does not seem to me to be disturbed by the fact that the assignation excluded the husband's *jus mariti* and right of administration. On the view that a provision was being made the wife was intended to be given a *de præsenti* right, although the use to be made of it was contingent on her survivance, and it was therefore consistent with the intendment of the transaction that she should hold that right for her own separate interest, free of her husband's control.

LORD SKERRINGTON did not hear the case.

The Court answered the first question of law in the negative and the second in the affirmative.

Counsel for the First Parties—D. Jamieson. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Second Parties—Aitchison. Agent—James A. B. Horn, S.S.C.

Tuesday, June 28.

FIRST DIVISION.

AITKEN'S TRUSTEES *v.* AITKEN AND OTHERS.

Succession—Liferent or Fee—Direction to Hold and Apply for Children—Subsequent Direction to Hold and Apply for their Liferent Alimentary Use only and for their Issue in Fee — Death of Child without Issue.

An *inter vivos* disposition and assignation contained a direction that after the granter's death his trustees should hold and apply the fee of the whole fund and subjects conveyed for behoof of all his children, equally among them, share and share alike to each child, "and said trustees shall hold and apply each child's share for behoof of such child in liferent for his or her liferent alimentary use only and his or her lawful issue in fee." The deed contained directions regarding the shares of any of the children who might predecease the survivor of the truster and his wife, but made no provision for the event of a child surviving them and dying without issue. The truster also executed eleven years later a trust-disposition and settlement, in which he disposed of the residue of his estate. A son who survived the truster and his wife having died without issue, *held* (*diss.* Lord Mackenzie) that under the direction contained in the disposition and assignation he died vested in the fee of his share.

James Ballantyne and others, as trustees under a disposition and assignation by the late James Aitken, shipbroker, Helensburgh, *first parties*, the said James Ballantyne and others as trustees under the trust-disposition and settlement of the late James Aitken, *second parties*, James Hill Aitken, as executor of his deceased brother Arthur Haynes Aitken, *third party*, the said James Hill Aitken and Lionel George Aitken and Reginald Alexander Aitken, sons of the late James Aitken, who along with the said deceased Arthur Haynes Aitken survived him, *fourth parties*, Betty Florence Aitken and Natalie Aileen Aitken, children of the said James Hill Aitken, and Marjorie Aitken and the other children of the said Lionel George Aitken, *fifth parties*, Mrs Edith Louise Aitken or Colley, Mrs Florence Emily Aitken or Miles, and Mrs Violet Alice Aitken or Reynolds, the surviving daughters of the late James Aitken, *sixth parties*, Percy Harold Colley, son of the said Mrs Colley, and others, as trustees under the marriage settlement of the said Percy Harold Colley, *seventh parties*, Hugh Rupert Miles son of the said Mrs Miles and Olive Joyce Reynolds, daughter of the said Mrs Reynolds, *eighth parties*, brought a Special Case for the opinion and judgment of the Court as to their rights in the share of the truster's estate given to the deceased Arthur Haynes Aitken by the said disposition and assignation.

The late James Aitken died on 9th April 1900. He was twice married and was survived by his second wife Mrs Emily Hill or Aitken, who died in 1913, and by the said Mrs Colley, a child of his first marriage, and the said James Hill Aitken, Lionel George Aitken, Reginald Alexander Aitken, Arthur Haynes Aitken, Mrs Miles, and Mrs Reynolds, children of his second marriage. His estate was administered under two trusts. The first trust was constituted by a disposition and assignation and two deeds of assignation and declaration of trust increasing the trust estate, and the second by a trust-disposition and settlement dated 30th June 1899. Arthur Haynes Aitken died on 10th July 1918 without issue.

