session of an entailed estate; that by section 18 of the Entail Act of 1882 the trustee in the sequestration of the heir in possession is entitled to apply for authority to disentail only if the estates are sequestrated for debt incurred after the passing of this Act; that the main debt founded on by the petitioning creditor was incurred prior to the passing of the Act, and that while other debts amounting to above £100 are also set forth in the affidavit, the bankrupt is entitled to get rid of these as a ground for sequestration in respect that he tendered payment of them prior to this petition being presented, and again in his answers to the petition. He has further tendered payment of them in a minute lodged on 16th March 1903, and that minute he has now at the last moment proposed to amend by tendering consignation. While I thought it right to allow the amendment, it does not, in my opinion, alter the position of parties, for such an offer is not, so far as I can find, warranted by any statutory authority, and must be disregarded. Section 30 of the Bankruptcy Act does not apply, for the effect of the payment there sanctioned is to prevent the award of sequestration. I therefore award sequestration in common form upon the petition as presented, and I think it is premature to consider what effect this may have upon a possible application for disentail.

The Lord Ordinary awarded sequestration in common form.

Counsel for the Petitioner—Constable—Ingram. Agents — Purves & Barbour, S.S.C.

Counsel for the Respondent — Chree. Agent—Thos. J. Cochrane, S.S.C.

Friday, July 17.

FIRST DIVISION.

[Lord Pearson, Ordinary.

LYNCH *v.* CORPORATION OF GLASGOW.

Compulsory Powers—Compensation—Interest of Leaseholder—Chance of Renewal of Lease—Railway—Lands Clauses Acts—Arbitration—Lands Clauses (Scotland) Act 1845 (8 *and* 9 *Vict. c.* 19), *sec.* 17—*City of Glasgow Corporation Improvement and General Powers Act* 1897 (60 *and* 61 *Vict. c. ccxv.*), sec. 9.

In an arbitration under the Lands Clauses Act 1845, or a local Act incorporating its provisions, a leaseholder is not entitled to compensation for the chance or expectation of a renewal of his lease at its expiry.

Expenses—Lands Clauses Acts—Alternative Awards—Action to Expiscate Award—Compulsory Powers—Lands Clauses (Scotland) Act 1845 (8 *and* 9 *Vict. c.* 19), *sec.* 32.

The Lands Clauses (Scotland) Act 1845, dealing with the compulsory purchase of lands, enacts (section 32)—"All the expenses of any such arbitration, and incident thereto, to be settled by the arbiters or oversman, as the case may be, shall be borne by the promoters of the undertaking."

In an arbitration under the Lands Clauses Acts the arbiter issued alternative awards for £1600 and £800, depending on the question whether a particular interest was to be taken into account. In an action raised by the claimant for declarator that he was entitled to £1600 the Court sustained the award for £800. *Held* that the promoters were entitled to expenses in the action.

The Corporation of Glasgow on 24th March 1900, acting under powers conferred upon them by the Glasgow Corporation and General Powers Act 1897, served upon Mrs Mary Lynch, wine and spirit merchant, 263 High Street, Glasgow, a notice to treat under the Lands Clauses (Scotland) Act 1845 (which is incorporated by the Glasgow Act of 1897). The notice set forth that the premises at 263 High Street, of which Mrs Lynch was tenant under a lease for five years, which expired at Whitsunday 1903, were about to be acquired by the Corporation under their compulsory powers, and required from Mrs Lynch "the particulars of your interest in the subjects so required and to be taken and used as aforesaid, and of the claim made by you in respect of the same," and intimated "that the Corporation are now ready and willing to treat and agree with you for the purchase of your interest therein, and as to the amount of compensation to be paid to you in respect thereof."

Mrs Lynch stated her claim "for goodwill, right of licence, fixtures, and fittings," at £5000.

The Corporation having refused to acquiesce in this claim, both parties nominated arbiters. The terms of the nomination of arbiters are quoted in the opinion of the Lord Ordinary, *infra*.

The arbiters appointed Mr David Dundas, K.C., as oversman.

Evidence having been led, Mr Dundas pronounced the following alternative findings—"(*a*) Upon the assumption that such compensation must in law be assessed solely upon the basis of the claimant's interest in the business and premises during the unexpired portion of the said lease, and upon the assumption that her interest must terminate at Whitsunday 1903, when the said lease would naturally expire—Eight hundred pounds (£800); or otherwise and alternatively (*b*) upon the assumption that in assessing said compensation, it is proper to include compensation representing the value in money of such expectation as the tenant reasonably had at the date of the notice served upon her by the Corporation of obtaining a renewal of the said lease after the said term of Whitsunday 1903—Sixteen hundred pounds (£1600)."

Note.—[*After stating the terms of the reference*]—"A question of considerable interest was argued by the counsel for the parties, the determination of which lies at the root of the matter.

"It was urged by the counsel for the Corporation that in assessing compensation no regard must be had to the chance or expectation, whatever it was, of the claimant that her lease might in ordinary course and apart from the intervention of the Corporation have been renewed, and her occupation have been continued for an indefinite period. The subject-matter of the compensation must, it was argued, be strictly limited to the fair value of the tenant's enjoyment of the shop and business during the unexpired period of the lease, *i.e.*, till Whitsunday 1903. On the other hand, the claimant's counsel urged that the question for arbitration was the value of the claimant's business to her as it stood at the date of the notice, including as an element for valuation the contingency of a renewal of her tenancy upon the expiry of the then current lease.

