

less. But I should be reluctant to come to a conclusion which would necessarily bring the law into well-merited derision. It may be true that the doctors are unable to say that it is physiologically impossible that a woman of 100 can conceive. But the doctors also say that it is physiologically possible for a man to reach the age of 200 or any age. Yet if a legacy were left to A on his reaching the age of 200, whom failing to B, I think there would be at least strong ground for maintaining that the legacy was instantly payable to B.

But the form of the pleadings, and the course adopted by the defenders in regard to proof, make it unnecessary for me to do more than reserve my opinion on a question which I think the Lord Ordinary has unnecessarily decided. Subject to the above observations, I am therefore of opinion that the Lord Ordinary's interlocutor should be affirmed.

The Court affirmed the Lord Ordinary's interlocutor.

Counsel for Defenders and Reclaimers—Macmillan, K.C.—Lippe. Agents—Webster, Will, & Co., W.S.

Counsel for Pursuer and Respondent—Macphail, K.C.—D. R. Scott. Agent—J. Anderson, Solicitor.

Tuesday, January 30.

## SECOND DIVISION.

[Lord Cullen, Ordinary.]

### GLENDINNING v. BOARD OF AGRICULTURE FOR SCOTLAND.

*Landlord and Tenant—Small Holding—Arbitration—Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), sec. 7(11)—Action of Declarator to Decide Question of Law Arising in Arbitration to Assess Tenant's Damages on Farm being Taken for Small Holding—Competency.*

An arbiter appointed to assess the damages payable to a tenant of a farm which had been taken for small holdings by the Board of Agriculture found that a question of law was involved. Parties thereupon suggested that he might make alternative findings, and agreed that no objection would be taken to any proceedings raised to have the question tested. The arbiter assessed the damages on one aspect of the question of law, but stated that if the other aspect were right the damages would be so much more. An action of declarator in the Court of Session was raised to decide the question of law. *Opinion per* the Lord Justice-Clerk and Lord Dundas that the action was incompetent.

*Landlord and Tenant—Termination of Lease—Removing—Notice—Negotiations Subsequent to Notice.*

A lease of a farm expiring at Martinmas 1913, the landlord sent formal notice

of removing to the tenant. Parties subsequently agreed that the tenancy should continue for a year, and that the notice of removing should be held to apply to Martinmas 1914. The Board of Agriculture having decided to take the farm for small holdings, but having under the order of the Land Court to Martinmas 1915 to do so, the tenant, with a view to a further extension of his occupation, approached the landlord, who intimated that he would serve no notice, as he did not wish to be without a tenant for a year, and did not know if the Board would take possession at Martinmas 1914. The Board having taken possession as at that date the tenant claimed compensation for the loss of a year's profits. *Held* that his claim was bad, in respect (1) that the notice of removing was good as at Martinmas 1914, (2) that he had only arranged a continuation thereafter conditional on the Board's action.

The Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), sec. 7, deals with *powers to facilitate the constitution of new holdings*, and sub-section (11) contains this proviso—"Provided that where the Land Court are of opinion that damage or injury will be done . . . to any tenant in respect that the land forms part or the whole of his tenancy . . . they shall require the Board, in the event of the scheme being proceeded with, to pay compensation to such amount as the Land Court determine after giving parties an opportunity of being heard, and if they so desire, of leading evidence in the matter: Provided always that where within twenty-one days after the receipt from the Land Court of an order under this sub-section . . . a tenant . . . intimates to the Land Court and to the Board that he claims compensation to an amount exceeding £300, and that he desires to have the question . . . to be settled by arbitration instead of by the Land Court, the same shall be settled accordingly; . . . if no final award be given within three months from the date when the arbiter is nominated, the questions aforesaid shall be decided by the Land Court as hereinbefore provided. . . ."

James Peter Glendinning, farmer, Fenton Barns, Drem, East Lothian, at one time tenant of Ballencrieff Farm, Aberlady, *pursuer*, brought an action against the Board of Agriculture for Scotland, *defenders*, whereby he sought to have it declared that in virtue of a lease of the farm of Ballencrieff, dated 6th and 22nd June, 1894, between Viscount Elbank and the pursuer for the term of nineteen years, and subsequently extended by the agreement of parties, his right of tenancy extended to Martinmas 1915, or otherwise that the pursuer had, as at 1st March 1914, by the said agreement and actings, acquired a good and valid right to occupy the farm of Ballencrieff from Martinmas 1914 to Martinmas 1915, and that on a sound construction of the provisions of the Small Landholders (Scotland) Act 1911 the defenders were bound to compensate the pursuer for the loss of profit resulting to him from their taking possession of

the farm at Martinmas 1914, and that, in any event, he was entitled to demand from the defenders payment of the sum of £1500. The case arose on an arbitration to assess damages to the pursuer on Ballencrieff being taken by the defenders for the creation of small holdings.

