the properties to Thomas William for his liferent use allenarly and to his said children in fee equally amongst them. It was implied in the argument that the trustees could not legally insert the word "allenarly" in the conveyance, because the testator had not himself used it, and that they are bound to convey to him for his liferent use and to his said children equally amongst them in fee, which would be equivalent, according to the chain of decisions of which *Frog's Creditors* was the first link, to giving the liferenter a fee. I do not think we are bound so to hold, having in view the particular language of this holograph will. The conveyance is to be in such terms as that the properties will be equally divided amongst the said children, and this can only be effected according to our forms of conveyancing as now settled in the manner I have stated. To quote the words of Lord Young in the case of *Mitchell's Trustees* (7 R. 1086, at 1090, 17 S.L.R. 739)—"It is the duty of the trustees . . . to do what will be legally efficacious to fulfil the intention." This is not a case (to which the rule of *Frog's Creditors* has also been applied) of a testator directing trustees to convey in specified terms, but is rather the case of a man ignorant of the forms of conveyancing, who directs his trustees what he wishes done with certain properties, leaving them to take the necessary legal advice to enable them to carry out his wishes. I am accordingly of opinion that the first question should be answered in the negative and the second in the affirmative.

[*His Lordship then dealt with the other questions in the case.*]

LORD GUTHRIE—I agree that the questions should be answered as your Lordship proposes. It was not denied by counsel for Thomas William Brash, the fourth party, the father of the second and third parties, that according to the ordinary and natural construction of the words used by the testator, especially in a will written by an illiterate testator as he evidently was, it was intended that his rights should be limited to a liferent and that the fee of the property in question should belong to the children of his second marriage. But it was said that the case of *Frog's Creditors*, M. 4262, compelled the Court to come to an opposite decision. This unfortunate result does not seem to me to follow unless it be held that there is nothing more in the testator's settlement than a direction to his trustees to make a conveyance to Thomas William Brash in liferent and to the children of his second marriage in fee. That is not the position, because the trustees, as I read the will, are to take the necessary steps to secure that at Thomas William Brash's death the estate shall be equally divided amongst the said children, which implies that any conveyance to him must be a conveyance for his lifetime only. The decision on this part of the case reached by your Lordships is in accord with the view expressed by Lord President Inglis in *Cumstie* v. *Cumstie's Trustees*, (1876) 3 R. at 942, 13 S.L.R. at 606, to which your Lordships have referred.

[*His Lordship then dealt with the other questions in the case.*]

The Court answered the first question of law in the negative, the second question in the affirmative, branch (*a*) of the third question in the negative, and branch (*b*) thereof in the affirmative.

Counsel for the First and Second Parties—Carmont. Agents—Beveridge, Sutherland, & Smith, W.S.

Counsel for the *Curator ad litem* to the Third Parties — Leadbetter. Agents — Beveridge, Sutherland, & Smith, W.S.

Counsel for the Fourth Party—Chree, K.C.—MacRobert. Agents—Webster, Will, & Company, W.S.

HOUSE OF LORDS.

Tuesday, January 18, 1916.

(Before Viscount Haldane, Lord Kinnear, Lord Shaw, Lord Parmoor, and Lord Wrenbury.)

SCOTT PLUMMER *v.* BOARD OF AGRICULTURE FOR SCOTLAND.

(In the Court of Session, July 20, 1915, 52 S.L.R. 806, and 1915 S.C. 1048.)

Landlord and Tenant—Property—Statute — Small Holdings — Compensation to Landlord on Constitution of Small Holdings—"Depreciation in the Value of the Estate"—"In Consequence of and Directly Attributable to" — Small Landholders (Scotland) Act 1911 (1 *and* 2 *Geo. V, cap.* 49), *sec.* 7 (11).

The Small Landholders (Scotland) Act 1911, sec. 7 (11), provides—"Provided that where the Land Court are of opinion that damage or injury will be done . . . in respect of any depreciation in the value of the estate of which the land forms part in consequence of and directly attributable to the constitution of the new holding or holdings as proposed, they shall require the Board, in the event of the scheme being proceeded with, to pay compensation to such amount as the Land Court," or in certain circumstances an arbiter, "determine. . . ."

Held (*aff.* judgment of the Second Division) that an arbiter was entitled to allow compensation for "depreciation on the saleable value" of the estate due to the presence of the small holding.

