say, ten years, and the beneficiaries were A for three years and B for seven years, could A have claimed all the compensation money on the ground that it was income of the first year? Clearly not.

In my opinion it has been rightly held that the £15,316 was not, nor was any part of it, income of 1913 or of any other year. The income tax was wrongly assessed and paid and received, and must be repaid as agreed with interest, and the pre-war standard must be calculated upon the footing that the sum was not profit.

As regards the £4500, it is unnecessary for me to state the opinion which I had formed. The parties have come to an agreement as regards that sum—an agreement which very fairly gives effect, I think, to the rights of the parties.

LORD CARSON—I concur.

Their Lordships ordered that the judgment appealed from be affirmed and the appeal dismissed with costs.

Counsel for Appellants—Hon. Sir William Finlay, K.C. — Morrice Mackay, K.C. — Edmunds. Agents — Craig & Henderson, Glasgow—R. S. Miller, W.S., Edinburgh—John Bransbury, London.

Counsel for Respondents — Attorney-General (Sir Gordon Hewart, K.C.)—Lord Advocate (Morison, K.C.)—Hills—Skelton. Agents—Stair A. Gillon (Solicitor of Inland Revenue for Scotland)—H. Bertram Cox, C.B. (Solicitor of Inland Revenue for England).

COURT OF SESSION.

Friday, December 9.

FIRST DIVISION.

[Lord Ashmore, Ordinary.

JOHN GRAHAM *v.* STIRLING AND ANOTHER

ROBERT GRAHAM *v.* STIRLING AND ANOTHER.

Process—Decree of Removing—Reduction—Competency—Court of Session Act (Judicature Act) 1825 (6 *Geo. IV, cap.* 120) *sec.* 44.

The Court of Session Act (Judicature Act) 1825, sec. 44, enacts—"When any judgment shall be pronounced by an inferior court ordaining a tenant to remove from the possession of lands or houses, the tenant shall not be entitled to apply as above by bill of advocation to be passed at once, but only by means of suspension as hereinafter regulated."

Held, in an action of reduction of a decree of removing, that the process of review by way of reduction was not excluded by the section, and action sustained as competent.

Landlord and Tenant—Joint Lease—Termination of Tenancy—Notice—Validity—Notice by One of Joint Tenants—Agricultural Holdings (Scotland) Act 1908 (8 *Edw. VII, cap.* 64), *sec.* 18 (1) *and* (2).

The Agricultural Holdings (Scotland) Act 1908, sec. 18, enacts—"(1) Notwithstanding the expiration of the stipulated endurance of any lease the tenancy shall not come to an end unless written notice has been given by either party to the other of his intention to bring the tenancy to an end. . . . (2) Failing such notice by either party the lease shall be held to be renewed by tacit relocation for another year and thereafter from year to year."

A farmer who had become sole tenant of a farm assigned the lease which had several years to run to himself and his brother. Shortly afterwards the brothers entered into an agreement to carry on "a joint trade or partnership" as farmers of the farm and became joint owners of the stock. The management of the partnership was left wholly to the farmer, who carried on the farm as if he were sole tenant, all the transactions in connection with it and all matters relating to the tenancy and lease being carried through by him in his own name. After the lease expired the tenancy was continued under tacit relocation for several years. The brother who managed the farm then gave notice to terminate the tenancy, the notice being in his own name and containing no reference to his brother. At the time the notice was given the brothers had forgotten that there was a joint tenancy and the proprietor's factor was unaware of it. Circumstances in which *held* that the notice was given with the authority of the other tenant and was sufficient under the Agricultural Holdings (Scotland) Act 1908, sec. 18 (1).

Opinions reserved as to whether one of two or more joint tenants can at his own hand give notice which will be effectual under the statute to prevent tacit relocation, or whether such notice must be given by or on behalf of all the joint tenants.

John Graham, farmer, Gatehouse, *pursuer*, brought an action against James Stirling, Lauriston Hall, Balmaghie, stewartry of Kirkcudbright, *defender*, and also against Robert Graham, farmer, Twynholm, for his interest, concluding for reduction of "a pretended decree dated 18th May 1920, and extracted 11th June 1920, pronounced by the Sheriff-Substitute of the Sheriffdom of Dumfries and Galloway at Kirkcudbright in an action of removing at the instance of the defender against the pursuer and the said Robert Graham," or alternatively for reduction of the decree "so far as it ordains the removal of the pursuer from the farm of Bargatton, and finds him liable to the defender in the expenses of the said action." There was also a conclusion for payment of a random sum as the expenses incurred by the pursuer as defender in the action of removing.

Robert Graham, *pursuer*, also brought an action against James Stirling, *defender*

in which the conclusions were similar to those in John Graham's action.

