back to something already referred to by the truster, namely, the beneficiaries to whom she had directed her trustees in the immediately preceding clause to pay legacies. These, with the exception of the last of them, are fitly described as charitable and benevolent. The last of them is as clearly religious. To no one of them in my opinion can all the characteristics of benevolent, charitable, and religious be attributed. The detailed description of the infirmaries, &c., which is given in the case is to my mind entirely negative of the idea that the infirmaries, &c., are in the sense of the will religious institutions. The truster has in a foreword, as it were, given specimens of what in her conception are charitable and benevolent and religious institutions, and directs her trustees to divide the residue of her estate among the other charitable and benevolent and religious institutions in the locality named. It seems to me impossible so to construe the bequest as to limit it to a class possessed of each and all of the qualifications. I think the language of the bequest invokes and indeed necessitates the principle of construction enunciated by Sargant, J., in the case of *Eades*, [1920] 2 Ch. 353. I venture to quote the following passage from that learned Judge's opinion as expressing my own views with reference to the clause now under construction. "Such a construction . . . is sometimes referred to as a disjunctive construction and as involving the change of the word 'and' into 'or.' This is a short and compendious way of expressing the result of the construction, but I doubt whether it indicates accurately the mental conception by which the result is reached. That conception is one I think which regards the word 'and' as used conjunctively and by way of addition for the purpose of enlarging the area of selection, and it does not appear to be a false mental conception or one really at variance with the ordinary use of language merely because it involves in the result that the qualifications for selection are alternative or disjunctive."

If I have construed the clause correctly, then on the authorities—*e.g.*, *Grimond's Trustees*, (1904) 6 F. 285, (1905) 7 F. (H.L.) 90, [1905] A.C. 124; *Williams*, (1835) 5 Cl. & Fin. 111—if the bequest had been "to religious institutions" without any limitation as regards locality or otherwise, it must have been held bad. But it is said that this result is avoided by the selected class of institutions being restricted to those to be found in Glasgow and Greenock, that is, in Glasgow and in Greenock. Now the addition of a local limitation has been referred to in more than one case as a factor which might make for upholding the validity of a bequest otherwise void from uncertainty—*Shaw's Trustees*, (1905) 8 F. 52; *Turnbull's Trustees*, 1918 S.C. (H.L.) 88, [1918] A.C. 337; but no case where "religious" was the sole qualification of the object was cited to us in which this effect was given to such a limitation. It has been rejected where the bequest was for religious "purposes" within the city of Aberdeen—*Shaw's Trustees*, for "public purposes" in the parish of Lesmahagow; *Turnbull's Trustees*, and for "deserving agencies in Aberdeen and Stonehaven"; *Symmers' Trustees*, 1918 S.C. 337, and I note that in *Campbell's Trustees*, 1920 S.C. 297, Lord Dundas thought that the result would have been the same if the bequest in *Symmers'* case had been for "deserving institutions." In the present case I am unable to agree that the local limitation to Glasgow and Greenock makes valid the bequest to "religious" institutions, and for this reason, that what renders void from uncertainty a bequest where the sole characteristic of the object of the bequest is "religious" is the vagueness and want of precision inherent in and inseparable from the attribute itself. That is the inference to be drawn, I think, from what was said of the term "religious" in *Grimond's* case, both by Lord Moncreiff in this Division and by the Lord Chancellor (Halsbury) in the House of Lords. The vice is not cured by substituting "institutions" for "purposes," or by the addition of a local limitation especially where the area is so extensive as in the present case. The uncertainty remains. Is the benefaction to be restricted to institutions professing the Christian religion or the Protestant religion, or where is the limit to be drawn?

In my opinion the question should be answered in the negative.

The Court answered the question of law in the affirmative.

Counsel for the First Parties—Chree, K.C.—J. Stevenson. Agent—Campbell Faill, S.S.C.

Counsel for the Second Parties—Henderson, K.C.—Burnet. Agent—J. S. M'Culloch, W.S.

Friday, March 17.

SECOND DIVISION.

[Lord Blackburn, Ordinary.

MACKENZIE'S TRUSTEES *v.* MACKENZIE.

