

## COURT OF SESSION.

Saturday, August 21, 1915.

BILL CHAMBER.

[Lord Johnston, Ordinary  
on the Bills.]MACINTYRE v. BOARD OF  
AGRICULTURE FOR SCOTLAND.*Landlord and Tenant—Smallholding—  
Compensation—Farm Compulsorily  
Acquired for a Smallholders' Scheme—  
Compensation to Tenant for Loss of Pro-  
fits over Remainder of Lease.*

Under a scheme for the formation of small holdings there was to be taken by the Board of Agriculture the whole of a farm the lease of which had still sixteen years to run, with breaks at four and eleven years. The farm was profitable, and it was proved that the landlord was satisfied with his tenants and had no intention of taking advantage of the breaks. The tenants claimed compensation for loss of profits over the remainder of the lease.

*Held* (1) that it was the duty of the arbiter "to consider the circumstances of the district, and that in a pretty wide sense, and to estimate the prospects in matter of time of the claimants finding another suitable farm fairly similar in class and quality to that from which they were being ousted, and to award compensation on that basis," subject always to the contingency of the lease being foreshortened—*Fleming v. Middle Ward of Lanarkshire District Committee*, (1895) 23 R. 98, 33 S.L.R. 83, applied but distinguished; (2) that he was entitled (a) to deduct from the annual profits a sum as the annual value of the tenants' own labour without granting an allowance for the claimants being deprived of their present opportunity of utilising their labour in conjunction with their capital and skill, and (b) to deduct also five per cent. interest on their capital.

*Expenses—Stated Case—Landlord and Tenant—Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49).*

The expenses in a case stated by an arbiter appointed to assess compensation under the Small Landholders (Scotland) Act 1911 is a matter for the decision of the Court and not for the arbiter, the case not being merely an incidental part of the arbitration.

Dugald Macintyre and John Macintyre, farmers, joint-tenants of the farm of Garmony on the estate of Torosay, Mull, claimants, claimed compensation for being compulsorily ousted from their farm by the Board of Agriculture, respondents, who proposed to form small holdings thereon under a scheme sanctioned by the Scottish Land Court.

The arbiter (Blair) appointed to assess the compensation payable to the claimants

proposed to award under Head I of the Claim—"Loss of profits on working farm for 16½ years, the unexpired period of the claimants' lease, at £450 per annum, £7425"—£1995. He added the following

*Note.*—"Having thus fixed the annual profit, the question remains upon what principle must compensation be awarded for the loss of that profit, or, in other words, how many years' purchase am I to take as the multiplier? The claimants contend (a) that as it has been proved in evidence that there is no intention on the part of either party to break the lease, compensation should be given for the full unexpired period of 16 years; or alternatively (b) that such compensation should be given subject only to a small deduction for the improbable contingency of a break taking place. In support of this contention the claimants cited the well-known case of *Fleming v. District Committee of Middle Ward of County of Lanark*, 23 R. p. 98, 33 S.L.R. 83.

"Now that case is distinguished from the present case in two respects—(a) that whereas in this arbitration the whole of the farm is taken, in the case cited only a small part of the farm was taken; and (b) that the arbitration in the case cited was under the Lands Clauses Act, whilst this arbitration is under the Small Landholders Act. As to the first point of difference, it is manifest that (apart from the question of a break) where only a small part of a farm is taken, the tenant being tied to the remainder for the unexpired period of the lease, an irresistible claim arises both in equity and law for compensation for the whole unexpired period, not only in respect of loss of profit upon the portion taken, but also in respect of loss arising through the general derangement of the whole farm caused by the severance of a part. On the other hand, where a whole farm is taken the tenant may in time be able to secure another holding, and thus utilise his capital and minimise his loss. Then as to the second point of difference, the important legal question arises whether the judgment in the case of *Fleming*, decided upon a Land Clauses Act arbitration, is binding in an arbitration under the Small Landholders Act.

"... It appears to me... that whilst the case cited must be followed in a Lands Clauses arbitration, it is not a precedent in an arbitration under the Small Landholders Act, and that the arbiter in the latter case should apply the general principle that it is for the person who is damned to minimise his loss as far as he can (e.g., by taking another farm), and that such an obligation upon him must be taken into account in assessing what is due to him in respect of compensation.

"As I have already said, a question of general importance is here raised, the determination of which will seriously affect not only the present claim but all future claims for compensation by tenants whose lands are taken under the powers of the Act of 1911. That the Board attach considerable importance to the subject is evident from

a reference to their Third Report to the Secretary for Scotland. . . .

