

FULL COURT

(Lord Elliot, John McVicar, D. W. Cunningham and A Gillespie)

GRAY v CROFTERS COMMISSION

Order of 31 July 1979

The Right Honourable Lord Gray, Airds Bay House, Taynuilt, appealed to the Land Court under section 16A(7) of the Crofters (Scotland) Act 1955 (as amended) against the proposed decision of the Crofters Commission not to grant a direction under section 16(9) that 6.756 hectares of vacant croft land in his ownership should cease to be a croft.

On 31 July 1979, the Land Court allowed the appeal and remitted the case back to the Crofters Commission in terms of section 16A(9) to give effect to their decision.

The note appended to the Court's order is as follows: --

This is an appeal by the landlord of a block of 6.756 hectares of vacant croft land at Airds, Taynuilt, against the proposed refusal of the Crofters Commission to direct that the said land should cease to be croft land.

The statutory background

As this is the first such appeal to this court against a decision of the Crofters Commission, it is necessary to consider the nature of the appeal and the statutory background to "decrofting" directions taking land out of the operation of the Crofting Acts.

Until the passage of section 17 of the Small Landholders (Scotland) Act 1911, a landlord obtaining possession of a vacant croft was not obliged to relet on crofting tenure. Section 17 of the 1911 Act, however, thereafter required him to report any vacant holding to the Board (later the Department) of Agriculture; and the landlord was not entitled, without their consent, to let the holding otherwise than to a neighbouring landholder for the enlargement of his holding, or to a new holder. An appellate jurisdiction in the Land Court was removed by section 6 of the Small Landholders and Agricultural Holdings (Scotland) Act 1931.

This remained the position until the Crofters (Scotland) Act 1955 revived the Crofters Commission in modified form, handing over certain administrative functions of the Land Court to that body and also giving it certain quasi-judicial functions. Section 16(9) of the 1955 Act contained the first decrofting provisions enabling crofts to be taken out of the operation of the statutory code. This section provided that where a croft was vacant the landlord might apply to the Secretary of State to direct that it should cease to be a croft and if the Secretary of State so directed the provisions of the Act should cease to apply to the croft, under certain reservations. Paragraph 12(b) of the First Schedule to the Crofters (Scotland) Act 1961 later added a requirement that the Secretary of State should intimate to the Commission any such direction given. But his decision still remained administrative and final.

The Crofting Reform (Scotland) Act 1976 has now introduced substantial changes by giving crofters for the first time a right to purchase their croft land and also an absolute right to purchase the site of their dwelling-house and garden ground. This has now made the issue of decrofting of greater importance; for, by decrofting, the

crofter becomes a proprietor entitled to develop or realise the full development value of his land: although under section 3(3) he may have to account to his former landlord for a half share thereof in the event of its sale within five years. Due doubtless to the new significance of decrofting, the Act provides that it is the Crofters Commission and no longer the Secretary of State which gives or refuses decrofting directions. Applications also now have to be dealt with by the Commission in a quasi-judicial manner in accordance with certain statutory principles and procedures; and the Commission has to issue a proposed decision containing its reasons. There is also now introduced, for the first time, a right of appeal to the Land Court.

So a decision whether to grant or refuse a decrofting direction has become a quasi-judicial rather than a purely administrative one.

Before considering these new provisions in detail it is necessary to state that the 1976 Act has not however altered the "vacancy" provisions of the 1955 Act nor, in particular, section 16(11A) of the 1955 Act, which provides that: -- "*a croft shall be taken to be vacant notwithstanding that it is occupied, if it is [so] occupied otherwise than by the tenant of the croft*". Under the statutory code it is a fundamental principle peculiar to the crofting system of land tenure, and unaltered by the 1976 Act, that a vacant or untenanted croft remains a croft, and the Crofters Commission have power to require that it should be let to a new crofting tenant.