Succession—Liferent and Fee—Liferenter Born after Date of Deed—Right to Fee—Trusts (Scotland) Act 1921 (11 *and* 12 *Geo. V, cap.* 58), *sec.* 9.

The Trusts (Scotland) Act 1921, section 9, enacts—" . . . Where any moveable or personal estate in Scotland shall by virtue of any deed dated after the 31st day of July 1868 (the date of any testamentary or *mortis causa* deed being taken to be the date of the death of the granter. . .) be held in liferent by or for behoof of a person of full age born after the date of such deed, such moveable or personal estate shall belong absolutely to such person, and where such estate stands invested in the name of any trustees, such trustees shall be bound to deliver, make over, or convey such estate to such person."

A testator who died in 1890 provided an annuity of £1000 a-year to his son,

and further directed that on his son's death his trustees should pay a proportionate share of the average yearly income of his personal estate corresponding to a capital sum of £80,000 among his son's children "equally, share and share alike, during their respective lives." He made further provision for the disposal of the capital of any share in the event of a child marrying or dying without issue. After the death of the son one of the son's children, who was of full age and born after the testator's death, claimed payment of the fee of his share of the £80,000 which under the settlement was directed to be held for him in liferent. *Held* (*rev.* judgment of Lord Blackburn, Ordinary) that the claimant's interest under the will was a liferent interest, and that in terms of the Trusts (Scotland) Act 1921 he was entitled to payment of the fee.

The Trusts (Scotland) Act 1921 (11 and 12 Geo. V cap. 58), section 9, is quoted *supra in rubric.*

Mrs Margaret Allan Stuart Mackenzie or Davison and another (Sir James Thompson Mackenzie's trustees), *pursuers and real raisers*, brought an action of multiplepoinding and exoneration to determine certain questions arising out of Sir James T. Mackenzie's succession. A claim was lodged for Captain Eric Dighton Mackenzie, a grandson of the truster, who claimed that he was entitled to be ranked and preferred to the sum of £20,000, being the fee of a share of the truster's estate, the income of which was bequeathed to him by the truster's will. In his claim he stated—"The claimant refers to and holds as repeated *brevitatis causa* the said trust-disposition and settlement and codicils. He refers in particular to the fourth purpose of the fourth and last codicil, which, *inter alia*, provides as follows:—'My trustees shall pay over a proportionate share of the average yearly income of my personal estate, corresponding to a capital sum of £80,000, to and among the children of the said Allan Russell Mackenzie equally, share and share alike, during their respective lives, and that half-yearly or otherwise as shall be most convenient for my trustees: And in the event of the marriage of any of the said children it shall be in the power of my said trustees to raise by the sale and conversion of securities forming part of my personal estate and to settle the amounts of their respective shares of the capital of the said sum of £80,000 in their respective marriage contracts or otherwise in such way and manner as to provide for the income of the said shares being paid in the event of their survivance to the respective wives or husbands of the said children, and for the fee of the said respective shares being made over to their issue, but such settlement shall always be made in such form and manner that it shall only take effect as regards the fee of the said respective shares in the event of there being issue of the marriage who shall survive the child to whose marriage such settlement shall relate: And in the event of the death of any of the said children before the share liferented by him or her under these presents shall have been settled for behoof of his or her wife or husband and issue as above provided, or after the share liferented by him or her shall have been so settled but without leaving issue, then, and in either of these events, the share liferented by such deceasing child shall be dealt with for behoof of the surviving children and their wives or husbands and issue in the same manner as is provided with reference to the original shares to be liferented by them respectively, but subject always in the event of such share having been settled as aforesaid to the right of the surviving wife or husband (if any) of such deceasing child in the income thereof, and in the event of the death of the whole of the said children before any of their shares of the said sum of £80,000 shall have been settled as above provided, or after the sum shall have been settled but without leaving issue, then, and in either of these events, the whole of the said sum and income thereof shall revert to and form part of my general estate, but subject always, in the case of any part of the said sum which may have been settled as aforesaid, to the rights of any surviving wife or husband in the income thereof: And it is hereby expressly provided and declared with reference to the shares of income corresponding to the said sum of £80,000 provided to the said children during their respective lives, that the same are strictly alimentary provisions for the sole and separate use and behoof allenarly of the said children respectively, and it shall not be in the power of them, nor any of them, to anticipate any of the half-yearly or other payments to be made by my trustees on account of the said income, nor to assign or convey the same either onerously or gratuitously, and the same shall not be affectable by their debts or deeds or the diligence of their creditors, nor shall the said income be subject to the *jus mariti* or right of administration or other rights of the husbands of female children, nor affectable by the debts or deeds of such husbands or the diligence of their creditors.'"

