated price was £114,000, and during the course of the work payments were made to the contractor under the contract, and, I presume, on engineer's certificates, to the amount of £167,000, and there, as everybody believed, the contract ended.

After a lapse of seven years, in February 1913, the pursuer, for the first time, brought forward a claim for £49,000 for work which he alleged was done outside the contract altogether, and was not covered by contract prices. He backed up this remarkable claim with a wealth and elaboration of detail almost unexampled in this Court. His condescendence extended to 44 articles, many of them very lengthy, and the record extended to 87 pages of print. In order to defend themselves against that claim, at once so stale and so complex in detail, the defenders were compelled to consult their engineers, to go back for a period of fourteen years, and to investigate the plans and sections extending over a period of six years. As the Auditor very well notes—"The defenders, their directors and salaried officers, were necessarily ignorant of the facts, and even their engineers could only supply them with the necessary information as the result of much labour and research."

The question is, whether or no the defenders in these very exceptional circumstances are entitled to have a reasonable allowance for preliminary investigation over and above the three guineas allowed in the table of fees.

The Auditor tells us that, following the settled practice of some thirty years, he would have been prepared to make a reasonable allowance to the defenders, but that the case of *Towers-Clark* v. *Wester Moffat Colliery Company*, 1914, 1 S.L.T. 371, seems to be hostile to that course being followed. I do not think so. In that case Lord Hunter, rightly or wrongly, applied the rule, and did not consider the case to be exceptional. But there is nothing in his Lordship's judgment to militate against the view that the regulation was not absolutely inflexible.

I think that the course which was followed by the Auditor and his predecessors is sound, and ought to be followed in this very exceptional case. We find direct authority for taking that course in the case of *Govan* v. *J. & W. M'Killop*, 1909 S.C. 562, 46 S.L.R. 416, where, I observe, there was submitted to the Court the same argument that we heard here, to the effect that the regulation was imperative and subject to no modification whatever, and Lord Low, who delivered the leading judgment in that

case, said—"In many ways the Act of Sederunt leaves no discretion to the Court. For example, where a maximum fee is fixed for a particular step in procedure the Court cannot allow a larger fee. But I cannot doubt that the Court has some discretion in applying the general regulations, and is entitled to make some modification upon the strict letter of such regulations if the justice of the case so requires."

That seems to me to be very sound law, and nothing was said against the authority of *Govan's* case except that there was not cited to the Court there the decision of this Division of the Court in the prior case of the *Mica Insulator Company* v. *Bruce Peebles & Company*, 1907 S.C. 1293, 44 S.L.R. 674, and it was argued—so at least I understood—that had the *Mica Insulator* case been quoted the judgment would have been the other way in the case of *Govan*. I cannot think so, for I find in the observations made by Lord Dunedin upon this regulation — 1907 S.C., at p. 1301 — nothing hostile to the view that was taken by the Second Division in the case of *Govan*. The general regulations attached to the Act of Sederunt are, of course, of the highest authority, but they are only regulations. They are merely a set of rules which the Court gives out for the guidance of the Auditor. They are not rules which any one Division sitting by itself can in any way set aside, because they have the authority of the Whole Court by which one Division is bound. But on the other hand they are not a statute where one must necessarily stick upon the mere letter of what has been enjoined; they are merely rules for our guidance, of which we are fully entitled to interpret the spirit." That is all that I propose to your Lordships that we should do in the present case.

It is true, no doubt, that in the *Mica Insulator* case the Court refused to allow the defenders the expense of preliminary inquiries to enable them to state their defence, but that was for a reason given which is wholly inapplicable to the present case. This is emphatically not a case in which the defenders were bound to know what their defence to these very detailed and elaborate statements truly was. This is not a case in which they were therefore not entitled to have any allowance made for finding out their defence.

For the reasons I have given I think this a highly exceptional case in which we ought to relax the third regulation, and accordingly I propose to your Lordships that we should pronounce an interlocutor very much on the lines of the interlocutor pronounced by this Division of the Court in the case of *Shirer* v. *Dickson*, 1885, 12 R. 1013, 22 S.L.R. 669, referred to at the discussion, viz., remit to the Auditor to reconsider his report with special reference to the objection of the defenders set forth in their note, to hear the explanations of the parties, and to allow the defenders such a sum as he, the Auditor, may find reasonable.

LORD MACKENZIE — I am of the same opinion. I agree with the views expressed by Lord Low in the case of *Govan*, 1909, S.C. 562, as to the discretionary power of the Court in dealing with the Act of Sederunt, and I think that the circumstances of this case are so exceptional that we ought to relax the rigid application of the Act of Sederunt.

But I think it my duty to point out that a considerable sum of money has in this case been absolutely thrown away in consequence of our rule of practice which makes it necessary to state the whole defence at once. I would point out that, if there had been a discretionary power vested in the Lord Ordinary to allow issue to be joined solely on the question of relevancy in the first instance, the whole of this expense would have been saved.

LORD SKERRINGTON concurred.

LORD JOHNSTON, who had not heard the case, delivered no opinion.

The Court remitted to the Auditor "to reconsider his report, with special reference to the objections of the defenders set forth therein, to hear the explanations of the parties, and to allow the defenders such a sum as he may find reasonable," and found the defenders entitled to the expenses in connection with their objections.

Counsel for the Pursuer—Moncrieff, K.C. —M. P. Fraser. Agents—Campbell & Smith, S.S.C.

Counsel for the Defenders — Dean of Faculty (Clyde, K.C.) — Watson, K.C. — Wark. Agents—Hope, Tod, & Kirk, W.S.

Wednesday, July 19.

FIRST DIVISION.

(SINGLE BILLS.)

[Lord Anderson, Ordinary.

WEINSCHEL *v.* WEINSCHEL'S TRUSTEE AND ANOTHER.

Process—Reclaiming Note—Competency—Bankruptcy—Reclaiming Note without Petition and Answers Appended—C.A.S., 1913, *D*, i, 2—*Judicature Act* 1825 (6 *Geo. IV, cap*, 120), *sec.* 18.

In a petition for recall of sequestration, the Lord Ordinary having allowed a proof, the trustee in the sequestration reclaimed. The prints of the petition and answers were not appended to the reclaiming note, but were lodged and boxed separately and later. The respondent objected to the competency of the reclaiming note on the ground that in this respect it did not comply with the Judicature Act, 1825, sec. 18, and C.A.S., D, i, 2. In the special circumstances of the Case the Court *repelled* the objections to the competency, but *observed* that petitions and answers were in this matter exactly equivalent to a closed record, and must be appended to any reclaiming note and boxed therewith.