The *facts* of the case were—In 1890 a lease of the farm of Bargatton in the stewartry of Kirkcudbright for nineteen years was granted by the proprietor in favour of John Graham and two of his sons William and Robert Graham and the survivors or survivor. John Graham and William Graham having died Robert Graham became in 1894 the sole tenant under the lease. In 1899, in order to get his brother John Graham a vote, Robert Graham assigned the lease to himself and to John Graham. The assignation was prepared by the proprietor's solicitors and on his instructions, and contained an undertaking by Robert Graham that his personal obligation and responsibility for payment of the rent and implement of all the obligations and conditions undertaken by him in respect of the lease should subsist as if the assignation had not been granted. In 1901 Robert Graham and John Graham entered into an agreement to carry on "a joint trade or copartnership" as farmers of the farm, and John Graham acquired one-half of the stock, but from the date of the assignation throughout the tenancy, which was continued under tacit relocation for several years after the period of the lease had expired, Robert Graham carried on the farm as if he were sole tenant, paying rent, taxes, and local assessments, and carrying through all the transactions in connection with management and stocking of the farm in his own name. The proprietor's factor Mr Sproat, who factored the farm from 1904 onwards, and did not know of the assignation of the lease, believed that Robert Graham was the sole tenant, dealt with and corresponded with him on that footing, and had never seen anything to suggest that he was not. John Graham and Robert Graham forgot about the joint tenancy. Between 1916 and 1918 Robert sent to Mr Sproat notices to terminate the lease, which were not timeous and were refused as insufficient. On 8th November 1918 he sent to Mr Sproat an undated letter containing notice in the following terms:—"I hereby give you notice that I intend to leave the farm of Bargatton at Whitsunday 1919. Kindly own receipt of this notice"; and repeated the notice by letter on the following day. The notices were all in Robert Graham's name, and contained no reference to John Graham or to the joint tenancy. The defender then advertised the farm and let it to a new tenant. John Graham saw the advertisement and spoke to Robert about it, but although he learned in March 1919 that the farm was let he made no protest or objections to the defender or to anyone else. In December 1918 Robert Graham applied to Mr Sproat to re-let the farm to him, but the factor refused. A correspondence between them ensued, in the course of which Robert Graham gave notice of a claim for unreasonable disturbance and as to the removal of certain articles on the farm which he described as his property. Nothing was said about John Graham in this correspondence, but owing to the intention which Robert Graham indicated in regard to cropping the farm the defender raised an action of interdict, during the preparation of which the factor became aware of the assignation of the lease in favour of John Graham. The first occasion on which it was stated for John Graham that he was not bound by the notice was when the interdict case came up in the Sheriff Court, and at the hearing of the case he explained that he had not made his claim to a joint tenancy sooner because he had forgotten that he was in the lease with Robert Graham. Thereafter Robert Graham and John Graham jointly made a claim under the Agricultural Holdings (Scotland) Act 1908 for unexhausted improvements "on quitting the farm of Bargatton." Possession was refused by the Grahams to the new tenant, and the landlord raised an action of removing against Robert Graham and John Graham, in which, after a proof, decree was granted on 18th May 1920 and extracted on 11th June 1920. John Graham and Robert Graham removed from the farm at Whitsunday 1920, notice having been given by the landlord, without prejudice to his pleas in the action of removing, to terminate the lease as at that date.

In the action brought by John Graham the pursuer *pleaded, inter alia*—"2. The provisions of the Agricultural Holdings Act not having been complied with the tenancy was not terminated and the action of removing was incompetent, and accordingly the said decree should be reduced. 3. The pursuer having neither abandoned his interest in the said farm on lease, nor given express or implied authority to his brother to send the alleged notice, is entitled to decree of reduction as alternatively craved for. 4. *Separatim*, the defender not being entitled to decree of removing at least against the pursuer in respect that he produced no written notice of intention to remove by the pursuer, and no competent proof to contradict the terms of the notice founded on, decree of reduction should be granted in terms of the alternative conclusion. 5. *Esto* that the notice of removal is good *quoad* Robert Graham, it does not bear to have been and was not given on behalf of the pursuer, nor was it accepted as being so given, and the pursuer, under the said Act and at common law, was entitled to retain possession of the farm, and reduction of the said decree should be granted in terms of the alternative conclusion."

The defender pleaded, *inter alia*—"1. The action is incompetent. 5. The said notice of termination, though *ex facie* bearing to be given by the said Robert Graham alone, is binding both on him and the pursuer, in respect (*a*) that the said Robert Graham was entitled to terminate his individual liability under the said lease at or at any term subsequent to the stipulated endurance thereof, and thereby to exclude the operation of tacit relocation in favour of himself and the pursuer, or (*b*) that the pursuer having abandoned the whole interest in and management of the farm to the said Robert Graham impliedly authorised him to ter-

minate the tenancy, and accordingly the defender should be assoilzied from the conclusions of the summons. 6. The said notice given by the said Robert Graham to the defender being binding on the pursuer in respect that he acquiesced in it and in the subsequent actings of parties on the faith thereof, the pursuer is not entitled to decree in terms of the conclusions of the summons."

In the action brought by Robert Graham the pursuer pleaded, *inter alia*—"2. The said findings in law [in the Sheriff-Substitute's interlocutor of 18th May] are unfounded and erroneous in respect that the alleged notice does not bear to be, *et separatim* was neither, (1) written, nor (2) accepted as written by Robert Graham as agent for John Graham either by (1) John Graham or (2) Robert Graham or (3) the landlord or his factor. 3. The provisions of the Agricultural Holdings (Scotland) Act 1908 with regard to notice of removing not having been complied with the tenancy was not terminated, and the action of removing was incompetent and irrelevant, and the said decree therein ought to be reduced."

The defender pleaded, *inter alia*—"1. The action is incompetent. 3. The pursuer having given notice to the defender as libelled, and having allowed the defender in reliance thereon to re-let the said farm, is personally barred from insisting in this action. 6. The said notice of termination, though *ex facie* bearing to be given by the pursuer alone, is binding both on him and the said John Graham in respect (*a*) that the pursuer was entitled to terminate his individual liability under the said lease at, or at any term subsequent to, the stipulated endurance thereof, and thereby to exclude the operation of tacit relocation in favour of himself and the said John Graham, or (*b*) that the said John Graham having abandoned the whole interest in and management of the farm to the pursuer impliedly authorised him to terminate the tenancy, and accordingly the defender should be assoilzied from the conclusions of the summons. 7. The said notice given by the pursuer to the defender being binding on the pursuer and also on the said John Graham in respect that he acquiesced in it and in the subsequent actings of parties on the faith thereof, the pursuer is not entitled to decree in terms of the conclusions of the summons."

On 19th January 1921 the Lord Ordinary (ASHMORE) in each action repelled the first plea-in-law for defender, repelled the pleas-in-law for each pursuer, and assoilzied the defender. The Lord Ordinary delivered one opinion applicable to both actions.

Opinion.—"This is one of two actions of reduction which have been brought at the instance of different pursuers against the same defender for the purpose of having a Sheriff Court decree of removing judicially reviewed on its merits and cut down.

"The pursuers Robert Graham and John Graham who are seeking to reduce the decree of removing claim that they were joint tenants of the farm of Bargatton, to which the decree applies and which belongs to the defender James Stirling of Lauriston Hall.

"The decree referred to was granted in an action of removing raised by Mr Stirling in May 1919 in the Sheriff Court at Kirkcudbright craving the Court to order Robert Graham and John Graham to remove from the farm as at Whitsunday 1919 as to the houses and grass lands and at the separation of the crop as regards the arable land.

