a special consultation before the proof, and (2) for the debate in the Inner House. The consultation fees objected to were sent that counsel might consider to what extent the evidence and documents in the previous action of suspension should be imported into the present case. Now I cannot understand how that matter could be considered apart from the general question regarding the proof to be led in respect of which another consultation fee to each counsel had been allowed. All the matters relating to the proof should have been considered together, and indeed it is difficult to see how they could have been considered apart. I therefore think that the fees connected with this consultation should be disallowed.

As regards the debate fees, £15, 15s. and £12, 12s. were sent to senior and junior counsel respectively for the first day's debate, and £12, 12s. and £8, 8s. for the second. Having in view the character and dimensions of the case the first day's fees were sufficiently generous, but they are not challenged as regards amount. It is said, however, that the discussion on that day only lasted some twenty minutes, when it became necessary to adjourn the debate, as a question of competency had been raised on a technical point, and that the second day's fee should be disallowed. I think this objection is well founded. The first day's fee had not been exhausted, and the attendance of counsel on the two days together did not really occupy even a whole day.

The remaining objections involve matters of pure taxation and were not ultimately pressed.

LORD GUTHRIE was present at the advising, but delivered no opinion, not having heard the case.

The Court sustained the objections to the extent of £46, 16s. 5d.: *Quoad ultra* approved of the report, and decerned against the pursuer for payment of the sum of £557, 16s. 1d., and found no expenses due to or by either party in connection with the objections to the Auditor's report.

Counsel for the Pursuer — M'Lennan, K.C.—Maclaren. Agent—John Robertson, S.S.C.

Counsel for the Defender—Macphail, K.C. —Dykes. Agent—James Scott, S.S.C.

Tuesday, July 20.

SECOND DIVISION.

[Lord Hunter, Ordinary.

SCOTT PLUMMER *v.* BOARD OF AGRICULTURE FOR SCOTLAND.

Landlord and Tenant — Property — Small Holding — Arbiter — Award — "Depreciation in the Value of the Estate" — "In Consequence of and Directly Attributable to" — Small Landholders (Scotland) Act 1911 (1 *and* 2 *Geo. V, c.* 49), *sec.* 7 (11).

The Small Landholders (Scotland) Act 1911, section 7 (11), enacts—"... Provided that where the Land Court are of opinion that damage or injury will be done ... to any landlord ... in respect of any depreciation in the value of the estate of which the land forms part, in consequence of and directly attributable to the constitution of the new holding or holdings as proposed, they shall require the Board, in the event of the scheme being proceeded with, to pay compensation to such amount" as the Land Court, or in certain circumstances an arbiter appointed by the Lord Ordinary on the Bills, determine. It further enacts—"In determining the amount of compensation under any provision of this Act no additional allowance shall be made on account of the constitution or enlargement of any holding being compulsory."

An arbiter, appointed by the Lord Ordinary on the Bills at the request of the landlord, made an award of compensation, *inter alia*, for depreciation on the ground that the estate had been depreciated in capital and saleable value. In an action at the instance of the landlord to enforce the decree-arbitral, *held* (*rev.* judgment of Lord Hunter, Ordinary) that the arbiter had not acted *ultra vires* in making the award, and that the award was covered by the terms of the statute.

Opinions per the Lord Justice-Clerk and Lord Johnston that the provision as to where the constitution or enlargement of a holding was compulsorily was merely to prevent a compulsory allowance being invariably granted as under the Lands Clauses Acts.

The Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, c. 49), enacts—Section 7—"*Powers to Facilitate the Constitution of New Holdings.* ... (11) ... Provided that where the Land Court are of opinion that damage or injury will be done to the letting value of the land to be occupied by a new holder or new holders, or of any farm of which such land forms part, or to any tenant in respect that the land forms part or the whole of his tenancy, or to any landlord either in respect of an obligation to take over sheep stock at a valuation, or in respect of any depreciation in the value of the estate of which the land forms part in

consequence of and directly attributable to the constitution of the new holding or holdings as proposed, they shall require the Board, in the event of the scheme being proceeded with, to pay compensation to such amount as the Land Court determine, after giving parties an opportunity of being heard, and, if they so desire, of leading evidence in the matter: Provided always that where within twenty-one days after the receipt from the Land Court of an order under this sub-section a landlord or a tenant, as the case may be, intimates to the Land Court and to the Board that he claims compensation to an amount exceeding £300, and that he desires to have the question whether damage or injury entitling him to compensation as aforesaid will be done, together with the amount of such compensation (if any), to be settled by arbitration instead of by the Land Court, the same shall be settled accordingly; and at any time within fourteen days after the said intimation, failing agreement with the Board as to the appointment of an arbiter, it shall be lawful for him to apply to the Lord Ordinary on the Bills for such appointment, and the Lord Ordinary shall forthwith, on receipt of such application, nominate a single arbiter to decide the questions aforesaid, whose award shall be final, and binding on the Board in the event of the scheme being proceeded with, and if no final award be given within three months from the date when the arbiter is nominated, the questions aforesaid shall be decided by the Land Court as hereinbefore provided.... In determining the amount of compensation under any provision of this Act no additional allowance shall be made on account of the constitution or enlargement of any holding being compulsory."

