LORD SKERRINGTON—Like the majority of your Lordships I am well satisfied with the judgment of the Lord Ordinary.

It does not seem to me that any light is thrown upon the case by figuring what would have happened if the trustees had made the apportionment at the time directed in the will, because the will did not contemplate that the fiars should be made parties to the apportionment. Of course the fiars were not then ascertained. But if we could suppose that a fiar had then been in existence and had come forward and said to the trustees, "Instead of paying me my share, I wish you to hold it as it stands, in certain investments," then the question would have been exactly the same as the question which we are now called upon to answer.

The only other observation I wish to make is with reference to the case of *Gilligan* (*Gilligan* v. *Gilligan*, 1891, 18 R. 387), which was founded upon by the pursuers' counsel and which is mentioned in the Lord Ordinary's note. The ground of judgment is stated as follows by Lord Rutherfurd Clark at p. 389—"The son as a beneficiary under the trust . . . was not entitled to any share of the heritable bond. His right was to a certain share of a moveable estate." These words seem to me exactly to describe the position and rights of the defender prior to the date of the transaction with which we are concerned in the present case, but they certainly do not describe his legal rights after that transaction had been entered into.

For these reasons I agree with your Lordship.

LORD JOHNSTON was absent at the advising.

The Court adhered.

Counsel for the Pursuers (Respondents)—Sandeman, K.C.—Burnet. Agents—Carmichael & Miller, W.S.

Counsel for the Defender (Reclaimer)—Chree, K.C.—Dykes. Agents—Lewis & Somerville, W.S.

Saturday, February 3.

SECOND DIVISION.

RACKSTRAW *v.* BRYCE DOUGLAS AND OTHERS.

Entail—Disentail—Heir-Apparent—Presumption as to Childbearing—Entail Amendment Act 1848 (11 *and* 12 *Vict. cap.* 36), *secs.* 3 *and* 52.

A lady, an heir of entail in possession, in her eighty-second year carried through a petition for disentail with the consent of her sister, aged seventy-eight, and the sister's only daughter, born in 1867, as the two next heirs-apparent in successive order. Under the destination there were called to the succession first after the petitioner the heirs whomsoever of her body. On the ground that the petitioner fell to be regarded as still capable of bearing issue, and consequently that her sister was not the heir-apparent, a person sought to reduce the instrument of disentail, averring that he was one of the three nearest heirs in existence whose consent to the disentail should have been obtained, and that he had not been called as a respondent to the petition. *Held* (*dis.* Lord Salvesen) that there is no presumption in law that a woman is past childbearing at any age, that there was no room for inquiry, and that reduction must be granted. *Question* (*per* Lords Dundas and Guthrie) whether cases might not arise in which inquiry would be allowed.

The Entail Amendment Act 1848 (11 and 12 Vict. cap. 36), sec. 3, enacts—"It shall be lawful for any heir of entail, being of full age and in possession of an entailed estate in Scotland holden by virtue of any tailzie dated prior to 1st August 1848, to acquire such estate, in whole or in part, in fee simple. . . . Provided always that such heir of entail in possession . . . shall have obtained the consents of the three nearest heirs who at the said dates are for the time entitled to succeed to such estate in their order successively immediately after such heir in possession, or otherwise shall have obtained the consents of the heir-apparent under the entail and of the heir or heirs in number not less than two including such heir-apparent, who in order successively would be heir-apparent . . ." Section 52—". . . The words 'heir-apparent' shall be construed to mean the heir who is next in succession to the heirs in possession and whose right of succession, if he survive, must take effect. . . ."

John George Hay Rackstraw, Sunderland, *pursuer*, brought an action against Miss Elizabeth Bryce Douglas, Edinburgh, and others, *defenders*, in which he sought to reduce a decree granted on 14th July 1914 by the Lord Ordinary officiating on the Bills (ANDERSON) approving and authorising the recording of an instrument of disentail of the lands of Burnbrae in the county of Dumbarton, of which the principal defender was the heir of entail in possession.

The pursuer averred—"(Cond. 4) On 9th June 1914 the defender, the said Miss Elizabeth Bryce Douglas, presented in the Bill Chamber of the Court of Session a petition under the Entail Acts, and in particular the Act 11 and 12 Vict. cap. 36, sec. 3, and relative Acts of Sederunt, for, *inter alia*, authority to record an instrument of disentail in order that she might acquire in fee-simple the subjects of the said entail, which then consisted of the lands of Burnbrae and others disponed in the said disposition and deed of tailzie, excepting the portions or rights disponed as aforesaid under statutory powers, and also of the said feu-duties or rents and the investment covered by the said deed of declaration of trust. (Cond. 5) In the course of proceedings following on the said petition a pretended deed of consent consenting to the proposed disentail was granted by the defenders Mrs Agnes Smith Bryce and Miss Janet Bryce. These

