the lease in point of money to justify the conclusion that there is a consideration other than rent conditioned, still this is a clause of a character which indicates that but for the relationship of the parties a lease in those terms would never have been given. I conclude, therefore, that there is more in this case than the mere relationship of the parties, and there is therefore sufficient to satisfy me, as apparently the valuation committee were satisfied, that the rent stipulated was less than the true annual value of the subjects. We cannot adopt that view just straight from the committee, because we do not know how far, in entertaining that view, they were not going upon personal knowledge of general lets. But I come to the same conclusion on the grounds which I have stated.

Now the committee having come to that conclusion, and having rejected the appellant's argument as to consideration other than rent, seem to have thought themselves precluded by decisions from giving legitimate effect to that conclusion. I cannot see exactly upon what they were proceeding, for on examination of the decisions referred to I cannot see that they were bound to infer anything else from the fact of relationship of the landlord and tenant than that the rent was quite possibly an inadequate rent, and were therefore bound to apply themselves to the circumstances and to determine whether in the circumstances the lease really was conditioned on considerations other than rent and the rent inadequate.

I think therefore that the judgment of the valuation committee should be altered, and, as there is no evidence, there is no alternative for us in this case but to accept for the current year the rent stated by the assessor, which was the rent at which the premises were entered in the previous years.

LORD SALVESEN—I am of the same opinion. Leaving out of view, as we are bound to do, the findings with regard to the value of the subjects let which have been derived from the personal knowledge of the valuation committee, I think this is a narrow case. Substantially I regard it as a let by a mother to her son, because while the trustees appeared as the lessors the mother was the person who had the true interest in the fixing of the rent. Now mere relationship is not sufficient to justify the Court in disregarding the lease, but if there is evidence from which you can infer that the sum mentioned in the lease is less than its fair value, then the rent is not, in terms of the Valuation Act, "conditioned as the fair annual value" of the subjects, but proceeds on the favour and affection which the lessor, who in this case was the mother, had for her tenant.

The only fact from which we can draw any inference with regard to the actual value of these subjects is that for thirteen years the father, who was the owner, was assessed at £235 annually, and that this lease is for a sum of £175 or a reduction of £60. If there had been evidence led by the respondents here to the effect that they had tried to get a tenant and had failed to get any offers for more than £175, I think that that would have displaced the presumption that arises from this sudden fall in value and the relationship of the parties to the lease. But it is a matter of admission that they have never advertised the subjects at all or sought to obtain any tenant other than the eldest son. That by itself would be sufficient for the decision of this case; but even if this view were open to doubt I do not think we can leave out of view the circumstance that this lease is a yearly lease with clauses of an unusual nature, and that these may have entered into the question of fixing the rent, seeing that the tenant gave up any claim which he might otherwise have had under the Agricultural Holdings Act. We cannot tell what the value of that renunciation may be. I think we were informed that it is probably not enforcible, but the parties to the lease must have thought that it had some value, and it is at all events binding in honour upon the lessee whether it is binding upon him in law or not. Accordingly I think that was a consideration other than rent which entitles us to disregard the lease, and as we have no other materials for fixing the fair value, to revert to the old valuation at which the subjects had stood for thirteen years.

LORD CULLEN—I concur.

The Court were of opinion that the determination of the valuation committee was wrong and sustained the assessor's valuation.

Counsel for the Appellant—Hon. W. Watson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Respondent—Chree. Agents—Beveridge, Sutherland, & Smith, W.S.

COURT OF SESSION.

Saturday, December 9.

FIRST DIVISION.

[Sheriff Court at Perth.

WILLIAMSON *v.* STEWART.

(Sequel to *Stewart* v. *Williamson*, 46 S.L.R. 918, 1909 S.C. 1254, and 47 S.L.R. 536, 1910 S.C. 47).

Lease — Outgoing — Valuation of Sheep Stock—Arbitration—Agricultural Holdings (Scotland) Act 1908 (8 *Edw. VII, cap.* 64), *sec.* 11 (3) *and Second Schedule*, 9.

In a case stated under the Agricultural Holdings (Scotland) Act 1908, to obtain the opinion of the Sheriff upon the correct method of valuing a sheep stock to be taken over at the end of the lease by the proprietor or incoming

tenant, *held* by the Sheriff, and affirmed on appeal—"It is the duty of the arbiter to value the sheep upon the basis of their value to an occupant of the farm in view of the arbiter's estimate of the return to be realised by such occupant from them in accordance with the course of prudent management in lambs, wool, and price when ultimately sold, and not upon the basis either (1) of market value *only*, or (2) of the cost and loss which would be involved in the re-stocking of the farm with a like stock if the present sheep stock were removed. The arbiter is entitled to take into account both current market prices and the special qualities of the sheep, both in themselves and in their relation to the ground, which in his opinion will tend either to enhance or to diminish the said return to be realised from them by an occupant of the farm."

Opinion by the Court—"The arbiter must consider the farm as he finds it, and fixing in his own mind a fair rent for the farm as a first expense must then go on to consider what the incoming man can afford to pay for the stock as it exists, in view of what prices he will eventually get in the market when the component parts of the stock as a going concern will be sold from time to time."