During the *arbitration proceedings* this incident occurred—“*The Arbitrator*—There is obviously a legal point, and how is it to be disposed of? I understand I have until the 30th of September for the ultimate disposal of the case, and the question is ‘Can this case be referred to the Lord Ordinary?’ I ask you to adjust a minute for early settlement. — Counsel for parties concurred in stating that if the arbitrator was so advised he should issue alternative findings, and that in the event of either party seeking to enforce his award no objection should be taken by the other party either to the form of the award or to an action for enforcement, or the findings of such an action.”

The *arbitrator's award* which gives the *facts* was—“ . . . Whereas it was contended in the said reference on behalf of the claimant that his tenancy of the said farm does not, and on behalf of the respondents that his said tenancy does, terminate at Martinmas 1914, and the parties concurred in stating that I should, if so advised, issue alternative findings so that the judgment of the Court can be obtained upon this point: And whereas I issued notes of my proposed findings and having considered the representations lodged by both parties against the same and heard counsel thereon I am now in a position to issue my final award, Therefore being well and ripely advised in the whole matters submitted to me, and having applied my judgment and experience as a man of skill thereto, I do hereby give forth and pronounce my final award as follows, that is to say, I find, *First*, That the said farm extends to 590 acres or thereby and is wholly arable; that by lease between The Right Honourable Montolieu Fox Oliphant Murray, Lord Elibank, heir of entail in possession thereof on the one part, and the said James Peter Glendinning, therein designed of Nethershiel, Mid-Calder, on the other part, dated 6th and 22nd June 1894, the said farm was let to the claimant for nineteen years from Martinmas 1894 subject to certain breaks, the last of which was at Martinmas 1908, at an annual rent of £1555, 10s., and under the other conditions specified therein; that the natural termination of the said lease was accordingly Martinmas 1913, and that by minute of agreement between the said Lord Elibank and the claimant, dated 11th and 15th May 1901, it was, *inter alia*, agreed that the rent of the said farm after Martinmas 1901 should be £1354, 10s. per annum. *Second*.—That formal notice was duly given in accordance with the Agricultural Holdings (Scotland) Act 1908, sec. 18, on behalf of the said landlord to the claimant requiring him to remove from the said farm at said term of Martinmas 1913; that upon his receiving said notice the claimant on 15th November 1912 gave notice to the said landlord in terms of section 10 of the Agricultural Holdings

(Scotland) Act 1908, that he would claim compensation under said section for unreasonable disturbance; that in the spring of 1913 negotiations were entered into for a new lease of the said farm, an on 27th May 1913 the claimant made an offer to the landlord for a lease for a further period of fourteen years on certain conditions; that this offer was not accepted, as in consequence of the negotiations which had at that time been opened by the respondents for the acquisition of the said farm for small holdings the agents of the said landlord did not see their way to tie their hands by a lease for a period of years, and accordingly on 13th June 1913, while the said notice of removal was still current, holograph missives passed between the claimant and the law agent for his said landlord in the following terms:— ‘To The Right Honourable Viscount Elibank, Ballencrieff, Winn Road, Southampton. *Fenton Barns, Drem, 13th June 1913.* My Lord—*Ballencrieff Farm*—I am willing that instead of your notice of termination taking effect at Martinmas 1913, it should do so at Martinmas 1914, when my tenancy will accordingly cease and determine without further notice, and that the rent for crop and year 1914 shall be One thousand four hundred and forty pounds, payable half-yearly at Whitsunday and Martinmas 1914. No expenditure on your part to be required by me. Otherwise the terms and conditions of the current lease to hold good and be applicable to the extended year. — Yours faithfully, adopted as holograph, JAMES P. GLENDINNING — *Stamp 6d.* — F. G. H. 13 June 1913. On behalf of Viscount Elibank I accept the above offer and hold the matter as concluded accordingly. FRANCIS G. HALDANE. *Edinburgh, 13 June 1913.* *Third*.—That the respondents’ negotiations with the said landlord for the constitution of small holdings upon the said farm by agreement having failed, the respondents on 14th October 1913 presented an application to the Scottish Land Court for the constitution of small holdings on the said farm; that the said application was duly intimated to the claimant, and he lodged answers therein, dated 25th October 1913; that by order dated 31st December 1913 the Scottish Land Court found the respondents entitled to constitute new holdings on said farm and to exercise said power up to 28th November 1915 in accordance with section 7, sub-section (11) (a), of the said Small Landholders (Scotland) Act 1911; that said order was intimated to the claimant on 9th February 1914; and that the claimant on 26th February 1914 intimated to the respondents that he claimed compensation to an amount exceeding £300, and desired to have the compensation payable to him settled by arbitration. *Fourth*.—That in or about said month of February 1914 the claimant had a meeting with the factors of his said landlord, and inquired, in view of his arrangements as to cropping during the ensuing season, whether they proposed to give him notice under the Agricultural Holdings Acts terminating his tenancy under the said missives of 13th June 1913, and that the said factors then stated that so far as the landlord was concerned