Charles Henry Scott Plummer of Sunderland Hall, Selkirk, *pursuer*, brought an action against the Board of Agriculture for Scotland, *defenders*, for payment of the sum of £3850, being the unpaid balance of the amount found due to the pursuer from the defenders by an award, dated 1st April 1914, in an arbitration between them pronounced by James Inglis Davidson, Saughton Mains, Midlothian, the arbiter appointed by the Lord Ordinary on the Bills under the Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), sec. 7 (11).

The defenders pleaded—"The arbiter having acted *ultra vires* in awarding said sum of £3850, the defenders should be assoilzied."

The *facts* of the case appear from the opinion of the Lord Ordinary (HUNTER), who on 23rd October 1914 assoilzied the defenders from the conclusions of the summons.

Opinion.—"The pursuer, who is the proprietor of the estate of Sunderland Hall in the county of Selkirk, sues the Board of Agriculture for Scotland for payment of £3850, being the unpaid balance of the amount found due to the pursuer from the defenders by an award, dated 1st April 1914, in an arbitration between the pursuer and defenders, pronounced by James Inglis Davidson, Saughton Mains, Midlothian, the arbiter appointed by the Lord Ordinary on the Bills under and in terms of the Small Landholders (Scotland) Act 1911, sec. 7 (11).

"On 27th January 1913 the defenders applied to the Scottish Land Court for the approval of a scheme for dividing up the farm of Lindean, which forms part of the pursuer's estate, into small holdings in terms of the Small Landholders (Scotland) Acts 1886 to 1911. The pursuer lodged answers to the defenders' application, appeared before the said Court, and opposed the scheme.

"On 18th April and 31st October 1913 the said Court pronounced orders whereby, after excepting certain parts of the said farm, they approved of the taking of the remainder of said farm for the purpose of forming small holdings and pronounced certain consequential findings, including the fixing of fair rents for the said small holdings.

"These orders were intimated to the pursuer on 23rd April and 12th November 1913 respectively.

"Thereafter on 29th November 1913 the pursuer intimated to the said Court and to the defenders that he claimed a sum in excess of £300 as compensation in respect of the formation of said small holdings.

"On 12th December 1913 the pursuer presented a petition to the Lord Ordinary on the Bills under and in terms of the Small Landholders (Scotland) Act 1911, sec. 7 (11), for the nomination of an arbiter to decide the amount of the compensation payable to him in respect of the formation of the said small holdings, and on the 8th January 1914 the Lord Ordinary on the Bills (Lord Anderson) appointed the said James Inglis Davidson as arbiter.

"Mr Davidson accepted the nomination, and after certain procedure pronounced his final award, finding the pursuer entitled to certain sums in respect of the value of the steadings, cost of fencing, unexhausted manure, &c. The fifth finding was for a sum of £4600, in respect of loss in the value of the estate in consequence of and directly attributable to the constitution of the new holdings. To his fifth finding he adds the following: — 'Alternatively, and in the event of it being hereafter held that depreciation in the capital and saleable value of the estate, by the constitution of said small holdings, is not a competent and valid claim under the statute, I assess the compensation payable in respect of loss caused by depreciation in the value of the estate at the sum of £750.' This latter sum as well as the other sums awarded to the pursuer have been paid by the defenders. It was pointed out by the defenders that according to the arbiter's view, without taking into account any part of the £4600, on a fair accounting it appears 'that a balance of £23, 7s. 3d. gross per annum at present emerges in favour of the pursuer.' An award which in addition to bringing about that result gives a very large sum in respect of loss in the saleable value of the estate appears somewhat startling. I am not, however, concerned with the question whether the arbiter did or did not give an excessive award. All I have to consider is whether in making his award so far as challenged the arbiter acted within or without his jurisdiction.

