Counsel for the Complainer—Christie, K.C. — Ingram. Agents — Mackenzie & Fortune, S.S.C.

Counsel for the Respondent—The Solicitor-General (Morison, K.C.) — Morton. Agent—The Crown Agent (Sir William S. Haldane, W.S.)

COURT OF SESSION.

Wednesday, May 20.

SECOND DIVISION.

[Scottish Land Court.

WHYTE *v.* STEWART.
STEWART *v.* WHYTE.

Landlord and Tenant—Small Holding—Application by Landlord to Resume Possession—Death of Applicant—Appeal—Competency—Small Landholders (Scotland) Act 1911 (1 *and* 2 *Geo. V, cap.* 49), *sec.* 32 (15).

A landlord presented an application to the Land Court for authority to resume a holding, and being dissatisfied with the order pronounced requested the Land Court to state a special case for appeal to the Court of Session. Before the case was finally adjusted the appellant died.

Held that his heirs in heritage were entitled to insist in the appeal.

Landlord and Tenant—Small Holding—Application by Landlord for Resumption of Holding—Reasonable Purpose—Postponement of Resumption—Competency—Small Landholders (Scotland) Act 1911 (1 *and* 2 *Geo. V, cap.* 49), *secs.* 19 *and* 32 (15).

Held that where a landlord applied for authority to resume a holding, and the Land Court was satisfied that his purpose was a reasonable one, the Land Court was bound to authorise resumption as soon as reasonably practicable, and was not entitled to postpone it.

Landlord and Tenant—Small Holding—Application by Landlord to Resume Possession—Payment of Compensation—Condition-Precedent—Assessment—Small Landholders (Scotland) Act 1911 (1 *and* 2 *Geo. V, cap.* 49), sec. 32 (15).

Held that where the Land Court authorised a landlord to resume a holding it was incompetent to make payment of compensation to the tenant a condition-precedent of resumption.

Held further that compensation fell to be assessed by arbitration and not by the Land Court, and, accordingly, that it was incompetent for the Land Court to appoint the tenant to lodge with the Court a statement detailing the subjects of his claim.

Landlord and Tenant—Small Holding—Equitable Rent—Small Landholders (Scotland) Act 1911 (1 *and* 2 *Geo. V, cap.* 49), *sec.* 32 (7).

Observations (*per* Lord Salvesen) on considerations which the Land Court may not legitimately entertain in fixing equitable rent.

The Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49) enacts:—Section 32 (15)—"Without prejudice to any agreement between the parties, the Land Court may, on the application of the landlord, and upon being satisfied that he desires to resume the holding or part thereof for building, planting, feuing, or some other reasonable purpose having relation to the good of the holding or the estate (including any purpose specified in section nineteen of this Act), authorise the resumption thereof by the landlord, subject to the payment of the like compensation to the tenant in respect of improvements on or in connection with the land renewed, to which a tenant would be entitled under the Agricultural Holdings (Scotland) Act 1908, on the determination of his tenancy. . . ."

By section 19 it is, *inter alia*, provided that resumption by a landlord for the purpose of personally residing on the holding, being his only landed estate, shall be deemed a reasonable purpose.

This was a Special Case stated by the Scottish Land Court for the opinion of the Second Division of the Court of Session in conjoined applications at the instance of (1) Andrew Whyte, Davaar, Brightons, Polmont Station, for resumption of an entire holding at Lawyett, Polmont Station, occupied and possessed by David Stewart, residing at Lawyett, near Wallacestone, Polmont, and (2) said David Stewart, to determine whether he was a landholder or a statutory small tenant in and of said holding, and for consequent orders.

The Case stated—"1. The said Andrew Whyte, landlord of the farm of Lawyett, let the said farm (excepting one dwelling-house) to the said David Stewart by lease, dated 6th April 1906, for the period of seven years from and after the term of Whitsunday 1906, at a rent of forty-five pounds, payable at the two terms of Whitsunday and Martinmas in equal portions, beginning the first term's payment at Martinmas 1906, and the next payment at Whitsunday 1907. The said farm extends to 27 acres or thereby. The said David Stewart occupied said farm as resident cultivating tenant during that period, and is still in possession thereof.

"2. On 21st August 1912 the said David Stewart applied to the Scottish Land Court, the prayer of the application being in the following terms:—'I hereby apply to the Court for an order determining whether I am a landholder or a statutory small tenant in and of the holding specified in the schedules hereto annexed, and for an order fixing a first fair rent therefor, or, alternatively, for an order fixing a first equitable rent therefor, and the period of renewal of my tenancy thereof.'

"3. On 6th May 1913 the said Andrew Whyte applied to the Scottish Land Court for authority to resume possession of the whole of said farm as let to David Stewart for the purpose of personally residing thereon, the said farm being his only landed estate. The prayer of the application is in

the following terms:—'I hereby apply to the Court under reference to the annexed statement of facts, for an order authorising me to resume the entire holding at Lawyett, Polmont Station, Stirlingshire, extending to 27 acres, 0 roods, 0 poles arable, and 0 acres, 0 roods, 0 poles outrun, or thereby, presently occupied and possessed by the respondent David Stewart, upon such terms and conditions as to compensation or otherwise as the Court may think fit, and requiring him, upon adequate compensation being made, and such other terms or conditions as the Court may impose being fulfilled, to surrender the said holding at Whitsunday next, or at such other date as the Court may determine.'

"4. The said applications were conjoined, evidence was led, parties' procurators heard, and the holding was inspected by the Court.

"5. It was maintained by the said deceased Andrew Whyte, respondent in the tenant's application, that (1) the tenant was not a landholder but a statutory small tenant; (2) that the applicant had failed to maintain the fences upon the holding in good condition and repair, and failed to cut and trim the hedges annually in terms of the lease, and therefore that no renewal should be granted. The Court held it proved that the tenant was not a landholder but a statutory small tenant. The landlord failed to satisfy the Court that there was any reasonable ground of objection to the tenant under section 32 (4) of the Act of 1911.