defenders are described in the said petition as the only surviving lineal descendants (other than the said Miss Elizabeth Bryce Douglas) of the entailer and not subject to any legal incapacity. The said Mrs Agnes Smith Bryce was also described in the said petition as the only sister of the said Miss Elizabeth Bryce Douglas, and the said Miss Janet Bryce was described therein as the only surviving child of the said Mrs Agnes Smith Bryce. (Cond. 6) After certain procedure the Honourable Lord Anderson, Lord Ordinary officiating on the Bills, on or about 14th July 1914 pronounced decree in terms of the prayer of the said petition as set forth in the foregoing summons. Thereafter on or about 8th August 1914 a pretended instrument of disentail executed by the said Miss Elizabeth Bryce Douglas, and recorded with the said decree in the Register of Entails on 28th July 1914, was recorded on her behalf in the Division of the General Register of Sasines applicable to the county of Dumbarton. Further, on or about 12th October 1914 there was recorded in the said Division of the General Register of Sasines a pretended said trust-disposition, dated 16th September 1914 (following upon a pretended agreement between them for disentail and re-settlement of the said entailed subjects, dated 29th June, and registered in the Books of Council and Session on 30th July 1914) by the said Miss Elizabeth Bryce Douglas, with consent of the said Mrs Agnes Smith Bryce and Miss Janet Bryce in favour of themselves as trustees for the purposes therein mentioned of the said entailed subjects comprising the lands and others described in the said pretended instrument of disentail, and the said investment. The only beneficiaries under the said pretended trust-disposition are the individual defenders, the said Miss Elizabeth Bryce Douglas, Mrs Agnes Smith Bryce, and Miss Janet Bryce, themselves. It is believed and averred that these defenders also obtained from the trustees under the said deed of declaration of trust a transfer of the said investment, and hold a stock certificate relating thereto in favour of themselves. The said pretended decree, instrument of disentail, agreement, trust-disposition, transfer, and certificate are the writings of which production is called for in the summons. (Cond. 7) The said petition with all that has followed thereon was incompetent and inept. At the date of the said petition the said Miss Elizabeth Bryce Douglas, who was born on 28th December 1832, was not the only heir of entail in existence, and it was accordingly necessary for her, under section 3 of the said Act 11 and 12 Vict. cap. 36, to obtain the consents of either (*a*) the three nearest heirs entitled to succeed to the said entailed estates in their order successively immediately after her, or (*b*) the heir-apparent under the said entail and of the heir or heirs, in number not less than two, including such heir-apparent, who in order successively would be heir-apparent. The obtaining of the prescribed consents is a condition-precedent to the grant of authority to disentail. As a matter of fact the said Mrs Agnes Smith Bryce was not the heir-apparent under the said entail, and the said Miss Janet Bryce was not the heir who in order after her would be heir-apparent when they granted the alleged deed of consent. (*Ans.* 7) . . . Explained that said petition proceeded under the last alternative of section 3 of the Entail Amendment Act of 1848. . . . the defenders Miss Elizabeth Bryce Douglas and Mrs Agnes Smith Bryce were past the age of childbearing, and no children could be born to them. The right of succession of the defender Mrs Agnes Smith Bryce if she survived her sister Miss Elizabeth Bryce Douglas was therefore indefeasible, and the right of succession of the defender Miss Janet Bryce if she survived her mother, the defender Mrs Agnes Smith Bryce, and the defender Miss Elizabeth Bryce Douglas, was also indefeasible. . . . . (Cond. 8) As averred in the said petition, the said Miss Elizabeth Bryce Douglas, Mrs Agnes Smith Bryce, and Miss Janet Bryce are the only surviving lineal descendants of the entailer. The entailer's brothers, the said William Douglas and Joseph Douglas, are dead, and there are no heirs of their bodies. The pursuer is the heir whomsoever of the body of the said Robert Hay, the entailer's nephew, through his (the pursuer's) mother Hannah Hay, and in the event of the defenders, the said Miss Elizabeth Bryce Douglas, Mrs Agnes Smith Bryce, and Miss Janet Bryce dying without leaving issue, he is the heir next entitled to succeed under the said disposition and deed of tailzie. (*Ans.* 8) . . . It is believed to be true that the entailer's brothers William Douglas and Joseph Douglas are dead, but it is not known and not admitted that there are no heirs of their bodies. Not known and not admitted that the pursuer is a lineal descendant of Robert Hay, the entailer's nephew, through his (the pursuer's) mother Hannah Hay. . . . (Cond. 9) Notwithstanding that the pursuer's relationship to the entailer as mentioned in condescendence 8 had been intimated to the defender, the said Miss Elizabeth Bryce Douglas, through her law agents, the said petition for disentail was not served upon or intimated to him, and he was not aware of its having been presented until after decree therein had been pronounced."

The pursuer pleaded—"The requisite contents not having been obtained or dispensed with, said decree was unwarranted, incompetent, and inept, and ought to be reduced, with all that has followed thereon, as concluded for."

The defenders pleaded, *inter alia*—"2. The pursuer's averments, so far as material, being unfounded in fact, the defenders should be assoilzied from the conclusions of the summons. 3. The said petition and the procedure following thereon being regular, and the consents as required by law having been obtained thereto, decree of reduction as concluded for should be refused. 4. The defender Mrs Agnes Smith Bryce having been the heir-apparent under the said entail, and the defender Miss Janet Bryce having been the heir who next in successive order would be heir-apparent, the defender Miss

Elizabeth Bryce Douglas was entitled with their consents to disentail the said lands and others."

On 20th July 1916 the Lord Ordinary pronounced the following interlocutor:—"Finds that the disentail proceedings mentioned on record were not conform to the statutes in respect that while the decree under reduction authorising the recording of the instrument of disentail executed by the defender Miss Elizabeth Bryce Douglas proceeded on a deed of consent bearing to be granted by the defender Mrs Agnes Smith Bryce as the heir-apparent under the entail, and by the defender Miss Janet Bryce as the heir, who in order successively would be heir-apparent, the said defender Mrs Bryce was not heir-apparent under the entail in respect that the destination in the deed of entail mentioned on record called to the succession before her the heirs whomsoever of the body of the defender Miss Elizabeth Bryce Douglas, and that although the said Miss Elizabeth Bryce Douglas was then of the age of eighty-one years it is not admitted that she was beyond the possibility of having children born to her; that no proof as to the fact is asked or admissible, and that she cannot by virtue of any legal presumption be held to have been beyond said possibility; with these findings continues the cause for further procedure, and grants leave to reclaim."

Opinion.—"In this action the pursuer seeks to reduce a decree granted by Lord Anderson on 14th July 1914 approving and authorising the recording of an instrument of disentail of the lands of Burnbrae in the county of Dumbarton, the said instrument of disentail itself, and various other writs.

"The petition for disentail was presented on 9th June 1914 by the present defender Miss Elizabeth Bryce Douglas, who was the heir of entail in possession, and was then in her eighty-second year. The nearest heir after her then in existence was the present defender Mrs Bryce, who was then in her seventy-ninth year. The nearest heir then in existence after Mrs Bryce was her daughter, the present defender Miss Janet Bryce.

"Under the destination there are called to the succession first after Miss Elizabeth B. Douglas the heirs whomsoever of her body. Similarly after Mrs Bryce there are first called to the succession the heirs whomsoever of her body.

"The deed of entail is dated and recorded in 1812. On the footing that the petitioner fell to be regarded as still capable of having issue, Mrs Bryce was not heir-apparent, and it was essential to a disentail that the consents of the three nearest heirs then in existence should be obtained, or that their expectancies should be valued and satisfied and their consents dispensed with. The pursuer avers that he is the nearest heir under the destination after Miss Bryce. He was not called as a respondent to the petition.

"The disentail proceeded tacitly on the footing that neither the petitioner nor Mrs Bryce were to be regarded as capable of having issue, and therefore (1) that Mrs Bryce was heir-apparent after the petitioner, and (2) that Miss Bryce was heir-apparent after her mother. On this footing there was produced a deed of consent by Mrs Bryce and Miss Bryce by way of proceeding under the last alternative in section 3 of the Rutherfurd Act (11 and 12 Vict. cap. 36). The terms of the petition did not explicitly draw attention to the point now raised—whether Mrs Bryce and Miss Bryce were in their order successively heirs-apparent; it escaped the notice of the reporter, and it thus was not brought under the cognisance of the Lord Ordinary or considered by him, and decree was granted in the usual form on the footing of the statutory requisites having all been duly complied with, following the recommendation in the report.

"The ground of reduction now proponed is that according to the law of Scotland the petitioner Miss Elizabeth B. Douglas fell to be regarded in the disentail proceedings as still capable of having issue notwithstanding that she had attained the age of eighty-one, or alternatively that Mrs Bryce fell to be so regarded although she had attained the age of seventy-eight.