"In the actions of reduction various defences are stated, and I must deal in the first place with a preliminary objection which has been taken to the competency of the remedy of reduction.

"It is maintained for the defender that in the circumstances the only competent form of review of the decree of removing is by suspension, and that reduction is incompetent.

"The argument in support of this contention was based mainly on the provision of section 44 of the Judicature Act 1825 (6 Geo. 4, ch. 120). That section reads as follows:—'And be it further enacted . . . that when any judgment shall be pronounced by an inferior court ordaining a tenant to remove from the possession of lands or houses, the tenant shall not be entitled to apply as above, by bill of advocation to be passed at once, but only by means of suspension, as hereinafter regulated.'

"The contention was that the words 'only by means of suspension' excluded the remedy of reduction in the present case.

"I think, however, that the limiting words founded on must be read in connection with the preceding section of the Act (section 43), a section which is now repealed but which being specifically referred to in the section quoted may be considered for the purpose of construing section 44.

"Now section 43 provides generally, *inter alia*, for the advocation of decrees of inferior courts before such decrees have been actually extracted.

"In my opinion the object of section 44 was to except from the general provision as to advocation decrees of removing, and to provide that as regards such decrees advocation even before extract should be excluded. I think, however, that neither expressly nor by implication is the remedy of reduction struck at.

"It was further maintained that at common law, and according to practice, suspension is the appropriate and only competent method of reviewing a decree of removing either before or after extract of decree, and that in the absence of direct precedent reduction should be held to be incompetent. Undoubtedly suspension is competent either before or after extract. In the present case, however, not only had the decree been extracted before 17th June 1921, when the actions of reduction were signeted, but by that date possession of the farm had been given up by the tenants Robert and John Graham.

"Now in *M'Dougall* v. *Galt* (1863, 1 Macph. 1012) a suspension of a Sheriff Court decree of removing, brought for review of the judgment, was held incompetent on the ground that the tenant had removed from the farm and had thus implemented the decree before raising the suspension.

Moreover, it appears from the report of the case that the tenant had also raised an action for reduction of the Sheriff Court decree. Unfortunately there is no reference in the opinions of the Judges to the action of reduction. That case does determine, however, that after implement of a decree of removing suspension is incompetent. Now in the present case the pursuers before raising the actions of reduction had *de facto* ceded possession of the farm. In these circumstances I am of opinion that reduction was competent at common law. I refer to the following authorities as bearing out my opinion—(1) *M'Dougall* v. *Galt, supra;* (2) *Johnston* v. *His Tenants*, 1628, M. 1515; (3) *Hog* v. *Hog*, 1837, 15 S. 532; (4) Lord Ordinary Kincairney's opinion in *Taylor's Trustees* v. *M'Gavigan*, 1896, 23 R. 945; and (5) *Mathewson* v. *Yeaman*, 1900, 2 F. 873 (especially Lord Justice-Clerk and Lord Trayner).

"In the words of Lord Trayner in the case last cited (p. 881)—'The right of review by reduction is a common law right which has existed for a very long time and is a mode of review which cannot be taken away except by statutory enactment.'

"For the reasons which I have given I will repel the defender's pleas against the competency of the actions.

"As regards the merits, the main question at issue between the parties in each case has reference to a notice of termination of the tenancy which was given by Robert Graham to the defender's factor in November 1918.

"Sub-sections 1 and 2 of section 18 of the Agricultural Holdings (Scotland) Act 1908 contain provisions applicable to such notices as follows:—'18 (1) Notwithstanding the expiration of the stipulated endurance of any lease, the tenancy shall not come to an end unless written notice has been given by either party to the other of his intention to bring the tenancy to an end . . .; and (*b*) in the case of leases from year to year or for any other period less than three years, not less than six months before the termination of the lease. (2) Failing such notice by either party the lease shall be held to be renewed by tacit relocation for another year, and thereafter from year to year.'

"In the present case the pursuers Robert Graham and John Graham maintain (*a*) that in November 1918 they were joint tenants under a lease for 19 years, ending in 1908, and thereafter renewed from year to year by tacit relocation; (*b*) that in law, in accordance with section 18 (1) of the Act of 1908 above quoted, in order that the tenancy might be brought to an end without the consent of both parties to the lease, it was necessary that the appropriate notice by or on behalf of the landlord or both joint tenants should first have been given; (*c*) that in fact the only notice of the kind was a notice by Robert Graham, one of the tenants, in his own name and on his own behalf only, and that no such notice was given by or on behalf of the other tenant John Graham; and (*d*) that the tenancy was not terminated by the notice given by Robert Graham, and that the decree of removing pronounced in the Sheriff Court on the assumption that the notice was sufficient was incompetent and inept and ought to be reduced.

"On the other hand it was maintained for the defender Mr Stirling (*a*) that John Graham had committed the whole management of the farm to Robert Graham and had committed to Robert Graham full right and power to act as sole tenant under the lease, and, *inter alia*, had authorised Robert to give notice to terminate the lease when he thought proper; (*b*) that the notice of termination given by Robert Graham in November 1918, although in name of Robert alone, was given really on behalf both of himself and John Graham; (*c*) moreover, that the defender having been induced by John Graham's actings to believe and deal with Robert Graham on the footing that Robert was sole tenant and to accept and act on the notice given by Robert as valid and effectual, and having acted on the belief so induced and altered his position, John Graham is not now entitled to disclaim or repudiate the notice; and (*d*) that in the events that happened tacit relocation was excluded and the lease was terminated at Whitsunday 1919.

"I have indicated generally the nature of the conflicting contentions, but having regard to the scope of the elaborate arguments addressed to me on both sides, I think that before dealing in detail with the arguments I ought to set forth what I hold to be the material facts established by the evidence, in the light of which the questions at issue fall to be considered and decided. . . .

[*His Lordship then narrated the facts.*]

"I think that I have now stated the material facts established by the evidence, and I proceed to consider them in their legal aspects. I begin by referring to John Graham's initial association with the lease —the only overt association disclosed in the case.

"The uncontradicted evidence is that the sole object of putting his name into the lease in 1899 was to give him a vote, and in my opinion the evidence as a whole points to his so-called tenancy being merely a nominal fictitious 'paper-right.' (Lord Ardmillan's language in *Hill*, 1871, 10 Macph. at p. 5.)

