proper inference from the proved facts is that the deceased did meet his death by an accident not merely in the course of the employment but arising out of the employment.

LORD JOHNSTON was absent.

The Court answered the question in the negative.

Counsel for the Appellant—Christie, K.C. —A. M. Mackay. Agents—Murray & Brydon, S.S.C.

Counsel for the Respondents—Sandeman, K.C.—Lippe. Agents—Boyd, Jameson, & Young, W.S.

Saturday, March 17.

FIRST DIVISION.

[Scottish Land Court.

ROGERSON *v.* VISCOUNT CHILSTON.

Landlord and Tenant—Smallholder—Succession — Improvements — Qualifications of Landholder — Residence on or within Two Miles of the Holding—Crofters Holdings (Scotland) Act 1886 (49 *and* 50 *Vict. cap.* 29), *sec.* 8—*Small Landholders (Scotland) Act* 1911 (1 *and* 2 *Geo. V, cap.* 49), *sec.* 2 (1) (*ii*) *and* (2).

The Crofters Holdings (Scotland) Act 1886, as amended by the Small Landholders (Scotland) Act 1911, section 1, enacts—Section 8—"When a [landholder] renounces his tenancy . . . he shall be entitled to compensation for any permanent improvements. . . ."

The Small Landholders (Scotland) Act 1911 enacts—Section 2 (1)—"In the Crofters Acts and in this Act . . . the word 'holding' means and includes (ii) As from the commencement of this Act . . . every holding which at the commencement of this Act is held by a tenant from year to year who resides on or within two miles from the holding and by himself or his family cultivates the holding with or without skilled labour (hereinafter referred to as an existing yearly tenant). . . ." (2)—"In the Landholders Acts the word 'landholder' means and includes . . . every existing yearly tenant . . . and the successors of every such person in the holding being his heirs or legatees."

The heir of an existing yearly tenant of a small holding, who died on 12th August 1912, possessed and cultivated the holding after the yearly tenant's death, although he did not reside on or within two miles of the holding, and on 10th October renounced, by intimation to the landlord, the tenancy as from Whitsunday 1913 and separation of the crop of 1913. He vacated the holding at Whitsunday 1913 except as regarded the arable land, and a new tenant entered. The heir claimed compensation for the improvements on the holding. *Held* (*per* the Lord President, Lord Mackenzie, and Lord Skerrington) that residence on or within two miles of the holding was not a continuing condition of the status of landholder, that the heir was a landholder, and as such was entitled to claim compensation. *Dis.* Lord Johnston, who held that the heir was not entitled to compensation under the Small Landholders Acts as his notice of renunciation and his actings had been under the Agricultural Holdings (Scotland) Act 1908.

John Rogerson, *applicant* and *appellant*, brought a Special Case in an application by him to the Scottish Land Court against Viscount Chilston, *respondent*, to fix the compensation due to the appellant as a landholder in respect of the improvements on the holding of Mill-lands of Shieldhill executed or paid for by his immediately elder brother William Rogerson junior and his father William Rogerson senior.

The Case stated—"1. At the commencement of the Small Landholders (Scotland) Act 1911, on 1st April 1912, the late William Rogerson junior was resident and cultivating tenant from year to year of the holding of Mill-lands of Shieldhill, consisting of a cottage, outhouses, and seventeen acres or thereby of land situated on the estate of Baads and Craigs, and at a yearly rent of £15. The said William Rogerson junior had succeeded his father William Rogerson senior as tenant of the holding on the death of the latter in June 1886 during the currency of a lease of the holding for nineteen years from Whitsunday 1868 granted by the then proprietor to the said William Rogerson senior.

"2. The said William Rogerson junior continued to be tenant of the said holding until his death on 12th August 1912.

"3. The said William Rogerson junior left a settlement by which he bequeathed the holding to the applicant John Rogerson.

"4. William Rogerson junior was predeceased by his wife without issue. John Rogerson was the immediately younger brother and the nearest heir-at-law of the said William Rogerson junior. No intimation of the said bequest was made to the landlord or his known agent by the applicant.

"5. No notice was given by or on behalf of the proprietor in terms of section 22 of the Act of 1911 either to the applicant or to the next heir of the said William Rogerson junior.

"6. In reply to an inquiry by the proprietor's factor on 7th October 1912, the applicant on 10th October 1912 gave notice of renunciation by him of the tenancy of the said holding to take effect at Whitsunday and separation of crop 1913, which was accepted by the proprietor's factor. He also intimated a claim for compensation. Negotiations between parties as to this claim followed, which did not result in agreement. At Whitsunday 1913 the applicant vacated the holding, except as regards possession of the arable lands under crop, and another person entered on the tenancy of the holding under a lease concluded in or before March 1913.

"7. No notice of renunciation was intimated to the Board of Agriculture by or on behalf of either the applicant or the proprietor under section 7 of the Act of 1886 as amended by section 18 of the Act of 1911.

"8. On 24th July 1913 the said John Rogerson presented to the Land Court this application. . . . .

"9. The said applicant died at Amisfield, Townfoot, on 4th January 1914, and his executors John Rogerson junior and David Livingstone Rogerson were thereafter sisted as party applicants to the application in room of the said applicant.

"10. In the application as presented it was not specifically stated whether the applicant claimed as heir-at-law or as legatee of the said William Rogerson junior. The claim was subsequently amended to the effect of adding a statement that it was made by the applicant as statutory successor *qua* heir-at-law of William Rogerson junior. The claim by the applicant was thereafter made and argued as resting on his succession to the holding as heir-at-law and not as legatee of the said William Rogerson junior.

"11. At and before 12th August 1912, the date of the death of the said William Rogerson junior, the applicant resided at the farm of Amisfield, Townfoot, and continued to reside there until his death on 4th January 1914. The distance separating Amisfield, Townfoot, from the holding in question exceeds two miles. The applicant did not at any time take up residence on or within two miles of the said holding in respect of which compensation was applied for in this application. . . . . .

"14. A joint minute of admissions was lodged. It was admitted that the said holding of Mill-lands of Shieldhill was a holding to which the Act of 1911 applied as at 1st April 1912. It was not disputed that the late William Rogerson junior was either a landholder or a statutory small tenant in the said holding, but the parties were at issue as to whether the improvements on the holding made by the said William Rogerson junior and William Rogerson senior in respect of which compensation was claimed amounted to the greater part of the permanent improvements on the holding within the meaning of section 2 (1) (iii) (*a*) and (*b*) of the Act of 1911.

"15. Parties were heard, and on 31st March 1916 the Land Court pronounced the following order:—'Edinburgh, 31*st March* 1916.—The Land Court having resumed consideration of the application and heard counsel, dismiss the application, under reference to the annexed note: Find no expenses due to or by either party. DAVID ANDERSON. ALEX. DEWAR. E. E. MORRISON. NORMAN REID.'

"16. The Court held (1st) that the applicant had no title to sue for compensation in respect that by reason of his having failed after the succession opened on 12th August 1912 to reside or to take up residence on or within two miles of the said holding, he had not become a landholder in and of the said holding.

