willingness to give up her legitim was assumed in the codicil, because the trustees were there directed to hold and invest her share "for her behoof instead of paying" it to her, which latter they were not authorised by the will to do unless she elected to give up her legitim. Moreover, the direction to pay the income to Mrs Gregson during her life is consistent with the same assumptions on the part of the testator. It is, however, a *non sequitur* to argue that the operative bequest in favour of Mrs Gregson's children was impliedly subject to the condition that these assumptions should be proved by subsequent events to have been well founded.

I have come to the conclusion that in whatever form the argument may be stated for the third parties they have failed to demonstrate that the bequest of the fee to Mrs Gregson's children contained in the codicil was conditional on the bequest in favour of their mother taking effect. In short, the bequest to the children created a separate and independent interest within the meaning of the rule of *Fisher* v. *Dixon*, (1831) 10 S. 55, *aff.* 6 W. & S. 431, as followed and explained by the Lord President (Inglis) in *Jack's Trustees* v. *Marshall*, (1879) 6 R. 543, 16 S.L.R. 326, and *Snody's Trustees* v. *Gibson's Trustees*, (1883) 10 R. 599, 20 S.L.R. 392. Two cases were cited (*Campbell's Trustees* v. *Campbell*, (1889) 16 R. 1006, 26 S.L.R. 699, and *M'Caull's Trustees* v. *M'Caull*, (1900) 3 F. 222, 38 S.L.R. 107) in which an opposite conclusion was reached, and the bequest of the fee was held to be forfeited in consequence of the liferenter having claimed legitim. In both these cases the Court held that a clause directing the disposal of a child's "share" in the event of forfeiture had reference to the liferented fund and not merely to the interest of the liferenter. The language of the will in *Campbell's* case was very different from that which we have to construe in the present case, but it is less easy to distinguish the present case from that of *M'Caull's Trustees*. I respectfully agree, however, with Lord M'Laren in thinking that the judgment in which he reluctantly concurred in *M'Caull's* case cannot be regarded as a precedent in the construction of the wills of other testators.

For the reasons stated I am of opinion that the bequest in favour of the second parties was not forfeited, and that the first query must be answered in the negative. As regards the income of the second parties' share accruing during Mrs Gregson's lifetime, I see no difficulty in holding that by the terms of the residue clause of the will it was forfeited owing to Mrs Gregson's election to claim legitim, and was carried by the gift-over in favour of the other children of the testator. Accordingly query 3 (*a*) must be answered in the affirmative. It was suggested in argument that the income in question should be regarded as accumulations of income within the meaning of the codicil, and must be paid over to the fiars along with the capital on the death of Mrs Gregson. I negative this view upon the ground that the discretionary power conferred by the codicil on the trustees to withhold and accumulate a part of the income never came into effect in view of the forfeiture by Mrs Gregson of her life interest.

The remaining questions are superseded. None of them raises in proper shape any question in regard to the Argentine property, and no such question was argued before us. Accordingly our decision will not foreclose any separate question, if there be a question, with reference to that property.

The Court pronounced this interlocutor—

"Answer the first question of law therein in the negative: Find it unnecessary to answer the second question: Answer branch (*a*) of the third question in the affirmative: Find it unnecessary to answer any of the subsequent questions, and decern: Find all the parties to the case entitled to their expenses out of the general trust estate, and remit," &c.

Counsel for the First Parties—Watson, K.C.—Hamilton. Agents—J. & J. Turnbull, W.S.

Counsel for the Second Parties—Wilson, K.C.—Paton. Agents—Alex. Morison & Company, W.S.

Counsel for the Third Parties—Constable, K.C.—Dykes. Agents—Macpherson & Mackay, S.S.C.

Wednesday, November 17.

COURT OF SEVEN JUDGES.

[Lord Hunter, Ordinary.

BUCHANAN *v.* TAYLOR.

Lease—Outgoing—Compensation for Improvements—Agreement that Compensation be Subject to Deduction of Value of Unexhausted Improvements Received by Tenant at Entry—Validity of Agreement—Agricultural Holdings (Scotland) Act 1908 (*8 Edw. VII, cap.* 64), *sec.* 5.

The Agricultural Holdings (Scotland) Act 1908, sec. 5, enacts—"*Avoidance of Contract inconsistent with Act.*—Subject to the foregoing provisions of this Act, any contract or agreement made by a tenant of a holding, by virtue of which he is deprived of his right to claim compensation under this Act in respect of any improvement comprised in the First Schedule hereto, shall be void so far as it deprives him of that right."

A lease between a landlord and the tenant of a farm provided that the value of certain unexhausted improvements which the tenant at his entry to the farm had received without payment, should form a deduction from any sum that might be found due to him as compensation on his waygoing. *Held* (*diss.* Lords Dundas and Skerrington) that the stipulation did not contravene the terms of the Agricultural Holdings (Scotland) Act 1908, section 5.

The Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64), enacts—Section 1

—"(1) Where a tenant of a holding has made thereon any improvement comprised in the First Schedule to this Act, he shall, subject as in this Act mentioned, be entitled, at the determination of a tenancy, on quitting his holding, to obtain from the landlord, as compensation under this Act for the improvement, such sum as fairly represents the value of the improvement to an incoming tenant. . . ." Section 5 *is quoted supra in rubric.* Section 6—"(1) If the tenant of a holding claims to be entitled to compensation, whether under this Act or under custom or agreement, or otherwise, in respect of any improvement comprised in the First Schedule to this Act, and if the landlord and tenant fail to agree as to the amount and time and mode of payment of the compensation, the difference shall be settled by arbitration. . . . (3) Where any claim by a tenant of a holding for compensation in respect of any improvement comprised in the First Schedule to this Act is referred to arbitration, and any sum is claimed to be due to the tenant from the landlord in respect of any breach of contract or otherwise in respect of the holding, or to the landlord from the tenant in respect of any deterioration wrongfully committed or permitted by the tenant, or in respect of breach of contract or otherwise in respect of the holding, the party claiming that sum may, if he thinks fit, by notice in writing given by registered letter or otherwise to the other party not later than seven days after the appointment of the arbiter, require that the arbitration shall extend to the determination of the claim to that sum, and thereupon the provisions of this section with respect to arbitration shall apply accordingly. . . ." Section 32—"Except as in this Act expressed, nothing in this Act shall prejudicially affect any power, right, or remedy of a landlord, tenant, or other person, vested in or exercisable by him by virtue of any other Act or law, or under any custom of the country or otherwise, in respect of a lease or other contract, or of any improvements, deteriorations, away-going crops, fixtures, tax, rate, teind, rent, or other thing."

George Andrew Buchanan of Gask, Auchterarder, *complainer*, brought a note of suspension against James Taylor of Lochie, Auchterarder, *respondent*, of a charge for payment of £115, 8s. 3d., under deduction of £4, 7s. 6d., being the sum payable by the complainer to the respondent under an award by an arbiter in an arbitration under the Agricultural Holdings (Scotland) Act 1908. The complainer, founding on a clause in a lease between the respondent and the complainer's author, claimed to liquidate his indebtedness under the decree-arbitral by releasing the respondent from a pecuniary obligation larger in amount than the compensation awarded under the statute.

The complainer pleaded—"(2) There being no sum due by the complainer to the respondent at the date of said charge, the same was illegal and ought to be suspended."

The respondent pleaded — "The note should be refused in respect. . . (*d*) That the deduction in question cannot competently be set off against the amount in the arbiter's award. (*e*) That the stipulations founded on by the complainer to deprive the respondent of his right to claim compensation are illegal and void. (*f*) That in any event the said claim of deduction, if competent, could only be proponed in said arbitration proceedings, and having been withdrawn therefrom cannot now be competently proponed."

The *facts* of the case sufficiently appear from the opinion of the Lord Ordinary (HUNTER), who on 8th December 1914 repelled the pleas-in-law for the respondent, sustained the second plea-in-law for the complainer, and suspended the charge.

Opinion.—"The complainer, who is the proprietor of Gask, seeks to suspend a charge at the instance of James Taylor, who was tenant of the farm of Chapelbank on the said estate, for payment of £115, 8s. 3d., under deduction of £4, 7s. 6d.

"By lease dated 16th and 21st August 1884 the late Mr Thomas Laurence Kington Oliphant of Gask let to the respondent the farm of Chapelbank for a period of nineteen years. The respondent's immediate predecessor as tenant of the farm was a Mr Robert Gardiner.

"In terms of the lease it was, *inter alia*, stipulated—'And whereas the proprietor is himself to settle the claim under the said Act which has been intimated by the outgoing tenant Robert Gardiner, it is hereby specially declared and agreed that the compensation to be fixed on the basis of the said schedule shall be subject to deduction of whatever sum may have been paid to the said Robert Gardiner in settlement of his said claim.' The Act therein referred to is the Agricultural Holdings (Scotland) Act, 1883, and the schedule therein referred to is the schedule appended to said lease, specifying the rates and proportions of unexhausted value at and for which the outgoing tenant is to be compensated.

"On the outgoing of Mr Gardiner the then proprietor paid him £153, 18s. 3d. as compensation for unexhausted improvements. A receipt for this sum is produced in process.

"On the expiry of the respondent's lease of 1884 the trustees of Mr Oliphant, who had meantime died, granted the respondent a renewal of the lease for nineteen years from Martinmas 1903, with power to either party to break the lease at Martinmas 1908, Martinmas 1913, or Martinmas 1918, on giving one year's notice. This second lease expressly continued the stipulation that any claim by the respondent on his outgoing for unexhausted improvements should be subject to the deduction mentioned in the first lease.

