ing on an impecunious tenant or taking over the stock at a loss to himself. One purpose of the irritant clause as I read it was to save him from such a position.

Neither does it seem to me that there is anything necessarily harsh or unreasonable in such an exercise of his rights. While it may be convenient that a landlord should take over the tenant's stock at the natural termination of the lease, it may not be easy for him to find another tenant, or convenient for him to take over the stock himself when the lease is prematurely terminated through the fault of the tenant.

There may be stipulations in a lease so independent of legal or conventional irritancies that they may be held to subsist notwithstanding forfeiture and premature termination of the lease. *Pendreigh's* case presents a good illustration. The tenant was taken bound at the beginning of the lease to lay out £200, to be repaid by the landlord at the expiry of the lease, with interest at 1½ per cent. per annum from date of outlay. He did so, but 9 years after the commencement of the lease it was terminated (the landlord exercising his option) owing to the tenant's bankruptcy. The tenant's trustee sued the landlord for repayment of the £200 with past-due interest in so far as unpaid. It clearly appears from the opinions of the Judges that they regarded the £200 expended by the tenant as an ordinary loan to the landlord. The Lord President says (p. 1041)—"The question is whether such a debt is extinguished by operation of the clause which brings the lease to a premature end. That cannot have been intended. The plain meaning of the contract is that this sum being advanced by the tenant the landlord becomes his debtor, the period of payment being postponed."

Lord Ardmillan says (p. 1042)—"The obligation of the landlord . . . is quite distinct and separate from the other stipulations. . . . I consider this advance to be truly a loan by the tenant to his landlord."

Lord Deas says (p. 1041)—"There might have been difficulty but for the stipulation of interest. But that stipulation makes it clear, I think, that the sum is truly a loan by the tenant to the landlord," and Lord Kinloch says (p. 1043)—"This is not, I think, one of those prestations on the part of the landlord which are held not demandable unless the tenant fulfils all his obligations down to the natural expiry of the lease. It was a special debt contracted for a special purpose."

But the obligation to take over stock is an ordinary stipulation in grazing leases intended to take effect and only suitable at the natural termination of the lease and awaygoing of the tenant. It is supposed to be for the mutual convenience of landlord and tenant, although usually I understand that it is by no means to the advantage of the landlord, upon whom the loss ultimately falls owing to over-valuation. But it would be inequitable to enforce it when the lease has been prematurely terminated through the fault of the tenant and when a new tenant is not available.

I should add that in my opinion the fact that express statutory provisions were thought necessary in the case of removals under the Hypothec Abolition Act 1880 and the Agricultural Holdings Act 1883 to the effect that the tenant should in the event of removal have the rights of an outgoing tenant, are not unimportant.

On these grounds I am for dismissing the appeal.

The Court sustained the appeal, affirmed the interlocutor of the Sheriff-Substitute, and remitted to the Sheriff to proceed.

Counsel for the Pursuers and Appellants—Campbell, K.C.—Graham Stewart. Agents—Gill & Pringle, S.S.C.

Counsel for the Defender and Respondent — Wilson, K.C. — Scott Brown. Agents—Davidson & Syme, W.S.

Thursday, January 15.

SECOND DIVISION.

[Sheriff Court at Glasgow.

ANDERSON *v.* WILLIAM BAIRD & COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *First and Second Schedules — Injured Workman Refusing to Undergo Surgical Operation — Nominal Reparation Awarded*

A workman whose thumb had been amputated as the result of an injury received in the course of his employment, and who was entitled to compensation under the Workmen's Compensation Act 1897, refused to undergo a surgical operation which would in all probability have removed the sensitiveness of the injured part and have enabled him to earn the same wages as before the accident, or at least to earn more wages than he was able to do before the operation. This operation was a simple one not attended with serious risk, and was such as a reasonable man not claiming compensation or damages would for his own advantage and comfort have elected to undergo. The workman had already undergone two operations, which had failed to remove the pain which incapacitated him for his former work.

On these facts the arbitrator found in law that the workman was precluded from insisting further in his application for compensation under the Act.

The Court *held* that in the circumstances of this case the workman's refusal to submit to the operation proposed disentitled him to a continuance of substantial compensation, and *recalled in hoc statu* the decision of the arbitrator, and of consent of the employers *remitted* to him to allow the workman 1d. weekly until

the further order of the Court—Lord Young *dissenting* on the ground that he could not support the proposition that an injured workman by refusing to submit to a surgical operation thereby cut himself off from the benefits of the Workmen's Compensation Act 1897.