"6. No objection was taken to the competency of the landlord's application for resumption. No motion to amend the said application was made by the applicant therein. No question was raised as to the powers of the Court to deal with the application in terms of the prayer thereof. The applicant Andrew Whyte contended that resumption should be authorised at the term of Whitsunday 1914; the respondent therein, David Stewart, contended (1) that resumption should be refused, or (2) if authorised, that resumption should be postponed for at least three years.

"7. It was proved that Lawyett was the only landed estate of the said Andrew Whyte, and that he desired to resume the entire holding let to the said tenant for the purpose of personally residing thereon and cultivating the holding, that the said Andrew Whyte had been tenant and occupier of Lawyett from 1872 to 1905 at an annual rent of £15; that he purchased it in 1905 and occupied it until he let it (excepting one dwelling-house) to David Stewart, as already stated; that intimation was made by him in August 1912 to the said tenant that he would not renew the lease on its expiry at Whitsunday 1913; that at the date of the hearing the said Andrew Whyte had retired from business and resided at Davaar in a house belonging to his eldest son. It was not proved that there was any urgency for resumption at an early date.

"8. It was proved that the said tenant David Stewart had at his entry got this farm in poor condition and without sufficient buildings for proper working; that he had erected and altered buildings at his own cost for its proper working, and had incurred considerable expenditure in bringing the farm into good condition; that the farm was in good condition and well worked at the date of the application and of the inspection; that the said buildings had been erected by the tenant without objection by the landlord, but without the landlord's written consent, and that the farm had only begun to yield an adequate return for his expenditure in bringing it into condition during the last two years or thereby of the said lease; that a further period was reasonably necessary to enable him to recoup himself for the inadequate return obtained during the earlier years of said lease.

"9. The Land Court thereafter issued an interlocutor in the following terms:—'*Edinburgh, 8th November* 1913.—The Land Court having considered the evidence adduced and resumed consideration of the conjoined applications, Find that the applicant David Stewart is a statutory small tenant in and of the holding described in the application, and that no reasonable ground of objection to him as tenant has been stated: Therefore find that he is entitled, in virtue of the 32nd section of the Act of 1911, to a renewal of his tenancy and to have an equitable rent fixed; and having considered all the circumstances of the case, holding, and district, fix and determine the period of renewal as at and from the term of Whitsunday 1913 to Whitsunday 1915, and the annual equitable rent payable by the applicant at twenty-five pounds sterling per annum, to run from the term of Whitsunday 1913 for the said period: Find with regard to the application by the landlord Andrew Whyte for resumption of the holding that it has been proved to the satisfaction of the Court that the applicant desires to resume the holding for the reasonable purpose of personally residing thereon, the said holding being his only landed estate: Therefore authorise and empower the said Andrew Whyte to resume the said holding at the term of Whitsunday 1915 on compensation for resumption being paid to the tenant, the said David Stewart, as provided by section 32 (15) of the Act of 1911, and on such compensation being paid require the said David Stewart to surrender his said holding at said term to the landlord; and failing parties coming to an agreement as to the amount of compensation payable, appoint the tenant the said David Stewart to lodge by or before 1st April 1915 a statement setting forth in detail the subjects for which compensation is claimed; and continue the case for further procedure.

"'(Signed) N. J. D. Kennedy
Alex. Dewar.
E. E. Morrison.'

"'*Note.*—With regard to resumption, the 15th sub-section of section 32 of the Act of 1911 determines the compensation payable to a statutory small tenant for resumption when resumption is authorised.

"'But the leading section which introduced resumption—section 2 of the Crofters Holdings Act of 1886—taken along with the explanatory 19th section of the Small Landholders Act 1911, regulates other terms and

conditions which may be imposed. Resumption of an entire holding at a short date has never been authorised. In the whole circumstances of the present case we think it would not be equitable to authorise resumption earlier than Whitsunday 1915. As regards the landlord there is no urgency for resumption. '(Intd.) N. J. D. K.
(Sgd.) ALEX. DEWAR.
(Intd.) E. E. M.'

"10. The said Andrew Whyte died during the adjustment of this Special Case, and his daughter Miss Margaret Johnston Whyte and his son Andrew Whyte have been sisted as parties to the conjoined applications and requisition for a Special Case.

"11. It is maintained for them that the Scottish Land Court have misinterpreted the statute, and that the foregoing decision is erroneous in law in respect that (1) it did not authorise the said Andrew Whyte to resume possession till the term of Whitsunday 1915, notwithstanding that the Land Court held it proved that he had satisfied them that he desired to resume possession for a reasonable purpose in terms of the statute, and that he should have been allowed to resume possession from Whitsunday 1914 at latest; (2) the said decision authorises resumption only on and after payment of 'compensation for resumption,' and failing the parties coming to an agreement as to the amount of compensation payable, appoints the said David Stewart to lodge with the Scottish Land Court by or before 1st April 1915 a statement setting forth in detail the subjects for which compensation is claimed, and continues the case for further procedure. It is maintained for the said parties that the Land Court in granting authority to resume were not entitled to do more than attach the condition, in terms of the statute, that it should be subject to the payment of the like compensation by the landlord to the tenant in respect of improvements which a tenant would be entitled to under the Agricultural Holdings (Scotland) Act 1908 on the determination of his tenancy. It is further maintained that the Scottish Land Court had no power to deal with or fix the amount of compensation payable by the landlord to the tenant, that compensation falling to be determined by arbitration in accordance with the provisions of the Agricultural Holdings (Scotland) Act 1908, as varied by section 32 of the Small Landholders (Scotland) Act 1911.

"12. It is maintained by the tenant David Stewart that (1) the order by the Land Court was competent, (2) that if any change in the period for which renewal was granted, and to the expiry of which resumption was postponed, were now to be made, the period should have been longer than the two years allowed by the Land Court.