This case is reported *ante ut supra.*

The defenders, the Board of Agriculture for Scotland, appealed to the House of Lords.

At the conclusion of the argument on behalf of the appellants, counsel for the respondent being present but not being called upon, their Lordships delivered judgment as follows:—

VISCOUNT HALDANE—The question which arises in this appeal is obviously one of great public importance. But except for that importance I find it difficult to think it is one deserving of the consideration which has been bestowed upon it in the Court below, or of giving rise to the difference of judicial opinion which has occurred.

The question is one of the construction of an Act of Parliament, and the point is in reality not a difficult one. The Small Landholders (Scotland) Act has set up a new system in Scotland, under which small holdings of various kinds are encouraged and provided for over the whole of Scotland. The machinery of the Crofters Act is largely made applicable to the remainder of Scotland, and special provision is made for setting up the small holdings to which I have referred. These small holdings may be constituted in more ways than one. They may be constituted by an agreement negotiated with the owner of the land on which it is proposed to establish them, and if so the landowner, of course, takes care to get in his price what would compensate him for loss arising from any depreciation of his estate consequent upon the establishment on it of the small holdings. But if an agreement is not come to, and the case is one in which the Board of Agriculture thinks it right that there should be small holdings upon that property, then the procedure which the statute prescribes comes into operation. That procedure includes compulsory purchase under provisions which are contained in the statute, and in the machinery is included the provision as to compensation, to which I will presently make reference.

I desire to say at the outset, in order to clear the ground of a certain amount of argument which I think is based upon misapprehension, that it is quite well established in the jurisprudence of this country that if Parliament declares something to be lawful, be it a railway or be it a system of small holdings, and enables people to make that railway or that system by the exercise of compulsory powers, then no compensation can be claimed in the absence of an express provision to the contrary by the Legislature, and that follows from this, that what the Legislature has declared to be right cannot be considered wrong in a court of justice, and no man can say, in the face of the supreme power of the Legislature where exercised against him, that he has any rights left. Just for that reason the Legislature has been in the practice of inserting compensation clauses in statutes which relate to compulsory purchase, and while it is quite true that it may be the fact that property is apt to be depreciated in the public mind by reason of a system of compulsory purchase being introduced, it is equally true that you usually find in such statutes provisions for compensation.

In the present case the arbitrator gave his award, and he awarded a certain sum of money upon the footing that it was compensation for depreciation in the value of the Lindean estate in consequence of and directly attributable to the constitution of the new holdings. He made his award in an alternative form, isolating certain minor items on which he awarded separately, and leaving the larger question whether he was entitled to make an award in respect of the item to which I have just referred on the footing that the statute conferred authority on him in that behalf.

When I turn to the statute I find that the provision under which the arbitrator acted is one which is very simply expressed. It is contained in section 7, sub-section (11), and reading it shortly it amounts to this—Provided that where the Land Court are of opinion—in this case where the arbitrator is of opinion—that damage or injury will be done to any landlord in respect of any depreciation in the value of the estate of which the land forms part in consequence of and directly attributable to the constitution of the new holding or holdings as proposed, they shall require the Board to pay compensation. Now in the present case the arbitrator has found plainly enough, when you read his award, that owing to the way in which the Board of Agriculture have selected the parts of the Lindean estate on which they propose to establish small holdings depreciation has been caused in the selling value of that estate. From the map which we have had before us it is plain that such depreciation might well result in the mind of somebody who was desirous of purchasing with considerations of amenity in the main in his mind, and who was therefore likely to be deterred by the introduction of a series of small holdings between the different parts of the estate. It may be true that the rental value is not affected. On the contrary, it seems to be likely to be somewhat increased by what will be got from the small holdings, but the amount of the rent receivable in one year is one thing, and the number of years' purchase which the owner can secure if he is minded to sell is quite another thing. In the present case the arbitrator, who is the person to whom the statute delegates, and delegates exclusively, the duty of judging, has found that within the meaning of the words of the statute there has been depreciation in the possible selling value of the property due to the constitution of these particular small holdings in this particular place. As I have said, I have examined this award, and have come to the conclusion that that is plainly what he meant and what he has done. Now that being so, it seems to me impossible to say that the arbitrator was acting outside his jurisdiction. Of course it is true that if the statute did not entitle him to say this he could not say it, and the mere fact that his award is intended to be final does not give him jurisdiction to do what is outside the duty which the Act of Parliament has cast upon him. He cannot go beyond the terms of the statute. He seems to me, in coming to the conclusion which he has, and in making the award he has, to have been acting exactly within that provision in subsection (11) of section 7 which is introduced to meet the case to which I have referred, of there being no right to obtain compensation unless the statute has made