"The complainer purchased the estate of Gask and became landlord of the respondent's farm in or about the year 1907. The respondent terminated the lease by notice at Martinmas 1913. As the parties did not agree as to the amount of the compensation payable to the respondent the matter was referred to arbitration, in the course of which the respondent received an award of £115, 8s. 3d., under deduction of £4, 7s. 6d.

awarded to the complainer in respect of a counter claim. The complainer maintains that as the amount due to the respondent under the award is less than the deduction to be made in respect of the payment to Robert Gardiner, nothing is payable by him.

"Several points were taken in answer to the complainer's contention. It was maintained in the first place that the complainer has no title to sue as the claim in respect of the payment by Mr Oliphant to Mr Gardiner was personal, and did not pass to the purchaser of the estate. The case principally founded upon by the respondent is *Gillespie* v. *Riddell*, 1908 S.C. 628, 45 S.L.R. 514, where an heir of entail in possession of an estate was held not bound by an obligation undertaken by a previous heir to purchase the sheep stock on the termination of a lease from an outgoing tenant. That case appears to me to have no bearing upon the question of the rights or liability of the purchaser of an estate with regard to current leases. Apart from the Agricultural Holdings Acts which make the landlord for the time being liable to the tenant for claims under the Acts, a *bona fide* and fair stipulation for meliorations was just as effectual against a purchaser as any other stipulation in a lease (*Arbuthnot*, 1772, M. 10,424, and *Morison*, 1787, M. 10,425). This liability must be in terms of the lease, and if it is subject to a properly constituted deduction the purchaser has the right to the deduction.

"The plea as to the incompetence of determining the complainer's right to the deduction from the claim by way of suspension appeared to me to be only a different way of stating the argument as to title, which I do not consider well founded.

"The question as to whether the arrangement entered into between the complainer's author and the respondent was or was not legal under the Agricultural Holdings Acts is perhaps attended with more difficulty. Section 5 of the Act of 1908 provides—'. . . [*quotes, v. sup. in rubric.*] . . .' It is said that the effect of the provision as to deducting the amount paid to Mr Gardiner may be to prevent the respondent from in fact recovering anything in respect of meliorations, and also, contrary to the policy of the Acts, to discourage expenditure by a tenant during the later years of his lease. The answer to this is that the statute strikes only at an agreement that excludes a claim, while the stipulated deduction neither excludes a claim nor affects the amount thereof.

"The last point taken by the respondent is that the deduction ought to have been dealt with in the arbitration. In the case of *Bell* v. *Graham*, 1908 S.C. 1060, 45 S.L.R. 770, it was decided that an arbiter in a claim under the Agricultural Holdings Act, in order to explicate his jurisdiction, was bound to decide whether the scale of compensation fixed by the lease was at its date fair and reasonable and fell to be applied. If, however, the view which I have taken as to the stipulated deduction having no effect upon the amount of the compensation be sound, I do not think that the arbiter had anything to do with it. It follows that the respondent's averments as to the deduction having been made and withdrawn from the arbitration are in my opinion irrelevant.

"On the whole matter I repel the pleas for the respondent, and sustain the second plea for the complainer, and suspend the charge."

The respondent reclaimed, and the case was argued before the Judges of the Second Division on 12th May 1915. On 20th July 1915 their Lordships in respect of the importance of the questions raised appointed the case to be argued before a bench of Seven Judges.

Argued for the reclaimer (respondent)—The stipulation relating to the deduction in question was null and void, because it was in contravention of section 5 of the Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64). The scheme of the statute was to give the tenant an indefeasible right to compensation for any improvements he had made—*Earl of Galloway* v. *M'Clelland*, 1915, 52 S.L.R. 822, *per* Lord President Strathclyde at p. 827 and Lord Mackenzie at p. 833. But the result of the agreement in question was to extinguish the respondent's claim altogether, and deprive him of his right to compensation—*Cathcart* v. *Chalmers*, 1911 S.C. 292, *per* Lord Dundas at p. 298, 48 S.L.R. 207, *affd.* 1911 S.C. (H.L.) 38, 48 S.L.R. 457. The right to "claim" compensation in section 5 meant the right to "obtain" compensation. To read it otherwise was to render nugatory the policy of the Act. An agreement like the present struck at that policy, because it would prevent a tenant from expending as much as he otherwise would on the subjects in the fear that he might not get it back at the end of the lease. The only other possible view of the agreement was that it was substituted compensation in the sense of section 4 of the Act, but in this case it should have been submitted to the arbiter, whose duty it was to say whether it was fair and reasonable—*Bell* v. *Graham*, 1908 S.C. 1060, 45 S.L.R. 770. This, however, had not been done. But this was not truly a pactional substitution of compensation for the statutory compensation, but rather an agreement which deprived the tenant of compensation in whole or in part—*M'Quater* v. *Fergusson*, 1911 S.C. 640, *per* Lord President Dunedin at p. 644, 48 S.L.R. 560.