"13. Rule 108 of the Rules of the Land Court provides:—'When the opinion of the Court of Session has been received by the principal Clerk, the Court shall, if and in so far as necessary to bring their decision on the matters in regard to which the said question or questions of law have arisen into conformity with the said opinion, recal, amend, or vary any order pronounced in the application, or shall make such new order or proceed otherwise therein as may be just.'

"14. The Case has been stated on the questions raised after the order of the Land Court, dated 8th November 1913, had been pronounced, at the request of the said Andrew Whyte and his representatives. The Land Court desire to bring under the notice of the Supreme Court that, by the death of the said Andrew Whyte the whole purpose of his application for resumption in order personally to reside thereon has failed, and that the more convenient course would have been for his representatives to apply to the Land Court for a re-hearing if resumption for the purpose of personal residence of both or either of them was desired."

The *questions of law* were—"1. Whether it was competent for the Land Court to pronounce in the said application for resumption an order postponing resumption until the term of Whitsunday 1915? 2. Whether it was competent for the Land Court in the said application to make resumption conditional on payment of compensation being made by the landlord prior to the tenant's surrender of possession? 3. Whether it was competent under the said application for the Land Court to appoint the tenant respondent in said application to lodge a statement detailing the subjects for which he claimed compensation?"

Argued for the appellants — (1) It was competent for the landlord's heirs in heritage to prosecute the appeal, for had the Land Court made the proper order he would have recovered possession before his death and the right to the property would have transmitted to his heirs. (2) It was incompetent for the Land Court to postpone resumption until Whitsunday 1915. The power to impose terms and conditions of resumption given under section 2 of the Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict. cap. 29) was not imported into section 32 (15) of the Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49). When a power was conferred on an authority to be exercised for a reasonable purpose, the authority was bound to exercise the power provided that the purpose was reasonable. The authority had no discretion to decline to exercise the power—*Gray* v. *St Andrews and Cupar District Committees of Fifeshire County Council*, 1911 S.C. 266, *per* Lord Salvesen at 277, 48 S.L.R. 409, at 415; *Walkenshaw* v. *Orr*, January 28, 1860, 22 D. 627; *Rex* v. *Mitchell*, [1913] 1 K.B. 561; *Eyre* v. *Corporation of Leicester*, [1892] 1 Q.B. 136; *Nichols* v. *Baker*, 1890, 44 Ch. D. 262, *per* Cotton, L.J., at 269; *Julius* v. *Lord Bishop of Oxford*, 1880, 5 A.C. 214; *Macdougall* v. *Paterson*, 1851, 11 C.B. 755. By section 19 of the Act resumption for the purpose of "personally residing" was a "reasonable purpose." The Land Court was not entitled to order postponement as a form of compensation to the tenant, because the compensation to which the tenant was entitled was otherwise expressly provided for by section 32 (15). Alternatively, even if the Land Court had a discretionary power to

postpone resumption, it was bound to exercise the discretion reasonably—*Gardner* v. *Jay*, 1885, 29 Ch. D. 50, *per* Bowen, L.J., at 58. This it had failed to do, inasmuch as it had postponed resumption for two years, and had taken £20 off the rent. (3) It was incompetent for the Land Court to make resumption conditional on payment of compensation. That might result in an indefinite postponement of resumption if there were delay in fixing the amount of the compensation. Section 32 (15) provided for compensation on resumption, but the compensation was "the like compensation . . . to which a tenant would be entitled under the Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64)," and under that Act the payment of compensation was not a condition-precedent. (4) It was incompetent for the Land Court to appoint the tenant to lodge a statement of his claim for compensation. Section 32 (5) enacted that, except so far as varied by section 32, the Agricultural Holdings (Scotland) Acts 1908 and 1910 should apply to statutory small tenants, and by the former Act the compensation fell to be assessed not by the Land Court but by an arbiter.

Argued for the respondent—(1) It was incompetent for the appellants to prosecute the appeal. A landlord had no right of resumption. He had merely a right to ask authority for it in certain events. The authority to resume which the Land Court had given was given for purely personal reasons, and accordingly since the landlord died before he actually resumed, the authority fell with his death although it could be renewed. In the same way a bastardy order in England fell where the mother died before the order was disposed of. A deceased party's representatives could not proceed with an action if the decree would be of no avail to them—*Martin* v. *M'Ghee*, March 27, 1914, 51 S.L.R. 499. Since the tenant had obtained a decision in his application entitling him to continue in possession for three years, which was necessarily equivalent to a refusal of the landlord's claim for resumption, and since the decision in the tenant's application was not brought under review in the present case, it was therefore incompetent, standing that decision, to prosecute the appeal. (2) It was competent for the Land Court to postpone resumption until Whitsunday 1915. Section 32 (15) gave the Court a discretion to grant or refuse resumption. There must be an urgent reason for resumption by the landlord, for the Act intended fixity of tenure—section 32 (4). Since the Legislature had not fixed any definite time, it was in the discretion of the Land Court to fix it. By postponing the time the Court had not adjected a condition to the resumption in the sense of section 2 of the Act of 1886. (3) It was competent for the Land Court to make the resumption conditional on payment of compensation. Its unlimited discretionary powers with regard to resumption involved a power to make payment a condition-precedent of resumption. That was the meaning of section 32 (15). (4) It was competent for the Land Court to appoint the tenant to lodge a statement of his claim for compensation. Even if it were the duty of an arbiter to assess the compensation, the Land Court, having received the statement, could remit it to an arbiter.