he had no desire to part with the claimant and would give no such notice, as they did not know whether the respondents were going to take possession of the said farm at Martinmas 1914 and did not wish to be in the position of having a derelict farm for a year; that the farm is for all practical purposes left in the four-course rotation, which is one of the alternatives provided in the said lease. *Fifth*—That the claimant did not communicate with the respondents as to the term at which he was to leave the farm, nor did the respondents, either directly or through the said landlord, give the claimant any notice to leave his farm, or any indication of their intention to enter the same at Martinmas 1914. *Sixth*—That in or about March 1914 the said landlord entered into an arbitration with the respondents to ascertain the amount of compensation to be awarded to him by the constitution of small holdings upon said farm, and that the said landlord's claims were on 18th May 1914 settled by joint minute between the parties to the same arbitration; that under said joint minute the respondents undertook to relieve the said landlord from all claims against him by the claimant under the Agricultural Holdings Acts, and interest on the sums fixed as compensation to the said landlord is to run from Martinmas 1914. *Seventh*—That upon the claimant leaving the said farm at Martinmas 1914 there will be left in the land the unexhausted or residual value of manures and feeding stuffs applied thereto or consumed thereon, in respect of which, after deducting the equivalents provided by the said lease for produce sold off the said farm, compensation amounting to £257, 10s. is due to the claimant, and that the claimant will incur loss on realisation of stocking and expense in connection with his outgoing from said farm due to the constitution of small holdings thereon, which loss and expense will amount to the sum of £150. *Eighth*—On a fair construction of the said missives of 13th June 1913 and the facts and documents before mentioned, I find that the claimant's tenancy of the said farm terminates at Martinmas 1914 and that damage or injury will be done to the claimant in respect that the land to be occupied by the new holders forms part or the whole of his tenancy, and I therefore assess the compensation to which the claimant is entitled on this footing at the sum of £407, 10s. sterling, with interest at the rate of 4 per cent. per annum from Martinmas 11th November 1914 until paid, and I ordain the respondents to pay to the claimant the said sum with interest as aforesaid. *Ninth*—Alternatively, and in the event of it being hereafter held that the compensation payable to the claimant falls to be assessed on the footing that his tenancy of the said farm continues after Martinmas 1914, I do hereby assess the amount of compensation to which the claimant is entitled as aforesaid at (a) the said sum of £407, 10s. with interest as aforesaid, and (b) the sum of £1500 with interest at 4 per cent. per annum from Martinmas 11th November 1914 until paid in respect of loss of profit for crop and

year 1915, and in the same event I ordain the respondents to pay to the claimant the two sums last mentioned with interest as aforesaid. . . . *Eleventh*—I find the respondents the said Board of Agriculture for Scotland liable in payment (*Primo*) of one-third of the expenses incurred by the claimant in the said reference . . . as the same shall be taxed by the Auditor of the Court of Session, to whom I hereby remit the account thereof for that purpose, declaring, however, that in the event of it being hereafter held that the tenancy of the claimant continues after Martinmas 1914, I find the claimant entitled to the whole of his said expenses taxed as aforesaid, of which account of expenses taxed as aforesaid and subject as aforesaid I ordain the respondents to make payment to the claimant."

The pursuer pleaded—"1. The pursuer's lease of the farm of Ballencrieff having been duly extended to the term of Martinmas 1915, decree should be pronounced in terms of the first declaratory conclusion of the summons. 2. *Separatim*—The pursuer having entered into a valid contract of lease of the said farm of Ballencrieff for the year beginning at Martinmas 1914, decree should be pronounced in terms of the second or alternative declaratory conclusion. 3. The pursuer having entered into a binding contract of lease of the said farm for the year ending Martinmas 1915, and having through the actings of the defenders lost the profits of occupation for said year, is entitled to compensation therefor from them, and decree should be pronounced in terms of the third declaratory conclusion. 4. The compensation for loss of profits for said year having been legally determined as of the amount of £1500, and the defenders being bound to pay said compensation to the pursuer, decree should be pronounced in terms of the petitory conclusion of the summons."

The defenders pleaded—"1. The pursuer's averments are irrelevant and insufficient in law to support the conclusions of the summons, and the action ought to be dismissed. 2. In respect that at the date of the Land Courts Order of 31st December 1913 the farm of Ballencrieff did not form part or the whole of the pursuer's tenancy beyond Martinmas 1914, the defenders are not liable to him in compensation for loss of profits subsequent to that date, and should accordingly be assoziated."

On 27th November the Lord Ordinary (CULLEN) allowed a proof.

