Tuesday, January 28.

FIRST DIVISION.

[Sheriff Court at Edinburgh.

TAYLOR *v.* STEEL-MAITLAND.

Lease—Statute—Compensation for Improvements—Market Garden—Agricultural Holdings (Scotland) Act 1908 (8 *Edw. VII, c.* 64), *secs.* 23 (1), 29 (2), *and* 35 (1).

A farm of 153 acres was let in 1892 "primarily as an agricultural subject," with permission, however, to the tenant to use all or so much as he might think proper for market garden purposes, but subject to certain conditions as to cultivation, *inter alia*, prescribing a four years' rotation. The tenant cultivated annually about 50 acres—though not always the same acres—as a market garden. In 1902 he was proceeding to erect a house for forcing rhubarb when the estate factor wrote asking what it was, and drawing attention to the conditions of the lease which he (the factor) stated would be strictly enforced. The house was completed, and the forcing of rhubarb continued an important part of the industry of the farm down to the expiry of the lease in 1911, when the tenant, on his outgoing, made a claim for compensation for improvements under the Agricultural Holdings (Scotland) Act 1908 in respect, *inter alia*, of the forcing-house and of the rhubarb stools left in the ground, then occupying about 12 acres.

Held (1) (*diss.* Lord Johnston) that (*a*) the small amount of the subjects used for market gardening purposes, and (*b*) the ambulatory character of that amount, did not prevent them forming a "market garden" as defined by the Agricultural Holdings (Scotland) Act 1908, sec. 35 (1); (2) that the subjects therefore fell within the scope of sec. 29 (2), which enables a tenant to claim compensation for market garden improvements; (3) that sec. 23 (1) enacting freedom of cropping applies only to arable and not to market gardening land, and consequently did not relieve the tenant here of the market gardening conditions in the lease; (4) that there had been no waiver or acquiescence by the landlord, and the factor's letter was a dissent to anything done in excess of the permission of the lease; and (5) that the tenant was therefore entitled to compensation for the forcing house and rhubarb stools as improvements, but only if and in so far as they were within a cultivation in accordance with the conditions of the lease.

Opinion (*per* Lord Johnston) that while looking to section 29 (3), which contemplated that there might be a "holding" within a "holding," the portion of land used for market gardening purposes might have entitled to compensation, the ambulatory character of the area used rendered that impossible in this case.

Statute — Construction — Lease — Agricultural Holdings (Scotland) Act 1908 (8 *Edw. VII, cap.* 64), *sec.* 29 (2).

The words "has then executed thereon" in section 29 (2) of the Agricultural Holdings (Scotland) Act 1908 must be construed as meaning "has thereafter executed thereon."

Callander v. *Smith*, May 9, 1901, 3 F. (H.L.) 28, 38 S.L.R. 576, *followed.*

The Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, c. 64), enacts—Section 23 (1)—"Notwithstanding any custom of the country, or the provisions of any lease or agreement, respecting the method of cropping of arable lands, or the disposal of crops, a tenant of a holding shall have full right to practise any system of cropping of the arable land on the holding, and to dispose of the produce of the holding, without incurring any penalty, forfeiture, or liability. . . ." Section 29—". . . (2) Where under a lease current on the first day of January Eighteen hundred and ninety-eight a holding was at that date in use or cultivation as a market garden with the knowledge of the landlord, and the tenant thereof has then executed thereon, without having received previously to the execution thereof any written notice of dissent by the landlord, any improvement comprised in the Third Schedule to this Act, the provisions of this section shall apply, in respect of that holding, as if it had been agreed in writing after that date that the holding should be let or treated as a market garden, . . . (3) Where the land . . . so used and cultivated consists of part of a holding only, this section shall apply as if that part were a separate holding." Section 35 (1) enacts—". . . 'Holding' means any piece of land held by a tenant which is . . . in whole or in part cultivated as a market garden. 'Market garden' means a holding cultivated, wholly or mainly, for the purposes of the trade or business of market gardening."

On 11th May 1912 James Inglis Davidson, Saughton Mains, Midlothian, the arbiter appointed by the Board of Agriculture and Fisheries in a reference under the Agricultural Holdings (Scotland) Act 1908 between Mrs M. R. Steel-Maitland of Barnton, Midlothian, *respondent*, and James Taylor, sometime farmer at Easter Drylaw on the said estate, *claimant and appellant*, submitted a Case under section 9 of the Second Schedule of the Act for the opinion of the Sheriff of the Lothians and Peebles at Edinburgh.

The *facts* were:—By lease, dated 24th and 30th May 1892, Sir James Ramsay Gibson Maitland (whose successor the said Mrs Mary Ramsay Steel-Maitland is) let to the said James Taylor All and Whole the farm and lands of Easter Drylaw for the period of nineteen years from and after Martinmas 1892. The extent of said lands was 153 acres or thereby and the rent £851, 8s.

