mined. I agree with your Lordships that the case need not go back to the arbitrator for the determination of this small matter, and I think we are doing full justice to the respondent in awarding him compensation as for total incapacity down to the date of the present application.

The LORD JUSTICE-CLERK and LORD DUNDAS were not present.

The Court answered the first question of law in the negative.

Counsel for the Appellants—Hon. W. Watson, K.C.—Gentles. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—Moncrieff, K.C.—Burnet. Agents—Simpson & Marwick, W.S.

Wednesday, March 7.

SECOND DIVISION.

[Sheriff Court of Forfarshire.

FINDLAY *v.* MUNRO.

Lease — Outgoing — Compensation for Improvements — Temporary Pasture—Benefit Allowed to Tenant — Agricultural Holdings (Scotland) Act 1908 (8 *Edw. VII, cap.* 64), *sec.* 1 (1) *and* (2) (*a*), *First Sched., Part III* (26).

A tenant entered a farm in 1882 and continued his occupation thereof under a new lease granted in 1901. The lease provided a five-course rotation for the worked land, but contained this clause —"Declaring, however, that the tenant may, if he prefers it, allow any portion of the said lands specified to be cultivated in a five-shift rotation to lie in grass for a longer period than two years, but on his breaking it up he shall be bound to adhere to the rotation above prescribed, with this exception, that he shall be entitled to take two white crops in succession after grass which has lain not less than three years." At his outgoing the tenant left a large amount of temporary pasture, and claimed compensation therefor under the Agricultural Holdings (Scotland) Act 1908, First Sched., Part III, sec. (26). *Held* that as the sowing down in grass was done under the obligations of the lease, the leaving of it in that state was not an improvement for which he could claim compensation.

Opinions per Lords Salvesen and Guthrie that the right given to take two white crops in succession off land which had been three years in grass was not a benefit allowed by the landlord to the tenant under the Agricultural Holdings (Scotland) Act 1908, sec. 1 (2) (*a*), and that a benefit consisting in temporary pasture received at the commencement of the lease would fall to be estimated as at the beginning of the last lease, not as at the tenant's first entry to the lands, *e.g.*, in this case in 1901 and not in 1882.

The Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64) enacts—Sec. 1 (1) —"When a tenant of a holding has made thereon any improvement comprised in the First Schedule to this Act he shall . . . 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. (2) In the ascertainment of the amount of the compensation payable to a tenant under this section there shall be taken into account—(*a*) Any benefit which the landlord has given or allowed to the tenant in consideration of the tenant executing the improvement. . . ." First Schedule, Part III—"*Improvements in respect of which consent of or notice to landlord is not required*—. . . (26) Laying down temporary pastures with clover, grass, lucerne, sainfoin, or other seeds sown more than two years prior to the determination of the tenancy."

An arbitration having been held under the Agricultural Holdings (Scotland) Act 1908 between Sir Hugh Thomas Munro, Bart., of Lindertis, proprietor of the farm of Kirkton of Kingoldrum, *respondent*, and Charles Findlay, Glenhill, Kirriemuir, formerly tenant of the farm, *appellant*, the arbiter (Mr Peter Purdie Campbell, Edinburgh) at the request of the proprietor stated a Case under the statute for the opinion of the Sheriff of Forfarshire as to whether the tenant was entitled to claim compensation for the large amount of temporary pasture on the farm at the outgoing.

The Case stated—"2. By lease, dated 9th and 14th days of October 1882, entered into between the now deceased Sir Thomas Munro, Baronet, then of Lindertis, and the said Charles Findlay, there was let to the said Charles Findlay all and whole the farm and lands of Kirkton of Kingoldrum, in the parish of Kingoldrum and county of Forfar, as then possessed by Thomas Newton as tenant therein, with the exception of a small field next the Glebe, and that for the period of 19 years from and after the term of Martinmas 1882. The lease contained mutual breaks at Martinmas 1889 and 1896. The rent stipulated under the lease was £525 sterling.

"3. The said *lease*, in addition to the ordinary clauses common in the agricultural leases in the district, contains the following clause with reference to cropping —'The tenant binds and obliges himself and his foresaids to cultivate, manage, and manure the lands hereby let in a skilful manner according to the most approved rules of good husbandry, and so as not to wear out or deteriorate but to improve the same, and without prejudice to the said generality the tenant binds himself and his foresaids as regards the whole arable land of the farm other than the fields known as the Bog and Bogleys, to cultivate the same according to the following five-course rotation, viz.—(*first*) grass which may be cut or pastured, (*second*) grass which shall be pastured only, (*third*) white crop, (*fourth*) green crop properly laboured and manured,

and (*fifth*) barley sown down with grass and clover seeds of the proper quantities and kinds; declaring, however, that the tenant may, if he prefers it, allow any portion of the said land to lie in grass for a longer period than two years, but on his breaking it up he shall be bound to adhere to the rotation above prescribed, with this exception, that he shall be entitled to take two white crops in succession after grass which has lain for not less than four years, but in no other case shall he be so entitled; and declaring further that he shall never have less than two-fifths of the said land, other than as aforesaid, under grass, and shall not at any time plough up first year's grass, and as regards the said Bog and Bogleys the tenant may either allow the same to lie in permanent pasture or cultivate the same in the rotation and manner above prescribed.'