“Now, before I offer any opinion upon the question at issue, it is necessary that I should state my proposed findings upon the facts. Assuming the Board's entry to the farm to be at Martinmas 1915, there will run a period of four years between that term and the first break, and eleven years to the second break, which occurs at Martinmas 1926. Well, it goes without saying that the tenants are not likely to seek to break such a profitable contract, and their evidence is of course to that effect. I also hold, as I am bound to do upon the evidence, that the proprietrix is unlikely to exercise the option, not only because of the probability in such an event of a claim by the tenants for unreasonable disturbance, but also because she gave the most positive testimony that she was satisfied with her tenants and desired them to remain on the farm to the end of their lease. It ought, however, to be observed that whilst it is practically certain that the first break will not be taken advantage of, the chapter of accidents has to be reckoned with in estimating what may happen eleven years hence. The proprietrix may before that time be dead or the estate may change hands. These I hope and believe to be remote contingencies, but they are possible, and as the Lord President said they form a proper subject of valuation, and some allowance must therefore be made for them. I do not profess, nor do I suppose it to be possible, that an exact actuarial value can be put upon them, but applying to the best of my ability the principle laid down in the case of *Fleming*, I should not value the remote contingency of a break taking place at more than two years' profits. In that event the compensation under this head would amount to 14 years' profits or £2300, which sum being discounted at 5 per cent. for a payment at Martinmas next amounts to £1995. On the other hand, if I were unfettered by the decision referred to, I should be disposed to allow only one-half the last-mentioned sum, as I consider that if the tenants were compensated for loss of profits for seven years, they would within such a period have ample time to secure another farm similar in character and rent to Garmony. In order to make a test case, counsel for the respondents invited me to give an alternative award under this head of the claim, but I cannot competently do so unless of consent, and as the claimants object I regret that I cannot give effect to the Board's suggestion.

“As the controversy between the parties has raised a purely legal question, I have naturally been advised and guided by my legal assessor. Acting upon such advice, I have come to the conclusion that the decision in the case of *Fleming* is applicable to the present arbitration and is binding upon me, and that it is my duty to follow it. In reaching this conclusion I have relied upon the following considerations—(a) that the provisions of the Lands Clauses Act and the Small Landholders Act respectively do

not differ in substance so far as conferring upon a tenant under a lease for more than a year a right to compensation in the event of his farm being taken under compulsory powers, and in particular there is nothing in either Act to show whether in a lease with a break the tenant is entitled to compensation for the whole unexpired period of the lease or only for part of such period; and (b) that there is nothing in the Lord President's judgment in the case of *Fleming* which might lead one to infer that the decision would have been different had the whole farm been taken instead of only a part. Indeed, whether the whole or part were taken appears to be an irrelevant consideration. Practically the only question discussed was, what was the arbiter's duty in assessing a tenant's compensation in a lease for years with a mutual break? Now the answer of the Lord President was that the tenant was entitled to compensation for the full unexpired term, subject to a deduction in respect of the contingency of the break. That is a plain ruling, delivered by a Judge of great eminence, and therefore as at present advised I cannot see my way to disregard it. But in view of the considerable sum involved in the present case, as well as of the general importance of the question raised, I shall be prepared on the motion of either party to state a special case for the opinion of the Court, so that I may have the advantage of a judicial opinion before I issue my final award.”

The Case stated—“5. Representations were lodged on behalf of the claimants against the arbiter's proposed findings, and the arbiter heard counsel for the parties thereon on 6th August 1915. Before issuing his award the arbiter, at the request of the respondents, has stated this Case for the purpose of getting the opinion of the Court upon the first question hereinafter stated.

“6. A further question has arisen regarding the expenses of this case upon which the arbiter respectfully desires the opinion of the Court. By section 7 (11) of the said Act of 1911 it is provided that ‘the Second Schedule to the Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, c. 64) shall apply to any such arbitration, with the exception of paragraphs 1, 5, 10, 11, and 16 thereof, and with the substitution of the Lord Ordinary for the Sheriff and the Auditor of the Court of Session for the Auditor of the Sheriff Court; and provided further that in the event of the scheme not being proceeded with the expenses of parties reasonably incurred in connection with the arbitration as the same may be allowed by the Auditor of the Court of Session shall be paid by the Board.’ The said schedule which prescribed the rules as to arbitrations provides (rule 9) that the arbiter may at any stage of the proceedings state a special case for the opinion of the Court upon any question of law arising in the course of the arbitration, and (rule 14) that the expenses of and incidental to the arbitration and award shall be in the discretion of the arbiter, who may direct to and by whom and in what manner those expenses or any part thereof are to be paid,

such expenses to be subject to taxation, which shall be subject to review by the Court.