The whole of said farm was arable land. The *lease* provided that "although the farm is let primarily as an agricultural subject, the said James Taylor and his foresaids shall be entitled to use all or so much of the land of the farm as he or they think proper for the purposes of a market garden, but subject always to the conditions following, *videlicet*—(1) None of the land shall be used for growing any kind of fruit except strawberries; (2) land used for market garden purposes shall be worked on a four years' rotation (the first and second years of the rotation being market garden produce, the third year white crop, and the fourth year grass); . . . (3) in the case of land under four years' rotation the tenant shall apply not less than 60 tons per acre of well-rotted horse or cow dung to the land in the first year, and not less than 40 tons per acre in the second year of the rotation; . . . (4) land which has been under market garden produce shall be thoroughly cleaned before being put under white crop; (5) the tenant shall be bound constantly to keep all land used for market-garden purposes well cleaned and in good heart, and to manage it according to the recognised rules of well-managed market gardens in the vicinity of Edinburgh," under a penalty in case of failure. Mr Taylor, who was a market gardener residing at Bangholm, Ferry Road, Edinburgh, from the outset grew market garden produce at Easter Drylaw, but the forcing of rhubarb was not carried on by him there until about the year 1902. In the course of his tenancy he gradually increased the area under market garden crops until there would be annually about 50 acres. These 50 acres, however, were not annually precisely the same ground, as Mr Taylor changed the portions of the ground, his custom being to select for market-garden purposes the fields or portions of fields he thought most suitable. The rest of the farm was cultivated as an ordinary arable farm. In evidence Mr Taylor stated—"Before I entered it, it had been cropped merely as a farm, and I began bit by bit to convert it into a market garden. After I was able to get the land to carry the crops I gradually increased my extent of market gardening. It was in 1899 that I began to grow rhubarb to any particular extent upon it. I required to have it ready for my forcing-houses in 1902. I ultimately extended my rhubarb break to from 12 to 15 acres." At the termination of Mr Taylor's lease at Martinmas 1911 about 50 acres of the farm were under market garden crops, and of these 12 acres or thereby were under rhubarb crop, a considerable part of which, however, had been planted out in the spring of 1911 after he had received notice to quit the holding, which course he had followed in previous years. In or about the year 1901 Mr Taylor removed from certain land which he had rented at Bangholm, and from that date down to November 1911 his whole business was carried on upon Easter Drylaw Farm. As there were no suitable houses upon Easter Drylaw for the growing and forcing of early rhubarb Mr Taylor erected and equipped suitable forcing-houses. This he did at his own expense, but without the previous consent of the proprietrix. The landlord's knowledge of the erection of the first forcing-house is established by the following *letter* to Mr Taylor from Mr Grigor, factor on the estate, and Mr Taylor's reply:—[*Mr Grigor to Mr Taylor, 4th November* 1903]—"Dear Sir—I beg to draw your attention to the terms of your lease of Easter Drylaw Farm, and shall be obliged if you will kindly explain what your intentions are with regard to the brick structure you are erecting on the field to the west of the garden. I may mention that the conditions of the lease will be strictly enforced.—I am, &c., JOHN GRIGOR." [*Mr Taylor to Mr Grigor, 5th November* 1903]—"Dear Sir—The building I am erecting is a forcing-house for growing rhubarb.—Yours faithfully, JAMES TAYLOR." From about this time onward to the termination of the lease, it was admitted on both sides that the growing of rhubarb at Easter Drylaw was carried on upon a larger scale than had previously been the case. The buildings erected by the claimant for market-gardening purposes were not required, and are not now required or used, for the purposes of a purely agricultural farm. The tenant's occupation of the subjects expired on 28th November 1911, and on 10th November 1911 he intimated a claim under the Agricultural Holdings (Scotland) Act 1908, in which he claimed, *inter alia*, the sum of £2163, 17s. 7d., being the value of the improvement claimed to have been effected by him on said holding or parts thereof by the planting thereon of the vegetable crops (limited in the claim to rhubarb stools) which continue productive more than two years, and the erection of buildings for the purpose of trade or business of a market gardener. On 9th December 1911 the rhubarb stools in question were sold by public roup by the proprietrix. After the arbiter had accepted office, the *proprietrix* lodged *objections* to Mr Taylor's claim, in which she repudiated said claim *in toto*, denying it to be competent or well founded, and alternatively stating it to be excessive. Proof was led by the parties before the arbiter on 25th, 26th, and 30th January 1912, and the proof having been closed the arbiter heard parties on the evidence on 31st January 1912. It was established in evidence that the proprietrix was aware of the manner in which the said farm was being managed and cultivated, and of the proportion thereof annually under market garden crops and of the nature and class of crops grown, and that she did not, either verbally or in writing, express any dissent therefrom, but warned Mr Taylor that the terms of the lease would be strictly enforced. In the growing of forced rhubarb it was proved (1) that the stools are kept in the forcing-house for from six to eight weeks; (2) that thereafter they are removed to the fields from the house; (3) that the stools require from three to five years' nursing in the field to recover their full vigour.

At the hearing on the evidence it was contended, *inter alia*, on behalf of the proprietrix that, upon a sound construction of the Agricultural Holdings (Scotland) Act 1908, and in view of the terms of the lease and of the facts above set forth, the clauses of said Act which allow compensation for tenants' improvements on land let or cultivated as market gardens do not apply to the claimant's holding as let to and cultivated by him, and that he is not entitled under the Act to any compensation for the improvements which he claims to have made. The contrary view was contended for by the claimant. At the hearing the claimant's law agent indicated his desire that the arbiter should state a case for the opinion of the Court on the question of law thus raised, and he subsequently, by letter dated 1st February 1912, requested the arbiter to state a case. The question thus raised is one which, in the opinion of the arbiter, was of considerable importance, and the determination of which was necessary before he could proceed to pronounce an award. A question had also been raised by the claimant as to whether, in view of the facts above set forth, the proprietrix had not barred herself from objecting to the validity of the claimant's claim.

The *questions of law* were—"1. Are the subjects which were let to, and cultivated and used by, the claimant, or any part thereof, a market garden as defined by the Agricultural Holdings (Scotland) Act 1908, to which the special provisions as to market gardens contained in that statute apply? 2. Is the proprietrix, in the circumstances stated in this case, barred from raising any question as to the tenant's right to obtain compensation under the Market Garden Clauses of the Agricultural Holdings (Scotland) Act 1908?"

On 23rd August 1912 the Sheriff-Substitute (GUY) answered both questions of law in the negative.

Note.—". . . . It is clear that the tenant's claim cannot fall under the first sub-section of section 29 of the Act of 1908, as the only agreement in writing between the parties upon which such a claim could be founded is the lease itself, and it is not dated on or after 1st January 1898. Any claim that the tenant has, therefore, must be brought by him under sub-section 2 of section 29 of the Act, and he must show that at 1st January 1898 his holding, or part of his holding, was in use or cultivation as a market garden with the knowledge of the landlord, and that he had then executed thereon, without having received previously to the execution thereof any written notice of dissent by the landlord, improvements comprised in the third schedule to the Act. Now there were certain of the improvements set forth in that third schedule which he was quite entitled to make under the powers which his lease gave him; for example, he had the power to plant strawberry plants and to plant vegetable crops which might continue productive for two or more years. There is no express power given to him in the lease to grow rhubarb, and it is possible that in the growing of rhubarb or such other vegetable crops he might not be able to grow these at a profit if he followed the rotation of cropping which is provided for in the lease for market gardening. But I repeat again that any such consideration does not affect the question for decision. The question is one of fact—Had the tenant at 1st January 1898 actually executed on a part of his holding any of the improvements specified in the third schedule to the Act? There is no statement in the case that he had, and there is no doubt that he had not then started to grow rhubarb, which is now the foundation of his claim. I think, however, that if he had at 1st January 1898 executed any of the statutory improvements he would have been entitled to preserve his claim under the Act, and to extend it to any similar improvements that he made after that date. That is really the meaning of the amending provision of the Act of 1908. I make this remark at this stage subject to some observations that I will have to make with regard to the tenant changing the locality of his market garden within the range of his whole holding. I take it that the statement of facts in the Stated Case is a statement of all the facts relevant to the question to be determined by me that could be stated. If this be so, then the tenant has failed to prove that at 1st January 1898 he had brought himself within the provisions of the Acts of Parliament entitling him to compensation such as he is now claiming in respect of his improvements on a market garden.