"4. The tenant took advantage of the 1889 break, and by an agreement dated 22nd and 24th days of June 1889 the proprietor resumed possession of a strip of 7 acres. The remaining subjects were let to the tenant for the unexpired period of the lease (*i.e.* the lease of 1882) at a rent of £385 sterling, and the *cropping clause* under said agreement provided that 'with reference to the cropping clause in said lease it is hereby agreed that the following portions of the farm, in so far as not already laid down to permanent pasture, shall as soon as practicable be laid down to permanent pasture, and shall so remain during the whole of the tenant's occupancy thereof, viz.—(*first*) the Saddler Field, extending to about nineteen acres; (*second*) the North Dams Field, extending to about twenty-five acres; (*third*) the East Dams Field, extending to about nine acres; (*fourth*) the two fields lying to the south of the Bog and Bogleys, and the Bog and Bogleys themselves; and (*fifth*) the high arable ground lying between the fields called the Smithy Park and Back of Hill Park and the Kirkton Hill Plantation, extending to about twelve acres, and the whole of the remaining arable land of the farm shall be cultivated by the tenant as he hereby binds and obliges himself to cultivate it during the currency of the lease according to the following five-course rotation, viz.—(*first*) grass which may be cut or pastured, (*second*) grass which shall not be cut but pastured only, (*third*) white crop, (*fourth*) green crop properly laboured and manured, and (*fifth*) barley sown down with grass and clover seeds of the proper quantities and kinds; declaring, however, that the tenant may, if he prefers it, allow any portion of the said land specified to be cultivated in a five-shift rotation to lie in grass for a longer period than two years, but on his breaking it up he shall be bound to adhere to the rotation above prescribed, with this exception, that he shall be entitled to take two white crops in succession after grass which has lain not less than three years, but in no other case shall he be so entitled, and on no account shall he plough up any of the above land specified to lie in permanent grass.'

"5. Advantage was taken of the break in 1896 to readjust the contract, and by an agreement, dated 4th and 6th May 1896, entered into between the said Sir Hugh Thomas Munro (who had become proprietor of the estate) and the tenant, the proprietor resumed (1) two portions of the hill grazing extending to forty-six acres or thereby, and (2) a piece of ground near the public road which had been planted in 1889. The rent for the remainder of said lands was fixed at £350 for crop 1897 and subsequent crops.

"6. By lease, dated 15th and 28th days of April 1901, a new lease of the said farm of Kirkton of Kingoldrum as then possessed by the tenant was entered into between the said Sir Hugh Thomas Munro, Baronet, and the said Charles Findlay for the period of nineteen years as from Martinmas 1901, with mutual breaks at Martinmas 1908 and 1915, at a rent of £359 sterling. The tenant took advantage of the latter break and left the farm at Martinmas 1915.

"7. The *cropping clause in the last-mentioned lease* is in the following terms:—'And the tenant binds and obliges himself and his foresaids to cultivate, manage, and manure the lands hereby let in a skilful manner according to the most approved rules of good husbandry, and so as not to wear out or deteriorate but to improve the same, and in no event shall he at any time take two white crops in immediate succession, and without prejudice to the said generality the tenant binds himself and his foresaids never to break up the following portions of the farm, but to allow them to remain in permanent pasture during the whole currency of the lease, viz.—(*first*) the Scurroch Field, (*second*) the North Dams Field, (*third*) the East Dams Field, (*fourth*) the two fields lying to the south of the Bog and Bogleys, and the Bog and Bogleys themselves, and the whole of the remaining arable land of the farm shall be cultivated by the tenant as he hereby binds and obliges himself to cultivate it during the currency of the lease according to the following five-course rotation, viz.—(*first*) grass which may be cut or pastured, (*second*) grass which shall not be cut but pastured only, (*third*) white crop, (*fourth*) green crop properly laboured and manured, and (*fifth*) barley or oats sown down with grass and clover seeds of the proper quantities and kinds; declaring, however, that the tenant may, if he prefers it, allow any portion of the said lands specified to be cultivated in a five-shift rotation to lie in grass for a longer period than two years, but on his breaking it up he shall be bound to adhere to the rotation above prescribed, with this exception, that he shall be entitled to take two white crops in succession after grass which has lain not less than three years, but in no other case shall he be so entitled, and on no account shall he plough up any of the above land specified to lie in permanent grass.' . . . . .