At advising—

LORD DUNDAS—The material facts in this case may be quite briefly summarised. By lease dated 6th April 1906 Andrew Whyte (now deceased) let the farm of Lawyett, extending to 27 acres, to David Stewart (whom I shall call the respondent) for seven years from Whitsunday 1906 at a yearly rent of £45. Stewart occupied the farm as resident cultivating tenant during these seven years, and is still in possession. The Small Landholders (Scotland) Act received the Royal assent on 16th December 1911, and came into operation on 1st April 1912. On 21st August 1912 Stewart lodged an application with the Land Court for an order determining whether he was a landholder or a statutory small tenant in the farm, and for an order fixing a first fair rent, or alternatively a first equitable rent therefor, and the period of renewal of his tenancy. Answers were lodged by Whyte, in which he expressed his desire to resume possession of the farm, and on 6th May 1913 he presented a separate application to the Land Court—apparently as a matter of precaution, having regard to No. 70 of the Land Court's rules—for an order authorising him to resume possession at Whitsunday 1913, or at such other date as the Land Court might determine. The prayers of both applications are printed in the Special Case, and seem to be framed in accordance with the forms scheduled to the rules issued by the Land Court in virtue of section 3 (11) of the Act of 1911. The applications were conjoined, evidence was led before the Land Court on 24th May 1913, they inspected the ground about a week later, and an interlocutor in the conjoined applications (printed in the Special Case) was issued on 8th November 1913. The Land Court found that Stewart was a statutory small tenant, fixed the renewal of his tenancy as at and from Whitsunday 1913 to Whitsunday 1915, and his equitable rent at £25 per annum during that period, and further in respect that it was proved to the satisfaction of the Court that Whyte desired to resume possession of the farm for the reasonable purpose of personally residing thereon, it being his only landed estate, authorised him to resume possession at Whitsunday 1915, subject to certain provisions as to compensation, which I shall afterwards refer to more particularly. Whyte craved a Special Case in terms of section 25 (2) of the Act. He died on 25th January 1914, before the case had been finally adjusted, and by interlocutor of the Land Court, dated 7th February 1914, his son and daughter, who (under his settlement) are his heirs in the farm, and whom I shall call the appellants, were sisted as parties in his room to the conjoined applications, requisitions for a Special Case, and the Special Case itself. The Special Case was presented to this Court on 19th February 1914. With the

decisions of the Land Court upon matters of fact or of administrative policy within their statutory powers we have no concern; our jurisdiction is limited to answering the questions of law which are put to us, or legitimately arise out of the statements of facts submitted in the Special Case.

Objections were stated *in limine* to the competency of the Case. In the body of it the Land Court bring under our notice their view that by the death of Andrew Whyte the whole purpose of his application for resumption in order personally to reside on the farm has failed, and that the more convenient course would have been for his representatives to apply to the Land Court for a re-hearing if resumption for the purpose of personal residence by both or either of them was desired. This view was developed in a vigorous argument by the learned Solicitor-General and his junior, who contended that Andrew Whyte having died before the interlocutor of 8th November 1913 came into operation, his application, based on his personal claim to resume possession and reside, fell absolutely; that the questions put to this Court were thus rendered entirely futile; that we have no right or power to interfere with the findings pronounced by the Land Court in Stewart's application; that the appellants have no title to raise any of the questions submitted; and that if they desire to resume possession of the farm they must present a fresh application to the Land Court in terms of the statute. In my opinion the objections to competency are ill-founded. The two applications to the Land Court were conjoined; the interlocutor pronounced on 8th November 1913 in the conjoined processes had in my judgment the effect of establishing and stereotyping, as matters of fact determining the status of parties, the termination of Stewart's tenancy and Whyte's right to resume possession. Whyte lived for some months after the date of the interlocutor, and I do not see that his subsequent death affected in any way the cardinal results established by it. I do not think there is any occasion or room for the appellants to apply to the Land Court for a re-hearing, or to lodge a fresh application. They are, in my opinion, entitled, as Whyte would have been if he were alive, to raise before us questions as to the competency in law of the Land Court's decision, and to maintain that the landlord's resumption ought to have been authorised as at a date earlier than 1915 and unclogged by any condition-precedent as to payment of compensation.

The case being therefore in my judgment competently before us, I shall deal *seriatim* with the questions of law submitted. The first of these is whether it was competent for the Land Court to pronounce an order postponing resumption till Whitsunday 1915. My opinion is in the negative. It appears from a note added by the Land Court to their interlocutor of 8th November 1913 that they considered such postponement to be in their power as falling within the "terms and conditions" which section 2 of the Crofters Act of 1886 authorises to be imposed in applications by a landlord for resumption of a holding. It seems to me that that section cannot here be prayed in aid by the Land Court, because it does not form part of the code of provisions contained in the Act of 1911 in regard to statutory small tenants. That code is to be found in section 32 of the statute. The respondent, however, maintained that, apart altogether from the Act of 1886, the Land Court had power under the section just referred to, and particularly sub-section (15) thereof, to authorise resumption as at a future and deferred date. I do not agree with this contention. Sub-section (15) provides that "the Land Court may, on the application of the landlord, and upon being satisfied that he desires to resume the holding or part thereof for building, planting, feuing, or some other reasonable purpose having relation to the good of the holding or the estate (including any purpose specified in section 19 of this Act), authorise the resumption thereof by the landlord . . ." Section 19 thus referred to provides that "without prejudice to the generality of the power to authorise resumption by the landlord for some reasonable purpose having relation to the good of the holding or of the estate, conferred by section 2 of the Act of 1886, the feuing of land, or the occupation by a landlord for the purpose of personally residing thereon of a holding, being his only landed estate, or the protection of an ancient monument or other object of historical or archæological interest from destruction or injury, shall respectively be deemed a reasonable purpose as aforesaid." I think these two sections, fairly read together, may be taken as expressing (if one applies their language to the particular case in hand) that the Land Court may, on the application of the landlord, authorise resumption of the holding upon being satisfied (as they were here) that he desires to resume for the reasonable purpose of residing thereon, it being his only landed estate. Now if that be, as I think it is, a fair gloss upon the words of the statute, it infers, in my judgment, a duty on the part of the Land Court, in the circumstances here present, to authorise resumption at the earliest date reasonably possible, and excludes any discretionary power on their part to refuse or postpone the right to resume. There is abundance of authority, Scots and English, to the effect that language which appears in terms to be a mere permission or discretionary power may amount to a peremptory duty when delegated by statute to a public authority appointed to exercise a public duty. It was therefore, in my opinion, incompetent for the Land Court to fix the date of resumption and surrender as late as Whitsunday 1915. The appellants' counsel stated—and one can appreciate his reasons for doing so—that he would be content if the date were altered to Whitsunday 1914. It is therefore unnecessary to consider whether or not he could have successfully maintained an argument in support of any earlier date. I conclude that we ought to answer the first question in the negative, and that the Land

