reclaiming-note was refused in respect of the failure of the pursuer to insist in it, the matter of reserved expenses was mentioned, and it was said that that matter might be disposed of when the account was reported on by the Auditor. If that be so, I think it is clearly competent to dispose of the reserved expenses as may be just, because the pursuer in reclaiming against the Lord Ordinary's interlocutor would have been entitled to bring up the point then, and he did not do so because of what was said at the time. I think this is a speciality taking the case out of the general rule. On the matter of the reserved expenses, therefore, I am of opinion that the defender is not entitled to the reserved expenses which were incurred for a stage in the process in which he was not successful.

The second point is of importance, and refers to the fees given to English counsel who gave evidence as to the law of England. That is a matter on which the Court is entitled to exercise its discretion, and on which it is necessary to exercise some discretion. Very large sums are claimed on the one side, and on the other it is maintained that these gentlemen who were required to expound the law of England are to be treated as ordinary witnesses to a matter of fact. I do not accede to either of these views. I think there must be an allowance made for the examination of such witnesses, which may fairly represent the amount of skill and erudition necessary in order to clear up the law in the manner required; and taking a moderate view of the case, I think it will be quite sufficient if a hundred guineas are allowed for the senior and seventy guineas for the junior counsel.

It would be extremely difficult to lay down any general rule on this subject or to state fees—the sort of *ratio* to be allowed in taxing such fees. Everything, or at least a great deal, will depend on the magnitude of the cause for which the evidence is required, and it cannot be represented that the present is not a heavy case, being an action for £50,000 as damages for slander. I do not say that what is now determined will be a precedent for any other case except so far as it shows what the Court allowed in a heavy and important case.

LORD SHAND, LORD ADAM, and LORD M'LAREN concurred.

The Court pronounced this interlocutor:—

"Find that the defenders are not entitled to the £18, 16s. 2d. of expenses reserved by the Auditor in his report: Sustain the objections for the defenders to the fees allowed by the Auditor for the witnesses Lumley Smith, Q.C., and William Graham, barrister-at-law, to the extent of allowing an addition of £115, 10s. to said fees: Repel the objections for the pursuer other than as regards the above-mentioned sum of reserved expenses: *Quoad ultra* approve of the Auditor's report and decern against the pursuer for the sum of £536, 13s. 8d. as the taxed amount of expenses of process after giving effect to the above findings."

Counsel for the Pursuer—D.-F. Balfour, Q.C.—Shaw. Agent—R. Ainslie Brown, S.S.C.

Counsel for the Defenders—Graham Murray. Agents—J. & F. Anderson, W.S.

Thursday, March 6.

SECOND DIVISION.

M'DOUGALL v. MACALISTER.

Jurisdiction—Crofters Holdings (Scotland) Act 1886*—Cottars—Permanent Improvements.*

Held that an action by a cottar for compensation for permanent improvements under the Crofters Holdings (Scotland) Act 1886 is incompetent in the Court of Session, and that such claims fell to be dealt with by the Crofters Commissioners.

Neil M'Dougall leased the salmon fishing in the sea *ex adverso* of the lands of Cour in the united parish of Saddell and Skipness in Argyllshire from August 1880 till August 1887, when he renounced his lease. During that time he occupied, at an additional rent of £1, 6s. per annum, a piece of ground upon which he erected a kind of dwelling-house and built a sea wall. He was ejected from said dwelling by Charles Brodie Macalister of Glenbarr and Cour, the proprietor of the ground, under a decree of removing dated 12th June 1889, and thereafter brought an action against the said Charles Brodie Macalister in the Court of Session "to have it found and declared that he was a cottar within the meaning of the Crofters Holdings (Scotland) Act 1886, and was entitled to compensation for permanent improvements in terms of said Act. The sum concluded for was £300.

The said parish has been duly ascertained and determined to be a crofting parish under sec. 19 of the said Act.

The pursuer pleaded—"In respect pursuer is a cottar within the meaning of the said Act, he is entitled to compensation for improvements as concluded for."

The defender pleaded—"It is incompetent to claim compensation for improvements under the Crofters Holdings (Scotland) Act 1886 in the Court of Session."