"9. On 9th November 1915 the said Charles Findlay as waygoing tenant duly intimated to the said Sir Hugh Thomas Munro a claim for compensation for improvements made by him upon the holding of Kirkton of Kingoldrum. The claim bore to be made

under the Agricultural Holdings (Scotland) Act 1908, and amounted in all to £468, 0s. 3d., including a claim of £222, 13s. 6d. as compensation for laying down of temporary pasture more than two years prior to the determination of the tenancy. . . . . .

"12. The following *facts* are held by the arbiter to be established:—(*a*) That the total area of the farm of Kirkton of Kingoldrum, exclusive of buildings, yards, &c., is 469·610 acres, and the land to remain in permanent pasture under the lease of 1901 extends to 125·091 acres, thus leaving as arable land 344·519 acres. The arable portion of the farm left by the claimant was in the following state:—

Under grain crop - - -	115·358	acres.
,, green crop - - -	49·188	,,
,, rotation grass - -	91·205	,,
,, temporary pasture (being the temporary pasture claimed for) -	88·768	,,
	344·519	,,

(*b*) That there is an obligation in his lease of the farm of Kirkton of Kingoldrum binding the claimant generally to crop and cultivate the arable land of the farm according to the most approved rules of good husbandry, and in particular to crop and cultivate it according to the five-course rotation prescribed by the lease, but with this declaration however, 'that the tenant may, if he prefers it, allow any portion of the said lands specified to be cultivated in a five-shift rotation to lie in grass for a longer period than two years, but on his breaking it up he shall be bound to adhere to the rotation above prescribed, with this exception, that he shall be entitled to take two white crops in succession after grass which has lain not less than three years.' (*c*) That the claimant was in the habit of sowing down to and allowing to lie in temporary pasture for a longer period than two years certain of the fields, and this system was continued to the end of his tenancy. (*d*) That more than two years prior to the determination of the tenancy the claimant laid down to temporary pasture the Culhawk Upper Bank Field (sown out in 1909), Upper Bank Field (sown out in 1910), Upper Saddler Field (sown out in 1911), Culhawk Midbank Field (sown out in 1912), and Sandy Hillock Field (sown out in 1912), on the farm of Kirkton of Kingoldrum, and left them in temporary pasture; that these fields extend to 88·768 acres, and that upon 64·129 acres thereof the claimant had executed an improvement upon the holding in the sense of the Agricultural Holdings Act. . . . (*g*) That the value of the foresaid improvements to an incoming tenant in the laying down of temporary pasture (1) on the farm of Kirkton of Kingoldrum was £143, 13s. . . . (*h*) That the claimant received very little grass on his entry to the farm of Kirkton of Kingoldrum at Martinmas 1882. The extent of grass then on the farm was not established with any precision, the only available evidence being that of the claimant himself, which the arbiter accepted, and which was as follows:—'When I entered in 1882 I found very little grass on the farm. It was nearly all under crop. The previous tenant was Mr Newton. (Q) Had he practically all the farm under crop?—(A) There might have been some reservations in his lease in consequence of which he could not have it all, but he had as much as he possibly could have. I found the state of the farm at my entry such that during the first year of my tenancy I could not break up any lea, there was so much of it broken up before. After I entered the farm I made it my business to put as much of it under grass as I could. I always kept a big part of it under grass. I did so irrespective of the rotations.' (*i*) That the question whether the claimant received 'benefit' in the sense of the Act in respect of the execution of the said improvements did not arise, and that no benefit was given or allowed by the proprietor to the claimant in respect of the execution of the said improvements, which the arbiter could, in the view which he took of the case, take into account in assessing compensation had he found it necessary to do so. . . . The arbiter on 17th August 1916 issued a note of his proposed findings, in which he proposed to find, *inter alia*, that the claimant was entitled to the sum of £143, 13s. as compensation for laying down 64·129 acres of the said farm of Kirkton of Kingoldrum to temporary pasture, and a sum of £12 as compensation for laying down eight acres of the farm of Broadmuir to temporary pasture, being the value of the improvements thereon to an incoming tenant.

"13. The proprietor lodged representations against the arbiter's proposed findings, in which he maintained (1) that the claim for the laying down of temporary pasture ought to be disallowed altogether as incompetent, and (2) that the arbiter must set against the claim any benefit which the claimant had received (*a*) under the provision of the lease which authorised him to take two white crops in succession from land that had lain not less than three years in grass, and (*b*) from the temporary pasture which he received at the commencement of his lease, and called upon the arbiter, in the event of him being unable to give effect to these representations, to state a case for the opinion of the court. The arbiter held that the representations introduced no new facts or arguments, and adhered to his proposed findings. The proprietor thereupon renewed his request to the arbiter to state a case under the statute. The arbiter considered the request fair and reasonable, and states this Case accordingly in terms of section 9 of the Second Schedule appended to the Act of 1908."