*Opinion.*—"By an Order of the Scottish Land Court, dated 31st December 1913, the defenders were empowered to constitute new holdings on the farm of Ballencrieff, in the parish of Aberlady, in terms of the Small Landholders (Scotland) Acts, 1886-1911, and to exercise their powers up to 28th November 1915. The scheme embraced the whole lands of the farm. The defenders ultimately decided to exercise the power and took possession of the farm at Martinmas 1914.

"The pursuer was tenant of the farm, which is the property of Viscount Elibank,

up to at least Martinmas 1914. His object in the present action is to have it found and declared that he had a right of tenancy for the subsequent year, up to Martinmas 1915, and that he is entitled to compensation from the defenders in respect of his having been deprived of the benefits of that year's tenancy. The defenders (1) dispute the existence of such right of tenancy, and (2) contend that if it existed it was created under conditions which make it unavailable to the pursuer as the ground of a claim for compensation against them.

"The history of matters is as follows:—The pursuer in 1894 entered on the farm under a nineteen years' lease, expiring at Martinmas 1913. On 9th November 1912 he received notice to quit at Martinmas 1913. After negotiation, missives were entered into on 13th June 1913 under which the tenancy was continued for another year. The terms of the missives are set forth in the condescendence. The pursuer, with the landlord's acceptance, agreed that instead of the foresaid notice to quit taking effect at Martinmas 1913 it should do so at Martinmas 1914, when his tenancy should accordingly cease and determine without further notice. He further agreed that the rent should be £1444, that no expenditure on the landlord's part would be required by him, and that otherwise the terms and conditions of his current lease should apply to the extended tenancy. Thereafter in October 1913 the defenders presented an application to the Scottish Land Court for power to constitute thirty new holdings on the farm, and on 31st December 1913 they obtained the empowering order already mentioned. This order was intimated to the pursuer on 9th February 1914, and on 26th February 1914 he intimated to the defenders his intention to claim compensation exceeding £300 and his desire to have the amount settled by arbitration in terms of the statute. On 12th March 1914 he petitioned the Court for the appointment of an arbiter, and on 30th June 1914 the Court appointed Mr James Inglis Davidson. Prior to the steps last mentioned the pursuer, according to his averments, had come to an agreement with his landlord for the continuance of his tenancy for another year, that is to say, from Martinmas 1914 to Martinmas 1915. It is on this alleged agreement that the present dispute hinges. At its date it was unknown whether the defenders would ever proceed with their scheme, and they had up to Martinmas 1915 to exercise their option in the matter. It was therefore not unnatural if the landlord sought to provide himself with a tenant to farm the lands for the year up to Martinmas 1915 in order to meet the event of the defenders either not exercising their power prior to that period or not exercising it at all. The defenders, however, maintain that the landlord was by the statute debarred, in a question with them, from so letting the lands for that year. In the arbitration the pursuer claimed, *inter alia*, compensation in respect of his being deprived of the benefit of his alleged right of tenancy for the year in question.

After a proof as to the whole claim the arbiter on 22nd September 1914 issued his decree-arbital in which he, *inter alia*, made the findings set forth in the record. He further found (Eighth) that the pursuer's right of tenancy terminated at Martinmas 1914, and assessed the compensation due to him on that footing at £407, 10s., with interest. But further and alternatively (Ninth), in the event of it being hereafter held that the compensation payable to 'the claimant falls to be assessed on the footing that his' tenancy of the said farm continues after Martinmas 1914,' he assessed the compensation at (1) the said sum of £407, 10s., with interest, and (2) the sum of £1500, with interest. The award is thus an alternative one intended to leave open for decision by the Court the question whether the pursuer had a right of tenancy entitling him to claim compensation for the year between Martinmas 1914 and Martinmas 1915. It was so stated in accordance with an agreement between the parties.

"Following on the decree-arbital the present action was raised by the pursuer. He asks for declarator (1) that he had a right of tenancy for the year in dispute, and (2) that he is entitled to compensation in respect of that year, and (3) decree for the sum of £1500 with interest, assessed by the arbiter hypothetically as applicable to that year.

"The defenders contend, in the first place, that *esto* the landlord in February 1914 agreed to let the farm to the pursuer for the year to Martinmas 1915 by a contract binding as between the pursuer and him, such contract can have no effect in relation to the defenders, so that in the matter of paying compensation to the pursuer they are entitled to treat it as non-existent. In the next place, they deny that the contract was made. It is more convenient to deal with the contentions in this order, as the first involves no inquiry into facts.