The said Act provides as follows—"Sec. 8. When a crofter renounces his tenancy or is removed from his holding, he shall be entitled to compensation for any permanent improvements." . . . "Sec. 9. When a cottar . . . paying rent renounces his tenancy or is removed, he shall be entitled to compensation for any permanent improvements" . . . "Sec. 10. Improvements shall be valued under this Act at such sum as fairly represents the value of the improvements to an incoming tenant." . . . "Sec. 29. The Crofters' Commission may, subject to the approval of the Secretary of Scotland,

frame and issue such printed forms of application and other forms of procedure as they shall think proper." . . . "Sec. 31. Nothing in this Act shall affect the provisions of the Agricultural Holdings (Scotland) Act 1883, provided that where any improvements are valued under the said Act with a view to compensation to be paid to a crofter, such valuation shall be made, unless the landlord and the crofter otherwise agree, by the Crofters Commission, according to the procedure prescribed by this Act." . . . "Sec. 34. In this Act . . . 'cottar' means the occupier of a dwelling house situate in a crofting parish with or without land, who pays no rent to the landlord, as also the tenant from year to year of a dwelling-house situated in a crofting parish who resides therein, and who pays to the landlord therefor an annual rent not exceeding £6 in money, whether with or without garden ground, but without arable or pasture land." . . . "Permanent improvements means the improvements specified in the schedule to this Act." . . . And the said schedule, after specifying nine kinds of permanent improvements, adds "(10) All other improvements which in the judgment of the Crofters Commission shall add to the value of the holding to an incoming tenant."

The Lord Ordinary (KINCAIRNEY), on 7th January 1890, pronounced the following interlocutor:—"Finds . . . that the amount of compensation due to a cottar under the said Act on removal from his dwelling cannot competently be determined in an action brought for that purpose in the Court of Session: Therefore dismisses the action, and decerns. . . .

"*Opinion.*— . . . . . . By the third conclusion of the summons, which proceeds on the footing that the pursuer was a cottar, the pursuer claims £300 as compensation under the Crofters Act. He founds on section 9 of the Act, and if he was a cottar he is entitled to compensation on the grounds stated in that section on establishing his right.

"But the defender has pleaded that it is incompetent to claim compensation for improvements under the Crofters Holdings (Scotland) Act in the Court of Session, and I have come to the conclusion that that plea is well founded.

"If it had been the compensation of a crofter which was in question, the matter would be clear enough, because the 31st section of the statute expressly provides that where any improvements are valued under the Agricultural Holdings Act, with a view to compensation to be paid to a crofter, such valuation shall be made, unless the landlord and crofter otherwise agree, by the Crofters Commission, 'according to the procedure prescribed by this Act.' What the procedure is which is prescribed by the Crofters Act is not very clear. But it seems clear that the assessment of a crofter's compensation falls within the scope of the duties of the Crofters Commissioners, and that both under that Act and under the Agricultural Holdings Act a crofter's compensation cannot be assessed in the first instance by the Court of Session, a tribunal which, having regard to the schedules of improvements for which compensation is to be paid in the two Acts, is obviously unsuited for doing so.

"The Agricultural Holdings Act does not apply to the case of a 'cottar,' and I do not know of any enactment which expressly relieves the Court of Session of the duty of assessing the compensation due to a cottar. It may not be easy to include the case of a cottar within the provisions of section 31, but I think it cannot possibly have been intended to commit the assessment of a crofter's compensation to the Crofters Commissioners, and not the assessment of a cottar's compensation. It was necessary to provide for the assessment of a crofter's compensation by the Crofters Commissioners, because otherwise the duty of fixing it might have been withdrawn from them by operation of the Agricultural Holdings Act. But this was not necessary in the case of cottars to whom that Act does not apply, and it appears to me to have been the manifest intention of the statute to include the assessment of such compensation among the matters committed to the determination and the final determination of the Crofters Commissioners. The Act provides that crofters and cottars may have certain specified advantages dependent on the circumstances of each case, such as, it may be, reduction of rent, relief from payment of arrears in whole or in part, compensation for improvements on removal or renunciation, and enlargement of their holdings, and it is committed to the Crofters Commissioners to determine the character and the measure of the benefits to be received in each particular case, and to determine, among other things, whether compensation shall be payable for improvements, and the amount of such compensation. The 8th, 9th, and 10th sections, which all relate to compensation for improvements, appear to be of the nature of directions addressed to the Commissioners for their guidance in assessing compensation. It is true that the Crofters Commissioners may not be a convenient tribunal for the determination of such questions, but they are certainly the tribunal for assessing the compensation of a crofter; and it is not more inconvenient that they should assess the compensation of a cottar. It would, at all events, be greatly more inconvenient if it were competent to bring such questions before the Court of Session. On the whole, I consider that this claim for compensation ought to be submitted to the Commissioners or determined by arbitration, and that it is incompetent in the Court of Session.