"7. The arbiter understands that in special cases heretofore stated under the Act of 1911 the liability for expenses has been decided by the Court in the ordinary way, it having apparently been assumed that the Court had power to determine the question of expenses. Notwithstanding this practice the arbiter has been advised that it is doubtful whether the Court has such a power. The schedule referred to confers no power upon the Court to determine the question of expenses, but on the contrary rule 14 specifically provides that 'the expenses of and incidental to the arbitration shall be in the discretion of the arbiter.' It has been decided that the answers of the Court to the questions submitted in a special case do not constitute a judgment in the ordinary acceptation of that term, but only an opinion, and therefore it appears to the arbiter that the special case is merely a step in the arbitration proceedings. If that view be sound, then the expenses of the Case would be 'incidental to the arbitration,' and would fall to be determined not by the Court but by the arbiter, in whom the jurisdiction to determine such a question is specifically vested by the statute. Upon a question of law the arbiter may consult his legal assessor, take the opinion of counsel, or state a special case for the opinion of the Court, and whichever of these courses he may adopt it would appear that the expenses thereof are 'incidental to the arbitration,' and therefore within his exclusive jurisdiction.

"8. Certain further questions have arisen which the claimants have desired the arbiter to include in this case. These arise as follows:—(1) In estimating the net annual profits of the farm the arbiter has deducted from the gross receipts, *inter alia*, a sum of £80 as representing the value of the labour expended by the two claimants themselves upon the farm. The respondents claimed that the deduction under this head should be much greater than £80, but the figure of £80 was put forward as a suitable deduction by two of the principal witnesses for the claimants, and the arbiter adopted their figure. The whole ordinary work of the farm was done by the claimants personally, and the only labour charges contained in the farm accounts were items of £18 for maid's wages and £3 for bracken cutting. The claimants now maintain that the foresaid deduction of £80 is not a competent deduction for the arbiter to make in estimating the net profits of the farm, in respect that no separate allowance has been made to them to cover any loss arising through their being deprived of their situations. The claimants are aged respectively 72 and 42. The arbiter has difficulty in seeing how any question of law arises in this connection. He has been asked to award compensation for loss of profits on working the farm, and in so doing it has been necessary for him to estimate, as a fact, the amount of profit derivable from the working of the farm. He has made such an estimate, and has

difficulty in seeing how any question of law is involved in the process, but at the request of the claimants he has stated question No. 3 for the opinion of the Lord Ordinary in the event of the Lord Ordinary holding that it raises a question of law. The respondents maintain that it does not raise a question of law and is not a competent question. (2) The arbiter has deducted from the annual profits of the farm a sum of £85, representing interest at five per cent. on the capital of the claimants invested in the farm—amounting to about £1700. As this sum represents the entire capital belonging to the claimants, the question arises whether it is competent to deduct interest on capital at all in these circumstances, and alternatively, if any deduction is competent, whether it should not be about bank deposit-receipt rates. It should be noted, however, that the skilled accountant who gave evidence for the claimants admitted that in estimating the profits of the farm it was necessary to debit the accounts with interest upon the capital invested in the farm. The arbiter is of the same opinion, and again has difficulty in seeing how any question of law arises. As regards the percentage of interest suitable as a debit, the claimants' skilled witness suggested four per cent. and the arbiter has taken five per cent. This also seems to the arbiter to raise no question of law, but at the request of the claimants he has stated question 4 for the opinion of the Lord Ordinary under the same conditions as affect question 3. The respondents maintain that question 4 is not competent in respect that it does not involve any point of law. (3) The arbiter has disallowed the claim of £241 in respect of loss on the realisation of the stock. Upon this matter the claimant put forward the following contentions:—The scheme of the Board of Agriculture has necessitated this realisation, which is a forced sale. The date when the Board of Agriculture propose to enter upon the farm is not yet determined. At the proof the Board undertook that in the event of the scheme proceeding their term of entry would be Martinmas 1915, and they have since lodged a minute in the process giving formal effect to this undertaking, but they have not yet decided whether in point of fact they have to go on with the scheme or not. The date of the claimants' outgoing is thus also not fixed. They do not know now and do not know when they will be informed whether the Board proposes to enter at Martinmas or not. They must therefore take the risk either of not taking steps to realise their stock now with the possibility of having to do so at great loss and inconvenience to themselves at Martinmas on short notice, or of realising their stock now and finding themselves in the position at Martinmas 1915 of having to restock the farm at the most disadvantageous time of the year. In these circumstances they contend that the arbiter is bound to compensate them in respect of loss on realisation of stock on the footing that they will require to realise at short notice at a date most disadvantageous for them. On the other hand, the respondents contend that

