LORD SKERRINGTON—It is, I think, clear that the scheme of administration which the testator had in mind was that his trustees should pay off the debts and legacies out of the accumulated rents of his heritable property. On the other hand, the will does not say in express language or by necessary implication that the debts and legacies shall be paid from no other source except the accumulated rents if any other source should become available. Such a source has now become available, and my opinion is that it is the duty of the trustees to take advantage of it. It follows that branch (*a*) of the third question ought to be answered in the negative and branch (*b*) in the affirmative.

LORD CULLEN did not hear the case.

The Court answered question 3 (*a*) in the negative, 3 (*b*) in the affirmative, and the first alternative of question 4 in the affirmative.

Counsel for First and Fourth Parties—Brown, K.C.—Leadbetter, K.C.—J. Stevenson. Agents—Blair & Cadell, W.S.

Counsel for Second and Third Parties—Macphail, K.C. — Henderson. Agents — Tods, Murray & Jamieson, W.S.

Friday, February 4.

FIRST DIVISION.

MITCHELL-GILL *v.* BUCHAN.

[Sheriff Court at Aberdeen.

Arbitration—Landlord and Tenant—Jurisdiction of Arbiter — Duty of Arbiter to Act in Accordance with Decision of the Court on Question of Law Obtained in Stated Case—Agricultural Holdings (Scotland) Act 1908 (*8 Edw. VII, cap.* 64), *sec.* 11 (3), *and Second Schedule, par.* 9.

In an arbitration under the Agricultural Holdings (Scotland) Act 1908 the landlord objected to the relevancy and competency of the outgoing tenant's claim for compensation. A joint minute of admissions having been lodged, and the arbiter having issued proposed findings repelling the landlord's objections, a case was stated for the opinion of the Sheriff in which the question of law was, "Whether on the facts admitted or proved it can be competently found that the landlord terminated the tenancy without good and sufficient cause and for reasons inconsistent with good estate management." The question having been answered in the negative by the First Division on appeal from the Sheriff-Substitute, and a remit made to the arbiter to proceed, the arbiter proposed to decide the question for himself in the affirmative. *Held* that the arbiter was bound to give effect to the decision of the Court by finding that the landlord did not terminate the tenancy without good and sufficient cause and for reasons inconsistent with good estate management, and to refuse the tenant's claim in so far as relating to compensation for unreasonable disturbance.

The Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64), enacts—Section 11 (3)—"If in any arbitration under this Act the arbiter states a case for the opinion of the sheriff on any question of law, the opinion of the sheriff on any question so stated shall be final unless within the time and in accordance with the conditions prescribed by Act of Sederunt either party appeals to either Division of the Court of Session, from whose decision no appeal shall lie. . . ."—Second Schedule, Rule 9—"The arbiter may at any stage of the proceedings, and shall, if so directed by the sheriff (which direction may be given on the application of either party), state in the form of a special case for the opinion of the sheriff any question of law arising in the course of the arbitration."

On 3rd May 1920 James Ebenezer Esslemont, the arbiter in a reference under the Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64) between Andrew John Mitchell-Gill, the landlord of the holding of Savoch, Aberdeenshire, and William Alfred Buchan, the outgoing tenant, stated a Case for the opinion of the Sheriff at Aberdeen upon certain questions of law which had arisen in the course of the arbitration.

The Case stated—"Among the claims falling to be disposed of by the arbiter, who was appointed by the Board of Agriculture by minute dated 16th October 1917, is a claim by the tenant for £745 as compensation under section 10 of the Act for loss or expense alleged to have been incurred by him on his quitting the holding at Whitsunday 1917 in consequence of the landlord having without good and sufficient cause and for reasons inconsistent with good estate management terminated the tenancy by notice to quit. The landlord disputed the relevancy and competency of the said claim, and it having been agreed that findings on the relevancy and competency of the claim should be issued before dealing with it on its merits, the landlord lodged answers to the tenant's claim to which the tenant lodged replies and the landlord thereafter additional answers. On 12th March 1918 the arbiter after consideration of the statements contained in the said claim, answers, replies, and additional answers, and in a joint minute of admissions, lodged by parties with a view to obviating the leading of evidence, issued proposed findings, indicating his opinion that the landlord had terminated the tenancy without good and sufficient cause, and for reasons inconsistent with good estate management, and proposing to repel the landlord's objections to the relevancy and the competency of the claim. Against this proposed finding the landlord lodged representations in which, *inter alia*, he objected to the proposed findings in respect that 'there is no evidence upon which he (the arbiter) can competently find that the landlord terminated the tenancy without good and sufficient cause, and for reasons inconsistent