"The pursuer urged that I should pronounce a finding that he was at the date of the ejection a cottar, even although I should not make any finding about compensation. I do not think that I ought to do so on the record as it stands.

"Although I have indicated an opinion that the pursuer, being neither crofter nor feuar, is in all probability a cottar, that conclusion is not consistent with his own averments, and does not fall within any

admission by the defender. Seeing that, in my opinion, I could not give such finding any practical effect, I consider that it is right that that point also should be left to the Crofters Commissioners."

The pursuer reclaimed to the Second Division, and argued—The Crofters Commission had no power to determine who were and who were not cottars. The Crofters Holdings Act defined cottars. It lay with this Court to apply the Act. There was nothing in the Act to exclude the jurisdiction of the Court of Session to determine that question, and the further question of the amount of compensation. The Act provided no machinery for the valuation of cottars' improvements, and so far as known the Commissioners had never dealt with such improvements, nor drawn up rules under sec. 29 for assessing them, as has been done in the case of crofters. By sec. 31 the only permanent improvements which the Commissioners were authorised to assess were those specified in the Agricultural Holdings Act when executed by a crofter.

The respondent argued—The Legislature evidently meant that the Act should apply to crofters and cottars alike. A cottar was just an inferior kind of crofter. All permanent improvements executed by crofters and cottars could only be dealt with by the Commissioners. Sec. 31 was intended to save the rights of the Commissioners even in cases otherwise falling under the Agricultural Holdings Act. As it lay with the Commissioners under paragraph 10 of the schedule to determine what were permanent improvements, they were clearly the only tribunal contemplated by the Act for dealing with such matters in the case of crofters, and it would be absurd to hold that although crofters must be content with the Commissioners, cottars might bring their claims to the Court of Session.

At advising—

LORD JUSTICE-CLERK — It cannot be doubted that this Act has not been very acutely framed. This may be partly accounted for by the fact that in the original draft nothing was said about cottars, and their position may have been overlooked in Committee when the new clauses dealing with them were introduced.

We have had our attention called to everything in the Act to indicate the intention of the Legislature as to cottars. The pursuer has abandoned the position of feuar but claims to be a cottar, and as such demands compensation for improvements on the ground from which he has been removed. The question before us is whether the proper and only tribunal for dealing with that matter is the Crofters Commission.

Now the Crofters Commissioners have received power to execute the Act, and instructions as to the improvements with which they are to deal. These improvements, whether executed by crofters or cottars, are, under sec. 10, to be valued under the Act at such sums as fairly represents the value of the improvement to an incoming tenant. Then the schedule appended to the Act, after giving a list of permanent improvements, says "All the improvements which in the judgment of the Crofters Commission shall add to the value of the holding to an incoming tenant." Now, the meaning of these different passages is, I think, that the Crofters Commissioners are to value all improvements under clauses 8, 9, and 10. Undoubtedly cottars are not mentioned in section 10, and there may be some difficulty in holding that the Commissioners are to value their improvements; but I am of opinion that cottars are just to be looked upon as an inferior class of crofters. They must be in a crofting parish, but because all the privileges given to crofters are not conferred upon them they had to be separately described. The duties, however, of the Commissioners with relation to crofters are to be similarly discharged with regard to cottars.

The only other point referred to by Mr Guthrie is the provision of section 31, which he read as limiting the right of the Commissioners to deal with improvements to those falling under the Agricultural Holdings Act. I read the section exactly in the reverse way. The provisions of the Act may include improvements specified in the Agricultural Holdings Act, and yet, says section 31, the Crofters Commissioners are to have power to dispose of such improvements.

LORD YOUNG—I am of the same opinion. Mr Orr very properly pointed out that the pursuer does not now insist in this action except under the third conclusion.

I think that the awarding of compensation for improvements under sections 8 to 10 relates to the execution of the Act, and that it was the intention of the Legislature that these improvements should be valued and compensation awarded by the Commissioners. I am not prepared to hold that the Act should be read so critically as to involve this, that while the Commissioners are the only tribunal for determining the rights of crofters to compensation, the only tribunal for dealing with cottars' rights is the Court of Session. I think the plain reading of the Act is that the Commissioners are the proper tribunal for estimating the compensation for cottars' improvements as well as for those of crofters.

LORD RUTHERFURD CLARK concurred.

LORD LEE—The points brought out during the discussion shew clearly that this is a case for the Crofters Commissioners. There is no exhaustive definition of permanent improvements. The schedule gives examples, but adds that the Crofters Commissioners are to determine what other improvements are to be included under the term "permanent improvements." I am therefore of opinion that the provisions of the Act are sufficient to confer upon the Crofters' Commissioners the decision of this question.

