good constructive delivery, where a new contract has been made between the seller and the buyer, under which the seller possesses on a new and lawful contract. Here the seller had the use of the pipes buried under the ground as the buyer's lessee. That is, *ex facie*, the state of matters. It might be simulate of course, in which case it could be set aside; but on the contract that is its nature, and I am of opinion that it is sufficient to pass the property.

Now, the party against whom a right of property is sought to be declared is Wilson, the owner. His voluntary trustee—for he has executed a trust-deed for behoof of creditors—is called too, and he defends the action. He can only do so on grounds competent to Wilson, and I think Wilson has no ground for a defence. The trustee urges that this, which would otherwise be good, is bad, because it is only a security. But that is quite a legitimate purpose for such a transaction, and that is where the case is undistinguishable from *M'Bain* v. *Wallace*. It has always been esteemed by us a perfectly competent way of giving a security for debt that the seller should execute an *ex facie* absolute disposition by which the money-lender becomes the proprietor. I remember in my early days at the bar arguing a case of the kind against a money-lender who took such a title, and against whom declarator was sought that the title was only a security title, that the disponee who was made absolute proprietor had only lent money, and that the pursuer was entitled to have the property back on paying the amount of the loan. It was admitted by him that it was only a security, but he defended himself on the ground that the declarator sought would prejudice the title for which he had bargained, and the Court refused the declarator on that ground, but intimated that they would interfere to give the declarator if the borrower tendered the money and the defender then were to refuse to give up the property. That same doctrine was applied to the case of moveable property in the case of *M'Bain* v. *Wallace*. There delivery was dispensed with on the authority of the case of *Duncanson*, M. 14,204. It was acknowledged that the transaction was a security, and it was held that the parties had lawfully contracted to accomplish their object by way of sale. We intimated in our judgment in the passage I read from my own opinion during the argument in this case—and I think the House of Lords also intimated—that if any attempt were made to use the property title to any other effect than to pay the debt and interest we should interpose to prevent that, and the lender then accordingly undertook that his title should only be good to the effect of obtaining his debt and interest.

Lord Craighill concurred.

Lord Rutherfurd Clark—It was acknowledged by the reclaimer here that the case of *M'Bain* v. *Wallace* was conclusive against him unless he could distinguish it from the present in matters of fact. He failed to do this on the facts, and therefore he acknowledges that the decision of the House of Lords is against him. That makes the ground of judgment simple. I was the Lord Ordinary in that case, and I must say that when I decided it I thought that I had pronounced a very sound judgment. I feel bound to confess I was entirely wrong. As, however, I am not yet able clearly to see wherein I was wrong, I prefer to follow the authority of the case than to give any reasons for pronouncing a decision contrary to it in this case.

The Court adhered.

Counsel for the Defenders and Reclaimers—Guthrie—Baxter. Agents—Wallace & Begg, W.S.

Counsel for the Pursuers and Respondents—M'Kechnie—Shaw. Agent—T. Carmichael, S.S.C.

Friday, December 16.

SECOND DIVISION.

[Lord Lee, Ordinary.

FORSYTH AND OTHERS *v.* TURNBULL AND OTHERS.

Succession—Whether "Means and Effects" includes Heritage—Titles to Land Consolidation (Scotland) Act 1868 (31 *and* 32 *Vict. c.* 101), *sec.* 20.

A holograph will in these terms, viz.—"In order to prevent all dispute after my death regarding the disposal of my property, I hereby leave and bequeath to my beloved wife the whole of the means and effects in my possession, or belonging to me at the time of my decease, to be absolutely at her disposal"—*held* to convey heritage.

Peter Cameron, dentist, 30 Barony Street, Edinburgh, died on 26th November 1882, leaving a widow but no children. He left a holograph will, dated 10th April 1871, in the following terms:—"In order to prevent all dispute after my death regarding the disposal of my property, I hereby leave and bequeath to my beloved wife the whole of the means and effects in my possession or belonging to me at the time of my decease, to be absolutely at her disposal. Signed in presence of Mr and Mrs Dingwal," &c.