the arbiter is right in proceeding on the footing that Martinmas 1915 is fixed as the date of the Board's entry, and assessing compensation accordingly. It is assumed, as the foundation of the present arbitration, that the scheme will be proceeded with, and the arbiter's award is given on that hypothesis. If the scheme is not proceeded with the present proceedings fall to the ground, and the arbiter has no jurisdiction to award compensation. But if the scheme is proceeded with the Board have bound themselves to take entry at Martinmas. The contingency that affects the date of entry affects also the whole arbitration proceedings, and is purified in the one case as in the other. The respondents accordingly contend that the arbiter is right in assessing compensation on the footing that Martinmas is the date of entry, because in no other event has he any jurisdiction to assess compensation at all. With reference to the question of loss arising from the 'forced' character of the sale of stock, the arbiter has stated in his said note the following—'As regards the live stock it is apparent to anyone having a knowledge of market conditions, that far from suffering any loss, the claimants will be able to realise their stock at a considerable profit.'

The questions of law were—“(1) In determining the compensation payable to the claimants under head 1 of the said claim, was the arbiter bound to adopt the principle laid down by the Court in the case of *Fleming* cited in said note? (2) Has the arbiter exclusive jurisdiction in determining liability for the expenses of this Special Case? (3) In estimating net profits was the arbiter entitled to deduct a sum of £80 from gross receipts in respect of the value of the claimants' own labour without awarding any separate sum to cover any loss arising through the claimants being deprived of the opportunity of utilising their labour in conjunction with their capital and agricultural skill? (4) In estimating net profits was the arbiter entitled to debit interest at 5 per cent. on the claimants' capital in the farm? (5) In the circumstances stated was the arbiter bound to award compensation under head 2 of the claim on the footing that the stock would be realised at a date most disadvantageous to the claimants, and in any case was he bound to make an allowance for expense of realisation and for the sale being a forced sale?”

LORD JOHNSTON—1. There is so much similarity between the position of the Land Court or the arbiter in the ascertainment of compensation under the Small Landholders Act 1911, sec. 7 (11), and that of an arbiter under the Lands Clauses Act 1845, that I readily accept the case of *Fleming v. The District Committee of the Middle Ward of Lanarkshire*, 23 R. 98, 33 S.L.R. 83, to which the arbiter has referred, though pronounced under the latter Act, as an authority under the former Act. In fact under both Acts compensation for loss occasioned by compulsory taking has to be ascertained, such taking being

under the powers of a general Act in the one case and of a special Act in the other. The only distinction is that the arbiter under the Lands Clauses Act has for seventy years past assumed by practice the right of giving an additional consideration in respect of the compulsory element in the taking, while the Land Court and the arbiter are by the Statute of 1911 specially debarred from so doing. Accordingly I should regard the judgment of the Lord President (Robertson) in *Fleming's* case as binding on me, though not *in pari casu*, where the circumstances are analogous. I do not, however, think that I should be justified in divorcing it from the circumstances in which it was pronounced and applying it to a different state of circumstances. Here the circumstances differ so completely from those in *Fleming's* case that I do not think they are covered by that judgment. There a portion only of a farm was taken. The tenant was bound to remain in occupation of the rest shorn of the portion taken during the remainder of the lease, whether that was terminated at the break stipulated in favour of both parties or ran its full endurance. So long therefore as the tenant remained tenant of the remainder of the farm he suffered from the loss of the part taken, and the only deduction possible from full compensation for consequent loss over the whole remaining years of the lease was an allowance for the contingency of the lease being brought to an end at the break. But here the whole farm is taken. The tenants have to leave, but when they do so they are free. They are not tethered to the remainder of the farm. It is at once open to them to take another, or seek other means of making a livelihood. To treat them as entitled to be compensated by a payment of compensation based on loss of average profits for the whole remaining years of the lease, even with a deduction in respect of the contingency of the lease being foreshortened at the break, would be equivalent to saying that they were entitled to have an annuity based on their former average profits paid to them for the years of the estimated endurance of the lease. For that there is no justification. The tenants are not entitled to sit down, fold their hands, and enjoy themselves at the expense of the Board of Agriculture—that is, of the national taxpayer—for the remaining years of their lease. Like the servant prematurely dismissed, they are bound in equity to minimise the loss as far as they can by seeking another farm or other employment. It is therefore for the arbiter to consider the circumstances of the district, and that in a pretty wide sense, and to estimate the prospects in matter of time of the claimants finding another suitable farm, fairly similar in class and quality to that from which they are being ousted, and to award them compensation on that basis. This, I understand, he has done in his alternative award, and though this matter does not come within my province I may say that if he has, as I understand is the case, in assessing compensation followed the lines which I have indicated he has also treated the claimants liberally. I therefore, subject

to the above, answer the first query in the negative.