The following *questions of law* were submitted for the opinion of the Court—"1. Did the laying down of the said temporary pasture in the circumstances stated constitute an improvement for which the tenant is entitled to compensation under the Agricultural Holdings (Scotland) Act 1908. If so, 2. Was the provision in the said lease allowing two white crops in succession to be taken on the conditions therein set forth a benefit falling to be taken into account by the arbiter in ascertaining the amount of such compensation. And 3. If 'benefit' falls to be taken into account by the arbiter in

assessing compensation, does it fall to be considered at (1) Martinmas 1882, or (2) at Martinmas 1901."

On 4th January 1917 the Sheriff (FERGUSON) pronounced an interlocutor containing the following findings—"Finds (1) In answer to question one that the laying down of the said temporary pasture constituted an improvement to the extent, if any, to which the land left in temporary pasture when the claimant quitted the farm, exceeded the extent to which the land was in temporary pasture at the commencement of the lease; (2) that question two falls to be answered in the affirmative; (3) that in answer to question three benefit falls to be considered as at and from Martinmas 1901."

Note.—"The first and principal question submitted is in view of the terms of the Act and of the decision in the case of *Earl of Galloway* v. *M'Clelland*, 1915 S.C. 1062, 52 S.L.R. 822, one of considerable difficulty. That case lays down that the mere fulfilling of contractual obligations in regard to cropping cannot constitute an improvement for which independent compensation can be claimed under the Agricultural Holdings Act. It was sought to assimilate this case to that by an argument that the permission given to depart from the ordinary rotation prescribed, to keep part of the land in grass beyond two years and to take a second year's corn crop, constituted an alternative system of rotation. This does not seem to me to be well founded, because the terms of the exception do not lay down a rotation as they do not specify a definite period in which the land may be kept in grass, and the natural way to read the clause is that a specified rotation is laid down and permission is given to modify it. The clause from its phraseology appears to be inserted in the interest of the tenant. He may if he prefers it allow any portion to lie in grass for a longer period, and if he does, upon return to the rotation after three years may take two white crops. The clause gives an optional modification or relaxation of the cropping stipulation.

"It was also argued that compensation under the Act was given not for leaving but for laying down land in temporary pasture, and that in laying down in grass the tenant was merely fulfilling his contractual obligation, as in the course of the lease the whole ground would fall to be laid down at some time or other in grass under the rotation. This appears to me to be too narrow and technical a construction, and practically to result in rendering the provision of the statute nugatory under the normal conditions of Scottish agriculture. It may be a consequence of importing into Scotland provisions originally directed to a different and possibly less advanced system of agriculture and unsuited to Scottish conditions, but it is not one to be lightly accepted. It does not appear from the case whether special grasses were actually sown with an express view to greater permanency, which I think is the sort of thing contemplated by the framers of the statute from the use of the words 'laying down,' but it seems to me that the requirement of the statute is satisfied if the land has been laid down and at the waygo the land is left with an enhanced value because it is in grass of an abiding, though not permanent, value. A stronger way of putting the landlord's case appears to be that under the lease the question of temporary pasture was fully considered and a code of permission and compensation satisfactory to both parties substituted for the statutory privileges, which became a contractual obligation. This view receives some support from the terms of sec. 4 of the Act, and I think the arbiter is bound to consider whether the clause in a broad view affords fair and reasonable compensation by giving the power of taking two white crops. It is to be observed that by this arrangement the tenant is relieved from the statutory obligation of restoring the rotation before quitting. But then there is no provision that the right to take an additional white crop is to be regarded as a waiver of any claims at the waygo, and as this clause of the schedule was in existence from 1900, parties must be assumed to have contracted with the statutory rights in view. I think it quite probable that in fact the option to depart from the rotation was intended as a concession to the tenant in the management of the farm, and not to lay a foundation for future compensation, but the right given by the Act is unqualified to the extent that improvement has been effected and not compensated, and the tenant having been left a free option and having in fact left in grass a larger quantity than he was bound to leave under the rotation, and, I assume, than he received, is entitled to compensation to the extent provided.

"Upon the second question it appears to me that the right to take two white crops was a benefit granted by the landlord with specific reference to a departure from the ordinary course of cropping, and must be taken into account in estimating what is due to the tenant. The thing to be arrived at is not mere value of the grass on the ground, but the extent to which the farm has been benefited by the method of cultivation adopted, and if the tenant has been, in fact, enriched by getting additional white crops, he has to that extent got his compensation already.