"This contention by the pursuer is said by the defenders to be repugnant to common sense, inasmuch as in the actual transaction of human affairs outside a court of law it would be taken as a fact of common knowledge and certain that a woman, whether eighty-one or seventy-eight, had outlived her capacity for bearing children. I am of opinion, notwithstanding, that the pursuer's contention is in accordance with the law of Scotland as laid down in decisions which I am bound to follow, and which affirm that there is no presumption in law that a woman is at any age beyond the possibility of having issue. Proof is held to be inadmissible. There is, of course, an original presumption that a woman after the age of puberty is capable of bearing children; and the law as I take it to be settled is that at no age does a counter presumption arise that she has ceased to be so capable. The practical result is that in any case where the capacity of a woman to bear children is a factor in the question at issue the Court must in the absence of admission decide the question on the assumption that the woman, no matter how great her age, is still capable of bearing children.

"In some of the earlier cases the question would seem to have been dealt with in a discretionary way. In the case of *Anderson* v. *Ainslie*, 1890, 17 R. 337, which was one of a petition under section 27 of the Rutherfurd Act for denuding and conveyance of lands held in trust for the purpose of being entailed, the question was raised sharply for decision. The competency of the petition depended on whether the truster's unmarried daughter Miss Margaret Ainslie, whose heirs of the body were called under the directed tailzied destination, could be regarded as beyond childbearing, she being then in her fifty-eighth year. The Lord Ordinary (Lord Kyllachy) was with the petitioner in her contention that Miss

Margaret Ainslie might be taken as past the age of childbearing. His interlocutor was recalled, and the petition was refused by the Second Division of the Court. Lord Rutherfurd Clark said — 'The first question comes to be whether we can assume it to be a fact that Miss Ainslie can have no issue. We know nothing more on this subject than Miss Ainslie's age. On the one hand it is plainly a matter on which we could not order inquiry. On the other hand the law has not assigned any age at which a woman is to be held as past childbearing. But if we can neither ascertain the fact by proof nor proceed on any legal presumption, I do not think that we can decide the case on the footing that Miss Ainslie can have no issue. We must assume the possibility of such issue, and by consequence we must hold that the petitioner is neither in form nor in fact the institute of entail.'

"The rule thus laid down was followed by the First Division of the Court in the case of *Beattie's Trustees* v. *Meffan*, 1898, 25 R. 765, where the question at issue depended on whether two married daughters of the testator Beattie, who were aged 56 and 57 respectively and had children, fell to be regarded as beyond the possibility of having more children. Lord Adam, who gave the leading opinion, after referring to the earlier cases of *Lowson's Trustees* (13 R. 1003) and *Urquhart's Trustees* (14 R. 112), quoted the passage from Lord Rutherfurd Clark's opinion in *Anderson* v. *Ainslie* (which I have quoted above) and said—'In my opinion the law as laid down in the case of *Anderson* is right and ought to be followed in this case.' And Lord M'Laren, who gave the only other opinion, said—'In my view the question in this case is to be solved by the clear and accurate statement of Lord Rutherfurd Clark in the case of *Anderson*.' Lord M'Laren went on to say —'That leaves open for consideration cases in which it may be proved or admitted that the possibility of issue is at an end, but in the absence of such admission or proof I agree with Lord Adam, following upon the case referred to, that the Court cannot order an inquiry into the matter, and at the same time that the Court has no legal presumption to guide it independent of the facts.' It is not quite clear to my mind what is the class of possible cases that Lord M'Laren intended to refer where there is proof, as distinguished from admission, that the possibility of issue is at an end, but his Lordship is quite definite in saying that the Court cannot order an inquiry into the matter.

"In the subsequent case of *Gollan's Trustees* v. *Booth*, (1901) 3 Fraser 1035, Lord Adam reaffirmed the rule of *Anderson* v. *Ainslie*, saying—'I think the more recent authorities hold that a woman cannot be presumed to be past childbearing at any particular age.

"The defenders referred to the cases of *De la Chaumette*, (1902) 4 Fraser 745, and *Turnbull's Trustees*, 1907, 44 S.L.R. 843. In the first of these cases the Second Division of the Court (*dis.* Lord Moncrieff) held that the capital of marriage-contract trust funds destined to the children of a marriage might be applied in the purchase of annuities for the spouses, the wife being nearly seventy years of age and never having had a child. The *ratio* was that while there was no legal presumption that a woman is at any particular age past childbearing, there was a sufficient *presumptio hominis et facti* that a woman of the age of seventy or thereby is past childbearing, on which the Court might act in a case where there was no other interest than that of possible issue involved. In the case of *Turnbull's Trustees* it was held, on caution offered, that testamentary trustees might make payment of the trust funds to the pursuer, the only barrier to whose right thereto was the possibility of her having issue and who was fifty-eight years of age. The *ratio* was thus explained by the Lord Justice-Clerk—'There is no doubt that it has long been a fixed doctrine in our law—and the same seems to be the case in England—that there is no age at which a woman is presumed to be incapable of childbearing. Nevertheless the Court have in several cases considered themselves able to allow property which is to all intents tied up when there is practically no possibility of children being born to be divided on security being found to make repetition in the event of a birth taking place. I think we may follow these cases on the present occasion.'

"Neither in the case of *De la Chaumette* nor in that of *Turnbull's Trustees* did the Judges purport to challenge the rule enunciated in *Anderson* v. *Ainslie* and endorsed in *Beattie's Trustees* that there is no legal presumption that at any particular age a woman is past childbearing, although the adoption of a *presumptio hominis et facti* in *De la Chaumette* seems in effect to amount to a refusal to apply that rule in the circumstances which there occurred. In the case of *Turnbull* the Judges went, as I take it, on the view that where the only interest involved is that of the unborn issue of the woman who may be in question the Court may follow 'a rule of practice' (*per* Lord Stormonth Darling) and allow trust funds to be dealt with on a discretionary view as to the probability of such issue ever coming into existence. The same view probably underlies the decision in the case of *De la Chaumette*.

"I am unable therefore to regard the cases of *De la Chaumette* and *Turnbull's Trustees* as weakening the authority of the cases of *Anderson* v. *Ainslie* and *Beattie's Trustees*.

"I was referred to a number of English cases. The law of England is not directly in point. But from the cases of *Jee* v. *Audley*, 1 Cox 324; *re Sayers Trusts*, L.R., 6 Eq. 319; *re Dawson*, L.R., 39 Ch. Div. 155; and *in re Hocking*, 1898, 2 Ch. 567, I should infer that the general rule of English law is the same as that enunciated in *Anderson* v. *Ainslie*, although there is a series of cases in the Court of Chancery which, as explained by Chitty, J., in *in re Dawson*, are cases 'in which the Court does not assume the impossibility of issue, but as a mere matter of

convenience of administration regards the high degree of improbability.' With these Chancery cases the cases of *De la Chaumette* and *Turnbull's Trustees*, already referred to, may perhaps be ranked.