On 27th September 1910 Colonel D. R. Williamson of Lawers applied in the Sheriff Court at Perth for a direction to Peter M'Intyre of Tighnablair, Comrie, arbiter in a reference under the Agricultural Holdings (Scotland) Act 1908, between him and John Stewart, Orchard Bank, Muthill, to state a case in terms of rule 9 of the Second Schedule to the Act.

The circumstances in which the application was made were as follows:—By letter dated 30th April 1904 Colonel D. R. Williamson of Lawers agreed to let the farm of Fordie to John Stewart for an annual rent of £130 for five years from Whitsunday 1904 "on the same conditions as agreed on in the lease expired A.D. 1894." The said lease contained this clause—"And the said John Stewart hereby binds and obliges himself at the expiry of this lease to leave the sheep stock on the farm to the proprietors or incoming tenant, according to the valuation of men mutually chosen, with power to name an oversman, but the proprietors or incoming tenant shall not be bound to take a larger amount of stock than the tenant has been in the usual practice of keeping on the farm during this lease." This lease expired as at Whitsunday 1894. From Whitsunday 1894 until Whitsunday 1904 John Stewart possessed the farm by tacit relocation.

The tenancy of John Stewart came to an end at Whitsunday 1909. Thereafter there was a litigation between the parties as to whether the method of arbitration provided in the lease had been superseded by the Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 61), sec. 11 (1), and the House of Lords, affirming the Court of Session, held that the Act applied and that a single arbiter fell to be appointed.

On 31st August 1910 Peter M'Intyre of Tighnablair, Comrie, was appointed arbiter under the Act by the Board of Agriculture and Fisheries, and on 5th September he accepted office. The parties were at variance as to the principles upon which the arbiter ought to proceed in making his valuation of the sheep stock, and also as to whether any question of law had arisen, and, acting upon a suggestion of the arbiter, Colonel Williamson, on 27th September made the application above referred to for a direction to the arbiter to state a case. On 22nd October the Sheriff (JOHNSTON) directed the arbiter to state a case for the opinion of the Sheriff.

The Case stated, *inter alia*—"The contentions of the said Colonel David Robertson Williamson are as follows:—

"(1) That on a sound construction of the lease the said sheep stock falls to be valued at market value, *i.e.*, the price of exchangeable value which it would bring if exposed for sale unconditionally to the test of competition in the open market; and in any event that no alleged practice or custom having the force of law with regard to the bases of valuation to be adopted can be read into the lease to the effect of adding anything to the price to be ascertained as aforesaid.

"(2) That if the valuation is not restricted to market value, as above contended for, then the basis on which the valuation is to proceed is to allow only such sum in excess of market value as an ingoing tenant would be prepared to give if he were buying the same stock in the market to bring it back to the farm.

"(3) That the portion of the sheep stock which in the ordinary course of management of the farm fell to be sold in the market in the autumn of 1909 should, in any event, be separately valued at market value only.

"The contentions of the said John Stewart are as follows:—

"(1) That no question of law has arisen.

"(2) That the contract of submission is perfect and intelligible and was settled and acted on by the parties as being so, and the said Colonel Williamson is under personal exception against repudiating the distinctness of his own contract, and the construction he gave to it when he accepted Mr Stewart's performance of the antecedent obligation as to taking over the sheep stock at Mr Stewart's entry to the farm.

"(3) That the arbiter is the sole judge of the various elements of value that fall to be considered in executing the reference; and

"(4) That the word 'valuation' is used in the plain, ordinary, and popular acceptation, and there can be no reasonable doubt of the meaning of the submission. Its popular meaning accords with the practice or usage of sheep farming in the district, including Colonel Williamson's estate and throughout the Highlands of Scotland—a practice which is so long established, uniform, and notorious that judicial cog-

nisance has been taken of it, and both of the parties here contracted with it in view, namely, that the arbiter, who is chosen for his technical knowledge and local knowledge, shall apply these in determining the value upon a consideration of all the elements which in his judgment go to constitute, enhance, or diminish the value at a specified time of the sheep stock of a particular farm to the tenant of that farm. The quarrel of Colonel Williamson is with the arbiter's mode of ascertaining the *quantum* of value—a matter which the parties have committed entirely to the arbiter, and into which courts of law have no jurisdiction to inquire. In leases of sheep farms throughout Scotland the words 'to value' or 'valuation' have been used and understood as contended for by Mr Stewart, and qualification or limitation of the elements of value when intended is wont to be expressed in the submission. Examples of the different clauses are given in the Juridical Styles (1907), vol. i, at pp. 434 and 449. Here the word 'valuation' was used without qualification, and the limited construction for which Col. Williamson contends is inadmissible. Colonel Williamson in his first contention seeks to insert a limitation by adjecting 'market' to 'value.' On the other contentions he seeks to qualify the obligation in other illegitimate ways. It is enough that the lease provides that the sheep stock of the farm are to be left there, and that the value to be determined is the value to the proprietor or incoming tenant of that farm. As to the element of 'acclimatisation,' the stipulation that the sheep should go with the land was made in the interests of both parties, because (1) the land cannot be profitably used except for sheep farming; (2) the process of acclimatising a stock is long and costly, for even under the most favourable conditions some years must pass before the death-rate and birth-rate respectively will attain normal proportions in a new stock; and (3) at Whitsunday, which was here (as usual) the term of entry and outgoing, removal of the stock from the farm is impracticable, because the ewes are then in low condition after lambing, and lambs are only from six weeks to a few days old—indeed, removal of hill sheep to a public or auction market at Whitsunday is almost unknown. In stipulating that the land and stock should be held together as a going concern, the parties necessarily intended that at the changes of tenancy contemplated under the contract the stock should be valued as part of a going concern. The provisions for valuation of the stock at Mr Stewart's entry and outgoing were identical, and he claims that as it was valued at his entry so it should be valued at his outgoing.