"The third question relates, it was explained, to the benefit the tenant received from the temporary pasture he received at the commencement of his lease. In contradiction to what occurred on previous occasions when breaks in a previous lease were taken advantage of, a new bargain was made in 1901, and a new and separate tenancy entered on. That was the time when any claim for permanent pasture, if such existed in respect of previous operations, should have been settled, and there had, in fact, been a large reduction of rent, both in 1889, when the cropping clause was altered, and in 1896. It must, I think, be assumed, in the absence of any reservation (and in this case in view of the fact that the lease was after 1900), that the period with which the waygo falls to be compared is the commencement of the actual tenancy which has just terminated.

In regard to this class of improvement, which obviously differs from buildings, the facts as to which are easy of ascertainment and the settlement for which is often carried on from lease to lease, this seems to me to be the natural and safe rule, and the burden of proof lies upon the claimant to show that he has, in fact, left a greater area in grass than existed at the commencement of the lease. An investigation of the profit from second white crops throughout two or three tenancies would be impracticable. The amount of grass existing at entry is in one sense a benefit received by the tenant. I think, however, the more accurate conception is that there is, in fact, no improvement, and therefore no room for the application of the statute, unless more land has been laid down and left in grass at the ish than existed at the entry."

The tenant appealed, and argued—The first question ought to be answered in the affirmative. The tenant was entitled to compensation for everything which he left in a better condition than he was bound to leave it. The second question ought to be answered in the negative. It was impossible to separate this benefit from the whole cropping scheme. Two white crops in succession did not constitute a benefit in the sense of the statute—Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64), sec. 1. The improvement here consisted in the laying down of temporary pasture, but the tenant derived no benefit therefrom. On the contrary, by his refraining from cropping he was a loser, but the soil became more fertile. The answer to the first part of the third question should be in the affirmative. It was impossible to assess the improvement in 1901 because the tenant was not at that date quitting the farm, and therefore 1882 was the only other date to be looked to. The true comparison to be drawn was between the actual condition of the farm and its condition if the tenant had only done what he was by the lease bound to do, not that he left it better than he found it. Counsel cited *Earl of Galloway* v. *M'Clelland*, 1915 S.C. 1062, 52 S.L.R. 822.

The respondent argued—The first question should be answered in the negative. All the pasture that was laid down was laid down in accordance with the stipulations of the lease. What had been compensated for was pasture left, not laid down. In England it was the pasture itself that was of value, not the rest given to the land—Johnston on Agricultural Holdings Act, p. 73; Jackson on the Agricultural Holdings Act, p. 125. The English view that it was the unexhausted value of seeds that was valuable was right. On exhaustion of artificial manures counsel cited *Brown* v. *Mitchell*, 1910 S.C. 369, *per* Lord President Dunedin at p. 379, 47 S.L.R. 216. Every acre had sooner or later to be laid down in grass as provided in the lease, and thus the laying down was not voluntary and therefore no compensation would arise. There ought to have been evidence that year by year something more than was contractual had been laid down. Every improvement had to be voluntary to entitle the tenant to compensation. Mere maintenance did not constitute an improvement. The second question ought to be answered in the affirmative, as also the second part of the third question. The grass in existence at the beginning of the lease had to be taken into account. In 1901 there was not merely a renewal of a tenancy but a new bargain was made in the new lease, and it was that period that should be looked to in making a comparison. Counsel also referred to *Earl of Galloway* v. *M'Clelland*, 1915 S.C. 1062, *per* Lord Johnston at p. 1082, 52 S.L.R. 822.

At advising—

LORD SALVESEN—The facts of this case are very fully stated by the arbiter, who has also given a very careful and considered opinion on what appears to be a new point under the Agricultural Holdings (Scotland) Act 1908. The claim of the tenant arises in respect of an alleged improvement of the farm which he quitted at Martinmas 1915. The particular improvement for which compensation has been awarded by the arbiter is stated to come under the First Schedule (26), which so far as applicable is in these terms—"Laying down temporary pasture with clover, grass, lucerne, sainfoin, or other seeds, sown more than two years prior to the determination of the tenancy." Under the provisions of his lease the tenant was bound to follow a five-course rotation, or in his option he might allow any portion of the land to lie in grass for a longer period than two years, but on his breaking it up he was bound to adhere to the five-shift rotation, with the right to take two white crops in succession after grass which had lain not less than three years. The tenant here availed himself of his option, and allowed a greater part of the land to be in grass than he could have done if he had followed the five-course rotation, and it is for the excess so left in grass for more than two years prior to the termination of the tenancy that he now claims.

The landlord maintains that this claim is incompetent as a ground for compensation. He says that the laying down of the land with grass was obligatory upon the tenant if he chose to follow the alternative mode of cropping the land. He admits that the tenant might if he had chosen during the lease have ploughed all the land in grass that was more than three years old and left it in stubble, but that no compensation is allowed under the Act for "leaving" land in grass which has been sown down more than two years before the tenant left the farm, and that his abstention, presumably for his own convenience, from ploughing up land which had lain more than three years in grass is not a ground for compensation as it does not constitute one of the enumerated improvements.