"Here, however, the interest involved is not that of unborn issue but the interest of a person in existence, the pursuer, who is entitled to appeal in his interest to the rule laid down in *Anderson* v. *Ainslie.*

"The defenders aver that in point of fact both Miss Douglas and Mrs Bryce was at the date of the disentail proceedings beyond the possibility of having children born to them. They do not ask a proof of this averment, conceding that the Court cannot order an inquiry into such matters as stated in *Anderson* v. *Ainslie.* They contend, however, that in the ascending scale of years one ultimately comes to ages at which it may be said to be a fact of common knowledge requiring no proof that a woman is beyond childbearing. They do not, of course, profess to say where the line should be drawn, but they say that the ages of eighty-one and seventy-nine clearly fall on the further side of it. Now this contention seems to me to run directly counter to the proposition in *Anderson* v. *Ainslie*, which is that, proof being inadmissible, there is *no age* at which the law presumes a woman to be in fact beyond childbearing.

"I am of opinion therefore that I must sustain the argument for the pursuer.

"There remains another question in the case. It is logically a prior question, relating as it does to the pursuer's title and interest to insist in the action, but the parties at the hearing agreed to leave it over. The pursuer avers that he is the third nearest heir in existence under the destination after Miss Douglas, Mrs Bryce and Miss Bryce being the first and second respectively. The defenders do not admit his averment. The question of family relationship thus raised may be susceptible of solution by extrajudicial inquiry, otherwise a proof will be necessary. Meantime I shall make findings and continue the cause for further procedure."

The defenders reclaimed, and argued—"Heir-apparent" was defined in section 52 of the Entail Amendment Act 1848 (11 and 12 Vict. cap. 36). The two consenters were heirs-apparent. There was a presumption *facti et hominis* that a woman eighty-one years of age could no longer bear children. The Scottish courts had never laid down the rule that they would always refuse to apply the presumption, notwithstanding that they had never made a rule that at a certain age a woman could not possibly bear children. Disentail procedure was remedial procedure, relief from the fetters of an entail being given on certain conditions. The Court did occasionally act on its knowledge of natural facts without requiring proof thereof—Dickson on Evidence, sec. 114. It was axiomatic, based on universal experience, that a woman eighty years of age would not bear more children. This did not affect decisions in the cases cited, which dealt rather with doubtful cases where the ages varied between fifty and sixty. Counsel cited *Anderson* v. *Ainslie*, (1890) 17 R. 337, 27 S.L.R. 276; *Beattie's Trustees* v. *Meffan*, (1898) 25 R. 765, 35 S.L.R. 580; *Urquhart's Trustees* v. *Urquhart*, (1886) 14 R. 112, 24 S.L.R. 98; *Louson's Trustees* v. *Dicksons*, (1886) 13 R. 1003, 23 S.L.R. 722; *De la Chaumette* v. *De la Chaumette*, (1902) 4 F. 745, 39 S.L.R. 524; *Turnbull* v. *Turnbull's Trustees*, (1907) 44 S.L.R. 843; *in re Widdow's Trust*, L.R., 11 Eq. 408; *Croxton* v. *May*, L.R., 9 Ch. Div. 388.

The respondent argued—The question for consideration here was—What is an heir-apparent in the sense of the Entail Amendment Act 1848? That question was answered in section 52 of that Act. The words used in the definition were "whose right of succession, if he survive, must take effect"; it was "must" and not "may." The question was purely one of entail law. Both Divisions had laid down that there was no presumption in law that a woman will not bear children beyond a certain age—the First Division in the case of *Beattie's Trustees* (*cit.*) and the Second Division in the case of *Anderson* (*cit.*). Counsel cited the following cases:—*Stewart Mackenzie* v. *Lady St Hilier*, (1906) 14 S.L.T. 448; *re Dawson*, L.R., 39 Ch. Div. 155, *per* Chitty, J.; *in re Hocking*, 1898, 2 Ch. 567, *per* Lindley, M.R., at p. 570; *White* v. *Edmond*, (1901) 1 Ch. 570; *Turnbull* (*cit.*); *Forbes* v. *Burness*, (1888) 15 R. 797, 25 S.L.R. 592.

At advising—

LORD JUSTICE-CLERK—In this action the pursuer seeks reduction, *inter alia*, (1) of a decree authorising the registration of an instrument of disentail, and (2) of the said instrument of disentail, in respect that the necessary consents required by law had not been obtained. The instrument of disentail was executed by the defender Miss Elizabeth Bryce Douglas in 1914, when she was eighty-two years of age, and the deed of consent was signed by the defender Mrs Agnes Smith Bryce, a widow, as heir-apparent under the entail in 1912, when she was seventy-eight years of age. The objection was that in law it could not be predicated that either of these ladies was now beyond the age of childbearing, so that Mrs Bryce was not heir-apparent within the meaning of section 52 of the Rutherfurd Act 1848.

In my opinion the judgment of the Lord Ordinary is right, and I should have been content to have adopted his opinion. But as there is a difference of opinion on the question I think it right to state my views.

It was conceded that in view of the authorities we could not allow proof on the subject, and accordingly the reclaimers did not ask for a proof. But they maintained that without proof they were entitled to absolvitor. In my view the question is concluded against the reclaimers by authorities which this Court is bound by. In the case of *Anderson* v. *Ainslie*, 17 R. 337, in this Division, the point was decided as regards a lady of fifty-eight, and in the First Division the same result was arrived at in the case of *Beattie's Trustees* v. *Meffan*, 25 R. 765, as regards two ladies aged fifty-six and fifty-seven respec-

tively. It was argued that because of the difference of the ages these cases could not affect the question in the present case where the ages are so much greater. I cannot accept this view. In my opinion the Courts have laid down a general rule which is applicable whatever the age be.

The case of *De la Chaumette*, 4 F. 745, was strongly founded on by the defenders. I am not sure how far that case can still be regarded as authoritative especially after the case of *Turnbull*, 44 S.L.R. 843, in the same Division, where payment was only authorised upon caution. Such cases, however, may be justified on the ground that they do not affect the authority of *Anderson* v. *Ainslie* and *Beattie's Trustees*, so far as the present question is concerned, in respect that they did not adversely affect the interests of living persons, and, moreover, that they had to do with the distribution of funds in the course of trust administration. I confess it is not easy to see how logically such an exception to the general rule can be justified, or how, if there is a legal right to obtain payment, caution can be insisted on. But these are considerations which I do not think it necessary to consider in this case.