The Case stated, *inter alia*—"7. By the said disposition and assignation, dated 13th September and registered in the Books of Council and Session 4th October 1888, the truster, after directing, *inter alia*, the payment of the balance of the income to the said Emily Hill or Aitken during his lifetime, provided, *inter alia*, as follows:—. . . . (Sixth) The said trustees shall hold and apply the fee of the whole fund and subjects before conveyed for behoof of all my children including the said Edith Louise Aitken' (the child of the first marriage) 'equally among them, share and share alike to each child, and said trustees shall hold and apply each child's share for behoof of such child in liferent for his or her liferent alimentary use only, and his or her lawful issue in fee, in such proportions, payable at such time, and subject to such restrictions as the liferenter or liferentrix thereof (their parent) shall appoint by any writing under his or her hand, and in case of no such appointment for behoof of such lawful issue equally, share and share alike, declaring that in the event of any of my children predeceasing the survivor of my said wife and me, the lawful issue of such children so predeceasing shall take the share or shares which would have been liferented by their deceased parent or parents had he or she or they survived, but in the event of any of

my said children dying before the survivor of my said wife and me without leaving lawful issue, then the share of such deceasing child or children shall accrue to and be held and applied by said trustees equally for behoof of my said children surviving my said wife and me, and the lawful issue of such children as may have died leaving lawful issue, equally among them *per stirpes*, in liferent and fee as before provided with regard to their original shares. . . .' 8. By his said trust-disposition and settlement the truster conveyed to trustees 'All and sundry the whole means and estate, heritable and moveable, real and personal, of every kind and description, and wherever situated, that shall belong to me at the time of my death, including therein all means and estate over which I have power of disposal by will or otherwise,' in trust for certain purposes, *inter alia*, as follows:— . . . In the eighth place I direct my trustees to hold and apply the residue of my whole means and estate for behoof of all my lawful children (including the said Edith Louise Aitken or Colley) in the following shares, videlicet—Two parts or shares for each of my sons and one part or share for each of my daughters in liferent for his or her liferent alimentary use only, and his or her lawful children in fee . . . and I provide with regard to the whole of the foregoing provisions in favour of my said children that in the event of any of them predeceasing me or surviving me and dying without leaving lawful issue, then the share of such deceasing child or children shall (so far as then unpaid) accrue to and be divided equally among my surviving children and the lawful issue of such as may have died leaving issue, equally among them *per stirpes*, in liferent and fee as after mentioned, but in the event of the deceasing child or children leaving lawful issue, such issue shall in every such case receive (if more than one child equally among them) the share or shares which would have been liferented by their deceased parent or parents had he, she, or they survived . . .; and I provide that in the event of any shares falling to my children in consequence of the death of their brothers or sisters without issue or under the foresaid clause of forfeiture, then and in that case all such additional shares shall be held by my said trustees for them in liferent and their children in fee as before provided with reference to their original share. . . .' The truster left estate sufficient to fulfil the whole of the trust purposes of the said trust-disposition and settlement, and to leave a balance to be dealt with under the residue clause contained therein. 9. Arthur Haynes Aitken at the date of his death had a liferent of (*first*) one-seventh share of the trust funds under the family trust; (*second*) one-sixth of the trust funds set aside in the testamentary trust to equalise the six children of the second marriage with the child of the first marriage (Edith Louise Aitken or Colley) for sums paid and made over to her during her father's lifetime or otherwise provided for her; and (*third*) two-eleventh shares (less certain sums advanced to him out of capital in terms of the powers conferred on the trustees) of the residue of the testamentary trust—there being four sons getting two shares each, and three daughters getting one share each, making altogether eleven shares. Although provision is made by the trust-disposition and settlement for the division among surviving children in liferent, and their issue in fee of the share liferented by a child surviving the testator and dying without issue, there appears to be no such provision with regard to such a share liferented under the said disposition and assignation. A question has accordingly arisen between the parties as to the proper destination of the said one-seventh share of the trust funds liferented by the said Arthur Haynes Aitken under the family trust. It is maintained (1) that the fee of the said share vested in the said Arthur Haynes Aitken upon the death of the said Mrs Emily Hill or Aitken, the truster's widow, and was carried at his death to his personal representatives; (2) that the interest of the said Arthur Haynes Aitken in the said share was limited to a right of liferent only, and that the fee of the said share as at his death fell under the operation of the trust-disposition and settlement; and (3) that the said share limited to a liferent as aforesaid passed to the heirs and representatives of the truster *ab intestato*. . . . ."

The first and second parties offered no argument.

The third party contended that the said share vested in fee in the said Arthur Haynes Aitken, and fell to be paid to him (the third party) as executor-dative foresaid.

