Counsel for the Pursuer—Solicitor-General (Dickson, Q.C.)—G. Watt. Agent—Marcus J. Brown, S.S.C.

Counsel for the Defenders—Ure, Q.C.—Grierson. Agent—James Watson, S.S.C.

Saturday, July 7.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

CALLANDER *v.* SMITH.

Landlord and Tenant—Outgoing—Compensation for Improvements—Market Garden—Statute—Construction—Effect—Retrospective Effect—Presumption against Retrospective Effect—Market Gardeners Compensation (Scotland) Act 1897 (60 *and* 61 *Vict. cap.* 22), *sec.* 4.

Section 4 of the Market Gardeners Compensation (Scotland) Act 1897, does not entitle a tenant under a lease current at the commencement of the Act, to claim compensation in respect of market garden improvements executed prior to the commencement of the Act.

Landlord and Tenant—Outgoing—Compensation for Improvements—Market Garden—Market Gardeners Compensation (Scotland) Act 1897 (60 *and* 61 *Vict. cap.* 22), *sec.* 4—"*Has then executed thereon.*"

In the Market Gardeners Compensation Act 1897, sec. 4, the words "has then executed thereon . . . . improvements in respect of which a right of compensation or removal is given to a tenant by this Act," mean "has executed" such improvements "prior to the commencement of the Act."

Landlord and Tenant—Outgoing—Compensation for Improvements—Market Garden—Market Gardeners Compensation (Scotland) Act 1997 (60 *and* 61 *Vict. c.* 22)—"*Holding*"—"*Part of a Holding*"—*Agricultural Farm Partly Used as Market Garden.*

Held per Lord Kyllachy (Ordinary), and acquiesced in, that in the construction of the Market Gardeners Compensation (Scotland) Act 1897, the term "holding" includes "part of a holding," and that consequently section 4 of the Act applied where part of a farm, held under an ordinary agricultural lease, had been cultivated as a market garden prior to the commencement of the Act.

By section 1 of the Agricultural Holdings (Scotland) Act 1883 (46 and 47 Vict. cap. 62), it is provided that a tenant who has made on his holding any improvements specified in the schedule thereto shall be entitled on quitting his holding to obtain from the landlord as compensation such sum as fairly represents the value of the improvements to the incoming tenant. Part III of the schedule specifies certain improvements to which the consent of the landlord is not required in order to entitle the tenant to compensation.

By section 42 of the Act "holding" is defined as "any piece of land held by a tenant."

By section 3 of the Market Gardeners Compensation (Scotland) Act 1897 (60 and 61 Vict. cap. 22), which amends and extends the provisions of the Act of 1883 as to improvements executed in or upon market gardens, it is provided that where after the commencement of the Act (1st January 1898), it is agreed in writing that a holding shall be let or treated as a market garden, the following provision, *inter alia*, shall have effect:—"(3) The following improvements shall, as far as regards such holding, be deemed to be comprised in Part III of the said schedule—(i) the planting of standard or other fruit trees permanently set out; (ii) planting of fruit bushes permanently set out; (iii) planting of strawberry plants; (iv) planting of rhubarb and other vegetable crops which continue productive for two or more years; (v) erection or enlargement of buildings for the purpose of the trade or business of a market gardener."

Section 4 of the said Act enacts as follows—"Where under a lease current at the commencement of this Act a holding is at that date in use or cultivation as a market garden with the knowledge of the landlord, and the tenant thereof has then executed thereon, without having received previously to the execution thereof any written notice of dissent by the landlord, any of the improvements in respect of which a right of compensation or removal is given to a tenant by this Act, then the provisions of this Act shall apply in respect of such holding as if it had been agreed in writing after the commencement of this Act that the holding should be let or treated as a market garden."

By section 6 of the said Act it is provided that "for the purposes of the principal Act and of this Act the expression 'market garden' shall mean a holding or that part of a holding which is cultivated wholly or mainly for the purpose of the trade or business of market gardening."

By lease dated 19th April and 2nd May 1881 Henry Callendar of Prestonhall and Westertown let to David Whytt Ewart Smith the farm of North Elphinstone, which extends to 359 acres or thereby, for nineteen years from Martinmas 1880.