"Under the Small Landholders (Scotland) Act 1911, sec. 7 (11), the arbiter has or may have to determine two questions—1st, whether damages entitling the proprietor to compensation will be done, and 2nd, the amount of such compensation. The damages referred to are such as arise from 'the depreciation in the value of the estate of which the land forms part in consequence of and directly attributable to the constitution of the new holding or holdings as proposed.' The first point taken by the pursuer is that the arbiter is the absolute judge of what constitutes damages. I find no warrant in the statute for such an argument. I think it is quite clear that if the arbiter has made an award in respect of a claim which is not a good foundation for an award under the statute his award falls to be set aside. The real question in this case appears to me to be whether or not the supposed loss in the selling value of the estate in respect of which the arbiter has made a large award is a good claim under the statute or not.

"The claim on which the award of the sum in dispute was based is in the following terms:—'Loss caused by depreciation in the value of the estate. The estate of which Lindean forms part extends to about 3000 acres. The area scheduled for small holding extends to about 840 acres, and is in the centre of the estate. The estate is a very desirable one from a residential point of view, and possesses many amenities. The conversion of so large and central a part of the estate from one farm under the ordinary tenure into twelve farms under the tenure prescribed by the Crofters and Small Landholders Acts will greatly diminish the residential attractions of the property, so many of the advantages of ownership being transferred to the tenants and Government departments by the terms of those Acts, and such wide and unrestricted powers being conferred upon the tenants. The sporting value of the said estate has also been greatly depreciated by the formation of the said holdings. Owing to its position the selling of the farm of Lindean by itself would detract from the value of the estate, but notwithstanding this, previous to the scheduling of the farm for small holdings, a very good price might have been obtained for it as a small residential property. There are some very fine sites for a house on it. It is very conveniently situated, and there is plenty of water on the farm. Now owing to the action of the Board of Agriculture it would probably be unsaleable. In respect of the depreciation in the value of the estate the claimant claims the sum of £9000.' As stated the claim covers various items. In the arbiter's award the £750 which have been paid refers to (1) depreciation in the value of the shootings of and adjoining Lindean farm, (2) loss arising from additional expense in the management of the estate in consequence of the changes effected by the formation of the small holdings, and (3) severance of a portion of the estate lying contiguous to Lindean farm and temporarily worked from another farm. The defenders admit that these claims properly formed the subject of an award by the arbiter. They arise from physical consequences to the heritable estate held by the pursuer. The pursuer, however, has not sold and does not propose to sell his estate, and the defenders object to the claim for loss in selling value as a hypothetical award based upon sentimental objections which offerers for the estate might have to the presence of statutory smallholders.

"Under the Small Landholders Act the proprietors of land are not deprived of their property. A new statutory relationship is created between owners of land and occupiers to whom the provisions of the statute apply. In the case of existing tenants, where their lands comply with the statutory requirements, they come within the provisions of the statute, and no compensation is payable under the statute to their landlords in consequence of the rights conferred upon the occupiers making the subjects less saleable. Where compensation is provided for the statute assumes that the lands will continue to be held by the proprietor, and upon that footing gives him compensation for depreciation in the value of the estate which he continues to hold if it is directly attributable to the constitution of the small holdings. The award given of which complaint is made appears to me to be not direct but indirect, remote, and hypothetical loss. It does not arise from depreciation in the value of the estate directly attributable to the constitution of the small holdings, but to objections which purchasers of the estate might personally have to the powers conferred by statute upon small holders. In my opinion the arbiter acted *ultra vires* in so far as the part of his award complained of is concerned. I therefore assoilzie the defenders with expenses."

The pursuer appealed, and argued—Under the compensation provisions of the statute —Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, c. 49), sec. 7 (11)—the validity of this claim was for the arbiter and for no other tribunal. If the arbiter went wrong, *intra fines compromissi*, this Court could not interfere. The effect of the Act was to put the arbiter in the same position as an arbiter under the Lands Clauses Acts. His sole duty was to fix value. In doing so he had to determine the depreciation in the value of the estate, including the capital value, and this was a practical question peculiarly suited to the arbiter as a practical man. What damage was directly attributable to the constitution of the new holdings could only be determined by him. In the case of *Lady Gordon Cathcart* v. *The Board of Agriculture for Scotland*, unreported, effect had been given to a claim for depreciation caused by imminent future rise of rates due to an anticipated influx of population. The words were clear, but if there was any ambiguity in them the claimant was entitled to a beneficial construction of them, because the Legislature was not supposed to deprive anyone of his rights—Maxwell on the Interpretation of Statutes (5th ed.), 461. It was clear, however, on the statute that the decision of the arbiter was right. The constitution of