"17. No other question was decided by the Court. The Court, though indicating an opinion in favour of the applicant's contention as to improvements on the holding, did not decide, but assumed for the purpose of determining the proprietor's plea of no title to sue, that the deceased William Rogerson junior would have been at the commencement of the Act (1st April 1912) and at the date of his death on 12th August 1912 entitled to be declared a landholder (and not a statutory small tenant) in and of the said holding. . . .

"19. It is *maintained* on behalf of the applicant that (1) under the Act of 1911, particularly section 2 (2) thereof, the right to compensation vests *ipso jure* in the heir-at-law of a landholder, and (2) further, that the provision as to residence in section 2 (1) (ii) and (iii) of the Act of 1911 applies only for the purpose of determining whether the tenant from year to year at the commencement of the Act of 1911 is or is not either a landholder or a statutory small tenant, but is not a condition of tenure under section 1 of the Act of 1886 and section 10 of the Act of 1911, or at least that the said provision as to residence does not affect the landholder's heir who has accepted the succession but does not desire to continue the tenancy and therefore renounces the tenancy and claims compensation.

"20. It is maintained for the proprietor that the decision of the Court was sound in law, on the ground stated in the note signed by the interim chairman."

The note of the Land Court appended to the order of 31st March 1916 stated—

Note.—". . . . The contention presented on behalf of the landlord was that the applicant had no title to sue, in respect that subsequent to the death of his brother William Rogerson junior in August 1912 he never became qualified as a landholder by residence on or within two miles of the holding, and therefore he failed to fulfil the conditions of section 8 of the 1886 Act of being as a landholder in a position to renounce his tenancy.

"This argument assumes that the qualification of residence in section 2 of the 1911 Act is a continuing condition which affects the status of a smallholder, not only as at the commencement of the Act but so long as he claims his rights under the statute. We are of opinion that this assumption is well founded and necessary to give effect to the provisions of the Act. This had been repeatedly held under the Crofters Act of 1886 by the Crofters Commission, who have refused to entertain an application by a person not so qualified by residence, *e.g.*, *Kennedy*, C.C., 1894-5, p. 114; *Thomson*, C.C. 1896, p. 31; *Petrie*, C.C. 1908, p. 43. We find nothing in the Landholders (Scotland) Act 1911 which constrains us to hold that a different interpretation must be given to the definition clause of that Act.

"The nature of the right which the heir of a crofter took under the Crofters Act 1886 has been canvassed in two cases—*Macleod* v. *Macrae*, 6 Sheriff Court Review 262, and *Polson* v. *Stewart*, 20 Sheriff Court Review 349. The right of the heir of a landholder must be of the same character. These two

cases decided that the claim for compensation by a crofter for permanent improvements executed on his holding did not form a fund of credit which could be made available to his creditors either in his own person or through his heir, in respect that the claim only emerged during the crofter's lifetime on his renunciation, and after his death on renunciation by his heir, and that the heir's renunciation was a right personal to him, the resulting benefits of which accrued solely to the heir. The ground for that view appears to be that the claim does not emerge against the landlord unless and until the election is made by the heir. These cases, however, are not conclusive of the present question, which may be shortly stated thus. Under section 8 of the Crofters Act of 1886 must the person claiming compensation be a landholder, and as such must he fulfil all the statutory qualifications necessary to constitute his status as such? We are of opinion that on a sound construction of section 8 this question must be answered in the affirmative. If so, does a person who claims as heir of a landholder fulfil the conditions merely by being clothed with the character of an heir, or must he also comply with the statutory tests? We think he must. Merely as heir he does not necessarily take, because under section 22 of the Act of 1911 he is put to his election, and on his refusal to accept the tenancy the right passes to the next heir. Accordingly there is implied in addition to his heirship a positive act of volition on his part to exercise the rights and as a necessary consequence to come under the obligations of a landholder. Such exercise of volition implies not merely an acceptance of rights but a liability to obligations. He cannot simultaneously renounce his obligations and retain his statutory rights, *e.g.*, of compensation—*M'Gregor* v. *Harvey*, 3 S.L.C.R. 57.

"When there is no bequest of the tenancy or the legatee fails to accept, section 22 gives the landlord the right to require the heir to state whether he elects to accept the tenancy, and failing his doing so it is declared that his right to the tenancy passes to the next heir. It is not suggested by this section that the heir has another option not expressed therein, viz., to renounce the tenancy and at the same time to claim compensation, thus separating the right of tenancy from the claim for compensation, and leaving the tenancy to devolve upon the next heir bereft of the valuable right to claim for permanent improvements. Nor is there any such suggestion to be found in any other section of the Act. On the contrary, section 8 of the Crofters Act which confers the right to claim compensation conditions the exercise of that right upon the applicant being a landholder. Were it otherwise an heir settled abroad with no intention of ever setting foot on the holding might refuse to take up the tenancy and at the same time carry off the whole sum due in respect of compensation for improvements. In the case of *Petrie* before referred to the Crofters Commission in the course of their judgment said—'Considering the history of the Act, the characteristics of the class whom the Act designed to benefit, and the mischiefs it was designed to remedy, the Commissioners think it clear that the obligation to reside "on the holding" passes with the holding and binds the heir or legatee who takes up the succession.' The only difference between the two Acts on this point is that the privilege is granted under the later Act of residing within two miles of the holding instead of on it. Is there then any reason why the qualifications should apply to the heir who resolves to take up the tenancy while the heir who does not propose to do so should be entitled to claim the benefits without fulfilling the obligations of a landholder? We see none. Or to put it another way, is the claim for compensation a perquisite of the nearest heir whether he refuses to take up the tenancy or not, or is there some co-relation between the right to claim compensation and possession of the holding? We think the latter is the sound view, and it receives support from the terms of section 2 (2) of the Small Landholders (Scotland) Act 1911, where the expression landholder is declared to include, not his successors generally, but his 'successors in the holding,' and such statutory successors include legatees. It is quite apparent that legatees could not approbate or reprobate the testator's settlement to the effect of taking under the will while repudiating the conditions attached to such acceptance. Further, the second heir who elects to take possession and work the holding does so equally as heir of the common ancestor, and there is no reason why his succession should be a partial succession to his ancestor's rights, consisting merely of a bare tenancy divorced from what is probably the more valuable part of his inheritance. Equally the nearest heir is bound either to take up the whole of his ancestor's rights and obligations or to leave them alone. There is no warrant in the law of Scotland for dealing piecemeal with the heir's rights of succession. This reasoning applies to both sets of circumstances contemplated in section 8 of the 1886 Act, *i.e.*, renunciation and removals. Removal of a landholder can only take place on a breach of the statutory conditions, and such breach can only be committed by a person who has previously qualified himself as a landholder. In the case of removal therefore equally with that of renunciation the assumption underlying the exercise of the right is an existing status of landholder. The statutory right to compensation for improvements transmits not merely to the heir-at-law but to any successor in the same family who is in possession of the holding at the time the claim is made. If the right to compensation vests *ipso jure* in the heir-at-law, then in his absence the landlord would not be in safety to prevent the holding becoming derelict by giving it to another member of the family (except under section 22) unless and until he had obtained a discharge from the heir-at-law, which would often be impossible. In many cases, notably in the Islands, it is the youngest son who takes up the holding in succession to his

father, his elder brothers being abroad. In such cases the landlord might be subjected to double claims for compensation, one by the sitting tenant on renunciation in virtue of his right as successor in the same family, and the other by the heir-at-law in virtue of his undischarged right as heir. It may be alleged that where there is no heir qualified as a landholder there would be resulting hardship in the landlord benefiting by the tenant's improvements. But the right to claim the benefit of the improvements is given by the statute, and if the statutory conditions are not fulfilled it cannot be a ground of complaint that the landlord then becomes entitled to what are his rights at common law.