"Then the present question arises long after the expiry of the natural ish of the lease in a question with a singular successor of the landlord who consented to the assignation in 1899, and the evidence has disclosed no actual and, as I think, no constructive possession—no overt act or claim of tenancy of any kind whatever on the part of John Graham following on or attributable to the assignation of 1899.

"In the words of Lord Truro (in *Hutchison* v. *Ferrier*, 1852, 1 Macqueen 196):—'By the Scotch law even the most formal lease or tack does not give any possessory interest in the land which it purports to demise until the proposed lessee enters into possession, actual or constructive.'

"The possible ground of objection to

which I have been referring to the right of tenancy which is now being claimed by John Graham was not raised in the pleadings, and, moreover, I do not think that on the evidence as it stands there is sufficient justification for making the objection a substantive ground of judgment in this case. I think that I must form and base my decision on the other grounds of fact and law which are raised on the pleadings and which have been fully debated on both sides. Nevertheless, it seems to me that the origin of John Graham's association may explain or throw light on his acknowledged complete forgetfulness of the fact that his name had ever been put into the lease, and may competently be used to support the case for the defence that Robert Graham alone was, or at least consistently acted as, the sole tenant.

"As already indicated the foundation of the case for the two pursuers is the alleged defect in the notice of termination of lease given in November 1918.

"In the first place I will deal with the contention on that subject which was based on section 18 already quoted of the Agricultural Holdings Act 1908.

"The argument was put thus—that the condition-precedent to the termination of the tenancy under that statute was due written notice 'by either party to the other'; that in its application to this case the word 'party' means the joint tenants Robert Graham and John Graham; that the notice given was a notice by Robert Graham alone—in his own name as an individual and on his own account—that it is incompetent to contradict the terms of the writing by showing by parole proof or by facts and circumstances that Robert was acting not only for himself but also as agent for John Graham; and therefore the notice being on the face of it inept as a notice by only one of two tenants, the mandatory provision of section 18 (2) of the statute applies, viz., the provision that failing notice by either party the lease 'shall' be held to be renewed by tacit relocation. The legal authority on which was founded the statement that evidence of the kind referred to is incompetent is the recent case of *Lindsay* v. *Craig*, 1919 S.C. 139.

"In that case the pursuer was suing the defender for delivery of certain shares, and alternatively for payment of £150 as their value. The pursuer founded on a receipt granted by the defender in his own name and *prima facie* on his own account as principal for £150 as the purchase price of the shares. The defence stated was that notwithstanding the terms of the receipt the defender had acted in the matter merely as agent for a third party to whom he had paid over the price of the shares, and that the third party and not the defender was liable to deliver the shares or repay the money.

"It was held, however, by the First Division that the defender was personally liable on the terms of the receipt, and that it was incompetent for him to adduce parole evidence to show in contradiction of the receipt which he had granted as principal that he was only an agent.

"In my opinion the decision in *Lindsay* v. *Craig* has no application in the present case in which the defender seeks to demonstrate by evidence, not that Robert Graham is not personally bound by the notice which he signed, but that Robert himself is personally bound, and that as agent for an unnamed principal, viz., John Graham, he also bound John Graham.

"The difference between the case of *Lindsay* v. *Craig* and the present case is illustrated by a series of decisions, and is conveniently brought out in the following passage (self-explanatory) which I take from the opinion of Mr Justice Montague Smith in the case of *Calder* v. *Dobell*, 1871, L.R., 6 C.P. 486 at p. 496. 'The written contract made by the plaintiffs with Cherry upon the face of it purports to be his (Cherry's) contract, and his contract alone, and the first question is whether parole evidence was admissible to show that he was contracting for a principal. The rule is that evidence is admissible to show that the person contracting was acting for a principal, because the admission of such evidence does not contradict the written contract. It is so put by Parke, B., in *Higgins* v. *Senior* (8 M. & W. 834, p. 844)—"This evidence" he says "in no way contradicts the written agreement. It does not deny that it is binding on those whom on the face of it it purports to bind, but shows that it also binds another by reason that the act of the agent in signing the agreement in pursuance of his authority is in law the act of his principal." "The evidence" Mr Justice Montague Smith continues, "is admissible on this principle, viz., that for the purpose of that contract the principal has allowed the agent to sign it in his own name in the place of himself. It has been held, no doubt, that evidence is not admissible to show that the person named as the contracting party is not liable."'

"The judgment of the Court of Common Pleas in which Mr Montague Smith took part was unanimous, and on appeal was unanimously affirmed by the Court of the Exchequer Chamber.

"I think it sufficient to supplement the apposite passage from Mr Justice Montague Smith's opinion by the following citation of authorities:—Bell's Principles, section 116; *Boswell* v. *Selkrig*, Hume's Decisions, p. 850; *Skinner* v. *Stocks*, 1821, 4 Barn. & Ald. 437, 23 Revised Reports 337; *Watteau* v. *Fenwick*, [1893] 1 Q.B. 346; *Kinahan & Company, Limited* v. *Parry, &c.*, [1910] 2 K.B. 389, reversed, [1911] 1 K.B. 459.

"The only question remaining is whether it has been established by the evidence that the notice given by Robert Graham was in fact authorised by John Graham and bound both of them.

"In my opinion the answer ought to be in the affirmative.

"For the pursuers it was contended that John gave Robert no express authority to give the notice; that Robert did not intend to bind John; that the factor accepted the

notice as a notice by Robert alone; that although John left Robert to manage and carry on the farm Robert's implied power did not cover more than acts of ordinary administration, and did not extend to an act such as the giving of notice to terminate the lease of the farm and thus put an end to the undertaking which *ex hypothesi* was to be continued under his management.

"The argument so put seems to me to ignore the strength of the defender's case as disclosed in the evidence. The evidence shows that since John Graham's name was put into the lease he has allowed Robert Graham to appear and act as the sole tenant. That Robert and John had both completely forgotten that John's name had ever been put into the lease, and that both were genuinely surprised when they were reminded in May 1919 that twenty years before that date the assignation had been granted to give John a vote—these facts confirm the other evidence that Robert from first to last consistently appeared and acted as the sole tenant.