By the lease Mr Smith bound himself to cultivate and labour the lands let according to the rules of good husbandry, and not to run out the same by irregular or over-cropping, and in particular never to have more than one-half of the lands in white crop at any time during the running of the lease, and to have the other half always in grass, fallow, or green crop, and never less than one-sixth part thereof in grass, and to leave the lands so at his removal. The lease contained a clause binding the tenant to pay an additional rent of £5 per acre for each acre cropped contrary to its terms.

At the end of 1898 Mr Smith gave notice

to the landlord that he intended to leave the farm at the expiry of the lease at Martinmas 1899.

On 7th July 1899 Mr Smith, who for a considerable number of years had used part of the farm for growing raspberries and strawberries, sent to the landlord a notice of claim for compensation under the Agricultural Holdings Act 1883, and the Market Gardeners Compensation Act 1897. In this notice were included the following items:—

(*c*) "In respect of fruit bushes permanently set out, 6 acres 3 roods 11 poles raspberry bushes, containing 27,319 bushes at 6d. £682 19 6

(*d*) "In respect of strawberry plants—18 acres 1 rood 10 poles; consisting of first year's strawberries—9 acres 2 roods 27 poles, and 57,247 lineal yards at 2d. per yard - - - - - £468 14 6

'Second year's strawberries—8 acres 2 roods 23 poles, and 48,238 lineal yards at 1d. per yard - - - - - - 200 19 10

£669 14 4

(*e*) "In respect of the erection of buildings for the purpose of the trade or business of a market gardener—

"Tomato house - -	£25	0	0
"Packing shed - -	6	0	0
"Store, &c. house -	10	0	0
	£41	0	0"

Following on this claim Mr Smith presented a petition to the Sheriff-Substitute at Haddington for the appointment of a referee under the Acts.

The landlord lodged defences to this petition, in which he objected to the above items being made the subject of the reference.

On 15th December 1899 the Sheriff-Substitute (SHIRREFF) appointed Walter Horsburgh Gibson, tenant of Camptoun, Haddington, as referee.

On 17th December 1899 Mr Callander presented a note of suspension and interdict in which he called Mr Smith and Mr Gibson as respondents, and prayed the Court to interdict Mr Smith from insisting in or prosecuting the foresaid items of his notice of claim, and to interdict Mr Gibson, as referee foresaid, from entertaining or awarding any sum in respect of the items (c), (d), and (e) of the notice of claim. The complainer was subsequently allowed to amend the prayer of the note by adding the following words:—"Or otherwise to interdict, prohibit, and discharge the said respondent David Whytt Ewart Smith from insisting in or prosecuting and following further the foresaid items of said pretended notice of claim in so far as they relate to alleged improvements executed prior to 1st January 1898."

The complainer averred (Stat. 3) that about ten years ago, notwithstanding the terms of the lease, the respondent Smith, without any notice to or permission from the complainer his landlord, began to use a portion of a field on the farm for growing raspberries and strawberries, and continued to do so until the expiry of the lease. He also averred as follows:—"(Stat. 5) The complainer believes and avers that the greater portion of the said alleged improvements, in respect of which compensation is claimed under the said items of claim, were executed prior to 1st January 1898, when the said Market Gardeners Compensation (Scotland) Act 1897 came into operation."

The respondent averred, *inter alia*, as follows:—"(Ans. 3) Admitted that about fourteen years ago the respondent commenced to cultivate raspberries and strawberries, and that he has carried on that cultivation ever since with the full personal knowledge of the complainer, and also with the personal knowledge of the successive factors on the estate, who have been five in number, without objection from the complainer or any of said factors. It is common to grow market garden crops on farms in the locality in which North Elphinstone is situated. It is the centre of a large market garden industry, and many of the farms in the neighbourhood are partly cultivated as market gardens. Strawberries were grown on another part of the farm during the respondent's lease by a sub-tenant of the respondent, and permission was got from the complainer's factor to sub-let part of the farm for that purpose." (Ans. 5, 6, and 7) . . . . "Admitted that the greater portion of the improvements in question was executed prior to 1st January 1898." . . . .

The complainer pleaded, *inter alia*—"(2) As the Market Gardeners Compensation (Scotland) Act 1897 does not apply to a holding such as North Elphinstone, the complainer is entitled to interdict as craved with expenses. (4) In any event, the respondent is not entitled to compensation for alleged improvements executed prior to the commencement of the said Act, and the complainer is therefore entitled to suspension and interdict in terms of the alternative prayer of the note."