"The most of the argument presented to me was on the question as to whether it was necessary, in order to entitle the tenant to compensation, that the part of his holding which was in cultivation as a market garden at the expiry of his lease required to be the same part throughout. If I had come to the conclusion that the tenant had had a claim under the Act in respect of the condition of matters at 1st January 1898, I should have been prepared to hold that he had not lost the right which he then possessed to claim compensation by changing from one part of his holding to another in the growing of market-garden produce. He would have been doing that under the express power given to him in the lease, and I think it would have been only fair and equitable that any right which he had to compensation at 1st January 1898 should not be lost by the exercise of a power antecedently granted to him by the landlord. This opinion, in the view that I have taken of the facts, does not of course affect the determination of the questions submitted to me in the present case.

"These observations apply to the first question of law put to me. As to the second question, I agree with the contention of the proprietor that her actings can never create a right in the tenant, and I do not think that any of her actings can bar her from stating and maintaining her statutory rights. Her actings may give rise to claims at the instance of the tenant if anything she did was contrary to or destructive of

his rights. But these are not matters which are raised in the present case."

The claimant appealed, and argued—The Sheriff-Substitute was in error in holding that the Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, c. 64), section 29 (2) was inapplicable where, as here, the improvements for which compensation was claimed had been executed subsequent to 1st January 1898, for the words "has then executed thereon" meant "has thereafter executed thereon"—*Callander* v. *Smith*, July 7, 1900, 2 F. 1140, *per* Lord Kyllachy at p. 1143, 37 S.L.R. 890; *affd.* May 9, 1901, 3 F. (H.L.) 28, *per* Lord Shand at p. 31, and Lord Davey at p. 32, 38 S.L.R. 576. Nor was it material that the whole of the subjects had not been used as a market garden, for "holding" meant any portion of land "in whole or in part cultivated as a market garden"—Act of 1908, section 35 (1). The question of rotation was irrelevant, for the tenant of a "holding" could practice "any system of cropping"—Act of 1908, section 23 (1). The factor's letter was not a valid notice of dissent to the execution of the improvements for which compensation was now claimed. That was especially so where, as here, the appellant had been allowed to erect the forcing house and to cultivate rhubarb. Had dissent been intended the notice should have been more explicit.

Argued for respondent—*Esto* that the word "then" in section 29 (2) of the Act meant "thereafter," that did not help the appellant, for this was plainly not a market garden in the sense of the Act. Market garden in the sense of the statute meant a holding cultivated "wholly or mainly" as a market garden—section 35 (1). What was let here was a farm—that was plain from the terms of the lease. *Esto* that the tenant could use such part of it as he chose for market gardening, that did not constitute the part so used a market garden in the sense of the Act, for the Act contemplated a definite portion of ground and not an ambulatory thing. Moreover, the improvements for which compensation was given were such as had been executed "thereon," *i.e.*, on a definite part of the holding. The statute contemplated continuity of cultivation and implied that the particular portion of the holding in use as a market garden in 1898 should continue to be used till the termination of the lease. *Esto*, however, that there was here a holding in the sense of the Act, the appellant had not complied with the conditions of the lease as to rotation of cropping, and that was sufficient to bar his claim. Section 23 (1), on which he relied, was inapplicable, for it applied only to arable land. Moreover, the improvements for which compensation was claimed had been made after dissent had been given by the landlord's factor, and the tenant therefore had no claim for compensation.

At advising—

LORD PRESIDENT—This is an appeal from the judgment of the Sheriff-Substitute in a Stated Case under the Agricultural Holdings Act 1908. The Case is stated by Mr Davidson of Saughton Mains, who was the arbiter in the case, for the determination of certain points of law. The parties to the arbitration are the tenant of the holding of Easter Drylaw on the estate of Barnton and the proprietrix of that estate. The tenant became tenant by lease entered into in 1892. Now 1892 was prior to the Market Gardeners' Compensation Act of 1897, which is the beginning of the legislation as regards market gardens. The regulating statute now is the Agricultural Holdings Act of 1908, the provisions of which replace the provisions of the former Acts. Under the lease in question the farm was let as an agricultural farm; but the lease contains the following provision:—". . . [*quotes*, v. *sup.*] . . .—(1) . . .; (2) . . ." Then there is a special provision for land under strawberries, which I need not quote. Then "(3) . . . [*quotes*, v. *sup.*] . . ." The object of that is perfectly clear. The farm is to be looked on as an agricultural holding, but the tenant is to have leave, if he chooses, to use portions of it as a market garden. If he does so he is to treat it in such a way that it will, so to speak, resume its place as an agricultural holding for those who come after him. The tenant, as a matter of fact, availed himself of this option, and he cultivated portions of the farm as a market garden, and practically he cultivated about 50 acres out of the total acreage of about 150. He did not, so to speak, stick to the same 50 acres all along, but he at one time cultivated one portion and at another another; but, roughly speaking, during his tenancy there were generally 50 acres under cultivation as a market garden. In November 1903 the tenant decided to force early rhubarb. With that intention he put up a forcing-house. Upon that the landlord's factor, in November 1903, wrote a letter in these terms—". . . [*quotes*, v. *sup.*] . . ." The tenant answered that the building he was erecting was a forcing-house for growing rhubarb, and after that time the tenant did grow rhubarb and forced rhubarb in the house. At the end of the lease this claim is brought for meliorations under the Agricultural Holdings Act. I should suppose that in the arbitration there are other claims, but the only claim which we have before us is the claim which is made in respect of this rhubarb. That is the only matter upon which the arbiter has asked for assistance as upon a point of law. A claim is made for this house and also for the value of certain rhubarb stools which were left in the ground. I suppose one is entitled to know so much—in fact, it is stated in the case—that the method of forcing rhubarb is that the rhubarb is forced in the house, that the stools are removed to the fields, and take some time to recover.

The section of the Act of 1908 which deals with market gardens is section 29. That section replaces, not in exactly the

same terms, but replaces, the earlier section in the repealed Act of 1897. (I may say the Act in the schedule is called the Act of 1895, but that is an obvious misprint; it is 1897, and indeed there is no difficulty raised, because the session and chapter, 60 and 61 Vict. cap. 22, are quoted correctly.) Now that section provides, sub-section (2), that "Where under a lease current on the 1st day of January 1898"—this lease was, of course, current at that time—"a holding was at that date in use or cultivation as a market garden with the knowledge of the landlord"—of that there is no question, for this holding was under cultivation as a market garden under the option given by the lease—"and the tenant thereof has then executed thereon, without having received previously to the execution thereof any written notice of dissent by the landlord, any improvement comprised in the third schedule of this Act, the provisions of this section shall apply in respect of that holding as if it had been agreed in writing after that date that the holding should be let or treated as a market garden, so, however, that the improvements in respect of which compensation is payable under these provisions as so applied shall include improvements executed before as well as improvements executed after that date." The improvements in the third schedule include the planting of asparagus, rhubarb, and other vegetable crops which continue productive for two or more years, and the erection or enlargement of buildings for the purpose of the trade or business of a market gardener; so that, so far as the schedule is concerned, both the rhubarb and the rhubarb forcing-house are improvements for which compensation might be claimed.

