

An effort has been made to establish as a custom of the port of Bristol what is no more than a method of taking delivery which suits the special convenience of one particular buyer. That appears to me to lack all the essentials of an established and settled custom at a port either of loading or of discharge. It is not certain except in the case of one receiver. It can by no possibility be notorious, since only four or five cargoes a-year are consigned to one receiver. It is not uniform except in the case of one of the receivers. And it is certainly not reasonable except in the case of Pirie, Wyatt, & Company or others who chance to be placed exactly as they are. In the case of other receivers it would be a most unreasonable custom, and one hesitates to lay down that there is an established and settled custom of the port of Bristol, which would be most anomalous and inconvenient, and which would probably operate unjustly in the case of subsequent buyers and receivers of esparto cargoes consigned to this port. Lord Justice-Clerk Moncreiff observed in the case of *Clacevich v. Hutcheson & Company*, 1887, 15 R. 11, 25 S.L.R. 11, with regard to an alleged custom in the discharge of bones at Aberdeen (p. 16)—“I do not think that any such custom has been proved. In the first place, the trade in bones has grown up lately, within the last thirty years.” Here it is twenty-five years. “Then there is only one merchant in Aberdeen who deals largely in bones, and that is the defender”—there is only one receiver who deals largely in esparto, and that is Pirie, Wyatt, & Company—“and his practice cannot raise up such a custom of the port as would be sufficient to bind traders.” “It appears,” says Lord Young in the same case (p. 17), “that” the defender “is in the habit of insisting on having the cargoes consigned to him separated on board the ships which brought them, but I cannot regard that as a custom of the port within the meaning of this charter-party. The practice of a single merchant to use ships in this way for his own convenience is not a custom of the sort to which the charter-party refers.”

These opinions seem to me to be exactly in point in the present case. The evidence clearly establishes that it is for the convenience of Pirie, Wyatt, & Company, papermakers at Wells, to receive esparto on railway trucks, but it establishes nothing more. I accordingly reach the conclusion that inasmuch as the alleged custom of the port of Bristol has not been proved the defenders are bound to pay demurrage. On the other questions which Lord Mackenzie has dealt with in his opinion I entirely agree with his Lordship.

LORD JOHNSTON did not hear the case, and was not present at advising.

The Court recalled the interlocutor of the Sheriff-Substitute, and repeated the findings in fact therein, Nos. 1 to 16 inclusive, and in place of No. 18 found “that had the pursuers not used lighters to facilitate the dispatch of the ‘Cronstadt,’ she would have been on demurrage for five days

longer”; and in place of the findings in law found “(1) that the exception clause in the charter-party above quoted did not apply to the charterers but only to the shipowners, (2) that the defenders were liable in the sum of £285, with interest, as concluded for, in name of demurrage, and (3) that the pursuers by employing lighters diminished the damages resulting from the defenders’ breach of contract in failing to take delivery within the period stipulated in the charter-party, to the extent of £200, being five days’ demurrage at £40 a-day, and that to this extent they were entitled to decree under the second conclusion of the summons: Therefore decerns,” &c.

Counsel for the Pursuers—A. O. M. Mackenzie, K.C.—C. H. Brown. Agents—J. & J. Ross, W.S.

Counsel for the Defenders—Macmillan, K.C.—D. Jamieson. Agents—Webster, Will, & Co., W.S.

Tuesday, July 11.

## SECOND DIVISION.

[Scottish Land Court.

HUNTER v. STRACHAN.

*Landlord and Tenant—Small Holding—Process—Appeal—Competency—Special Case Bringing under Review Decision by a Single Member of the Land Court—Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), sec. 25 (5).*

An application to have a first equitable rent fixed was presented by the tenant of a croft. He maintained that he had given valid notice of his intention to take, and had taken, advantage of a break in his lease. The application was dealt with by a single member, not the chairman, of the Land Court.

*Held*, after consultation with the judges of the First Division, that a special case to the Court of Session bringing under review his decision was competent.

*Landlord and Tenant—Lease—Break in Lease—Notice by Tenant that he will Remove at Break in Lease.*

A tenant under lease of a croft wrote to the landlord’s agents—“I have a break in my lease at Whitsunday 1915 and I asked the yearly rent down to £24 and a water supply from the cistern which supplies Minnes to be brought across in metal pipes”; and they replied—“We have received your letter of yesterday’s date and shall submit your request for a reduction of rent and a water supply to Mr H. for instructions. We may point out, however, that Mr H. already agreed to provide a water supply but you declined to accept it.” Nothing further was done, and the tenant, on the basis that he had taken advantage of the break, applied to the Land Court to fix a first equitable rent.