2. The second query I also answer in the negative. I do not regard the expenses of a special case as expenses incidental to the reference and in the sole discretion of the arbiter in the sense of the Act, and of the schedule of the Agricultural Holdings Act of 1908 which it incorporates. There is nothing to exclude the inherent power of this Court to decide questions of expenses in all cases coming before it, and though it may, if it thinks fit, remit to the arbiter to dispose of the expenses of a case along with those in the reference, it is not always desirable that this course should be taken. In this case I think that it is proper that I determine the question of expenses in this Court, and that there should be no expenses to either party.

3. I participate in the doubt whether the third question is a question of law. But I think that the course taken by the arbiter is correct. If it be a question of law I answer it in the affirmative.

4. It is also doubtful whether this is a question of law. But as I agree with the arbiter I may add that it was, I think, proper to debit such interest. The rate is in my view a matter for the arbiter.

5. I answer the fifth question in the negative. In any event the claimants must have borne the expense of realisation at the expiry of the lease. If they have to realise prematurely and are being compensated for disturbance, they must take the risk of hitting a bad market, just as they will have the advantage of a favourable one.

His Lordship answered questions 1, 2, and 5 in the negative, and 3 and 4 in the affirmative.

Counsel for the Claimants—Sandeman, K.C.—C. H. Brown. Agents—J. Miller Thomson & Co., W.S.

Counsel for the Respondents—Graham Robertson. Agent—Sir Henry Cook, W.S.

Friday, December 17.

## SECOND DIVISION.

### ANDERSON'S TRUSTEES v. MATTHEW AND OTHERS.

*Revenue — Estate Duty — Relief — "Sum Charged on" Bequest — "Trustees or Owners of the Property" — Finance Act 1894 (57 and 58 Vict. cap. 30), secs. 9 (4) and 14 (1).*

By his trust-disposition and settlement a testator bequeathed his paper-mill business with its whole assets to A and B in equal *pro indiviso* shares, but subject to a burden of £40,000 in favour of certain other beneficiaries, "which shall be a debt due to my trustees payable out of the whole of the foregoing assets," and he directed his trustees in place of conveying the business to A and B to form it

into a company and to allot the shares equally between them, and to secure the £40,000 by a bond and disposition in security over the whole of the heritable property to be conveyed to the company. The heritable property was only worth about £18,000. The trustees having carried out the testator's instructions, *held* that the estate duty on the testator's estate which effeired to the heritable property was not exigible out of residue, but was accountable for by A and B and the donees of the £40,000 in rateable proportions.

The Finance Act 1894 (57 and 58 Vict. cap. 30) enacts:—Section 6—“(1) Estate duty shall be a stamp duty collected and recovered as hereinbefore mentioned. (2) The executor of the deceased shall pay the estate duty in respect of all personal property (where-soever situate) of which the deceased was competent to dispose at his death on delivering the Inland Revenue affidavit, and may pay in like manner the estate duty in respect of any other property passing on such death which by virtue of any testamentary disposition of the deceased is under the control of the executor, or, in the case of property not under his control, if the persons accountable for the duty in respect thereof request him to make such payment.” Section 8—“. . . (4) Where property passes on the death of the deceased, and his executor is not accountable for the estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title, shall be accountable for the estate duty on the property, and shall, within the time required by this Act, or such later time as the commissioners allow, deliver to the commissioners and verify an account to the best of his knowledge and belief of the property: Provided that nothing in this section contained shall render a person accountable for duty who acts merely as agent or bailiff for another person in the management of property.” Section 9—“(1) A rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable. . . . (4) If the rateable part of the estate duty in respect of any property is paid by the executor, it shall, where occasion requires, be repaid to him by the trustees or owners of the property, but if the duty is in respect of real property it may, unless otherwise agreed upon, be repaid by the same instalments and with the same interest as are in this Act mentioned. (5) A person authorised or required to pay the estate duty in respect of any property shall for the purpose of paying the duty or raising the amount of the duty when already paid, have power, whether the property is