Now there are various points of law that have been brought forward by the landlord as excluding this particular claim for compensation. But I may say at once that it is unfortunate that the learned Sheriff-Substitute has disposed of the case on a ground which it is impossible to uphold, owing to the fact that his attention was not called to the case of *Smith* v. *Callander* (3 F. (H.L.) 28). He disposes of the case on a very short ground, and one which, if it had been sound, would have been conclusive. The Act deals with the case where, under a lease current at the beginning of 1898, "the tenant thereof has then executed thereon, without having received previously . . . any written notice of dissent." Now the learned Sheriff-Substitute has read the word "then" as if it meant "at that date," and if that were so it would end the matter, for there is no question that these improvements were not executed in 1898. But unfortunately in the case of *Smith* the opinions both of the Lord Ordinary in this Court and of the learned Judges in the House of Lords were that the word "then" really meant "thereafter," and accordingly the learned Sheriff-Substitute's ground of judgment is gone.

The next point that was argued was that the holding was not at 1st January 1898 in use or cultivation as a market garden, in view of the provision that not the whole farm but only 50 acres should be so cultivated. I do not think that argument will do, because in the 35th section holding is defined as meaning "any piece of land held by a tenant which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden." Now this farm is obviously in part cultivated as a market garden, and therefore the argument that it is not a holding will not do. But then section 29 goes on, "and the tenant thereof has then executed thereon," that is, of course, upon the holding—the holding as a market garden. It is found as a fact in the case that nobody can tell now what precise 50 acres were occupied as a market garden in 1898, and therefore the landlord argues that you cannot tell whether the improvement as here now was really put upon the holding which existed as a market garden in 1898. Well I do not think that argument will do either. I think that as the holding shifts from one part of the farm to another the possibility of making improvements upon that holding also shifts, and I think it would be far too narrow a view to hold that the mere fact that the part of the farm that was cultivated was, so to speak, ambulatory, excluded the tenant from the advantages conferred by the Act.

But then comes the last argument, and this argument is, I think, conclusive against the tenant's claim. The statute says "without having received previously to the execution thereof any written notice of dissent." Now I remind your Lordships of the letter which I have read, where the factor, seeing the large building in course of erection, says in effect, "Now remember, look at your lease, because we are going to hold you strictly to the terms thereof," and the lease says that the market gardening ground is to be treated under a four-shift rotation and with a special treatment of dung under that four-shift rotation. I think that that is a dissent from the tenant cultivating the land in any way that is inconsistent with that rotation. There are two things to be said about that—first of all, the tenant argues that the provisions as to rotation were swept away by the 23rd section of the Act, which says, "Notwithstanding any custom of the country, or the provisions of any lease or agreement, respecting the method of cropping of arable lands, or the disposal of crops, a tenant of a holding shall have full right to practise any system of cropping of the arable land on the holding, and to dispose of the produce of the holding . . . without incurring any penalty, forfeiture, or liability," and there are certain other provisions which lay certain duties upon the tenant which I need not read. The simple answer to that argument is, that of set purpose that provision is applied to arable land only, and therefore a provision in a lease respecting market gardening ground is not struck at by section 23. The other thing to be said is this, in order to express

the argument I have been obliged for the moment to assume that the cultivation of rhubarb is contrary to the provisions as to the four-shift. I do not consider that I have any right to know that, and I have no right to lay it down. I may know it, and indeed there are various indications in the case which, even if I knew nothing about it, would enable me to guess with something approaching to certainty that the two things are inconsistent, but at the same time I do not think we can say that in this Court. That is a matter for the arbiter, who is asking our directions on a point of law, and therefore I think we ought to tell the arbiter that if he is of opinion that the growing of rhubarb with a forcing-house was a method of cultivation which was inconsistent with the terms of the lease with regard to the use of the land for market garden purposes, then the factor's letter was a good expression of dissent by the landlord, and that it barred a claim for compensation. I think that we ought to answer the question put to us in that way.

Another question was put as to whether the proprietrix was barred, and there the learned Sheriff-Substitute held that she was not. I think he was right, and I have nothing to add on that part of the case.

LORD JOHNSTON—This case raises a question of difficulty as to the retroactive effect of the Agricultural Holdings (Scotland) Act 1908, which has now been substituted for the Acts of 1883 and 1897. It arises under a lease of the farm of Easter Drylaw for nineteen years by Sir James Gibson Maitland, Bart., to James Taylor, dated in May 1892. At that date the first Scottish Agricultural Holdings Act, that of 1883, was still in force. That Act made no provision specially applicable to market gardens, and its provisions with regard to compensation generally were more limited than those contained in the subsequent Acts. It contained a clause, section 5, for which the section 4 of the later Act of 1908 is now substituted, limiting its application where a lease executed after its date contained an agreement securing to the tenant fair and reasonable compensation, having regard to the circumstances existing at the time of making such agreement, for any improvement specified in the third part of the schedule to the Act. In such cases the compensation in respect of such improvement was to be payable in pursuance of the agreement and not under the Act. The third part of the schedule deals with manuring, and is really the only one of the provisions for compensation which could be made to apply to market gardens. The lease of 1892 was executed in full view of the passing of the Agricultural Holdings Act of 1883, and takes advantage of the section to which I have referred by including a special agreement as to compensation.

I think it desirable to look carefully at the provisions of this lease, for while, on the one hand, the tenant is designed as a market gardener, and was at its date carrying on that trade at Bangholm on the north side of Edinburgh, and while there are provisions permitting him to continue that trade at Drylaw, on the other hand the subject was an arable farm, supplied with all the farm buildings and all the other appurtenances requisite for that purpose. The lease in its general scope is an agricultural lease, and the express permission to use any part of the ground for market gardening is a matter wholly subsidiary. It is, moreover, not only limited, but its extent and its limitations are very clearly defined.

I have already said that the lease is in its essence an ordinary agricultural lease of an arable farm. It is one which, owing to its proximity to a large town and to the high rent accordingly commanded, contains a scheme of provisions regarding cultivation very liberal to the tenant. But it contains two very important conditions bearing on its real purpose as an arable holding—first, a provision that the tenant should undertake to keep a sufficient stocking of horses, cattle, and implements, and to cultivate and manage the lands according to the most approved rules of good husbandry, and to apply to them the whole manure made on the farm, and an equivalent of well-made dung bought in for any straw sold off the farm; and second, a provision that the tenant should never in the course of the lease have less than one-fourth part of the whole land of the farm under drilled green crop, all properly cleaned, and manured with not less than forty tons of well-made horse or cow dung per acre.