"In saying that residence is necessary we do not mean to infer that the residence must be immediate on the succession opening or continuous. There may be many circumstances in which immediate residence may be impossible, such as absence abroad, and continuous residence would be an undesirable requirement looking to the class of persons who are smallholders, many of whom are necessarily engaged in other and subsidiary occupations, while others may be temporarily absent on military or naval duties with the forces of the Crown. But what is requisite is that the landholder should make his home on or within the statutory limit from the holding. The class intended to be benefited by the Act was not the absentee tenant whose principal interest and permanent home were entirely outside the holding.

"In the present case John Rogerson deliberately elected, quite properly no doubt in his own interests, to retain his farm as his home, but in choosing to remain a farmer in preference to qualifying as a landholder we think he elected to forfeit his rights and his status as a landholder."

The *Note* of Mr Dewar stated—"I do not dissent from the foregoing judgment because I think that upon a point of law the opinion of the Chairman as legal member of the Court ought to prevail over that of a lay member. But as the judgment traverses a decision issued by me two years ago, I think it due to the parties affected by that decision that I should indicate the precedents upon which it was founded, and the reservations subject to which I have assented to the foregoing judgment, particularly that part of it which lays down that the heir of a landholder who renounces the tenancy of a holding is not entitled to claim compensation for permanent improvements unless he is himself fully qualified as a landholder, especially in respect of the statutory requirement as to residence.

"There is no question that under the Crofters Act a crofter was bound to reside upon his holding and that the Crofters Commission uniformly held that view. But as from 1st April 1912 the importance of residence as affecting the status of a landholder has been modified in two important respects by the Act of 1911—that is to say, (1) it is not necessary that a landholder other than an existing crofter should at the date when the Act applied to his holding reside upon the holding at all provided he resided within two miles of it, and (2) it seems also equally clear that thereafter continuous personal residence on or within two miles of the holding is not necessary provided the landholder's home is within these limits.

"I am satisfied, however, that the Crofters Commission made a distinction between the conditions which a crofter must fulfil if he was to be entitled to exercise the rights conferred by the Act of 1886, and the conditions affecting a crofter's heir who did not wish to continue the tenancy of the holding but who renounced the tenancy and claimed compensation. I am concerned to show that the Crofters Commission made this distinction, in the first place because I understand it is questioned that they made the distinction, and in the second place in order to demonstrate that my decision in the case I have referred to—*Patrick N. Fraser, Stoneydale, Shetland* (Report for 1914 p. 260)—was at that date sound. If that be so the foregoing judgment is a departure from the established practice of the Crofters Commission on the same question.

"I shall refer, therefore, to some decisions by the Crofters Commission issued subsequent to the case of *Macleod* v. *Macrae*, 1890 S.C.R. 262, confirmed by *Polson* v. *Stewart*, 1904 S.C.R. 349, which decided that a claim for compensation does not form part of the executry estate of a crofter but only emerges on his heir's renunciation or removal—(1) In 1894 the Commission, in the case *Waters*, Report for 1894, p. 90, where a claim for compensation was objected to on the ground that the applicant was not a crofter as he had not entered into active possession of the holding nor had resided thereon, repelled the objection and awarded compensation. In the note appended it is stated—'But it is further urged that the applicant never took up the succession. This is incorrect, because as legal tenant in right of succession he renounced, and his right to renounce was expressly admitted and accepted, and further because his right as successor in the holding passed to him *ex lege* and vested him with all claims appertaining to him in respect of his character as heir-at-law. How then can it be contended that the claim for compensation is met by the plea that the applicant does not reside on the holding? For aught that appears he might have resided upon it had he not chosen to renounce, but an accepted renunciation by a landlord who manifestly was anxious that Alexander Bain should get the holding cannot supply him with a ground for opposing compensation when claimed by the renouncing tenant as legal heir of the deceased predecessor.' (2) In 1896 (*Morrison*, 1896, p. 99) compensation was awarded to an executrix and general disponee residing in Edinburgh of a crofter whose holding was situated at Tingwall, Shetland. (3) In 1899 (*Mackay* 1899, p. 61) the Commission dismissed as barred by delay an application for compensation by an heir-at-law residing at Glasgow of a crofter whose holding was situated upon the estate of Clyth, Caithness, and who died in 1892. The claim for compensa-

tion was not made until five years afterwards. In the course of the appended note it is stated—'The question for determination is whether the applicant as heir of the deceased William Mackay is entitled to compensation under the Act as on renunciation of tenancy. The Commissioners are of opinion that he is not. The applicant's right of succession arises upon the death of William Mackay in 1892 without issue. It was then open to him as succeeding heir either to take up the succession and occupy and possess under the Crofters Act or to renounce the same and claim compensation if so advised, but from his own statement it appears that the succession remained vacant so far as he was concerned for the period from 1892 to 1897.' (4) In 1900 (*Inkster*, 1900, p. 73) compensation was awarded to an heir who resided in Edinburgh in respect of a holding situated in the Island of Westray, Orkney, and in the appended note it is stated—'The applicant was entitled either to enter upon occupation and possession of the holding at Martinmas 1899, or before that date to renounce her right of tenancy and claim compensation under the Act. She elected to take the latter course.' It is a circumstance of this case that after the death of the crofter the holding was occupied by the applicant's brother at the request of the landlord and the brother, but, as set forth in the order, this was with the consent of the applicant, who stipulated that her rights should not thereby be affected. (5) In 1909 the Commission awarded compensation (*Manson*, 1909, p. 76) to an heir-at-law (a police constable in Edinburgh) of a crofter who died in possession of a holding at Tongue, Sutherlandshire. The heir-at-law had intimated to the estate management that he did not intend to take up residence on the holding, and renounced the tenancy in terms of section 7 of the Crofters Act. (6) In the same year the Commission (*Swanson*, 1909, p. 81) repelled objections taken to an application for compensation by an heir-at-law residing in New Zealand, of a crofter (his sister) who died in possession of a holding at Murkle, Caithness. In the course of the proceedings the applicant died in New Zealand, and the application was thereafter followed up by his heir Mrs Barnetson, another sister, residing at Sibster, Caithness. The Commission continued the application to allow the substituted applicant to complete her title as executrix of her brother the heir-at-law. In the note appended it is stated that the original applicant (the heir who died in New Zealand) 'did not intend to take up the tenancy of the holding in succession to his sister (the crofter) but preferred to renounce the same and claim compensation due for the permanent improvements executed on the holding. As soon as practicable after hearing the news of his sister's death he instructed the present application to be lodged with the Commissioners. This election to renounce instead of taking up the tenancy was a perfectly competent procedure on his part, as has already been decided in similar cases by the Commissioners. (See case of *Barbara Drever or Inkster*, February 12, 1900, report for that year, p. 73).' In the following year the claimant's title having been completed the Court awarded compensation—*Barnetson*, 1910, p. 96. (7) In 1912 compensation was awarded (*Matheson*, 1912, p. 102) to an heir-at-law who did not take up the tenancy but renounced the holding, the renunciation being accepted by the landlord.