This was a stated case on an appeal by John Anderson, engineman, Kilsyth, the claimant in an arbitration under the Workmen's Compensation Act 1897, brought by him against William Baird & Co., Ltd., iron and coal masters, Glasgow, in the Sheriff Court at Glasgow, for compensation at the rate of 15s. 10½d. per week from and after 20th September 1901 until the claimant was again able to earn his full wages or until the further orders of the Court.

The Sheriff-Substitute (GUTHRIE) stated as follows:—"Proof was led before me and parties heard on July 1 and 3, 1902, when I found that the following facts had been established:—

"1. That the appellant was on 18th April 1901 employed in the respondents' works in Kilsyth, and that it was admitted by them that he was entitled to compensation under the Workmen's Compensation Act for an injury to the thumb of his right hand received on that day.

"2. That the respondents paid compensation in respect of said injury and appellant's consequent incapacity for his ordinary work until 5th December 1901, at the rate of 15s. 10½d. per week.

"3. That after the occurrence of the accident by which the injury was caused the appellant's thumb was amputated at the metacarpal joint.

"4. That as the appellant continued to suffer pain, preventing him from using his right hand in his usual work as a washer at a coal-pit, which requires him to shovel coal and pull levers at a washing machine, a further operation on the thumb joint took place at the Royal Infirmary, Glasgow, in June 1901.

"5. That the appellant still continued to suffer pain, and to be incapacitated for work in consequence of the adhesion of the skin to the stump.

"6. That this was due either to the defective performance of the operation in June, or to some neglect in attending to the hand thereafter.

"7. That the appellant was examined on 28th September 1901, and advised that he should undergo another operation, which would in all probability remove the sensitiveness of the injured part, and enable him to earn wages as before, or at least to earn more than he is able to do now.

"8. That the operation so advised is a simple operation not attended with serious risk or pain, and is such as a reasonable man not claiming compensation or damages would for his own advantage and comfort elect to undergo.

"9. That since April 1902 the appellant had been in receipt of 14s. a week in the employment of the Pearl Insurance Company.

"I therefore continued the case till 15th October 1902, that the appellant, if so advised, might submit himself to the operation, and that it might be ascertained whether he had been enabled to earn wages as before.

"Having heard parties at the said continued diet, I found that the appellant had refused to undergo the minor operation before referred to.

"I therefore found in law that the appellant was thereby precluded from insisting further in the application before narrated, and assoilzied the respondents. I found the appellant liable to them in expenses from 7th July last (the date of the foregoing findings).

"The question of law for the opinion of the Court is—Whether the appellant by his refusal to undergo the minor operation referred to is precluded from insisting further in his application for further payment of compensation under the Workmen's Compensation Act 1897?"

Argued for the appellant—(1) There was no warrant in the Act for making a workman submit to a surgical operation as a condition of his being entitled to the benefits of the Act. The duty of the arbitrator was in the first place to find out if the workman had been injured in the course of his employment and if the injury was not attributable to his serious or wilful misconduct. If these two propositions were held by the arbitrator to be made out in favour of the workman, then the duty of the arbitrator was to award compensation to the workman and not to force the workman to undergo surgical experiments on his limbs. This could without exaggeration be called a surgical experiment, as the appellant had undergone two operations already without effect. The arbitrator did not find in fact that if the appellant submitted to the operation he would be cured. (2) In any event the proper course was not to assoilzie the respondents, but to keep the matter open by awarding a nominal sum as weekly compensation.

No reply on the first branch of the appellant's argument having been called for, the Lord Justice-Clerk after consultation with the othes Judges asked counsel for the respondents if he objected to an award of nominal compensation for the present.

Campbell, K.C., for the respondents, replied that he had no objection to such an award.

LORD YOUNG—I wish to say that I do not see my way to concur in such a course being adopted. No case has been cited or suggested in which it has been found that a workman must submit to a surgical operation before he can be found entitled to the benefits of the Act. It is not suggested that there is anything here but an honest shrinking from a surgical operation by a man who has already submitted to two such operations without the pain suffered by him being removed. I wish to guard myself from concurring in anything that appears to support the proposition that a workman by refusing to submit to a surgical operation thereby cuts himself off from the benefits conferred on him by an Act of Parliament.