These are general over-riding provisions. But then it is added that, without prejudice to the foregoing provisions, "although the farm is let primarily as an agricultural subject," the tenant should be entitled to use all or so much of the land of the farm as he might think proper for the purpose of a market garden. This apparently general provision is, however, thus restricted—first, no kind of fruit except strawberries is to be grown; second, any land under strawberries is to be worked on a six-year rotation—three years strawberries, the fourth and fifth years green crop, and the sixth year white crop; third, where land is put under this crop there is to be applied to the land in the first year not less than seventy tons, in the fourth year sixty tons, and in the fifth year forty tons of good farm-yard manure. If instead of strawberries the land is used for growing ordinary market garden produce, fourth, this must be on a four-year rotation, the first and second years of the rotation being market garden produce, not less than sixty tons of manure being applied the first year and forty the second, the third year white crop, and the fourth year grass, and the land to be thoroughly cleaned before being put under white crop. Moreover, the tenant is taken bound generally to keep all land used for market garden purposes well cleaned and in good heart, and to manage it according to the recognised rules of well-managed market gardens in the

vicinity of Edinburgh. If the tenant fails to observe these conditions of his liberty to use any part of the farm as a market garden he comes under an obligation to pay an additional pactional rent of £10 an acre for every acre ascertained on a reference not to have been properly managed. Further, there is a general provision that should the tenant choose to crop the ground in any manner other than that specified during the currency of the lease without written consent of the landlord he comes under an obligation to pay £10 an acre of additional pactional rent for every acre so cropped differently for the year of miscropping, "without prejudice nevertheless to the right of the first party" [the landlord] "to stop such miscropping in whole or in part as he may incline."

These provisions which I have thus summarised indicate very clearly that the tenant received no roving commission to turn the farm or any part of it into a market garden, but that his permission to do so was limited and defined, in strong contrast to his comparative freedom in cultivating the farm as an ordinary arable farm. Their practical intention and effect was to limit market gardening to the growing of strawberries and of such market garden produce as could be grown in two successive years, that is, of ordinary vegetables; and further, to bring the land back at the end of the market gardening rotation to such a condition that, though it might again be used for market gardening, it might also at once go back to ordinary arable cultivation. The latter would, I think, have been the natural course to follow, and in fact apparently was followed.

One further condition, which I have already referred to, I will shortly note. It is that compensation for unexhausted manures in the land of the farm, without discrimination of ordinary arable and market gardening use, is provided according to a schedule annexed, this arrangement to come in place of and to supersede those of the Act of 1883 with reference to compensation for tenants' improvements which were dispensed with by mutual consent.

Before I advert to the Market Gardeners Act of 1897, which came into force on 1st January 1898, and the Agricultural Holdings Act of 1908, which repealed and superseded the Acts of 1883 and 1897, I think it convenient to state briefly what has been the course of cultivation of the farm as stated by the referee after evidence led before him.

Prior to Mr Taylor's entering on possession the farm was cultivated wholly as an arable farm.

Mr Taylor at once began to grow market garden produce, and gradually increased this use of the land until there was about 50 acres or one-third of the farm under market garden crops. This continued to be the area under this system of cultivation till the termination of the lease.

"These 50 acres, however," the referee states, "were not annually precisely the same ground, as Mr Taylor changed the portions of the ground, his custom being to select for market garden purposes the fields or portions of fields he thought most suitable. The rest of the farm was cultivated as an ordinary arable farm."

It must be added that when he suggested that the case should be amended in certain particulars, the Sheriff, to whom it had been presented, was informed "that it would be impossible for any amendment of the case to be made so as to give me particulars as to what precise part of the whole holding was in use as a market garden at 1st January 1898, and as to whether any of the improvements which would have given the tenant a claim under the Act of 1897 had then been executed." but that he might take it "that from 1st January 1898 down till the expiry of the lease, fifty acres, although not the same fifty acres," were cultivated as a market garden. This information must therefore be accepted as if it had been part of the case stated by the referee.

We are not told what was the nature of the crops taken prior to 1st January 1898. It is not said that strawberries were cultivated, and I assume therefore that the portion of the farm turned to market gardening purposes prior to that date was cropped, under the four-years' rotation stipulated by the lease, with ordinary market garden produce. But after the passing of the Market Gardeners' Act of 1897 Mr Taylor began to grow rhubarb and to force rhubarb. This is not a fruit. It is an ordinary market garden product of the vegetable species. But it cannot be grown in any case, and certainly not for forcing, under the four-years' rotation of the lease. It takes some time for the rhubarb stools to mature for forcing. The process of forcing takes, as we are told, six or eight weeks. The stools are then removed to the fields, and require three to five years' nursing in the open to recover their vigour.

What Mr Taylor did was to plant out rhubarb in 1899 to be ready for forcing in 1902, by which time he had erected a range of forcing houses adjoining the steading. And from that date to the end of the lease he continued the practice of forcing rhubarb for the early market, having generally about 15 acres of the farm under this crop. But for this rhubarb cultivation so carried on there would probably have been no question between Mr Taylor and Mrs Steel-Maitland, who is now the proprietrix of Drylaw, as in regard to ordinary market garden crops no compensation can be claimed except for unexhausted manure, and as whether that claim falls to be ascertained under the lease or under the Act there would probably not be much difference in the actual measure of compensation.

It must be apparent from the above statement that from and after 1st January 1898 Mr Taylor commenced and continued to cultivate in contravention of his lease. He was not stopped. But Mrs Steel-Maitland was, through her factor, made aware of the course he was pursuing. She did

not either verbally or in writing express any dissent therefrom, but she warned Mr Taylor, particularly when in course of erecting his forcing-houses, and when she was apprised of their purpose, "that the conditions of the lease will be strictly enforced."

Apparently Mr Taylor assumed that the Act of 1897 freed him from the restrictions of his lease, and authorised him, notwithstanding thereof, to do anything in the way of market gardening for which compensation is provided by that Act, and now by the Act of 1908. For he now claims, *inter alia*, compensation (£2163, 17s. 7d.) for the value of the improvement "effected by him on said holding or parts thereof by the planting thereon of the vegetable crops (limited in the claim to rhubarb stools) which continue productive more than two years, and the erection of buildings for the purpose of trade or business of a market gardener," all as detailed in Schedule III of his claim. These buildings were the forcing-houses.

The parties differed, and a reference was made to Mr James Inglis Davidson under the Act of 1908, before whom it was contended on behalf of the proprietrix that "upon a sound construction of the Agricultural Holdings (Scotland) Act 1908, and in view of the terms of the lease, and of the facts above set forth, the clauses of said Act which allow compensation for tenants' improvements on land let or cultivated as market gardens do not apply to the claimant's holding as let to and cultivated by him, and that he is not entitled under the Act to any compensation for the improvements which he claims to have made."