"With the exception of the case first cited all the above judgments were by three members of the Commission, including always either the late Sheriff Sir David Brand or, after 1907, Lord (then Sheriff) Kennedy as legal member.

"It thus seems clear that the Crofters Commission uniformly made a distinction as regards the statutory requisite of residence between a crofter who intended to retain possession of his holding and the heir of a crofter who did not wish to retain possession but who claimed compensation. This is the interpretation put upon the decisions of the Commission by an independent authority—Sheriff Rankine in his work on Leases. See page 651 (3rd ed.), where it is stated—'When a landholder renounces his tenancy, or is removed, he or his heir is entitled to compensation for any permanent improvements,' and page 652—'An heir renouncing does not require to have entered on residence.'

"These decisions merely follow the common law as to the succession to leases or any other heritable right. The succession having passed to the heir-at-law I have difficulty in seeing what authority there is for holding that the heir must satisfy the conditions as to residence or cultivation (for cultivation is now a statutory condition of tenure) before he can competently renounce and claim compensation. The right to compensation is an equitable provision granted by the Legislature, dependent only upon due notice of renunciation (or its equivalent) and upon the improvements satisfying the conditions specified in section 8 of the 1886 Act. If it were not, one would expect that forfeiture of the tenancy incurred by breach of any of the statutory conditions would involve loss of the right to compensation. But by express statutory enactment the effect is exactly the contrary. Removal for breach of a statutory condition, or for any other cause, entitles a landholder to compensation. Consequently if a landholder ceases to fulfil the statutory requisite as to residence and is removed, the fact of his removal would immediately entitle him to compensation. If, therefore, non-fulfilment of the requisite as to residence may give rise to compensation, why impose upon an heir to whom the right of succession passes *ex lege* the fulfilment of a requisite which, so far as compensation is concerned, would not bar his ancestor? Cases can be figured where the requisite as to residence would be practically impossible of fulfilment, *e.g.*, if the succession devolved upon an official, such as a parish minister, a sheriff clerk, or a police constable, who is bound to reside within the sphere of his office. Parliament has thought it equitable to confer the right to compensation even after breach of any of the statutory conditions of tenure. It

does not appear to be equitable to refuse compensation to an heir who takes up the succession and immediately renounces the tenancy without incurring any breach.

"Applying this reasoning to the present case, it appears that William Rogerson junior was at the commencement of the Act of 1911 tenant from year to year of a small holding, and, as the greater part of the permanent improvements upon the holding had been executed by him and his father without payment or fair consideration received, he became at 1st April 1912 a landholder. The status of the tenant of a small holding is not dependent upon or in suspense until he makes application to this Court. At the date when the Act applies to the holding, he by force of the statute is either a landholder or a statutory small tenant according as the greater part of the improvements are his or his landlord's. William Rogerson junior died in August 1912. In October following, his heir, the applicant, renounced the tenancy as from the term of Whitsunday following, and that renunciation was accepted by the landlord. As the landlord accepted renunciation of the tenancy from the heir of the landholder and acted upon the renunciation I have some doubt, apart from the question of residence, whether the landlord is not barred from objecting to the claim for compensation.

"Further, as the holding was at William Rogerson junior's death a landholder's holding which thereafter became vacant, the question arises whether the provisions of section 17 have been complied with, and particularly whether the landlord has let the holding to a neighbouring landholder as an enlargement or to a new landholder."

Argued for the appellant—The appellant was the heir of an existing yearly tenant and was therefore a landholder—Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), section 2(2)—and as such was entitled to compensation for improvements. He was a landholder though he had not resided on or within two miles of the holding, for such residence was necessary as a qualification only as at 1st April 1912, when the Small Landholders Act 1911 came into operation, and did not remain a continuing condition of the status of landholder thereafter. Under the Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict. cap. 29), section 34, it had never been held that residence on the holding was a continuing condition. *Livingstone* v. *Beattie*, 1891, 18 R. 735, 28 S.L.R. 518; and *M'Iver* v. *M'Iver*, 1909 S.C. 639, 46 S.L.R. 552, did not decide that point. Section 34 of the Crofters Holdings Act 1886 (*cit.*) was expressly repealed by section 39 of the Act of 1911; *cf.* also section 26 (3) (*a*). The Act of 1911, section 2 (1), set out the qualifications required by the persons referred to therein to enable them to come within the classes of persons favoured by that Act. Residence was one of those qualifications, but it was required merely at 1st April 1912. That was shown by the use of the word "existing," and by the fact that residence was not one of the statutory conditions—Crofters Holdings (Scotland) Act 1886, section 1; Landholders Act 1911, section 10. From the option to reside within two miles of the holding, and the addition of cultivation by the holder or his family to the list of statutory conditions, together with the repeal of section 34 of the Crofters Act 1886, the inference was that the Legislature had substituted cultivation for residence as a qualification. Thus there was no provision that a new holder must reside on the holding—section 2 (1) (iv), 7, 11, and 15. But if residence was a continuing condition, that did not prevent the appellant, as heir of the holder, from getting compensation for improvements. There was no dubiety as to the right upon which his claim was based. He could not take as legatee, for he had not intimated the bequest to the respondent, as he was bound to do by the Crofters Act 1886, section 16 (*a*). After the death of William Rogerson junior the appellant possessed as executor and took up the succession as heir. As executor he had no title to compensation, and consequently his sole title to compensation was as heir. The Land Court's interpretation of the Landholders Act 1911, section 22, as putting the heir to his election and requiring an act of volition by him before he became entitled to the benefits of the Act, was erroneous. The heir of a landholder was *ipso facto* a landholder—section 2 (2)—and the right to compensation vested in him *ipso jure*. Section 21 was merely intended to shorten the *tempus deliberandi* of the heir, and to give the proprietor a compulsitor to secure an occupant for the holding. It was absurd to argue that the heir must reside on the holding in order to give him the right to claim compensation, for while that right vested in him *ipso jure* he could not claim compensation until he renounced the tenancy as he had here done—Rankine on Leases, 3rd ed., 651. Further, the interpretation placed upon section 22 by the appellant had the effect of giving the heir the same rights as were in his ancestor; it was in conformity with the decisions of the Crofters Commission; and it was consistent with the policy of the Landholders Acts. The Land Court was in error in holding that the appellant's contention if given effect to would give him the rights of a landholder without incurring the corresponding obligations. In the present circumstances the appellant was liable for arrears of rent, section 23, and repayment of loans, section 7. It was for the respondent to show that the appellant must take up, and reside on or within two miles of, the holding before he could claim compensation. If that had been necessary then the Act should have provided expressly therefor. Both questions should be answered in the negative.