an express provision for it. The Leglislature has thought fit to introduce compensation provisions here, just as it has done in the Lands Clauses Act and other statutes with which your Lordships are familiar. That being so, the arbitrator has awarded this compensation. It is said that that compensation is really due to the prejudice caused in the public mind by the introduction of the new system—a prejudice which in course of time will pass away. The arbitrator has found that that prejudice is due to the constitution of these particular small holdings, presumably in the place and under the circumstances in which they have been constituted. That is his finding. It is true he has also said that the landlord has no present intention of selling; but what of that? According to the principles which are so well settled in this House and in others courts, when you make a claim of this kind under a section of this kind you must make your claim once for all. If hereafter new damage emerges from the same cause, and for which you therefore might have claimed, you cannot claim it again, and the arbitrator was therefore bound to take into account what has been called the potential diminution in the selling value, but what is really something that affects the value of the estate both for the purposes of sale and for the purposes of security. Therefore once you come to the conclusion that the arbitrator has done what he has done, and that he has taken into account facts, and not merely the effect upon the public mind of the circumstance that the Legislature has passed the Act in question, it seems to me that the conclusion is one which is free from reproach. It is not the system but the particular constitution of these small holdings that is the *causa causans*, to use the expression that has been used at the bar. It is not a case of potential loss, but a case of actual loss.

That is really sufficient to dispose of the appeal. It has been argued that the words introduced later on in section 7, saying that nothing is to be given for loss on the ground of the purchase being compulsory, prevent us from recognising this claim as a claim which is admissible under the section. But it is obvious that these words have been introduced for a very different purpose, namely, for preventing the practice growing up under this Act, which has grown up under the Lands Clauses Act, of giving an extra allowance or an extra percentage merely because compulsion has been resorted to.

For these reasons I am of opinion that the judgment of the Court below was right, and I move your Lordships that this appeal be dismissed, and dismissed with costs.

LORD KINNEAR—I entirely agree with my noble and learned friend on the Woolsack, and I do not think it necessary to trouble your Lordships by repeating what he has said. I shall only say that I should, for myself, have thought the case an exceedingly simple one from the outset, except for my great respect for the judgment of the learned Lord Ordinary, but then I think that consideration is completely displaced by the reasoning of my noble friend.

LORD SHAW—My only doubt in this case arises from the cause alluded to by my noble friend opposite, namely, on account of the judgment pronounced by Lord Hunter. Any judgment from that learned Judge deserves and demands very respectful scrutiny by this House.

So far, and so far only, do I agree with the argument presented by the appellants, that I think it would be quite correct to state that there could be no compensation awarded by a court of law in respect merely of the state of the law. I think that proposition can be broadly affirmed, and the only line of attack on this judgment lay in that direction.

But having listened to the arguments by the appellants' counsel, I am not at all satisfied that that is the true situation of matters here. The state of the law being accepted as correct by the courts and forming no basis of compensation, the law itself, by the mouthpiece of the statute, has directed what a court or arbiter has to do in regard to the elements of compensation. The entire question before your Lordships' House has reference to the construction of a few words in sub-section (11) of section 7 of the Small Landholders Act 1911. Before I read the specific words referred to, I may say that the entire transaction of the forming of new holdings is clogged with a proviso which refers in terms to three different matters. In the first place, compensation is to be awarded in respect of damage or injury arising to the letting value of the actual land which is the subject of the statutory operation; in the second place, in consequence of that land being severed from a farm of which it formed a part, and this severance damage is accordingly made a second ground of compensation. Then, in addition to that, there is the third ground which is very broad, and in my opinion very clear. It is—"In respect of any depreciation in the value of the estate"—that means the value of the estate as a whole upon which the operation of carving out new holdings is performed—"of which the land forms part in consequence of and directly attributable to the constitution of the new holding or holdings as proposed." The learned Lord Ordinary traverses the application of that section by the following observation. He says—"The award given of which complaint is made appears to be not direct, but indirect, remote, and hypothetical loss." "It does not arise," says the learned Judge, "from depreciation in the value of the estate directly attributable to the constitution of the small holdings, but to objections which purchasers of the estate might personally have to the powers conferred by statute upon small holders." I gather that the Lord Ordinary does really mean, not objections which would be had to the powers conferred by the statute in general, but objections which contemplating purchasers of the particular estate would have to the constitution of new holdings by reason of the powers conferred by the