The question thus raised was one which in the opinion of Mr Davidson was of importance, and the determination of which was necessary before he could proceed to pronounce an award. And he accordingly stated a Case for the opinion of the Sheriff under section 11 of the Act of 1908, in which he submitted the following question of law —"Are the subjects which were let to, and cultivated and used by, the claimant, or any part thereof, a market garden as defined by the Agricultural Holdings (Scotland) Act 1908, to which the special provisions as to market gardens contained in that statute apply?"

The Sheriff answered this question of law in the negative, and an appeal to this Court was taken by Mr Taylor, the tenant.

Before the referee Mr Taylor had also pleaded that Mrs Steel-Maitland was barred by her actings from challenging his right to compensation as claimed. This question also the Sheriff answered in favour of Mrs Steel-Maitland, but at the bar of this Court the contention was abandoned by the appellant's counsel, and need not be further adverted to.

In dealing with the question at issue any reference to the Act of 1897, which was the Act in force during almost the whole of Mr Taylor's lease, may be avoided, because the more comprehensive Act of 1908 superseded both the general Agricultural Holdings Act of 1883 and the Market Gardeners' Act of 1897, and with a still more retroactive effect.

In considering this question for determination it must be kept in mind that we are dealing with a subject held under lease dated prior to and not after 1st January 1898, and therefore under a lease the parties to which could not have had in view any of the provisions of the Act of 1897 or of the substituted Act of 1908. It is very difficult to keep the two positions separate in one's mind, but this decision cannot directly determine a question arising under a lease dated after 1st January 1898.

Turning to the Act of 1908, section 29 (1) says—"In the case of a holding in respect of which it is agreed by an agreement in writing made on or after the first day of January 1898 that the holding shall be let or treated as a market garden," certain provisions for compensation shall apply.

And section 29 (2) says—". . . [*quotes*, v. *sup.*] . . ."

I think that four points arose for the consideration of the referee. First, What is the holding to which it is proposed to apply the compensation provisions of the statute? Second, Was it in use or cultivation prior to 1st January 1898 as a market garden in the sense of the Act? Third, Have any of the scheduled improvements been timeously executed, so that the condition-precedent of the provisions of the section applying has been fulfilled? Fourth, Was their execution barred from having that effect by prior written notice of dissent from the landlord?

The first two and the fourth of these questions involve, of course, matters of fact, but are, in the circumstances as set forth to us, questions of law. The third is a pure question of fact.

First—What is the holding? It is quite clear that if the holding be regarded as the whole land under the lease it was not in use or cultivation as a market garden at any time prior to 1st January 1898. It is therefore necessary to find whether "holding" is to receive a more restricted meaning.

Now "holding" is, section 35 (1), defined as meaning any "piece of land held by a tenant which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden."

"Market garden" again is, section 35 (1), defined as "a holding cultivated wholly or mainly for the purpose of the business of market gardening."

But to these definitions there is superadded this provision, section 29 (3)— "Where the land to which such agreement relates, or so used and cultivated, consists of part of a holding only, this section" (that is, the provisions of the Act regarding compensation) "shall apply as if that part were a separate holding."

I confess to some difficulty in knowing how to combine these overlapping provisions. They certainly are not a model of perspicuity. But on the best consideration I can give them I think they contemplate

two different kinds of holdings, a major holding and a minor holding, a holding and a holding within a holding, and that they apply the term holding both to the holding as a whole and to the particular part of the holding.

It is not to prevent a piece of land held by a tenant being "a holding" in the general sense that part of it is cultivated as a market garden. If part of the holding is cultivated as a market garden, the provisions of the 29th section are to apply to the part as if it were a separate holding. But the whole or the part, the holding in the major sense or in the minor, must, if the clauses providing market gardening compensation are to apply, be cultivated wholly or mainly as a market garden.

This cannot be said of the whole of this holding. Of what, if any, part of it can it be said? I think it must be answered that no part of the holding can be pointed out which prior to 1st January 1898 was, or indeed since that date has been, in use or cultivation as a market garden, because the market gardening, such as it has been, has been ambulatory, and for such a state of things the Act makes no provision, and probably did not mean to do so. For I am unable to agree with the learned Sheriff that fair and equitable considerations justify the application of the provisions of the Act to what I have called an ambulatory market garden holding. It seems to me that considerations of equity are out of place, in any case in the interpretation and application of a statute, and that a landlord is more particularly entitled to except to their admission where, as here, a statute is attempted to be applied in such a manner as to impose burdens on him in contempt of contract and to demand that it be strictly interpreted and strictly applied.

There is, therefore, in my opinion no holding, in the sense of the Act, to which the special provisions for market gardening compensation apply.

Second—Assuming that the Sheriff's view as to the equitable construction is to find acceptance, was this ambulatory area in use or cultivation *as a market garden* in the sense of the Act?

This at once brings one up against the question—Did the Act of 1897, and does this Act of 1908, really throw to the winds a lease such as that in question entered into prior to its date, and empower a tenant who is by contract under definite restrictions to contravene such restrictions, grow what crops he chooses, erect what structures he thinks proper, and then come on his landlord at the end of the lease for compensation for the improvements he has thus forced upon the latter? And this question is the more important in that it is contended, and not without reason if the premise be correct, that erection or enlargement of buildings for market gardening purposes without the consent of the landlord gives to the tenant of a market garden a right to compensation, whereas if he were tenant of an arable farm he would (section 20) only have a certain limited right of removal.

I do not find that the Act of 1908 goes this length in its interference with contracts already made. I say so for two reasons—First, the Act, section 23, which notwithstanding that there may be contracts to the contrary, confers freedom of cropping and of disposal of produce, only applies to arable lands, and section 29 must be read in the light of section 23. Second, I think that the statutory provisions in question only applied to land used or occupied for market garden purposes generally, that is, to land which is held under agreement enabling it to be turned to market gardening purposes without restriction, or to land so held under restrictions, subject to those restrictions. That is to say, in this latter case, where improvements specified in the third schedule to the Act or any of them can be competently made by the tenant under the terms on which he holds his lands, and are made, then and then only will the Act give him a right to compensation. This is a different thing from saying that the inclusion of certain improvements in the third schedule authorises contravention of the conditions of the holding and confers a right of compensation in respect of such contravention.

As in any view the land in question under rhubarb was in use or cultivation in contravention of the conditions under which it was held, I do not think that it was in use or cultivation as a market garden in the sense of the Act, and therefore that its provisions as to compensation do not apply.

I pass over for the present the third question.

Fourth—Assuming improvements to have been made which would have brought this holding under the provisions of the Act, were they barred from having that effect by prior written notice of dissent from the landlord? I think they were. A condition in the lease precluding the making of a scheduled improvement is in my opinion sufficient written notice of dissatisfaction to satisfy the condition of bar. The tenant cannot found on a breach of the lease as bringing him under the provisions of this Act, and then plead a continued breach as giving him right to compensation under the Act.

To revert now to the third question.