It will thus be seen that, without decrofting, the crofter who purchases his croft under the 1976 Act merely purchases the proprietor's interest therein and steps into his shoes as the notional landlord of a vacant croft. It is also pertinent to note that the new provisions relating to the decrofting of croft land now serve a dual function and apply both to an application by a crofter as well as by a landlord, the same principles without distinction being applied to each. There are, however, special provisions contained in section 16A(4) applying only to crofters and enabling a crofting tenant who proposes to purchase his croft to seek an anticipatory decrofting direction (which comes into effect on purchase), as if he was the landlord of a vacant croft. He may also appeal to the Land Court against any such proposal to refuse an anticipatory direction. In addition there are special mandatory provisions enabling a crofter to purchase and decroft the site of his dwellinghouse and garden ground.

The main decrofting provisions are contained in section 13 of the 1976 Act which introduces substitute decrofting provisions into the 1955 Act as new sections 16 and 16A. Section 16(9), which applies in the present case, provides inter alia: -- "*Where a croft is vacant, the Commission may, on the application of the landlord, direct that the croft shall cease to be a croft or refuse to grant the application*", and on the direction being granted the crofting legislation then ceases to apply except in certain circumstances.

As already mentioned, the applicant under this subsection may be the landlord or the former crofter who has purchased his croft.

The new section 16A of the 1955 Act contains the principles to be applied and reads:-

" (1) The Commission shall give a direction under section 16(9) of this Act that a croft shall cease to be a croft if -- (a) Subject to subsection (2) below, they are satisfied that the applicant has applied for the direction in order that the croft may be used for or in connection with some reasonable purpose within the meaning of section 12(2) of this Act and that the extent of the land to which the application relates is not excessive in relation to that purpose; or (b)

the application is made in respect of a part of a croft, which consists only of the site of the dwellinghouse on or pertaining to the croft and in respect of which a crofter is entitled at the time of the application, or has been entitled, to a conveyance by virtue of section 1(2) of the Crofting Reform (Scotland) Act 1976, and they are satisfied that the extent of garden ground included in that part is appropriate for the reasonable enjoyment of the dwellinghouse as a residence. (2) Without prejudice to subsection (1)(b) above, the Commission, in determining whether or not to give such a direction, shall have regard to the general interest of the crofting community in the district in which the croft is situated and in particular to the demand, if any, for the tenancy of the croft from persons who might reasonably be expected to obtain that tenancy if the croft were offered for letting on the open market on the date when they are considering the application."

Procedure before the Crofters Commission and their decision

In accordance with the procedural provisions contained in the new substitute section 16A of the 1955 Act the Commission duly advertised the appellant's application. As a result of this newspaper advertisement, six persons wrote expressing interest in a tenancy of the land in question. A seventh person was later added to the list. The land in question was inspected by the Department's lands officer on behalf of the Commission. The latter then signified to the applicant that they intended not to grant his application, and the applicant then exercised his right to be heard in support of his case. A local hearing was thereafter conducted by the Commission's vice chairman and area commissioner, Mr N. A. MacAskill. The full Commission, at a subsequent meeting on 3 November 1978, then decided not to grant the application either in its original or an alternative modified form suggested at the hearing. Under section 16A(7) the Commission duly gave notice of the proposed decision specifying the nature of and the reasons for such decision. Under section 16A(8) there is a right of appeal within a period of 21 days to the Land Court and this was duly exercised by the appellant.

The grounds for the Commission's proposed decision are contained in the following extracts therefrom: -

"The Commission are required to have regard to the demand for the tenancy of the croft land from persons who might reasonably be expected to obtain that tenancy if the croft land were available for letting on the open market at the date of consideration of the application under section 16(9). Interest in obtaining the tenancy of the land was expressed by the following persons [their names and designations were then given]. The persons above mentioned all appear to have croft or agricultural experience and at least five of the seven (it transpired) were known to the landlord... they would all therefore be acceptable to the Commission if any of them were put forward as a prospective tenant by the landlord and accordingly the Commission have no doubt that there is a continuing demand from persons who meet the statutory requirements. In addition to establishing the existence of the type of demand defined by statute the Commission have to take account of the wider general interests of the local crofting community. In addition to the expressed interest of the persons mentioned, Mr MacIennan, grazings clerk, affirmed at the hearing that he had been approached by a number of other persons who are interested in obtaining a let. The Commission take the view that there is ample evidence of an unsatisfied demand from crofters and persons of crofting experience in the Taynuilt area, and accordingly they are satisfied that it is in the general interests of the local crofting community that croft land

should continue to be available for letting under crofting tenure... in reaching their decision the Commission have had regard to the demand which was genuine, firmly expressed, prior to and at the hearing, and the general interests of the crofting community in the district. They also have considered whether there would be any subsequent degree of hardship to the landlord by the refusal of the application. Having considered the landlord's representations on this matter we do not think there would be any such hardship."