Argued for the respondent—The appellant had no title to sue; he had merely renounced a tenancy. Such renunciation might be either under the Small Landholders Act 1911 (*cit.*) or under the Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64). A year's notice of renunciation was required under the Small Landholders Acts—Crofters Holdings Act 1886, sec. 7—and the Board of Agriculture had to be notified—Small Land-

holders Act 1911, sec. 18. Here the notice was less than a year and there was no intimation to the Board of Agriculture. Such notice was not notice under the Landholders Acts but it was sufficient under the Agricultural Holdings Act 1908 (*cit.*), sec. 18. The appellant had done nothing to bring himself into a position to claim the benefits of the Small Landholders Acts as he was bound to do before he could so claim—*Clyne* v. *Sharp's Trustees*, 1913 S.C. 907, 50 S.L.R. 688; *Hill* v. *Wilkie*, 1916, 53 S.L.R. 728. It was plain that the renunciation itself did not indicate any action under the Act of 1911, for it was a mere renunciation at Whitsunday of a lease which expired then, and that was all the appellant had done. If he had been applying for the renewal of an expiring lease, that would clearly have been an action under the 1911 Act, but no renewal would have been granted if the appellant had stated that he would not reside on or within two miles of the holding. His predecessor had not done anything either to bring him under that Act. If that contention was sustained, that appellant had still his rights under the 1908 Act. Further, the appellant was not a landholder, for he did not reside on or within two miles of the holding. Residence was a continuing condition; that was so under the Crofters Act 1886 as interpreted by the decisions in *Livingstone's* and *M'Iver's* cases (*cit.*). Further, the policy of the Small Landholders Acts was to encourage a return to the land, whereas the appellant's argument if sustained would enable the landholder to be an absentee. The Act of 1911 was to be read with the Crofters Acts—section 36—and it was for the appellant to qualify such a change of policy as he argued had been made of the Act of 1911. Further, by section 2 (2) of the Act of 1911 the heir of a landholder to be himself a landholder must be his predecessor's successor "in the holding." Those words were not surplusage but meant that the heir must reside on or within two miles of the holding, *i.e.*, his relationship to it must be the same as that of his predecessor at the passing of the Act. It was absurd to call an absentee a successor "in the holding." Residence was necessary in the case of a legatee—section 16 (*c*) of the Act of 1886 as amended by section 20 of the Act of 1911—for intimation of the bequest to the landlord gave the legatee a right to the holding, but the landlord could refuse to receive him in it. The proviso of that section stated the only case in which the right to compensation was separated from the obligation to occupy. Similarly a "statutory successor" must occupy the holding—Act of 1911, section 31. In calling him an "heir" that Act did not intend that his right should be those of the heir-at-law, but merely used that term to define him while the Act itself and not the common law formulated his rights. Residence was also impliedly shown to be necessary by section 10 (1) and (2) of the Act of 1911 and by section 1 of the Crofters Act 1886. The cases referred to in the notes, decided by the Crofters Commission, did not decide that residence was unnecessary and did not differentiate the heir from the landholder. But in any event Lord M'Laren had taken the opposite view in *M'Iver's* case (*cit.*). The heir did not *ipso jure* become the successor of the holder, for by taking action under section 22 of the Act of 1911 the landlord could cut out the heir unless he took up the holding. Further, in this connection the heir was not *eadem persona cum defuncto—MacLeod* v. *Macrae*, 1890, 6 S.L.Rev. 262; *Polson* v. *Stewart*, 1904, 20 S.L.Rev. 349. In fact the right to claim compensation ran with the lands and went to the successor not *qua* heir but as successor in the holding.

At advising—

LORD SKERRINGTON—So far as appears from the Special Case and from the appendix, which contains the opinions of the members of the Land Court, three questions of law and three only were raised and discussed before that tribunal. In the first place, the landlord maintained that the applicant had never become qualified as a landholder under the Small Landholders (Scotland) Act 1911, and had therefore no title to claim compensation under that Act, in respect that after the death of his brother and predecessor in the holding the applicant admittedly never resided on or within two miles from the holding. In the second place, the landlord maintained that the applicant's claim to compensation failed in respect that the whole or the greater part of the improvements on the holding had not been provided by the applicant or his predecessor in the same family. This looks like a question of fact, but it really was one of law, viz., whether the value of improvements executed by a sub-tenant in contemplation of his becoming principal tenant ought or ought not to be taken into account. In the third place, the applicant maintained that the landlord was barred by his actings from insisting on the first of these two contentions. The Land Court repelled the plea of bar, and the applicant's counsel stated to us that their client acquiesced in this decision. By a majority the Land Court answered the first question in favour of the landlord and dismissed the application. While the Court expressed an opinion in favour of the applicant on the second question, it pronounced no actual decision upon the point. This procedure was, I think, unfortunate, because if we answer the questions of law in the Special Case in favour of the applicant (as I think we must), and hold that non-residence is no bar to a claim for compensation for improvements upon a small holding, it will still be open to the landlord to oppose any award of compensation (*a*) upon the ground (previously argued but not decided) that a material part of the improvements was executed by a person who was only a sub-tenant at the time, and (*b*) upon a further ground of which no hint is to be found in the Special Case and relative opinions, but which was somewhat obscurely suggested by the landlord's counsel in the course of the arguments which they addressed to us. So far as I understand this new argument it came to this, that certain letters which are not before us, and which are merely referred to in the Special Case, operated

as an agreement whereby the applicant discharged in favour of his landlord any claim to compensation for improvements under the Small Landholders (Scotland) Act 1911, while reserving any such claim competent to him under the Agricultural Holdings (Scotland) Act 1908. The applicant's predecessor in the holding, who died on 12th August 1912, was undoubtedly a landholder under the Act of 1911, and the applicant was his heir-at-law. As the applicant entered into possession of the holding and gave notice of renunciation which was accepted by the proprietor's factor, *prima facie* he became a landholder and was entitled to claim compensation for improvements under that statute. If it was really argued before the Land Court that the applicant had debarred himself by contract or otherwise from claiming compensation under the Act of 1911 it was the duty of the landlord's counsel to move that the Special Case be remitted to the Land Court for amendment. This motion would not have been granted unless we were first satisfied that there was a substantial question to try, for which purpose a precise statement by the landlord's counsel of the facts on which they relied and of the question which they intended to raise would have been essential. No such statement was submitted to us and no such motion was made. Accordingly I do not further concern myself with a question which was not competently before us, but which (if it really has any substance in it) may still be raised before the Land Court and thereafter before us on a second appeal. Something was said at the discussion as to the failure to notify the Board of Agriculture of the applicant's renunciation of the holding. If the landlord considers that the applicant's claim to compensation is prejudiced by such failure the point is still open to him.