"The arbiter only desires to add, for the information of the Court and of his own knowledge, that generally the valuation of sheep stock as between an outgoing tenant and the proprietor, or an ingoing tenant, in Perthshire and many other parts of Scotland, where the stock is bound to the farm (*i.e.*, by a clause such as that in the lease in question), have, according to a recognised and well-established custom, been invariably conducted on the principle, which is termed 'use and wont,' of putting an acclimatised or hefting value upon the regular sheep stock beyond the value which they would have if removed from and sold off the land, because they have a higher value to the proprietor or incoming tenant who is to continue to hold them on the farm. The reason for such higher value being placed on the stock is that sheep bred and retained on the land are known to settle, live, and thrive much better than strange sheep brought on to the same ground. The result is that such sheep are less liable to a heavy death-rate, while at same time they are less expensive to herd, as they seldom stray from their own ground."

The *questions of law* submitted for the opinion of the Court were—"(1) Is the arbiter sole judge of the principle of valuation and of the various elements of value that fall to be considered by him in executing the reference? (2) Or otherwise, upon what principle of valuation, on a sound construction of the lease, is the arbiter bound to proceed in making his valuation of said sheep stock and executing the reference?"

On 25th May 1911 the Sheriff pronounced this interlocutor—"The Sheriff finds in law in answer to the questions stated by the arbiter—(1) The judgment of the arbiter upon these matters is subject to the finding of the Court upon any matter which the Court holds to be matter of law. (2) It is the duty of the arbiter to value the sheep upon the basis of their value to an occupant of the farm in view of the arbiter's estimate of the return to be realised by such occupant from them in accordance with the course of prudent management in lambs, wool, and price when ultimately sold, and not upon the basis either (1) of market value *only*, or (2) of the cost and loss which would be involved in the re-stocking of the farm with a like stock if the present sheep stock were removed. The arbiter is entitled to take into account both current market prices and the special qualities of the sheep both in themselves and in their relation to the ground which, in his opinion, will tend either to enhance or to diminish the said return to be realised from them by an occupant of the farm. Further, the Sheriff finds no expenses to be due to or by either party in this stated case."

"*Note.*—This is a Special Case stated by an arbiter for the opinion of the Court under section 11 (3) and Schedule II, 9, of the Agricultural Holdings (Scotland) Act 1908. I understand that the parties are in agreement as to the form of the questions put as apt to determine all the questions of law between them. The case is one of some general importance to the agricultural community, and therefore before addressing myself to the argumentative matters which were canvassed before me I think it proper to set forth the general

conditions under which the question arises, as these are familiar to the judge-ordinary of the bounds.

"Sheep farming on an extensive scale was introduced into the Highlands of Scotland towards the close of the eighteenth century. As a breeding stock is not readily or advantageously moved from one farm or district to another it was found to be desirable when land was let as a sheep farm to stipulate that the sheep stock upon the farm should be handed over by an outgoing to an incoming tenant at valuation. Whether this practice as regards sheep stock is to be regarded as a survival of the old custom of steel bow or as a modern imitation of that custom it is not necessary to inquire. The system has obtained down to the present day, and for a long time it seems to have given universal satisfaction. In recent years, however, it has caused a good deal of friction and dislocation in estate arrangements, and it has led to a number of litigations. For reasons which are explained by the arbiter in this case a ewe in the market is less valuable to the occupant of a holding than a ewe upon the ground upon which it has been reared. It is less likely to thrive, and there is more risk that it may die or miss lambing or stray—these risks being greater or less according both to the climate and to the character of the ground upon which it has been reared and the climate and the character of the ground to which it is now moved. This consideration has for a long time been recognised in valuations, and something more has been allowed for sheep upon the ground upon which they have been reared than the price they would bring if sold in the market. This allowance has come to be known as 'acclimatisation value.' Down to very recent times, however, the amount was comparatively small, the matter attracted little attention and caused no complaint, and even the word 'acclimatisation,' now so familiar, was hardly known in this relation. The old Scottish word was 'hefting.' To 'heft' was to become familiar with a place, and this consists with the fact that originally the consideration to which attention was chiefly directed was that sheep usually do not wander from ground with which they are familiar, a matter which was of considerable importance when most sheep farms were unfenced.