The procedures followed on appeal

The Court conducted the appeal against the Commission's proposed decision by hearing the evidence *de novo*. The appeal alone is on fact and law, unlike an appeal against the proposed decision of an arbiter. Furthermore there were no shorthand notes of evidence or any findings-in-fact available, and an inspection of the locus (which the Commission did not to make) was required. This is a procedure the Court used to adopt when it heard appeals from decisions of the Secretary of State under the Agricultural Holdings (Scotland) Act 1949 until the Agriculture Act 1958 made the Land Court itself the adjudicating body. While the hearing of evidence by an Appeal Court in an appeal from a lower judicial tribunal or administrative body acting judicially is unusual in Scotland (as opposed to England), it is not altogether unknown. Such are appeals from licensing boards to a sheriff under section 39 of the Licensing (Scotland) Act 1976, where under section 39(5) there is a restricted power to hear evidence. On an appeal against the proposed refusal of a decrofting order in terms of section 16A(8) the statute gives us a wider power for providing that the Land Court may: "*hear or consider such evidence as they think fit in order to enable them to dispose of the appeal*".

A difficulty, however, confronting the Court in conducting the appeal as a rehearing was that there was no opposing party to contradict the appellant with legal argument or contrary evidence.

Prior to the hearing the Commission had lodged a note of representations with the limited purpose of informing the Court of the steps taken by the Commission in considering the application made to them, and also making available to the Court documents submitted to or prepared by the Commission in the proceedings before them. The Commission took the view that, having acted in a quasi-judicial capacity, they had now exhausted their functions under the relative statutory provisions and should not therefore be a party to this appeal. They also referred to Court to the following cases which at least indicated that they are not obliged to appear as parties: *Lighthouse v City of Edinburgh District Licensing Board* 1978 SLT (Sheriff Court) 41; *Hutcheon v Hamilton District Licensing Board* 1978 SLT (Sheriff Court) 44 and *Kieran v Adams and Another* 1979 SLT (Sheriff Court) 13.

In the circumstances the Court was obliged *ex proprio motu* to cite as witnesses all the would-be crofter tenants who had appeared at the previous hearing. All duly attended the appeal hearing: with one exception, on good cause shown. At the hearing the Court also required to some extent to adopt an investigatory role by examining the witnesses as to their qualifications and intentions as prospective tenants of the vacant croft land. They were also cross-examined by the appellant's solicitor. But the Commission's solicitor did not intervene, except on points of information or to assist the Court upon the law applicable.

All the above procedures adopted by the Court were expressly agreed to by all persons present.

Findings-in-fact

Evidence was given on behalf of the landlord, by Lord Gray himself, and also by his professional adviser Mr Nicholas Harper, who is a partner of Langley-Taylor, chartered surveyors, London and Perth. Six of the seven persons listed by the Crofters Commission also gave evidence.

From the evidence, from certain documents lodged as productions and from the Court's own inspection of the croft land and the surrounding farm, we found the following facts to be admitted or proved: --

1. The appellant purchased Airds Bay Estate, Taynuilt, in 1971. His family have long connections with the area. The estate consists of some 434 acres, of which 250 are croft land comprising 30 crofts with common grazings. Of the remainder, about 160 acres are in hand but let out in seasonal grazings as they were prior to 1971. Of the crofts, some 12 only are worked by crofters themselves. The crofts are situated in the three townships of Kirkton, Hafton and Airds. The village of Taynuilt within which these townships lie is in a state of transition. It contains hotels, guest houses and farms as well as crofts and is a centre for several activities. In particular there is mounting pressure from tourism which is recognised by the district planning authority as of particular importance, requiring special planning control due to the vulnerability of the area.