I now come to the important and general question of law which the Land Court has decided in favour of the landlord, viz., whether residence on or within two miles of the holding is by the Act of 1911 made a continuing condition of the landholder's statutory right, and whether if this condition is not complied with a person who otherwise would have enjoyed the status of a landholder is deprived, at least temporarily, of the privileges flowing from that status. The objection to the view of the statute taken by the Land Court is that section 2, which defines four classes of persons who are to be landholders, mentions residence with reference to only two of them, and even then not as a continuing condition of the tenure, but as a qualification which must exist at the commencement of the Act on 1st April 1912. By section 2 (1) (i) and (2) of the Act of 1911 the first class of persons who are to become landholders as from the commencement of the Act consists of "existing crofters," *i.e.*, of persons to whom the Crofters Holdings (Scotland) Act of 1886 applies. Though this clause is not expressly confined to persons resident upon their crofts on 1st April 1912, that limitation may be implied if under the Act of 1886 every crofter was bound to reside on his holding. Section 34 of the Act of 1886 enacted—"In this Act 'crofter' means any person who at the passing of this Act is tenant of a holding from year to year, who resides on his holding, the annual rent of which does not exceed thirty pounds in money, and which is situated in a crofting parish, and the successors of such person in the holding being his heirs or legatees." Whether intentionally or not, this clause is so framed that the words "at the passing of the Act" do not limit the generality of the expression "who resides on his holding." Accordingly it may be plausibly maintained that a person otherwise entitled to the status of a crofter would not become a small landholder if at the commencement of the Act of 1911, on 1st April 1912, he was not actually or constructively resident on his croft. The case of *Livingstone* v. *Beattie*, 1891, 18 R. 735, 28 S.L.R. 518, may be usefully referred to, not indeed as a binding decision, because the question was not in controversy, but as evidence of the general understanding of the legal profession to the effect that residence on the croft was a continuing condition of the crofting tenure. This was assumed to be the law by two Sheriffs; by the eminent counsel on both sides who conducted the suspension in the Court of Session; by Lord Kincairney in the Outer House; and by the Judges of the First Division. The only controverted question as to residence in that case was one of fact, viz., whether the person claiming to be a crofter had or had not resided on the holding. Obviously considerable latitude had to be allowed to persons who were constructively resident on their holdings, and also to persons who succeeded as heirs or legatees, and who *bona fide* intended to take up their residence on the croft so soon as it was reasonably possible for them to do so. I propose to assume, for the purposes of the present decision, that the Crofters Act was correctly understood by the eminent lawyers to whom I have referred, and that an heir of a deceased crofter could not have recovered compensation for improvements in terms of the Act of 1886 if (like the applicant in the present case) he failed to take up his residence on the holding within a reasonable time after the opening of the succession. Even, however, if all this is granted to the landlord, I fail to see how it can be made out upon any plausible construction of what are now styled the Small Landholders (Scotland) Acts 1886 to 1911, that residence on a holding which prior to 1912 was a croft, is a continuing condition of the tenure of the landholder in right of that holding. The sole reason, so far as I know, for the opinion that continued residence was necessary in the case of a crofter was the definition which I have quoted from the Act of 1886. But that definition was repealed by the Act of 1911. The three members of the Land Court who formed the majority do not seem to me to attach sufficient weight to the repeal of this definition and to the absence from the present code of any reference whatsoever to residence in the case of crofters who have become landholders. It does not appear whether in the case of such landholders the majority of the Land Court

would consider that the residence must be on the holding, or might lawfully be within two miles from the holding. Neither view derives any support from the statutes as now in force. I have thought it right to deal at length with the case of holdings which were held by crofters prior to 1st April 1912, because such holdings are the first which are mentioned in the Act of 1911 as falling within its provisions, and they may be regarded as typical of all other small holdings. If it could have been demonstrated in the case of such holdings that the Act of 1911 carried forward the former condition of residence on the holding, or imposed a new condition of residence within two miles of the holding, it might have been said that a similar condition of the tenure ought to be implied in the case of the other classes of persons who are declared to be landholders by section 2 of the Act of 1911. As I have already stated, however, there is no foundation for any such argument.

The holding with which we are concerned is situated in Dumfriesshire, and in a parish to which the Act of 1886 did not apply prior to 1911. The applicant's predecessor at the commencement of the Act of 1911 was an "existing yearly tenant," because he then answered the description in the second head of sub-section (1) of section 2 of that Act. In particular it could be predicated of him that "at the commencement of this (the 1911) Act" he was "a tenant from year to year who resides on or within two miles from the holding." He accordingly became a landholder from 1st April 1912. If he had not then resided on or within two miles of the holding he would not have been an existing yearly tenant, and would not have become a landholder. I cannot, however, discover either in the statute or in the opinion of the majority of the members of the Land Court any satisfactory reason for holding that an existing yearly tenant who has become a landholder must thereafter continue to reside on or within two miles of his holding as a condition of his tenure. The third head of section 2, sub-section (1), defines the persons who are to become landholders *qua* qualified leaseholders. The clause draws a sharp contrast between the termination of the lease, at which date the leaseholder may develop into a landholder, and "the commencement of the Act," at which date the leaseholder must have resided on or within two miles of the holding. Residence is not required at the date when the leaseholder becomes a landholder; much less is it made a condition of the tenure. The fourth head of the sub-section deals with new holdings, and is silent on the matter of residence. A written condition as to residence might be enforced if the Land Court found it to be reasonable (Act of 1886, section 1 (5)); or if the Land Court authorised such a condition in the case of holdings compulsorily constituted under section 7 (9) of the Act of 1911. The new statutory condition introduced by section 10 of the Act of 1911, to the effect that a landholder must cultivate his holding by himself or his family with or without hired labour, probably made it unnecessary, in the opinion of the framers of that Act, to insert any condition as to the landholder's residence.

For the reasons above set forth I suggest to your Lordships that the second question of law in the Special Case should be answered in the negative. It is, I think, unnecessary to answer the first question, as it seems to be identical with, though not so well worded, as the second question.

LORD MACKENZIE—I agree with the conclusion reached by Lord Skerrington on the ground that I am unable, after an examination of the statute, to find that it contains any continuing obligation of personal residence.

LORD JOHNSTON—[*Opinion read by Lord Mackenzie*] — In this case the important question under the Small Landholders Acts, whether the condition of residence which is to be found in the definition of "crofter," section 34 of the Crofters Act 1886, and also in section 2 of the Landholders Act 1911, affects the landholder and his successor in the holding throughout their tenure of the holding, or is satisfied by actual residence of the original landholder at the commencement of the Act of 1911, that is, at 1st April 1912.

The Land Court, under the guidance of the learned interim-chairman, have for reasons deserving the greatest attention determined this question in its first branch in the affirmative and in its second branch in the negative. But I have on a careful consideration of this particular case come to the conclusion, differing herein from your Lordships, that it is involved in specialties which prevent the question which I have stated being clearly raised, or requiring or admitting of its being solved.

The question is assumed to arise in relation to the claim of an heir to the compensation admittedly due to a landholder on being removed from or renouncing his holding. Put broadly, the heir's claim really as stated by the Land Court is that "the right to compensation vests *ipso jure* in the heir-at-law of a landholder" — in fact he seems to maintain that the claim of compensation is of the nature of an inheritance which he can make good though he has no intention of carrying on the holding. Again, in the words of the Land Court, the heir maintains his position to be that of one who "has accepted the succession but does not desire to continue the tenancy, and therefore renounces the tenancy and claims compensation." The heir in question is in point of fact a farmer in the vicinity, but living beyond the two-mile radius of section 2 of the Act of 1911, and has not the slightest intention of taking to the holding. All that he wants is to secure the compensation. This is certainly not the popular idea of what the Act intended, but it may be his statutory right notwithstanding.