the holdings in the present case was the cause of the depreciation for which the arbiter had found compensation to be due, and compensation must be commensurate with the injury — *Hadley* v. *Baxendale*, (1854) 9 Exch. 341; *London and North-Western Railway Company* v. *Evans*, [1893] 1 Ch. 16, *per* Bowen, L.J., at p. 27. Even if the landowner did not intend to sell, still the loss was potentially there, and he was entitled to claim for it. The only way in which such depreciation could be ascertained was through the mind of a possible purchaser. The rule followed in certain cases of damage, *e.g.*, the squib case —*Scott* v *Shepherd*, 1773, 2 W.B. 892, 1 Smith's L.C., p. 454—was useful for interpreting the words "directly attributable" and should be followed here. Counsel also referred for the interpretation of these words to *Bostock & Company, Limited* v. *Nicholson & Sons, Limited*, [1904] 1 K.B. 725.

Argued for the defenders—If the arbiter was final, the statute had made him a final court of first instance. But this was not to be anticipated as a probable result of the statute even if he was to be regarded as a substitute for the Land Court. The arbiter had clearly exceeded his jurisdiction. The statutes gave him power to award compensation, but not to determine what compensation fell within the Act, and if he included indirect damage or hypothetical or contingent loss in his award, he could be corrected. Existing small holdings became automatically subject to the Act without compensation for any effect which this might have on the sentimental selling value of the estate—section 2 (2). The inference from this treatment of existing holdings was that the statute intended no such compensation to be payable in the case of new holdings. If it were competent for the arbiter to consider saleable value, then such value must be limited to rental or security of rental, and could not include purely sentimental value. Section 7 (11), however, did not include selling value. It meant depreciation in the physical condition of the particular heritable estate as distinct from sentimental depreciation. In this respect it was similar to the Railway Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. c. 33), sec. 6. The words "depreciation in the value of the estate" meant actual *de facto* depreciation, *e.g.*, the making of roads or drains or interference with game. The words "directly attributable" meant consequences which flowed directly from the action of the Board of Agriculture—*Thompson* v. *Schmidt*, 1891, 8 T.L.R. 120; *Smith* v. *Fife Coal Company, Limited*, 1914 S.C. (H.L.) 40, 51 S.L.R. 496. The arbiter assumed that statutory small holdings were permanent, would always be depreciatory in the market, and that the rent fixed by the Land Court would always remain the rent. He entirely ignored the option given to the landlord to resume the holding in certain contingencies — Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict. c. 29), sec. 2, and Small Landholders (Scotland) Act 1911 (*cit.*), sec. 19. If the statute had intended to allow compensation for such claims as the present, it would have had a special provision to that effect. Awards of this character would render the carrying out of the statute wholly uneconomic and impossible. The common law cases cited by the reclaimer were not in point.

At advising—

LORD JUSTICE-CLERK — This action is brought to enforce a decree-arbitral pronounced in an arbitration under the Small Landholders (Scotland) Act 1911. The circumstances are that the pursuer Mr Scott Plummer was proprietor of the estate of Sunderland Hall in the county of Selkirk, and one of his farms, with the exception of a small part, was appropriated for the purpose of establishing small holdings under the Statute of 1911. Mr Scott Plummer made application to have the compensation, if any, to which he was entitled, determined by an arbiter instead of by the Land Court, and accordingly Mr James Inglis Davidson was appointed arbiter to adjudicate upon the claim. He did so and found the claimant entitled to £8588, 4s. 3d. under five different heads. Four of these were not challenged. The fifth, which was damage "In respect of loss caused by depreciation in the value of the estate in consequence of and directly attributable to the constitution of new holdings, £4600," was admitted by the Board of Agriculture to the extent of £750, which represented heads of damage "In respect of depreciation in the value of the said estate of Sunderland Hall *qua* heritable subject in consequence of and directly attributable to the constitution of said new holdings on the farm of Lindean." To the remainder of the award under this head the Board of Agriculture objected on the ground, as stated in their sixth answer, that "Said claim contains items of claim which are incompetent under the Small Landholders (Scotland) Act 1911, and said incompetent items were taken into account by the arbiter in awarding said sum of £4600. The said incompetent items included damage on account of the operation of the statute and the loss of the purely personal attributes of ownership due to the tenure created under the Act." The pursuer pleaded—"The said sum of £4600 having been competently and validly assessed by the said arbiter, decree should be pronounced as concluded for." The defenders pleaded—"The arbiter having acted *ultra vires* in awarding said sum of £3850, the defenders should be assoilzied." The Lord Ordinary practically gave effect to that plea of the defenders and assoilzied them from the conclusions of the action.