statute being put in operation upon that particular estate. In another passage of his judgment he refers to these as "sentimental objections which offerers for the estate might have to the presence of statutory small holders." In my humble judgment an arbitrator has nothing to do with the quality of the objections which either depress or raise market values. The one equally with the other he does not inspect the quality of; he assesses their pecuniary result. Your Lordships are well aware that it is one of the duties of an arbitrator to assess all things which appraise or depress value, including the modes and fashions of the time or the ideas of persons appearing in the market who may be able to purchase. These sentimental objections matter nothing one way or another, except as they affect the price to be realised. It is the same with regard to this estate in that particular as with regard to any other. The arbitrator had to take into account not the state of the law in general but the fact that part of the executive had handled that estate and set up the law which introduced the compensation process.

There are many advantages and disadvantages to be considered by the arbitrator. The advantages were, *inter alia*, that many purchasers might have considered that by an estate having small holders upon it there would be large expense saved; there would be no chaffering as to rent in future; there would be no arrears of rent in all probability in all time to come; there would be no expense of claims for improvements in all time to come; and consequently there would be a reduction in estate management. All those things might be figured on the side of the advantages. On the side of the disadvantages was the fact that there was less power of control on the part of the landlord, and the fact that whatever the award was his views with regard to his general management as landlord in that part of the estate might be seriously affected. To these latter the present arbiter appears to have attached importance. All these things were taken into account, and properly so, by the arbitrator, as bearing upon the one fact he had to determine, namely, the value of the estate. He has compared advantages with disadvantages, but these latter did, in the view which he adopted, so preponderate as to enable him to pronounce—and no one questions his honesty—this very large award. Had it been established that the arbiter had given compensation for what was in any particular not directly attributable to the constitution of these new holdings, but to what was either remote or indirect or consequential, then the entire result of this case would have been different.

In those circumstances I venture to express my entire agreement with Lord Johnston in the observation that the state and time which apply to this award is the state of matters existing at the date of the award. Views as to these advantages or disadvantages or their preponderance in future may change as the operation of the Act proceeds, but what the arbitrator had to do was to consider the state of matters when he pronounced his award. And I hold it to be quite fantastic to object to this award on the ground that it was a hypothetical award. It was only hypothetical in the sense that not only present but all prospective elements of value must be now finally considered when the arbitrator makes his award.

I apologise to your Lordships for even stating these facts, but it was out of respect for the Lord Ordinary and because of the importance of the case that I thought it right to give separate expression to my views.

LORD PARMOOR—The question raised in this appeal appears to me at least to be a very simple one, if we apply to it the ordinary principles which ought to be applied in the construction of statutes which give compensation.

There are two points on which I entirely agree with the argument of the learned Solicitor-General for Scotland. In the first place it is quite clear that an arbiter cannot give compensation in respect of matters not comprised within the statutory powers of the Act which confers jurisdiction upon him. I think it is also quite clear that no arbiter can ever finally decide for himself the question of jurisdiction. As was stated by the noble Viscount Haldane, all statutes of this kind proceed on the footing that there is no compensation unless it is expressly given in the terms of the statute itself. Statutes of this character make legal what otherwise would be illegal acts, and, as is familiar to every one, under the Lands Clauses Consolidation Act it has been held several times that compensation is an alternative to the right of action, but if no compensation is given, as in the case of *Brand* v. *Hammersmith Railway Company*, L.R., 4 H.L. 171, and cases of that character, you cannot say that what has been sanctioned by the statute is illegal, and therefore there is neither compensation nor any other remedy.