To reach a determination of this question it is clear that a precise ascertainment of the facts is necessary, and that we have not got in this case. But the facts so far as stated raise another and prejudicial ques-

tion, viz., whether the heir has not barred himself in any event by his action from claiming under the Small Landholders Act 1911, and must not be content with the compensation to which he is admittedly entitled under the Agricultural Holdings Act 1908.

I shall endeavour to collect the facts bearing upon this question, though I do not find it possible to ascertain either these or those bearing on the legal point which I mentioned at the outset without the assistance of the judgment or explanatory note to the Land Court's interlocutor and the assistance of counsel.

William Rogerson senior was sub-tenant of the Mill-lands of Shieldhill in Tinwald parish, which may now be styled "the holding," from 1855 to 1868, under the tenant of Shieldhill Farm. He thereafter obtained a lease of the holding for nineteen years from Whitsunday 1868. He died in 1886. William Rogerson junior, his son, obtained a new lease for nineteen years from Whitsunday 1887, on which he possessed, and at its expiry in 1906 he continued to possess from year to year till his death on 12th August 1912.

Both William Rogerson senior and William Rogerson junior resided on the holding. But as Tinwald was not in a crofting area they neither of them became crofters or had any right under the Crofters Acts 1886, &c. But William Rogerson junior survived the commencement of the Small Landholders Act 1911, and as the holding satisfied all the conditions of that Act, and he was resident on and cultivated it, he had become either a landholder *qua* existing yearly tenant or a statutory small tenant—the Land Court have indicated an opinion but have not decided which. This I think unfortunate, because if he were a statutory small tenant his heir's rights, just as his own, would be those only accruing under the Agricultural Holdings Act 1908, which it is admitted that he has in any event. They have rejected his claim under the Act of 1911 as landholder, which only was before them, on the ground that his right had not been clothed with residence, and accordingly they did not deal with the question of bar, which I consider to be necessarily prejudicial. Any claim under the Agricultural Holdings Act 1908 as statutory small tenant or in any other capacity is still open to him. But it would be different in its incidents from that of a landholder under the Act of 1911. The case has, however, been argued to us on the higher ground of claim. This course of argument was probably justified, because the Land Court had indicated an opinion that the tenure would be found to be that of landholder *qua* existing yearly tenant, and it is evident that if they had thought it necessary they would have so found.

The facts then down to the death of William Rogerson junior on 12th August 1912 are perfectly clear. What follow on his death are unfortunately not so clear. But I think that they are ascertained with sufficient detail for the present purpose.

William Rogerson junior dying on 12th August 1912 left a crop in the ground. He apparently left a will by which he bequeathed the holding to his younger brother and heir John Rogerson. We have not before us either the will of William Rogerson junior or his lease of 1887. But we know that the ish of the latter was at Whitsunday from houses, grass, and land in green crop, and at the separation of the crop from the land under white crop.

Under the Agricultural Holdings Act 1908, section 1, William Rogerson junior had right to compensation for improvements enumerated in the schedule to the Act at the determination of the tenancy. Under section 19 he had right to bequeath his lease. This right was made subject to the proviso that the legatee must within twenty-one days from the testator's death intimate the bequest to the landlord, in which case such intimation imported acceptance of the lease, and gave the landlord power to take certain steps with a view to refusing the legatee as tenant. The statute is, however, silent as to what is to be the result of the tenant failing to make due intimation. On the other hand, if the legatee does not accept the bequest the lease descends to the heir of the tenant. I am dealing with the case meantime without regarding the Landholders Acts, because it appears to me that that is the footing on which the parties themselves dealt with it. I shall refer to the Landholders Acts later.

John Rogerson gave no notice of any kind of the bequest to him, either under the one Act or the other, and apparently took possession and continued the cultivation without residing, and probably without considering whether he was doing so as legatee or heir, for it made no difference to him. But (and here we are left very much groping in the dark for want of production of documents and other primary evidence) on the landlord's factor addressing some communication to the applicant on 7th October 1912—that is, two months after his predecessor's death—he at once on 10th October 1912 gave notice of renunciation by him of the tenancy, to take effect at Whitsunday and separation of crop 1913, and intimated a claim, undefined, for compensation. His notice was accepted by the landlord. The farm was re-let, and John Rogerson removed of his own accord according to his notice, and the new tenant entered on possession. Now it must be noted that this was exactly what he was entitled to do under the Agricultural Holdings Act of 1908 and what he was not entitled to do under the Landholders Acts. And I can see nothing which could prevent him electing to proceed under the former Act or which would compel him to proceed under the latter Acts if his landlord chose, as I think he must be held to have done, to acquiesce. He could not in my opinion take advantage of the former Act and at the same time claim under the latter Acts.

Whether he be assumed to have taken up the lease as legatee or as heir his acts in taking to the lease made him the tenant under the provisions of the 19th section of the Agricultural Holdings Act of 1908. But

the tenancy being by tacit relocation, was one from year to year, and section 18 of the same Act gave him the right to terminate his tenancy on notice of not less than six months before the termination of the lease. With this provision he exactly complied—for the termination of the lease was Whitsunday 1913, though with the usual right to a waygoing white crop, and he gave notice on 10th October 1912. Everything was thus in order for his claim of compensation under the Agricultural Holdings Act 1908. He gave notice of claim. And he made no other claim prior to his removal. But some time after he had removed he bethought himself, probably under advice, of his rights under the Landholders Acts, and on 24th July 1913 presented to the Land Court the application under which the present question has arisen.

It may not be out of place to advert for a moment to his rights at common law irrespective of the statutes. Where a tenant in possession dies, his heir alone is, unless the lease contains same exceptional destination, entitled to take up the lease, and his heir primarily is liable to the landlord in the prestations under the lease, and particularly for damages for breach of the contract of lease, if the landlord can qualify such, on his declining to take up the lease and carry on the farm. Of course his liability is limited to the value of his succession *qua* heir. Though the executry estate may also be liable—see *Bethune* v. *Morgan*, 1874, 2 R. 186, 12 S.L.R. 142—this is only subsidiarily. Hence the heir alone is entitled to such claim for compensation as his predecessor could have vindicated. It runs, in my opinion, with the lease, whether the claim is under the lease, or the lease is silent as to compensation and the claim is under the Agricultural Holdings Act 1908. Hence the position of John Rogerson as to claims for improvements either at common law or under the Agricultural Holdings Act 1908, when he came to take up the lease on his brother William's death, was free from all complication.

I have shown, I think *positive*, that John Rogerson when he renounced the lease of the Mill-lands of Shieldhill proceeded with precision under the Agricultural Holdings Act 1908. But it may also be shown *negative* that he did nothing to place himself under the Landholders Acts as he might have done had he so chosen.