By feu-charter dated 10th February 1879 the testator had acquired from the Magistrates and Town Council of the royal burgh of Kinghorn a piece of ground in Kinghorn on which he built a house, the feu-right being taken "to the said Peter Cameron, and his heirs and successors whomsoever." He completed no feudal title to it, and his widow died without making up a title, but continued to occupy the house upon the personal right, to the date of her death on 12th September 1886. She died intestate, and after her death her heirs-at-law entered upon possession of the house.

This action was raised against Mrs Cameron's heirs-at-law by the heirs-at-law of Peter Cameron to have it found and declared that the defenders had no right to the house in Kinghorn, and should be ordered to remove, in order that the pursuers might enter thereto and possess the subjects as their property.

The pursuers pleaded—"(3) The holograph will founded on by the defenders does not carry the said heritable subjects, and the defenders have no right thereto under the said will."

The defenders pleaded—"(1) The subjects in question having been carried by the holograph will of the said Peter Cameron to his widow, and having become her property, and she having died intestate, the defenders are now entitled thereto as her heirs-at-law."

The 20th section of the Titles to Land Consolidation (Scotland) Act 1868 provides—"From and after the commencement of this Act it shall be competent to any owner of lands to settle the succession to the same in the event of his death, not only by conveyances *de præsenti* according to the existing law and practice, but likewise by testamentary or *mortis causa* deeds or writings, and no testamentary or *mortis causa* deed or writing purporting to convey or bequeath lands which shall have been granted by any person alive at the commencement of this Act, or which shall have been granted by any person after the commencement of this Act, shall be held to be invalid as a settlement of the lands to which such deed or writing applies, on the ground that the granter has not used, with reference to such lands, the word "dispone," or other word or words importing a conveyance *de præsenti*, and where such deed or writing shall not be expressed in the terms required by the existing law or practice for the conveyance of lands, but shall contain with reference to such lands any word or words which would, if used in a will or testament with reference to moveables, be sufficient to confer upon the executor of the granter, or upon the grantee or legatee of such moveables a right to claim and receive the same, such deed or writing if duly executed in the manner required or permitted in the case of any testamentary writing by the law of Scotland, shall be deemed and taken to be equivalent to a general disposition of such lands within the meaning of the 19th section hereof by the grantee of such deed or writing in favour of the grantee thereof, or of the legatee of such lands." . . .

The Lord Ordinary (LEE) on 1st August 1887 sustained the defences, and assoilzied the defenders from the conclusions of the action.

"*Opinion.*—The pursuers are heirs-at-law of the late Peter Cameron, who died on 26th November 1882. They seek by this action to have it found and declared that the defenders (the heirs-at-law of Peter Cameron's widow) have no right to a house in Kinghorn which belonged to him at the time of his death, and ask for decree of removing against them in order that the pursuers may enter thereto, and possess the subjects as their own property.

"As the title of the pursuers is established by the general service, No. 7 of process, and the notarial instrument, No. 9 of process, the question is, whether the defence is established, viz., that the subjects were carried by the holograph will of Peter Cameron? The terms of the will are not in dispute, but it is contended by the pursuers that it has no application to lands, and did not give to the widow a right to the subjects.

"The merits of the defence thus depend on the terms of the will, as affected by the 20th section of the Titles to Land Consolidation Act 1868.

"The will (dated 10th April 1871) is as follows:—'In order to prevent all dispute after my death regarding the disposal of my property, I hereby leave and bequeath to my beloved wife the whole of the means and effects in my possession, or belonging to me at the time of my decease, to be absolutely at her disposal.'

"At the date of the will Peter Cameron was possessed of no right to lands, but in 1879 he acquired the piece of ground in dispute, and built a house upon it. The feu-right was taken to 'the said Peter Cameron and his heirs and successors whomsoever.' He completed no feudal title to it, and his widow also died without making up a title, but the subjects were possessed by him, and afterwards by her, as upon a personal right, and no plea has been stated upon the absence of a completed title as affecting the question.