"This is not a case of a special or limited authority. As I have shown from the evidence Robert was left in absolute and entire control, and this was evidenced in every aspect of his dealings as tenant of the farm. Moreover, the giving of the notice in November 1918 was only one of a series of acts of a kind appropriate to one who is acting and has the right to act as sole tenant. I refer in particular to the successive notices terminating the lease given by Robert Graham in his own name in 1916 and 1918, to his negotiations as to the resumption of parts of the farm, and his adjustment and settlement of the compensation, and to the notice of his claim for compensation for unexhausted improvements.

"Let it be assumed that the landlord instead of accepting the notice had repudiated it on the ground that John's name having been introduced into the lease in 1899 the notice ought to have been given by both Robert and John. It seems to me that that repudiation would have been hopeless in the face of the circumstances under which John's name was originally put in the lease and in view of the evidence that John never at any time or in any way acted as a tenant or, claimed to have the right of a tenant, whilst on the other hand Robert always throughout the whole twenty years, and in every way, both appeared to be and acted as the sole tenant.

"I think that the principles given effect to in the case of *Jones* v. *Phipps*, 1868, L.R., 3 Q.B. 567, are applicable in this case. In *Jones* v. *Phipps* the trustees under a marriage settlement vested with the legal title to the trust estate left the entire control and management of a farm to the husband, Sir Maxwell Graves. The farm was let on yearly tenancy, and Sir Maxwell, having differed with the tenant as to the conditions of let, gave him notice to quit. The notice bore to be given by Sir Maxwell as an individual, 'I hereby give you notice to quit,' &c. The trustees knew nothing about the giving of the notice or Sir Maxwell's intention to give it. The tenant disputed the validity of the notice on the ground that it was given by Sir Maxwell in his own name without the authority of the trustees.

"Mr Justice Lush, who gave the judgment of the Court (Mellor, Lush, and Hannen, JJ.), said that the decision in the case must depend on the answers to two questions, one of fact, the other of law, viz., Had Sir Maxwell in fact authority from the trustees, and, assuming that he had such authority, was the notice to quit given in his own name sufficient in law. Both questions were answered in the affirmative. 'On the first point,' said Mr Justice Lush, 'we are of opinion that the facts stated lead to the conclusion that Sir Maxwell Graves had the authority of the trustees to give a notice to quit. He had assumed the entire control over the farm from the time it was purchased in 1863, and had for a period of twenty-six years been allowed by the trustees to have entire management of all the other settled estates. . . . It was incidental to such an authority that he should determine the tenancy by notice to quit at such time as he should think proper. . . . On the second point we are of opinion that it is not essential to the validity of a notice to quit by such an agent that his agency should appear on the face of the document itself. The distinction is between a general agent and one holding a special or limited authority.'

"For the reasons which I have given I have come to the conclusion that the notice given by Robert Graham bound both him and John Graham, and in the circumstances that it validly and effectually excluded tacit relocation, and brought the lease to an end at Whitsunday 1919.

"I will accordingly repel the pursuers' pleas and assoilzie the defender."

The pursuers reclaimed, and the cases were heard together before the First Division.

Argued for the pursuer John Graham—(1) The action was not incompetent. Reduction was a competent method of reviewing decrees of removing before the Judicature Act of 1825 and was not affected by the Act. The true construction of section 44 of the Act was that it made advocations incompetent and substituted suspensions in place of them and had no application to reductions. Where, as in this case, the decree had in effect been implemented suspension was incompetent, and reduction was the only process by which pursuer could challenge the decree—Maclaren, Practice, p. 153; Shand's Practice, ii, 613; *Mackenzie* v. *Mackenzie*, 1823, 2 S. 149; *Urquhart* v. *M'Kenzie*, 1824, 3 S. 84; *Hog* v. *Hog*, 1837, 15 S. 532; *Wilson* v. *Campbell*, 1839, 2 D. 232; *M'Dougall* v. *Galt*, 1863, 1 Macph. 1012; *Taylor's Trustees* v. *M'Gavigan*, 1896, 23 R. 945, 33 S.L.R. 707; *Mathewson* v. *Yeaman*, 1900, 2 F. 873, 37 S.L.R. 681; *Lamb* v. *Thompson*, 1901, 4 F. 88, *per* Lord Moncrieff at p. 92, 39 S.L.R. 80. (2) The notice to terminate the lease was invalid on the face of it. It was not signed by both tenants, and was therefore bad in form — Agricultural Holdings (Scotland)

Act 1908, sec. 18 (1) and (2); *Gordon* v. *Bryden*, 1803, M. 13,854; *Magistrates of Perth* v. *Andrew*, 1798, Hume, 562; *Lockhart* v. *Twaddle*, 1800, Hume 564; *Bett* v. *Murray*, 1845, 7 D. 447; *Scott* v. *Livingstone*, 1919 S.C. 1, *per* Lord Justice-Clerk at p. 5, 56 S.L.R. 1. The defect could not be remedied by facts and circumstances, such as the acts *mala fides* of the tenant, or acquiescence—*Blain* v. *Ferguson*, 1840, 2 D. 546, *per* Lord Fullerton at p. 549. There was no reference in the notice to this pursuer's interest in the farm, but if there had been it would not have validated the notice. Notice by an agent for the tenant was excluded by the terms of section 35 (3) of the Act. An agent and principal could only be bound alternatively —*Morel Brothers & Company* v. *Earl of Westmorland*, [1904] A.C. 11. In any event the agency must be disclosed, and an agent could not give notice to terminate a lease without the knowledge of the principal — *Keighley, Maxstead, & Company* v. *Durant*, [1901] A.C. 240. There was no case here of implied authority. Such authority required clear proof, and could not exist where one of the parties did not know he was a tenant. It could not be deduced from partnership, because such notice was not a partnership act. In an action of removing joint tenants must be called—*Macdonald* v. *Macdonald*, 1807, Hume 580. Even the bankruptcy of a joint tenant did not end the right of the other tenant to continue—*Young* v. *Gerard*, 1843, 6 D. 347; *Buttercase and Geddie's Trustee* v. *Geddie*, 1897, 24 R. 1128, 34 S.L.R. 844. The case of *Jones* v. *Phipps*, 1868, L.R., 3 Q.B. 567, where the notice was by a general trust agent, did not apply. There was nothing in the suggestion that this pursuer's contention would result in setting up a perpetual obligation. A joint tenant might terminate the joint tenancy, but by so doing he did not terminate the other tenant's right.