"There is not, so far as I am aware, any direct authority upon the point. A number of English cases were cited—[*Ex pte. Farlow* (1831), 2 B. and A. 341, 36 Rev. Rep. 580, and *Ex pte. Wright*, 2 B. and A. 348, 36 Rev. Rep. 586 (*Hungerford Market* cases); *Rex* v. *Liverpool Railway Co.*, 1836, 4 A. and E. 650, 43 Rev. Rep. 454; *Nadin*, 1848, 17 L.J. Chan. 421]—but they seem to me to have depended upon special considerations and the construction of clauses in special Acts of Parliament. The Scots case of *City of Glasgow Union Railway Co.*, 1870, 8 Macph. 747, 7 S.L.R. 426, came very near to deciding, but I think just missed deciding, the point here raised (see *per* Lord President, 7 S.L.R., at p. 427—'There are really some nice points in this case, but it just falls short of raising them'). In *Fleming* (23 R. 98) the Court held that the arbiter's duty was to value the contingency of a lease being terminated at a break, but no question arose as to the possible renewal of the lease after its natural term expired. The views stated in English text-books—[Cripps, 4th ed., p. 104, Balfour Browne, p. 113]—seem to be rather adverse to the contention of the claimant, but they are based upon the English cases above referred to.

"I think therefore that the question is still an open one, and that I am free to consider it apart from any decision of the Court, Scots or English.

"My opinion is in favour of the view that in the case of a lessee, especially of a lessee of premises licensed for a public-house, which is a peculiar business in many respects, it is the duty of an arbiter to take into account in assessing compensation the whole conditions under which the tenant stood at the date of the notice, and to include in the compensation to be awarded money value for the contingency of a renewed period of tenancy.

"It is, I think, settled law that a claimant is not to be prejudiced by the fact that, owing to the action of the promoters in compulsorily acquiring the property with a view to its demolition, it has become certain that the lease would not and could not have been continued or renewed. This conclusion is, in my opinion, deducible from *Fleming's* case (23 R. 98), and from some of the English cases to which I was referred. See *Dumbarton Water Commissioners*, 12 R. 115, *per* Lord President, at p. 120.

"But as the question raised and argued is not without difficulty, it appears to me that the proper course is to issue alternative findings, so as to leave it open to the Court to decide the question of law, and to avoid, if possible, any risk of the award being set aside upon the ground that it contained money value in respect of interests or contingencies which do not form the subject of legal compensation.

"I propose, therefore, to issue my award upon the alternative basis indicated in the foregoing findings."

Mrs Lynch raised the present action against the Corporation concluding for declarator "that in the circumstances of the present case the pursuer is entitled, as against the defenders, to compensation for the expectation she reasonably had at the date of the notice to treat condescended on of continuing to occupy the licensed premises situated at No. 263 High Street, Glasgow, as tenant thereof beyond the duration of the lease she held at the date of said notice to treat."

The action also contained alternative conclusions for payment of £1600 and of £800.

With respect to her interest in the subjects, the pursuer made the following averments (which were in substance admitted):—"(Cond. 2) The pursuer tenanted the said premises at 263 High Street, Glasgow, under a lease dated 2nd and 4th March 1898, granted by Gossman & Smith, house factors, Glasgow, on behalf of the then proprietors, for a period of five years from the term of Whitsunday 1898. The pursuer had occupied the said premises for nearly ten years prior to Whitsunday 1898. . . . (Cond. 3) The premises occupied by the pursuer consisted of a large shop with cellar attached, and fitted with the usual fittings of the trade. It was situated in a busy locality, and the business carried on by her was a profitable one. The defenders, through the magistrates of the city, who are the licensing authorities, had suppressed several licences in the immediate neighbourhood before the date of said notice to treat, and had thus increased the value of the pursuer's business. But for the intervention of the defenders under their statutory powers, the pursuer would have been allowed to occupy said premises and carry on her said business therein during the rest of her life. In the arbitration proceedings after mentioned her landlords appeared, by their law-agent, and stated that he believed the pursuer was a good tenant, and that but for the acquisition of the property by the Corporation the proprietors would in all probability have continued her tenancy."

The Lands Clauses (Scotland) Act 1845 enacts (sec. 17)—"When the promoters of the undertaking shall require to purchase any of the lands which by this or the special Act, or any Act incorporated therewith,

they are authorised to purchase or take, they shall give notice thereof to all the parties interested in such lands . . . and by such notice shall demand from such parties the particulars of their interests in such lands, and of the claims made by them in respect thereof, and every such notice shall state particulars of the lands so required, and that the promoters of the undertaking are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works."

The City of Glasgow Corporation Improvement and General Powers Act 1897 enacts (sec. 3)—"The Lands Clauses Acts are (except where expressly varied by this Act) incorporated with and form part of the same." Section 9—"Whenever the compensation payable in respect of any lands, or of any interest in any lands, proposed to be taken compulsorily in pursuance of this part of this Act . . . requires to be assessed, the estimate of the value of such lands or interests shall be based upon the fair market value, as estimated at the time of the valuation being made, of such lands and of the several interests in such lands, due regard being had to the nature and the condition of the property."