2. The 6.756 hectares of vacant croft land under dispute was never a complete croft in itself and was split between crofts number 7, Hafton and numbers 8, 9, 10 and 11, Airds. Only one of these (number 10) was a complete croft. Attached were also five shares in the local common grazings.

3. With the estate in 1971 the appellant also purchased the Taynuilt Hotel, towards the renovation and rehabilitation of which he thereafter devoted most of his working time. Most of the farm he continued to let for grazing to a neighbouring farmer and to several crofters, as his predecessor had done. By 1976 rehabilitation of the hotel had been completed and it was sold. Thereafter the appellant, acting with the advice of Mr Harper, turned his attention to the reorganisation of local crofts, in which move he was successful in gaining the cooperation of the crofters. Two crofters had previously surrendered the land for feus of their houses under the Crofters (Scotland) Act 1961, so there was already vacant croft land to be considered. The intention of the new scheme of reorganisation was to provide somewhat larger crofts in more convenient situations.

4. The proposed scheme for the reorganisation of the crofts was explained to a public meeting convened in Taynuilt Hotel in 1974. It had been the subject of considerable negotiation and adjustment involving the local crofters. Mr Robertson, the clerk to the common grazings committee, told the appellant that he was not prepared to be directly involved as joint promoter of the scheme; but he gave valuable information and advice. Two schemes were eventually agreed, including one relating to the disputed area under which the 6.756 hectares were to revert to the home farm to be reclaimed by drainage. The public meeting generally approved these proposals, although some minor points, such as accesses, were altered. It was attended by Mr Moffat and Mr Mackay from the Department of Agriculture, as agents for the Crofters Commission. At the public meeting the crofters involved did not dispute the reversion of the 6.756 hectares to the estate, although one outsider present at question the principle thereof. While the Commission were at first reluctant to be involved in a recasting scheme which did not originate from the

crofters themselves, they eventually sent their then solicitor, and their chief technical officer, Mr McFarlane, who gave full cooperation. But they fairly warned the appellant not to assume a decrofting direction for the vacant area. They also inquired whether the landlord was prepared to agree to the recasting schemes going ahead in any event. To this the landlord agreed and recasting schemes have now been approved and given effect to. A third awaits resolution of two outstanding disputes which it is still hoped may be resolved.

5. The landlord now intends actively to farm all of the home farm himself, and a new farm scheme has recently been approved for grant aid with the Department of Agriculture. It is intended to remove the main grazing tenant by the end of the year. 20 to 25 blue-grey cows are to be run on 45 acres to the west of the Airds Bay Road, where the land was seen by the Court on inspection to be capable of carrying the present stock and, with improvement, many more. The landlord hopes to increase the farming potential by at least 50% and to provide more local employment as well as making his new farming equipment available, if required, for his crofting neighbours. These improvements are to be effected in stages of about 15 acres per year, paying for the improvements out of revenue. But a loss was expected by the estate for the first three years.

6. A drainage scheme was once mooted for the 6.756 hectares in the 1960s; but this scheme failed through lack of agreement among the crofters as to cost sharing. Upon inspection in May 1979 in wet weather, the court found the ground to be totally waterlogged and, except for a small area on the east side of the burn, quite incapable of cultivation. Here Mr McFarlane (of croft number 11) is allowed to cultivate a small area. The remainder is covered with rushes and, in its undrained state, is only capable of providing mediocre grazing in the middle of summer. There is no croft house, and the evidence was that planning permission is unlikely to be given for one in the main road; nor would there be access for one anywhere else. The vacant croft land is separated from the Airds Bay road by a fenced-off portion of the home farm.

7. The landlord deepened the burn about two years ago. But to provide proper drainage to bring the 6.756 hectares back under cultivation or into a condition for proper grazing would require the bed of the burn to be straightened, as well as deepened by about 3 ft. Its sides would then require to be reinforced to maintain the outflow from the tiled drains which would have to be laid to drain the rest of the area to the burn. The total cost, if carried out by outside contractors, would be £12,000 - £15,000 gross, although somewhat less if machinery could be borrowed. These costs would be subject to grant aid. The landlord has the money available to effect these improvements. The necessary reclamation work could be done in stages, with perhaps open drains to start with to test the direction of flow before the tiles were later laid.

