otherwise suitable might be refused on the sole ground that the workman being able to work preferred not to do so?

I have sufficiently indicated the grounds upon which I hold that the first awards were bad and that the second awards are good. I need only add that the legal view upon which the arbitrator proceeded in his first awards does not seem to me to derive support from the observation of Lord Kinnear in the passage cited. His Lordship did no more than state what he considered to have been the reason which led Parliament to differentiate between minor workmen and all others.

In my judgment the question of law as put to us in each of the two stated cases ought to be answered in the affirmative, and the determinations of the arbitrator ought not to be interfered with. As, however, your Lordships are of opinion that the awards are vitiated by an error of law which is not disclosed in the question of law as it has been put to us, it becomes necessary in justice to the parties and also to the law that we should ourselves formulate the question which in ordinary circumstances, and but for a misunderstanding, the appellants' legal adviser would have asked the arbitrator to insert in the stated cases. I venture to submit the following—"Would it have been lawful for me to refuse to increase the applicants' weekly payment as authorised by the proviso in paragraph (16) of the First Schedule to the Act solely upon the ground that as he had attained his full earning capacity at the time of the accident I considered it unreasonable that he should be in a better position than an ordinary workman?" That, as it seems to me, is the question of law which your Lordships are prepared to answer in the affirmative and which I am prepared to answer in the negative.

LORD JOHNSTON was not present at the hearing and advising.

The Court pronounced this interlocutor—

"Of consent of parties, answer the question of law in the case in the affirmative: Recal the arbitrator's award of compensation of 16th September 1916: Find that in assessing the amount of the compensation due to the respondent the arbitrator was entitled in his discretion to give or to deny effect to the proviso contained in section (16), Schedule 1, appended to the Workmen's Compensation Act 1906: Remit to the arbitrator of new to consider and determine the amount of said compensation, and decern."

Counsel for the Appellants — Watson, K.C.—W. T. Watson. Agents — W. B. Rankin & Nimmo, W.S.

Counsel for the Respondents—Moncrieff, K.C.—Burnet. Agents—Simpson & Marwick, W.S.

Saturday, November 18.

SECOND DIVISION.

[Sheriff of Dumfries and Galloway.

WALKER *v.* KERR.

Landlord and Tenant—Smallholder—Removing — Summary Ejection — Competency—Small Landholders (Scotland) Act 1911 (1 *and* 2 *Geo. V, cap* 49).

A statutory small tenant made application to the Land Court for further renewal of tenancy, which application was refused, the Court consisting of only one member. The tenant appealed to a quorum of the Land Court, but before appeal was taken the landlord brought an action for warrant of summary ejection on the ground that the tenant had no right or title to occupy the farm. *Held* that the tenant had a title of possession, and that ejection by summary process was *incompetent.*

William Hamilton Walker, *pursuer*, brought an action in the Sheriff Court at Dumfries against Joseph Kerr, *defender*, for declarator that the defender had no right or title to the further occupation of the farm of Old Moss-side, of which the pursuer was proprietor, and for warrant summarly to eject him therefrom.

The pursuer pleaded, *inter alia*—"(2) The defender's application for a renewal of his tenancy as from Whitsunday 1915 having been refused, he has ceased to be a statutory small tenant of the said farm of Old Moss-side. (3) The defender having no right or title to possession of said farm, decree should be granted as craved."

The defender pleaded, *inter alia* — "(1) The action is incompetent, and should be dismissed with expenses."

The Sheriff-Substitute (CAMPION), sustaining the first plea-in-law for the defender, dismissed the action.

Note.—"On or about Whitsunday 1904 the defender became tenant under the pursuer of the farm of Old Moss-side. No formal lease was entered into, and the defender, who was still in the occupation of the holding at 1st April 1912, then became a statutory small tenant till Whitsunday 1914 by virtue of the Small Landholders (Scotland) Act 1911. The defender applied for and was granted a renewal of said tenancy till Whitsunday 1915. On 5th April 1915 the defender made application to the Land Court for further renewal of tenancy, which application was refused.

"The pursuer now craves this Court to find that the defender has no right or title to occupy said farm of Moss-side, and to grant warrant summarily to eject him, and to interdict him from again entering upon the same. The question is whether, looking to the circumstances of this case, such a crave is a competent one.

"The defender cannot be said to be in possession by force, fear, or mere tolerance, or as Professor Rankine puts it in his work on Leases, with "no shadow of a title." Further, as to what constitutes a case for

summary ejection, see the opinion of the Lord President in the case of *The Scottish Property Investment Company* v. *Horne*, 8 R. 737, 18 S.L.R. 525. It is true that the defender's application, thus far considered by one member of the Land Court, has been refused, but any order or determination arrived at under such delegated power has not the effect of a final judgment, but is appealable to a quorum of three members of the Land Court, one of whom shall be the chairman of the Land Court — Small Landholders (Scotland) Act 1911, sec. 25, sub-sec. 5.