On 12th March 1903 the Lord Ordinary (PEARSON) pronounced the following interlocutor:—"Finds with regard to the decree-arbitral, pronounced by the oversman in the reference between the pursuer and the defenders that the oversman was entitled in fixing and determining the compensation which the pursuer is entitled to receive from the defenders in full of her claim for compensation in respect of her interest in the lease, goodwill, right of licence, fixtures and fittings, all therein mentioned, to include compensation representing the value in money of such expectation as the pursuer reasonably had, at the date of the notice served upon her by the defender, of obtaining a renewal of her lease after the term of Whitsunday 1903: Finds that on this footing the amount ascertained by the said decree-arbitral, which is dated 24th May 1901, to be due by the defenders to the pursuer is one thousand six hundred pounds: Therefore decerns and ordains the defenders to make payment to the pursuer of the said sum of one thousand six hundred pounds."

"*Opinion.*—The pursuer carried on until May 1900 the business of wine and spirit merchant in licensed premises at 263 High Street, Glasgow. She was at that time tenant of the premises under a lease for five years, which expired at Whitsunday 1903. She avers, and it is not disputed, that she had occupied the premises for nearly ten years prior to Whitsunday 1898, and that she had purchased the goodwill, fittings, and stock of the business from the previous holder of the licence.

"The defenders in the course of executing certain statutory improvements, served her with a notice to treat, dated 24th March 1900, requiring from her the particulars of her interest in the subjects therein mentioned, namely, 'the spirit shop and pertinents situated at 263 High Street.' It appears from the narative of the documents after mentioned that the pursuer thereupon lodged a statement of her claim (which has not been produced) claiming a sum of £5000. The Corporation declined to pay the amount claimed, and tendered a smaller sum; whereupon the parties respectively named arbiters to try the question of disputed compensation. On the documents the dispute appears to be rather as to the amount to be paid than as to the scope or terms of the reference. These terms may admit of construction; but whatever their true construction may be, the respective nominations of arbiters appear to me to express the agreement of parties as to the scope of the arbitration. Of course the governing document, so far as regards the scope of the contract to take land, is the notice to treat. But the ingredients of the claim for compensation may be matter of dispute, even where the subject to be taken is clearly identified, and where they are set out in the documents constituting the arbitration, it is a question of construction whether the arbiters in estimating the compensation are entitled to take into account every circumstance which in their view affects the amount to be awarded, or whether any and what limits are imposed upon their powers.

"Now the nomination of an arbiter for the pursuer narrates that she had stated her claim, 'for goodwill, right of licence, fixtures and fittings,' at £5000, and that the Corporation not having acquiesced in the said claim, it was necessary that the same should be settled by arbitration in terms of the Lands Clauses Act, and she therefore nominated an arbiter on her part 'for settling said disputed compensation.' The Corporation in nominating their arbiter narrate that the pursuer 'claims from' us in respect of her interest in said lease, goodwill, right of licence, fixtures and 'fittings the sum of £5000 sterling'; that they refused to pay that sum, but made a tender to her of £1500 'in full of her said claim,' which she had declined to accept; that the question of disputed compensation between the parties fell to be ascertained in terms of the Lands Clauses Act, and that they thereby nominated and appointed the person named to be arbiter on their behalf concerning said matters, and that in terms of the Act. The arbiters having differed, devolved the reference on the oversman; and in order to give parties an opportunity of having the present question decided in a court of law he stated his decree-arbitral alternatively, as set out *supra*.

"The question is, whether a reference in the terms I have quoted warrants the inclusion of a sum representing the value in money of such expectation as the tenant reasonably had, at the date of the notice to treat, of obtaining a renewal of the lease after Whitsunday 1903. I answer that question in the affirmative. I hold that under the expression 'her interest in the saidl ease, goodwill, and right of licence,' it was not beyond the arbiter's competency to take account of the money value of such

expectation as the pursuer reasonably had of obtaining a renewal of the lease. The inclusion of goodwill and right of licence among the subjects of claim would not of course itself submit them to the arbiters as necessary ingredients in their estimate of the compensation due. The documents which constitute the arbitration must be taken as a whole in order to see what questions both parties have agreed to submit. In this case it appears to me that the documents confer on the arbiters power to go beyond the existing lease, and to assess a sum for the value of goodwill and right of licence on any basis they deem proper if they find it capable of being estimated at all. There is undoubtedly a market for the tenant's interest in a licensed business. It is a thing which is bought and sold every day, and I have no doubt that the chance of getting a current lease renewed, or of the tenant being allowed to remain after its expiry, is an ingredient in the value. I do not say that the oversman was bound to award anything on that head. He might quite possibly have found it incapable of assessment in money. But in the course of a three days' proof evidence was led upon that among other subjects, and there can be no question here that the thing was capable of estimation, because the oversman expressly finds that if this item be taken into account it increases the sum awarded by £800. This precludes the suggestion that this ground of claim is too vague and precarious to be allowed. In some cases it might be so; in this case the oversman finds that it is not.

"It was urged by the defenders that this question could not be regarded apart from the owner's compensation, as if any award in favour of the tenant in respect of the period after the expiry of the lease would necessitate a corresponding deduction from the value of the owner's interest. But that is not so, for the supposition that the lease may be renewed assumes that it is for the benefit of both, and this assumption is (as is well known) specially applicable to the case of licensed premises, where a change of tenant affects the chance of a renewal of the licence.