with good estate management,' and in which he craved the arbiter to state a case for the opinion of the Sheriff in accordance with the provisions of rule 9 of the Second Schedule of the Act. As finally adjusted, the question of law proposed in the Stated Case for the opinion of the Sheriff was 'Whether on the facts admitted or proved it can competently be found that the landlord terminated the tenancy without good and sufficient cause and for reasons inconsistent with good estate management.' This question the Sheriff-Substitute (Young) on 8th June 1918 answered in the affirmative. On an appeal by the landlord to the First Division of the Court of Session under section 11 (3) of the Act, the following interlocutor was on 10th January 1919 pronounced by said Division, viz., 'The Lords having considered the appeal along with the Stated Case, and heard counsel for parties, recal simpliciter the interlocutor of the Sheriff-Substitute dated 8th June 1918; answer the question of law in the Case in the negative, and remit to the arbiter to proceed: Find the appellant entitled to expenses both in this Court and in the Sheriff Court, and remit the account thereof to the Auditor to tax and to report.' Following upon this interlocutor the arbiter, on 22nd August 1919, heard parties as to its effect on the subsequent procedure in the arbitration, and in particular as to whether the arbiter was bound to find that the landlord had not terminated the tenancy without good and sufficient cause and for reasons inconsistent with good estate management, and to dismiss the claim, the landlord contending that the arbiter is, and the tenant that he is not, bound by said interlocutor. On 22nd September 1919 the arbiter, having carefully considered said interlocutor, issued an interlocutor by which for the reasons stated in the note appended thereto he proposed of new to repel the landlord's objections to the relevancy and competency of the tenant's claim, and to allow to the parties a proof of their averments in respect of said claim, to be led on a date to be afterwards fixed. On 24th October 1919 the landlord presented to the Sheriff an application craving the Court to direct the arbiter to state a Special Case for the opinion of the Sheriff upon the questions of law hereinafter submitted, and on 27th March 1920 the Sheriff-Substitute (Laing) pronounced an interlocutor directing him to do so."

The *questions of law* were — "1. Is the arbiter bound to give effect to the said interlocutor of the First Division of the Court of Session by finding that the landlord did not terminate the tenancy without good and sufficient cause and for reasons inconsistent with good estate management, and to refuse the tenant's claim in so far as relating to compensation for unreasonable disturbance? 2. Is the arbiter, in spite of said interlocutor, entitled to entertain and proceed with the assessment of said claim."

On 24th November 1920 the Sheriff-Substitute (Laing) answered the first question of law in the negative, and the second question of law in the affirmative.