Court should, in accordance with their rule 108, amend their interlocutor of 8th November 1913 so as to give effect to the view indicated. Before leaving this point it may be right to add that, holding (as I do) that the Land Court had no discretionary power in this matter, I refrain from expressing an opinion as to the legal competency (or the reverse) of the reason which, as I gather from the concluding portion of article 8 of the Case, led them to defer the date of resumption to Whitsunday 1915.

The second question is whether it was competent for the Land Court to make resumption conditional upon payment of compensation being made by the landlord prior to the tenant's surrender of possession. By the interlocutor of 8th November 1913 the Land Court authorised and empowered Andrew Whyte to resume the holding at Whitsunday 1915 "on compensation for resumption being paid to the tenant, the said David Stewart, as provided by section 32 (15) of the Act of 1911, and on such compensation being paid, require the said David Stewart to surrender his said holding at said term to the landlord." The latter part of the sentence quoted makes it a condition-precedent of resumption that the assessed amount of compensation should be actually paid; and the appellants argue that the imposition of this condition-precedent was *ultra vires* of the Land Court. I think their contention is well founded. Section 32 (15) of the statute as I read it, *directs* the Land Court, in the circumstances of this case, to authorise resumption "subject to the payment of the like compensation to the tenant in respect of improvements on or in connection with the land resumed, to which a tenant would be entitled under the Agricultural Holdings (Scotland) Act 1908 on the determination of his tenancy." The words "subject to the payment of" are no doubt open to construction, but upon the whole I think they only import a right to the tenant to receive compensation upon the footing and in the mode prescribed by the Act of 1908, and afford no warrant for making actual payment of the assessed amount a condition-precedent to the tenant's surrender of the holding. This construction seems to me to be in accordance with the natural and ordinary meaning of the words used, and I think that if the contrary meaning had been intended Parliament could very easily (and presumably would) have made that clear. The contrary view might involve great hardship to the landlord; there would be no security that, in spite of his endeavour, the amount of the compensation could even be ascertained at the appointed date of resumption; and the tenant might contrive to sit on in possession for a long time after it if the arbitration proceedings were unduly protracted and litigation perhaps ensued in one form or another before the amount of compensation was finally determined and could be paid. In my judgment the Land Court's order upon this matter was not warranted by the statute, and was *ultra vires* and illegal.

The interlocutor of 8th November 1913 proceeded further to "appoint the tenant the said David Stewart to lodge by or before 1st April 1915 a statement setting forth in detail the subjects for which compensation is claimed." We are asked by the third question to decide whether this part of the order was competent. It is not quite clear, as the question is stated, whether the Land Court ordered the claim to be lodged on the footing of, and preparatory to, themselves assessing the compensation, or merely as an administrative step of procedure which they conceived might tend to expedite procedure before an arbiter. But I think, from what appears in the printed case, and from the way in which the arguments were presented to us, that we must treat the question as proceeding upon the former of the two hypotheses, and answer it accordingly. On that assumption our answer ought, in my opinion, to be in the negative. Section 32 of the statute seems to me to give the statutory small tenant, upon the landlord's resumption of the holding, a right to receive compensation ascertained by arbitration as prescribed by the Act of 1908, and to afford no warrant for its assessment by the Land Court. In my judgment, therefore, we ought to answer the second and third questions in the negative; and I apprehend that the Land Court should, in order to bring their interlocutor of 8th November 1913 into conformity with our opinion, delete that part of it which begins with the words "on compensation for resumption" and ends with the words "compensation is claimed," and substitute for the deleted matter, following the language of section 32 (15), "subject to the payment of the like compensation to the tenant the said David Stewart in respect of improvements on or in connection with the land resumed to which a tenant would be entitled under the Agricultural Holdings (Scotland) Act 1908 on the determination of his tenancy."

LORD SALVESEN—This case brings into relief the somewhat drastic changes that have been effected by the Small Landholders (Scotland) Act 1911 in the law relating to the private ownership of land. The late Andrew Whyte was the owner of the farm of Lawyett, in Stirlingshire, extending to twenty-seven acres. He had himself been the tenant of the farm from 1872 to 1905, when he purchased it from the then proprietor. Thereafter he let it to Mr David Stewart, the respondent, under a lease for seven years from and after the term of Whitsunday 1906, at a rent of £45. In ordinary course he would have been entitled to resume possession, if he had so desired, at the termination of this lease, or to have re-let it on the best terms he could obtain. In the meantime, however, the Act in question was passed by which the Scottish Land Court was constituted, and every person who answered the definition of a small landholder, or a statutory small tenant, obtained a right—subject to certain exceptions to which I shall shortly refer—to continue in the tenancy at such rent, failing agreement, as the Scottish Land Court

might fix. The respondent availed himself of the privilege so conferred upon him by statute, and on 21st August 1912 applied to the Court for an order determining whether he was a landholder or a statutory small tenant of the holding in question; and for an order fixing a first fair rent, or alternativately, a first equitable rent, and the period of renewal of his tenancy. The application was opposed by Andrew Whyte, the proprietor, on the ground that the holding constituted his only landed estate, and that he was desirous of occupying it for the purpose of personally residing upon it. In addition to lodging answers to the respondent's application, he also, on 6th May 1912, lodged a separate application for an order on the respondent requiring him to surrender the holding at Whitsunday 1913. The two applications were conjoined, evidence was led, parties heard, and the holding inspected by the Land Court. We were informed that all this took place during the month of May 1913. On 8th November 1913, or nearly six months after the hearing, the Scottish Land Court issued their decision in this summary case. They held it proved that Lawyett was the only landed estate of the said Andrew Whyte, and that he desired to resume the entire holding let to the respondent for the purpose of personally residing thereon and cultivating the holding; but, nevertheless, they did not authorise him to resume the holding until Whitsunday 1915, and in the meantime they found the respondent entitled to a renewal of his tenancy, and to have an equitable rent fixed as a statutory small tenant; and they fixed and determined the period of renewal as from Whitsunday 1913 to Whitsunday 1915, and the annual equitable rent payable at £25 sterling per annum. The first question in the case is—whether it was competent for the Land Court in the circumstances to postpone resumption by the owner until the term of Whitsunday 1915.