"This case is therefore still pending before another Court, of which judicial notice is to be taken by all Courts of Justice as specially provided by the section dealing with the jurisdiction of the Land Court. So long as the matter continues in dependence in that Court, it constitutes, I think, one fatal objection to the competency of an action dealing with the same matter in this Court. As to how long an action continues in dependence in a Court, I may refer to the old case of *Aitken* v. *Dick*, 1863, 1 Macph. 1038. Lord Deas there says — 'I have no doubt that an action continues in dependence till expenses are disposed of.' The action must therefore continue in dependence while still under appeal.

"It is further admitted that no notice of removal has been served by the pursuer on the defender. Indeed we have no written notice of termination of tenancy given by either side in terms of sec. 37 of the Sheriff Court Acts 1907-1913. On the requirements of notice and subsistence of tacit relocation, so far as either may have any bearing on the present case, we may refer to *Oag* v. *Sharp's Trustees* in the Scottish Land Reports for April 1913, and *Clyne* v. *Sharp's Trustees*, 1913 S.C. 907, 50 S.L.R. 688. We here find no steps resorted to on either side to bring to an end a tenancy admittedly existing up till Whitsunday 1915. It would be markedly foreign to the whole scope and tendency of the Small Landholders and other recent cognate Land Acts were the effect of any one of them to dispense with notice which the Sheriff Court Act makes an imperative preliminary to warrant of ejection."

The pursuer appealed to the Sheriff (ANDERSON), who adhered.

Note. — "I agree with the views of the Sheriff-Substitute and have little to add. At the date of the raising of the action, and at the time when I heard the appeal, the question whether the defender was entitled to obtain from the Land Court a renewal of his tenancy as a statutory small tenant was still under the adjudication of the Land Court. The defender could not therefore be said to have no title of possession, and an action of ejection was not competent. I think the time when the competency of the action falls to be determined is at the date when it is raised. . . ."

The pursuer appealed to the Second Division of the Court of Session, and argued—The tenant was not appealing to tacit relocation as his title to remain in occupation, but was relying upon obtaining a further order by the Land Court. As soon as the statutory small tenant had had his tenancy terminated by the Land Court he had lost all title, and he could not found upon tacit relocation—*Sutherland's Trustee* v. *Geddes*, 16 R. 10, 26 S.L.R. 6; *M'Farlane* v. *Mitchell*, 2 F. 901, 37 S.L.R. 705. The period of tenancy had been limited by the Land Court to one year, and on the expiry of that year there was no right to remain in possession, although if neither party had taken any steps section 32 (5) of the Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49) would have operated tacit relocation. The case of *Hill* v. *Wilkie*, 1916, 53 S.L.R. 728, did not apply, as there no notice was timeously given to modify the term of the renewing lease. There was nothing in the statute to say that if a tenant had not succeeded in clothing himself with a statutory right when his tenancy expired he had any right or title. This action of ejection was lodged at a time when the tenant had no title, and the procedure was thus competent and the action relevant. Counsel also referred to *Clyne* v. *Sharp's Trustees*, 1913 S.C. 907, 50 S.L.R. 688, as distinguishable from the present case.

The defender argued—This was not a competent form of process. Removing was competent, but not summary ejection—*Robb* v. *Brearton*, 1895, 22 R. 885, 32 S.L.R. 671, *per* Lord Adam An action for a summary warrant of ejection was only competent on notice having been given six months previously—Sheriff Courts (Scotland) Act 1907 (7 Edw. VII. cap. 51), sec. 36. The question of tenancy was still under consideration, as the tenant's appeal to a full quorum of the Land Court, which he had timeously lodged within one month, was still pending. At anyrate section 32 (5) of the Small Landholders Act 1911 (*cit.*) made applicable to the tenant section 18 of the Agricultural Holdings Act 1908 (8 Edw. VII, cap. 64), whereby the landlord was bound to give six months' notice — *Johnston* v. *Thomson*, 1877, 4 R. 868, 14 S.L.R. 558.