I am of opinion that on the authorities which are binding on us we ought to affirm the Lord Ordinary's interlocutor.

It seems to me that in this matter the law of England is on the general question the same as ours, but the exception as to trust administration has perhaps been further developed in England than with us. I refer specially to *in re Dawson*, 39 Ch. D. 155, and to *in re Hocking*, [1898] 2 Ch. 567.

LORD DUNDAS—I am of the same opinion. The pursuer in this action seeks reduction of an interlocutor recently pronounced in a petition for authority to record an instrument of disentail, and of other documents following thereon. The Lord Ordinary has at this stage decided only one point in the case, which has by his Lordship's leave come before us on a reclaiming note. This point turns upon the construction of the latter portion of section 3 of the Rutherfurd Act, and particularly of the words "heir-apparent" there occurring, which are defined in section 52 of the same Act. When the petition was presented the petitioner Miss Douglas was eighty-one years of age, and the persons called as respondents were her sister Mrs Bryce, then aged seventy-eight, and her daughter Miss Bryce, who was born in 1869. These ladies were called as being "the heir-apparent under the entail, and the heir or heirs in number not less than two, including such heir-apparent, who in order successively would be heir-apparent." Section 52 enacts that "'heir-apparent' shall be construed to mean the heir who is next in succession to the heir in possession, and whose right of succession, if he survive, must take effect." The question is whether it can be affirmed of the respondents that their right of succession, if they survive, "must take effect." The Lord Ordinary has answered that question in the negative, and I agree with him. I find myself so completely in accord with the full and able opinion which his Lordship has pronounced that I do not desire to add very many words of my own. I think the point is not open, but is concluded, so far as the Court of Session is concerned, by authority. It is, in my judgment, settled that there is no age at which a woman is presumed in law to be incapable of childbearing; nor is that a matter upon which the Court will (at all events in the general case) grant inquiry. The reclaimer's counsel did not ask for proof in the present case. These points were clearly laid down by the Second Division in *Anderson* v. *Ainslie*, 17 R. 337, to which the Lord Ordinary refers. The Court reversed an interlocutor of Lord Kyllachy, and I think impliedly overruled, *inter alia*, an Outer House judgment by Lord M'Laren (*Barron*, 24 S.L.R. 735), and also *Urquhart's Trustees*, 14 R. 112, which Lord Kyllachy had cited with approval. The Lord Ordinary quotes (and I need not repeat) an important passage from Lord Rutherfurd Clark's opinion to the effect, *inter alia*, that "the law has not assigned any age at which a woman is to be held as past childbearing," and that "it is plainly a matter on which we could not order inquiry." A few years later, in *Beattie's Trustees*, 25 R. 765, the First Division followed *Anderson* v. *Ainslie*, expressly approving the opinion of Lord Rutherfurd Clark above referred to, and disapproving of two earlier decisions of the Second Division—*Louson's Trustees*, 13 R. 1003, and *Urquhart's Trustees*, already cited. I think the rubric in *Beattie's Trustees* is correct in stating that it was "held (following *Anderson* v. *Ainslie*) that there is in law no presumption that a woman is past childbearing at any age." Again, in *Gollan's Trustees*, 3 F. 1035, Lord Adam, who had delivered the leading opinion in *Beattie's* case, said—"I think the most recent authorities hold that a woman cannot be presumed to be past childbearing at any particular age. Therefore I think that we cannot give effect to that contention." And in the most recent case upon this subject—*Turnbull's Trustees*, 44 S.L.R. 843—the Lord Justice-Clerk, who had taken part in *Anderson* v. *Ainslie*, said—"There is no doubt that it has long been a fixed doctrine in our law . . . that there is no age at which a woman is presumed to be incapable of childbearing." As regards inquiry, it may be that a case might arise where the Court might consider some measure of proof to be admissible, *e.g.*, if there were clear and specific averments that a person (man or woman) was incapable of procreation owing to some accident, mutilation, or disease. Possibly Lord M'Laren had something of this kind in view when he gave his opinion in *Beattie's Trustees*. But these remarks have no application to the case before us.

The reclaimer's counsel founded strongly upon the case of *De la Chaumette's Trustees*, 4 F. 745. I do not think it helps them. The decision may perhaps be supported, as the Lord Ordinary suggests, upon the special ground that it did not involve, as the present case does, the interest of any living person. I may say, however, for my own part that

if a case should arise hereafter, indistinguishable upon its facts from *De la Chaumette's Trustees*, I think the decision there arrived at by the majority of the Court might well be reconsidered by a fuller bench. In any view, however, it is not here directly in point, and does not in my judgment in any way weaken the weight of authority already referred to.

It appears to me therefore that the point now before us is concluded, so far as we are concerned, by the decided cases. I think it would serve no good purpose, and would indeed be idle, to consider how we might have been disposed to deal with it if it had arisen for our determination now for the first time; to attempt to trace or analyse the reasons which may have led the Court to the conclusions they arrived at on former occasions; or to endeavour to define the scope and limits of what was referred to in the arguments as the common knowledge of mankind with regard to the subject derived from collective human experience. I am not much moved by the fact, strongly relied upon by the reclaimer's counsel, that the ages of the ladies here in question—eighty-one and seventy-eight respectively—are considerably more advanced than those which were actually under consideration by the Court in the various reported cases, because, as I have already shown, the learned judges all expressed, without qualification or reservation, the general doctrine that there is no age at which a woman is presumed in law to be incapable of bearing a child, and have indicated that the matter is not one as to which the Court will (at all events, in the general case) order inquiry. It would not in my judgment be right or proper that we should send the case for rehearing before a fuller bench, because both Divisions of the Court have deliberately committed themselves to the doctrine I have enunciated. If that doctrine is wrong I think it must be put right by the Court of last resort, or perhaps by legislation. I see no reason why Parliament should not, if it thought fit, pass an Act anent the presumption of progeny, as it has already legislated in regard to the presumption of life.

There is one other matter I should like to refer to. It was, I think, unfortunate that the present pursuer was not called as a respondent to the petition. Counsel were at issue as to why this was not in fact done, but it is unnecessary to go into that matter. It is apparent that if the pursuer had been so called much trouble and expense might have been avoided. There is, I apprehend, no doubt that the correct practice in all entail petitions is to call the next three heirs of entail entitled to succeed, if there be three or more heirs in existence. The point unfortunately does not appear to have attracted the notice of the reporter to whom the proceedings in the petition were remitted, any more than did the matter which has formed the subject of the present discussion. But I think it worth while to state what I believe to be the correct practice in all such petitions, as it used to be observed in days when they were much more numerous than they are now, and as I notice that it was laid down by Lord Low in the case of the *Duke of Portland*, (1893) 1 S.L.T. 144.

For these reasons I am of opinion that we ought to adhere to the interlocutor reclaimed against. The case must, I suppose, go back to the Outer House for further procedure.