Argued for the pursuer Robert Graham—(1) The action was competent. Reduction was competent before the Judicature Act 1825. Sections 41 and 44 of the Act were to be read together, and merely substituted suspension in place of advocation without affecting the competency of reduction. In the present case suspension was incompetent – *Johnston* v. *His Tenants*, 1628, M. 15,151. (2) To prevent tacit relocation the notice must conform strictly with the statute. It must amount to renunciation — *M'Intyre* v. *M'Nab's Trustees*, 1831, 5 W. & S. 299, *per* Lord Lyndhurst at p. 302, quoting Stair and Bankton; Ersk., ii, 6, 35; Bell, Leases, ii, 132; Bell, Prin., secs. 1265, 1265 (*a*); Hunter, Landlord and Tenant, pp. 513 and 524 — and must, where there is joint tenancy, be by all the tenants. In an action of removing joint tenants must all be called —*Macdonald* v. *Macdonald, cit. sup.*; *Grant* v. *Grant*, 1753, M. 13,841, F.C., 18th December 1753. The notice here was therefore invalid. Neither authority nor agency could be read into the notice, for none of the parties knew at the time that John Graham was a tenant. The partnership did not give authority. A lease was not a partnership asset which could be dealt with in the ordinary course of the partnership business. Cases like *Calder* v. *Dobell*, 1871, L.R., 6 C.P. 486, on agency, did not apply. In *Jones* v. *Phipps* the notice was by a general trust agent who clearly had authority. What had happened afterwards could not authorise the notice. But even if there was authority it was not present to the minds of any of the parties, and could not therefore be said to have been exercised—*Calder* v. *Dobell* (*cit. sup.*), *per* Montague Smith, J., p. 469. In the absence of knowledge and misrepresentation there was no case of waiver or bar—Bell's Comm., vol. i, p. 511; Bowstead on Agency, p. 21. The purpose of the statutory provisions as to notice was to exclude such questions as had been raised here.

Argued for the defender—(1) The action was incompetent. Since the Judicature Act 1825 suspension was the only competent process of reviewing decrees of removing—Mackay's Practice, vol. ii, p. 515; *Campbell's Trustees* v. *O'Neill*, 1911 S.C. 188, 48 S.L.R. 115; *Ross* v. *Webster*, 1833, 12 S. 200. The process of removing was a very special one, introduced to prevent dislocation of agriculture—Stair, ii, 9, 39, and 40; Hunter, Landlord and Tenant, vol. ii, p. 39. The methods of review were summary. Suspensions and advocations were competent until the Judicature Act, and after that only suspensions—*Ross* v. *Webster* (*cit. sup.*), *per* Lord Balgray at p. 202. Suspension was competent here. The pursuers had not implemented the decree, but had removed under notice. Reduction was never competent as a method of reviewing a decree of removing. It was not suggested as a method in Hunter, Landlord and Tenant, vol. ii, p. 92. It was only a competent process in the case of nullities—Mackay's Practice, vol. ii, p. 494; Mackay's Manual, p. 620. All the cases prior to the Judicature Act cited by pursuers in support of the competency proceeded on the ground of nullity — *Hog* v. *Hog*; *M'Kenzie* v. *M'Kenzie*; *Urquhart* v. *M'Kenzie*; *Taylor's Trustees* v. *M'Gavigan*. *Johnston* v. *His Tenants*; and *M'Dougall* v. *Galt* were not sufficiently reported. (2) Tacit relocation meant renovation of the contract by the consent of the parties, which was implied from their silence, but if one party was not silent there could be no tacit relocation—*M'Intyre* v. *M'Nab's Trustees*, *cit. sup.*; *Sutherland's Trustees* v. *Miller's Trustee*, 1886, 16 R. 10, *per* Lord Young at p. 13, 26 S.L.R. 6; Bell's Dictionary, *s.v.* Lease; Hunter, Landand Tenant, vol. i, p. 523. So if one of several joint tenants was silent there could be no tacit relocation. Otherwise joint tenants might be bound in perpetuity, for they were bound jointly, and one of them could not terminate his obligation while leaving the others bound—*Neilson* v. *Mossend Iron Company*, 1886, 13 R. (H.L.) 50, *per* Lord Watson at p. 54, 23 S.L.R. 867. The cases of *Young* v. *Gerard*, *Buttercase and Geddie's Trustee* v. *Geddie*, and *Bett* v. *Murray*, *cit. sup.*, did not apply. The first was decided on the terms of a written lease, the second carried the law no further, and the third was decided on a question as to whether the assignees of the lessee were

bound by his notice. The notice by Robert Graham had therefore prevented tacit relocation and was not invalid. The pursuers' contention on section 18 (1) of the Agricultural Holdings Act 1908 was unsound. All that was required was that the notice should be substantially in accordance with the section. The terms of the section were similar to the provisions as to notice in the Agricultural Holdings Act 1883, and were intended to alter the times for notice. Otherwise the section merely imported the common law. There were no cases to support the pursuer's contention. In *Campbell's Trustees* v. *O'Neill, cit. sup.*, the ground of invalidity was failure to define the term. In *Scott* v. *Livingstone, cit. sup.*, there were separate subjects. Further, on the facts there was clearly authority or agency. The lease was an asset of the partnership. As the partner entrusted with the whole management Robert had his partner's authority to terminate the lease. Pursuers' construction of section 35 (3) of the Act was not justified. That section was intended to make the provisions apply to all agents, as opposed to the limited application of the Act of 1883. The pursuers' contention as to waiver was bad—*Dunlop & Company* v. *Meiklem*, 1876, 4 R. 11, 14 S.L.R. 19.

LORD PRESIDENT—With regard to the question whether reduction is a competent remedy in the circumstances of this case, I have not heard anything sufficient to lead me to think that the conclusion at which the Lord Ordinary arrived was otherwise than well founded. It has not been made out that decrees of removing were excluded from the general applicability of the process of review by way of reduction prior to the Judicature Act of 1825; and for the reasons which are stated by the Lord Ordinary I do not think that section 44 of that Act had the effect of excluding them for the first time.