The fourth parties contended, *inter alia*—(1) That the said share vested in fee in the said Arthur Haynes Aitken on the death of the truster, and on the death of the said Arthur Haynes Aitken passed to his heirs *in mobilibus* for division equally among them. . . . .

The fifth parties contended that the said share did not vest in the said Arthur Haynes Aitken, and fell to be dealt with as residue under the trust-disposition and settlement. . . .

The sixth parties contended that the fee of the share in question vested in the said Arthur Haynes Aitken on the death of the truster, and that on the death of the said Arthur Haynes Aitken it passed to his heirs *in mobilibus*. Alternatively they contended that it was not disposed of by the truster and fell to be divided among the truster's heirs *in mobilibus*. . . . .

The seventh and eighth parties contended that the fee of the share in question never vested in the said Arthur Haynes Aitken, and that his right therein never extended beyond a liferent. They further contended that the said share was carried by the said trust-disposition and settlement, and fell to be administered and distributed in terms thereof. . . . .

The *questions of law* included the following:—"1. With regard to the said one-seventh share of the estate falling under the family trust—(*a*) Did the said share vest in the late Arthur Haynes Aitken; or (*b*) does

it form part of the estate which falls to be administered and distributed in terms of the said trust-disposition and settlement; or (*c*) does it pass to the truster's heirs and representatives *ab intestato?*"

Argued for the third and fourth parties—The fee of his share vested in Arthur Haynes Aitken. This was a typical case of an initial gift of fee to the children and could only be restricted by words clearly indicating a different intention. The words "hold and apply" indicated a gift of fee—*Donaldson's Trustees* v. *Donaldson*, 1915 S.C. (H.L.) 55, 53 S.L.R. 97; *Greenlees' Trustees* v. *Greenlees*, 1894, 22 R. 136, 22 S.L.R. 106; *Dunlop's Trustees* v. *Sprot's Executor*, 1899, 1 F. 722, 36 S.L.R. 531. Lord Cullen mentioned *Young's Trustees* v. *Young*, 1901, 3 F. 616, 38 S.L.R. 434. It was equivalent to "hold and divide." "Hold and retain" was different—*Nicol's Trustees* v. *Farquhar*, 1918 S.C. 358, 55 S.L.R. 303. The subsequent part of the clause merely provided for the event of a child having issue. Such a clause could not restrict an unqualified gift of fee where the child died without issue — *Tweeddale's Trustees* v. *Tweeddale*, 1905, 8 F. 264, 43 S.L.R. 193, *per* Lord President at 8 F. 273.

Argued for the seventh and eighth parties —The fee of the share in question never vested in Arthur Haynes Aitken. The first part of the bequest was equally applicable to liferent or fee. The rule of *Lindsay's Trustee* v. *Lindsay*, 1880, 8 R. 281, 18 S.L.R. 199, upon which the third and fourth parties relied, only applied where the terms were not ambiguous. In other cases it was necessary to look to what followed to ascertain what the bequest meant—*Macgregor's Trustees* v. *Macgregor*, 1909 S.C. 362, 46 S.L.R. 296; *Smith's Trustees* v. *Clark*, 1920 S.C. 161, 57 S.L.R. 196. To support their contention the third and fourth parties were forced to disregard the conclusion of the sentence which they were not entitled to do—*Nicol's Trustees* v. *Farquhar*, *supra*. Further, the truster had made the provisions of the family trust part of the provisions of his settlement, with the result that the share fell to be divided equally among the surviving children in liferent and their issue *per stirpes* in fee.

Argued for the fifth parties—The deed was unilateral and *inter vivos*, and was not to be construed on the assumption, which in the case of a testamentary deed favoured a gift of fee, that the granter was finally disposing of his whole estate. Further, the words of the bequest did not clearly indicate a fee. The use of the word "fee" was merely to indicate that after previously dealing with revenue he was dealing with capital. "Hold and apply" was also used in restricting the fee to a liferent. "And" meant in the following way. On the other hand liferent was indicated to be the intention in the directions regarding the shares of predeceasing children "which would have been liferented" by them, and in the directions in the settlement regarding the sums set aside to put the children on an equal footing. The fee of the share therefore had never vested, and must, as estate which the truster had reserved power to dispose of, be dealt with under the residue clause in the settlement.