The landlord appealed and argued — Unless the arbiter was bound to give effect in his award to the opinion of the Sheriff or decision of the Court the provisions of the Second Schedule, paragraph (9), of the Agricultural Holdings (Scotland) Act 1908 would be valueless. The words of the paragraph were almost identical with those of section 19 of the Arbitration Act 1889 (52 and 53 Vict. cap. 49), and the weight of English judicial opinion was that the arbiter was bound by the opinion obtained under that section (*British Westinghouse Electric and Manufacturing Company* v. *Underground Electric Railway Company of London*, 1912, 3 K.B. 128, *per* Vaughan Williams, L.J., at p. 138 (quoting the Lord Chancellor and Lord Halsbury in *Pearson & Son, Limited* v. *Great Western Railway Company* (unreported) and 1912 A.C. 673. The purpose of the procedure was to enable the Court to hold a control over the arbiter (*Knight and Tabernacle Permanent Building Society*, 1892 A.C. 298, *per* Lord Halsbury, L.C., at p. 302, Russell, Arbitration and Award, p. 302). That the arbiter was bound to give effect to the opinion or decision was not inconsistent with his being final judge of law and fact (*Knight and Tabernacle Permanent Building Society*, 1891, 2 Q.B. 63, *per* Lord Esher, M.R., at p. 68). Similarly, the Court was bound to give effect in its judgment to the opinions delivered in a hearing before Seven Judges (Court of Session Act 1868 (31 and 32 Vict. cap. 100) section 60), and the opinions of the Common Law Judges had rarely been disregarded by the House of Lords (Denison and Scott's Practice and Procedure of the House of Lords, p. 23). Though the arbiter was final judge the Court could interfere if there was an error on the face of the award (Russell, Arbitration and Award, pp. 142 and 209). The arbiter had fallen into an error as to quality. The opinion of the Sheriff or decision of the Court was of higher quality than that of counsel or a legal assessor. It was a declaration of the law, and if the arbiter disregarded it he would be guilty of misconduct (*Adams* v. *Great North of Scotland Railway Company*, 1890, 18 R. (H.L.) 1, 27 S.L.R. 579; *Mitchell* v. *Cable*, 1848, 10 D. 1297).

Argued for the respondent—An arbiter was final judge of law and of fact. The Agricultural Holdings (Scotland) Act 1908 did not limit the arbiter's jurisdiction. If the Legislature had intended that the arbiter was to be bound to give effect to the opinion of the Sheriff or the decision of the Court it would have said so. It had said so in the Small Landholders' (Scotland) Act 1911 (1 and 2 Geo. V. cap. 49), section 25 (2), by the use of the word "determine" (Mackay's Manual of Practice, p. 308), and in the Workmen's Compensation Act 1907 (6 Edw. VII., cap. 58), Second Schedule (17) (*b*), under which instructions were to be given as to the judgment to be pronounced. A similar provision existed in the Court of Session Act 1868, section 60. There was no such provision in the Agricultural Holdings (Scotland) Act 1908. On the contrary, the use of the words "opinion" and "decision"

indicated that there was no intention to limit the arbiter's jurisdiction. An opinion was different from a judgment—*Cathcart* v. *Board of Agriculture*, 1915 S.C. 166, 52 S.L.R. 108, *per* Lord Skerrington; Court of Session Act 1868, section 63; *Halliday and Others* v. *M'Callum*, 8 Macph. 112; *Macdougall* v. *Lowson's Trustees*, 7 Macph. 976. "Decision" was not a technical word (*ex parte County Council of Kent*, 1891, 1 Q.B. 725, *per* Lord Halsbury, L.C., at p. 728), and was merely equivalent to 'opinion.' The expressions used in the *British Westinghouse Electric and Manufacturing Company* v. *Underground Electric Railway Company of London* did not clearly point to the opinion being binding on the arbiter. What the Act had done was to create a procedure which was purely consultative (*ex parte County Council of Kent*), in which the position of the Court was similar to that of a legal assessor—*Cathcart* v. *Board of Agriculture; Glendinning* v. *Board of Agriculture*, 1917 S.C. 264, 54 S.L.R. 234, The purpose was to assist the arbiter—*ex parte County Council of Kent; Cowdray* v. *Ferries*, 1919 S.C. (H.L.) 27, 56 S.L.R. 220; *Brown* v. *Mitchell*, 1910 S.C. 369, 47 S.L.R. 216—not to control him. He could thus obtain the advice of very high authority in the form not of a judgment but of an opinion (*in re Knight and Tabernacle Permanent Building Society*, 1892, 2 Q.B. 613, *per* Lord Esher, M.R., at p. 615, and Bowen, L.J., at p. 619) and could disregard it if he did not agree with it. Otherwise his functions would be merely executorial. Disregard of the opinion would not amount to misconduct. The circumstances of the case might alter, or the arbiter might think that to give effect to the opinion would cause injustice.