"The amount of the acclimatisation allowance gradually increased, and during the last quarter of a century it has done so in the face of a falling market value to an extent which has become an important economic factor in connection with sheep farming. It has become increasingly difficult to get new tenants to take sheep farms on the basis of an open valuation—that is, a valuation not limited to market prices or market prices plus a definite prearranged percentage. In this way, as is represented, the landlord has sometimes been obliged to purchase the stock from the outgoing tenant at a price which an incoming tenant will not give.

"The present case has been taken, as I understand it, to test the legality of the principle of valuation under which allowance is made for acclimatisation value. It is contended that it is an illegitimate factor to take into account. But it is also, I understand, contended that, be it that this element may legitimately be regarded, effect must not be given to it upon an unsound principle, viz., by postulating the farm as stripped of sheep and assessing as the value of the sheep stock taken over their market value plus the loss which would be entailed if the holding had to be re-stocked. The tenant it is urged is bound to leave the sheep stock on the farm, and if, nevertheless, for the purpose of valuation, the tenant is to be figured as free to remove the sheep stock, and therefore as being in a position to bargain as to the terms upon which he will leave it, the landlord must equally be figured as free to decline to take the sheep stock, and therefore as being in a position to bargain as to the terms upon which he will purchase it.

"The first matter which I have to consider is whether there is any question of law in the case. Now with reference to such a contract as the present such questions as 'Is the arbiter bound to value the stock at its market price?' or 'Is the arbiter bound to value the stock as between a willing purchaser and a willing seller?' appear to me to be questions of law. Mr Hunter for the tenant did not really dispute this, but his contention was that the matter is so clear upon the terms of the lease that no question as to the basis of valuation can arise. When asked to define this clear basis his answer was 'The value as between a seller and a purchaser.' He was probably quite well advised not to attempt to define more particularly, but I do not think that this definition carries us very far, for every valuation in connection with the transfer of property is either *de facto* or theoretically for the purpose of valuation a valuation as between a seller and a purchaser. Having regard to the Scottish authorities cited—*Scott* v. *Ritchie* 7 S.L.R. 135; *Erskine* v. *Crombie* 9 Macph. 54; *Lord Advocate* v. *Earl of Home*, 18 R. 397—and to cognate English cases which were quoted to me, I think that matter of law is involved in the question of the principle or basis upon which a valuation between an outgoing tenant and a landlord as incoming tenant under such a contract as the present is to proceed.

"I had a learned argument upon the theory of value. There seems to be agreement between economic and legal authority that the value of an article is its exchangeable value. That value has been defined. 'Value, when it occurs in a contract, has a perfectly definite and known meaning, unless there be something in the contract itself to suggest a meaning different from the ordinary meaning. It means exchangeable value—the price which the subject will bring when exposed to the test of competition.' (Per Lord M'Laren in *Lord Advocate* v. *Home*, 18 R. at p. 403.)

"In the case of turnips, fodder, and such like commodities upon a farm which a waygoing tenant is bound to leave at

valuation, it is settled that notwithstanding his obligation to leave the same, what he is entitled to is the value of the article if exposed to competition in the open market, where that value is greater than its value for consumption upon the holding. But does the same rule hold where the value for use upon the holding is greater than the value of the article if removed from the holding? There is this difference at all events between the two cases, that in the former the landlord or incoming tenant as such may be ignored as a possible purchaser; in the latter case he cannot be so ignored, he is part of the market. Further, I do not think that it would necessarily follow that the value on the basis of such a free sale and free purchase should be only a fraction above the highest price which would be given by another purchaser. Where it is very important to one person to secure something, the seller may hold out and use this as a compulsitor to obtain a much higher price than anybody else would give. If free sale and free purchase is the proper basis, then it is no more to be assumed that the tenant would sell to the landlord at a fraction over what he would be likely to obtain from somebody else, than it is to be assumed on the other hand that the landlord would offer to the tenant as high a price as if there was somebody else prepared to bid against him to the last penny to which he would go rather than see his land left void of sheep stock. It was indeed suggested that the landlord might follow the sheep to the auction market and buy them back, but I do not think that this is a conclusive consideration. The tenant might not so dispose of the sheep stock, and even if he proposed to do so the landlord might be willing to give a good deal rather than run the risk of having the sheep bid up against him at an open market.

"The foregoing considerations may be illustrated by the case of a piece of land of small intrinsic value to A, but of great value to B, because it lies into his property, or is required in order to enable him to complete a block of buildings. I apprehend that a valuator called in under the circumstances would have regard to the facts both that the property was of great value to B, the purchaser, and that it was of little value to A if he lost B as a purchaser. I do not think that it would make any difference in the valuation whether or not there was an obligation to sell, and to purchase at the price fixed by the valuator. A and B might have agreed to a sale at a valuation by C, or without having come to any such agreement they might have called in C to say what he thought would be a fair price. I think that C's valuation, if he knew his business, would be the same in either case. This is of some importance, because it is suggested in argument that where there is an obligation to sell on the one hand and to purchase on the other, the valuator may not postulate a willing seller and a willing purchaser, and value as between such. But the theory of a willing purchaser and a willing seller is the general principle of valuation to be applied in all cases, unless the special term of the contract or nature of the subject-matter require some other principle to be invoked. It would work in this way in the present case. The landlord or incoming tenant would be figured as a purchaser free to buy or not to buy, the tenant as a seller free to sell to the landlord or incoming tenant, or to remove the stock from the holding. The arbiter would value the stock at what he deemed the proper price as between parties so circumstanced, each fairly exercising against the other the inducements which belonged to him.