LORD JUSTICE-CLERK.—This is a summary process of ejectment or removal. In my opinion that process can only be brought if the person sought to be ejected or removed is in the position of a squatter or a person without a title, but I do not think the defender and respondent can be said to have been in that position. The order of the Land Court refusing the tenant's application for an extension of his tenancy as a statutory small tenancy, and for the fixing of an equitable rent, was pronounced by Colonel Dudgeon, one member of the Land Court, alone, but that judgment is not final. An appeal may be taken within a month of the date of the judgment, and in point of fact an appeal was taken within that period and a few days after the present action was raised. In these circumstances I think it is impossible to say that the defender and respondent was then in the position of being a person that could be turned out of his holding by summary ejection. I agree with the Sheriff when he says—"At the date of the raising of the

action, and at the time when I heard the appeal, the question whether the defender was entitled to obtain from the Land Court a renewal of his tenancy as a statutory small tenant was still under the adjudication of the Land Court; the defender could not therefore be said to have no title of possession, and an action of ejection was not competent."

As to whether under recent legislation ejection by summary process is competent, or whether an ordinary action of removal is not still necessary, I desire to express no opinion; and I also express no opinion on the question of whether it was competent for the tenant to say, even after the Land Court had refused his application, that he was entitled to retain possession of the farm on the ground of tacit relocation, in respect that no notice of termination had been given by the landlord six months prior to the expiry of the lease.

I am of opinion that the appeal should be refused.

LORD GUTHRIE and LORD HUNTER concurred.

LORD DUNDAS and LORD SALVESEN were not present.

The Court dismissed the appeal.

Counsel for the Pursuer (Appellant)—Moncrieff, K.C.—MacRobert. Agents—Bonar, Hunter, & Johnstone, W.S.

Counsel for the Defender (Respondent)—Blackburn, K.C.—Dykes. Agents—Wilson & Matthew, S.S.C.

Friday, November 24.

FIRST DIVISION.

[Lord Hunter, Ordinary.

CALEDONIAN RAILWAY COMPANY *v.* CLYDE SHIPPING COMPANY, LIMITED.

NORTH BRITISH RAILWAY COMPANY *v.* CLYDE SHIPPING COMPANY, LIMITED.

Railway—Arbitration—Jurisdiction—Demurrage of Trucks—Statutory Reference to Arbiter—Railway Rates and Charges No. 19 (*Caledonian Railway, &c.*) *Order Confirmation Act* 1892 (55 *and* 56 *Vict. cap. lvii*), *Schedule of Maximum Rates and Charges, &c., sec.* 5—*Railway Rates and Charges No.* 25 (*North British Railway, &c.*) *Order Confirmation Act* 1892 (55 *and* 56 *Vict. cap. lxiii*), *Schedule of Maximum Rates and Charges, &c., sec.* 5.

By the Railway Rates and Charges No. 19 (Caledonian Railway, &c.) Order Confirmation Act 1892, schedule, section 5, and the corresponding schedule and section of the Railway Rates and Charges No. 25 (North British Railway &c.) Order Confirmation Act 1892, the Caledonian and North British Railways were entitled to charge in addition to the tonnage rate a reasonable sum for certain services "when rendered to a trader at his request or for his convenience," and it is enacted that "any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade." The railways sued a firm of shippers, who acted solely as carriers of goods for others, for amounts alleged to be due in respect of detention of waggons and sheets. The defenders repudiated liability, and pleaded that the question being a difference arising under section 5 of the schedule referred to, it fell to be determined by an arbitrator, and maintained that the action should be dismissed. The pursuers maintained that the only points for an arbitrator under the section were the reasonableness of the charge and of the free time, any other matter in dispute having to be settled before the arbitration clause could come into force. *Held* (1) that a difference had arisen under section 5; (2) that the difference fell to be determined by an arbitrator appointed under that section; and (3) (*rev.* Lord Hunter) that the action should be sisted pending the arbitration.

The Railway Rates and Charges No. 19 (Caledonian Railway, &c.) Order Confirmation Act 1892 (55 and 56 Vict. cap. lvii), Schedule of Maximum Rates and Charges, &c., enacts—Section 5—"The company may charge for the services hereunder mentioned, or any of them, when rendered to a trader at his request or for his convenience, a reasonable sum by way of addition to the tonnage rate. Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party: Provided that where before any service is rendered to a trader he has given notice in writing to the company that he does not require it, the service shall not be deemed to have been rendered at the trader's request or for his convenience. (i) Services rendered by the company at or in connection with sidings not belonging to the company. (ii) The collection or delivery of merchandise outside the terminal station. (iii) Weighing merchandise. (iv) The detention of trucks, or the use or occupation of any accommodation, before or after conveyance, beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof, or the consignor or consignee to give or take delivery thereof; or, in cases in which the merchandise is consigned to an address other than the terminal station, beyond a reasonable period from the time when notice has been delivered at such address that the merchandise has arrived at the terminal station for delivery; and services rendered in connection with such use and occupation. (v) Loading or unloading, covering or uncovering merchandise. . . ." Section 25—"In this schedule, unless the context otherwise requires, . . . the term 'trader' includes