The Act, section 29 (2), makes it a condition precedent to the provisions for compensation applying, in the case of leases current on 1st January 1898, that the tenant "has 'then'" executed, without exception on the part of the landlord, some one or more of the improvements enumerated in the third schedule to the Act. The Sheriff has, not unnaturally, interpreted "has then" as meaning "has at or prior to that date," but he was evidently not aware that the words had in the case of *Smith* v. *Callander* (3 F. (H.L.) 28) been construed by the House of Lords as meaning "has thereafter." This decision is binding on us, and as the Sheriff's determination depends entirely upon the interpretation which he puts upon this passage in the Act it

follows that it is not well founded. From the statement of the case I think that we must assume that improvements of the class enumerated in the third schedule to the Act were made after 1st January 1898, and therefore that the third of the questions which I have suggested for consideration would fall to be answered in the affirmative.

In view, however, of the conclusion to which I have come on the other three questions, this matter is, in my opinion, of no importance.

For the reasons stated, I think that the first question in the case must be answered in the negative, and that the second is superseded.

LORD MACKENZIE—The question in this case is whether part of the farm of Easter Drylaw, which was let by lease dated in 1892 (with an addition in 1894), and which the tenant left at Martinmas 1911, is to be held a market garden under the Agricultural Holdings (Scotland) Act 1908, so as to entitle the tenant to claim compensation for improvements of the nature provided for by the third schedule. The special provisions as to market gardens are contained in section 29 of the Act, and the question in the present case arises on sub-section (2), which is as follows—"... [*quotes, v. sup.*] ..." Under this subsection two conditions must be fulfilled before a tenant is entitled to claim compensation for improvements comprised in the third schedule. It must be shown (1) that the holding was at 1st January 1898 in use or cultivation as a market garden with the knowledge of the landlord, and (2) that the tenant thereof has "then" executed thereon, without having received previously to the execution thereof any written notice of dissent by the landlord, the improvements in respect of which he claims compensation. The facts stated in the present case by the arbiter and the Sheriff-Substitute are that from the outset the tenant grew market garden produce at Easter Drylaw, and that from 1st January 1898 down to the expiry of the lease 50 acres (although not the same 50 acres) were in cultivation as a market garden. No question is raised in the case as to the landlord not having knowledge that 50 acres were being cultivated as a market garden on 1st January 1898, or as to the cultivation as at that date having been in contravention of any of the provisions of the lease. Whether there has been compliance with the first condition of the subsection is purely a question of fact, and upon this question of fact parties are agreed. The provisions of the sub-section so far are therefore satisfied.

The difficulty arises upon the question whether there has been compliance with the second condition of the sub-section. The view upon which the Sheriff-Substitute has decided against the appellant proceeds upon a construction of the word "then," which he takes to mean as at 1st January 1898. If the Sheriff-Substitute is wrong in this—if the word "then" must be construed as "thereafter"—then the rest of his opinion is in favour of the appellant. Now in coming to the conclusion that he did it is evident that the attention of the Sheriff-Substitute had not been directed to the case of *Smith* v. *Callender*, 2 F. 1140, *aff.* 3 F. (H.L.) 28. The Act under consideration there was the Market Gardeners (Scotland) Act 1897, sec. 4, but the provisions of that Act are so similar to the present that what was said there applies here. The opinion of Lord Kyllachy in the Court of Session, and the views expressed by the Lord Chancellor, Lord Shand, and Lord Davey in the House of Lords, are distinct authority for construing "then" as meaning "thereafter." The ground, therefore, upon which the Sheriff-Substitute's opinion rests cannot stand. The word "then" in sec. 29 (2) must be construed as "thereafter." There is no question that the improvements for which the tenant here claims compensation were executed after 1st January 1898; therefore so far as this is concerned there has been compliance with the second condition of the sub-section.

More serious difficulties, however, remain, one of which is whether in order to entitle the tenant to compensation that part of his holding which was in cultivation as a market garden at the expiry of his lease requires to be the same as that which was in cultivation at 1st January 1898. The Sheriff-Substitute's view is that the tenant does not lose his right to claim compensation by changing from one part of his holding to another in the growing of market garden produce. In this I agree. The definition clause of the Act, sec. 35, provides that "market garden" means a "holding cultivated wholly or mainly for the purpose of the trade or business of market gardening," and that "'holding' means any piece of land held by a tenant which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, and which is not let to the tenant during his continuance in any office, appointment, or employment held under the landlord." Sub-section (3) of section 29 provides—"Where the land to which such agreement relates or so used and cultivated consists of part of a holding only, this section shall apply as if that part were a separate holding." The respondent's argument was that the statute implied a continuity in cultivation, and that in order to have continuity the tenant was bound to show that he had executed the improvements in respect of which he claimed compensation at the ish on the same area as was in cultivation as a market garden at 1st January 1898. The argument was also pressed that in order to give the word "thereon" in the second sub-section its proper construction it must refer to the holding or part of the holding which was in cultivation as a market garden at 1st January 1898. Owing to the phraseology I am unable to say that the matter is free from difficulty, but upon the best consideration I have been able to

give to the matter the meaning of section 29 (2) seems to be this—If a holding is stamped as at 1st January 1898, either in whole or in part, with the character of a market garden, and if value is left to the landlord or the incoming tenant in that holding, either as a whole or in part, to an extent not greater than the area which was in cultivation as a market garden at 1st January 1898, then if the improvements which have created that value are of the character contemplated by the third schedule, and if the other conditions of the statute have been complied with, the tenant has a claim for compensation. As regards the necessity for continuity, that question does not really arise for determination here. There was a continual cultivation, though not of the same 50 acres. I may say, however, that the necessity for continuity seems to me to be implied from the language of sub-sec. 2, where it says that the provisions of the section shall apply in respect of the holding "as if it had been agreed in writing after that date that the holding should be let or treated as a market garden." Applying this provision to the facts of the present case, it means that the holding must to the extent of 50 acres have been continually treated as a market garden. Accordingly I am not prepared to hold that the tenant's claim fails because the situation of the 50 acres upon the holding has changed from time to time.