"If the will be applicable and intended to apply to lands, I think that the feu-charter cannot be said to contain a destination which evacuated, as to this subject, Peter Cameron's testamentary disposition. A man who takes a feu-right in favour of himself, takes it also by the operation of law in favour of his heirs and successors whomsoever; and the fact that this is expressed in the deed creates in my opinion no presumption of an intention to exclude the application of a general settlement to the subject of such a right. The case of *Don* v. *Webster*, referred to by the Lord Justice-Clerk in dealing with the Leith Street subjects in *Farquharson* v. *Farquharson*, 10 R. 1253, was decided as a case of special destination. A destination to heirs whomsoever it is well settled is no destination at all.

"The question whether the will purports to convey lands, and contains with reference to such lands any word or words which would, if used in a will or testament with reference to moveables, be sufficient to confer upon the executor or grantee a right to claim and receive the same is a question of intention; but I think it is acknowledged in all the cases which have occurred that it is not a question to be decided upon conjecture. If, therefore, the only words used had been those bequeathing the whole of the testator's 'means and effects,' I should have been disposed, to hold this case ruled by the cases of *Pitcairn*, 8 Macph. 604, and *Edmond*, 11 Macph. 348. But these are not the only words, and I think that it is settled by the decisions that if it clearly appears from the context that the testator intended to dispose of his whole property, whether heritable or moveable, the expression 'means and effects' may be sufficient to include lands. In the case of *Urquhart* v. *Dewar*, 6 R. 1026, the Lord President expressed his opinion that the question will always be, 'Does the deed contain a "word or words" having reference to lands sufficient to express the intention of the testator to pass his heritage by his will? If there be such, either when taken by themselves or in connection with the rest of the will, then I think the lands will be effectually conveyed. . . . I only farther desire to add, by way of caution, that of course words conveying moveables are not sufficient to convey heritable property unless the wish is clearly implied in the language. They must be words importing that heritable property is meant to be conveyed as well as moveable, or that the whole estate is to be conveyed without distinguishing between the two kinds.' The opinions of the

other judges equally imply that the intention may be gathered either from the words of description themselves or from the rest of the will.

"The case of *M'Leod's Trustees* v. *M'Luckie*, 10 R. 1056, was decided on the same principles. The testator there nominated a 'sole executor and trustee,' and after certain bequests of moveables directed him 'to sell the remainder of my property wherever situated, and divide it.' The opinions of the Judges of the Second Division in the cases of *M'Leod's Trustees*, 2 R. 481, and of *Aim's Trustee*, 8 R. 294, are clearly to the same effect.

"So standing the authorities, the question is whether the preamble of this will, 'In order to prevent all dispute after my death regarding the disposal of my property,' is not a sufficiently clear expression of the testator's intention to dispose of his whole estate without distinction? My opinion is that the word 'means and estate,' when read in connection with the rest of the will, are intended to be applicable to the whole property belonging to the testator at the time of his death, and that therefore under the 20th clause of the Act of 1868 the will is equivalent to a general disposition of the subject in question, and created in favour of the testator's widow an obligation upon the heirs and successors of the grantor to make up titles and to convey the same. The testator having been survived by his wife, this obligation is enforceable by the defenders as her successors.

"I therefore sustain the defences and assoilzie the defenders."

The pursuers reclaimed, and argued—The object of the 20th section of the Titles to Land Consolidation (Scotland) Act 1868 was to provide that any expression of intention habile to convey moveables should be sufficient to convey heritage also, if clearly applicable to heritage. That enactment, however, could not be applied to the will in question, as there the words "means and effects" were clearly words applicable solely to moveables. In the following cases this matter had been made the subject of actual decision —*Pitcairn* v. *Pitcairn*, February 25, 1870, 8 Macph. 604, *vide* Lord President's opinion; *M'Leod's Trustees* v. *M'Leod*, February 28, 1875, 2 R. 481, *vide* Lord Gifford's opinion; *Urquhart* v. *Dewar*, June 13, 1879, 6 R. 1026, *vide* Lord President's and Lord Shand's opinions. In *Brown* v. *Bower and Others*, 1770, M. 5440, it had been held that the words "means and effects, heritable and moveable," did not carry heritage—*Edmond* v. *Edmond*, January 30, 1873, 11 Macph. 348. It was said that the dispositive clause which bequeathed the "means and effects" was controlled by the narrative clause, which used the word "property." That was unsound. The only effectual clause of the deed could not be enlarged in this manner. It was also a highly important element in considering this question that the testator at the time of executing the deed was not possessed of the house in dispute.