LORD SALVESEN—[*After referring to the averments and section* 52 *of the Rutherfurd Act*]—At the date of the petition for disentail Miss Elizabeth Bryce Douglas was eighty-one and a half years of age and her sister was over seventy-eight. The ground of reduction which the Lord Ordinary has sustained is that according to the law of Scotland these two old ladies are still capable of having issue, and this notwithstanding that there is a distinct averment by the defenders that both were then past the age of childbearing and that there has been no inquiry of any kind on the subject. If this be indeed the law of Scotland, it affirms as a fact what according to the universal experience of mankind is not so, and declares that something which is universally admitted to be impossible according to the law of nature must nevertheless be regarded as possible by the law of Scotland. I am of opinion that this is not the law of Scotland, and that there is no decision binding upon us which compels us to affirm a proposition so utterly divergent from common sense.

The exact age at which a woman necessarily ceases to be capable of bearing children has never been judicially settled. Between the ages of fifty and sixty there are instances recorded, although very infrequent, of women having given birth to children, but we were not referred to a single instance of women having become mothers at the age of seventy-eight or eighty-one. If we as judges are not entitled to proceed on the common knowledge of mankind in general, it is at least possible for us to order an inquiry as to the facts on which the pursuer's case turns, and which are averred as facts and not as matters of law. Such inquiry, I take it, would have no relation to the particular ladies concerned (they being admittedly in no sense abnormal), but would be limited to ascertaining whether in the past any woman of the age of seventy-eight or upwards has been known to give birth to children after attaining such age. This may be proved by experts in the same way as any scientific fact which may be the subject of dispute, with this difference, I apprehend, that it is scarcely conceivable that there could be any difference of opinion among experts. It would be analogous to proving the proposition, now regarded as axiomatic, that all men must die. Both propositions are based on myriads of instances to which there has been no exception in the course of nature. *A priori* there is no reason why a particular man should not live for ever although no other man had done so, and *a priori* there is similarly no reason why a woman should not be capable of bearing children so long as she lives. The same may be said of every scientific fact which

has contributed to the advancement of knowledge, as, for instance, that water when it gets below a certain temperature expands, whereas if it were like most other substances it might be expected to contract. The facts of science which are treated as certainties are all based upon inductive logic. The conclusions so reached afford just as much certainty as those which are derived by deductive reasoning. Given a sufficient number of observed cases all exhibiting precisely the same phenomena under the same conditions, it becomes scientifically certain that the same results will follow with substances of the same nature, on which no experiment has been tried, when subjected to the same conditions. Thus, to take the above simple illustration, it appears to me to be as certain that a woman of seventy-eight cannot bear a child as it is that the water in the bottle on the table of the Court will expand when its temperature is reduced to freezing point.

All this appears elementary, and the only reason why I refer to it is to point out that in matters which are the common knowledge of mankind the Courts have acted without inquiry on such knowledge. Thus in questions of vesting the ultimate death of a person is treated as an event which must happen, and not as an event to which the maxim *dies incertus pro conditione habetur* applies. Similarly, while the Court has never fixed the maximum duration of pregnancy in women, I take it that we should not order an inquiry in the case of a woman whose husband had died two years before the birth of her last child, and who averred that her late husband was the father of the child. It appears to me to be just as little necessary to have an inquiry as to whether a lady of seventy-eight is capable of bearing children.

So far I do not understand that your Lordships entertain a different opinion, but that you base your decision upon authority. I have a great respect for the judgments of our predecessors, and where they settle a rule which has been followed in practice, and which has been long regarded as governing a legal relation to which it applies, I should be very slow to join in reconsidering the rule even though I thought it rested on principles which could not now be easily defended. We are not, however, dealing with a case of that kind, for no practice can ever have followed on the decisions which your Lordship in the chair proposes to follow, although some persons may have refrained from putting forward claims which would have been entertained but for these decisions. Nor can I regard as having any binding effect a decision which treats a matter of fact as matter of law, and determines without inquiry the fact to be the opposite of what we all know it to be. But even on authority strictly treated I am of opinion that the reclaimers are entitled to succeed. The earliest authority that I have come across is a passage in Lord Stair's Institutes, where he deals with the case of a certain Marion Weir, which was debated in 1647 and 1648. Speaking with reference to this case he says (bk. v, 30)—"As to the other case in the instance proposed, it seems the succession ought to have depended till the event of the lawful issue of Marion Weir, first, because that had a determined time by the course of nature, viz., that 50 or 52 years of age at which time the issue of women is reputed extinct, which it is not in the case of man." Perhaps since Stair wrote there have been some cases of women giving birth to issue at ages slightly above the age of fifty-two, but these are so infrequent that they might for practical purposes be left entirely out of account. It may, however, be well to err on the side of caution, and not to hold a woman incapable of bearing children until she has reached the age of sixty, so that we may run no risk of our decision on a question of this kind being refuted by a subsequent event, however improbable. The latest decision is on the same lines. I refer to the case of *De la Chaumette's Trustees*, 4 F. 745, where it was held that a woman of seventy was past the age of childbearing. Lord Young said—"I may say also that the opinion which your Lordship in the chair has expressed, and in which Lord Trayner concurs, agrees with mine, that no account whatever can be taken of the suggested possibility of these old people having a family now, and therefore the case must be determined on the footing that the Court regards issue of this marriage as impossible—not as impossible because it would be contrary to the law of Scotland, but impossible because it would be contrary to the law of nature." Lord Trayner observed—"There is, however, a very strong presumption *hominis et facti* that a woman who is seventy years of age is past childbearing;" and Lord Moncreiff said—"I recognise as clearly as your Lordships do that there is now no possibility of issue of the marriage of the second parties, looking to the advanced age (seventy years) of Mrs Chaumette." Lord Moncreiff, indeed, dissented from the judgment, but on a ground which was entirely technical, namely, that the possibility of issue was not a question of law for the Court but a question of fact, and as the dispute arose on a special case it could not according to our practice be presented for decision unless parties were agreed on the facts. The Lord Justice-Clerk (Macdonald) qualified his opinion thus—"I think that although it has never been declared that an absolute legal presumption arises from any age that no issue is possible, nevertheless, in considering the particular case the Court may, when no other interest can be involved except that of prospective issue, act on a presumption *hominis et facti*, based upon what is known as possible or impossible according to the experience of mankind. Now, except in an old case referred to in works on medical jurisprudence, no such thing has been heard of as issue between people of the age of the second parties in this case." While the interest of the respondent is that of a stranger, I am unable to appreciate the view that his interest must be protected more jealously than the interests of unborn children who may reasonably be expected to come into

existence, and I do not think this solitary indication of opinion at all limits the application of the judgment based on the crucial fact on which the whole Division proceeded that a woman of seventy is past the age of childbearing.

