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

[viz., building improvements], and executed after the commencement of this Act, unless the landlord . . . has previously to the execution of the improvements, and after the passing of this Act, consented in writing to the execution of such improvement." . . .

Section 4. "Compensation under this Act shall not be payable in respect of any improvement specified in the second part of the schedule hereto [viz., drainage improvements], and executed after the commencement of this Act, unless the tenant has, not more than three months and not less than two months before beginning to execute such improvement, given to the landlord . . . notice in writing of his intention so to do." . . .

Section 7. "Notwithstanding anything in this Act, a tenant shall not be entitled to compensation under this Act unless four months at least before the determination of the tenancy he gives notice in writing to the landlord of his intention to make a claim for compensation under this Act. When the tenant gives such a notice, the landlord may, before the determination of the tenancy, or within fourteen days thereafter, give a counter notice in writing to the tenant of his intention to make a claim for compensation under this Act. Every such notice and counter notice shall state, as far as reasonably may be, the particulars and amount of the intended claim."

Section 9. "Where there is a reference under this Act, a single referee, or two referees and an oversman, shall be appointed as follows:— . . . (6) If for seven days after notice by one party to the other to appoint a referee, or failing a referee appointed, another referee, the other party fails to do so, then, on the application of the party giving notice, the Sheriff shall, within fourteen days, appoint a competent and impartial person to be a referee."

Section 20. "Where the sum claimed for compensation exceeds one hundred pounds, either party may, within seven days after delivery of the award, appeal against it to the Sheriff on all or any of the following grounds:—(1) That the award is invalid; (2) that the award proceeds wholly or in part upon an improper application of, or upon the omission properly to apply, the special provisions of sections 3, 4, or 5 of this Act; (3) that compensation has been awarded for improvements, acts, or things, or for breaches of stipulations or agreements, or for committing or permitting deterioration in respect of which the party claiming was not entitled to compensation; (4) that compensation has not been awarded for improvements, acts, or things, or for breaches of stipulations or agreements, or for committing or permitting deterioration in respect of which the party claiming was entitled to compensation. . . . The decision of the Sheriff on appeal shall be final."

Sir J. G. T. Sinclair presented this note of suspension and interdict against Oliver and the referees Brown and Scott to prevent the reference being proceeded with.

The complainer averred—"Under the said minute of agreement or lease, and an additional agreement appended thereto, dated 13th October 1882, certain improvements were made on the said farm. These were almost entirely executed before the passing of the Agricultural Holdings Act, and all in virtue of special stipulations in the said agreement or lease and additional agreement. The complainer implemented the whole obligations undertaken by him under the said agreement or lease. . . . The improvements included in the said five items of claim were executed mainly in implement of the obligations contained in said minute of agreement or lease and additional agreement, and they all fall under the first and second parts of the schedule to the said Act. In so far as they were executed before the commencement of the said Act, the landlord, within one year after the commencement of the Act, has not declared in writing his consent to the making of the improvements in terms of section 2 of said Act. And in so far as such of them as are specified in the first part of said schedule and were executed after the commencement of the said Act, they were so executed without the landlord or his agent duly authorised in that behalf having previously to the execution of the improvements and after the passing of the said Act, consented in writing to the execution of such improvements, in terms of section 3 of the said Act; and in so far as such of them as are specified in the second part of said schedule, and were executed after the commencement of the said Act, no notice in writing was given by the tenant to the landlord, or his duly authorised agent, of his intention to execute such improvements; and no agreement between the landlord and tenant was ever entered into regarding the same in terms of section 4 of said Act."

The respondent replied—". . . The improvements included in the first five items of the claim, so far as not provided for by the agreements referred to, were carried out by the deceased Alexander Clyne in consequence of communications between him and Mr Logan, the factor for the respondent. After the death of the said Alexander Clyne, the documents in his possession bearing on said improvements, and including the accounts and vouchers connected therewith, were all taken away by the deceased's brother, David Clyne, by whom they were handed to the said Mr Logan. The respondent has had no means of obtaining from him the documents necessary for establishing the said claim, but intended to recover the same in the course of the reference. In these circumstances the respondent is not able to say whether the written consents and notices required by the Act in reference to claims under Schedules I. and II. were or were not given, but he considered it to be his duty to keep the matter open by including the said items in his claim."

The Lord Ordinary on the Bills (Trayner) granted interim interdict, and appointed answers to be lodged, which having been done he recalled the interim interdict formerly granted, and refused the note, &c.