The sixth parties adopted the argument of the third and fourth parties that the share had vested. Alternatively they maintained that the share fell to be divided equally among the six surviving children in liferent and their issue *per stirpes* in fee.

LORD PRESIDENT—The question depends upon the applicability to the terms of this family trust of the principle of construction illustrated by the leading case of *Lindsay's Trustees* v. *Lindsay* ((1880) 8 R. 281): —Given words amounting to an absolute provision of fee in favour of a beneficiary, the superaddition to them of subsequent clauses which purport to limit the beneficiary's interest to a liferent with fee to issue will not prevent the absolute provision from receiving effect as such if the circumstances to which the subsequent limitation applies are excluded by the death of the beneficiary without having had issue. As is usual in cases of this class the difficulty is to determine whether the settlement does contain in the first instance words amounting to an absolute provision of fee. A direction to pay to A, followed by a direction to hold for A in life, and A's issue in fee, is just a roundabout and double-barrelled method of directing that the gift shall be held for A in life and A's issue in fee, whom failing for A in fee. The objection to the double-barrelled method is that it becomes equivocal the moment the words initially used to express the granter's bounty to A are not in themselves so decisively expressive of absolute gift as to be proof against the effects of construction (in the light of the rest of the deed) showing or tending to show that their use is consistent with an intention to give A no more than the later direction confers. Both Lord Adam in this Court (*Greenlees' Trustees* v. *Greenlees*, 1894, 22 R. 136, at p. 139) and Lord Wrenbury in the House of Lords (*Donaldson's Trustees* v. *Donaldson*, 1916 S.C. (H.L.) 55, at p. 68) in dealing with cases of this class have pointed out that an initial direction to "hold for" A is an absolute provision of fee in his favour. And so it is, no doubt, apart from context. But it is obvious that a direction so general in form may receive its true—and very different — colour from the reflection cast upon it by the rest of the deed in which it occurs. I agree with the Lord Justice-Clerk and Lord Dundas in *Smith's Trustees* v. *Clark* (1920 S.C. 161) in repudiating the idea that the words of initial gift—whatever their terms—can be interpreted as if they were used in isolation from the rest of the deed.

I have found the present case to be one attended with considerable difficulty both on account of the words in which the initial gift is conceived, and because when one turns for more certain light to the other provisions of the deed there is but little enlightenment to be found in them. The direction to the trustees is to "hold and

apply the fee of the whole fund" for behoof of the granter's children "equally among them, share and share alike, to each child," and then proceeds as follows—"And said trustees shall hold and apply each child's share for behoof of such child in liferent, for his or her liferent alimentary use only, and his or her lawful issue in fee." It will be observed that the same form of words—"hold and apply"—is used in both the initial and in the subsequent direction, and that the two directions are coupled together by the simple conjunctive "and." Now the words "hold and apply" are in themselves strongly indicative of a provision in fee. As has been pointed out, the word "hold" by itself may—and if unexplained by the context does—import an absolute gift of fee. But the expression "hold and apply," is not only consistent with a gift of the capital of the provision, but, *prima facie* at any rate, necessarily involves the conferment of an effective interest in it. For the fee is not to be "held" merely, but is to be "applied" for the beneficiary—in short, the fee is to be his. Thus the expression is properly and appropriately used in the later direction, which besides giving each child a liferent in the share provided to him by the initial clause, provides in favour of that child's issue an undoubted fee. If the words "hold and apply" are unequivocally used in the later direction as expressing a gift of fee, can I legitimately read them as excluding a gift of fee in the initial clause? Moreover, the conjunctive "and," which links up the two clauses—while it is possible that it might be used to convey the same meaning that has been expressed in other settlements by such words as "in the following manner," or "subject to the following conditions"—is not suggestive of any such construction. Notwithstanding the force of these considerations, I think the case lies near the border line. But the settler chose to adopt what I have called the double-barrelled method of expressing his intentions, and we must do our best to interpret his meaning through it. When I turn to the rest of the deed I find one element in it which tends to support the construction which I think I am compelled to put upon the words of the initial gift. That element is that when the granter goes on to provide for what is to happen in the case of the decease of any of his children without issue, he provides that the share of a child dying without issue before himself, or before his wife (who was liferentrix of the settled funds), is to go to his surviving children and the issue of predeceasers, but he makes no provision at all for the case of a child dying without issue after the death of both himself and his wife. This omission is natural and reasonable if by force of the initial gift the fee of such child's share was intended to become indefeasible in him, in the double event of his not having issue and of his own survivance of the settlor and his wife. It is true that in an *inter vivos* deed of this kind the presumption which arises from the granter's failure to dispose of a share in a particular event is nothing like so strong as in the case of a testamentary deed where such failure would be followed by intestacy. Moreover, the settlor made a will eleven years afterwards containing a residue clause. But the fact that in making what was apparently intended at the time to be a complete family provision (in which the chances of life and death as affecting the disposal of the children's interests were taken into careful account), the settlor left so considerable a *lacuna* in the express dispositions of the trust, seems to point in favour of the view that by the initial direction he understood himself to have given a right of fee to all the children, while superimposing upon that right of fee other directions which (should they fail owing to survivance by the child of himself and his wife and the absence of issue) would leave the original gift of fee to be effective.