"I have carefully considered whether the sheep stock falls to be valued in this way in the present case, but I have come, though not without hesitation, to the conclusion that it does not. My reason for negativing this view is that this basis of valuation is not in accordance with what I conceive to be the practice of agricultural valuations of this kind, and is not therefore to be regarded as the basis of valuation contemplated by this contract.

"I also reject the theory, which is in the forefront of the landlord's argument in the present case, that the valuation is to be simply the current price of sheep in the market. If this means that the landlord or incoming tenant is not to be regarded as part of the market, I can see no reason or ground for such a contention, and it is supported by no practice. On the other hand, if the landlord or incoming tenant is to be regarded as in the market as an interested purchaser, then the case is just that with which I have already dealt of a willing but free seller and a willing but free purchaser, each with a strong inducement to conclude a bargain with the other.

"This latter principle is not of universal application. It is not directly applicable to the case of buildings which a tenant has erected under a stipulation that he shall be paid for them at a valuation on the expiry of his lease. There the subject to be valued is incapable of removal without total destruction, and accordingly it is vain to attempt to figure the tenant as a free seller. Under such a contract it has been held that the principle of exchangeable value is to be applied by considering the subject as a whole and estimating the enhancement of the value of the whole by the presence of the building—*Lord Advocate* v. *Earl of Home*, 18 R. 397. That is taken to be an implied term of the contract under which the tenant is to be paid for the building at a valuation on the expiry of his tenancy. I am of opinion, however, that there is no implication that moveable chattels such as sheep in a case like the present are to be valued like buildings on the basis of the difference between the total value of the farm with a stock upon it and the value of the farm if it were derelict as regards stock—in other words, by crediting to the value of the sheep stock in addition to its market value the loss which the occupant would suffer if the stock were removed and he had to bring in a fresh

stock. The sheep are not like buildings *pars soli*. They are marketable separately from the farm like other farm equipment which it is customary to hand over at valuation at entry and waygoing. Many farms are so situated in relation to markets and road communications that if the whole of the turnips, straw, and manure which a waygoing tenant is bound to leave at valuation were removed, their replacement would be so very costly as to be commercially hardly possible and great injury would be done to the holding. I do not think that this is a consideration which can legitimately be allowed to form the basis of the valuation of these commodities as between an outgoing tenant who is bound to leave them and the landlord or incoming tenant. Here the holding gives value to the sheep because it suits them, and the sheep give value to the holding because they suit it. There, on the other hand, the holding gives value to the turnips, straw, and manure because it is at hand to consume them; the turnips, straw, and manure give value to the holding because they are at hand to feed it. In neither case, as I take it, can the value of the mutual benefit be credited wholly to the one side. The value of a holding and of the sheep stock upon it may be a certain amount—say £1000 more than the *cumulo* value of the two if they are severed the one from the other. I am unable to read into such a contract as the present an agreement that this £1000 shall all be credited to the sheep.

"I put in the course of the argument the case of a country mansion which has been let on a long lease on the condition that at the close the tenant shall hand over all the furnishings and fittings at a valuation to the landlord. If the furnishings and fittings were all removed from such a house, and the walls left bare and gaunt—blinds, grates, carpets, mirrors, everything that fitted the house gone—possibly their replacement would be so costly that the house might not be commercially worth refurnishing and refitting to let, although unlettable as an unfurnished house. It might be a total loss. But, as it appears to me, a valuator would err who made this consideration the basis of his valuation. The things are there. They must be handed over in terms of the lease and cannot be removed. If you are to postulate a tenant free to remove them, you must postulate a proprietor free to refuse to take them. On the other hand, the valuator would err equally if he were to place upon these articles *in situ* so far as specially adapted to the house only the break-up value which they would bring if sent to an auction market.

"Accordingly, for the reasons stated, I reject as the basis of valuation (1) the current price only of sheep in the market; (2) the loss to the landlord if the farm were left without sheep; (3) a bargain between the tenant and the landlord postulated as both free, but faced the former with the dread of getting no more than market value if the landlord does not buy, and the latter of suffering the heavy loss of restocking the holding if the tenant does not sell to him.

"I shall now explain what I conceive to be the true principle which I have given effect to in my finding.

"In my opinion, in an agricultural valuation such as the present, the principle supported both by law and by general practice is that where the article to be delivered over is of more value to the incoming tenant than to anybody else, the basis of valuation is the return which the article will yield to him as occupant. This is not necessarily the same as the cost of replacing the article if it were taken away, and is not therefore to be measured by the loss which would be sustained if it were removed and not handed over.