*Held* (rev. decision of the Land Court) that the correspondence was not a valid notice by the tenant that he intended to take advantage of the break in his lease.

William Jopp Chambers Hunter, *appellant*, brought a Special Case in an application to the Land Court by John Strachan, *applicant and respondent*, for an order fixing a first equitable rent and the period of renewal of the tenancy of the farm or croft of Damhead, on the estate of Tillery, Aberdeenshire, of which the appellant was heir of entail in possession.

The Case stated—“ . . . 2. The applicant became tenant of the subjects at Damhead, on the estate Tillery, under a lease for nineteen years from the term of Whitsunday 1903, with a mutual break on twelve months' notice in writing being given prior to the terms of Whitsunday 1909 or Whitsunday 1915. The rent under the lease was £40. In 1907 the tenant received a reduction of £5, and since 1903 he has received an annual abatement of £4 for the purpose of applying manure to the land.

“3. On 13th May 1914 the tenant wrote to the landlord's agents in the following terms—‘ . . . [The correspondence is quoted supra in rubric] . . . ’ Nothing further was done on this correspondence until this application was lodged on 18th January 1915. The applicant is still tenant of the said subjects.

“4. The case was heard at Aberdeen on 7th May 1915 by Mr Alexander Dewar, a member of the Land Court. Evidence was led, and the said letters were admitted. The holding was inspected on 13th May 1915. Mr Dewar held that the tenant's letter of 13th May 1914 was sufficient notice that the tenant intended to take advantage of the break in the lease as at Whitsunday 1915, and he accordingly found that the applicant was a statutory small tenant and entitled to have an equitable rent fixed and a period of the renewal of his tenancy. . . .

“6. The said William Jopp Chambers Hunter respectfully *maintains* that the said John Strachan had not given valid notice in terms of his lease of his intention to take advantage of the break therein at the term of Whitsunday 1915, and that the said decision is erroneous in point of law in respect that it finds that the said lease was terminated by written notice at the term of Whitsunday 1915, and to the extent that it repels the objection of the said William Jopp Chambers Hunter that the said John Strachan is tenant of the holding under a lease current to the term of Whitsunday 1922.

“7. The said John Strachan maintains that by his letter of 13th May 1914 he gave notice of termination of his tenancy under the break provided in his lease; that said letter was accepted by the respondent's law agents as intimation that the said John Strachan intended to take advantage of the break in the lease unless the landlord agreed to a reduction of rent; that no such reduction was agreed to by the landlord; that no terms were arranged on which he would consent to stay on the holding after Whitsunday 1915; and that he was therefore not

a tenant of the holding under the lease current till Whitsunday 1922. Further, the said John Strachan maintains that there is no question of law involved in the interlocutor of the Land Court which can competently be appealed to the Court of Session.”

The *order* dated 6th August 1915 repelled the appellant's objections, found that the applicant had terminated his lease at Whitsunday 1915 by written notice, that he was thereafter a statutory small tenant, fixed the period of renewal at seven years and the rent at £29.

The *note* appended to the order of the Land Court stated—“ . . . The Court is satisfied that the applicant's letter is sufficient notice that he was taking advantage of the break in his lease at Whitsunday 1915 in order to obtain a reduction of rent and a water supply, and that the letter seems to have been accepted as such by the respondent's solicitors. There is no statutory form of notice to take advantage of a break in a lease. No doubt the letter in form might seem to be merely communicating a fact as regards the break, but taken as a whole there does not appear to be any room for doubt as to his intention in writing the letter. No agreement was reached between the parties as to what the conditions of the tenancy should be after Whitsunday 1915, and the applicant thereupon lodged the present application as a statutory small tenant to fix a first equitable rent and a period of renewal of his tenancy. . . . ”

The *question of law* was—“ Did the applicant's letter of 13th May 1914, above quoted, constitute a valid notice of his intention to take advantage of the break in his lease at the term of Whitsunday 1915? ”

Counsel for the respondent at the outset of the hearing objected to the *appeal* as being *incompetent*, and argued—*Appeal* to the Court of Session was incompetent. Appeal from a judgment of a single member of the Land Court should be to three members—Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), sec. 25 (5). The whole Act showed this, and the Act having provided an appeal from the decision of one member, its whole provisions should have been exhausted before proceeding to a special case. There was no previous case of review straight from one member. Section 3 designed the “chairman” of the court, who was to be an advocate. That proved that the “Court” was a plurality of members. They might delegate their powers to one of their number, but his report would be subject to review by at least three members, one of whom should be the chairman. It was out of reason to suggest that a party could by bringing his special case from the judgment of one member ignore all the rest, more especially where the Act had stipulated that the chairman was to be a lawyer of ten years' standing. Here the case had not been considered by a lawyer.