8. The Court's appraisal of the various candidates for the tenancy is deferred until later in this opinion.

The statutory principles governing decrofting

The legal framework within which the decrofting provisions require to be operated is now contained in the new section 16A of the Crofters (Scotland) Act 1955 as substituted by the Crofting Reform (Scotland) Act 1976. The new section 16(9), already quoted, is discretionary and provides that where a croft is vacant the Commission may, on the application of the landlord, direct that the croft shall cease to be a croft; or refuse to grant the application. The new section 16A(1) provides that the Commission shall give a direction under section 16(9) if they are satisfied that the

applicant has applied for the direction in order that the croft may be used for or in connection with some reasonable purpose within the meaning of section 12(2) of the 1955 Act. That subsection has now to be read with the additional purpose added by the Crofters (Scotland) Act 1961: "*or for any other purpose likely to provide employment for crofters and others in the locality*".

The appellant's solicitor submitted that the words "*some reasonable purpose within the meaning of section 12(2)*" were merely expository of the other purposes contained in section 12(1) and, in particular, the specified purpose of "*the good of the estate*". In contrast the Commission's solicitor submitted that the phrase should be strictly construed according to its exact wording, referring only to the specific purposes mentioned in section 12(2). Section 16A(2), he suggested, had now replaced section 12(1).

Section 12(2) of the 1955 Act was introduced by the words: "*for the purpose of the foregoing subsection the expression 'reasonable purpose' shall include*". Under the original resumption provisions contained in section 2 of the Crofters Holdings (Scotland) Act 1886 all these purposes were contained in the one section. While the draftsman could have made the intention of Parliament clearer by referring merely to section 12 rather than to section 12(2), we nevertheless consider that the phrase "*within the meaning of section 12(2)*" was intended to signify that all the purposes which would justify a resumption under the 1955 Act were intended to be incorporated; and further that the purpose of section 16A(1)(a), viewed in its wider context, was to make decrofting directions mandatory on the Commission (subject only to section 16A(2)) in circumstances where a resumption order would have been granted had the croft been occupied by a crofter. In our opinion it follows that the decisions of the Court relating to resumptions also apply, including the determination that it is not a "*reasonable purpose*" for resuming croft land that the sole purpose of the resumption is to enable the cultivation of the holding to be carried on personally by the landlord: *Tabor -v- McMaster* 1962 SLCR Appendices 91; *Buckworth -v- Ross* 1925 SLCR 94, at page 96; and *Board of Agriculture for Scotland -v- McLean* 1929 SLCR 71, at page 85. If the 6.756 hectares had now been occupied by a crofter it would not have been allowed under the 1955 Act to be resumed for personal cultivation by the landlord.

In the circumstances we agree with the Commission that this is not a "*reasonable purpose*" case under section 16A(1) where (subject to section 16A(2)) decrofting is mandatory.

Nor, of course, does it fall under the other mandatory provisions of section 16A(1)(b) which makes a decrofting direction peremptory in the case of the dwellinghouse and adjoining garden ground. Here Parliament contemplated decrofting wherever the dwellinghouse was situated, even in the midst of remote crofting communities.

The case then falls under section 16(9) which is discretionary, within the principles laid down in section 16A(2). The latter contains the guidelines to be applied by the Commission in deciding whether a direction should be granted or refused.

The court heard legal argument as to the meaning of this subsection, and we were again indebted to the solicitor for the Crofters Commission for his assistance on the law applicable.

It was contended by the appellant's solicitor that the Commission had wrongly concluded that as there was a local demand this therefore ruled the matter and the general interests of the crofting community were synonymous with demand. Without

touching on the factual position, the Commission's solicitor pointed to the obvious interrelation between demand and local community interest which, so he said, inevitably tended in practice to become merged. He also, however, observed that the Commission treated each case on its merits.