"Speaking of a turnip crop, in the case of *Scott* v. *Ritchie*, 7 S.L.R. 135, Lord President Inglis said—'The waygoing tenant is to be paid for the turnips by the landlord or incoming tenant. *Now what would he have got if he had been able to eat them off himself?* According to the oversman's opinion two-thirds of the value of the turnips go to flesh and bone of the stock fed upon them and one-third to the land from the dung made by the stock. The tenant is just as much entitled to receive the third he would have got as dung as the two-thirds that he would have got as flesh and bone.'

"Now here the sheep stock upon the farm considered as a stock to remain upon the farm represents so much wool, so much progeny, and eventually so many cast ewes, or it may be so much mutton. These are what the sheep would have yielded to the outgoing tenant if he had been able to remain and realise them. To adapt the words of Lord President Inglis, they are 'what he would have got for them if he had been able to use them on the holding himself.' These, too, represent what these sheep will yield on realisation to the occupant who takes them over. It is right that the arbiter should have regard to the market price of sheep as being the market or collective estimate of the value and prospects for the time being of such stock. It is right too that he should take into account the acclimatisation of the stock. If the stock is an acclimatised one, it may well be that these sheep will be healthier on the holding, and that accordingly there will be fewer deaths, more and better lambs, and eventually more and better cast ewes or mutton, all as the ultimate return to the purchaser for these sheep against the price which he pays for them and his outlays in maintaining them. But, on the other hand, the tenant being under covenant to leave the stock, as the landlord is to take it, it appears to me that it would be illegitimate for the arbiter to proceed upon the footing of what would be the position of matters if the ground were left bare and the landlord or incoming tenant were obliged to stock it with strange sheep or to turn it to some other purpose. The suggestion that because a farm is unhealthy for strange sheep, and great loss would be

caused if the present stock were removed, therefore the sheep are to be valued on the basis of such loss, seems to me to be as illegitimate as would be the suggestion that because a farm being far from a market and at the end of a rough five-mile road, the manure, straw, turnips could not be replaced except at great cost, therefore the manure, straw, and turnips which the tenant is bound to leave are to be valued on the basis of such cost.

"I shall endeavour to make the matter plain by an illustration, and of course I take round and random figures. I postulate a farm unhealthy to strange sheep but stocked with well acclimatised sheep which the tenant is bound to deliver over. Now in these circumstances if an arbiter were to say, 'If this farm had to be re-stocked with strange sheep many would die, many would get into poor condition, the fleeces would be lighter, many would abort, a number would stray—the loss would be equivalent to half the whole stock. Therefore whilst the price of the present stock if sold in the market is 30s. per head, the value to the incoming tenant of the stock which the outgoing tenant is bound to deliver over is 60s. per head, although that is an amount which the incoming tenant can never ultimately realise from these sheep.' That, in my view, would be an unsound principle. But, on the other hand, if the arbiter were to say, 'The price of these sheep if sold now in the market is 30s. per head. But no occupant would sell them in the market, for, as sheep to be retained upon the farm, being acclimatised, they would do much better than in the hands of some stranger purchaser; they represent an eventual return to the occupier in produce and ultimate sale, the present value of which is 40s. per head, and that must be their price as between the outgoing and the incoming tenant.' That, in my opinion, would be the sound principle which it would be the duty of the arbiter to follow.

"In estimating the value of sheep on the basis of the return to be got for them, regard must, of course, be had to outgoings, including the annual value or rent of the farm. In my opinion, this annual value or rent of the farm for this purpose is the annual value or rent of such a farm let as a farm with a continuous sheep stock—the rent which the late tenant would presumably have paid had there been a renewal on fair terms of the lease. This coincides with the Lord President's suggested test of value above referred to. What would the tenant have got for them had he remained in the holding?

"In this connection I may point out that the principle of exchangeable value as defined by Lord M'Laren, viz., the price which the subject would bring when exposed to the test of competition, coincides with the principle of valuation which I have indicated, although to make the test directly applicable it is necessary to figure particular circumstances different from the present. The arbiter may regard the matter in this way—'If this farm were in the hands of the proprietor as a farm with this stock upon it, and there were several offerers for it at the rent which I, the arbiter, consider the ordinary rent of such a farm, year in, year out, when carrying this stock, and if in these circumstances the proprietor were to invite the offerers to tender for the sheep stock, what price would he get in such a competition?'

Where a farm, naturally unhealthy, was let without any stock upon it, I can figure a bargain under which a waygoing tenant who on entry had undertaken to stock it and leave an acclimatised stock, was to be recouped for the initial loss at the end of his lease. Everything would, of course, depend upon the terms of the bargain in relation to the circumstances of the case. I am unable to read into the present contract a stipulation for a valuation upon this basis. This farm may have carried a continuous sheep stock for one hundred years, and the question of the original stocking belongs to past history which is probably forgotten.