Argued for the appellant—This was not an appeal, strictly so called. It was a statement asking a ruling on a point of law.

This procedure might be adopted at any stage. The members of the Land Court were judges of what they would delegate to one of their number. There was no limitation of the powers they might delegate. Hence one person might for the nonce be "the Land Court." There was no provision in the Act for confirmation of the decision of one member by a quorum of the Land Court. "Court" meant the Scottish Land Court, however it might at the moment be constituted, one or two or more persons sitting as members.

The Court, after consultation with the judges of the First Division, repelled the objections to the competency.

On the *merits of the case*, argued for the appellant—The respondent was sitting under a lease, for he had not taken advantage of the break therein. The matter could be tested by assuming the converse case. If the appellant had taken the letter as notice and re-let the farm the tenant would have had a good ground for complaint. The notice must be unequivocal—*Gilchrist v. Westren*, 1890, 17 R. 363, 27 S.L.R. 273; *M'Intyre v. M'Donald*, 1829, 8 S. 237. Here there was no notice at all, only a fortifying of the request for easier terms. The appellant's agents did not treat the respondent's letter as dealing with the break at all. They made no reference to the break in their reply.

Argued for the respondent—Conditional intimation was quite enough, as was decided in the case of *Gilchrist (cit.)*. There was in the letter a clear juxtaposition of the using of the break or alternatively the receiving of the improvements.

At advising—

LORD JUSTICE-CLERK—In this case the question submitted to us by the Land Court is—Did the appellant's letter of 13th May 1914, above quoted, constitute a valid notice of his intention to take advantage of the break in his lease at the term of *Whit-sunday 1915*?

In their opinion the Land Court treat the letter as one by which the applicant terminated his lease at the break therein provided for, and they treat the notice as being a notice which the landlord's solicitors seem to have accepted by their reply. There is not much authority in the shape of case law upon the notice that is required to be given in order to take advantage of a break in a lease, but Mr Bell in his *Principles*, sec. 1271, says that it must be clear and explicit. I do not think this letter is either clear or explicit, and I do not think it gives notice of any intention to break the lease at all. I think the reference to the break in the lease was thrown in as a make-weight in order that the tenant might have a better chance of getting the two things he specially wanted, namely, a reduction of his rent and the provision of a water supply. I certainly cannot read the letter of the landlord's solicitors as being in any sense an acceptance of that notice; it is merely an intimation that the request of the tenant for a reduction of rent and a

water supply would be referred to the landlord.

In these circumstances I am of opinion that the question submitted to us should be answered in the negative.

LORD DUNDAS—I entirely agree. I cannot see how upon any reasonable method of construction the letter of 13th May 1914 can be held as sufficiently importing a determination by the tenant to bring his lease to an end at the ensuing break. The Commissioner in his note says—"No doubt the letter, in form, might seem to be merely communicating a fact as regards the break," and so far I agree with him, but when he goes on to say "but, taken as a whole, there does not appear to be any room for doubt as to his intention in writing the letter," I fear I must part company with him. I cannot imagine that the landlord would have been allowed to found on this letter as an effective notice if it had been for his interest to do so. I do not think the tenant can be permitted to take advantage of the letter to any such effect, and I agree with your Lordship that the question must be answered in the negative.

LORD SALVESEN—I am of the same opinion. It is, no doubt, a circumstance not without weight that the letter was written on the 13th of May, two days before the expiry of the time within which notice fell to be given in terms of the lease; and if I were clear that the tenant intended by his letter to avail himself of the break, I should be very willing to stretch a point as regards the ordinary meaning of the language which he used. But after having heard all that Mr Dykes had to say on behalf of the tenant I remain absolutely in the dark as to what the intention of the tenant was—whether his intention was to give notice that he wished to avail himself of the break, or whether he was unwilling to do so in view of the possibility of getting better terms from his landlord by agreement.

In these circumstances it is impossible to say, as the Land Court does, that by that letter the tenant terminated his tenancy; and I agree that we must answer the question as your Lordship in the chair has proposed.

LORD GUTHRIE—I agree. The question deals only with the tenant's letter, and I agree with your Lordship that the letter does not amount to the clear and explicit notice desiderated by Mr Bell in the passage which your Lordship quoted from the *Principles* (section 1271). But we must also consider the reply of the landlord's solicitors. Had that reply shown that the landlord's solicitors understood the tenant's letter to amount to an intimation that unless he got a reduction of rent he would take advantage of the break in his lease, and had the parties acted on that footing, I should have thought the tenant was right and that we should have followed the case of *Gilchrist*, 17 R. 363, but it is quite clear from the letter of the landlord's solicitors that they did not take the view the tenant is now putting forward.