At advising—

LORD PRESIDENT—When it is said that an arbiter in Scotland is the final judge both of fact and law it is not implied that he is entitled either to make the facts as he would like them to be, or to make the law what he thinks it ought to be. Like any other judge he must take the facts as they are presented to him, and the law as it is. Otherwise he would act not as the parties' judge but as their oracle — his function would be not judicial but arbitrary, and his award would be given not according to the principles of justice but according to the caprice of personal preferences. Like other judges of more highly specialised qualifications and experience, he may err both in interpreting the evidence before him and in applying the law to the facts which he thinks are proved; and he being the final judge on the subject-matter of the submission, any such errors and misunderstandings into which he may innocently fall cannot be corrected. But that is all that is meant by saying that he is the final judge of fact and law. If it could be proved that in arriving at his award an arbiter had invented the facts to suit some view of his own, or had fashioned the law to suit his own ideas, then, however innocent in itself might be the eccentricity which had seduced him into such a travesty of judicial conduct, his behaviour would naturally imply that justice had not been done; he would be guilty of that which Lord Watson in *Adams* v. *Great North of Scotland Railway Company* (1890, 18 R. (H.L.) at p. 8, 27 S.L.R. 579) described as misconduct, and his award would be reduced.

An arbitration under the Agricultural Holdings Act 1908 differs in important particulars from an arbitration at common law. It is not the result of a contract of submission voluntarily made by two disputants with a judge of their own selection; it is imposed on the parties by statutory prescription. And while it is generally subject to the same principles as those which apply to a common law submission it is qualified by important statutory incidents. Thus the arbiter if guilty of misconduct can be deprived of his office by the Sheriff. Again the arbiter, if he is in doubt as to any question of law arising in the course of the arbitration, is given the right and power to submit that question in the form of a Special Case for the opinion of the Sheriff, and either of the disputants has the right and power (through the intervention of the Sheriff if need be) to compel the arbiter not merely so to submit such a question to the Sheriff, but also, if dissatisfied with the opinion of the Sheriff, to appeal to this Court for the decision by it of the question of law so submitted. Moreover, the opinion of the Sheriff on the question of law which has arisen is declared by the Act to be final unless one of the parties appeals, and in that case it is enacted that no appeal shall lie from the decision of this Court. Machinery is thus provided through the authoritative legal tribunals for the ascertainment of what the law is on the question which has arisen in the course of the arbitration—in a form which is final for the purposes of the arbitration. Once the arbiter is furnished with the final answer to the question of law he is no more entitled to disregard it or to substitute a different answer more to his liking than he would be to disregard or subvert the facts on which his award is asked, however little to his taste their complexion might be. It remains unhappily possible that consistently with all this the arbiter may err in applying to the facts of the case the law, be it never so clearly ascertained; and as has already been pointed out it is possible that an error of that kind may be beyond correction or remedy. That is a different affair in which much may depend on the generality or specialty of the question submitted. An ascertainment of the law in general terms may in effect be no more than an assistance to the arbiter in arriving at his award, notwithstanding that he is bound to use it. In the present case the question was highly specialised. It was whether the arbiter in certain defined circumstances could competently adopt a certain course, and the decision of the question was in the negative. The arbiter now proposes to decide the question for himself in the affirmative and to adopt the course—without any alteration having occurred in the circumstances—which had for the purposes of this arbitration been finally decided to be

incompetent. He cannot, in my opinion, do this without committing misconduct, for by acting as he proposes he would convict himself of open disregard of the judicial obligations which he assumed when he allowed himself to be nominated as arbiter.

In short, an arbiter is no more above the law than any other subject of the Crown, or than any other kind of judicial officer for that matter; on the contrary he is bound by it. An arbiter under the Agricultural Holdings Act of 1908 is bound by the final answer in law which he obtains from the appropriate tribunal appointed in the Act to determine any incidental question of law which he submits or is required to submit to that tribunal. He is in this regard in very much the same position as the Sheriff when called upon to decide with regard to a closing order under the Housing and Town Planning Act 1909. The Sheriff may and can be required to state in the form of a Special Case for the opinion of the Court of Session any incidental question of law. The words "for the opinion of the Court" mean, said Lord Dunedin in *Johnston's Trustees* v. *Glasgow Corporation* (1912 S.C. at p. 303, 49 S.L.R. 269), that the Court would "give the Sheriff their opinion on a question of law, and he" (that is, the Sheriff) "would not be entitled to disregard it." It is nothing to the point that the act of jurisdiction involved in what the Statute of 1908 calls the "opinion" of the Sheriff, or in what the same statute calls the "decision" of the Court of Appeal, is not one which is capable of receiving direct operative effect by any form of legal diligence or execution. There are other acts of authoritative jurisdiction of which the same can be said. Nor is it to the point that in this country, and perhaps even more in England, the question of the competency of appeals sometimes turns on whether a judicial pronouncement is or is not of the kind on which legal diligence or execution can directly follow.