I have come to be of the opinion that the Lord Ordinary has erred in the matter. The question turns entirely upon the construction of section 7, sub-section (11), of the statute, and particularly of the first proviso appended to that sub-section. That proviso is in these terms—"Provided that where the Land Court are of opinion that damage or injury will be done to the letting value of the land to be occupied by a new holder or new holders, or of any farm of which such land forms part, or to any tenant in respect that the land forms part or the

whole of his tenancy, or to any landlord either in respect of an obligation to take over sheep stock at a valuation, or"—and this really is the phrase which raises the question—"in respect of any depreciation in the value of the estate of which the land forms part in consequence of and directly attributable to the constitution of the new holding or holdings as proposed, they shall require the Board in the event of the scheme being proceeded with to pay compensation to such amount as the Land Court determine after giving parties an opportunity of being heard and, if they so desire, of leading evidence in the matter." That is qualified by this further proviso—"Provided always that where within twenty-one days after the receipt from the Land Court of an order under this sub-section a landlord or a tenant, as the case may be, intimates to the Land Court and to the Board that he claims compensation to an amount exceeding three hundred pounds and that he desires to have the question whether damage or injury entitling him to compensation as aforesaid will be done, together with the amount of such compensation (if any) to be settled by arbitration instead of by the Land Court, the same shall be settled accordingly." Then there is a provision for the appointment of an arbiter by the Lord Ordinary on the Bills, and it is declared that his award "shall be final and binding on the Board in the event of the scheme being proceeded with, and if no final award be given within three months from the date when the arbitrator is nominated, the questions aforesaid shall be decided by the Land Court as hereinbefore provided."

Under these provisions where the Land Court are of opinion that damage or injury will be done to any landlord in respect of any depreciation in the value of the estate of which the land taken forms part, which is directly attributable to the constitution of the new holding or holdings as proposed, they are to require the Board to pay compensation to such amount as the Land Court determines, and therefore they have two questions to consider. In the first place they must determine whether the constitution of the new holdings will cause damage or injury to any landlord "in respect of any depreciation in the value of the estate of which the land forms part in consequence of and directly attributable to the constitution of the new holding or holdings;" and if they come to be of opinion that such damage or injury will be caused they have next to decide what the proper amount of compensation to be given in respect thereof is; and having so decided they are bound to order payment accordingly. These two questions may be removed from the jurisdiction of the Land Court if the conditions of the next proviso come into operation. If the landlord or the tenant claims more than £300 and desires to have his claim settled not by a judgment of the Land Court but by the arbitration of an arbiter, he is entitled to have it settled in that way, but it is important to notice that the two questions—first, whether damage or injury of the character which is being dealt with has been done to the landlord, and what is the amount—are quite separate and distinct questions, and both of them are by the statute committed to the final judgment of the Land Court, unless in cases where the proprietor or tenant makes a claim fulfilling the conditions specified and requires the decision of these questions to be left to an arbiter.

In the present case Mr Scott Plummer desired that the matter should be determined not by the Land Court but by an arbiter, and as the conditions which entitled him to have his wish given effect to existed the arbitration was set up. The two questions which the first proviso refers to were thus taken from the jurisdiction of the Land Court and handed over to the jurisdiction of the arbiter, but there are still two quite separate and distinct questions—first, whether damage of the character specified in the statute has been done, and if so, what is the amount of the compensation. These two questions were here submitted to the arbiter, and his decision is just as final in regard to the first of these questions as with regard to the second—the purpose of the Legislature being that litigation as to these questions should be discouraged and that there should be a rapid mode of ascertaining and finally determining them. The statute, at the end of the proviso, declares that the award shall be final and binding on the Board in the event of the scheme being proceeded with; and it goes on to say—"and if no final award be given within three months from the date when the arbiter is nominated, the questions aforesaid shall be decided by the Land Court as hereinbefore provided." That is to say, if this rapid and expeditious mode of determining these two questions is not followed, and the arbiter does not give his decision within three months, then the determination of both questions shall revert to the Land Court, and they shall be decided by them just as they would have been decided by them originally if the claimant had not exercised the option which the statute gives him of saying "I prefer an arbiter."

The arbiter here has considered both these questions and has decided them. He has considered the question whether damage or injury entitling the claimant to compensation will be done. He has answered that question by saying that in his opinion damage of that character will be done. He has also considered the question what is the proper amount of compensation, and he has fixed that at £3850. In so doing he has only exercised the jurisdiction which the statute conferred on him, and from his decision there is no appeal. The statute declares that his award shall be final, and accordingly in my judgment the pursuer, having got this award from the arbiter, is entitled to decree for the amount thereof.