Accordingly I propose to answer question 1 (*a*) in the affirmative. That will render it I think unnecessary to answer either 1 (*b*) or 1 (*c*), although, I suppose, both of them might be answered in the negative. With regard to question 2, it will be unnecessary for your Lordships, if you agree in the conclusion at which I have arrived, to return an answer to any of the branches of that question, because it only arises in the event of question 1 (*b*) being answered in the affirmative.

LORD MACKENZIE—The question whether or not there was vesting in Arthur Haynes Aitken, who died on 10th July 1918, depends upon whether those maintaining that there was vesting are able to bring the present case within the class of which *Greenlees' Trustees* ((1894) 22 R. 136) and *Tweeddale's Trustees* ((1905) 8 F. 264) are familiar examples. It depends upon being able to show that there is an initial gift of fee in the sixth purpose of the *inter vivos* disposition and assignation, and that the later portion of the same clause does not take off from the absolute gift of fee in the earlier part of the clause.

The provision is that "the said trustees shall hold and apply the fee of the whole fund and subjects before conveyed for behoof of all my children including" a daughter by a former marriage, "equally among them, share and share alike to each child." It has been conceded that no significance can be attached to the use of the term "fee," because the term is plainly used as distinguished from the liferent interest which had been dealt with in the preceding purpose of the deed, and as used here means no more than a capital sum. But it is said that "hold and apply" as used in the opening part of the clause are sufficient to give a fee. When one turns to the later part of the clause one finds that the provision is that the "trustees shall hold and apply each child's share for behoof of such child in liferent for his or her liferent alimentary use only, and his or her lawful issue in fee, in such proportions, payable at such times," &c., and the natural construction would be to say that the later part of the clause was intended to explain what the granter of the

deed set out in the earlier part of the clause to accomplish, and that by "hold" was meant that continuity in trust administration which was to be effected in the manner pointed out by the word "apply." I do not doubt that if the words "hold and apply" stood alone that would be sufficient to confer a right of fee upon a beneficiary, but in order to find out whether these words as used in the particular deed have that meaning it is necessary to examine the whole clause.

The case is in marked contrast to the case of *Tweeddale*. In *Tweeddale* the initial gift took the form of a direction to pay a particular sum at a particular term which was specified, and it was held that the later clause did not take off the absolute gift so given. But the specialty of the case lay in the fact that the initial gift was conceived in the form of a direction to "pay," as was pointed out by Lord President Dunedin in *Macgregor's Trustees* (1909 S.C. 362) which was decided four years later. The case of *Donaldson* (1916 S.C. (H.L.) 55) was referred to as establishing that the word "hold" is to receive the same meaning as "pay," but I venture to point out that in *Donaldson's* case all that Lord Dunedin said in *Tweeddale's* case was expressly adopted by Lord Atkinson. And I also think that the expression upon which so much weight has been put in the present case in the opinion of Lord Wrenbury (at p. 68) must be taken along with the feature in *Donaldson's* case that there was a condition there that the share was to vest absolutely as at the term of payment, that is to say, when the beneficiary attained the age of twenty-five.