I was at first very much inclined to take the view of the Sheriff, who held that this was too technical a ground for rejecting the claim. On further consideration, however, I think we are not at liberty to extend by implication the grounds upon which a tenant can claim compensation from his landlord. In every one of the enumerated improvements it is some positive act on the part

of the tenant which gives rise to the claim, and it has already been decided in the Whole Court case of the *Earl of Galloway*, 1915 S.C. 1062, 52 S.L.R. 822, that in order to give a claim under the Act the tenant must do something more than fulfil his contractual obligation. Now it is conceded that he could not cultivate the farm according to the provisions of his lease under the alternative mode of cropping of which he availed himself without laying down the land in grass to the extent that he has actually down. It is true that he was under no obligation to leave in grass all the land which in fact he has left, but the Act makes no allowance for the tenant "leaving" in grass more than two years old, land which he was bound to lay down with grass according to the terms of his lease. He may or he may not thereby have conferred a benefit on the landlord or the incoming tenant. In the present case I shall assume that he did so, as the arbiter has awarded compensation on that footing, but that is not a matter in respect of which the Act gives him a claim, any more than the landlord would have had a claim against him had he taken a second white crop from land which he had allowed to lie more than three years in grass, and which he had devoted to cereals in the last two years of his lease. It is plain that if the tenant had chosen he might have left the whole of the farm in grass. While this would have been on the reasoning which the arbiter has followed a ground of compensation in respect of the excess quantity of grass on the farm, so far from that being a benefit to the landlord it might have been very much the reverse. The truth appears to be that the improvement described in the First Schedule (26) seems to have been imported from England, and first found its way into a Scottish Act in 1901, and it is inapplicable to ordinary agricultural leases in this country where a fixed rotation of cropping is for the most part provided for. I am accordingly constrained to the view, which is also that taken by the modern writer Mr Connell, that the leaving of land in grass sown more than two years before the determination of the tenancy cannot be regarded as synonymous with the laying down of land in grass, and as the laying down here was done under a contractual obligation I hold that it gives no claim to compensation.

If the above view is well founded it is sufficient for the disposal of the case. But as the other questions were fully argued it is right that we should express an opinion upon them. As regards the point raised by the second question I agree with the arbiter and differ from the Sheriff. The provision with regard to the taking of two white crops in succession from land that has lain more than three years in grass is in my view only part of the alternative system of cropping which the tenant in his option might adopt. I cannot see how it can be regarded as a benefit allowed by the landlord. A benefit is something which the tenant gets from the landlord, whereas this was just one of the possible incidents of a system of cropping the farm which the landlord permitted but of which the tenant did not avail himself.

The third point is one of more general importance, and raises the question whether where a proper benefit falls to be taken into account in assessing compensation it falls to be considered as at the time when the tenant first entered on the possession of the land, or at the commencement of the lease under which he was occupying at the time when he quitted the holding. On this point I am in full agreement with the Sheriff. I adopt the view expressed by Lord Johnston in the case of *Galloway* (p. 1082), where he says that constructively a sitting tenant who enters into a new lease must be held to take over from himself the farm in the condition in which it then was, just as he might have taken it over from a third party who was the outgoing tenant. Now in 1901, when Mr Findlay entered into his last lease of the farm at Kirkton, he could have made no claim in respect of an improvement which consisted in the laying down of temporary pasture more than two years prior to the outgoing. A claim for compensation in respect of such an improvement would have been excluded by section 7 of the Agricultural Holdings Act 1900, for it had been executed before the Act came into operation. I fail to see therefore how it is possible to go back to the year 1882, when Mr Findlay first became tenant of this farm. Neither the 1900 nor the 1908 Act seems to me to justify a comparison between the year when the first tenancy commenced and the termination of the tenancy under a subsequent lease. It is to be assumed that when the last lease was entered into the condition of the land at the time was taken into account by both parties. If there was then a good ground for compensation had the tenant been leaving, the fact that he gave up his claim, as he impliedly did when he entered into the new lease, must presumably in the case of a temporary improvement have been taken into account in adjusting the rent. Section 8 of the 1908 Act was referred to as justifying the arbiter's view, but all that it provides is that a tenant who remains in his holding during two or more tenancies shall not on quitting his holding be deprived of his right to claim compensation under this Act in respect of improvements by reason only that the improvements were not made during the tenancy on the determination of which he quits the holding. It does not provide that improvements which were not made during the tenancy shall form a ground of compensation and must, I think, have reference to improvements of a permanent character which still remain as an asset at the end of the last tenancy, as for instance new buildings or indeed any of the improvements enumerated in Part I of the First Schedule. Here the improvement was made during the last tenancy, and whether it was an improvement or not falls to be determined by the condition of the farm when that tenancy was commenced. On this point the decision in *Galloway's* case appears to me to be conclusive against the appellant. A majority of the whole Court held that temporary pasture sown

more than two years before, although not specially mentioned in the lease or allowed as a benefit, must be taken into account as being a benefit under 1 (2) (*a*). Accordingly if this matter alone had to be considered I should have been well content with the first finding of the Sheriff, and with the reasons which he gives for arriving at it. In the whole circumstances I propose that we should recal the judgment of the Sheriff and answer the first question stated by the arbiter in the negative, and find it unnecessary to answer the second and third questions.

