money is to be applied. Of course the most ordinary case of the exercise of such a power would be where there had been some loss of interest to the beneficiary, and it was necessary that a portion of the capital should be so invested that he might spend the remainder of his days in the same degree of comfort that he had hitherto enjoyed. But the power is not limited to questions of this sort. It is a power to give the beneficiary liferenting the fund the absolute control of a portion of the capital, provided the trustees shall think it a reasonable application of the money. It appears to me to be quite proper for the factor to inquire of the beneficiary what he means to do with the money, for the very purpose of the trust is to protect him against the improvident expenditure of his capital. Now, in this case, where it is explained that he proposes to sink the money in an annuity, I cannot doubt that, upon this explanation being made, the judicial factor has a case before him entitled to very favourable consideration, and as he comes to us stating that he approves of the proposed advance, I am of opinion with Lord Kinnear that the power should be granted.

The LORD PRESIDENT and LORD ADAM concurred.

The Court recalled the interlocutor of the Lord Ordinary, granted the prayer of the petition, and found the petitioner entitled to the expenses of the petition out of the capital of the trust-estate.

Counsel for the Petitioner and Reclaimer — Dundas — Howden. Agents — Shiell & Smith, S.S.C.

Counsel for the Respondents — Guy. Agents—Sibbald & Mackenzie, W.S.

Friday, November 15.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

FLEMING AND ANOTHER *v.* DISTRICT COMMITTEE OF MIDDLE WARD OF COUNTY OF LANARK.

Arbitration—Lands Compulsorily Acquired —Compensation—Agricultural Tenant—Break in Lease.

A tenant occupied certain agricultural subjects on a nineteen years' lease, which empowered either him or his landlord to put an end to it at the termination of six, eleven, or sixteen years from the term of entry. Soon after the term of entry, the local authority of the district under the Public Health (Scotland) Acts, in virtue of powers conferred upon it by a private Act of Parliament, served a notice upon the tenant of its intention to take a portion of the lands occupied by him for the purpose of constructing certain water-works. In a question between the local authority and the tenant as to the compensation payable to the latter, *held* that the proper method of valuation was to take the tenant's interest on the footing that his lease was for nineteen years, subject to deduction in respect of the contingencies affecting its duration for that period, and that the amount of this deduction was a matter for the determination of the arbiters appointed in terms of the Lands Clauses Consolidation Act 1845.

On 6th November 1894 John Fleming and James Murray, tenants of the farm of Low Plewland belonging to the Duke of Hamilton, in the parish of Avondale and county of Lanark, raised an action against the District Committee of the Middle Ward of Lanarkshire for declarator that upon a just construction of their lease they were entitled to receive full compensation from the defenders for all loss, injury, and damage sustained and to be sustained by them to the term of Whitsunday 1911, being the natural termination of the said lease, in consequence of the defenders taking land and way-leave on the said farm under their private Water Act 1892, and for payment (1) of the sum of £6307, 14s. 1d., and (2) of the sum of £50.

The pursuers possess the said farm under a lease dated 15th and 20th February 1892, granted in their favour by the commissioner of the Duke of Hamilton. The duration of the lease is for nineteen years, but with power "to either of the parties hereto to put an end to this lease at the termination of six, eleven or sixteen years from the respective terms of the tenants' entry under the same, upon the party resolving to exercise such power giving to the other party notice in writing at least six months previous of his intention to do so."

In 1892 the defenders obtained a private Act of Parliament (55 and 56 Vict. cap. 169), whereby they were authorised and empowered to construct certain water-works to supply water within the district. The main reservoir for storing the water is situated in part upon the pursuer's farm. In 1893 the defenders served on the pursuers a notice stating their intention of taking certain portions of their farm, extending to 66 acres, for the purposes of the said works, and a further notice was served with regard to a way-leave over an additional portion of the farm. The pursuers lodged a claim for compensation in respect of the taking of the said lands and way-leave.

By deed of nomination and submission dated 10th October 1893, the defenders, in terms of the Lands Clauses Consolidation (Scotland) Act 1845, nominated an arbiter on their part to determine the purchase money to be paid for the said lands and the said way-leave, and for all injury or damage occasioned to the pursuers by the defenders' actings, the said arbiter to fix and determine alternatively the amount of purchase money and compensation to be paid to the pursuers as aforesaid, in the first place, on

the footing that their right and interest in the said lands and others expired at Martinmas 1897, and, in the second place, on the footing that their right and interest did not expire till Martinmas 1910. The said nomination was stated by the defenders to be made under protest and without prejudice.