The provisions of the Small Landholders (Scotland) Act 1911 are chiefly concerned with small landholders, but section 32 contains a code of provisions applicable to statutory small tenants. Sub-section 15 contains the provisions with regard to the resumption of the holding, or part thereof, by the landlord, and it is on the terms of this subsection that the chief controversy has turned. It becomes necessary therefore to quote its terms in full—"(15) Without prejudice to any agreement between the parties, the Land Court may, on the application of the landlord, and upon being satisfied that he desires to resume the holding or part thereof for building, planting, feuing, or some other reasonable purpose having relation to the good of the holding or the estate (including any purpose specified in section 19 of this Act), authorise the resumption thereof by the landlord, subject to the payment of the like compensation to the tenant in respect of improvements on or in connection with the land resumed to which a tenant would be entitled under the Agricultural Holdings (Scotland) Act 1908 on the determination of his tenancy, and in addition, where part only of the holding is resumed, to such reduction of rent as may be agreed between the parties, or in case of dispute determined by the Land Court." In the note which the Scottish Land Court appended to their interlocutor of 8th November they say—"The leading section which introduced resumption — section 2 of the Crofters Holdings Act 1886—taken along with the explanatory 19th section of the Small Landholders Act 1911, regulates other terms and conditions which may be imposed. Resumption of an entire holding at a short date has never been authorised. In the whole circumstances of the present case we think it would not be equitable to authorise resumption earlier than Whitsunday 1915." It is plain from this passage that the Court were of opinion that the provisions of section 2 of the 1886 Act had been imported into the code contained in the 1911 Act relating to statutory small tenants. In my opinion this is not so. All the purposes in respect of which the Court may authorise a landlord to resume are set forth in the sub-section above quoted, and it is only necessary to refer to section 19 in order to find what purposes other than those already expressed are specified in that section. Section 19 itself is not incorporated, and even if it were, it is difficult to see how it could be held to incorporate the provisions of section 2 of the Crofters Act. The solution of the controversy must therefore depend on the language of sub-section 15 taken along with the addition which is imported by the clause in brackets from the 19th section, that occupation by the landlord for the purpose of personally residing thereon of a holding being his only landed estate is a reasonable purpose in respect of which the Court may authorise the resumption by the landlord of the holding. It was strenuously urged by the respondent that the language was permissive, and that it is in the discretion of the Land Court, although satisfied that the landlord desires to resume his holding for one of the purposes specified, to grant or refuse his application. I cannot think that that is in accordance with the sound construction of this statute. It is, no doubt, for the Court to find the facts, but as soon as they are satisfied on the facts that the landlord desires to resume the holding for a reasonable purpose, it is their duty to give effect to the intention of the Legislature, and to grant an order authorising the landlord to resume. In the case in question what he had to satisfy them of was his present desire and intention to resume and cultivate. It is that intention which is to be given effect to. If the Land Court has power to postpone the resumption for a period of two years, equally must they have power to postpone it for any longer period, or to refuse it altogether. To give an applicant who desires to resume at Whitsunday 1913 the right to resume two years later when the whole circumstances may have changed, and he may be unable to enter upon personal occupation of the holding, is to stultify the whole proceedings. I hold that sub-section (15) imposes a duty

upon the Land Court of authorising resumption in favour of the landlord as soon as reasonably practicable after they are satisfied of the facts which the landlord must establish as a condition-precedent to his application being granted. To hold otherwise would be to make the Land Court absolute masters of the situation, and enable them to give effect or not to the plain intendment of the statute as they thought fit.

There are many decisions to the effect that language which is in form permissive must nevertheless in certain cases be construed as imperative in effect. I refer especially to *MacDougall* (1851, 11 C.B. 755), *Eyre* ([1892] 1 Q.B. 136), and *The King* v. *Mitchell* ([1913] 1 K.B. 561), all of which are cases in which the dicta in the well-known case of *Julius* v. *Lord Bishop of Oxford* (1880, 5 A.C. 214) received practical application. Some of them had special reference to the powers of courts of law.

Even if I had been of a different opinion I should still have held, on the facts stated by the Court below, that the discretion which they have exercised is vitiated by the grounds upon which they exercised it. I gather from statement 8 that they postponed the period of the landlord's resumption for two years in order to enable the tenant to recoup himself for the inadequate return he obtained during the earlier years of his lease. Apparently it was upon the same footing, although this is not expressly said, that they reduced the rent of £45, on which the parties had agreed, to £25. In my opinion such a consideration could not legally enter into the question either of fixing an equitable rent or of postponing the term of resumption by the landlord. Sub-section 8 of section 32 lays down the considerations upon which the equitable rent is to be fixed. These do not include compensation in respect of the holding having been over-rented during the term of the tenancy, or in respect of loss which the tenant had made while working the holding. If such matters were to be considered, the rent might have been fixed at nothing, and would thus not be the rent of the subjects at all. The rent at which the holding has been let is no doubt an element which the Court are entitled to consider in fixing an equitable rent, and one which ought to have very great weight, but it appears to me to be monstrous to say that the new rent is to be fixed at a low figure—that is, at less than what would otherwise be an equitable rent—in order to make up to the tenant for loss which he has previously sustained. Presumably, on the same reasoning, if the Land Court had doubled the period of the new tenancy, they would have fixed the rent at a higher figure, and if they had only continued the tenancy for a single year would have reduced the rent to an illusory sum. What they have to fix is the equitable rent, not the rent which will enable the tenant to recoup himself for losses which he has sustained during his prior tenancy, any more than they would be entitled to double the equitable rent because the landlord was able to show that during the previous tenancy the tenant had made a large profit by the working of the holding.