Argued for the complainer — The Lord Ordinary was right in sustaining the complainer's second plea-in-law. The main question for the consideration of the Court was whether the agreement in question was struck at by the Agricultural Holdings (Scotland) Act 1908, sec. 5. This section, which deliberately interfered with freedom of contract, should be strictly construed. What that section struck at was an agreement depriving the tenant of the right to claim compensation. The intention of the Legislature was to leave the tenant a clear road to arbitration, but the arbiter was *functus* when he had adjudicated upon the claim, and questions regarding special agreements which did not operate till the tenant sought to enforce his award were outwith the scope

of the reference. The use of the word "claim" in section 5 was intentionally by way of contrast from the use of the word "obtain" in section 1 (1), which recognised a tenant's right to obtain payment of compensation after an award had been made, subject to any right of set-off competent to the landlord under section 32. There was no authority for reading "claim" in section 5 as equivalent to "obtain"—*Cathcart* v. *Chalmers* (*cit. sup.*). Further, the agreement did not by its nature prevent the tenant obtaining compensation, because it was entirely fortuitous if the sum in the agreement exceeded the amount of compensation. Further, there was nothing in the Act to make it imperative on the landlord to go to the arbiter with the agreement. Section 6 (1) did not apply, and section 6 (3) made it optional for the landlord to do so. The cases of *M'Quater* v. *Fergusson* (*cit. sup.* and *Earl of Galloway* v. *M'Clelland* (*cit. sup.*) did not apply. Further, the agreement in question was not one for substituted compensation, and therefore section 4 did not apply.

At advising—

LORD PRESIDENT—The complainer here is the landlord of the farm of Chapelbank, and the respondent was the outgoing tenant of the farm. The main question for our decision is whether the respondent has made a bargain with the complainer which is struck at by the 5th section of the Agricultural Holdings Act 1908. The statutory criterion which it is incumbent upon us to apply is this—Is the agreement one by virtue of which the respondent is deprived of his right to claim compensation under the Act? When the statute speaks of a claim, in my opinion it means an effective claim—not an idle claim, but a claim which issues in an enforceable award by the tribunal to which it is submitted. That is the criterion, stated in somewhat different language, laid down by Lord Dundas, and expressly approved by the House of Lords in the case of *Cathcart* v. *Chalmers*, 1911 S.C. (H.L.) 38, at p. 40. Using his Lordship's language I ask, does this agreement "operate to deprive the tenant of his right to obtain any compensation at all?" Tried by this criterion I am of opinion that the agreement before us bears the strain well.

At the term of Martinmas 1913 the outgoing tenant, the respondent, made a claim for compensation under the Agricultural Holdings Act which was submitted to, entertained by, and decided by an arbiter. He awarded the respondent the sum of £115 odds as compensation for unexhausted improvements. The whole procedure was unchallenged—and I think unchallengeable—by the landlord, who does not question the validity of the award, and concedes that under it the sum of £115 odds is due and payable to the tenant. But he proposes to liquidate his indebtedness, not by handing to the tenant a sum of money, but by releasing him from a pecuniary obligation larger in amount than the compensation awarded under the statute. The justification for that proposal rests upon an agreement to be found *in gremio* of the lease of 1903, which runs as follows:—"And whereas the tenant has arranged to take a further lease of the farm, therefore the parties hereto have agreed that the sum represented in said claim shall form a deduction from the amount payable to the tenant at the termination of this tenancy, in the same way that it would have done had the tenant vacated the farm at Martinmas 1903."

It appears that as far back as 1885, in an arbitration between the landlord of the farm and the respondent's immediate predecessor in the tenancy, the sum of £153 was awarded to the tenant as compensation for unexhausted improvement under the statute. That sum was paid by the landlord to the tenant as far back as 14th March 1885, and it is conceded that the present tenant, the respondent, derived the advantage of that unexhausted improvement at his entry to the farm; but he bargained with his landlord that he should not be called upon to pay for that advantage in cash, but that he should be permitted at the expiry of his own lease to set the sum due to his landlord against the amount which might be found due to him by his landlord for the unexhausted improvements at the termination of the lease. That bargain appears to me to be hostile neither to the letter nor to the spirit of the statute. It was a bargain highly advantageous to the tenant, and I should regret if we were compelled by the language of this Act to deny to tenants the benefit of arrangements which seem to me to be so beneficial to them, for in the result the tenant did obtain the compensation which was awarded to him at the expiration of his lease, not, it is true, in the form of a sum of money, but in what was equivalent thereto—a release from a pecuniary obligation larger in amount than the sum to which he was entitled by the arbiter's award.