The trustees *pleaded*—"2. On a sound construction of the purposes of said testamentary writings regarding the fund in question these purposes are still operative and capable of being carried into effect. 3. In any event the trustees acting under the said testamentary writings are entitled before being called on to make payment to obtain a judgment of the Court upon the claim."

The *facts* of the case appear from the opinion of the Lord Ordinary (BLACKBURN), who on 11th March 1922 repelled Captain Mackenzie's claim.

Opinion.—"This is a claim in an action of multiplepoinding in which the estate of the late Sir James Thompson Mackenzie of Glenmuick forms the fund *in medio.* Sir James died in 1890, and by the fourth clause of the fourth and last codicil to his trust-disposition and settlement he provided an annuity of £4000 a-year to his son Allan Russell Mackenzie, who succeeded him in

the baronetcy. The clause further provided that on the death of the said Allan Russell Mackenzie and the cessation of the annuity 'my trustees shall pay over a proportionate share of the average yearly income of my personal estate corresponding to a capital sum of £80,000 to and among the children of the said Allan Russell Mackenzie, equally, share and share alike, during their respective lives.' The clause goes on to provide that in the event of the marriage of any of the said children the trustees may settle the amounts of their respective shares of the capital of the said sum of £80,000 in their respective marriage contracts, so as to provide for the income being paid to their surviving husbands or wives, and for the fee to be paid to their surviving issue if any. In the event of any child dying before such settlement was made or thereafter without issue his or her share was to be dealt with for behoof of the surviving children and their wives or husbands and issue in the same manner as was provided with regard to original shares.

"At the date of Sir James' death there were in existence three children of his son Allan, and a year afterwards a fourth child was born, namely, the present claimant Captain Eric Dighton Mackenzie, who is now of age. He claims immediate payment of a share in the fee of the said capital sum of £80,000 proportionate to the share of the income which he at present enjoys, in respect that he was born after the death of the truster and is now of full age. He supports his claim by reference to the ninth section of the Trusts Act of 1921, which re-enacts section 17 of the Entail Amendment Act 1868.

"Answers have been lodged by Sir James Mackenzie's trustees, who declined to make payment without judicial authority. They state that they have ascertained that of the other parties interested in the provision, Sir Victor Mackenzie, the eldest son of Sir Allan, does not object to the claim for his personal interest. Nor does Lady Kilmarnock, a daughter of Sir Allan, although her marriage-contract trustees desire to remain neutral. The remaining child of Sir Allan was killed in the war leaving a widow from whom no answer has been received.

"I am of opinion that the section of the Trusts Act founded on has no application to the present case. The gift of income was a class gift which, subject to a certain contingency, vested *a morte* in the members of the class then in existence. The claimant's interest which emerged subsequent to the testator's death was merely to a share of the income along with the other members of the class, and does not appear to me to be a liferent within the meaning of the section. In any event his right cannot be converted from a life interest to a fee without affecting the interests of third parties born during the lifetime of the testator who have a vested right to his share of the income in certain events. This alone would appear to be sufficient to exclude the application of the section (*Baxter's Trustees*, 1909 S.C., *per* Lord Dunedin at p. 1031; *Shiell's Trustees*, 8 F., *per* Lord Stormonth Darling at p. 853). There is a further consideration, namely, that Lady Kilmarnock has three children, who were all born before the claimant came of age. Accordingly at that date when the claimant maintains that his right to the income was converted to a right of fee there were in existence members of the class on whom the whole capital of the estate had been settled by the truster who are other third parties whose rights would be affected if the claim was sustained. In my opinion the ninth section of the Trusts Act was not intended to apply and cannot be applied to such a case as this, and I shall accordingly repel the claim."