As this is the latest authority on the subject, and is equally binding upon us with any other of the decisions cited, it ought in my opinion, even if it were opposed to these decisions and overruled them, to be followed by us. But in reality the decision is not in my opinion opposed to the decisions on which the respondent founds, and I adopt what Lord Trayner said in reviewing these decisions, for they were by no means left out of account. All that these cases decided was that certain ladies between the ages of fifty and sixty could not be regarded on a mere statement of their age to be beyond the possibility of having issue. I frankly concede that some of the dicta of the Judges went beyond the circumstances of the cases which were actually before the Court, and as the judgment proceeded on these dicta in at least one of the cases it might be plausibly said that the point was ruled by authority but for the fact that *De la Chaumette's* case must be held to have overruled these dicta as grounds of judgment in the case of a woman of seventy years. I have never understood that it was our duty to hold ourselves bound by a decision in an earlier case by one Division which was overruled in our own Division after full consideration. If we thought that the decisions as such conflicted, or that the principles on which they were decided were inconsistent, our duty would be to send the present case to a larger tribunal, but not to follow the earlier decision because we happened to think it the more convincing.

Now the two cases on which the Lord Ordinary mainly relies are those of *Anderson*, 17 R. 337, and *Beattie's Trustees*, 25 R. 765. The case of *Anderson* was a complicated one, raising various questions as to the construction of a settlement, and the decision would, I think, have been exactly the same though the point with which we are now dealing had not been involved. Lord Young said—"I would only add to what your Lordship has said, that Margaret's age" (she was fifty-eight at the date of the petition) "was known to her father, and that she is hardly appreciably older now than she was at his death in 1888, or when he executed the trust in 1885, or the relative codicil in 1888. Yet his direction to his trustees is that they shall abide the event and execute no entail before her death. I think the trustees are not at liberty to violate or disregard his direction on any such view as that on which the Lord Ordinary here proceeded, and I should have thought so although the lady named had been a hundred at the date of the deed and any age you please when the question arose. I think a testator may lawfully direct his trustees to await the death of a maiden lady of any age, however advanced, and thereupon to convey his succession to her child should she have one, and if not, then to some-one else." This passage relates to the direction of the testator that the trustees should hold his lands for the successive liferents of his widow and daughter, and upon the death of the last survivor of these two persons settle the lands by deed of strict entail on the heirs mentioned. Dealing with this and other clauses Lord Rutherfurd Clark says—"So far therefore it is clear enough that the time at which the truster directed the entail to be made has not arrived. For Mrs Ainslie and Miss Margaret Ainslie are both alive, and the residue has not yet been invested in the purchase of lands." It is unnecessary to go further into the elaborate opinion of the Judges, as I think it clear that the petition would have been dismissed on grounds which have no application to this case. Lord Rutherfurd Clark, however, did in the course of his opinion give expression to views which form the basis of your Lordships' judgment. These embraced two propositions, the first being that the question whether a lady of a given age could have issue is a matter on which the Court could not order inquiry, and the second that the law has not assigned any age at which a woman is to be held as past childbearing. His conclusion is thus expressed—"If we can neither ascertain the fact by proof, nor proceed on any legal presumption, I do not think that we can decide the case on the footing that Miss Ainslie can have no issue. We must assume the possibility of such issue." I respectfully dissent from the former of the premises laid down by his Lordship, and for which he adduces no authority and gives no reason. Why should a matter of fact not be ascertained by inquiry, if indeed it cannot be assumed to be a fact, as I think in the present case it ought to be. The law has not fixed the maximum period of pregnancy. Are we therefore to assume that gestation may be prolonged over a period of years? I do not think the Courts have ever laid down such a proposition with regard to a fact which, like the question whether a woman has by reason of age become incapable of childbearing, may be determined by the evidence of medical experts. Neither in the one case nor the other would the inquiry have reference to the particular lady's capacity. It would deal with general physiological facts applicable to the human race. I think further that it is not fair to a judge in criticising his views to dissociate them from the facts of the particular case with which he was dealing. In *Anderson's* case there was no special averment that the birth of a child to a woman of fifty-eight was unknown to medical science, and perhaps the Court could not safely have proceeded on judicial knowledge in a case so near the border line.

Lord Adam's opinion in the case of *Beattie* practically adopts the views of Lord Rutherfurd Clark to which I have adverted; and my only additional criticism on it is that the ladies in respect to whom the question arose were fifty-six and fifty-seven, not seventy-eight and eighty-one; and that the only question truly decided was whether these ladies could be assumed incapable of having children. Lord M'Laren in con-

curring with Lord Adam said—"That leaves open for consideration cases in which it may be proved or admitted that the possibility of issue is at an end, but in the absence of such admission or proof I agree with Lord Adam, following upon the case referred to, that the Court cannot order an inquiry into the matter, and at the same time that the Court has no legal presumption to guide it independent of the facts." It is to be noted, however, that this opinion was pronounced in a special case in which it is perfectly accurate to say that the Court cannot order an inquiry, and I do not question the soundness of the decision having this in view. It is obvious, however, from Lord M'Laren's opinion that he thought that in other cases proof might be allowed that the possibility of issue had come to an end by reason of a woman having attained a certain age. There is nothing in the decision itself which warrants the proposition underlying the respondent's whole argument, namely, that the law of Scotland assumes as a matter of law that a woman is capable of childbearing at any age however advanced, and that this presumption is incapable of being rebutted in any case by competent evidence. A *presumptio juris et de jure* has no application to matters of fact that are capable of being ascertained by inquiry.

I have thought it right to state thus fully the reasons of my dissent from your Lordships' judgment, as I cannot be a party to bringing the law of Scotland, which is for the most part the embodiment of common sense, into well deserved contempt even on a branch of it which is of comparatively limited application.

LORD GUTHRIE—As the pleadings stand, and as the case has been treated by the parties, I agree with the Lord Ordinary that the pursuer is entitled to decree, although on one point decided by him, the point dealt with by Lord Salvesen, I desire to reserve my opinion.

The Lord Ordinary has found that no proof as to the fact that Miss Elizabeth Bryce Douglas, a lady of eighty-one, or of Mrs Agnes Smith Bryce, a lady of seventy-eight, being beyond the possibility of having children born to either of them is admissible. If by this is meant that no allegation which would involve, for its proof, an order for personal examination is admissible, this may or may not be a sound proposition. But if it is meant to exclude a case where it is relevantly offered to be proved that a woman has reached an age beyond the utmost limit of authentically known childbearing, ordinary or extraordinary, I desire to reserve my opinion on that question.