And, indeed, to do the respondent full justice it was not argued on his behalf that the agreement must be set aside, but it was contended to us that it fell to be considered by the arbiter in judging whether the basis for estimating the compensation provided in the contract of lease was fair and reasonable. I cannot agree that there is any clause in the Act of Parliament which would compel the arbiter when asked by the tenant to consider the merits of the claim which was settled as far back as 1885. The contention seems to be that the arbiter in 1913 is to be asked to revise and, if he chose, to diminish, and I suppose to increase, the amount which the arbiter had awarded in the shape of unexhausted improvements eight-and-twenty years before. That would not appear to be a very business-like arrangement, and I can see nothing in the Act of Parliament to justify it. It is distinctly contrary to the agreement, which I hold to be valid, and which is expressed in very explicit terms to the contrary. I think therefore that the parties did well when they withdrew altogether the claim for deduction from the arbiter's consideration in the present case.

On the short ground that this agreement does not defeat the tenant's claim for compensation, but, on the contrary, enables him

to obtain his compensation, not in truth in the form of a money payment, but in a form precisely equivalent, I am prepared to affirm the judgment of the Lord Ordinary.

LORD JUSTICE-CLERK—I agree with your Lordship. The case as argued before us for the tenant was based mainly, if not entirely, upon section 5 of the Act. [*His Lordship read the section.*] The section applies to contracts or agreements of that description, whether made before or after the Act. In my opinion such a section requires to be strictly construed, and when it expressly strikes only at contracts or agreements which deprive the tenant of his right to claim compensation I think we are not entitled to substitute for the terms there used any other terms. This agreement which is challenged, so far from depriving the tenant of his right to claim compensation, only comes into effect if and when the tenant has exercised his right to claim and the arbiter has pronounced upon it.

Accordingly it seems to me that the agreement in question cannot be said to be one struck at by section 5, particularly when we find that in section 32 it is provided that "Except as in this Act expressed, nothing in this Act shall prejudicially affect any power, right, or remedy of a landlord, tenant, or other person, vested in or exercisable by him by virtue of any other Act or law, or under any custom of the country or otherwise in respect of a lease or other contract, or of any improvements, deteriorations, awaygoing crops, fixtures, tax, rate, teind, rent, or other thing." That seems to me to leave it perfectly plain that except in those cases where the agreement challenged is clearly brought within the terms of section 5, the agreement must receive effect.

We were referred also in the course of the argument to section 1, which was founded on as giving the tenant an indefeasible right to compensation for improvements. The language of that section, so far as the point I am now considering is concerned, is very clearly distinguishable from the language of section 5, because it provides—"Where a tenant of a holding has made thereon any improvement comprised in the First Schedule to this Act, he shall, subject as in this Act mentioned, be entitled at the determination of a tenancy, on quitting his holding, to obtain" compensation. The obvious comment upon that is that as contrasted with section 5 the right there is to "obtain" compensation, whereas in section 5 all that is given is a right to "claim." Section 1 is qualified by these words, "He shall, subject as in this Act mentioned," and in my opinion these words are wide enough to include, and do include, the provision in section 32 by which any right that the landlord has by contract or otherwise, which is not struck at by article 5, is preserved intact. Therefore on these grounds I am of opinion that the Lord Ordinary was right in the course he took, and that his judgment should be affirmed.

I agree entirely with the view which your Lordship in the chair has expressed as to the propriety of the arbiter dealing with the clause in the lease which we are now considering. I may also add that the case before us was argued almost entirely upon section 5 and section 1, and certainly was not argued upon section 4, which, in my judgment, ought not to affect the result at which we arrive.

LORD DUNDAS—I think this is a difficult case, but I have come to the conclusion that the interlocutor reclaimed against is wrong.

Certain preliminary points, argued in the Outer House, which bulk in the Lord Ordinary's opinion—as to the complainer's title, and as to the competency of determining by way of suspension his alleged right to claim deduction—were abandoned at the bar of the Second Division. The arguments in that Court, and before the fuller bench, turned largely upon the question whether or not the arrangement in regard to the deduction, embodied in the lease, was illegal under section 5 of the Act of 1908, in respect that it deprived the tenant of his right to claim compensation under the statute. I think this question should be answered in favour of the tenant.