The respondent David Whytt Ewart Smith lodged answers and pleaded, *inter alia*—"(6) The prayer of the note ought to be refused with expenses, in respect that the respondent is entitled, on a sound construction of the Market Gardeners Compensation (Scotland) Act 1897, to compensation for his improvements executed prior to as well as after 1st January 1898."

On 29th December 1899 the Lord Ordinary on the Bills (KINNEAR) passed the note and refused interim interdict.

Thereafter the reference proceeded, and the referee issued his final award on 29th January 1900. The complainer appealed to the Sheriff.

On 15th March 1900 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—"Interdicts, prohibits, and discharges the respondent the said David Whytt Ewart Smith from insisting in or prosecuting and following further the items of the pretended notice of claim specified in the prayer of the note, in so far as they relate to alleged improvements executed prior to 1st January 1898: *Quoad ultra* refuses the prayer of the note: Finds no

expenses due to or by either party, and decerns."

Note.—"In this case I do not, I think, require to resume the facts. They appear upon record as succinctly as I could state them.

"The first question is whether the respondent's claim for alleged improvements under the Market Gardens Act of 1897 is wholly outwith the statute, in respect that the respondent's holding is an ordinary agricultural farm, and that only a part of it has been cultivated as a market garden. The affirmative is maintained by the complainer on the ground that the statute only applies where 'a holding is cultivated as a market garden,' that a holding is *prima facie* an entire holding, and that there is nothing in the interpretation clause either of the Act of 1897 or of the principal Act (the Agricultural Holdings Act of 1883) which defines a holding as including part of a holding.

"On this question—which, as it seems to me, involves only a verbal puzzle—my opinion is with the respondent. The Act of 1883 defines a holding as 'any piece of land held by a tenant;' and the Act of 1897 contains only an interpretation of the phrase 'market garden'— which, however, it proceeds to define as 'a holding, or that part of a holding which is cultivated wholly or mainly for the purpose of the trade or business of market gardening.' In these circumstances the question comes really to be, whether the words 'any piece of land held by a tenant' cover any piece of land so held, whether it be a part or the whole of the actual holding. Now, I am not sure how far that interpretation would work as applied to the principal Act. I can see that with respect to some of the clauses of that Act its application might be difficult. But however that may be, one thing is, I think, clear enough, that the interpretation clause of the latter Act—the Act of 1897—assumes, if it does not express, the interpretation suggested. Otherwise the clause in question—I mean the interpretation clause of the Act of 1897—would as far as I see, be unintelligible. Accordingly, in my opinion, it follows that, on the just construction of the Act of 1897, it must be held that the term 'holding' includes any part of a holding.

"The next question is, whether it does not appear sufficiently on the face of the record that at least a large and separable part of the complainer's claim is outside the statute, and cannot therefore be properly adjudicated upon by either the arbiter or the Sheriff.

"The part of the claim of which this is sought to be affirmed is the demand for compensation in respect of strawberry, raspberry, and other plants planted in the years from 1894 to 1897, prior to the commencement of the statute in January 1898. The complainer says that, assuming all other facts in the respondent's favour, the 4th section of the statute (being the section on which the claim is rested) confines the operation of the statute to improvements of the required description executed without dissent by the landlord after the commencement of the Act.

"I am, on the whole, of opinion that on the just construction of the section the complainer is right. The question appears to turn on the meaning of the word 'then,' occurring on the fourth line of the section; and that word, as there used, means, in my opinion, and must mean, 'thereafter' or 'subsequently,' as maintained by the complainer—not 'theretofore' or 'previously,' as suggested by the respondent. In other words, the true meaning of the 4th section appears to be that in the case of current leases, and with respect to improvements executed after the commencement of the Act, it shall not be necessary to have a written agreement, dated after the commencement of the Act, agreeing that the holding shall be treated as a market garden, but that it shall be enough with respect to such improvements (1) that the landlord 'at the commencement of the Act' knew that market gardening was being pursued; and (2) that, so knowing, he did not dissent in writing from the execution of the improvements for which compensation is claimed.