The late William Rogerson junior being at 1st April 1912 tenant from year to year of a subject which fulfilled *ipso facto* the conditions of a holding in the Landholders Acts, became *ipso jure* a landholder in the sense of these Acts. It does not matter that he had done nothing to take advantage of his new position. He bequeathed his lease and therefore "his right to his holding" (Act of 1886, section 16) to his brother John Rogerson. The legatee did not intimate the bequest to his landlord as required by section 16 (*a*), and therefore the landlord neither was called on to do nor could do anything on his part. It is said that such intimation would have imported (section 16 (*b*)) "acceptance of the landholder's right to the holding by the legatee." It is implied that non-intimation is equivalent to non-acceptance, for it is provided (section 16 (*h*)) that if the legatee does not accept the bequest the right to the holding shall descend to the heir of the landholder in the same manner as if the bequest had not been made. It must be taken, therefore, that John Rogerson did not stand on the bequest to him. His right as heir, however, remained to him. This right which was his at common law is recognised by the definition of landholder in the Act of 1911, section 1, superseding the definition of crofter in the Act 1886, section 34, for it provides that landholder shall mean and include, *inter alios*, every existing yearly tenant "and the successors of every such person in the holding being his heirs or legatees." John Rogerson therefore became a landowner in respect of his brother's holding as at his brother's death provided he elected to accept the tenancy, for if he did not there is divestiture under the Act of 1911, section 22, in favour of the next heir, and provided the failure to reside did not disqualify him. For the present purpose I assume the latter point in his favour. If then he elected to accept the tenancy he was entitled under the Act 1886 (section 7) to renounce his holding and to claim (section 8) compensation for permanent improvements on the holding, but only (section 7) at any term of Whitsunday or Martinmas, and upon one year's notice in writing to the landlord. This he did not give, and therefore the landlord had neither call nor opportunity to take any steps competent to him under the Landholders Acts. John Rogerson took another course as above set out, and without treating himself as a landholder under the Small Landholders Acts took advantage of his power to renounce under the Agricultural Holdings Act 1908, and his renunciation was accepted.

For these reasons I find myself obliged to say that in the circumstances of this case the applicant, now represented by his testamentary trustees, is barred by his own action from claiming compensation under the Landholders Acts though not debarred from compensation of a different kind.

I think it proper to add that had I found it necessary to decide, as the case is presented and on the materials before me, the important question on which your Lordships propose to give judgment, I should be disposed to think that continuing residence is an essential though implied condition of landholding, and therefore to agree with the Land Court. But provided the tenancy is accepted by the landholder or his successor, be he heir or legatee, removal is so far as I can see the landlord's only remedy for non-residence, and removal for non-residence does not apparently disentitle to compensation any more than removal for breach of any of the express statutory conditions. If this be so I do not follow how the applicant's non-residence can affect his right to compensation merely because he has deserted or abandoned his tenancy and has not waited for removal. If therefore I did not hold him barred in the circumstances,

and were at the same time compelled to decide the question to which I have just adverted, I should, I think, have to sustain in this case where he has taken possession and worked off the waygoing crop the applicant's claim to compensation under the statute. But I desire to hold myself free on the merits of the question here raised, for I think it a most dangerous thing to decide summarily such a large and far-reaching question on a case the course of which has been such as not properly and fully to raise it or to present it in all its bearings. This presses the more upon me that I feel your Lordships' judgment may go further than I think you probably intend it to do, for it will doubtless some day be pleaded (first) as a bar to removal for non-residence however absolute and continuous, and (second) as converting the claim of compensation into a right of succession which vests *ipso jure* in the heir or legatee at whatever distance he may reside, and though he has not the slightest intention of coming to enter on possession of the holding. I think that we ought not without necessity to throw difficulties in the way of obtaining an untrammelled judgment on this aspect of the question, which will doubtless some day arise, and which we have not had under cognisance. A judgment on such narrow and unsatisfactory premises may well foreclose the wider issue and defeat the intention of the Legislature.

LORD PRESIDENT—I have had an opportunity of reading the opinion delivered by Lord Skerrington and concur in it *in omnibus*, and therefore the question will be answered as his Lordship suggests.

The Court answered the second question in the negative, and found it unnecessary to answer the first question.

Counsel for the Appellant—Morton—Lillie. Agents—Pairman & Miller, S.S.C.

Counsel for the Respondent—Blackburn, K.C.—Maconochie. Agents—J. C. & A. Steuart, W.S.

Wednesday, February 28.

EXTRA DIVISION.

[Sheriff Court at Lerwick.

UMPHRAY *v.* GANSON BROTHERS.

Reparation—Negligence—Road—Motor Car Overtaking Led Horse—Motor Cars (Use and Construction) (Scotland) Order 1904, Article IV (3).

A horse, led by bridle and rope held by a man walking on the left side of the road and of the horse, collided in daylight with a motor car which about 15 yards from overtaking the horse had been thrown out of gear to avoid noise, had been drawn somewhat toward the right side of the roadway, but had not materially reduced speed. The roadway was about 12½ ft., the car 5 ft. 7 in., in width, and between 5 and 6 ft. of the width of the roadway were left for the man and horse. When overtaken by the car, which was travelling at 18 miles an hour, on a down gradient, the horse swerved to the right, collided with the car, and was injured.

Held that the driver of the car was blameworthy and his master liable in damages, in respect that the injury to the horse resulted from the driver's failure to apply the brake and give the horse a wider berth than he did.

Opinions reserved on the question whether, in view of the Motor Cars (Use and Construction) (Scotland) Order 1904, Article IV (3), the man in charge of the horse could have taken it to the off-side of the road and place himself between the horse and the car.

The Motor Cars (Use and Construction) (Scotland) Order 1904, which is dated March 30, 1904, Article IV, enacts—"Every person driving or in charge of a motor car when used on any highway shall comply with the regulations hereinafter set forth, namely—. . . 3. He shall when meeting any carriage, horse, or cattle keep the motor car on the left or near side of the road, and when passing any carriage, horse, or cattle proceeding in the same direction keep the motor car on the right or left side of the same. . . . 6. He shall on the request of any police constable in uniform, or of any person having charge of a horse or cattle, or if any such constable or person shall put up his hand as a signal for that purpose, cause the motor car to stop and to remain stationary so long as may be reasonably necessary."

William Hay Umphray, farmer, Reawick, *pursuer*, brought an action in the Sheriff Court at Lerwick against Ganson Brothers, motor-car hirers, &c., Lerwick, *defenders*, concluding for payment of £45 in name of damage sustained by the pursuer in consequence of the loss of a horse through the fault of the defenders' employee.

The pursuer averred—"(Cond. 3) On Thursday 20th August 1914 a horse belonging to the pursuer was travelling by road from Reawick to Lerwick for the purpose of being shipped from Lerwick to Aberdeen for sale. The horse was in charge of Alexander Stout, the pursuer's ploughman. (Cond. 4) At a point in the public road between Bixter and Tresta, nearly opposite the house called Quarsdale, the said Alexander Stout and the pursuer's horse in his charge were overtaken by a motor car belonging to the defenders, which was being driven from Walls to Lerwick by a chauffeur in the employment of the defenders, and for whom they are responsible. (Cond. 5) At the time when the motor car overtook the horse, the horse was being carefully led by the man in charge, who, in due compliance with the rules of the road, kept as close to the left or near edge of the road as it was possible to go. (Cond. 6) At the place referred to the road does not exceed 12 feet 9 inches in breadth from ditch to ditch. (Cond. 7) In view of the narrowness of the road and the greater risk thereby arising of a possible accident when the motor car was