It is sufficient that I am unable without evidence, which is not asked, to affirm in any of its possible meanings the defenders' averments in answer 7, on which their defence is based, namely, "Both the defenders Miss Elizabeth Bryce Douglas and Mrs Agnes Smith Bryce were past the age of childbearing, and no children could be born to them." In the first place, I think this statement is irrelevant, from ambiguity and consequent want of notice. Is it meant that at such ages a physical change has taken place which makes it impossible for any woman of the ages of these ladies to conceive? Or is it meant that even if conception at such ages is not physiologically impossible, no such case has been known, not only in the ordinary but in the extraordinary course of nature? Or is it meant that there is some peculiarity personal to these ladies, or either of them, which would prevent conception otherwise possible?

But whichever of these senses may be taken I am unable without evidence to affirm any of them. It is said to be matter of judicial knowledge that a woman cannot conceive at eighty-one or seventy-eight, because no such case has ever been authentically known, and therefore that there is a legal presumption against the possibility of such conception. I at least have no such knowledge, either judicial or personal. Medical books, which I have casually looked at, refer to an alleged case of conception at seventy-two, but whether based on reliable data they do not say. If such a case has actually occurred, these books do not suggest any physical change in the next ten years of a woman's life which would render conception impossible at the later period. Besides, for aught I know, since the date of these books, a case of conception at a later period may have actually occurred. I regret that the defenders have not seen their way to state by amendment what their averment means. If they had averred, for instance, that there had been no authentically known case, usual or unusual, beyond, say, the age of sixty, I should not have felt myself precluded by the authorities from considering a request for a proof of such an averment. But the defenders have not amended their record, and they have declined to ask for proof. They have perilled their case on an assumed judicial knowledge, which in my case at least does not exist.

In none of the cases, Scotch or English, quoted to us was it alleged, or could it have been alleged, that the age of the women was beyond the known age of childbearing. In two only—*Urquhart*, 14 R. 112, and *De la Chaumette*, 4 F. 745—had the woman reached sixty, the age in *Urquhart* being sixty-one, and in *De la Chaumette* sixty-nine, and both these cases were dealt with in a way not reconcilable with some of the unqualified opinions in the cases referred to by your Lordship. I read the opinions in these cases, to the effect that there is no particular age which raises a legal presumption of the impossibility of childbearing, as controlled in their operation by that circumstance; and I read the opinions against the admissibility of evidence as referring to evidence dealing with some personal peculiarity of the individual. The case of *De la Chaumette*, for instance, shows that special circumstances, not in view of the Judges in the leading cases of *Anderson*, 17 R. 337, and *Beattie*, 25 R. 765, were held to affect the result. Take the case of a centenarian. If it could be proved that there is no authentic record of any woman of any race conceiving after sixty, the law as it stands may be power-

less. But I should be reluctant to come to a conclusion which would necessarily bring the law into well-merited derision. It may be true that the doctors are unable to say that it is physiologically impossible that a woman of 100 can conceive. But the doctors also say that it is physiologically possible for a man to reach the age of 200 or any age. Yet if a legacy were left to A on his reaching the age of 200, whom failing to B, I think there would be at least strong ground for maintaining that the legacy was instantly payable to B.

But the form of the pleadings, and the course adopted by the defenders in regard to proof, make it unnecessary for me to do more than reserve my opinion on a question which I think the Lord Ordinary has unnecessarily decided. Subject to the above observations, I am therefore of opinion that the Lord Ordinary's interlocutor should be affirmed.

The Court affirmed the Lord Ordinary's interlocutor.

Counsel for Defenders and Reclaimers—Macmillan, K.C.—Lippe. Agents—Webster, Will, & Co., W.S.

Counsel for Pursuer and Respondent—Macphail, K.C.—D. R. Scott. Agent—J. Anderson, Solicitor.

Tuesday, January 30.

SECOND DIVISION.

[Lord Cullen, Ordinary.

GLENDINNING *v.* BOARD OF AGRICULTURE FOR SCOTLAND.

Landlord and Tenant — Small Holding — Arbitration — Small Landholders (Scotland) Act 1911 (1 *and* 2 *Geo. V, cap.* 49), *sec.* 7 (11)—*Action of Declarator to Decide Question of Law Arising in Arbitration to Assess Tenant's Damages on Farm being Taken for Small Holding—Competency.*

An arbiter appointed to assess the damages payable to a tenant of a farm which had been taken for small holdings by the Board of Agriculture found that a question of law was involved. Parties thereupon suggested that he might make alternative findings, and agreed that no objection would be taken to any proceedings raised to have the question tested. The arbiter assessed the damages on one aspect of the question of law, but stated that if the other aspect were right the damages would be so much more. An action of declarator in the Court of Session was raised to decide the question of law. *Opinion per* the Lord Justice-Clerk and Lord Dundas that the action was incompetent.

Landlord and Tenant — Termination of Lease—Removing—Notice—Negotiations Subsequent to Notice.

A lease of a farm expiring at Martinmas 1913, the landlord sent formal notice of removing to the tenant. Parties subsequently agreed that the tenancy should continue for a year, and that the notice of removing should be held to apply to Martinmas 1914. The Board of Agriculture having decided to take the farm for small holdings, but having under the order of the Land Court to Martinmas 1915 to do so, the tenant, with a view to a further extension of his occupation, approached the landlord, who intimated that he would serve no notice, as he did not wish to be without a tenant for a year, and did not know if the Board would take possession at Martinmas 1914. The Board having taken possession as at that date the tenant claimed compensation for the loss of a year's profits. *Held* that his claim was bad, in respect (1) that the notice of removing was good as at Martinmas 1914, (2) that he had only arranged a continuation thereafter conditional on the Board's action.

The Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), sec. 7, deals with *powers to facilitate the constitution of new holdings*, and sub-section (11) contains this proviso—"Provided that where the Land Court are of opinion that damage or injury will be done . . . to any tenant in respect that the land forms part or the whole of his tenancy . . . 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 tenant . . . 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 . . . to be settled by arbitration instead of by the Land Court, the same shall be settled accordingly; . . . . 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. . . ."

James Peter Glendinning, farmer, Fenton Barns, Drem, East Lothian, at one time tenant of Ballencrieff Farm, Aberlady, *pursuer*, brought an action against the Board of Agriculture for Scotland, *defenders*, whereby he sought to have it declared that in virtue of a lease of the farm of Ballencrieff, dated 6th and 22nd June, 1894, between Viscount Elibank and the pursuer for the term of nineteen years, and subsequently extended by the agreement of parties, his right of tenancy extended to Martinmas 1915, or otherwise that the pursuer had, as at 1st March 1914, by the said agreement and actings, acquired a good and valid right to occupy the farm of Ballencrieff from Martinmas 1914 to Martinmas 1915, and that on a sound construction of the provisions of the Small Landholders (Scotland) Act 1911 the defenders were bound to compensate the pursuer for the loss of profit resulting to him from their taking possession of