The Court answered the question submitted in the negative.

Counsel for the Appellant—*On Competency*—Horne, K.C.—Lippe; *On Merits*—Macmillan, K.C.—Paton. Agents—Alex. Morison & Company, W.S.

Counsel for the Respondent—Morton—Dykes. Agent—James Scott, S.S.C.

Wednesday, June 7.

## SECOND DIVISION.

[Scottish Land Court.]

HILL v. WILKIE.

*Landlord and Tenant—Small Holding—Statutory Small Tenant—Tenant Sitting from Year to Year—Term from which Renewal of Tenancy and Equitable Rent may Run—Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), sec. 32 (4).*

A tenant of a small holding who had had a lease was sitting from year to year, the year running from Martinmas. In December he applied to the Land Court for an order fixing a first equitable rent and the period of the renewal of his tenancy.

*Held* that the equitable rent and the period of renewal of tenancy must run from the Martinmas following the application, not that preceding it.

*Clyne v. Sharp's Trustees*, 1913 S.C. 907, 50 S.L.R. 688, distinguished.

*Landlord and Tenant—Small Holding—Rent—Equitable Rent—Improvements Executed under Stipulation in Previous Lease—Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), sec. 32 (8).*

A tenant of a small holding, who had executed improvements under a stipulation in his lease, applied to the Land Court to fix an equitable rent. *Held (diss. Lord Salvesen)* that the Land Court was not bound, in fixing the first equitable rent, to exclude from its consideration the improvements so executed by him.

Robert Wylie Hill of Balthayock, Perthshire, *appellant*, brought a Special Case in an application to the Land Court by George Wilkie, *applicant and respondent*, for an order determining whether he was a landholder or a statutory small tenant of his holding of Craignorth Pendicle, of which the appellant was proprietor, and for an order fixing a first fair rent, or alternatively a first equitable rent and the period of renewal of the tenancy.

The Case stated—"1. By lease, dated 18th and 21st May 1895, the said Robert Wylie Hill let to the said George Wilkie, Balthayock school and dwelling-house, together with 25 acres or thereby, imperial measure, of Craignorth Muir contiguous thereto, for the period of nineteen years from Martinmas 1895, with a break in favour of either party at Martinmas 1908. The rent stipulated was £18, 15s. for the first three years

of the lease, and £31, 5s. yearly during the remainder thereof, payable at the two terms of Whitsunday and Martinmas by equal portions. The subjects are known as Craignorth Pendicle.

"2. By said lease it was provided that the proprietor should (1) put said dwelling-house into tenantable order, (2) convert the schoolhouse into a stable and byre capable of accommodating two horses and six cows respectively, (3) form the porch and coal cellar at end of school into a milkhouse, (4) convert one of the privies into a poultry house, (5) erect a wooden shed to measure 26 feet 6 inches by 16 feet internally, (6) provide a small wooden coal cellar, and (7) erect a wire fence on the north and east marches of said 25 acres of Craignorth Muir.

"3. By said lease it was conditioned and agreed upon that the tenant should break up not less than 5 acres of the land and bring it into tillage in each year, and should crop the land either on a five-course or six-course rotation, the land to be managed and cropped according to the rules of good husbandry, and all hay, turnips, straw, or other crops except the first cut of rye grass hay should be consumed on the land, and said George Wilkie being always bound and obliged to bring and apply to the land a full and sufficient supply of manure so as to prevent the land being at any time exhausted or deteriorated. With regard to the houses, fences, and ditches of the said pendicle the tenant agreed to accept same after the foresaid repairs and alterations were executed as in a complete state of repair, and to uphold them in that state during the currency of the lease, and to leave them in such state and condition at his removal, ordinary tear and wear excepted.

"4. In or about 1903 the said Robert Wylie Hill let other 10 acres of adjoining muir land to the said George Wilkie conform to offer by the applicant, dated 30th November 1903, whereby he agreed to rent the land at 18s. per acre for the first three years and 25s. per acre "for the remainder of his lease." No other written evidence was produced with reference to the let of this land, but it was not disputed that the agreement was that it was to be taken on the same terms as those contained in the lease so far as applicable thereto, and except in so far as modified by said offer. The applicant's holding now comprises the said 35 acres.

"5. Said lease was terminated by the proprietor at Martinmas 1908 by notice in terms thereof. Thereafter the applicant continued to possess the holding from year to year at the same rent as he had previously paid.

"6. On 31st December 1913 the tenant applied to the Court for an order determining whether he was a landholder or a statutory small tenant, and for an order fixing a first fair rent for the holding, or alternatively a first equitable rent therefor and the period of renewal of the tenancy thereof.

"7. Answers were lodged to the application by the proprietor, and the application