The claimant reclaimed, and argued—In terms of the Trusts (Scotland) Act 1921 (11 and 12 Geo. V, cap. 58), section 9, which re-enacted similar provisions in the Entail Acts, the claimant was entitled to be ranked and preferred in terms of his claim—*MacCulloch* v. *MacCulloch's Trustees*, 1903, 6 F. (H.L.) 3, 41 S.L.R. 88; *Shiell's Trustees* v. *Shiell's Trustees*, 1906, 8 F. 848, 43 S.L.R. 623; *Baxter* v. *Baxter*, 1909 S.C. 1027, 46 S.L.R. 743; *Crichton-Stuart's Tutrix*, 1921 S.C. 840, 58 S.L.R. 563; Bell's Dictionary, *s.v.* Liferent. If this was a liferent in the sense of the statute, the statute could not be refused effect on the ground that someone else would be injuriously affected by the conversion of the liferent into a fee.

Counsel for the pursuers and real raisers intimated that their attitude in the matter was neutral. Before the Act could be applied it must be clear that the provision in question was limited to a liferent and that it was truly a liferent interest—Ersk. ii, 9, 41, and Bell's Prin., sec. 1041, were also referred to.

LORD JUSTICE-CLERK—This is an action of multiplepoinding brought by the trustees of the late Sir James Thompson Mackenzie of Glenmuick. The Lord Ordinary has repelled the claim of Captain Eric Dighton Mackenzie, a grandson of the truster, born after the truster's death and under such circumstances as brought into operation the provisions of section 9 of the Trusts (Scotland) Act of 1921. That section practically repeats earlier provisions which occurred in some of the Entail Statutes. Section 9 provides—"It shall be competent to constitute or reserve by means of a trust or otherwise a liferent interest in moveable and personal estate in Scotland in favour only of a person in life at the date of the deed constituting or reserving such liferent, and where any moveable or personal estate in Scotland shall, by virtue of any deed dated after the thirty-first day of July Eighteen hundred and sixty-eight (the date of any testamentary or *mortis causa* deed being taken to be the date of the death of the granter, and the date of any contract of marriage being taken to be the date of the dissolution of the marriage), be held in liferent by or for behoof of a person of full age born after the date of such deed, such moveable or personal estate shall belong absolutely to such person, and where such estate stands invested in the name of any trustees, such trustees shall be bound to deliver, make over, or convey such estate"

to the person in question who has the liferent. In the circumstances of this case that section applies exactly to the provision in question, which is in favour of this posthumous child Eric if the effect of the trust is to constitute a liferent in his favour.

The truster himself in my opinion quite plainly thought he was constituting a liferent by the provisions of his deed, and that he could effectively constitute a liferent. Accordingly the first question we have to consider is, What is the legal character of the provision which Eric Mackenzie now enjoys under his grandfather's settlement? The best definitions of a liferent in our books, I think, are to be found in Bell's Principles, sections 1037 and 1041. In section 1037 he refers to the Roman servitudes, habitation, and usufruct. The latter he says is "a right to use and enjoy a subject during life without wasting its substance." Then he goes on to say—"This . . . corresponds with liferent in the law of Scotland, which is more of the nature of limited property than of servitude. It is the right to use and enjoy a subject during life without destroying the substance." In section 1040, which deals with liferent by reservation, he says — "This form of liferent is constituted by a conveyance of land or other heritable subject in fee, reserving to the granter the liferent use." In the following section, which deals with liferent by constitution, he says — "Liferent by constitution is created in a marriage-contract, settlement, or other conveyance, by disponing an estate to one in liferent and another in fee . . . or by an annuity of a certain sum payable out of the estate." In these definitions Professor Bell was proceeding on passages in Erskine's Institutes, ii, 9, 39, and ii, 9, 41. I also refer particularly to ii, 9, 43, where Erskine says—"Life annuities secured on land are truly conventional liferents. These are rights of a yearly sum of money or quantity of grain made payable by a proprietor out of his lands and constituted by seisins which subsist during the life of the annuitants. They are generally granted to widows either in place of or as an addition to their legal provisions, and sometimes they are purchased by the annuitant for a price presently paid." Having regard to these definitions I have no doubt that what Eric Mackenzie takes here is a liferent under his grandfather's will in circumstances, as I have said, to which the Trusts Act of 1921 is applicable.