"The opposite reading is not, as it appears to me, required by the grammatical construction, and it seems to involve at least two absurdities: (1) that compensation shall be paid for *old* improvements, but not for *new*,—that is to say, shall be paid only for improvements executed before the Act; (2) that with respect to such old improvements the landlord's consent shall be held implied unless he shall have expressed his dissent before the commencement of the Act, and also before, it might be, he had any knowledge that his land was occupied as a market garden.

"It has not been, it may be proper to note, suggested that what the 4th section really means is, that if under a current lease and subject to the prescribed conditions *any* improvement of the required kind is executed, the effect is to subject to compensation *all* improvements whenever executed, whether before or after the Act, and whether or not dissented from by the landlord. It is true that if the section were to be read quite literally, such a construction might be maintained. For, as expressed, the result of making an improvement is not that it shall be itself compensated, but that the Act shall apply as if an agreement in writing had been executed in terms of section 3. And that being so, it is perhaps true that under section 3 the effect of such an agreement is quite general, and is not confined to improvements executed after the date of the agreement, or even to improvements executed after the date of the Act. But it is, of course, necessary that the statute shall receive a rational interpretation; and when language is obviously elliptical, the necessary implications must be supplied. Here it is, I think, plain enough that the whole enactment of the 4th section applies only to the improvements which it describes. These improvements are its subject-matter, and as applying to them it must be read. Reading it otherwise, the result would, *inter alia*, be that if after the commence-

ment of the Act a tenant in the position of the respondent contrived to plant without previous dissent from his landlord a single strawberry plant, he would thereby open to himself a claim to be compensated for all improvements falling under the Act, whether past or future, and whether made with the landlord's consent or in face of his express dissent. I must say that I do not think that this would be a rational construction of the statute, and therefore I am not surprised that the respondents did not venture to maintain it.

"I am on the whole, therefore, of opinion that, so far as the respondent's claim applies to improvements made prior to the commencement of the Act, the claim is outside the statute, and that neither the arbiter nor the Sheriff is entitled to deal with it.

"It remains to consider whether, this being so, there is any reason why interdict should not be granted, at least to the modified effect expressed in the complainer's amended prayer. It appears to me that there is no such reason. It is said that the arbitration has proceeded, and that the arbiter has issued his award; but it is, I think, settled practice that if a process of interdict has been timeously brought, it is no obstacle to a final interdict that, *pendente processu*, the illegal proceedings have been completed — See *Grahame* v. *Magistrates of Kirkcaldy*, 9 R. (H.L.) 91, and other cases cited at the debate.

"It is also said that there has been an appeal to the Sheriff, and that under the Act the Sheriff is final. But the appeal is only taken *ob majorem cautelam*, and where the question is whether the proceeding is within or outside the statute, there can be no finality.

"It is said finally that the Court does not as a rule assume that the statutory tribunal will exceed its powers, and does not therefore as a rule interpose *ab ante*. As to this, however, there is, in my opinion, no general rule. It is a question of circumstances and discretion, and, taking the decisions as they have occurred, there are, I should think, as many one way as the other. Here the point at issue is not only distinct and separable, but arises sufficiently on the pleadings. Moreover, the Court is informed that the arbiter has (if I am right in my view) in fact misconstrued the statute and exceeded his jurisdiction. Altogether I can see nothing to be gained by refusing to utilise this process, in which the question can quite well be tried, and putting the parties to the expense of a reduction. Such a course would, I must say, strike me as somewhat pedantic.

"Accordingly, on the whole matter I am of opinion that the complainer is entitled to interdict in terms of his alternative and qualified prayer, and that *quoad ultra* the suspension should be refused, no expenses being found due to or by either party."

The respondent Smith reclaimed, and argued—Section 4 of the Act of 1897 had a retrospective effect and gave the tenant compensation for improvements executed prior to, as well as for those executed after, the commencement of the Act. The Lord Ordinary had not stated the respondent's argument correctly. He maintained that the section applied to all improvements executed both before and after the commencement of the Act. The landlord's notice of dissent was on a sound construction of the section dissent whenever the holding was begun to be used as a market garden, and that might be before the commencement of the Act. This showed that the Act had a retrospective effect. The Lord Ordinary had turned "has then" into "shall thereafter." The section provided that if a tenant was using his holding or part thereof as a market garden at the date of the commencement of the Act without the written dissent of the landlord, he was entitled to compensation for all improvements made by him during the period of such use.