The Lord Ordinary in his note says—"Under the Small Landholders (Scotland) Act 1911 the arbiter has or may have to determine two questions—first, whether damages entitling the proprietor to compensation will be done; and second, the amount of such compensation." I agree

entirely with that, subject always to this, that I think the words "or may have" ought not to be there. The Lord Ordinary takes the view that there is something in the character of the damage claimed under this head that takes it out of the statute altogether. He refers in his note to the items in the £4600, which the Board of Agriculture admit as correct claims of damage against them, and the Lord Ordinary says they arise from "physical consequences to the heritable estate held by the pursuer." Then he goes on to say—"The pursuer, however, has not sold and does not propose to sell his estate, and the defenders object to the claim for loss in selling value as a hypothetical award based upon sentimental objections which offerers for the estate might have to the presence of statutory small holders." I cannot agree with that reasoning. It seems to me that the question which the arbiter has to determine is, Has there been depreciation in the value of the estate in consequence of and directly attributable to the constitution of the new holdings? Depreciation in the selling value of property because of interference, either under the Lands Clauses Act or the Railway Clauses Act, is a ground of damage with which we are familiar. No doubt in one sense it may be spoken of as hypothetical, but I suppose there is hardly ever one of those claims for compensation in connection with railways, or water-works, or public works of that kind, where it is not everyday practice for gentlemen experienced in these matters to come forward and say that besides the value of the land taken, and besides the loss of value due to separation, the selling value of the estate will be diminished by the taking away of the land in question from the rest of the estate. It is the invariable practice, or almost the invariable practice, for effect to be given by the tribunal to that contention, and it is their duty to do so if depreciation is proved, and large sums or small sums, as the case may be, are awarded on that particular ground. Therefore the suggestion that it is hypothetical or sentimental in its quality does not, to my mind, affect the result, the question being whether the property has been depreciated. It was argued by the learned Solicitor-General that the result was not in consequence of and directly attributable to the constitution of the small holdings. I think it is, but I think that is a question of fact which the arbiter has to determine, and which he was well able to determine both from his own experience and from the evidence laid before him. He says in his award—"It is, however, within my knowledge and experience, and is consistent with the evidence adduced for both parties, that the capital and saleable values of such subjects as those under review are represented by a lower number of years' purchase of their rental than in the case of fair-sized farms." That is a finding in fact. Apparently it was a finding in regard to which evidence was led, and it was a finding which, in my judgment, the arbiter was quite entitled to come to, but it is suggested that because the land is not taken in the sense that Mr Scott Plummer does not cease to be proprietor of it—he is left with the farm and he is not going to sell it—therefore he has suffered nothing. I cannot follow that reasoning. Further, it is said that his rental is not diminished, or at least that he is fully compensated for any diminution. But if the capital value of his property is diminished, that seems to me a perfectly good ground for awarding compensation to the extent to which the arbiter thinks compensation is due. If by the operation of the statute the selling value of the property has been considerably diminished, to say that the proprietor is not damnified, that there has been no depreciation in the value of the estate, is a proposition which I frankly confess I cannot accept. I am of opinion that the pursuer here is entitled to decree in terms of the conclusions of the summons.

I should just like to refer in a word to an argument which the defenders founded on the last clause of the proviso to sub-section (11), which is in these terms—"In determining the amount of compensation under any provision of this Act no additional allowance shall be made on account of the constitution or enlargement of any holding being compulsory." I have not any doubt that that clause was introduced for the reason suggested by Lord Dundas in the course of the discussion, in order to prevent the occurrence of what happened under the Railway and Lands Clauses Acts, where a compulsory allowance, as it is called, is almost invariably allowed. That clause seems to me to have been inserted just for the purpose of preventing any such compulsory allowance being given where compensation was being claimed under this statute. It is effective for that purpose, and I think it serves no other purpose whatever.

I am of opinion that we should recal the Lord Ordinary's interlocutor, and grant decree in terms of the conclusions of the summons.

LORD DUNDAS—I agree with all that your Lordship has said. I think the Lord Ordinary's interlocutor is wrong. I am unable to hold that the arbiter has in any way acted *ultra vires*. The statute empowers him, as I read section 7 (11), to award compensation, *inter alia*, where he is of opinion that damage or injury "will be done . . . to any landlord . . . in respect of any depreciation in the value of the estate of which the land forms part in consequence of and directly attributable to the constitution of the new holding or holdings as proposed." The arbiter found, *inter alia*, "that damage or injury has been done to the claimant in respect of depreciation in the value of his estate of which the land taken" (*i.e.*, the land to be occupied by the new holders) "forms part in consequence of and directly attributable to the constitution of the new holdings," and assessed compensation accordingly for, *inter alia*, "(*a*) depreciation on the capital and saleable value of the estate of Sunderland Hall as above explained." He had explained in quite general terms that it was within his knowledge and experience,

"and is consistent with the evidence adduced for both parties, that the capital and saleable values of such subjects as those under review are represented by a lower number of years' purchase of their rental than in the case of fair-sized farms. These circumstances are accentuated in the case of Sunderland Hall estate by the appropriation of its central area, embracing about one-third of its whole extent, for the formation of small holdings."