I do not agree with what the Lord Ordinary says to the effect that these provisions resulted in a gift of income to a class. At any rate I think the gifts were several, and in point of fact were separated, and Eric Mackenzie in terms of the will now enjoys his own share of the income of the capital fund in question. The result, in my opinion, is that Eric Mackenzie simply gets a liferent of so much of this capital fund which the trustees hold for his behoof, and as he was not in life at the date of the deed constituting or reserving the liferent, is now of full age, and was born after the date of the deed, I see no answer to his demand that his grandfather's trustees should pay over to him the capital corresponding to his liferent.

Several cases have been referred to. The case of *MacCulloch* (1903, 6 F. (H.L.) 3) has, in my opinion, no application to this case, and indeed Mr Watson quite properly said he did not found upon it as a judgment which would in any way affect this case. But he referred to certain observations of Lord Davey (at p. 6) in the House of Lords. But both *MacCulloch's* case and *Haldane's* case (1895, 23 R. 276) were judgments not upon the statute in question but referred to prior statutes, and specially proceeded on the construction of the particular settlements which were then being considered. *MacCulloch's* case was decided by the Second Division proceeding expressly and entirely upon the decision of the previous case of *Haldane*. Lord Davey says he does not think that was a right view. But whether it was a right view or not, neither of these were judgments upon the statute. I do not think that the observations which were there made, though I accept them as sound in the particular circumstances in which they were made, are binding upon us when we are asked to give a judgment upon this statute which we are now construing.

To the circumstances of this case the statute is, in my opinion, distinctly applicable. The provision made is in my judgment a liferent. The person entitled to the liferent fulfils all the conditions which are required to bring the statute into operation. He makes his demand upon the trustees by lodging a claim in this multiplepoinding to be entitled to the proceeds of the sum in question and to be ranked and preferred to the sum of £20,000. Having regard to the terms of the statute I see no answer to the claim so made. The claim of Eric Mackenzie, therefore, instead of being repelled should be sustained to the effect that the trustees must now pay the money over to him.

The Lord Ordinary suggests that this will disappoint some of the people who but for Eric's claiming the payment of this money would or might subsequently succeed to it. I cannot follow that reasoning because I think the purpose of the statute could not possibly be carried out without prejudicing someone. It is no reason, in my judgment, for refusing to give effect to the statute that the result of that would be to make some other beneficiaries worse off than they otherwise would have been. The purpose of the statute was to discourage the tying up of moveable property by way of liferent, and I think we are bound to give effect to the statute even although the result is to prejudice others who might have succeeded to the capital liferented.

I think we should recal the Lord Ordinary's interlocutor and rank and prefer Captain Eric Dighton Mackenzie in the terms of his claim.

Lord Salvesen — On the language of section 9 of the Trusts (Scotland) Act of 1921 I find it impossible to reach any other conclusion than that which your Lordship in the chair has formulated. The operative