"The defenders' first contention above stated is not supported by any express statutory provision. In the case of an order of the Land Court such as we have here, giving the defenders an optional power to constitute small holdings exercisable up to a date approximately two years ahead, the Act is silent on the subject of the landlord's power of dealing with his lands in the interim while the defenders' power has not yet been exercised. The landlord does not know whether the power will ever be exercised, and if it comes to be exercised that may be at the last moment—here Martinmas 1915. If his tenant at the date of the order has a lease which at least covers the interval there is no difficulty. The lands will be cultivated, and if the power is exercised the tenant will be compensated for any loss thereby occasioned to him. But if there is no such tenant under a lease covering the interval, how is the landlord to act in order to meet in his interests the event of the defenders' power never being exercised at all? The defenders' contention is that he must just leave the lands derelict and uncultivated, unless, indeed, he takes up the cultivation himself as opposed to letting them (a distinction which I do not

clearly understand), which course would usually be impracticable; and if he so leaves the lands derelict and uncultivated for the interval, and if, further, the defenders never exercise their powers, the resulting loss to the landlord is one for which the statute provides no compensation. The landlord can only claim for loss occasioned by the constitution of the holdings if they come to be constituted.

"The defenders seek the ground for their contention in the scheme of the Act for fixing compensation for loss accruing from the prospective exercise of the power to constitute new holdings. The statutory scheme is peculiar in this respect, that it aims at the assessment of compensation being made hypothetically—that is to say, before the defenders have exercised their power—so that the compensation assessed will be due only if the defenders come to exercise their power, otherwise not, the idea being apparently that the defenders should be put in the position of knowing what the proposed scheme will cost them before they make up their minds to proceed with it. If they elect not to proceed they pay the arbitration costs.

"It is true that the statute contemplates the proceedings for assessing compensation ensuing shortly on the empowering order, on the tacit assumption apparently that the interests, landlord and tenant, requiring to be compensated will probably then be fixed. But it does not provide specially for the possible case, said to have arisen here, of a new tenancy having to be arranged and being arranged after the date of the order, to cover the intervening period up to the expiry of which it may not be known whether the defenders are to exercise their powers or not. I have given my best consideration to the defenders' argument, but I am unable to accept it. The Act does not by any express provision tie the landlord's hands in such a case. Nor can I derive from it by implication the result that in such a case the landlord is called on if need be to leave his lands uncultivated during the interval, he being given by the Act no claim for the loss which would thereby accrue to him in the possible event of the defenders' scheme never being proceeded with.

"*Esto* the view which I have expressed is right, the defenders contend that the pursuer did not have a right of tenancy of the farm for the year up to Martinmas 1915. The averments on record present an issue of fact. The defenders, while prepared if necessary to contest this issue on a proof, contend that proof is incompetent, and that the Court in this action must accept the findings in fact on the subject of the alleged lease made by the arbiter, and is limited to drawing an inference from them one way or another, to wit, whether they disclose an agreement for lease or not.

"The question of the pursuer's right to the £1500 hypothetically assessed by the arbiter might have come to this Court by way of a special case stated by the arbiter containing findings in fact and questions in law for decision by the Court. It comes up, however, in the present form as the result

of an arrangement between the parties. No plea to the competency of the action in any of the issues it presents is taken by the defenders. The action being thus before me on its merits by consent of parties it seems to me that I must proceed to the decision of it by the ordinary steps of procedure, and as it involves as presented an issue of fact I shall allow a proof."

The defenders reclaimed, and argued—(1) *Competency*.—The reclaimers did not question the competency of the action, for they had agreed to the question of law being so tested, but they challenged the competency of the claim. Compensation was only payable when the damage was directly attributable to the constitution of new holdings. Any further loss was due to a bargain between the landlord and the tenant, which they had made with their eyes open after intimation of the order of the Land Court had been given, and for this loss the arbiter could make no award. The decision of the arbiter was final on facts, and the Lord Ordinary could not decide on a question of fact. The pursuer was not in good faith, in view of the agreement, in raising and asking proof of the question of fact. Although it was quite competent for parties to make a bargain, that bargain could not bind a third party, namely, the arbiter. (2) *Merits*.—Not only did the present case not fall within the doctrine of tacit relocation, but the parties were dealing with one another on the footing of the order of the Land Court, which had already been notified to them. The landlord had merely tentatively arranged that he would retain the pursuer as his tenant in the event of the defenders failing to proceed with their scheme. Even apart from the question of competency the action should be dismissed as irrelevant.