Accordingly I do not think that this is a case which can be said to be ruled in any way by the decision in the case of *Tweeddale*. The case of *Smith's Trustees* v. *Clark* (1920 S.C. 161) illustrates the principle which should be applied—I refer particularly to the opinion of Lord Dundas at p. 171. I think, that considering the clause as a whole, all that Arthur Haynes Aitken got was a liferent and not a fee.

I am impressed by the difficulty introduced by the later clause in the disposition and assignation which provides for the disposal of the fund in the event of the death of a child without issue, because it is apparent that there is an event which is unprovided for in that clause. If the child survived both the spouses and died without issue, then there is nothing to dispose of the share which so lapsed. Possibly if we had been construing a testamentary settlement, that might have turned the scale in favour of taking the view that if the construction of the initial clause that I give it would lead to intestacy, the earlier clause must be held as having given a complete right of fee. But then we are not confronted with that difficulty here, and the considerations which were urged by Mr Gentles in favour of the view that the granter of the assignation may well have wished to keep his hand upon the fund in certain circumstances certainly have great force. When one turns to the testamentary settlement one finds that there is a recital of among other things the whole provisions made by him in favour of his wife and the children in (first) the contract of marriage, (second) an assignation of an earlier date, and (third) the disposition and assignation under consideration. Then follows the eighth purpose, which is a residue clause, which just catches up the fund in the event unprovided for in the *inter vivos* assignation and makes due provision for its disposal.

In my opinion a sound construction of the two deeds would lead to answering the first question, branch (*b*), in the affirmative, holding that the share originally destined to Arthur Haynes Aitken forms part of the estate and falls to be administered in terms of the trust settlement, in which event 2 (*a*) should be answered in the affirmative.

LORD CULLEN—I think that the terms of the direction at the beginning of the sixth purpose of the trust deed to the effect that the "trustees shall hold and apply the fee of the whole fund and subjects before conveyed for behoof of all my children . . . equally among them, share and share alike to each child," are habile to express the gift of the estate in fee to the testator's children equally among them. If he had stopped at the end of the sentence I have quoted, there could have been no question. Following this *prima facie* initial gift there are directions to the effect that the trustees shall hold the share of each child for his or her liferent and for his or her issue in fee. The testator in making these last-mentioned directions as to each child's share, uses again the words "hold and apply" when he is undoubtedly engaged in providing for the disposal of the totality of the shares, both capital and interest. Thus the *prima facie* effect of these words in the leading direction is not thereby weakened or qualified but corroborated. Mr Hunter, indeed, argued that the truster used the word "apply" in two different senses. I think his argument logically compelled him so to argue; but I confess that I see no justification for this construction. There is nothing in the rest of the deed which has the effect of qualifying the *prima facie* effect of the leading direction in the sixth purpose. On the contrary, there is the consideration to which your Lordship in the chair has referred, arising from the fact that the testator had expressly provided for the failure of issue in certain events, but has made no such provision for the particular event which has happened.

I am of opinion, therefore, that the case is susceptible of the principle applied in the well-known series of decisions to which the argument for the third, fourth, and sixth parties appeals, and that in the circumstances which have happened, Arthur Haynes Aitken died vested in the fee of his share, so that branch (*a*) of the first question should be answered in the affirmative.

LORD SKERRINGTON did not hear the case.

The Court answered question 1 (*a*) in the affirmative and found it unnecessary to answer the remaining questions.

Counsel for the First, Second, Third, and Fourth Parties — Henderson. Agents — Arch. Menzies & White, W.S.

Counsel for the Fifth Parties—Gentles. Agents—Arch. Menzies & White, W.S.

Counsel for the Sixth Parties—King. Agents—Campbell & Smith, S.S.C.

Counsel for the Seventh and Eighth Parties—Hunter. Agents—Campbell & Smith, S.S.C.

Saturday, June 25.

SECOND DIVISION.

[Lord Sands, Ordinary.

ROGER *v.* HUTCHESON AND OTHERS.