"This case was argued by the defenders as if it depended entirely on the terms of the Lands Clauses Act. It is true that the nominations of the arbiters bear to be made in terms of that Act. But the terms of this reference appear to me to go considerably beyond anything contained in the Act, even according to its widest interpretation. The Act itself makes no special provision, and uses no special words, applicable to tenancies for more than a year, except the provisions as to severance in sections 112 and 113, and as to the production of the lease in section 115. The tenants in such leases are simply included among 'the parties interested in such lands' referred to in section 17; and that section requires from owners and tenants alike 'the particulars of their interest in the lands taken, and of the claims made by them in respect thereof.' The Act has indeed been construed somewhat liberally in practice, in favour of the claims of persons engaged in trade, whether as owners or as tenants, so as to admit claims which are not strictly for compensation for the interest taken, such as loss of business through compulsory removal, expenses of removal, loss on forced realisation of stock, and the like. These, however, have in some cases been allowed under the expression 'injuriously affected' occurring in section 6 of the Railways Clauses Act, which I understand not to be applicable here. But in any view there seems to have been no reported case since the Act passed in 1845, in which the chance of the sitting tenant or his successor obtaining a renewal of the lease after its natural expiry has been taken into account in the compensation. It is worthy of note that the Lands Clauses Act does appear to recognise a wider right to compensation in the case of tenants for a year. By section 114 a yearly tenant is entitled to compensation 'for the value of his unexpired term or interest . . . and for any loss or injury he may sustain.' I should suppose that these last words are wide enough to cover such a claim as the one now made. But there are no similar words used in the Act as regards tenants for more than a year. The difficulty in applying the Act to this claim in the absence of some such words is put thus, that the subject of compensation must be an interest in the lands taken, and the pursuer's interest in the lands taken is just the right of occupancy until Whitsunday 1903, the chance of her being allowed to remain undisturbed being of too personal a nature to be included in the expression 'an interest in land.' On the other hand, the lessee's interest, which is taken, may accurately be described as a lease, and I cannot doubt that part of the value of the lease of licensed premises to the sitting tenant is the chance of renewal, or of being allowed to remain undisturbed. While the principal Act is not clear upon this matter, it is proper to have regard to a circumstance which was not adverted to in argument, namely, that the Glasgow Improvement Act of 1897, under which I understand the improvement in question to have been authorised, and on which the notice to treat is based, varies the provisions of the Lands Clauses Act in this matter of assessing compensation in respect of any lands or of any interests in any lands proposed to be taken compulsorily. It enacts (section 9, sub-section 1) that 'the estimate of the value of such lands or interests shall be based upon the fair market value, as estimated at the time of the valuation being made, of such lands and of the several interests in such lands, due regard being had to the nature and the condition of the property.' It is true that this clause, when read as a whole, seems to have been framed for the protection of the Corporation, but none the less it prescribes a rule for the valuation of the interests in the lands which is stated somewhat more definitely than is done in the Lands Clauses Act. Now, one of the 'several interests' in the land here in question is a lease, and the question was, what is its fair market value?

If that section applies to this case, I am disposed to think that it makes clear what is left ambiguous on the terms of the principal Act, namely, that all circumstances which affect the 'fair market value' of the pursuer's interest may be taken into account by the arbiter. It is within his competency to decide whether that interest has a market value, and if so, whether that value varies with the chance of obtaining a renewal, and this is practically what I understand the oversman to have affirmed in his second alternative finding. If the claimant be regarded as holding on to the subjects, it is her chance of getting a renewal that is to be estimated. If she is regarded as selling it, it is the purchaser's chance. Neither course being open to her, owing to the Corporation having taken the subjects, it was for the arbiters and oversman in fixing the fair market value to assess the value of that chance, if it was capable of assessment.

"I have looked carefully into the authorities cited, but they do not appear to me to have any direct bearing upon either of the grounds on which I hold that this case, which I regard as exceptional, must be decided in favour of the pursuer."