The pursuer argued—(1) *Competency*.—There being no express prohibition in the Small Holders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49) against contracting out, the two parties, being *sui juris*, were quite entitled to contract out of the Act and by agreement to take the decision of the Court in an action like the present one instead of following the statutory procedure of a special case before the Lord Ordinary on the Bills. *Scott Plummer v. The Board of Agriculture for Scotland*, (1915) S.C. 1048, at p. 1051, 52 S.L.R. 806, was cited. (2) *Merits*.—If the pursuer had a legal right to occupy the farm from Martinmas 1914 to Martinmas 1915, he also had a title to sue for compensation in respect of the compulsory surrender of his right to occupation. By section 18 of the Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64) a tenant of a farm was entitled to six months' notice to quit on a yearly lease and to a year's notice on a longer lease. A tenant could not contract himself out of his right to a notice to remove as regards a question with the defenders, although he might do so in a question with the landlord. *Vide* also the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, c. 51), sec. 34. There was no such thing as personal bar in agricultural leases. It was conceded that the pursuer was a secured tenant for

1913-14. In staying on he would have considerable obligations to meet, e.g., the maintenance of servants. The landlord having told the tenant that he would not receive notice to quit could not thereupon compel him to remove. Parliament did not intend that farms should be put *extra commercium*. Persons (in the present case the tenant) who had suffered in the public interest as by being expropriated were entitled to receive compensation therefor.

At advising—

LORD JUSTICE-CLERK—This case has raised important considerations. Some of them were fully argued, and as regards others the parties, or at least the Board of Agriculture, thought they were not entitled fully to argue them because of the supposed agreement come to in course of the arbitration proceedings. The two questions to be decided are, first, whether this action is competent, and if so, second, whether there are relevant averments to support the conclusions of the summons. Both may perhaps be treated under the head of relevancy, but, strictly speaking, one goes more to the competency of the action.

[His Lordship having narrated the proceedings before the arbiter, proceeded]—The arbiter under the proviso in sub-section 11 of section 7 of the 1911 Act was bound to issue a final award within three months from the date of his nomination, and he would not have done so unless he had pronounced a decision on the legal question which was raised before him and had assessed the damages due according to that decision, because, according to Scots law, an arbiter, in the general case, is judge both of fact and of law, and under said sub-section if he has any doubt as to any legal question the statute provides him with a means of getting that doubt solved by stating a special case. In these circumstances the arbiter in his eighth finding decided both the legal question and the question of fact, and it was not competent, either by agreement of parties or in any other way, to raise the question as to whether his decision was correct or not. If the single arbiter fails to decide the whole question submitted or involved in determining the amount of compensation within three months, then, whether the parties like it or not, the question at issue between them would revert to be decided by the Land Court. In my opinion the arbiter's ninth finding did not effectively qualify the eighth finding or deprive it of its finality. Apart from questions of jurisdiction (as in the *Lindean* case—*Scott Plummer v. Board of Agriculture for Scotland*, 1916 S.C. (H.L.) 94, 53 S.L.R. 207) the arbiter is not in my opinion entitled to issue an alternative award. It is expressly provided that unless a "final award be given within three months from the date when the arbiter is nominated" the questions in dispute "shall be decided by the Land Court." I am of opinion that it is *pars judicis* to see that an arbitration under sub-section 11 is not allowed to result as is here proposed in an ordinary action in the Court of Session.

I am of opinion that this action is not competent, in respect that the arbiter duly and properly determined the questions of fact and law before him in the eighth finding, and that it is not permissible for either of the parties to attempt to get behind that finding, whether by an ordinary action or in any other way, where no point of jurisdiction is involved as is admitted to be the case here.

But we have had the question on the merits argued before us, and I have come to be of opinion that the arbiter arrived at a sound conclusion upon that question. Notice to leave the farm was duly and timeously given on the footing that the lease expired, as it then did, at Martinmas 1913; but on the 13th of June 1913 the tenant wrote to the landlord proposing that instead of that notice taking effect at Martinmas 1913 it should do so at Martinmas 1914, "when my tenancy will accordingly cease and determine without further notice"; and then there were provisions as to the rent and other conditions for the year from Martinmas 1913 to Martinmas 1914. The landlord agreed to that proposal by a document in these terms—"On behalf of Viscount Elibank I accept the above offer and hold the matter as concluded accordingly." I think it is impossible to say that there was not a due and legal notice to terminate the lease so that the tenant would be bound to remove at Martinmas 1914. No exception is taken to the legality of the notice which was to operate at Martinmas 1913. I think that the letter of June 1913 did not spite that notice, and therefore the argument that no notice was given at 1914 failed. In my opinion a perfectly good notice was given, which ought to receive effect as if it had originally been stated to take effect as at Martinmas 1914. If that be so, I think the fourth finding by the arbiter does not in any way affect that notice. It does not bear to refer to it at all or to say that that notice is not to receive effect. So far as the arbiter's findings are concerned—and we are bound to take his findings as conclusively established—they only amount to this, that in the event of the Board of Agriculture not taking possession of the farm at Martinmas 1914, then the landlord and tenant were willing that the occupancy of the farm by the tenant should continue for another year, but I do not think that circumstance in the least affects the validity of the notice which was given originally for Martinmas 1913 and validly extended to take effect at Martinmas 1914, or necessitated a further notice to take effect at Martinmas 1914.

The result is that while I myself would have been prepared to hold the present action incompetent, I think the averments for the pursuer are irrelevant, and that we accordingly should sustain the first plea-in-law for the defenders and dismiss the action.