The Lord Ordinary dismissed the reclaimer's argument in a rather summary way by saying (after quoting section 5) that "the statute strikes only at an agreement that excludes a claim, while the stipulated deduction neither excludes a claim nor affects the amount thereof." That seems to me an unsatisfactory mode of dealing with the matter. I think that, looking to the general policy of the Agricultural Holdings (Scotland) Acts, one must construe the words "right to claim compensation" not according to their strict and literal interpretation, but rather as meaning "right to claim compensation effectively," or "to claim and obtain compensation." Nor do I agree with the Lord Ordinary's view that the deduction does not affect the amount of the claim, when in result it would (if allowed) deny all practical effect to it. The reclaimer's case would, I apprehend, have failed if the stipulated deduction had been in respect of a liquid counter-claim for a debt due by him to the landlord outside the provisions of the lease; but that is because the debt would have been recoverable by the landlord at law apart from any stipulation in the lease. The deduction here in question is not in respect of any debt due by the tenant to the landlord. What we have here is an agreement between the parties that a sum due and paid by the landlord to a former tenant, with which the reclaimer originally had no concern, shall form a deduction from any compensation to be awarded to the reclaimer under the statute at the termination of his lease; and this, as it seems to me, is precisely the kind of agreement which is struck at by section 5 of the Act.

I may add that if it were the fact—and it was not quite clear to me at the discussion how the matter stood—that the arbiter awarded compensation on the substituted

scale provided by the lease, the result of the case would, in my judgment, be the same, but the *ratio decidendi* somewhat different. Section 5 of the Act strikes at any agreement by virtue of which a tenant is deprived of his right to claim "compensation under this Act" in respect of any improvement comprised in the First Schedule. It seems to me, from a study of numerous sections of the statute, that compensation under the Act means compensation as defined by section 1 (1), and is intended to stand distinct from and in contrast to compensation payable by agreement in pursuance of or as permitted by the Act. Upon the assumption in fact which I have postulated, the question would appear to turn not upon section 5 but upon the language of section 4—whether or not the "agreement in writing," viz., the lease, which substitutes agreed-on terms for compensation under the Act, truly "secures to the tenant . . . fair and reasonable compensation." I think the answer to this question would be in the negative, for, assuming the scale of substituted compensation to be fair and reasonable, I do not see how it could justly be affirmed that fair and reasonable compensation was "secured" to the tenant by an agreement which results in no compensation being payable to him at all. That would, of course, be the result if the deduction is to be supported, as the landlord maintains it must be.

For these reasons we ought, in my opinion, to recal the interlocutor reclaimed against, refuse the note of suspension, find the letters of charge orderly proceeded, and decern accordingly.

LORD SALVESEN—In 1884 the then proprietor of Gask let the farm of Chapelbank, which was part of his estate, to the respondent at a yearly rent of £435. A claim of compensation for improvements had been intimated by the previous tenant against the landlord, but at the date of the lease the amount of compensation due had not been fixed. In these circumstances a clause was inserted in the lease to the effect that, as the proprietor was himself to settle this claim, it was agreed that the compensation which might be awarded to the respondent at the termination of his lease should be subject to deduction of whatever sum had been paid to the outgoing tenant in settlement of his claim. This sum was in the subsequent year fixed at £153, 18s. 3d. by the award of an arbiter appointed under the provisions of the Agricultural Holdings (Scotland) Act 1883.

At the termination of his lease in 1903 the respondent agreed to renew it for another period of nineteen years, but subject to a right to either of the parties to terminate the lease at certain specified dates. The provision with regard to deduction of the amount paid by the landlord for compensation was repeated, and it was agreed that the sum represented in said claim should form a deduction from the amount payable to the tenant at the termination of his second tenancy, which in point of fact took place in 1913.

The agreement thus made was obviously one for which the tenant received full consideration, for the amount of the rent was fixed with reference to all the conditions of the lease of which this was a material one. On his entry to the farm he got the benefit of the unexhausted improvements left by his predecessor. The landlord might have demanded that the sum which he undertook to pay to the outgoing tenant should form a debt due by the respondent at the termination of his lease. Instead of that he was willing to allow the amount at which the outgoing tenant's claim was settled to form a deduction merely from the amount of any claim for the like improvements which the tenant might have. As matters have turned out, under this arrangement the tenant has benefited to the amount of £38, for according to the arbiter's award he left only £115 worth of improvements in the land while he received at his entry improvements to the value of £153.

The Agricultural Holdings (Scotland) Act 1908 contemplates agreements between landlord and tenant with regard to the compensation payable to the outgoing tenant, for it provides (section 7) that where an incoming tenant has, with the consent of his landlord, paid the outgoing tenant compensation for improvements, he shall be entitled to recover the amount so paid from the landlord at the termination of the tenancy. The fact that the compensation had not been fixed at the date of the first lease to the respondent, and the circumstance that the tenant probably required all his capital to stock the farm, account for the more favourable arrangement which he made with his landlord.