The defenders reclaimed, and argued—The Lord Ordinary was wrong in treating this as an exceptional case depending on the terms of the nomination of arbiters or of the Glasgow Corporation Act 1897. It was in reality an arbitration under the Lands Clauses Act 1845, and the question was whether under that Act a leaseholder had right to compensation for the expectancy of a renewal of his lease. He had no such right. In claiming such a right he was claiming for an expectancy which necessarily ceased to exist as soon as the undertakers acquired the subjects. There could thus be no expectation that the former owner would renew a lease. All that the Lands Clauses Act provided compensation for was a legal interest in land, plus compensation for disturbance. Although the point had never been definitely decided under the Lands Clauses Act, yet it had been decided against the tenant in questions arising under Acts with provisions practically identical—*The King* v. *Manchester and Liverpool Railway Co.*, 1836, 4 Adol. & Ellis, 650; *ex p. Nadin*, 1848, 17 L.J., Ch. 421; *ex p. Edwards*, 1871, L.R., 12 Eq. 389; *Wadham* v. *North-Eastern Railway Co.*, 1885, 14 Q.B.D. 747, and 16 Q.B.D. 227; *City of Glasgow Union Railway Co.* v. *M'Ewen & Co.*, 1870, 8 Macph. 747, 7 S.L.R. 426; *Solway Junction Railway Co*, v. *Jackson*, 1874, 1 R. 831, 11 S.L.R. 344; *Fleming* v. *Newport Railway Co.*, 1883, 8 App. Cas. 265; *Fleming* v. *District Committee of Middle Ward of Lanarkshire*, November 15, 1895, 23 R. 98, 33 S.L.R. 83; Cripps' Law of Compensation (4th ed.), p. 104; Balfour Browne's Law of Compensation (ed. 1896), p. 113. The principle established in these cases was that the tenant could only claim for the interest he had in his existing lease, not for any chance of renewal—*Ex p. Farlow*, 1831, 2 Barn. & Adol. 341, and the other *Hungerford Market* cases cited against them were decided on the terms of the special Act. They were distinguished in the *King* v. *Manchester and Liverpool Railway Co.* (cited *supra*). Even if it were true that the interest for which the pursuer claimed had a marketable value, that made no difference; the Act did not require the undertakers to pay for every speculative chance. But it was not true; no one would purchase a tenant's right except conditionally on the lease being renewed. The undertakers were entitled, if they pleased, to wait till the end of the lease, and then turn the tenant out; they were not bound to begin their operations at once or to buy out every tenant—*Stevenson* v. *North British Railway Co.*, November 28, 1901, 4 F. 230, 39 S.L.R. 215. If they chose to proceed at once, why should they pay for any right except the actual interest in the lease which the tenant could maintain against them?

Argued for the respondent—This was a case under the special terms as to what should be compensated contained in section 9 of the Glasgow Act 1897. It provided that compensation should be made for "interests" at their "fair market value." The chance of a renewal of the lease was an interest which had a market value. The *Hungerford Market* cases—*ex p. Farlow*, 1831, 2 Barn. & Adol. 341; *ex p.* Wright, 2 Barn. & Adol. 348; *ex p. Still*, 4 Barn. & Adol. 592; *ex p. Gosling*, 4 Barn. & Adol. 596—where compensation was awarded for the expectation of a renewal of tenancy, though the tenant had no contract, showed that an undertaker might have to pay for more than the legal interests of the tenant. *Cooper* v. *Metropolitan Board of Works*, 1883, 25 Ch. D. 472, and *Belton* v. *London County Council* [1893], 68 L.T. 411, were authorities to the same effect. Even if the case were to be taken as raising the general question under the Lands Clauses Act, it was within the powers of the arbiter to compensate for the expectation of a new lease. The case was really analogous to that of a lease with a break, as to which see *Fleming* v. *District Committee of Middle Ward of Lanarkshire, cit. sup.* The argument that the undertakers might wait till the expiry of the lease, and then turn the tenant out, was equally applicable to the case of a break in a lease, but had not prevailed.

At advising—

LORD PRESIDENT—The question in this case is whether an oversman, acting under what appears to me to have been a statutory arbitration, was entitled, in fixing the amount which the pursuer should receive from the defenders in full of her claim for compensation in respect of her interest in a lease of licensed premises in Glasgow, to include a sum representing the value in money of such expectation as the pursuer reasonably had at 24th March 1900, the date of the statutory notice to treat served upon her by the defenders, of obtaining a renewal of her lease after its expiry at the term of Whitsunday 1903.

The following are the circumstances under which the question arises:—The pursuer was, when she received the defenders' notice to treat, tenant of licensed premises at No. 263 High Street, Glasgow, for a period of five years from Whitsunday 1898, so that the natural expiry of her lease of these premises was at Whitsunday 1903.

The defenders, in exercise of powers conferred upon them by the City of Glasgow Corporation Improvements and General Powers Act 1897, gave to the pursuer on 24th March 1900 a notice to treat under the Lands Clauses Acts, which are incorporated with the Glasgow Improvements and General Powers Act 1897, in respect of the lease of her shop already mentioned, and on 2nd August 1900 the pursuer, in response to this notice, made a claim for the sums to which she alleged that she was entitled as compensation.

As the parties were unable to agree in regard to the amount of compensation payable to the pursuer, an arbitration was entered upon in the ordinary way, and in it the pursuer maintained that she was entitled not merely to compensation in respect of the unexpired period of her lease between the date of the notice to treat and the termination of the lease at Whitsunday 1903, but also to compensation representing the value in money of the expectation and prospect which she alleges that she reasonably had at the date of the notice of obtaining a renewal of her lease, or, in other words, of the lessor agreeing to enter into a new contract with her. She contended that the continued enjoyment of her licence, of which she maintained that she had a good prospect, and the goodwill of her business, formed valuable assets which the arbitration tribunal was entitled and bound to take into account in estimating the compensation payable to her. On the other hand, the defenders, who had, as at 15th May 1899, acquired the right of property in the premises of which the pursuer was tenant, contended that she was only entitled to compensation in respect of any loss or damage which she might sustain in consequence of her removal during the period from Whitsunday 1900 to Whitsunday 1903, maintaining that nothing was payable in respect of the period after that date in respect of the exercise by the defenders of the powers which Parliament had conferred upon them.