The first question must in my opinion be answered in the affirmative and the second in the negative.

LORD MACKENZIE—Mr James E. Esslemont, the arbiter appointed by the Board of Agriculture, stated a Case in the course of the arbitration, as required by the statute, in which he set out certain facts and asked the following question—"Whether on these facts it can competently be found that the landlord terminated the tenancy without good and sufficient cause and for reasons inconsistent with good estate management?"

On 10th January 1919 the First Division of the Court of Session, on appeal from the Sheriff-Substitute, answered the question of law in the negative and remitted to the arbiter to proceed.

Mr Esslemont having been told by the Court of Session that the answer to his question was "No," now states that he proposes to proceed with the arbitration on the footing that the answer should have been "Yes." To do so will constitute a plain failure of duty on the part of Mr Esslemont. This is a statutory, not a common law, arbitration. A reference to the Second Schedule, Rule 9, of the Act makes it clear that an arbiter acting under the Act can be compelled to state a case on any question of law arising in the course of the arbitration.

The case so stated is for the opinion of the Sheriff, who is final, unless, as is provided by section 11 (3) of the Act, "either party appeals to either Division of the Court of Session, from whose decision no appeal shall lie." The arbiter now wishes to learn whether he can disregard the decision of this Court. The answer is in the negative.

The first question put must therefore be answered in the affirmative and the second in the negative.

LORD SKERRINGTON—I am unable to persuade myself that the Agricultural Holdings (Scotland) Act 1908 intended to subject landlords and tenants to the inconvenience and expense of litigation, first in the Sheriff Court and then on appeal in the Supreme Court, for no other purpose except in order to furnish an arbiter with a legal opinion which he should be at liberty to disregard if he happened to disagree with it. Nor can I construe the Act as either inviting or permitting an arbiter to override and set at nought the legal rights of one of the parties to the reference, as these rights have been defined for the purposes of the arbitration by a court of law specially selected by the statute for that very purpose. It is, no doubt, true, as the Sheriff says, that an arbiter is *prima facie* the final judge upon every question which may arise in the course of the reference, but this consideration is not very helpful if the submission or Act of Parliament in pursuance of which the arbiter acts not merely authorises but in certain circumstances requires him to adopt a particular method of inquiry as regards certain matters. In such a case it would depend upon the construction of the contract or of the statute whether an arbiter who adopted this special method of inquiry was bound to accept the answer which he thus obtained as conclusive and binding. If the arbiter were merely authorised and in certain cases required to take the opinion of an expert upon a legal, scientific, or technical question, it would probably be difficult to infer from this fact alone that he was bound to accept that opinion as conclusive. The inference might be different if the opinion which he was authorised or required to obtain on a technical question was that of a tribunal established by some trade association and professing to act judicially. In the case before us the arbiter was authorised, and if so directed by the Sheriff was required, by paragraph 9 of the Second Schedule of the Act, to state a Special Case for the opinion of the Sheriff on a question of law, and either party might apply for such a direction. By section 11 (3) of the statute the opinion of the Sheriff on any question so stated is declared to be final unless either party appeals to a Division of the Court of Session, from whose decision no appeal shall lie. Moreover, by section 11 (1) it is enacted that all questions referred

to arbitration shall be determined by a single arbiter "in accordance with the provisions set out in the Second Schedule to this Act." I do not think that this enactment would be complied with if the arbiter refused to act upon the opinion delivered by the Sheriff or by a Division on an appeal from the Sheriff. No doubt the statute does not in so many words declare that it is the arbiter's duty to act upon the law as laid down by the Court for his information, but something must always be left to implication and good sense. There is no express enactment requiring him not to issue his award until he has received and read the opinion of the Court.