I now come to consider what appears to me to be the most difficult point in the case. Section 29 (2) deals with improvements which have been executed by the tenant without previous written notice of dissent by the landlord. If previous to the execution of the improvements the landlord has given notice of dissent, then one of the conditions-precedent has not been fulfilled, and the tenant can have no claim for compensation. Now the claim in the present case is thus described in the case stated by the arbiter. "The tenant's occupation of the subjects referred to expired on 28th November 1911, and, of this date, he intimated a claim under the Agricultural Holdings (Scotland) Act 1908, in which he claimed, *inter alia*, the sum of £2163, 17s. 7d., being the value of the improvement claimed to have been effected by him on said holding or part thereof by the planting thereon of the vegetable crops (limited in the claim to rhubarb stools) which continue productive more than two years, and the erection of buildings for the purpose of trade or business of a market gardener, all as detailed in Schedule III. of said claim." "In the growing of forced rhubarb it was proved (1) that the stools are kept in the forcing house for from six to eight weeks; (2) that thereafter they are removed to the fields from the house; (3) that the stools require from three to five years' nursing in the field to recover their full vigour." Now the factor on the estate wrote to the tenant on 4th November 1903 in the following terms:—". . . [*quotes, v. sup.*] . . ." He received a reply dated the 5th. "The building I am erecting is a forcing-house for growing rhubarb." Now the letter of 4th November 1903 was a written notice by the landlord. If there could be any doubt reference may be made to sec. 35 (3). It is, in my opinion, a notice of dissent within the meaning of sec. 29, sub-sec. 2, in so far as the improvements by the tenant now claimed for were in contravention of the stipulations in his lease. On the facts of the case it does not appear that any question can arise as to the letter having been received by the tenant previous to the execution of these improvements. Whether the improvements in respect of which the present claim for compensation is made were in contravention of the terms of the lease is in my opinion not a question of law but a question of fact, and must be determined by the arbiter. The lease specially provides that although the farm is let primarily as an agricultural subject, the tenant is to be entitled to use all or so much of the land of the farm as he may think proper for the purposes of a market garden, but subject always to the conditions therein set forth. I do not think it necessary to refer in detail to these, because their application to the facts of the present case are not for the Court but for an agricultural expert. If in executing the improvements in question the tenant has contravened his lease, the result of this is to exclude the application of section 29 (2), and is not merely to found a claim of damages. It was argued by the Dean of Faculty that the effect of section 23 of the Act was to delete from the lease for the purposes of this case all the cropping clauses in it. Section 23, however, does not deal with market gardens but only with arable land. The fact that section 23 does strike out the provisions of every lease regarding the method of cropping arable lands, but says nothing about market gardens, is a strong reason for inferring that the Legislature never intended the Act to have any such effect as that contended for by the appellant. If the appellant's argument were sound, then the provisions of section 29 (2) would apply here as if it had been agreed in writing after 1st January 1898 that the holding should be let or treated as a market garden free from restrictions. I am unable to see how that view can be correct where, as here, the landlord before the improvements were executed had directed the tenant's attention to the terms of his lease, which contains express restrictions, and had told him they would be strictly enforced. In this view of the case it is right to say as regards the second question put to us, which raises the question of personal bar, that, in view of the terms of the letter I have already referred to, I do not see ground for holding that the landlord can be held to have acquiesced in the execution of improvements contravening the lease when the tenant had express written notice that its terms were to be enforced. Although any point on the second question was given up by the appellant, I think it right, taking the view I do of the case, to express an

opinion upon it. On the facts as stated in the case I do not see how we can give effect to the plea of bar.

The answer to the first question should, in my opinion, be that the Court finds that the provisions of section 29 (2) apply to the 50 acres which were under cultivation at the expiry of the lease, but in so far only as the cultivation thereof had not been in contravention of the terms of the lease.

Further, find that the tenant has a claim for compensation for the erection of the forcing-house in question, but only in so far as it was not erected or enlarged in contravention of the terms of the lease, and continue the cause in order that parties may obtain the opinion of the arbiter; and, as regards the second question, that it is unnecessary to answer it, the appellant not having insisted in his plea of bar.

LORD PRESIDENT — LORD KINNEAR concurs in Lord Mackenzie's opinion.

LORD PRESIDENT—It is the opinion of the majority of the Court—Lord Johnston would go further—that we cannot deal with the expenses until we know what the arbiter has done, and we shall therefore pronounce an order upon the arbiter to state whether the cultivation of the rhubarb and the erection of the forcing house were in contravention of the lease. If he answers that question affirmatively we shall then find the respondent entitled to expenses.

The Court pronounced this interlocutor—

"Recal the interlocutor of the Sheriff-Substitute of 23rd August 1912: Find, in answer to the first question of law in the case, that the provisions of section 29 (2) apply to the fifty acres which were under cultivation at the expiry of the lease, but in so far only as the cultivation thereof had not been in contravention of the terms of the lease: Further, find that the tenant has a claim for compensation for the erection of the forcing-house in question, but only if and so far as the said forcing-house constitutes an improvement in connection with a cultivation which was not prohibited by the terms of the lease: Find it unnecessary to answer the second question of law in the case, and remit to the arbiter to proceed: *Quoad ultra* continue the cause."

Counsel for Claimant and Appellant—Dean of Faculty (Scott Dickson, K.C.)—Guild. Agents—Guild & Guild, W.S.

Counsel for Respondent—Constable, K.C.—Mitchell. Agents—John C. Brodie & Sons, W.S.

Tuesday, January 28.

FIRST DIVISION.

MACRAE *v.* LEITH.

Right in Security—Agent and Principal—Heritable Security—Lien—Right of Creditor in Possession to Delivery of Leases and Estate Documents in Hands of Estate Factor.

A heritable creditor in possession under a decree of maills and duties, wishing to appear at an approaching meeting of the Land Court, presented a petition for delivery of the "leases . . . and all other documents whatever" connected with the estate and which were then in the hands of the factor. The latter lodged answers in which he maintained that he was entitled, in virtue of his lien as factor, to retain them in security of his claims against the estate.

Held that the petitioner was entitled to delivery for the purposes stated of the leases, and also of such of the other documents as served to show the relation between the estate and its tenants, and respondent *ordained* to lodge an inventory of the documents in his possession in order that these might be ascertained.

On 11th December 1912 Sir Colin G. Macrae, W.S., Edinburgh, heritable creditor in possession under a decree of maills and duties, dated 1st June 1911, of the estate of Thrumster in the county of Caithness, *petitioner*, presented a petition to the First Division for delivery of "the whole leases, writs, books, accounts, vouchers, and all other documents whatever, of or in connection with the estate of Thrumster, to which the petitioner as heritable creditor in possession has right, and in the possession or under the control of" David Leith, bank agent, Wick, *respondent*, who claimed to retain them in respect of a balance which he alleged to be due to him as factor on the said estate.

The petitioner averred—"The necessity of obtaining the said documents has recently become a matter of extreme urgency, owing to intimation having been received by the petitioner that the Land Court appointed under the Small Landholders Act of 1911 is to begin its sittings in Wick on the 13th September next for the purpose of adjudicating on claims by the landholders and statutory small tenants on the estate of Thrumster for valuation or re-valuation of holdings under the provisions of the said Act. No less than fifty-four claims have been lodged by small tenants on the estate of Thrumster, and the petitioner finds it essential to have immediate access to the said leases, books, and other documents of the estate for the purpose of answering these claims. The petitioner has applied to the said David Leith on more than one occasion for production of these documents, but the said David Leith declines to comply with his