The defenders replied — What was to be determined was whether the testator made it clear that his intention was to convey all estate, heritable and moveable, which might belong to him at his death. It was true that it had been held that the word "effects" alone was not enough to carry heritage, but the Court would look to the whole deed and not to the dispositive clause alone. The deed, moreover, was not the deed of a skilled person. What the testator clearly meant to make was a universal settlement in favour of his widow. It was true he had no heritable estate when he made the will, but nothing had occurred since to show that he had altered his desire to favour his widow. Except in *Brown's* case, the two words "means and effects" had never been found together, and doubts had been since thrown by Lord Young on the judgment in that case, in *Oag's Curator* v. *Corner*, &c., June 26, 1885, 12 R. 1162. The word "property" in the narrative clause clearly indicated the testator's intention to deal with heritage and moveables alike, and the words "means and effects" in the dispositive clause were enough to cover all that was intended by the word in the narrative clause — *M'Leod's Trustee* v. *M'Luckie*, &c., June 28, 1883, 10 R. 1056.

At advising—

Lord Justice-Clerk—In this case the subject of discussion is a *mortis causa* settlement, written and executed by an unprofessional man without the intervention of a law-agent. He does not use, nor intend to use, nor profess to use, technical language in a technical sense. On the contrary, it is plain from the facts that he was writing as a man desiring without technical words to express the objects which he had in view. The only question is, whether it appears on the face of the instrument what the object was which the maker of it had in view—for to that we must give effect —and for my own part I must say I have not been able, notwithstanding the argument addressed to us, to entertain any doubt as to what he did intend. The will is in favour of the man's wife and no one else. He says his object is to prevent dispute after his death with regard to the disposition of his "property." I think there is no ambiguity there, and no one reading these words would doubt that he meant to make a settlement of all his property, both heritable and moveable. But he then goes on to express in the words of bequest the subject-matter of the settlement. He says—"I hereby leave and bequeath to my beloved wife the whole of the means and effects in my possession, or belonging to me at the time of my decease." He disposes of his "property" by leaving his whole "means and estate" to his wife. That that was meant to cover everything I see no reason to doubt. It is said indeed that in the former condition of our law it was necessary to use technical language in conveying land, and that in that state of the law "means and effects" was understood to apply to moveables and not to heritage, and the question is whether they still retain that meaning contrary to their popular meaning. In some judicial opinions which have been quoted to us, more weight has, I think, been given to the mere technical meaning of these words than I myself could do. I think it is impossible in a question of the intention of this man to limit the meaning of a settlement which he intended to be universal, because in some former cases settlements prepared not by testators themselves, but by men of business—I think that was the fact with regard to all these cases—the words

"means and estate" have been restricted in their application to personal property. They were not, I am convinced, intended to be so restricted in this man's will. While, therefore, I do not doubt that there is room for difference of opinion, I have on the whole no doubt, for my own part, that the deceased meant to include any heritage of which he might be possessed.