It is now maintained that the agreement above referred to is struck at by section 5 of the 1908 Act as being an agreement "by virtue of which he (the tenant) is deprived of his right to claim compensation under this Act in respect of any improvement comprised in the First Schedule hereto." I am unable so to hold. The tenant's right to claim compensation was fully reserved to him, and there can be no better evidence of this than the fact that the amount has been fixed by the award of an arbiter. Had the award been in excess of £153 the respondent would have been entitled to recover the excess. The agreement is therefore not against the policy of the Act, one of the main objects of which was to encourage tenants to cultivate the land to the best advantage. It was urged that the word "claim" must be construed as equivalent to "obtain." I do not think so. The word "obtain" is used in section 1, sub-section (1), and the word "claim" is used both in section 5, with which I am now dealing, and in section 1, sub-section (3). It may be conceded that the tenant must be entitled to make an effective claim, but the claim is not the less effective because it is subject when ascertained to a deduction by way of set-off. If the landlord had stipulated that the amount of the outgoing tenant's claim, which he paid, was to constitute a debt payable by the tenant at the termination of his lease, the tenant would no more have

obtained compensation, in the sense in which he uses the term, than he does under the more favourable arrangement which he in fact made. The only doubt I had at one time was that under such an agreement the tenant might be tempted to expend as little as possible in the way of manures on the land during the closing years of his tenancy, so as to keep the claim for compensation down to the lowest possible figure, and that this might be held as tending to discourage the best cultivation; but on referring to the lease I find that there is the usual obligation to cultivate the land according to the rules of good husbandry, which necessarily involve the application of a certain amount of manure to the land. The Act does not seek to prevent the tenant from cultivating his land in any way he pleases consistently with the obligations he has undertaken to the landlord. It only secures to him the right to receive compensation for improvements he has made, to the extent to which these remain unexhausted at the termination of his lease, and which but for this Act and its predecessors would have belonged to the landlord without payment. On these grounds I am of opinion that the Lord Ordinary is right in the result at which he arrived. On the other point argued I content myself with saying that I do not think that under either of the leases—and certainly not under the 1903 lease—did the agreement with regard to the outgoing tenant's claim form a part of a substituted scheme of compensation. It was therefore not a matter with which the arbiter had any jurisdiction to deal.

LORD MACKENZIE—I have come to the conclusion, though not without doubt, that the Lord Ordinary is right in this case.

I do not think that the agreement contained in the lease is struck at by section 5 of the Act of 1908. In reaching this conclusion I do not proceed upon a narrow construction of the words "right to claim compensation." The fair meaning of these words seem to me to be "right to have the amount of compensation fixed by an arbiter." The words "compensation under the Act" refer to section 1 (1), and mean "such sum as fairly represents the value of the improvement to an incoming tenant." This may be fixed under the provisions of the Act either by arbitration or by agreement. If by agreement it may still be necessary to call in an arbiter in order to decide the point dealt with in section 4. In the present case the arbiter had to consider and decide whether the substituted compensation in the lease was fair and reasonable, keeping in view the provisions of the Act. That question the arbiter did apply his mind to and decide. Upon the view he took he fixed the amount of compensation due to the tenant. It appears to me he discharged his duty when he had dealt with this matter. Under the terms of the 1903 lease he was not bound to consider the stipulated deduction in arriving at a conclusion on the question whether the substituted compensation was fair and reasonable. The tenant agreed with the landlord that the expenditure of the liquidated amount of which he (the tenant) had got the benefit should form a deduction from the amount payable to him. It does not appear to me that the right of the tenant under the Act is thereby defeated.

I think the judgment of the Lord Ordinary ought to be affirmed.

LORD GUTHRIE—I agree with your Lordship in the chair. The lease of 1884 and the lease of 1903 provide that the amount paid to the previous tenant by the landlord shall form a "deduction" from the compensation payable to the respondent. This is an incorrect expression. The two sums might have been equal, in which case, while the one sum might have been set off against, it could not have been deducted from, the other. Or, as has actually happened, the sum paid to the previous tenant might have been larger than the compensation found due to the respondent, in which case no question of deduction could have arisen, in view of the complainer having no right to exact the difference. We must therefore find out what is the substance of the contract between the parties. That contract seems to me to confer an independent right on the part of the landlord to payment of £153 from the tenant, subject, however to two qualifications, first, that he shall not be entitled to exact the whole amount unless the compensation which shall be awarded to the tenant equals or exceeds it, and second, that in event of the compensation awarded being less than £153, the landlord shall not be entitled to payment of any sum in excess of the amount of compensation awarded. If so, it follows, in my opinion, that the tenant has not, on a sound construction of section 5 of the Act of 1908, been "deprived of his right to claim compensation" under the Act, whether statutory compensation or substituted compensation, and the case is sharply contrasted with the position put as an analogy in the course of the discussion, namely, where a tenant agrees simpliciter, or in respect of some counter stipulation, not to claim compensation. In the present case the tenant's claim necessarily results in an arbitration and an award; in the case said erroneously to be analogous any attempt to institute an arbitration would be interdicted. It is therefore not necessary to hold with the Lord Ordinary that the statute strikes only at an agreement that excludes a claim. I think with your Lordship that the claim must be an effective claim.