The Lord Ordinary has held that the reference warrants, and apparently that it requires, that a sum should be awarded to the pursuer representing the value in money of such expectation as she as tenant of the premises reasonably had at the date of the notice to treat of obtaining a renewal of the lease after Whitsunday 1903. His Lordship apparently considers that the documents constituting or setting on foot the arbitration in this case confer on the arbiters power to go beyond the lease which was in force at the date of the notice to treat, and to award a sum in respect of the value of goodwill and right of licence on any basis they may deem proper. He says that the respective nominations of arbiters appear to him to express the agreement of parties as to the scope of arbitration, though of course the governing document, so far as regards the scope of the contract to take land, is the notice to treat.

The defenders, on the other hand, maintain that the question depends entirely upon the City of Glasgow Corporation Improvements and General Powers Act of 1897, and the Lands Clauses Acts which are incorporated with it, and under which the arbiters were nominated, and that the Lord Ordinary is in error in thinking that the terms of the present reference go considerably beyond anything contained or provided for in these Acts, even according to the widest interpretation which could be placed upon them. The effect of sustaining this contention would be to hold that the arbitration was partly statutory and partly at common law, or perhaps rather that it was an arbitration altogether outside of and not governed by the statutes dealing with compulsory taking of lands or real interests in land in Scotland. I am, however, unable to concur in this view, as it appears to me that there was no conventional enlargement of the scope of a lands clauses arbitration, and no surrender by the defenders of any rights conferred upon them by the statutes under which the property occupied by the pursuer was taken. In other words, there was no conventional substitution of anything else for the standard and method of valuation provided by these statutes.

The Lord Ordinary says (I think correctly) that tenants under leases for more than a year are merely brought within the provisions of the Lands Clauses Acts by being included among "the parties interested in such lands" mentioned in section 17 of the Lands Clauses Act of 1845, and from this it seems to me to follow that the only interest which they have, in respect of being deprived of which they can claim compensation under the Act, is that of the unexpired period of their lease or leases. I think that the Lord Ordinary is correct in saying that there has been no reported case since the Act of 1845 was passed in which the chance of a tenant or his successor obtaining a renewal of his lease after its natural expiry has been taken into account in assessing compensation although the case must have occurred thousands of times, and if this be so, the present case involves a new departure of great importance and of far-reaching consequences. It appears to me that such a claim could only prevail if it was established that the chance or hope of obtaining a renewal of a lease after its expiry is an interest in the lands in the sense of the statutes, and I am unable to find any warrant either in the statutes or in the decisions for adopting this view. A lease during its currency has some of the attributes of a real right or interest in lands, but the chance of its being renewed by the personal volition of the lessor does not seem to me to be in any reasonable sense an interest in land for the purposes of such a question as the present.

In this connection it is important to keep in view that the case of a yearly tenant is specially dealt with by section 114 of the Lands Clauses Act of 1845, which declares that a tenant in possession of lands "having no greater interest therein than as a tenant for a year, or from year to year" shall be entitled to compensation for the value of his unexpired term or interest in such lands, "and for any just allowance which ought to be made to him by any incoming tenant," and for any loss or injury which he may sustain. I do not think that even in the case of a yearly tenant the words just quoted would cover a claim of the nature made in this case, but even if they were held to do so, the express provision relative to the case of a yearly tenant would in my judgment emphasise by contrast the difference between the case of such a tenant and that of tenants holding under leases of longer duration. As I have already stated, tenants under such longer leases can only claim in respect of these leases as giving them a real interest in the lands, and this being so, it appears to me that both upon principle and upon a true construction of the statutes the chance of a tenant obtaining upon the expiry of his lease a renewal of it to which he has no legal right is not in any reasonable sense an interest in the lands. I am of opinion that in order to an interest in lands becoming a subject of valuation under the Acts it must be a real interest depending upon a legal right which existed at the date of the statutory notice under which the lands or the claimant's interest in them were taken. A chance of a tenant obtaining a renewal of a lease by the goodwill of the proprietor is not, in my judgment, an interest in the lands in the sense of the Acts.

It appears to me that the quality of the interest requisite to give rise to such a claim as is made in the present case is well explained by Lord Watson in the case of *Fleming* v. *Newport Railway Co.*, 8 A.C. 265. It must be a legal interest entitling the party to the thing in respect of which his claim is made as matter of right. I am not aware of any case in which the chance of a third party, under no obligation to grant or to continue a right, doing so from favour has been held to give rise to a claim for statutory compensation. It is a personal matter altogether detached from the subject of the statutory purchase, which in my judgment comprises exclusively lands and legal interests in lands.

The pursuer relied strongly upon the case of *ex parte Farlow* (1831) 2 Barn. & Adol. 341, but this was decided under the Hungerford Market Act (11 Geo. IV. c. 20), which contained a special clause which provided that all tenants for years, or from year to year, "or at will," who shall sustain any loss, damage, or injury in respect of any interest whatsoever for goodwill, improvements, tenant's fixtures, or otherwise "which they now enjoy, by reason of the passing of this Act" shall be entitled to compensation, to be assessed if necessary by a jury. The words of this clause are much more favourable to a claim of this kind at the instance of a tenant than those of the Lands Clauses Acts or the other Acts passed in or since 1845; and in another case under the same Act—*ex parte Wright*, 2 Barn. & Adol. 348—in which the other conditions of holding were somewhat different from those in *Farlow's* case, the Court discharged the rule. None of these cases appear to me to go the length of holding that the mere probability of the continuance of a tenancy without disturbance is a ground for claiming compensation. In this connection I may also refer to the case of *ex parte Nadin*, 17 L.J., Ch. 421.