I cannot agree with the reasoning by which the Lord Ordinary reaches his conclusion. He begins by pointing out that according to the arbiter's view, without taking into account any part of the £4600 awarded by the fifth head of the award, a balance of £23, 7s. 3d. gross *per annum* at present emerges in favour of the pursuer; and adds—"An award which, in addition to bringing about that result, gives a very large sum in respect of loss in the saleable value of the estate appears somewhat startling." I do not agree with the observation quoted. One can easily figure cases—and the arbiter has held that the present case is in fact one of these—where, although the present rental of an estate is not impaired, or, it may be, is even increased, its capital or sale value may be gravely diminished by reason of an operation or transaction of the kind here in question; such a result is not, to my mind, startling. The Lord Ordinary then says—"The real question in this case appears to me to be whether or not the supposed loss in the selling value of the estate, in respect of which the arbiter has made a large award, is a good claim under the statute or not;" and his Lordship proceeds, as I understand his opinion, to develop reasons for holding that loss in selling value of an estate is not a good ground for compensation under the statute. He points out that the claimant here "has not sold and does not propose to sell his estate," and says that "the statute assumes that the lands will continue to be held by the proprietor." I confess that I cannot find in the language of the Act of Parliament any warrant for the assumption which the Lord Ordinary postulates. Power to sell one's land is a cardinal condition and quality of the right of ownership, and it is not taken away by this statute. The fact that Mr Scott Plummer stated (as appears) that he has no present intention of selling his estate seems to me to be entirely irrelevant. He may change his mind; he could sell the estate now or hereafter if he so pleased; or his successor in the estate could sell if he wanted to do so; and there is, I take it, no better test of the capital value of an estate than what it could, according to the best advice and estimate of skilled valuers, be sold for in open market. The Lord Ordinary, however, seems to consider that capital or sale value of the estate is not to be looked at at all in this question of compensation. His Lordship says that "the defenders object to the claim for loss in selling value, as a hypothetical award based upon sentimental objections which offerers for the estate might have to the presence of statutory smallholders," and in a later passage of his opinion "the award given of which complaint is made appears to me to be not direct, but indirect, remote, and hypothetical loss. It does not arise from depreciation in the value of the estate directly attributable to the constitution of the small holdings, but to objections which purchasers of the estate might personally have to the powers conferred by statute upon smallholders." I do not agree with the Lord Ordinary's reasoning. The arbiter—whose wide experience is well known to the Court—has found in fact that damage has been done to the pursuer in respect of depreciation in the value of his estate in consequence of and directly attributable to the constitution of the new holdings; and it is apparent on the face of the award that the evidence adduced by both parties tended to support the arbiter's view, though the witnesses probably differed widely as to the *quantum* of injury sustained and compensation to be awarded. If it be the fact, as the arbiter has found it to be, that purchasers would object to give as large a price for the estate as they would have been willing to pay if the smallholders had not come into possession of Lindean, I am unable to see why such objections should, in a question of the proprietor's compensation, be discarded as "sentimental," or merely "personal" to the purchasers; or why the compensation awarded should be deemed to be "indirect, remote, and hypothetical." I think that the objections are real and substantial, because, according to the arbiter, the introduction of the smallholders does in fact infer a material diminution in the price obtainable from a purchaser if the estate should come to be sold—which, after all, is no more than a measure of the actual depreciation in the present value of the estate in the hands of the pursuer; and I consider that the arbiter did not proceed *ultra fines* in awarding compensation under the head now complained of by the defenders.

I am therefore for recalling the Lord Ordinary's interlocutor, repelling the plea-in-law stated for the defenders, and decerning against them for payment as concluded for in the summons, with expenses in both courts.