In the opinion of the Court the two guiding principles which Parliament has laid down in section 16A(2) to be followed in deciding whether to grant or refuse a decrofting direction, while interrelated, are not synonymous. The Commission is directed, in the first place, to have regard to the general interest of the crofting community in the district in which the croft is situated. In our view this constitutes the overriding consideration -- overriding in some cases even a balance of agricultural advantage or some hardship to a crofting landlord -- involving social considerations of community interest. For traditionally, and even now, crofting communities as such do not depend solely upon agriculture for the income. The use of the word "*general*", too, in this context signifies that the crofting community interest should be widely rather than narrowly construed.

The words which follow, prefaced by the phrase "*and, in particular*", merely indicate a particular aspect of the foregoing general interest, namely, the demand by prospective acceptable tenants for the crofting tenancy in question. In our view, the Crofters Commission have wrongly construed words of particularity following words of generality as restricting the operation of the preceding words. Where, in contrast, general words follow particular ones, indicating a particular class or category, then the *ejusdem generis* rule of interpretation applies to confine the scope of the general words to the same preceding class: see Maxwell on *The Interpretation of Statutes* (12th edition), page 297. But the *ejusdem generis* rule cannot be applied in reverse. As Lord Cave, Lord Chancellor, said in *Ambaitelos -v- Anton Jurgens Margarine Works* [1923] AC 175, at page 183: "*I know of no authority for applying that rule to... a case where, to begin with, the whole clause is governed by the initial 'general words' "*. Again in *Canadian National Railways -v- Canada Steamship Lines Ltd* [1945] AC 204, in a case involving the Canadian Transport Act 1938 Section 35(13), which directed the Canadian Board of Transport Commissioners: "*on any application under this section, the Board shall have regard to all considerations which appear to it to be relevant*" -- followed by a more specific direction to have regard to particular matters -- the Judicial Committee of the Privy Council held that the latter in no way detracted from the generality of the prior direction.

In the present case the Commission are initially directed to have regard to the general interest of the local crofting community. In the light of the above decisions we do not consider that this general direction can be confined or limited in its scope by the subsequent and more particular direction to consider local demand, if any, for the tenancy. It does not, therefore, follow that if one or more persons are encouraged by advertisement to seek a tenancy of the croft, a decrofting direction should never be granted. This nevertheless appears from the proposed decision to have been the view adopted by the Crofters Commission in the present case, and to have justified their decision not even to inspect the locus.

In our opinion this is taking too narrow a view for, in a particular case, the general crofting interest as broadly interpreted may be served by a decrofting direction; and may not be harmed in any way. Conversely, in a particular case, there may not be any local crofting community at all to have any interest. Such would be the case of a croft in a built-up area of where a croft is surrounded by contiguous farms with no other crofters or crofting community nearby. While in such cases the Commission is certainly obliged under section 16A(6) at least to give bare advertisement of an application for a decrofting direction -- so that any local objections can be considered

by them -- we do not think that Parliament intended the Commission in such a situation positively to encourage new tenants who may be expected to be numerous; or that it contemplated crofters who had purchased (or were about to purchase) their crofts being subsequently ousted by the substitution of new tenants from elsewhere. Yet the "vacancy" provisions of the 1955 Act, if strictly operated, could bring about this very result with the former crofter in some cases invited to submit his reletting proposals. Through purchasing his croft he would then have exchanged his legal security of tenure for insecurity of occupancy. That it may not be the Commission's practice to enforce the "vacancy" provisions against a former crofter or a member of his family so long as he continues to occupy and work the acquired land, cannot detract from the fact that they could legally do so. The crofter's right as owner to occupy his land becomes insecure because, on purchase, he becomes deemed landlord of a vacant croft subject to displacement by a new crofting tenant who, in turn, could apply to purchase his croft in terms of the 1976 Act.

The Court prefer therefore to adopt the different interpretation already advanced leading to more workable results and under which decrofting directions would normally follow -- unless against the general interest of a local crofting community which actually exists. There is no need to rehearse grounds for refusing decrofting directions in cases where, for instance, fragmentation might serve to undermine local township obligations and the existing local community. These grounds are principally for the Commission to judge in the particular circumstances of the local crofting community.