terms are—"Where any moveable or personal estate in Scotland shall by virtue of any deed dated after the thirty-first day of July Eighteen hundred and sixty-eight (the date of any testamentary or any *mortis causa* deed being taken to be the date of the death of the granter, and the date of any contract of marriage being taken to be the date of the dissolution of the marriage) be held in liferent by or for behoof of a person of full age born after the date of such deed, such personal or moveable estate shall belong absolutely to such person." There does not seem to me to be any dubiety in that language. The only question that could be raised is whether the estate was held in liferent by the claimant. In the deed itself the trustees are directed to hold a sum of £80,000 for behoof of the children of Sir Allan Mackenzie, on the footing that the children are to share equally in the income of that fund. If the deed receives effect no one of these children can have any other interest in that fund than that of an alimentary liferenter. There is no question of their taking a contingent fee under the provisions of their grandfather's settlement. If that be so, then every factor that must be established in order to entitle this claimant to succeed is present. The trustees hold estate—that is not doubtful—under a deed dated after 1868. The claimant has a liferent interest in that estate, and is now a person of full age, born after the date of the death of his grandfather, which is to be taken as the date of the deed. I cannot understand how it can be said that he had any other interest in the fund than a liferent interest, and that, I think, irrespective of the question whether the shares were separable shares. But if any difficulty could arise because the bequest was not separable, it does not arise here, for the testator contemplated that the £80,000 was to be split up from time to time, *e.g.*, as one or other of his children married, and the trustees were directed either to hold a share, ascertained at the time by the number of the family, in their own hands, or to hand over in the form of securities or cash the amount corresponding to that share to be held by the marriage-contract trustees. We were told that in point of fact these powers had been exercised, and that two sets of marriage-contract trustees held between them £40,000, and that there is only £40,000 left, one-half of which goes to Sir Victor Mackenzie, and the other half of which has been enjoyed by the claimant. I may add that the testator invariably speaks throughout the settlement of the shares as "their separate shares," *i.e.*, he speaks of a share as a thing liferented by a particular child. Accordingly, not only has there been contemplated separation, but there has been actual separation, and we now know that the claimant's share in his grandfather's settlement was £20,000, which has been held by the trustees for his behoof.

That is the only question raised here, and, like your Lordship in the chair, I am entirely at a loss to understand what relevancy there is in the view of the Lord Ordinary that the plain intention of the statute is not to take effect because some persons would be prejudiced. Where a liferenter is entitled to have it declared that the fee is also vested in him, and must be paid over to him, others must necessarily be disappointed who might take in the event of his dying while he was still a liferenter. And whether these persons are alive or may come into existence later will not affect the principle of the matter. I have no doubt that the Lord Ordinary was misled by a construction of some of the observations in the cases that have been referred to, and that he has not paid sufficient attention to the terms of the statute itself, which seem to me not to be open to construction except in so far as I have stated, *i.e.*, there might be a controversy in a particular case whether there was really an estate held in liferent.

LORD ORMIDALE—Under his grandfather's settlement Captain Eric Mackenzie had only a liferent interest in a share of his grandfather's estate. There is nothing to suggest that he had anything of the nature of a contingent fee, and therefore the case is entirely different from the case of *Shiell*, (1906) 8 F. 848. It seems to me that he had, to adopt Lord Kyllachy's language, neither more nor less than a liferent. Accordingly, so far as his interest is concerned, the requirements of section 9 are satisfied. The only thing that has occasioned me any difficulty is, that while it goes without saying that where a liferenter takes advantage of section 9, then the interest of the beneficiary who would eventually be the fiar of the sum liferented must suffer, there has been a suggestion in certain cases in which the question arose under the earlier statute that the position would be different if in the event of the liferenter being allowed to take advantage of the provision corresponding to section 9, injury to persons other than the ultimate fiar might be caused. The earliest of these is *MacCulloch's* case, (1903) 6 F. (H.L.) 3. It may be that that case did not raise a question to which the statute was directly applicable, but in *Baxter's* case, (1909) S.C. 1027, at p. 1031, Lord Dunedin thought it worth while, when the Court was construing the section corresponding to section 9, to refer to *MacCulloch's* case and to *Shiell's* case, which he thought proceeded upon the judgment in *MacCulloch's* case. In dealing with the latter he pointed out that in addition to the interest of the person who would eventually become fiar, it was possible that the interests of parties, who would during their lifetime have taken some of the share if the provisions of the testator were allowed to be carried out, might suffer. That makes it necessary to examine very closely the provisions of the particular settlement which is under construction. At first, on an examination of these provisions, I thought that the Lord Ordinary had come quite rightly to take the view which he has expressed. But on consideration I am satisfied that that is not

so, although I am not sure that I quite follow Lord Dunedin in the observation that he made, and counsel were unable to assist me by giving any apt illustration of what they conceived to have been in his Lordship's mind.