Lord Young—I think that the point would have been clear but for the decisions to which your Lordship has referred, and the judicial *dicta* in them, but even having regard to them I concur with your Lordship's judgment. I hesitate to add anything, because almost everything that one can say in this kind of case is of necessity common-place. We are here construing a will, and it is a common-place remark that it must be construed according to the will or intention of the person who made it. Our aim is to ascertain what he intended. It is common-place to say we are to find that in the instrument. But the same writings do not unfortunately convey the same meaning to different minds, and there are no cases in which there is a more frequent difference of opinion than in cases involving the interpretation of such instruments. But they all proceed on the rule that the thing to be ascertained is the intention of the testator as it can be collected from the language used. I do not think the Act of 1868 aids us at all. Of course but for it this will would have been impotent with respect to the heritage, for before it was passed the law was that a will was ineffectual with respect to heritage. It was not prior to the Act a deed concerning heritage at all, but an expression of the will of the testator as to what his executor was to do after his death. Before the Act, then, the the law required a bequest of heritage to be effected by a conveyance *de præsenti*. Well, the Act altered that, and said that a will as an instrument expressive of the wishes of the testator as to the disposal of his property after his death, should operate on land as well as on moveables. But here the question raised on the construction of the will is what property is included. The Act of 1868 says nothing whatever about the language to be used in describing property. It merely says that if well described, land shall pass according to the will, although it be land. But for the decisions to which I have referred I should have said there were no technical rules in the law of Scotland with regard to the language to be used in describing property. There was a rule for its conveyance, but I am not aware of a rule for the language necessary to describe it. The ordinary rules of language would, I should have thought, be the rules applicable. The party must give some kind of description of the subject of the deed, and it is to be construed according to the ordinary meaning of language, and without rules. But some of the decisions go to this, that "means and effects" will not include house property or land, but will include heritable bonds or bonds and dispositions in security. Now, I confess there is no statute for that, and if there is any rule of common law for it I do not know where it is to be found, except in decisions which are not unanimous. But these decisions create a difficulty no doubt. Perhaps I should observe that there was more safety and good sense in making such a rule as that "means and effects" should not include lands or houses before 1868, because then lands and houses required, in order to cover them, words of *de præsenti* conveyance—technical language. Now, however, we are dealing with the matter in a different spirit, because the Act has pronounced that if a man expresses his intention with sufficient distinctness to enable the reader to understand him, even if he does so on a sheet of paper, it shall be effectual to convey heritage as well as moveables. I sympathise entirely with what your Lordship has said as to the non-acquaintance with technical language of the person who made this will, and it was to proclaim that technical language was unnecessary that the Act was passed.

Now, applying these general observations here, I come to the conclusion that the maker of this will meant all his property to pass under it. He made no conveyance, merely expressing his will as he wished it to be carried out after his death, and to have effect with respect to all his "means and effects." I think those words include house property, unless there is something in the deed to signify the contrary, and there is nothing in this will to signify the contrary. The introductory words lead me to the conclusion that he intended to express his will with respect to all his property. I therefore conclude that he used the expression "means and effects" in the later lines in the same sense as "property" in the earlier, and the instrument would I think have had the same construction and effect if those expressions had been transposed. I therefore think we should adhere to the Lord Ordinary's interlocutor.

Lord Craighill—I concur. The case is one of some nicety, but I have felt no great difficulty in regard to it. Had the only words been "means and effects" there would have been room for doubt, for in their ordinary meaning those words signify moveable property and not heritage, but if we find that the testator intended to include house property, a wider meaning will be given to them. The case differs from most of those cited to us, in the testator using the word "property" in the opening sentence, in which he says his purpose is "to prevent all dispute after my death in regard to the disposal of my property." It is conceded that "property" will include land as well as moveables, and there is, I think, no escape from holding that he did mean to include his heritage. It would be strange if, his purpose being to prevent disputes after his death, he intended only to prevent them as to his moveable estate. He meant to prevent them as to heritage also if he left any. Therefore, the question being what he meant by "means and effects," I think we must read that expression by the light of the word "property," and hold that he meant to include lands under the words "means and effects." If so, I think the Act of 1868 removes any difficulty, because it provides by sec. 20—[*His Lordship read the section*]. Under that section if words are used as applicable to lands which in the ordinary meaning of the language apply to moveables, there is nothing to prevent the will affecting land. I think that is the case with the will of the testator. I therefore concur with your Lord-

ship and Lord Young.

Lord Rutherfurd Clark—The deed here is a will. Before the Act of 1868 that deed was not habile to dispose of land. But a change was made in our laws by the Act, which provides that no testamentary or *mortis causa* deed or writing purporting to convey or bequeath lands, should be void for certain reasons which the Act proceeds to specify. The question seems to me to be this—Does the will before us purport to convey or bequeath lands? If it does, then it is effectual to carry them; if it does not, it is ineffectual. Now, the testator here does not use the word "lands," but bequeaths his "whole means and effects in his possession, or belonging to him at the time of his death." Do these words—"means and effects"—include "lands," or is an instrument so expressed one which we are bound to hold as purporting to convey "lands"? I am sorry to say I have very great doubts whether it is of this character. We have in some decisions expressed the view that the words "means and effects" do not include "lands," and therefore it is with great hesitation that I assent to reading the words in a way contrary to the decisions. Unless I go against them I think I am bound to hold this deed ineffectual to convey the house in question, and but for the strong opinions expressed by your lordships I think I should have been bound to hold that the deed did not carry the house.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Dickson—Wilson. Agent—L. M'Intosh, S.S.C.