In the present case we are faced with a crofting community whose population is also part of the village of Taynuilt in a developing area. Here there has been active crofting community involvement in the reorganisation of two of the local townships involving all the crofters concerned and with much discussion and adjustment. This process is still proceeding in the case of the third township.

Section 8(1) of the Crofters (Scotland) Act 1961 provides that the Crofters Commission, whether of their own accord or on the representation of a crofter or crofting landlord or clerk to the grazings committee, and after due consultation and inquiry, may prepare the draft of a reorganisation scheme. Such a reorganisation scheme has to provide under section 8(2) for the reallocation of the land in the township in such manner as is, in the opinion of the Commission, most conducive to the proper and efficient use of that land and to the general benefit of the township. Such reorganisation is therefore clearly recognised by Parliament to be in the local community interest. But this provision has proved notoriously difficult to operate in practice. In the present case the appellant is entitled to the credit of being the main instigator, for it was he or his adviser who prepared the draft scheme which witnesses referred to as a "recasting scheme", not being an official statutory reorganisation. The clerk to the grazings committee too played a prominent part and the Commission's officials also cooperated. It was part of this recasting scheme -- not a vital but nevertheless an incidental part -- that the area of 6.756 hectares should revert to the estate so that the landlord could drain it by conducting the major extensive drainage operations required in order to restore it to agricultural use. The area in question never was a single crofting unit, but rather separate strips of wet land belonging to five separate crofts. All the crofters agreed to its reversion to the estate.

Taking a broad view of the general interest of the local crofting community, the Court considers that what the crofters comprising the community have freely agreed to is *prima facie* likely to be in their interest. There will probably be some incidental advantage to neighbouring crofters in the complete drainage of this low ground.

Admittedly one local crofter, Mr McFarlane, spoke in favour of a continuing tenancy, but we do not regard his evidence at the appeal hearing as really going back on his prior agreement, so much as a protest at new outside tenants being encouraged to come in. His attitude was the entirely reasonable one that if anyone was to be allowed in -- as he put it, to share in "the open basket" encouraged by the Commission -- it should be himself. But he did not wish to become tenant of the whole unit, and merely desired to be allowed to continue to cultivate a small portion.

Having regard to the general interest of the local crofting community, we therefore see no reason for refusing the decrofting direction now sought.

We have already expressed our views on the secondary consideration of "*demand, if any, for a tenancy if the croft were offered for letting on the open market*". This envisages the landlord advertising the croft to let and finding a suitable tenant acceptable to him and eventually to the Commission. As we have already remarked, this is a subsidiary question and not the sole criterion. Nevertheless we consider it should be taken into consideration.

In considering the prospective tenants listed by the Crofters Commission as being interested in obtaining the tenancy of the vacant croft land, and who appeared at the hearing, the Court must consider certain basic requirements which an applicant would have to satisfy before he might be regarded as "*reasonably expected*" to obtain the crofting tenancy of this particular area of land.

These requirements include at least a basic knowledge of crofting agriculture, considerable energy and initiative to deal with a very serious drainage and reclamation problem, and sufficient capital not only to stock and crop the land but also to meet the heavy outlays involved in providing buildings and carrying out the major drainage works required to bring the land into production. In addition there arises the question of provision of housing where a potential applicant does not already have a home in the district.

One of the applicants, James Mallows, Kilmelford, was unable to attend the hearing, and we are unable to comment directly on his suitability beyond observing from the Commission's own comments that is a shell fish farmer. Six others did appear and were examined on oath.

Duncan Gillies, The Caravan, Lorn Furnace, Taynuilt

Mr Gillies is aged 24 and is married with one child. His father has a croft in Kirkton township and he has a background knowledge of croft work. He would eventually live on the subjects if he was able to build a house there. He has not walked over the land and is unaware of what drainage works are required. He would intend to keep cattle which he would put on the common grazings in the summer while he took a crop of hay. He has very little capital.

John Gillies, 7 Kenmore Cottages, Bonawe

Mr Gillies is aged 26 and is married with two children. He is a brother of Duncan Gillies and has the same background knowledge of crofting, but in addition he has had a fair experience of farm work on dairy and sheep farms in Perthshire and Argyll and completed a one-year course at Lawers School of Agriculture. He is presently working in a local sawmill and has applied for a council house in Taynuilt. He is aware that considerable drainage works would be required, but considers that these could be spread over two to three years and financed out of savings. He has no

capital available to finance drainage, provision of buildings and stock, which he thought might altogether cost around £5,000.