LORD DUNDAS—I am of the same opinion, and on very much the same grounds. I think this action, in the most favourable view of it, is an irrelevant action, but I also think with your Lordship that it is an

incompetent action. It seems to me that the antecedent procedure got very badly out of order. The Act of 1911 provides for arbitration in larger claims of this sort, and it also prescribes the mode and form under which such an arbitration is to be conducted. In particular, the arbiter must issue a final award within three months, and (I quote from the statute) "If no final award be given within three months from the date when the arbiter is nominated, the questions aforesaid shall be decided by the Land Court as hereinbefore provided." The object of that, I take it, as of a good many other provisions in this Act of 1911, was to ensure speed and to avoid protracted legal inquiries. There is a provision and a useful one that the arbiter may, if troubled by some point of law, state a special case and get in a summary way the opinion—because it is only an opinion—of the Lord Ordinary on the Bills—whether in session or vacation, and that opinion is final as far as this Court goes, as was laid down by the First Division in the recent case of *Lady Cathcart v. The Board of Agriculture*, 1915 S.C.166, 52 S.L.R.108. Why the parties could not resort to that procedure in the present case I do not fully grasp. They seem to have had a full month in which to do it, and from general knowledge and from personal experience I should have thought that a case might have been adjusted and the opinion of the Judge obtained and everything done within much less than that time. But however that may be, the parties seem to have agreed that instead of getting the Lord Ordinary's opinion before the award, a certain question of law, or of mixed fact and law, should be left over to be ultimately decided after the award, not by the arbiter and not by the Lord Ordinary, but by the Court of Session, with, as this case has shown, a reclaiming note to a Division, and I suppose a possible appeal to the House of Lords. I think that if an arbitration is set afoot under this Act it must be carried out according to the terms of the Act, and that the arbiter must within three months decide with or without the assistance and guidance of the Lord Ordinary all questions of fact or of law which are duly submitted to him, and that if he fail to do so he has not exhausted his reference. Of course I must guard myself by saying that if there were a question involved as to the arbiter's jurisdiction, that would be for this Court, as one may see from the recent case of *Lindean—Scott Plummer v. Board of Agriculture*—but there is nothing of that sort here. I think the parties, or at all events the Board of Agriculture, did see this difficulty, and foresaw that if the arbiter were merely to give alternative findings without deciding this particular question one way or the other, there would be a grave risk of the whole procedure falling to pieces. Accordingly they stated this view to him in their representations, and the result was that after having heard parties' counsel the arbiter did decide the point, because in his eighth finding he deals with this question of mixed fact and law. He makes a finding, he assesses, and he ordains.

In other words, as I read it, he gives a competent and final award upon that matter, and I confess that the ninth finding, with whatever ingenuity of purpose it may have been inserted, appears to me to be merely superfluous, irrelevant, and ineffective. We were told that that was not what the parties meant, and it was suggested that it was not what the arbiter meant. I have my doubts about that, looking to what one sees from the representations and the form of the award; but however that may be, it is enough to say that as a matter of construction of the award I can arrive at no other conclusion than that this point was decided, finally decided, competently decided, and I think rightly decided, by the arbiter in his award. The present action is brought virtually and in effect for declarator that the decision of the arbiter in the eighth finding was wrong, and for payment of the sum of money to which the present pursuer would be entitled on the footing that the assumption embodied in the ninth finding were to be given effect to. That seems to me a perfectly irrelevant and indeed an incompetent demand. The arbiter has, I think, properly decided the point, and that is in my view an end of the case. I confess I do not quite understand why the Lord Ordinary allowed a proof, but the interlocutor was not in that respect supported by the respondents' counsel at our bar. That to my mind is an end of the whole matter, but as we heard argument upon what are called the merits of this point, I agree with your Lordship that we should express our view upon it, and I have no reluctance or difficulty in concurring with your Lordship in holding that the arbiter's decision of the matter was perfectly right. I have no doubt that, whatever view those of your Lordships who have not yet spoken may take upon the question of competency, it is more satisfactory that the parties should know that our opinion upon the merits of the question is in the direction which I have indicated.

On the whole matter, therefore, I consider this an incompetent action, but however that may be I consider it to be an irrelevant one, and I agree with your Lordship that we ought to recal the interlocutor, to sustain the first plea-in-law for the defenders, and to dismiss the action.

LORD SALVESEN—There is no plea to the competency stated by either of the parties, and there could not very well be one in view of the agreement that was come to. I do not doubt that in some cases it is for us to state a plea that has not been proposed by either of the parties, but I cannot say that I am satisfied that the course which the parties took in the special circumstances narrated makes this action incompetent, and I desire to reserve my opinion upon that matter. It is not very likely that the point will present itself again for our consideration, because under ordinary circumstances one or other of the parties has an interest to found upon the statutory provisions, and will not readily agree to take himself out of them.