The Court refused the reclaiming-note and adhered.

Counsel for Pursuer and Reclaimer — Guthrie—Orr. Agents—Fodd, Simpson, & Marwick, W.S.

Counsel for Defender and Respondent—C. K. Mackenzie. Agents — Melville & Lindsay, W.S.

Saturday, March 8.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

ALEXANDER AND OTHERS *v.* LOWSONS (LOWSON'S TRUSTEES).

Trust — Trust-Settlement — Construction — Intention of Testator—Partnership—Dissolution of Partnership—Continuity of Provision in Favour of a Business notwithstanding Dissolution of Partnership by Death of One of the Partners.

A truster who had succeeded his father in a manufacturing business, and had assumed his sons as partners, and invested the great bulk of his estate in the hands of the firm, directed his trustees to allow the whole of his funds in the business to remain "invested in the hands of and on loan to the firm on their personal security for the period of twenty years from" his death, with interest, payable to the beneficiaries under his will. He provided for the final and equal division of his estate among his children.

After the truster's death the business was carried on by his sons, and on the death of one of the partners, two of the testator's children raised an action to have it declared that the principal sum lent to the firm was now payable, on the ground that the loan was provided solely for the firm, who received it at the truster's death, and fell to be repaid at the dissolution of the firm, which had occurred by the decease of the partner.

The Court *held* that the intention of the testator was to benefit the business by allowing his funds to remain invested therein, and therefore that the pursuers were not entitled to decree as concluded for, but reserved right to the pursuers, or either of them, to apply to the Court for decree for payment of their shares or share in the event of circumstances entitling them thereto prior to the date fixed for repayment.

This was an action by Mrs Eliza Lowson or Alexander and Mrs Euphemia Lowson or MacHardy against their brothers James Lowson younger, William Lowson, and John Lowson, as trustees of their late father James Lowson junior, and against their brothers James Lowson younger, and William Lowson, the sole surviving partners of the firm of John Lowson & Sons, for repayment of the sum of £45,680, 18s. 10d. lent by the defenders, the trustees, to the firm of John Lowson & Son, and for payment of £11,420, 4s. 6d., the amount of the pursuers' aggregate shares of the said sum.

The pursuers alleged that the sum became payable on the 30th June 1887, being the date of the dissolution of the firm by the death of their brother Andrew Lowson, a partner of the firm.

James Lowson junior died upon 27th November 1883. He was the senior partner of the firm of John Lowson & Son, manufacturers, Forfar. The business had been originated by his father, and he succeeded to the principal position in it, and assumed his sons as partners. At the time of his death the firm consisted of his three sons, Andrew, James, and William Lowson. Besides these he left two sons, Francis, who died before the raising of the action, and John, who was employed in the business, but was nót a partner. He also left four daughters, who were all married. By a trust-disposition and settlement dated 12th December 1866 he appointed his five sons his trustees, and, *inter alia*, as regarded the residue of his estate, he directed them to hold and administer it for the use of themselves and their sisters equally, share and share alike, on their respectively attaining majority or being married, excepting the sum of £20,000, part of his capital in the firm, which £20,000 he directed and appointed his trustees to continue invested on loan to the firm of John Lowson & Son, on their personal security, for the period of five years from and after his death, the firm paying interest at £5 per cent. therefor, but with this stipulation, that the loan should be paid up by two equal instalments, the first whereof was to be payable five years after his death should his wife be then alive, and the second whereof was to be payable upon his wife's decease. The truster provided for a final and equal division of the capital sum among his sons and daughters, with provision for their issue and survivors.

By codicil dated 13th October 1883 the truster, *inter alia*, provided—"I do now hereby authorise, direct, and appoint my said trustees named in my said trust-disposition and settlement to allow the whole funds, property, and means belonging to me which may at the date of my death be lent or invested in the business of the said firm of Messrs John Lowson & Son, either as a partner thereof or on loan, or in any other manner of way, to remain and continue invested in the hands of and on loan to the said firm, on their personal security, for the period of twenty years from and after my death, they paying interest thereon half-yearly at the rate of 4 per cent. per annum, to which the same is hereby restricted, the said firm having it in their power to pay up the whole or any part of the said loan sooner than the said twenty years if they find themselves in a position to do so; and so long as the said loan shall continue the interest thereof shall be divided half-yearly in equal shares to and amongst my said five sons and four daughters, named in my said trust-disposition and settlement,