On 7th November 1893 the pursuers, under protest that the condition contained in the defenders' deed of nomination and appointment that the arbiter should give two, or alternative, findings of the amount or amounts to be found due to the pursuers, was illegal and invalid, nominated and appointed an arbiter on their part along with the defenders' arbiter. The said arbiters appointed an oversman, and on 19th October 1894 pronounced their final sentence and decree-arbitral.

By the said decree-arbitral the arbiters found that the District Committee were liable to pay as compensation to the pursuers—"I. (*a*) On the footing that the said claimants are entitled to compensation for loss, injury, and damages as aforesaid, sustained and to be sustained by them to the term of Whitsunday 1898 only," the sum of £2573, 3s. 0¼d; "(*b*) on the footing that the said claimants are entitled to compensation for loss, injury, and damages as aforesaid, sustained and to be sustained by them to the term of Whitsunday 1911, being the natural termination of said lease," the sum of £6307, 14s. 1d. II. In respect of the lands taken for way-leave the sum of £50.

The pursuers maintained that they were entitled to compensation under the second of the above alternative findings, and accordingly claimed the sum of £6307, 14s. 1d.

The pursuers pleaded—"(2) The condition in the said lease with regard to a break being personal to the parties thereto, and not having come into operation, the defenders are not entitled to found upon the same, and the pursuers are entitled to compensation" in terms of the second branch of the first head of the said decree-arbitral.

The defenders pleaded, *inter alia*—"(3) On a sound construction of the pursuers' lease, they are entitled to compensation only on the footing of their tenancy expiring at the first break therein. (4) The pursuers having no vested right or *jus quæsitum* to a continuance of their tenancy beyond the date of the first break in their lease, they are not entitled to decree as concluded for."

On 3rd July 1895 the Lord Ordinary (STORMONTH DARLING) pronounced an interlocutor in which he found, decerned, and declared in terms of the conclusions of the summons.

The Lord Ordinary's note was as follows:—"The question here is whether the tenant of a farm holding under a lease for a term of years with breaks in it available to either party, is entitled to receive compensation under the Lands Clauses Act on the footing of his tenancy enduring for the full period of the lease, or only till the first break after the land is taken.

"It is a new question, on which there is no direct authority. I have found it a difficult one, and I do not profess to have arrived at a very confident conclusion. But, on the whole, it seems to me that the tenant is entitled to compensation for the full term.

"I admit the force of the defenders' argument that a lease containing mutual breaks binds the parties only till the first break arrives, and that they are then perfectly free to make a new bargain. They may do so or they may not; nobody can tell till the time comes for giving notice. But in the meantime a portion of the farm is compulsorily taken on the footing of full compensation, which can only be assessed once for all, and must be determined according to the vested rights and interests in the land as they exist at the time.

"Now, what was the nature of the pursuers' right to this farm when the defenders took 66 acres of it to form a reservoir? It was a right to possess it for nineteen years from Martinmas 1891, subject to the double contingency of the tenants being turned out of it by the landlord at the end of six, eleven, or sixteen years, or of their electing to go of their own accord at one or other of these period. For the loss of the part taken the statute provides, in the first place, a proportional abatement of rent, and so far there is no difficulty. But when further compensation is claimed, it is on the footing that the loss of the part taken deprives the tenant of the profits which he would have made out of that part during the remainder of his lease, and also that it will diminish the profit which he is likely to make out of the part which is left to him.

Now, profit being the postulate of the claim, it is not to be supposed that the tenant would himself make use of a break in the lease so as to terminate a beneficial contract. Indeed, this power on the tenant's part may be regarded as making the lease more valuable to him, and certainly it can never make it less so. Then, if the break be considered on its other side, as an option on the part of the landlord, it is difficult to see why a third party, like the promoters of an undertaking, coming in under compulsory powers, should take any benefit from the possibility or even the probability of the option being exercised so as to turn the tenant out. In short, the existence of the contingency does not destroy the tenant's vested right to possess for the full period, though it makes his right defeasible in a certain event. I do not see my way to hold that a break in favour of the tenant alone would diminish the value of a right, which in truth it enhances, nor that a break in favour of the landlord alone ought to be treated as a certainty, when in truth it is only a chance. But if neither of these powers standing alone would have the effect for which the defenders contend, it is very difficult to see why the mere combination of the two should make all the difference....

"I do not know whether the arbiters, in arriving at the larger of the two sums, made any allowance for the possibility of the lease being terminated at one of the breaks. Certainly that was quite a proper matter for them to consider, but their award is not before me on its merits, and

the decision of the present question cannot be affected by anything which they did or left undone."