Counsel for the Defenders and Respondents—Macfarlane. Agents—Scott Moncrieff & Traill, W.S.

Saturday, December 17.

FIRST DIVISION.

[Lord Ordinary (Trayner) on the Bills.

TOLLEMACHE SINCLAIR *v.* OLIVER AND OTHERS.

Lease—Compensation for Improvements—Reference—Suspension and Interdict—Competency—Agricultural Holdings (Scotland) Act 1883 (46 *and* 47 *Vict. c.* 62), *secs.* 2, 3, 4, 7, 9, *and* 20.

The trustee upon the sequestrated estate of a deceased tenant gave notice to the landlord of a claim for compensation for improvements under the Agricultural Holdings Act 1883, consisting of seven different heads, and appointed a referee. The landlord also appointed a referee, but limited him to the consideration of the last two heads of the claim, on the ground that the other five could not competently be made under the statute. The trustee then applied to the Sheriff to appoint a referee, on the ground that the landlord's appointment was bad. The Sheriff appointed a referee to act along with the nominee of the trustee.

The landlord then presented a note of suspension and interdict to prevent the reference from being proceeded with. The respondent maintained that the process was incompetent, as the only mode of review provided by the statute was an appeal to the Sheriff under section 20. *Held* that the reference ought not to be allowed to proceed until it was determined whether the claim on behalf of the tenant was valid under the statute or not, and that a suspension and interdict was a competent form of process to try that question. Note *passed.*

Alexander Clyne, tenant of the farm of Weydale Mains, Thurso, belonging to Sir J. G. T. Sinclair, Bart., under a minute of agreement or lease of said farm for nineteen years from Whitsunday 1879, dated 27th December 1878, died on 13th June 1885. After his death his estates were sequestrated, and William Gordon Oliver, farmer, Sibmister, was elected trustee. Mr Oliver carried on the farm till Whitsunday 1887, when he removed from it, and it was let to a new tenant.

Before removing, Mr Oliver, on 8th January 1877, gave notice to Sir J. G. T. Sinclair of a claim for compensation for improvements as required by section 7 of the Agricultural Holdings (Scotland) Act 1883. The claim amounted to £515, and consisted of seven heads, of which the first two were for buildings, the next three for drainage, and the last two for feeding stuffs and manure. These three classes corresponded to the three classes specified in Parts I., II., and III. respectively of the Schedule to the Act. Sir J. G. T. Sinclair on 28th May 1887 intimated a counter claim of £422, 12s. 5d.

On 2d July 1887 Mr Oliver, in terms of sec. 9, sub-secs. 3 and 5, of the Act, appointed George Brown, farmer, Watten, as his referee, and requested Sir J. G. T. Sinclair to appoint another referee.

Accordingly on 8th July Sir J. G. T. Sinclair appointed James Barnetson, farmer, Ulbster, as his referee, but limited his appointment to the consideration of the last two heads of Oliver's claim, on the ground that the claim made in the first five heads was incompetent under the statute for the reasons stated below.

Considering this limited appointment as equivalent to a failure to name a referee, Oliver applied to the Sheriff-Substitute at Wick, under sec. 9, sub-sec. 6, of the Act, to appoint a referee to act for Sir J. G. T. Sinclair, and the Sheriff-Substitute appointed Alexander R. Scott, farmer, Noss.

The provisions of the Act material to the case are as follows:—

Section 2. "Compensation under this Act shall not be payable in respect of improvements executed before the commencement of this Act, with these exceptions, namely, . . . (2) Where a tenant has executed an improvement mentioned in the first or second part of this schedule within ten years previous to the commencement of this Act, and he is not entitled under any contract or custom to compensation in respect of such improvement, and the landlord, within one year after the commencement of this Act, declares in writing his consent to the making of the improvement." . . .

Section 3. "Compensation under this Act shall not be payable in respect of any improvement specified in the first part of the schedule hereto