On the other point I am in full agreement with your Lordship in the chair. I think it was a difficult point of law and one which might well have been made the subject of an opinion by the Lord Ordinary on the Bills for the guidance of the arbiter. I am not sure that I entirely agree with Lord Dundas in holding that the arbiter finally decided the matter. I think, according to the true view of the award, he has said that the compensation is to be fixed at a certain sum on the assumption that according to the documents and the evidence before him there was no tenancy beyond Martinmas 1914—an assumption which he supports by his own personal opinion; but then I think he goes on to make quite properly an alternative award on the assumption that his view on the legal question is open to review, and that the tenancy is to continue after Martinmas 1914—notwithstanding that he himself would have decided the contrary—and on that assumption he fixes the compensation at £1500. I think an arbiter in stating an alternative award does generally and almost necessarily indicate which view he would adopt himself.

This raises the question whether on a fair construction of the missives of 13th June, and the facts and documents before the arbiter—he being final with regard to the facts which he finds and which are stated in his fourth finding—we must hold in law that the tenancy continued beyond Martinmas 1914. I agree with your Lordship in the chair that we are not driven to that view at all. The circumstances here were very exceptional. The landlord and tenant both had an interest in the farm being cultivated up to the time when the Board of Agriculture were going to take possession. Unfortunately the Board had a considerable latitude of time. It was not known whether they would take possession at November 1914 or at November 1915, although November 1915 was the extreme limit allowed by the Land Court for taking the place. There was thus an interval of great perplexity to the landlord and to the tenant, and these parties came together and as I think entered into an agreement of lease for the year from Martinmas 1914 to Martinmas 1915 conditional upon the Board of Agriculture not taking possession of the farm at Martinmas 1914. That was a very sensible arrangement and one which protected either party against loss, except the loss which the tenant is here claiming for, namely, loss of prospective profit. In the event of the Board of Agriculture not occupying the farm at Martinmas 1914 the tenancy was to go on for another year, it apparently not being anticipated that the Board would do anything so foolish as to enter between terms and so subject themselves to all the claims of compensation that would arise against them if they interfered with a growing crop.

These being the circumstances, I think that this was quite a reasonable agreement, and I take it that that was what the arbiter held to be the agreement in fact that was come to, because he holds that the tenancy did terminate at Martinmas 1914, and as I think he holds that it was only con-

ditionally renewed for a further period of a year. That being so, I think the whole claim of the pursuer in this action hinges on his having an absolute right of possession as against his landlord for the year from Martinmas 1914 to Martinmas 1915, and that right I do not think he ever acquired. I concur with your Lordships that the claim of the pursuer fails; and while personally I prefer that the defenders' second plea-in-law—which is really the plea that disposes of this case on the merits—should be sustained, I think the action will be quite well disposed of by sustaining the defenders' first plea-in-law in the light of the opinions which we have expressed as to the grounds upon which we do so.

**LORD GUTHRIE**—It is admitted that the allowance by the Lord Ordinary of a proof of the parties' averments on record cannot stand. The agreement between counsel for the parties for alternative findings is badly framed and difficult to understand, but if anything was competently left to the Court under these findings it was only a legal question, namely, whether on the facts found by the arbiter in his fourth finding the pursuer's tenancy terminated at Martinmas 1914 or continued till Martinmas 1915.

With Lord Salvesen I desire to reserve my opinion as to whether it was competent for an arbiter, acting under the very special provisions of this statute, to pronounce an alternative award at all, and in particular this alternative award, containing as it does the eighth finding, not a mere opinion, but a definite finding. It is enough to hold, as I do, without deciding the question of competency, that the arbiter came to a right conclusion on the facts bearing on the question before us and on the legal conclusion from these facts.

Had he found otherwise, a difficult question might have arisen as to whether a decision in favour of the pursuer would not have involved a claim on the Board which the statute did not contemplate. The arbiter's decision raises no such question. That decision, contained in the eighth finding, seems to me the proper conclusion from the facts found in the fourth finding. I agree with Mr Macmillan that the arrangement at the meeting in February 1914 was for a new lease for a year. But then I agree with the Solicitor-General that any such arrangement for a lease was to be conditional upon the Board of Agriculture not taking possession at Martinmas 1914. The Board took possession at that date, and therefore the arrangement as to a lease fell, and the pursuer obtained no rights resulting from tenancy against the Board of Agriculture for the period now in question, namely, from Martinmas 1914 to Martinmas 1915.

The Court recalled the interlocutor of the Lord Ordinary, sustained the first plea-in-law for the defenders, and dismissed the action.

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Counsel for the Defenders and Reclaimers—The Solicitor-General (Morison, K.C.)—W. Mitchell. Agent—Sir Henry Cook, W.S.