The Sheriff has in my view attached altogether undue importance to the forensic distinction between an "opinion" delivered by a court in virtue of what has conveniently been described as a "consultative jurisdiction" specially conferred upon it on the one hand, and an ordinary judgment or decree on the other hand. Although such an "opinion" cannot be enforced or appealed against in the same way as a judgment or decree, it does not follow that it has no binding effect either upon the arbiter or upon the parties to the reference. It is, I think, a contradiction in terms to speak of the Court's "consultative jurisdiction" and to say at the same time that the Court has no power to lay down the law as to which it has been consulted, but merely offers an opinion which all concerned are free to reject. On the other hand, it is a very old and familiar idea that one person may be authorised to lay down the law and another to apply it.

None of the Scottish cases cited by the Sheriff supports the conclusion at which he has arrived, and the same is, I think, true of of the English cases. If Lord-Justice Bowen was right in thinking that the opinion of the Court "binds the arbitrator in honesty or morals to act upon the law as the Court states it" ([1892] 2 K.B. at p. 619), it would seem to follow that the arbitrator would be guilty of misconduct if he wilfully refused so to act. However that may be, I am prepared to decide that it is a condition of an arbiter's appointment under the Agricultural Holdings (Scotland) Act 1908 that he shall not wilfully disregard the opinion of the Sheriff or of a Division delivered upon a question of law submitted by him for the opinion of the Sheriff, and that if he violates this condition he is guilty of misconduct which may vitiate the award. Of course an award may be vitiated by misconduct on the part of an arbiter which was not wilful but was due to a mistake on his part, as was pointed out by Lord Watson in the case of *Adams* v. *Great North of Scotland Railway Company* (18 R. (H.L.) 8). I do not need to consider in the present case how matters would stand if an arbiter through a mistake misapplied the law as laid down for him by the Court.

The Sheriff's note is peculiar in this respect, that it begins by demonstrating that the arbiter is free to act upon his own opinion of the law and to disregard the opinion of the Court. It concludes, however, somewhat inconsistently by warning the arbiter that he may be guilty of misconduct if he avails himself of the freedom which *ex hypothesi* belongs to him. I do not understand this.

I agree with your Lordships that the answers given by the Sheriff to the questions of law were erroneous, and that the first question ought to be answered in the affirmative and the second in the negative.

LORD CULLEN—I agree with your Lordships in the view that the first question presented in the Stated Case should be answered in the affirmative and the second in the negative.

The arbiter's view, as explained in his note, is that the final decision of this Court on the question brought here on appeal from the Sheriff under the former Stated Case is of the same quality as advice received by him from the clerk in the arbitration or from any other private individual to whom he might resort for advice on matters of law entering into the disposal by him of the subject-matter of the arbitration. I am unable so to read the statute. I construe it as plainly meaning that when a disputed question of law arises in such an arbitration and is brought into Court by the statutory Stated Case, the opinion of the Sheriff, if it becomes final, or the decision of this Court, if an appeal from the Sheriff be taken, is an effective adjudication on the disputed question for the purposes of the arbitration. It does not lie either with the Sheriff or with this Court but with the arbiter to pronounce the operative award in the arbitration; but in so far as an adjudication on the question of law is an ingredient in the award, it is in my opinion the statutory duty and obligation of the arbiter in making the award to accept and act on the adjudication contained in the opinion of the Sheriff, if final, or the decision of this Court if there has been an appeal. Accordingly, if the arbiter were to follow the course which he has proposed to himself I think that his award would be open to challenge as being in contravention of the statutory conditions of his jurisdiction.

The Court answered the first question of law in the affirmative and the second in the negative.

Counsel for the Appellant—Macphail, K.C.—R. C. Henderson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Respondent—Macmillan, K.C.—R. M. Mitchell. Agents—Alex. Morison & Co., W.S.