"*Note.*—The respondent has made a claim against the complainer under the Agricultural Holdings (Scotland) Act 1883, and the complainer has intimated a counter claim. As parties could not agree upon their respective claims the respondent appointed a referee, and called on the complainer to appoint another, who should, in terms of the Act, determine what, if anything, was due under the said claims or either of them. The complainer appointed a referee, but excluded from the reference several of the heads of the claim maintained by the respondent. The latter thereupon applied to the Sheriff to appoint a

referee on behalf of the complainer, on the ground that the complainer had not himself made an appointment as craved. The purpose of the present note is to have the referees interdicted from proceeding with the reference, on the ground that the respondent's claim (to the extent referred to) does not fall within the statute. I am of opinion that I cannot entertain the present complaint. It is the duty of the referees to determine how far either of the claims can be given effect to, and they will do so after having heard parties, and taken such evidence as they may deem necessary or proper. If they go wrong in their decision by allowing claims not warranted by the statute or otherwise, the complainer can appeal to the Sheriff, whose judgment on such an appeal will be final. The present complaint is really an attempt to obtain a decision in the Bill Chamber or Court of Session upon one of the questions which the statute has remitted to the Sheriff for decision, and which therefore should be decided only by the Sheriff."

The complainer reclaimed, and argued—The Court of Session had the supervision of all inferior courts so as to keep them within their proper jurisdiction. The Court was here asked to stop what was clearly illegal. This arbitration should not be allowed to go on where statutory requirements had not been complied with. It was not a question of interfering with arbiters proceeding with a reference. The question was whether there was any valid reference here to proceed with. The argument on the other side, founded on the 20th section of the Agricultural Holdings Act, that this was an incompetent form of process, was irrelevant. That section provided for appeals from arbiters who had issued an award in a competent reference under the Act; and as it only made an appeal to the Sheriff competent if the sum claimed was above £100, then if this form of process was incompetent, any number of irrelevant claims might go to arbitration without the possibility of either challenge or appeal. The application here was outwith the statute, and was presented to prevent irregular and incompetent proceedings being taken—*Lord Advocate* v. *The Police Commissioners of Perth, &c.*, December 7, 1869, 8 Macph. 244, and *Hunter* v. *Barron's Trustees*, May 13, 1886, 13 R. 883.

Argued for the respondents—This form of process was incompetent because the only mode of review was by appeal to the Sheriff under sec. 20 in cases of claims over £100, and the Sheriff's judgment was final. Even if competent, the Court would not exercise its discretion by way of interdicting *ab ante* the arbiters from proceeding with the reference, from a fear that they might neglect their statutory duties, and admit incompetent claims. It was for the arbiters to decide upon the competency of the claims, and after their decision an appeal could be taken as provided by the Act.

At advising—

Lord President—The proceedings in this case commenced with a notice of claim for compensation by Mr Oliver, trustee on the sequestrated estates of the late Alexander Clyne, that claim consisting of seven different heads. The respondent Mr Oliver thereupon appointed George Brown as his arbiter, and the complainer Sir John George Tollemache Sinclair, the landlord appointed James Barnetson as his arbiter, but he qualified the appointment by limiting the arbiter to the trial of the sixth and seven heads of the claim made, because in his view the first five heads were not under the statute, and could not competently be made under the statute. The respondent then applied to the Sheriff to appoint an arbiter for the landlord, on the ground that the landlord's appointment, because limited, was not a good one, and the Sheriff assenting to this view appointed Alexander Scott.

Now, if the complainer is right in his view, that only the sixth and seventh heads of the claim can competently be sent to arbitration, then his appointment of Barnetson is good, and if he is wrong in thinking the first five heads should be excluded, then Scott's appointment by the Sheriff is good and valid. In the one case, therefore, the tribunal will be Brown and Barnetson, and in the other it will consist of Brown and Scott. Now, are we to allow the reference to go on while it is still doubtful whether Brown and Barnetson, or Brown and Scott are to be the arbiters? This to my mind affords the the solution of the whole question, for nothing could be more inexpedient and incompetent than to let such an arbitration go on, before determining which of these two sets of arbiters is to try the case. If the complainer's objection to the first five heads of the claim were manifestly frivolous, the Court would let the case go on, but it is impossible, looking to the state of the record, to say that there is anything of the nature of frivolity in these objections. The complainer says distinctly that the Act requires that with regard to some of these items there must be the landlord's antecedent consent in writing, and in regard to the others there must be notice, and that neither of these requirements has been complied with. Now, it is impossible to say that objection is either fanciful or frivolous. But I think still more weight must be given to the complainer's objection when we consider the answer made to it by the respondent. He says he does not know whether there was the required consent, or notice, or not, but he will try to prove before the arbiters that there was, and his apology for not knowing these important facts is that he is only the assignee to the claim, and that there may be some difficulty in proving whether there was consent, or notice, or not.

In these circumstances I think it would be extremely inexpedient to allow the proceedings to go on till it has been determined whether there was the necessary consent or notice or not. I am therefore for passing the note and remitting to the Lord Ordinary.

The objection to our doing so seems to be founded upon the 20th section of the Act, which provides for an appeal to the Sheriff. That is very competent and proper where the arbiters have competently entered upon the execution of their duties. But what guarantee have we here that they have any right to try the claims at all?