We are, however, relieved from any difficulties which might otherwise have arisen in connection with this matter, because the appellants have intimated that they are willing to accept the rent of £25 for the year to Whitsunday 1914 on the footing that they are at that date put in possession of the subjects.

The second question is, whether it is competent for the Land Court to make resumption conditional on payment of compensation being made by the landlord prior to the tenant's surrender of possession. This again depends entirely on the construction of sub-section 15. Resumption is to be authorised "subject to the payment of the like compensation to the tenant in respect of improvements on or in connection with the land resumed to which a tenant would be entitled under the Agricultural Holdings (Scotland) Act 1908 on the determination of his tenancy." In my judgment this simply means that as a condition of obtaining resumption the landlord shall be liable to pay the specified compensation. It does not warrant an order by the Court which in effect postpones the right of resumption until the compensation has been ascertained and paid. It may be impossible for the landlord to get the compensation ascertained for months, and possibly years after the first step has been taken. The history of the present proceedings, which were initiated on 6th August 1912 and are only now being disposed of in 1914, illustrates the delays to which even summary proceedings may be exposed when they involve points of legal difficulty, and all the time the tenancy has to run on, notwithstanding that the landlord may be willing to pay the compensation as soon as it has been finally ascertained. I cannot see any good grounds either in law or in equity for such exceptional procedure. In effect the tenant's occupation would be continued during a term for which no equitable rent had been fixed, apparently as a compulsitor on the landlord making due payment of the compensation when fixed. Such a condition is in my view quite illegal, and I have therefore no difficulty in answering the second question in the negative.

As regards the third question, all that the Land Court have hitherto done is to appoint the tenant to lodge with them on or before 1st April 1915 a statement setting forth in detail the subjects for which compensation is claimed. It is apparent however that this is merely the first step towards the ascertainment of the claim, and that the Land Court mean to dispose of it themselves, otherwise they would scarcely have set forth the appellants' contention on the subject in statement 11 of the case. That contention is that the Scottish Land Court had no power to deal with the amount of compensation payable by the landlord to the tenant, this compensation falling to be ascertained by arbitration in accordance with the provisions of the

Agricultural Holdings (Scotland) Act 1908, as varied by section 22 of the Small Landholders (Scotland) Act 1911. This is undoubtedly an important question, and one which in any case must be determined, because although the tenancy, according to our judgment, falls to be terminated at Whitsunday 1914, the respondent has a right to compensation, and I think it would be unfortunate that we should have a second case stated upon the question by whom that compensation is to be fixed. The actual order of the Land Court is comparatively harmless, but it is only intelligible on the footing that they mean to fix the compensation themselves. In my opinion that is not within their province. The tenant is to get the like compensation to which he would be entitled under the 1908 Act. Such compensation is ascertained by arbitration, and no express power is given to the Land Court to assess it. On the contrary, sub-section 10 seems to me to exclude the Land Court as the arbiter, because it provides that they are to nominate the arbiter instead of the Board of Agriculture, but the power to nominate an arbiter only arises if the parties have failed to agree, and in any event it is he and not the Land Court who must fix the compensation. Accordingly I think we ought so to find in answer to the third query, the form of the answer that I suggest being as follows:—"That the Scottish Land Court has no power to deal with or fix the amount of compensation payable by the appellants to the respondent, such compensation falling to be determined by arbitration in accordance with the provisions of the Agricultural Holdings Act 1908 as varied by section 22 of the Small Landholders (Scotland) Act 1911."

The only other matter which requires to be noticed is the fact that Mr Andrew Whyte died in January 1914, and the argument is that, as the right of resumption is personal to the landlord, the appellants, who are now in right of the heritage cannot competently proceed with this appeal. It was suggested that their remedy was, as the existing landlords, to make an application asking that they should be entitled to resume the holding if they desired to reside upon it and cultivate it. Counsel for respondent maintained that the finding in favour of his client to the effect that he was entitled to continue his tenancy until Whitsunday 1915 would be no bar to such an application. As regards the last argument, I think it is untenable. Standing the order of 8th November in favour of the respondent, the Land Court could not competently give these appellants a right to resume at any earlier period than Whitsunday 1915. But all this appears to me to be beside the mark. If at 8th November 1913 the Court ought to have authorised Andrew Whyte to resume his holding as at the immediately following Martinmas, or even as at Whitsunday 1914, the appellants cannot be in a worse position because the Court erroneously refused to do so. Had the right order been pronounced, the death of Andrew Whyte thereafter would have had no effect in continuing the tenant's right of occupation. That right would have been ended as at Martinmas 1913 or Whitsunday 1914. There would thus have been no legal obstacle to the appellants, as owners, entering upon the property and doing with it what they pleased. The landlord's right of resumption having been fixed by the order, that right transmitted to his heirs just as it would under any other decree of Court which had decided a disputed question of heritable right.