The defenders reclaimed, and argued—The question here was, What is the tenancy? It was not a lease for nineteen years; it was a lease only for six years, and if the tenant sat longer, it was only in virtue of a new consent given six months before the termination of the first period. The case was thus distinguished from the *Solway Junction Railway Company* v. *Jackson*, March 12, 1874, 1 R. 831. The contingency, in short, was precisely on a footing with the chance of tacit relocation at the end of a nineteen years' lease. If the tenant got compensation on the larger scale, he would, of course, throw up his lease at the end of the first six years.

Argued for the respondents—The Lord Ordinary was right. The lease is for nineteen years with the chance of a break; not for six years with the chance of a renewal. The pursuers were therefore entitled to declarator and decree—*The Queen* v. *Kennedy*, February 8, 1893, L.R. (1893), 1 Q.B. 533; *Bexley Heath Railway Company* v. *North*, June 9, 1894, L.R. (1894), 2 Q.B. 579.

At advising—

LORD PRESIDENT—The arbitration proceedings, out of which this action arises, had an unusual course. Part of the farm of which the pursuers were lessees having been taken compulsorily by the defenders, the pursuers were entitled to compensation for the damage done to them in their tenancy by reason of the severance. Instead of simply nominating an arbiter to estimate the compensation, the defenders nominated their arbiter, but went on to bid him assess the compensation according to two alternative formulæ without allowing the arbiter to choose any other principle of valuation. The pursuers, while protesting against the validity of this limitation of the inquiry, nominated their arbiter; and, so far as appears, the arbiters proceeded, without further challenge, on the lines laid down in the defenders' nomination. We have now before us the award, stating the amount of compensation in either alternative view; and the pursuers call upon us to affirm in a declaratory finding the soundness of one of the defenders' formulæ, and to give effect to it by decerning for the sum which, in this view, the arbiters have found due.

The question which the arbiters ought to have determined was a comparatively simple one. The tenants held under a lease bearing to be for nineteen years, but with power to either of the parties to put an end to it at the termination of six, eleven, or sixteen years from the tenant's entry on giving six months' prior notice. The tenant thus had right to possess for nineteen years, subject to the contingency of the landlord availing himself of one of the breaks. It is plain that the value of the tenant's right under such a lease is less than that of a tenant who holds for nineteen years certain. The difference between the two must depend on a variety of circumstances giving rise to a proper question of valuation. The circumstances might lead the arbiters to think that the tenants were pretty safe not to be turned out at the first break, but that they would be turned out at the second break, or they might think that they were pretty safe for the whole term of nineteen years; or they might think very little of the chance of the tenancy surviving the first break. But all these contingencies would have to be considered, and allowance made for them, the inevitable result being that the amount awarded must be less than would be due to a tenant for nineteen years certain.

On the other hand, it is equally clear that it would be erroneous in principle to confine attention to the profits to be earned before the first break. The tenant's right is definitely higher than that of a tenant for six years, and its value is necessarily greater. For the reasons already stated, the difference in money may be large or it may be small, but it exists. Accordingly, it seems to me that the sound way of proceeding is to treat the tenant as a tenant for nineteen years, subject to contingencies which must to a greater or less extent diminish the chances of his continuing in possession.

Unfortunately the arbiters have not so proceeded, and were never allowed to do so. The alternative before them was to treat the tenant as a nineteen years' tenant pure and simple, or as a six years' tenant pure and simple.

We are now asked to affirm the alternative of nineteen years pure and simple, and I cannot do so. The arbitration has miscarried, because the arbiters have not been allowed to value the damage done to the tenants, but have, instead, given the figures upon two express hypotheses of valuation, both of which are unsound.

The result is, that unless the parties can come to an agreement as to the sum which would represent the principle which I have stated, and so save the arbitration proceedings from going by the board, we must grant absolvitor. In any event, we cannot but assoilzie from the declaratory conclusion.

I am glad to see, from the last sentence of his opinion, that I am at one with the Lord Ordinary on the proper principle of valuation, which is by far the most important question. My difference with his Lordship is merely as to the sound construction of this award. I think that, read along with the submission which it professes to meet, the second alternative takes no account of what the Lord Ordinary says was proper matter for consideration.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

On 17th December, it having been intimated that the pursuers had agreed to accept the smaller sum fixed by the arbiters in full of their claims, the Court recalled the interlocutor of the Lord Ordinary, dismissed the action, and found the pursuers entitled to expenses.

Counsel for the Pursuers—Ure—Cullen. Agent—John B. Young, S.S.C.

Counsel for the Defenders—Rankine—Clyde. Agents—Bruce & Kerr, W.S.