Ian M. Inglis, 10 Achlonan, Taynuilt

Mr Inglis is aged 38, married with three sons, and has lived in the Taynuilt district all his life. He is presently engaged in agricultural and forestry contracting (fencing, etc), and in addition operate in early morning milk round in Taynuilt in partnership with one of the other interested parties. He has been endeavouring to obtain the tenancy of a croft in the district. He is well aware of the drainage problems, but considers that he could tackle the work with the aid of a machine which he could obtain locally. He claims to have no problems about financing the work. He would retain his present work and house and would simply summer cattle on the land.

Donald McFarlane, 11 Airds, Taynuilt

Mr McFarlane is aged 66 and has two sons. He was the tenant of approximately 1.1 hectares of the land concerned, but voluntarily relinquished that the area in the recasting scheme. As already mentioned this is the only portion in which he is interested.

John Wilson, 14 Cruachan Cottages, Taynuilt

Mr Wilson is aged 49 and is married with four children. He came to the Taynuilt area from Ayrshire in 1961 and is presently employed as a supervisor and driver with a bakery depot in Oban, but is being made redundant. He has a milk round in the Taynuilt area in partnership with Mr Inglis. His intention would be to put the whole area under horticultural crops, using plastic greenhouse equipment. He is aware of the drainage problems but thinks they could be overcome in a period of five years. He could get the use of a drainage machine from a friend. He claims to have capital at hand.

Alex Mackinnon, Achnacone, Appin

Mr Mackinnon is aged 55 years and is married with two sons. He was brought up on a croft on Mull and is presently tenant of Achnacone farm where his stock is 400 ewes ("loaned" to him by the proprietor). He does not intend to give up the Achnacone tenancy and he would continue to live in Appin and carry on sheep farming and contract shearing, fencing, etc in which is also engaged. Mr Mackinnon said he would employ a contractor on drainage works and could contribute £6,000 (with a grant). If the cost was more than that, he thought the subjects would not be viable. What Mr Mackinnon really wants is a croft to retire to when he gives up his tenancy and with that end in view he would require to build a house.

Appraisal of potential applicants

We are of the opinion that the two Gillies Brothers, although they have a suitable background knowledge, have not seriously considered the financial implications of taking the tenancy and bringing this land into production. Mr Inglis is deeply involved in other businesses and did not appear to intend fully to develop the land. Mr McFarlane has already obtained the benefit of the recasting scheme and his proposal would result in a new fragmentation of the township. Mr Wilson's proposal for intensive horticultural production, involves specialist skills and very heavy capital outlay on drainage, and we are not convinced that he could carry out his very ambitious project. Mr Mackinnon's claims for consideration could not be accepted,

as he would be an absentee tenant who could not devote his interest to bringing the land into production. Although we agree with the Commission that many of the would-be tenants were known to the landlord, both he and also his solicitor in the closing submission made on his behalf said he was not prepared to accept.

The Court are not therefore convinced that any of the above persons could be reasonably expected to obtain the tenancy of this area of land with serious drainage and reclamation problems. The croft land in question was never a complete croft in itself, nor is it capable of being run by a crofter in accordance with the statutory conditions contained in the Second Schedule to the Crofters (Scotland) Act 1955, unless the major drainage scheme described is first undertaken.

In these circumstances it is only reasonable that the 6.756 hectares formerly part of number 7 Hafton and numbers 8, 9, 10 and 11, Airds, in the parish of a Ardchattan and Muckairn shall cease to be a croft or parts of crofts. The Court therefore allow the appeal, and remit back to the Crofters Commission in terms of section 16A(9) of the Crofters (Scotland) Act 1955 as amended to give effect to our determination.

There will be no finding as to expenses.

For Appellant

Condie, Mackenzie & Company, Perth

For Commission (watching brief)

Cailean M. M. Taylor, Inverness.