In this particular case the relevant section is section 7, sub-section (11), and the particular words which I desire to quote are very few. Compensation is given "in respect of any depreciation in the value of the estate of which the land forms part in consequence of and directly attributable to the constitution of the new holding or holdings as proposed." I think it is quite clear in the first case, as the Solicitor-General said, that there is no compensation here given in respect of severance which is the subject-matter of compensation under the Lands Clauses Act, but it is given "in consequence of and directly attributable to the constitution of the new holding or holdings as proposed." In my view "constitution" means the constitution in fact in a particular case, and I think that is a consideration which is made the basis of the amount of compensation awarded by the arbiter. Secondly, as regards the words "the new holding or holdings as proposed," in my view the words "as proposed" are not against the award which the arbiter has made, but in

favour of the view that he has taken, because I think the words "as proposed" are clearly applicable to the question of site, as well as to other considerations when the new holding or holdings are constituted on a particular estate.

As I understand the argument of the Solicitor-General it comes to this—that there is some special meaning to be attached to the words in this section, which excludes what is the ordinary principle in the assessment of depreciation in the value of an estate, namely, a depreciation in its selling value. In any ordinary method of assessment depreciation in the selling value would be the test of depreciation in the value of the estate, and the Solicitor-General has had to argue that, for reasons which I cannot follow, the ordinary method of assessment has been excluded by the operation of the words which we find in this particular statute. What he relies on, as I understand, are various reasons; I took down five of them, but I think they all may be comprised under two heads. In the first place he says that it is compensation for tenure, and that no compensation for tenure is given under the words of the statute. I think that that is a misunderstanding both of what the arbiter has awarded and of the words of the statute. What the arbiter has awarded is not compensation in respect of tenure, but compensation in respect of the user of land which that tenure allows; in other words, compensation in respect of user of land in accordance with the statutory power which this section and the rest of the Act has given. Now applying the ordinary principles of compensation, it is exactly in respect of a user of land which the statute has rendered legal that compensation is ordinarily given, if such user does in fact cause damage, or, to use the words of this statute, does cause depreciation in the value of the estate. It would appear to me to be entirely impossible to exclude the notion of the user which this new tenour allows. It is the very factor which has been introduced under the statute, and it is the very factor which in accordance with ordinary compensation principles would be the basis in reference to which the amount of depreciation ought to be assessed.

The other point is as regards potential value. It is quite clear that where compensation has to be assessed once for all—and that is the principle of all compensation claims if damage or injury can be foreseen—in all such cases you have to ascertain what is called the potential value. I should like to associate myself with what was said by Lord Kinnear in the course of the argument. You might have the case of an actual price fixed, and that actual price reduced in consequence of the constitution on a particular portion of an estate of a new holding or holdings as proposed in a scheme under this Act. It is quite clear that in that case you would have the difference between the price fixed before the scheme had been introduced and the amount which could be obtained for the estate after the introduction of the scheme, but it makes no difference as regards principle that you have not two actual figures of that kind which may be convenient for the purposes of comparison. There is hardly a compensation case in which the arbiter has not to consider the potential value, but of course he has to determine it partly in reference to the evidence brought before him and partly in reference to his own skill and knowledge in matters of this kind.

I should like to say one word in conclusion as regards an argument adduced by the Solicitor-General, in which he said that this interpretation might interfere with the general use of this statute. I do not follow that argument at all. The selection of the particular site is for the authority constituted under the Act, and *prima facie* one would suppose that a site would be selected in which the damage to the rest of the estate would be as small as possible, but even assuming that in order to carry out the purposes of the Act, damage, and considerable damage, is done, as in the present case, it appears to me that on every principle the owner is entitled to compensation. If you take any other principle except that it means that some particular owner suffers a particular injury for what is after all a matter of public concern and of national importance. The object of all compensation law is to meet cases of that kind, because when you have met them you may assume that whatever charge is placed upon persons in connection with a matter of public and national importance, it is spread equally and equitably amongst all parties and all persons.

I admit I can find no difficulty whatever in the present case, and it appears to me that the decision of the Inner House is right and should be affirmed.

LORD WRENBURY—I agree, and I find it unnecessary to state anew the same opinion in different words. It suffices that I should say that, in my judgment, the arbitrator had jurisdiction to allow this compensation because the statute expressly authorised its allowance.

Their Lordships dismissed the appeal with expenses.

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Counsel for the Defenders (Appellants)—The Solicitor-General for Scotland (Morison, K.C.)—Graham Robertson. Agents—Sir Henry Cook, W.S., Edinburgh — John Kennedy, W.S., Westminster.