Lord Mure—I am of the same opinion. The simple question here is, whether the note of suspension is to be passed, its object being to stop the respondent from proceeding under an alleged arbitration with respect to certain claims for compensation for improvements. If the complainer's argument is good it would be an

incompetent arbitration. His objections are clearly stated, and there is not any very satisfactory answer given to them. The respondent frankly admits that he has not in his possession the means of answering them. I do not think in these circumstances the Court with its eyes open should allow such a case to go on with the case of *Hunter* before us, in which the other Division entertained a similar question under this Act. I think we should do the same. I therefore agree with your Lordships that we should pass the note.

Lord Adam—The 7th section of the Act says—"Every . . . notice . . . shall state, as far as reasonably may be, the particulars and amount of the intended claim." I should have thought that under that provision so many particulars at least should be set forth as would show the claim was a relevant claim. Now, from all that is said here the claim may be relevant or irrelevant, legal or illegal. It is said and admitted by the respondent that he does not know whether he has a relevant claim or not—only let him go to the arbiters, and they being good arbiters, will decide that question. But if the claim is not a legal claim the arbiters are not arbiters at all. Therefore, in the exercise of our admitted discretion, I think we should be very wrong if we sent such a claim to the arbiters.

Lord Shand was absent from illness.

The Court passed the note and remitted the case to the Lord Ordinary.

Counsel for the Complainer and Reclaimer—Balfour, Q.C.—R. Johnstone. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Respondents—D.-F. Mackintosh—Salvesen. Agent—Thomas Dalgleish, S.S.C.

Tuesday, December 20.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

NIXON (INSPECTOR OF PORT-GLASGOW) *v.* ROWAND (INSPECTOR OF BURGH PARISH OF PAISLEY).

Poor—Birth Settlement—Lunatic.

A pauper became chargeable after attaining the age of puberty, who had been deserted by her father, and whose mother was dead. She was of weak mind. *Held*, upon the evidence, following the case of *Cassels* v. *Somerville*, 12 R. 1155, that the state of her mind was not such as to render her incapable of acquiring a settlement in her own right; and, following the cases of *Greig* v. *Greig and Macdonald*, 1 Macph. 1172, and *M'Lennan* v. *Waite*, 10 Macph. 908, that as she had not acquired a residential settlement in her own right, her settlement was in the parish of her birth, in preference to any derivative settlement she might have had previously.

Bridget Tonner, a pauper, was relieved by the Inspector of Poor of Port-Glasgow in 1879. This was an action of relief at his instance against the Burgh Parish of Paisley, where the pauper was born. The date of her birth was 16th May 1863. Her mother died in May 1879. Her father was an Irishman, who had deserted his wife and child in 1864, but had returned to live with them in 1878, and again deserted his child upon the death of his wife. Between 1864 and 1879 the pauper lived with her mother in Port-Glasgow.

It was admitted in the case that the pauper had not acquired a residential settlement in her own right when she first became chargeable.

The two points maintained by the defender were—1st, that she had a derivative settlement in Port-Glasgow through her mother; and 2nd, that by reason of mental weakness she was incapable of acquiring a settlement in her own right, and that her settlement was therefore that of her father, which was not in Scotland.

With regard to the 2nd point, the evidence led before the Lord Ordinary was to this effect—Dr Clouston deponed that he found the pauper to be, not an idiot, but a congenital imbecile of a marked type, and that he did not think she was fit to do anything to earn her livelihood. Dr Littlejohn stated that she was an imbecile, and unable to do anything for her own subsistence—mentally and physically imbecile. Dr Taylor, one of the parochial surgeons in Port-Glasgow, said he found she understood what he said to her, and could give tolerably intelligent replies to his questions, and that she had evidently had no education. "I saw no physical appearances to lead me to class her as a congenital imbecile. I had no difficulty in advising the board that she was a proper object to be received into the ordinary wards of the poorhouse. I had no difficulty in certifying that she was not a lunatic, insane, an idiot, or of unsound mind, all of which questions we have to answer Yes or No. At the same time I was obliged to say she was weak in her intellect, but that is not sufficient to render her incapable of working." Dr Leslie, medical officer to the Scottish National Institution for the Education of Imbecile Children at Larbert, deponed that he had examined the pauper, and that his opinion was that she was "feeble-minded, but nothing approaching an idiot;" that she could count up to three, and that he did not see why she could not be taught more if under proper tuition.

The Lord Ordinary (Kinnear) on 13th July 1887 repelled the defences, and decerned against the defender in terms of the conclusions of the summons, and found the pursuer entitled to expenses, &c.

"*Note.*—It is admitted that the pauper had not acquired a residential settlement in her own right when she first became chargeable.

"But it is said that she had a derivative settlement in Port-Glasgow through her mother. The mother died in May 1879, when the pauper was sixteen years of age, and the father, who had deserted his wife and child in 1864, but had returned in 1878, and had been living in family with them in Port-Glasgow, again deserted his child upon the death of his wife, and has not since been heard of. When the pauper first became chargeable therefore she had attained the age of puberty. Her mother had died, and she had been deserted by her father. In these cir-