Landlord and Tenant—Arbitration—Undertaking by Incoming Tenant to Relieve Landlord of Outgoing Tenants' Claims for Improvements—Reference of Question of Amount to Two Arbiters and an Oversman—Competency—Agricultural Holdings (Scotland) Act 1908 (8 *Edw. VII, cap.* 64), *sec.* 11 (1).

The Agricultural Holdings (Scotland) Act 1908 enacts—Section 11 (1)—"All questions which under this Act or under the lease are referred to arbitration shall, whether the matter to which the arbitration relates arose before or after the passing of this Act, be determined, notwithstanding any agreement under the lease or otherwise providing for a different method of arbitration, by a single arbiter in accordance with the provisions set out in the Second Schedule to this Act."

Where an incoming tenant, under his lease, undertook responsibility for the proprietor to pay compensation to the outgoing tenant for improvements under the Agricultural Holdings (Scotland) Act 1908, and by deed of submission the question as to the amount of the compensation was referred by the incoming and outgoing tenants to two referees and an oversman, *held* (*rev.* Lord Ordinary (Sands)) that the reference to two referees and an oversman was not prohibited by the Agricultural Holdings (Scotland) Act, sec. 11, sub-sec. 1, it being neither under the Act nor under the lease, but under the agreement expressed in the submission.

Opinion per Lord Salvesen—"I think that a statutory privilege which is conferred even in such absolute terms as are expressed in section 11, sub-section 1, may be waived."

Landlord and Tenant—Compensation for Improvements — Whether Claim Timeously Made — Agricultural Holdings (Scotland) Act 1908 (8 *Edw. VII, cap.* 64), *sec.* 6 (2).

The Agricultural Holdings (Scotland) Act 1908 enacts—Section 6 (2)—"A claim by the tenant of a holding for compensation under this Act in respect of any improvement comprised in the First Schedule to this Act shall not be made after the determination of the tenancy. . . ."

An incoming tenant under his lease undertook responsibility for the proprietor to pay compensation to the outgoing tenant for improvements under the Agricultural Holdings (Scotland) Act 1908, and by deed of submission executed prior to the determination of the tenancy the question as to the amount of the compensation was referred by the incoming tenant and the outgoing tenant to arbitration. The deed contained, *inter alia*, the following clause in the enumeration of the matters referred:—"*Sixth.* What sum shall be payable by the second party . . . to the first party as compensation for improvements under the Agricultural Holdings Act?" No statement containing the particulars and amount of the intended claim was, however, made until after the expiry of the tenancy.

Circumstances in which *held* (*rev.* Lord Ordinary (Sands)) that the existence and nature of the claim had been sufficiently certiorated, and that accordingly it had been timeously made.

Harry Stevenson Roger, sometime farmer at Manorhill, Makerstoun, Roxburghshire, *pursuer*, brought an action against William Hutcheson, farmer, Courthill, Kelso, *defender*, and also against Thomas Greenshields and Thomas Steel Greenshields, farmers, Manorhill aforesaid, and Hugh James Elibank Scott MakDougall of Makerstoun, for any interest they might have, in which the conclusions were that "It ought and should be found and declared, by decree of the Lords of our Council and Session, that the defender has validly and effectually accepted the office of oversman under and in virtue of (*first*) a deed of submission, dated 26th and 27th May 1919, entered into between the pursuer and the said Thomas Greenshields and Thomas Steel Greenshields, under which Thomas Templeton, farmer, Sandyknowe, Kelso, and Peter Purdie Campbell, land agent, 20 Rutland Square, Edinburgh, were appointed arbiters; (*second*) minute, dated 29th May 1919, by the said arbiters accepting office under the said deed of submission, and appointing the defender to be oversman in the event of their differing in opinion, and by the defender accepting office as oversman foresaid; and (*third*) minute of devolution by the said arbiters, dated , devolving the reference under the said deed of submission upon the defender as oversman, and that the defender as oversman foresaid is bound to proceed in the said submission and bring the matters submitted to him to a final conclusion; and the defender ought and should be decerned and ordained by decree foresaid to proceed in the said submission, and to decide upon and bring to a final conclusion the matters submitted to him by issuing a final decreet-arbitral or award in such terms as he may think right; and in particular, the defender as oversman foresaid ought and should be decerned and ordained to ascertain, fix, and