The case has been long and anxiously debated upon its merits. The whole question turns on the sufficiency (under section 18 of the Agricultural Holdings (Scotland) Act 1908) of the notice of termination of tenancy of 8th November 1918 to prevent tacit relocation after Whitsunday 1919.

The lease of the farm to which the notice referred was originally granted in 1890 to the late John Graham, the late William Graham, and the pursuer Robert Graham, and the survivors or survivor of them. It expired at Whitsunday 1908, and the tenancy continued under tacit relocation thereafter. In 1899, John and William having died, the pursuer Robert Graham assigned the lease with the landlord's consent to himself and the pursuer John Graham. The purpose of this was none other than to qualify John, who was then attaining majority, for the electoral franchise, but the result was to make John a joint tenant in all respects under the lease with his brother. Two years later, that is, in 1901—the lease having still seven years to run—Robert and John went into partnership in the farm, and they have continued in partnership throughout. The partnership was a wholly informal one, each partner being a joint lessee, and each being a joint owner of the stock. It does not appear to be doubtful in these circumstances that the respective interests in the tenancy of the two partners became assets of the partnership. Indeed the lease was its principal asset. But so little account did the partners take of the legal, as distinct from the business, aspect of their relations, that they allowed the fact that they were interested in the lease as joint lessees (and not merely as partners) to pass into oblivion, and never brought it to mind until some months after the date of the notice in question. The partnership affairs were placed or left exclusively in the control of Robert. He alone represented the partners and joint lessees in all matters regarding the tenancy and lease which had to be transacted with the landlord or his factor, with the result that the latter also completely forgot that the lease had been a joint one between Robert and John since 1899.

I agree with the Lord Ordinary in thinking it proved that John was no more than a sleeping partner. The entire control of the partnership and its affairs and of the relations under the lease of the joint lessees with the landlord were committed to Robert. Moreover, like the Lord Ordinary, I think it is a clear inference from what took place between the brothers when John learned that the farm was publicly advertised to let by the proprietor that Robert had, as between himself and his brother, full antecedent authority, so far as regards any right or interest John had in the tenancy or lease, to prevent tacit relocation being continued beyond any term of Whitsunday, if he (Robert) thought it expedient in the interests of the partnership to prevent it, and to serve the necessary notice of termination of tenancy for that purpose. When the partnership was entered into and these very wide powers were committed to Robert, the partners must, in the absence of evidence to the contrary, be held to have known the state of the title to the lease. It is true that by the time Robert gave the notice of 8th November 1918 both he and John had forgotten that John was in the lease as joint lessee, but they were both fully aware that a lease existed which belonged to their partnership, no matter whether it stood in the name of one or of both of them.

The notice, as I read it, is a clear notice of termination of the lease, and Robert, who gave it in his own name, genuinely intended it to be such. He had no idea that his notice could be limited in effect so as to refer to anything less than the whole tenancy under the lease. So far as his own actual right of joint tenancy was concerned the notice was fully supported. So far as John's actual right of tenancy under the lease was concerned, the notice was fully warranted by the antecedent authority which John had committed to him, for that authority did not hang upon the precise state of the title to the tenancy. The fact that at the date when Robert penned the notice he was forgetful that John was also lessee does not in these circumstances

appear to me to be necessarily fatal to the notice. Nor do I think it material that the landlord's factor in receiving and acting on the notice erroneously believed that Robert was sole tenant, for the validity of the notice turns on the authority Robert had to give it, not on the factor's misconceptions regarding the precise personality of the tenant.

The pursuers' case is thus utterly wanting in substance. But they take their stand on strictly formal grounds, and maintain that the notice was insufficient for its purpose because it did not expressly refer to John's share in the joint tenancy, or—which is the same thing—because it did not expressly declare that Robert was acting not solely on his own behalf but also as an authorised agent on behalf of John. Now a notice of termination of tenancy is certainly an important document, but it is a very ordinary one in the relations of tenants with their landlords or their landlords' factors—people who, however expert they may be in agriculture and in land management, are often indifferent draughtsmen. The notice must no doubt be in writing, and it must be such as to convey to the party to whom it is addressed, in the circumstances in which it is so addressed, a clear intimation that tacit relocation is not consented to by the tenants. But it is obvious that a notice which complied with this moderate standard might appear to be far from self-sufficient if the relations established in practice between the parties, and the circumstances in which the notice was given, were to be ignored. I am unable to read the Agricultural Holdings Act as making it an indispensable condition of the validity or sufficiency of the notice that it must be signed by the tenants personally, or as making it incompetent for a duly authorised agent to sign it on behalf of them or some of them. Then is the notice of 8th November 1918 to be held bad because Robert's agency for John is not disclosed on the face of the notice? The circumstances were that for the whole period of nearly twenty years which had elapsed since 1899 Robert had by himself dealt with the landlord and his factor as being entitled to represent and act for both tenants; that in point of fact throughout the whole of that period Robert was actually entitled so to act by John's full authority; and further that in point of fact that authority included power to prevent the indefinite continuance of tacit relocation. In my opinion Robert's notice, given in the circumstances which are established to have existed in this case, is sufficient—both for his own interest and as an exercise of the power which John had given to him in relation to his (John's) interest—as a notice of termination of tenancy under the Agricultural Holdings (Scotland) Act 1908.

A further question of very wide and general interest was raised as to whether, in order to prevent the continuance of tacit relocation the notice must be given by or on behalf of the whole of a group of joint tenants, or whether it is not enough to prevent that result that one or more (who are not willing to be bound by the old terms for a further year) give notice of termination. It is difficult to believe that joint tenants are subjected by the law to so oppressive a condition as that to which an affirmation of the former alternative would subject them. But as, in my opinion, the case is one which can be satisfactorily disposed of on the grounds already explained, I do not think it necessary to come to any decision upon this other and wider legal question.