LORD GUTHRIE—I agree with your Lordships on the question of competency, and also in the answers you have proposed to the three questions in the case. The question of competency is involved in the first of these three questions. In considering that question it is immaterial whether the date to be looked at is 6th May 1913, when the late Andrew Whyte, the landlord, presented his application, or 8th November 1913, when the Land Court pronounced their interlocutor in the conjoined applications, finding that he fulfilled the two statutory requisites, namely, *bona fide* intention to reside personally on the holding, and that the holding was his only property. Andrew Whyte's death did not occur till 25th January 1914. Assuming 8th November 1913 to be the proper date for the determination of the question, Andrew Whyte, in my opinion, became then entitled to immediate resumption of the holding of Lawyett, and David Stewart's rights in the holding came to an end, subject to such compensation as the statute gave him, and it may be to such period as might be reasonable for enabling him without unnecessary hardship to remove. I therefore answer the first question in the negative, and doing so, necessarily hold that the deceased's son and daughter, as his heirs in the farm, are entitled to insist that Stewart's tenancy was absolutely determined, and not merely, as the Land Court have found, to apply for a re-hearing if resumption for the purposes of both or either of them is desired. The latter is not the question which they desire to raise, and it is a question which does not seem to me to arise. I agree with the views expressed by your Lordships on the non-application to the case of section 2 of the 1886 Act as to terms and conditions.

On the second question I agree that the view taken by the Land Court is not one to be presumed, would lead in many circumstances to practical injustice, and is not warranted by the words of the code applicable to statutory small tenants contained in section 32 of the 1911 Act, taken along with the provision of the Act of 1908.

On question 3 I am not prepared to answer it in the negative if the question be taken by itself, but read along with the contentions as stated in article 11 of the Case, which are clearly meant to raise the wider question of the Land Court's right to deal with the amount of compensation payable by the landlord to the tenant, I agree in the course proposed by your Lordships, and looking to the ulterior object thereby disclosed I answer the question in the negative.

LORD JUSTICE-CLERK — I concur with Lord Dundas. I have had an opportunity of perusing his opinion prepared after consultation, and it so entirely expresses my views that I find it unnecessary to add anything. I will only say that I desire to confine my opinion to the matters dealt with by Lord Dundas. Beyond that I do not wish to go.

The Court answered the three questions of law in the negative.

Counsel for the Appellants — Johnston, K.C. — Aitchison. Agents — R. D. Ker & Ker, W.S.

Counsel for the Respondents—Solicitor-General (Morison, K.C.) — D. Jamieson. Agents—Dove, Lockhart, & Smart, S.S.C.

Saturday, May 23.

FIRST DIVISION.

BANNATYNE'S TRUSTEES *v.* WATSON'S TRUSTEES.

Succession — Vesting — Vesting subject to Defeasance — Conditional Institution — Destination-over — Double Contingency — Legacy — Lapse.

A testator directed his trustees to hold a sum of money for behoof of A in liferent and her children in fee, declaring that in the event of any of the children dying before the term of payment therein prescribed leaving issue, such issue should be entitled to their parent's share. In the event of any of the children dying without issue, the share which such predeceaser would have taken on survivance was to be paid to his or her surviving brothers and sisters and the issue of such as had predeceased. In the event of A's death without issue the legacy was to be paid to her brother B, whom failing to his issue, whom all failing to C, D, and E, the children of X, and the survivors and survivor of them, the issue of any who should have predeceased being entitled to the share which their parent would have taken on survivance. B and the three children of X all survived the testator, but all of them predeceased the liferentrix without issue, E being the last survivor. On the subsequent death of the liferentrix without issue a question arose as to the parties entitled to the legacy.

Held that the legacy had lapsed, and had not vested, subject to defeasance, either in B or in E.

Observations on the doctrine of vesting subject to defeasance.

On February 6, 1913, R. D. Watson, The Hermitage, Teignmouth, and others, the testamentary trustees of the late John Bannatyne, merchant in Glasgow, *first parties;* the said R. D. Watson and another, the trustees and executors of the late James Watson, Streatham Hill, Surrey, *second parties;* Francis Martin, writer, Paisley, and another, the testamentary trustees of the late Miss Eliza M. Cogan, 29 Stafford Street, Edinburgh, *third parties;* and J. C. Livingston, W.S., Edinburgh, the testamentary trustee of the late R. J. Bartholomew, Ascog, Bute, *fourth party,* presented a Special Case with regard to the rights of the second, third, and fourth parties in part of the testator's estate.

By his trust-disposition and settlement Mr Bannatyne, who died on 19th August 1878, provided, *inter alia,* as follows:—"Thirdly, I direct my trustees to make payment to each of Susan Matilda Cunningham Graham Bartholomew and Robert John Bartholomew, both children of the deceased Robert Bartholomew, merchant in Glasgow, of the sum of two thousand five hundred pounds, and that on their respectively attaining the age of twenty-one: Declaring that in the event of either of them predeceasing the said period of payment leaving issue, such issue shall be entitled to the legacy which their parent would have taken on survivance: And further, that in the event of either of them predeceasing the said period without leaving issue, then the legacy which would have been taken by such predeceasor on survivance shall fall and accresce to the survivor of the said two legatees, whom failing, to his or her issue, whom all failing, then the said two legacies shall fall into and form part of the residue of my estate."

The last purpose of the said trust-disposition and settlement was as follows:—"And *lastly,* and with regard to the residue of my estate (including therein such of the foregoing legacies as may have lapsed) . . . I direct my trustees as at my death to pay and convey the same absolutely to and in favour of the said James Watson, whom failing by his predeceasing me, then to and among his children and the survivors and survivor of them, the issue however of any of them who may have predeceased me leaving issue being entitled to the share which their parent would have taken on survivance." The said James Watson, who was a nephew of the testator, survived him and died on 26th December 1899.

By a codicil the said John Bannatyne provided as follows:—"With reference to the legacy of two thousand five hundred pounds provided by the third purpose of my said trust-disposition and settlement in favour of Susan Matilda Cunningham Graham Bartholomew, now Henn, I hereby direct my trustees, instead of paying the same as therein directed, to hold and apply, pay and convey the same for behoof of the said Mrs Susan Matilda Cunningham Graham Bartholomew or Henn, in liferent for her liferent use only and to and among her children in fee, and that in such shares and proportions, and subject to such terms, conditions, and restrictions, and otherwise as she may appoint by any writing under her hand, and failing such writing, then to and among such children equally, and that on their respectively attaining the age of twenty-one and on the death of their said mother: Declaring that in the event of any of the