I think it is impossible to say that there are here third parties who would during their lifetime have taken some of the share destined to the claimant if the provisions of the testator had been allowed to be carried out, *i.e.*, who would have benefited under the deed if they happened to survive the present claimant. I agree with your Lordships that the bequest is not a joint one. As Mr Watson pointed out, the idea of severance is to be found at the very beginning of the provision, and is continued right throughout. On the marriage of any one of the children the trustees are directed actually to realise sufficient of the estate to reduce the child's interest into an aliquot and distinct part. Accordingly, as I cannot think that any beneficiary under this settlement other than the ultimate fiar would be affected by giving effect to section 9, I agree with your Lordships that the judgment of the Lord Ordinary should be recalled.

The Court recalled the interlocutor of the Lord Ordinary, ranked and preferred the claimant in terms of his claim, and remitted the cause to the Lord Ordinary to proceed.

Counsel for the Claimant and Reclaimer—Macphail, K.C.—Skelton. Agents—R. R. Simpson & Lawson, W.S.

Counsel for the Pursuers and Real Raisers—Watson, K.C.—Carnegie. Agents—Tods, Murray, & Jamieson, W.S.

HOUSE OF LORDS.

Tuesday, May 23.

(Before Viscount Haldane, Viscount Finlay, Viscount Cave, Lord Dunedin, and Lord Wrenbury.)

CRERAR *v.* BANK OF SCOTLAND.

(In the Court of Session, June 18, 1921, S.C. 736, 58 S.L.R. 524.)

Bank—Right in Security—Secured Loan Account—Transfer to Bank of Shares in Security of Advances—Right of Bank to Tender Shares of Same Denomination in Lieu of Specific Shares Transferred—Acquiescence in System followed by Bank—Bar.

In an action against a bank by one of its customers, who had transferred to the bank in security of advances shares of a certain denomination, the pursuer claimed that on repayment of the loan the bank was bound to account to her for its intromissions with the specific shares lodged, and that it was not entitled to tender a corresponding amount of shares of the same denomination. In the course of the action it was found in fact by the First Division, on appeal from the Sheriff Court, that the bank credited the pursuer in its books with the quantity of shares transferred without making any note or keeping any record of the denoting numbers of the shares, and treated them as interchangeable with the shares of the same denomination held by it on account of other customers, that in the transactions in question the bank acted throughout in accordance with their usual practice, and that this practice was known to and approved of by the firm of stockbrokers whom the pursuer employed as her agents to carry through the transactions with the bank. *Held* (*aff.* judgment of the First Division) that on the facts so found the defenders were not bound to account to the pursuer for their intromissions with the specific shares in question, and appeal *dismissed.*

The case is reported *ante ut supra.*

The pursuer appealed to the House of Lords.

At delivering judgment—

VISCOUNT HALDANE—The point in this case is a very short one, and your Lordships do not think it necessary to take further time to consider the appeal.

I do not propose to recapitulate the facts out of which the claim arises, they are not in dispute. The position in which we sitting in this House are placed makes it the less necessary, for the appeal is limited by the provisions of the 40th section of the well-known Act of 6 Geo. IV, cap. 120, which provides that "when in causes commenced in any of the courts of the sheriffs . . . matter of fact shall be disputed and a proof shall be allowed and taken according to the present practice, the Court of Session shall, in reviewing the judgment proceeding on such proof, distinctly specify in their interlocutor the several facts material to the case which they find to be established by the proof, and express how far their judgment proceeds on the matter of fact so found or on matter of law and the several points of law which they mean to decide; and the judgment on the cause thus pronounced shall be subject to appeal to the House of Lords in so far only as the same depends on or is affected by matter of law, but shall, in so far as relates to the facts, be held to have the force and effect of a special verdict of a jury finally and conclusively fixing the several facts specified in the interlocutor."

Now the case was heard first before the Sheriff-Substitute, who after various proceedings made certain findings. But these were recalled by the Sheriff-Principal, and finally the Court of Session disposed of the matter both in point of fact and in point of law. So far as findings of fact are concerned your Lordships are debarred from considering them here excepting as they raise questions of law.

It was a case in which a lady had sought to claim in an action of accounting against