LORD SKERRINGTON—The notion of resorting to an action of reduction for the purpose of obtaining a review on the merits of a decree *in foro* pronounced in the Sheriff Court seems somewhat strange and of the nature of an anachronism. None the less it was admitted by the defender's counsel, as the result of an examination of a great number of authorities, that the general rule of our practice is favourable to the admission of that form of review and that, if it is to be excluded some special reason must be adduced. It was argued that in the present case the necessary special reason was to be found in the first place in the language of the 44th section of the Judicature Act of 1825 (6 Geo. IV, cap. 120), and in the second place in the summary character of an action of removing which, it was said, impliedly excluded the idea that at any time within forty years the merits of the removing should be reconsidered by the Court of Session in an action of reduction. While I acknowledge the force of this reasoning I agree with the Lord Ordinary and with your Lordship that the defender has not been successful in showing that the remedy of reduction is incompetent in a case like the present one. Accordingly I proceed to consider the controversy between the parties upon its merits.

The first question which has to be considered is in regard to the meaning of the notice given by Robert Graham to the landlord's factor upon 9th November 1918. In interpreting that notice we are entitled to have regard to the relation in which the parties stood to each other at the time, and to keep in view the fact that the whole duties which fall upon a tenant with reference to his landlord had been for very many years discharged by Robert Graham and by nobody else. I accordingly read the notice as being (in the language of the Act) an intimation by Robert Graham of "his intention to bring the tenancy to an end" at Whitsunday 1919 by surrendering the farm to the landlord at that term. If that be so the next question is whether Robert had authority from his brother John to give that notice. The Lord Ordinary has stated in great detail his reasons for arriving at an affirmative conclusion, and it would serve no useful purpose for me to go over the same ground. Authority is a question of fact, and in the present case if there was authority it must

be deduced as an inference from a great number of facts which have been established by the proof. I hold it proved that Robert, who was the active partner in the joint adventure for carrying on the farm, had authority from his brother to bring the joint adventure to an end at any time and to realise its assets, and for that purpose to terminate the lease of the farm by giving the requisite notice to the landlord. When the substance of the matter is looked at it was of no importance to the joint adventurers whether the lease was in favour of Robert or of John or of both of them jointly.

That was the Lord Ordinary's ground of judgment, and it is sufficient for the disposal of the action. We do not require to decide whether it is really the law of Scotland that a lease in favour of two or more joint tenants must after the expiry of the stipulated term continue in force from year to year by tacit relocation unless and until all the joint tenants can be brought to concur in giving a written notice to the landlord of their intention to bring the tenancy to an end. If that is the law of Scotland the responsibility incurred by a person who signs a joint lease as one of the tenants is a very onerous and extraordinary one, because the law will attribute to him an intention to renew the lease at the end of the stipulated term notwithstanding the fact that he has notified the landlord timeously and with due legal formality that he refuses to be a party to any renewal of the joint lease but on the contrary desires that it should come to an end. On principle it is difficult to understand how there can be room for tacit relocation in such a case. On the other hand Stair (ii, 9, 34) appears to regard a notice given by a tenant in order "to take off tacit relocation" as a "renunciation" and as falling within the same category as a renunciation which is intended to bring a lease to a premature termination, though of course in this latter case the renunciation requires the consent of the landlord either antecedent or contemporaneous or subsequent. There can, I think, be no doubt that a renunciation of this latter kind must be the act of all the joint tenants and not merely the act of one of them. It is also proper to notice that one of several joint lessors must apparently submit to allow the tenancy to continue in force unless and until he can induce the other joint lessors to concur with him in bringing an action of removing—Erskine, ii, 6, 53. The subject of the Removing of Tenants is discussed with great erudition in an essay by Walter Ross, W.S., printed at the end of the second edition of his lectures on Conveyancing. He expresses the opinion that a tenant under a tack which is about to expire has nothing in his person to renounce, and that a declaration of his intention to give up the possession at the natural expiry of the lease is sufficient to prevent tacit relocation—vol. ii, p. 524. Erskine appears to favour the same opinion—ii, 6, 44 *ad fin.* Neither writer, however, seems to have had in view the question which arises in the present case.

LORD CULLEN—As regards the plea to competency advanced by the defender, no authority was cited for the proposition that, prior to the Judicature Act actions of removing were excepted from the general rule. And a number of instances of actions of reduction of decrees of removing are to be found in Morison's Dictionary and elsewhere. As regards the more special proposition founded on section 44 of the Judicature Act, I agree with the view taken by the Lord Ordinary that the terms of that section did not abrogate the process of reduction as a process of review applicable to removings. The reports since the date of the Judicature Act contain various cases of that kind. In addition to those cited to us, I may notice the case of *Johnstone* v. *Dickson* (1831, 9 S. 452), where a decree of removing was reduced after ejection on the ground that the pursuer in the removing had no title to sue, and also the case of *M'Donald* v. *Sinclair* (1843, 5 D. 1253), in which an action was brought by a landlord for reduction of a decree in an action of removing in which a defence by the tenant had been sustained.

On the merits a somewhat difficult question is raised as to the form of the notice given by Robert Graham. I think that the notice, on a fair construction, refers to the tenancy as a whole and not merely to a partial interest therein peculiar to Robert, and that it therefore embodies a complete and not merely a partial intimation of intention on the tenants' side to terminate the tenancy. If this is so, the question remains whether Robert had authority from John to give up the tenancy, and therefore to give a sufficient notice for the purpose. On this point I agree with your Lordships in thinking that he had. I think it is a fair inference from all the facts and circumstances proved that Robert had complete control of the affairs of the partnership, including the matter of continuing or terminating the tenancy.

As regards the point which has been dealt with by Lord Skerrington, viz., whether one of two or more joint tenants can at his own hand and in his own name give a notice which will be effectual under the statute to prevent tacit relocation, I desire to reserve my opinion.

LORD MACKENZIE was absent.

The Court in each case recalled the interlocutor of the Lord Ordinary, held the production satisfied, and of new assoilzied the defender from the conclusions of the summons.

Counsel for the Pursuer John Graham—Chree, K.C.—R. M. Mitchell. Agents—Scott & Glover, W.S.

Counsel for the Pursuer Robert Graham—Watson, K.C.—J. G. Jameson. Agents—Scott & Glover, W.S.

Counsel for the Defender—Mackay, K.C.—Henderson, K.C.—W. R. Walker. Agents—Baillie & Gifford, W.S.