LORD GUTHRIE—The Sheriff has decided that the appellant is not entitled to the compensation claimed by him, unless and to the extent to which the pasture more than two years old, left by him on his farm at his outgoing in 1915—when taking advantage of a break he gave up the farm—exceeded the pasture more than two years old on the farm at the beginning of his last tenancy in 1901. This decision is questioned by both parties, and it may be that if the date of 1901 taken by the Sheriff for the commencement of the tenancy is correct, the further proceedings before the arbiter contemplated by the Sheriff would result in no benefit to the tenant.

But in considering the case I assume that a larger amount of pasture more than two years old was left by the tenant in 1915 than was on the farm in 1901, and further, that such additional amount would be an advantage, estimable in money, to the landlord or incoming tenant. On these assumptions I am of opinion that the Statute of 1908 does not entitle the outgoing tenant to compensation for such additional amount, and that (first), because the claim is made by the tenant, and rightly treated by the arbiter and Sheriff, as based on the ground that the tenant voluntarily left, at his outgoing, ground in grass more than two years old which he might have left in stubble after it had been exhausted by having one or even two white crops taken off it.

The question depends on the proper construction of section 1, sub-section (1), and the First Schedule, Part III, section 26, of the 1908 Act. I cannot find in these any warrant, in express terms or by reasonable inference, for any such claim. The 26th section of the schedule may only apply to farms held in Scotland on tenures similar to those in use in England, if there be any such, as to which I have no information. The question is, does it apply to the present case? The statute contemplates in this section, as in all the others, an active operation; the claim is based not on the tenant doing anything which when it was done gave him no claim to compensation, but to his subsequently, whether from inadvertence or to serve his own ends, or in an erroneous expectation that he would enter on a new lease, choosing not to execute certain operations. The Sheriff holds this is too narrow and technical a construction to give the statute. On the contrary it seems to me the only construction the words will reasonably admit.

But (secondly) suppose that "allowing to lie" can be construed as equivalent to laying down in the statute, I am still of opinion that the appellant has no claim. According to the case of the *Earl of Galloway*, 1915 S.C. 1062, if the appellant can claim for laying down, it must be in respect of ground, which he was not bound to lay down under the terms of his lease. But, under either of the alternatives in his lease, the ground in respect of which the claim is made was necessarily laid down in grass during the course of the lease. If so, whether what the tenant did constituted an improvement in the sense that he thereby left the farm more valuable at his outgoing than at his entry, this was not an improvement for which he can claim, because within the meaning of *Lord Galloway's* case it was an improvement contemplated and provided for in the lease. I think the judgment which your Lordship proposes to pronounce is in accordance both with the letter and the spirit of the Statute of 1908. The operations contemplated in the statute involved expenditure of time, money, and labour by the tenant, part of the value of which, if he farmed according to the rules of good husbandry and did not scourge the ground, he was compelled to leave to the landlord and incoming tenant. In my opinion it was not intended that a tenant voluntarily refraining, presumably for his own purposes, to take advantage of a provision in the lease in his favour should be entitled to claim compensation. If a benefit to the landlord and incoming tenant resulted this was not wrested from the outgoing tenant. That he chose to make a voluntary gift to the landlord and incoming tenant could not found or come within the solid grievance which the statute was designed to meet.

If I am right in the views above expressed it is unnecessary to consider the second and third questions. I concur, however, in the views your Lordship has indicated in regard to them.