According to the statement of facts by the arbiter in the present case, the sheep stock was valued over to the tenant in 1869, and 'the valuation was made according to use and wont.' It was argued for the landlord that the statement was inadmissible and should not be regarded because there had been no proof in the matter. I apprehend, however, that in a stated case I must take the facts from the arbiter. If the landlord has been refused opportunity for proper inquiry he may have other remedies. But I do not think that there is any substance in the landlord's objection to the statement. The landlord's representative treated the statement as implying that the large and, as he contends, inflated allowance for acclimatisation which is now common was made on the tenant's entry. Even if such a statement were relevant, the arbiter has not made it, and I am satisfied he did not mean it. I interpret the statement in the light of what the arbiter has said about 'use and wont' in regard to acclimatisation as meaning that in the view of the arbiter there was already a 'use and wont' to allow something for this in 1869, and that this appears to have been done in the valuation when the tenant entered upon the holding. In my view subsistence of a 'use and wont' may be a relevant consideration. What the arbiter and oversman did when the lease was entered into in 1869 is irrelevant.

"'Use and wont' as explained by the arbiter is as follows (and in the absence of any statement to the contrary I must assume that his statement covers 1869 as well as 1909, although the amounts usually allowed may have been widely different):—

"'The arbiter only desires to add for the information of the Court and of his own knowledge that generally the valuations of sheep stock as between an outgoing tenant and the proprietor or an ingoing tenant in Perthshire and many other parts of Scotland, when the stock is bound to the farm (*i.e.*, by a clause such as that in the lease in question), have, according to a recognised

and well-established custom, been invariably conducted on the principle which is termed "use and wont" of putting an acclimatised or hefting value upon the regular sheep stock beyond the value which they would have if removed from and sold off the land because they have a higher value to the proprietor or incoming tenant who is to continue to hold them on the farm. The reason for such higher value being placed on the stock is that sheep bred and retained on the land are known to settle, live, and thrive much better than strange sheep brought on to the same ground. The result is that such sheep are less liable to a heavy death-rate, while at the same time they are less expensive to herd, as they seldom stray from their own ground.'

"This statement is not inconsistent with the principle of valuation, which as I have explained falls to be followed in this case. The arbiter does not affirm that there is a recognised and well-established custom to value the sheep stock as if the tenant were free to remove them, whilst the landlord is not free to refuse to take them or otherwise on the footing that the tenant is to be treated as a person who has created an acclimatised stock upon ground formerly sheepless under a covenant that he is to be compensated for doing so; such a custom to have the effect of an implied term of a contract such as the present would have to be established by a uniform practice subsisting over a very long term of years, and recognised and acquiesced in both by landlords and tenants. I do not think that a Court could entertain the question whether such a special custom was established to this effect without far more detailed and specific findings by the arbiter than the bare statement that there was a custom.

"The arbiter uses the term a 'bound' stock This case was argued to me on the footing that there is here a 'bound' stock, and no suggestion was made to the contrary. The lease is singularly bald on this matter. I could conceive of an argument upon the lease that whilst the tenant is bound to leave the sheep on the farm he is under no obligation to leave an acclimatised stock, and is not to be treated as if he were bound to do so. Self interest would generally prevent a tenant doing anything else. But in any view if the point had been raised I should have been prepared to hold that where the tenant was bound as here to leave the sheep stock of a sheep farm at valuation it was contrary to good husbandry, and therefore unlawful for him, to remove the ordinary ewe stock on the eve of the expiry of his lease."

Colonel Williamson appealed. The arguments appear in the Sheriff's note. The following authorities were cited—*Erskine's Trustees* v. *Crombie*, November 1, 1870, 9 Macph. 54, 8 S.L.R. 52; *Scott* v. *Ritchie*, December 2, 1865, 7 S.L.R. 135; *Frier* v. *Earl of Haddington*, November 22, 1871, 10 Macph. 118, 9 S.L.R. 100; *Lord Advocate* v. *Earl of Home*, January 12, 1891, 18 R. 397, 28 S.L.R. 289.

The appeal was heard on 6th and 7th July 1911 before the LORD PRESIDENT, LORD JOHNSTON, and LORD MACKENZIE, LORD KINNEAR being absent, and was advised on 9th December, the opinion of the Court being delivered by

LORD PRESIDENT—The question of what is a proper valuation in the circumstances before us is a question of mixed law and fact.

There is a certain difficulty in distinguishing the law from the fact when as yet the valuation has not been made, but it is obviously so expedient that the arbiter should be assisted that I think we are bound to make the attempt.

It is probably the easiest method to begin by considering the extreme contention on either side. For the landlord it was argued that the valuation must proceed on market value and market value alone.

For the tenant it was contended that the valuation should be made according to "use and wont," which was explained to mean the adding of a percentage to market value to represent acclimatisation value.

We do not think either of these views is, as stated, correct.

To begin with, we think a good deal of confusion is caused by the term "market value." The subject here is a sheep stock —in particular, a ewe stock—to be handed over at Whitsunday. Now in one sense there is no such thing as a market value for such a stock. It is not the custom to sell a ewe stock in a mart as a whole in one lot, nor to sell individual lambs which are too young to be removed from their mothers, nor ewes which are not in condition. If, therefore, the stock was simply taken off the ground at Whitsunday, and so to speak forcibly conveyed to a mart and there sold, it is obvious that it would yield very little. It would be like "scrapping" machinery or selling a business at a break-up value.

On the other hand, there is a market value which has an obvious bearing on the question. When the lambs get old enough they will be partly sold, and when a ewe is cast it will be parted with for value. The breeding ewe has also a value. The prices that are so to speak reigning in the market must affect the arbiter's view of the value of each component item of the stock. The value is the value of each item in a going business, not a break-up value.