For these reasons, I am of opinion that the Lord Ordinary's interlocutor of 7th March 1903 should be recalled, and that the pursuer should have decree only for the £800, which the defenders have all along been willing to pay.

LORD M'LAREN—I concur in the judgment of your Lordship. There are three points which I hold to be established—First, as to the decisions, I think the tenant's case is largely rested upon decisions or expressions of judicial opinion in the English Courts. Now, I am satisfied that there is no judicial authority in support of the present claim—no authority for holding that it is an element in awarding compensation to a tenant that he may possibly have his lease renewed.

Next, I think that we ought not to consider at all the cases that may arise of tenants who do not hold under a lease, because, as was pointed out by Lord Kinnear in the course of the argument, such cases may include two kinds of contract. There may be tenants who hold for one year and who have no expectation of having their tenure renewed, and there may be cases where the tenure is really of this nature that it is an indefinite contract of location with a right to either party to terminate it on giving notice. In such cases it may be that the language of the Lands Clauses Consolidation Act applicable to interests other than those of leaseholders may be construed to include claims founded on the expectation of the licence being continued. In the present case I agree that the language of the section is broad enough to cover a claim of expectancy, but then it must be an expectation founded on legal right. We had an instance of that kind of expectation in the case of a lease with a break, where it was decided by this Division of the Court that the chance that the landlord might use his power to bring the contract to an end is a matter the arbiter is entitled to take into account in calculating the compensation. Now, in the present case the contingency which the arbiter proposes to value is the chance that at the termination of the lease two persons who are free to renew their relation, and are equally free to decline to renew it, might agree to enter into a new relation for the same or a different term of years. That is not a contingency founded on any right, for it is admitted that there is no obligation to renew the lease, and

therefore I am of opinion that the chance of renewal is not an element which can be taken into account in valuing the tenant's interest in terms of the statute.

LORD KINNEAR—I agree with your Lordships. I think that the interest in land for which the Lands Clauses (Scotland) Act provides compensation must be a legal interest in land, by which I mean a real interest in land such as will enable a person in whom it is vested to maintain a right in law to prevent the promoters interfering with his occupation, or entering on the occupation of the subject themselves until the terms on which he may be excluded have been satisfied. The position of promoters who have acquired lands subject to leases seems to me clear enough. If it be supposed that they have acquired the land from the owners by voluntary agreement or otherwise, and paid the price of it, they then come into the position of owners of land subject to the existing leases. They may or may not require to compensate the leaseholders according as they resolve to interfere or not to interfere with the leaseholders' rights. They may consider what are the terms of the existing leases and how long they have to run; and with reference to any one or more of them they may resolve that they will not disturb the lessee in the meantime, but that they will give him notice to quit at the termination of his lease. Now if the promoters give the ordinary legal notice to determine the lease at its expiry it seems to me out of the question to suggest that the tenant can have any claim for compensation for the loss of a hope which he had previously entertained of his lease being renewed. He has no right to remain in occupation after the determination of his lease, and therefore there can be no ground for compensation. I do not think it makes any difference in that position as between the promoters and a tenant that instead of waiting for the determination of the lease according to its terms, they have exercised their right to put an end to it on payment of compensation for the unexpired term, because if they resolve to buy up the tenant's right in the subsisting lease they put themselves and him, when his right has been bought, exactly in the same position as if his lease had run out, and he has no better position when the unexpired term of his lease has been fully compensated to claim compensation as for a hope of renewal than he would have had if the lease had run out. The legal right which he had is exactly as he had before, and *ex hypothesi* that has been compensated and the hope of renewal was nothing more than a chance that if he chose to ask for renewal his landlord might grant it. But when the promoters have been put in the place of the landlord the effect of the purchase which makes them landlords in their turn is no lower in respect of the right of the past tenant for renewal than the effect of purchase by any other purchaser. In any case the tenant may ask for a renewal, and in any case the landlord may refuse to grant it. And therefore it simply comes to this, that the tenant claims to have compensation for what he calls an interest, which according to his own statement of it is conditional on the absolute will and pleasure of the landlord for the time being. It seems to me to be out of the question to say that as between landlord and tenant there can be any obligation to pay the tenant for the loss of such an interest as that, if indeed it can be dignified with the name of interest at all—it is nothing but a chance. To say that if things had remained unaltered some third person might have been willing to pay money for such a chance seems to me to be altogether irrelevant to the question, because whatever value the supposed purchaser might attach to the hope of a renewal of the lease cannot affect the proprietor—cannot raise a claim that is good against the proprietor, who *ex hypothesi* has an absolute right to refuse renewal if he chooses; and to require a railway company to pay for the exercise of that right seems to me to be requiring them to pay for something that they had already paid for when they bought and paid for the land, because it is inherent in the right of property which they acquired by purchase of the lands that they shall be entitled to decline to renew any lease that they do not choose to renew after the expiry of the legal term.

Now, that view, which is in accordance, I think, with what has been said by your Lordship, seems to me to be in accordance also with both the statute and the authorities. I can find in the Lands Clauses Act no indication of any other interest which will entitle the tenant to compensation except his interest in respect of the unexpired term of his lease. That is the condition expressed in the 115th section by way of defining the interest which a tenant who has a larger interest than from year to year would be entitled to make good against the promoters, and I think it is also entirely in accordance with the decisions. I agree with your Lordship that the cases in reference to Hungerford Market are of importance as illustrating the true distinction between a statute which will allow interests of that kind to be taken into account and the Lands Clauses Act.