LORD JOHNSTON—I concur with your Lordship. The section, or rather the portion of the section, with which alone we are concerned is the proviso in sub-section (11) of section 7 of the Landholders Act 1911. That provides for three separate things. It provides for compensation, first, where the Land Court, or in this case the arbiter, is of opinion that the landowner will suffer by reason that damage or injury will be done to the letting value of the land to be occupied by the new holders, or of any farm of which such land forms a part—that is to say, will be done to the letting value of the portion taken for new holdings if these are only a portion of a farm, or will be done to the remainder of the farm if a portion of the farm is left after the new holdings are carved out of it. It provides for compensation, second, if the Court or the arbiter are

of opinion that the tenant will suffer by reason that damage or injury will be done to him in respect that the land taken for new holdings forms part of the whole of the subject which he holds under a current lease —that is to say, if part of his farm is taken and he is left with the remainder, reduced in value by such taking, or if the whole of his farm is taken from him, in either case in the course of his lease. These first two items are concerned with the question from the point of view, the first of the landlord, the second of the tenant, confining attention to the area taken for new holdings as distinguished from the rest of the estate of which it forms a part. But the third item regards the question of injury from the point of view of the landowner's whole estate, and provides for compensation where the Court or arbiter are of opinion that damage or injury will be done to any landlord "in respect of any depreciation in the value of the estate of which the land forms part in consequence of and directly attributable to the constitution of the new holding or holdings as proposed." One asks first of all at what point of time is that depreciation to be ascertained, and I think the necessary answer is that it is to be ascertained as at the date at which the land is taken for the constitution of new holdings. What, then, is the meaning of depreciation at any given point of time in the value of an estate? It can, as I conceive it, be nothing other than the depreciation, if any, in the selling value of the estate as at that date. The learned Lord Ordinary appears to think that the depreciation contemplated by the statute can have nothing to do with selling value in the present case, because *de facto* the estate was not at the point of time in question and indeed is not now for sale. That is a chain of reasoning which I really cannot follow. Even although the landholder has not placed his estate on the market, it may depreciate in value just as much as if he had done so, and I should have thought that even in the end of October 1914, when he pronounced his judgment, the Lord Ordinary might have learned from current events that property was capable of depreciating in value although the owner of it had made no attempt in the previous couple of months to sell it. Depreciation in the value of an estate cannot be looked upon purely from the point of view of sale. An estate has always a potential value as a security, and no landowner knows when he may not require it as a fund of credit. A proposing purchaser would look at it from the same point of view. There has been, under this statute, imposed upon this estate a drastic change in the relation between its owner and the tenants of a substantial part of it. It is conceivable that that change, although it may not touch, for the present at any rate, the gross rental of the estate, may affect materially the abstract selling value, and therefore the security value, of the estate in the general market. That is not avoided by the fact that the owner has no immediate intention of either selling or of borrowing. It may be a fact all the same. It has been held, and I think on reasonable grounds, by the experienced arbiter here, that circumstances have occurred by reason of the changes introduced by the Act and by the Board of Agriculture taking advantage of its provisions to acquire part of the estate, which have affected its value in the market, and this is precisely what the statute intended to provide for. To interfere with the arbiter's discretion on this matter, unless he has acted *ultra vires*, is impossible. That he has done so was hardly seriously contended, and at any rate may be negatived without hesitation.

In these circumstances there can be no question that the arbiter's award must be given effect to.

I desire to add that I entirely concur with your Lordship's view as to the meaning and object of the last passage of the section with which we are dealing. This is clear to anyone who knows anything about Scottish practice under the Lands Clauses Acts. That practice may not be defensible on the intention of these statutes. But it had the sanction of sixty years, and it was prudent to provide against a similar practice growing up under this Act.

LORD GUTHRIE, who was present at the advising, delivered no opinion, not having heard the case.

LORD SALVESEN was sitting in the First Division.

The Court recalled the interlocutor of the Lord Ordinary, and decerned against the defenders for payment to the pursuer of the sum of £3850 sterling with interest as concluded for.

Counsel for the Pursuer and Reclaimer—Constable, K.C.—J. A. Christie. Agents—Mylne & Campbell, W.S.

Counsel for the Defenders and Respondents—Solicitor-General (Morison, K.C.)—T. G. Robertson. Agent—Sir Henry Cook, W.S.

Tuesday, July 20.

SECOND DIVISION.

[Sheriff Court at Kirkcudbright.

MILLIGAN *v.* HENDERSON.

Reparation—Negligence—Dangerous Animal—Dangerous Propensity—"Scientia"—Liability of Owner.

An action of damages for personal injury was raised on the ground that a dog belonging to the defender, or for which he was responsible, having come suddenly from behind a wagonette of the defender's which it was accompanying, passed in front of the pursuer, who was cycling past the wagonette, causing her to swerve, to hit the front wheel of the wagonette, and to fall, receiving injury. The pursuer failed to prove that the dog was vicious, but there was evidence that it was frolicsome, being about ten months old, though it had