LORD ANDERSON—I have found the decision of this case attended with difficulty. I was impressed by the argument submitted by Mr Chree on behalf of the tenant. I am unable to accept the landlord's contention that compensation was awarded for what was not an improvement in the sense of the statute. The Act of 1908, First Schedule, Part III, art. 26, declares the improvement to consist in "laying down temporary pasture with . . . seeds sown more than two years prior to the determination of the tenancy." Compensation is to be awarded not for sowing seeds but for creating pasture, and the lapse of a period of two years is contemplated by the Act before an improvable subject has been brought into existence. It is for this improvable subject—pasture—that compensation falls to be given, and the pasture must necessarily be in existence at the ish, otherwise no claim for compensation would be open to the outgoing tenant. Accordingly the distinction taken between "laying down" and "leaving" urged on behalf of the landlord seems to me to be hypercritical and unsound. "Laying down"

in my opinion connotes and necessarily implies "leaving." I accordingly take the view that the tenant made an improvement in the sense of the Act. This, however, is not enough to entitle him to succeed in his claim for compensation. It is necessary that he should make out that what he did was a voluntary and not a contractual act —*Earl of Galloway*, 1915 S.C. 1062. On this point I am of opinion that the landlord is entitled to succeed. The condition of the farm as to grass at the termination of the tenancy was the necessary result of the fulfilment by the tenant of his contractual obligations. He was bound by his lease to turn into pasture the portion of the farm in respect of which compensation is claimed, and therefore his creation of pasture was not voluntary but an act of obligation. His abstention from breaking up the pasture so created was doubtless voluntary, but this was a negative and not a positive act, and statutory compensation is awarded only for voluntary positive acts. By abstaining from breaking up pasture created in virtue of contractual obligation the tenant did nothing more than refrain from doing what he might have done but did not choose to do. This is the real basis of his claim for compensation, and there is no statutory warrant for countenancing such a claim.

It follows that the first question of law should be answered in the negative. This renders it unnecessary to deal with the other two questions, which I therefore refrain from considering.

The LORD JUSTICE-CLERK and LORD DUNDAS were not present.

The Court recalled the interlocutor of the Sheriff, answered the first question of law in the negative, and found it unnecessary to answer the second and third questions.

Counsel for the Appellant—Chree, K.C. —D. Jamieson. Agents—Guild & Guild, W.S.

Counsel, for the Respondent—Macphail, K.C.—Hamilton. Agents—Lindsay, Howe, & Company, W.S.

Tuesday, February 27.

EXTRA DIVISION.

FARMER'S TRUSTEES *v.* FARMER.

Succession — Election — Legitim — Approbate and Reprobate—Special Destinations and General Settlement — "Residue" — Order of Preference for Payment of Legitim.

A testator died, survived by his widow and children, and leaving (*a*) funds invested by him in favour of himself and his wife or the survivor, (*b*) funds invested by him in name of himself and one or other of his children or the survivor, and (*c*) a testamentary settlement containing a dispositive clause in general terms in favour of trustees, and provisions, including a bequest of residue, to his children.

Held that the investments and settlement formed one scheme of disposal, that the children must elect between legitim and their conventional provisions, that the bequest of "residue" was not a special legacy, and that legitim was payable *primo loco* from the residue.

A Special Case for the opinion and judgment of the Court was presented by the trustees under the trust-disposition and settlement of the deceased George Honeyman Farmer, *first parties*, five of the six children of the testator who survived him, *second parties*, and the testator's widow, *third party*.

The Case set forth—"2. By his said *trust-disposition and settlement* the testator gave, granted, assigned, and disponed to the trustees therein named 'all and sundry my whole means and estate, heritable and moveable, real and personal, of every kind and denomination and wheresoever situated, presently belonging and owing to me at the time of my death, including therein all means and estate over which I have or shall have power of disposal by will or otherwise, together with the writs, vouchers, and securities thereof, but in trust always for the ends, uses, and purposes following.' 3. The said trust purposes were—(First) Payment of debts, &c.; (second) payment of a legacy to each accepting trustee; (third) power to carry on or sell the testator's business; (fourth) conveyance to his wife of his jewellery, personal effects, and furniture, and payment to her of £150 for mournings and interim aliment; (fifth) provision to his wife of the liferent of a dwelling-house or an equivalent thereto; (sixth) payment of certain small legacies; (seventh) payment to his wife of an alimentary annuity of £500, 'declaring that the foregoing provisions and annuity hereby granted to my said wife are and shall be in full satisfaction to her of terce, *jus relictæ*, and every other claim competent to her against my means and estate in the event of her survivance;" (eighth) to hold the whole residue and apply the annual proceeds, or such part thereof as the trustees might deem necessary, for the maintenance, education, and advancement of the testator's children until the youngest attained majority; and (lastly) on the youngest child reaching majority, for division of the whole residue equally among the children. The trustees were appointed executors, and clothed with the usual powers of administration and investment. 4. By codicil of 27th June 1910 the testator directed his trustees to convey a heritable property in Great Eastern Road, Glasgow, to his wife in liferent, and to his two youngest children equally between them and their heirs in fee, 'and that as an additional provision to my said wife and my said two youngest children.' . . . 5. The testator nowhere declared that his provisions for his children were to be accepted by them as in full of all claims on his estate for legitim and the like, nor that if they claimed legitim they were to forfeit their testamentary provisions. With regard to the provisions for the widow there is the clause quoted in article 3 hereof, but no clause of forfeiture. Further, there