There are two points it seems to me to be observed on these cases. In the first place, the persons claiming compensation enjoyed an interest, which although it nominally subsisted from year to year only might be considered—and I think was considered—as in reality permanent but for the passing of the Act. But what is more important is that the words of the statute were not only larger and more extensive than any words we have to consider, but they were expressly applicable to such an interest as that, because the persons in occupation were entitled to be compensated for any interest whatsoever—for goodwill or otherwise. Now, when these cases are contrasted with the case of *The King* v. *Liverpool and Manchester Railway Company*, and again with the case of *Nadin* to which your Lordship referred, the point is brought out very clearly in the opinions of the

Judges. In the case of the *Liverpool Railway*, which was decided before the passing of the Lands Clauses Consolidation Act for England, but which was decided on a private Act, in which rights of compensation were expressed in very much the same terms, it was held that the probability of the non-renewal of a lease in virtue of a promise made to that effect by the landlord, but without any covenant for renewal, was not a proper subject for compensation, and in support of the claim for compensation the Hungerford Market cases were cited, but Lord Denman points out the distinction when he says this interest is merely a hope of renewal. It is different from the cases under the Hungerford Market Act, because the words in that statute antecedent to "goodwill" were sufficient to cover the legal interest, and therefore there must be ascribed to the word "goodwill" some meaning that would cover an interest outside the legal interest, such as the chance of obtaining some other benefit after the legal interest had come to an end. I think that the two cases to which I have last referred in contrast with the Hungerford Market cases are authorities for holding that so far as compensation under the Lands Clauses Act is concerned it is necessary that the party claiming should show a legal interest; and in the second place, a claim for what is called goodwill as against the landlord is not a legal interest at all which can be compensated. The Lord Ordinary suggests that the reference may be enlarged by the terms of the nomination of arbiters. If the umpire had considered these terms in the way in which the Lord Ordinary suggests these may be construed, and had decided absolutely that the claimant was entitled to compensation for the loss of a hope of renewal, then a question would have arisen whether the submission was to be governed by the terms of the Lands Clauses Compensation Act, or whether the *fines compromissi* had been extended by the terms of the claimant's nomination of an arbiter. If it could have been held that there was a larger reference to the arbiters and the oversman than the Lands Clauses Consolidation Act contemplated, which as at present advised I must say I should have great difficulty in holding, then an argument might have been raised by the claimant that the arbiter's decision on that point of law was final, and that the Court could not interfere. But no question of that kind can arise in the present case. No question can arise even as to what the *fines compromissi* are, or whether the terms of the nomination enlarged the subject for arbitration, because the arbiter has not decided the question, but on the contrary, following the course which was pointed out by Lord President Inglis as a proper one for an arbiter to take in such circumstances, he has given an alternative award, and has left the question we are now considering open to the decision of the Court. By the terms of the award the question is open. That award is accepted by both parties, and therefore I agree in thinking that the only question we have to consider is whether the Lands Clauses Consolidation Act and the Glasgow Act with which it is incorporated give a legal claim for compensation in respect of the hope or chance of a renewal of the lease in question. I think they do not, for the reasons which have been stated by the Lord President.

Both parties moved for expenses.

Counsel for the pursuer and respondent argued that the action was incident to the arbitration, and therefore that the expenses should be borne by the promoters, under section 32 of the Lands Clauses (Scotland) Act 1845 (quoted in rubric).

The Court decerned in favour of the pursuer for £800; *quoad ultra* assoilzied the defenders from the conclusions of the action, and found the pursuer liable in expenses.

Counsel for the Pursuer and Respondent—Wilson, K.C.—Crabb Watt, K.C.—Adamson. Agents—W. & J. L. Officer, W.S.

Counsel for the Defenders and Reclaimers—Ure, K.C.—J. R. Christie. Agents—Simpson & Marwick, W.S.

Friday, July 17.

FIRST DIVISION.

[Sheriff-Substitute at Glasgow.

COWIE *v.* DIEZ.

Process—Appeal for Jury Trial—Proof or Jury Trial—Amount of Damages Sole Question at Issue.

In an appeal for jury trial in an action brought in the Sheriff Court at the instance of a stevedore against the owners of a ship, concluding for damages for personal injury resulting from an accident at Glasgow docks, the defenders admitted their liability for the accident, and the only question remaining was the amount of damages. The defenders moved that the case should be remitted for proof in the Sheriff Court. The pursuer opposed this motion on the ground that the case was suited for trial by jury, and that the amount of damages was eminently a jury question. The Court *ordered* issues.

John Cowie, foreman stevedore, 16 North Avenue, Govan, raised this action against Captain Manuel Diez, captain of the steamship "Rui Perez," concluding for £300 as damages for personal injury sustained by him while working on the said ship in Glasgow harbour.

On 24th March 1903 the Sheriff-Substitute (BALFOUR) allowed a proof, and the pursuer appealed to the Court of Session for jury trial.

On the motion of the defender the case was sent to the Summar Roll. The defender put in a minute admitting liability for the accident from which the pursuer's injury resulted, but not making any tender.