LORD SKERRINGTON—The first question which it is necessary to decide is whether a certain agreement contained in the reclaimer's lease of July 1903 is one by virtue of which, in the language of section 5 of the Agricultural Holdings (Scotland) Act 1908, he is deprived of his right to claim compensation under that Act in respect of any improvement comprised in the First Schedule to the Act. If this question is answered in the affirmative the validity of the agreement depends upon whether in the language of section 4 of the same statute such agreement secures to the tenant fair

and reasonable compensation for his improvements.

The expression "compensation under this Act," as used in section 5, means one thing, and one thing only, viz., compensation as defined in section 1 (1) of the Act—in other words, "such sum as fairly represents the value of the improvement to an incoming tenant." The expression is used in the same sense in sections 2, 3, 4, 6, 7, 8, and 13. Section 6 is specially important in respect that it expressly refers to compensation payable by agreement as something different from compensation "under this Act." So, too, section 7 refers not merely to compensation payable "under," but also to compensation payable "in pursuance of this Act." If the distinction between compensation in general and the statutory compensation alone referred to in section 5 is kept in view it will at once become apparent that the Lord Ordinary, misled no doubt by the way in which the case was presented to him in the written and oral pleadings, has expressed no opinion on the question whether the agreement between the parties deprived the reclaimer of his right to claim statutory compensation. It will also become apparent that beyond all doubt the agreement referred to did have this effect, because it provided a schedule of compensation which was to be substituted for compensation under the Act. It follows that the arguments addressed to us by counsel in regard to the true meaning of section 5 and the possible distinction between a "right to claim" and a "right to recover" compensation are entirely beside the mark.

The next question is whether the agreement for substituted compensation complied with the two requirements of section 4 of the Act, viz.—"First, that the compensation to be substituted for the statutory compensation shall be secured to the tenant; and secondly, that it shall be compensation on a fair and reasonable scale." I quote these words from the opinion of Lord Shaw of Dunfermline in *Cathcart* v. *Chalmers*, 1911 S.C. (H.L.) 38, at p. 40. In the ordinary case the question which I have stated would be one of fact for the arbiter, but in the present case it is really one of pure law depending on the true construction and effect of a written agreement. Assuming, as I do, that the scale of compensation provided by the schedule to the agreement was fair and reasonable, can it be said that the agreement secured such compensation to the tenant and so complied with section 4? In *Cathcart's* case the scale of substituted compensation was perfectly fair, but the agreement was vitiated *in toto* by the adjection of what Lord Dundas in a passage of his opinion approved by the House of Lords described as "a collateral stipulation . . . which might (at least indirectly) operate to deprive the tenant of his right to obtain any compensation at all." In the present case the matter was not left uncertain as it was by the agreement in *Cathcart's* case, because the reclaimer by his agreement renounced absolutely and unconditionally in favour of the landlord a substantial part at least of the value of his improvements as these might at the end of his lease be fairly assessed in terms of the schedule. It seems to me to be immaterial that the scale in the schedule was fair and reasonable if the amount assessed in terms thereof was by the agreement secured, not to the tenant but to the landlord, with the result that the "compensation payable under" the agreement, and which the arbiter was empowered by section 6 (4) to award to the tenant, must necessarily amount to less than the fair value of the improvements. Further, it seems to me to be irrelevant to point out that the agreement between the landlord and tenant was in itself fair and reasonable, because what the statute requires is that the compensation secured to the tenant and not the agreement shall answer this description. Nor is it relevant to say that the tenant received value, and presumably full value, at his entry, in consideration for his agreement to accept at his outgo payment of less than the full amount of compensation assessed in terms of the schedule. If that were a good answer the whole policy of the Act might be defeated by onerous and, I assume, honest stipulations to the effect that in consideration of the farm being under-rented or of the landlord having erected buildings or made other improvements not taken into account in fixing the rent, the tenant should at his outgo be paid only a percentage of the sum fairly representing the value of his improvements assessed either in the manner pointed out in section 1 (1) or in accordance with a substituted scale in pursuance of section 4 and 6 (4). Lastly, it is no answer to argue that possibly the end which the landlord in the case before us desired to gain might have been achieved in some other way—for example, by a stipulation in the lease to the effect that at the ish the tenant should be bound to pay to the landlord an ascertained or ascertainable sum in return for improvements or other value received from the landlord by the tenant at entry. It is arguable that such a stipulation, if it had been included in the lease between the present parties, might have justified a suspension such as the present one, upon the ground that the statute had not deprived a landlord of the ordinary right to plead compensation *de liquido in liquidum*. But no such question arises in the present case, and I express no opinion in regard to it.

Upon these grounds I think that the Lord Ordinary's judgment is wrong and that the suspension should be refused.

The Court adhered.

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