We agree with the Sheriff in thinking that the determining consideration is what can be made out of the stock, viewing the stock and farm as a going business. For it must always be kept in view that the question of the farm is inextricably mixed up with the question of the value of the stock. If the farm cost the tenant nothing, he could, so to speak, "afford" to give more for the stock. But he has to pay rent, and even the landlord, if it is he that is taking over the stock, must be here considered as if he was a hypothetical tenant. Accordingly the arbiter must consider the farm as he finds it, and fixing

in his own mind a fair rent for the farm as a first expense, must then go on to consider what the incoming man can afford to pay for the stock as it exists, in view of what prices he will eventually get in the market when the component parts of the stock as a going stock will be sold from time to time.

This view does allow for a value in which has been included acclimatisation. But it is quite different from what has been termed "use and wont"—a term in our view quite inappropriate to such a matter. The idea of adding a fixed percentage, the figure of which is arrived at because others have done it in other arbitrations, is, we consider, really to disregard the matter in hand; and it is this habit which has led to what everyone knows has been a great injustice in such valuations. For it leaves altogether out of sight the crucial question, viz., whether after he has paid a rent the incoming man can at such prices make the farm pay as a going concern.

On the whole matter we think the Sheriff has come to a right conclusion, but we have thought it better to express our judgment in our own words.

The Court pronounced this interlocutor—

"Affirm the interlocutor of the Sheriff dated 25th May 1911: Dismiss the appeal, and decern: Find no expenses due to or by either party."

Counsel for the Appellant—Murray, K.C. —Mercer. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Respondent—Cooper, K.C.—Chree. Agents—Connell & Campbell, S.S.C.

REGISTRATION APPEAL COURT.

Monday, December 11.

(Before Lord Dundas, Lord Mackenzie, and Lord Skerrington.)

MILNE *v.* DOUGLAS.

Election Law—Lodger Franchise—Occupancy "Separately and as Sole Tenant"—Occasional Use of Lodgings by Another Person—Representation of the People Acts 1868 (31 *and* 32 *Vict. cap.* 48), *sec.* 4, *and* 1884 (48 *and* 49 *Vict. cap.* 3), *sec.* 2.

The Representation of the People (Scotland) Act 1868, sec. 4, as applied to counties by the Representation of the People Act 1884 (48 and 49 Vict. cap. 3), sec. 2, enacts—"Every man shall . . . be entitled to be registered as a voter . . . who is qualified as follows; that is to say . . . as a lodger has occupied . . . separately and as sole tenant, for twelve months preceding the last day of July in any year, lodgings of a clear yearly value if let unfurnished of ten pounds or upwards . . ."

A person claimed to be registered in the list of voters as a lodger in respect of a bedroom of the required annual value. The claim was objected to on the ground that the claimant did not have the sole occupation of the qualifying subject. The Sheriff repelled the objection and admitted the claimant to the roll. The objector appealed. The facts showed that the claimant had the sole right to occupy the bedroom, but that for a portion of the qualifying period he permitted his brother to sleep in the room along with him.

Held that the claimant's occupation of the bedroom was sufficient, and that his claim had been rightly admitted by the Sheriff.

At a Registration Court for the county of Peebles, held at Peebles on 27th September 1911, which was adjourned to 6th October 1911, Thomas Douglas junior, draper, March Street, Peebles, claimed to have his name inserted in the list of voters for the combined counties of Peebles and Selkirk as a voter under the lodger franchise. Robert Anderson Milne, a voter on said list, objected on the ground that the claimant had not the sole occupation of his lodgings.

The Sheriff-Substitute (ORPHOOT) repelled the objection and admitted the claim, and at the request of the objector stated a case for appeal.

The Case gave the following *facts*—"The dwelling-house in March Street, Peebles, in which claimant resides, is tenanted by his father at a rent of £13, 10s., and consists of kitchen, parlour, back bedroom, small front bedroom and large front bedroom and bathroom. It is occupied by respondent's father and mother, two daughters, the respondent, and his brother (a schoolboy.) The claimant paid for the use of the room claimed upon, and had the sole right to occupy that room. From September 1910, and for a considerable but indefinite period of the winter, the boy slept with the claimant at his request, as he preferred the boy to be with him. The boy could have had a bed of his own. During the first two weeks in July 1911 he slept in the claimant's room, with the claimant's consent. To the extent above stated the claimant *ex gratia* allowed his brother to use his bedroom."

The *question of law* for the opinion of the Court was—"Is the claimant entitled, in terms of the Representation of the People (Scotland) Act, 1868, section 4, to be entered as a voter in the register of voters for the combined counties of Peebles and Selkirk in respect of his having, for the qualifying period, separately and as sole tenant occupied the lodgings claimed upon?"

Argued for the appellant — The facts of the case were inconsistent with the statutory requirement for a lodger qualification. The Act of 1868 (31 and 32 Vict. cap. 48), sec. 4, rendered it essential that the qualifying premises should be occupied by the lodger "separately and as sole