LORD TRAYNER—In view of Lord Young's remarks I should like to say that, in my view if there was reason to believe that risk to life or permanent deterioration to health would be occasioned by this operation I do not think that the appellant would be bound to submit to it in order to entitle him to a continuation of his compensation. But where, as here (according to the Sheriff's finding), the operation is one not attended with serious risk or pain, I am of opinion that if the appellant refuses to submit to a remedy that would remove or lessen his incapacity for wage earning he must take the consequences.

The Court pronounced this interlocutor—

"Having heard counsel for the appellant in the stated case, Of consent recal (*in hoc statu*) the decision of the arbitrator; remit to him to allow the appellant the sum of one penny weekly until the further order of the Court."

Counsel for the Claimant and Appellant—Munro. Agents — St Clair Swanson & Manson, W.S.

Counsel for the Respondents—Campbell, K.C.—Hunter. Agents—W. & J. Burness, W.S.

Friday, January 16.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

M'MILLAN & SON, LIMITED *v.* ROWAN & COMPANY.

Arbitration—Reference "to Arbitration"—Application to Court to Name Arbiter—Number of Arbiters not Specified—Arbitration (Scotland) *Act* 1894 (57 *and* 58 *Vict. c.* 13), *secs.* 2 *and* 3.

Where the parties to a contract agreed to refer disputes "to arbitration," but there was no provision as to the way in which the arbitration was to be carried out, and one of the parties refused to proceed to arbitration, *held* (*aff.* Lord Stormonth Darling, Ordinary), in a petition under the Arbitration (Scotland) Act 1894 for the appointment of an arbiter by the Court, that the Court had no jurisdiction under that Act to name an arbiter or arbiters where the contract provides simply for reference "to arbitration," and not for reference either to a single arbiter or to two arbiters.

This was a petition under the Arbitration (Scotland) Act 1894 by Archibald M'Millan & Son, Limited, shipbuilders, Dumbarton, praying the Court to name a single arbiter to act under a clause of reference contained in a contract between the petitioners and David Rowan & Company, engineers, 231 Elliot Street, Glasgow.

The Arbitration (Scotland) Act 1894 (57 and 58 Vict. c. 13) enacts as follows—section 1—"An agreement to refer to arbitration shall not be invalid or ineffectual by reason of the reference being to a person not named." Sec. 2—"Should one of the parties to an agreement to refer to a single arbiter refuse to concur in the nomination of such arbiter, and should no provision have been made for carrying out the reference in that event, or should such provision have failed, an arbiter may be appointed by the Court on the application of any party to the agreement."

Section 3 of the Act contains similar provisions with regard to an "agreement to refer to two arbiters."

In March 1898 a contract was entered into between the petitioners and Rowan & Company whereby the latter firm contracted to construct for the petitioners the engines, boilers, and machinery of certain steamers.

One of the articles of the contract provided, *inter alia*, as follows:—"In case any dispute shall arise between the parties hereto or their representatives concerning the meaning or construction of these presents, or any clause or agreement herein contained, or any other matter or thing whatever in any way relating to the said engines, boilers, and machinery, all such disputes shall be referred to arbitration."

Certain questions having arisen between the petitioners and Rowan & Company in connection with the contract referred to, the petitioners sought to have those questions determined by arbitration, but Rowan & Company declined to name or join with the petitioners in naming an arbiter or arbiters.

The petitioners thereupon presented the present application to the Court.

Answers were lodged for Rowan & Company. They stated certain objections which it is unnecessary to refer to particularly. They also averred as follows:—"The said clause of arbitration is invalid and ineffectual both at common law and under the statute referred to. Further, the prayer of the petition is incompetent, as it does not set forth what matters of dispute the arbiter is to be appointed to determine."

On 22nd November 1902 the Lord Ordinary (STORMONTH DARLING) refused the prayer of the petition.

Opinion.—[*After narrating the facts and dealing with certain of the respondents' grounds of objection, which it is unnecessary to refer to for the purposes of this report, his Lordship proceeded*]—"But then the respondents have an objection to the petition which goes to the root of my jurisdiction. They say that the only power a court has to appoint an arbiter is either, under section 2 of the Act, where there has been an agreement to refer to a single arbiter and one of the parties to the agreement has refused to concur in nominating him, or, under section 3, where there has been an agreement to refer to two arbiters and one of the parties has refused to name his arbiter. They further say that this case falls under neither of these heads, because it is impossible to tell from the contract here which mode of arbitration was agreed to by the parties.