Argued for complainer—The Lord Ordinary's construction of the meaning of section 4 was right. "Then" as used in the section meant "thereafter." The whole tenour of the Act showed that it had no retrospective effect. The provision as to the landlord's dissent in writing would be of no avail, if the Act applied to improvements before its commencement. That provision was inserted in order that the landlord might be able to stop the application of the Act. In any event, if the section was ambiguous, it must be interpreted so as not to apply retrospectively — Maxwell on Interpretation of Statutes, 3rd ed. 298.

At advising—

LORD JUSTICE-CLERK—I have felt myself unable to agree with the interpretation of section 4 of the Market Gardeners Compensation Act 1897 arrived at by the Lord Ordinary. He reads the words "has then executed thereon" as if the words were "has thereafter" or "has subsequently." I think that the reading is strained, and that the sound view is that the clause relates to a case where before the Act a tenant has with knowledge of and without written dissent from the landlord made improvements such as those contained in the 3rd section of the Act—then the Act is to apply as if the parties had agreed in writing after the commencement of the Act. Therefore I cannot assent to the ground on which the Lord Ordinary has decided the case.

But another question arises. Even if the case be one in which the conditions of section 4 apply as I have stated them, it does not follow that in any question of compensation things done before the Act may be subjects of compensation, there being no bargain between the landlord and tenant importing liability by the landlord for the improvements. The purpose of the Act under the enacting section (sec. 3) is to give compensation to a tenant who after the Act with the written consent of the landlord does certain things upon the land, and in the view I take of section 4, it is intended to give to tenants in the circumstances there set forth the

same benefits, and only the same benefits, as are conferred on tenants under section 3 —viz., compensation for improvements made after the Act. In the one case there must be written consent. In the other case the previous acquiescence of the landlord is held to entitle the tenant to the benefit of the Act. But it is the same benefits in both cases,– viz., compensation for improvements after the passing of the Act. I therefore think that the conclusion of the Lord Ordinary is right. It is admitted on record that the improvements in question were in the main executed before the commencement of the Act, and therefore I am of opinion that the Lord Ordinary has rightly held that the complainer is entitled to interdict.

LORD TRAYNER—I cannot agree in the Lord Ordinary's view that the words "has then executed" refer to something which the tenant should "thereafter" or "subsequently" perform. That seems to me a subversion of the language of the statute. But that interpretation of the clause is not necessary to support the conclusion at which the Lord Ordinary has arrived—a conclusion in which I concur.

To support the contention of the reclaimer it would be necessary to hold that the Act was retrospective in its application, and according to rule that is never done unless warranted by the Act itself, expressly or by necessary implication. Now, there is nothing in the Act to suggest that it was intended to be retrospective. The contrary is what I would infer from the fact that the Act was passed to confer a benefit not previously enjoyed, and which only came into existence by the passing of the Act.

The Act provides for two different cases, viz. (1), the case where after the commencement of the Act it was agreed in writing that a holding should be used as a market garden (which is not the case we have here to deal with); and (2) the case where land held under a lease current at the commencement of the Act had been used and cultivated as a market garden with the knowledge of the landlord, and on which the tenant had "then" (that is, at the commencement of the Act) executed improvements of the character to which the Act refers. In this latter case (which is the case before us) the Act confers a benefit upon the tenant. But what benefit? As I have noticed already the reclaimer (the tenant) says it confers on him a right to compensation for improvements executed by him during the currency of his lease. I think that is not so. The Act points out what is to be the effect of the tenant's operations executed before the passing of the Act in the knowledge of his landlord under a lease then current. It is to put such a tenant in the same position as one who after the passing of the Act had taken under a written agreement land to be used as a market garden. But a person who after the commencement of the Act took land to be used as a market garden could not possibly claim for improvements on the land at an earlier date. Nor can the reclaimer. If the reclaimer is allowed compensation in respect of improvements executed after the commencement of the Act, he is put on the same footing as a tenant who contracted in view of the Act. The terms of clause 4 in my opinion give him nothing more.

LORD MONCREIFF—The effect of the 3rd section of the Market Gardeners Act of 1897 is prospective, and under it a tenant has no claim for compensation unless it is agreed in writing between landlord and tenant that the holding shall be let or treated as a market garden.

In my opinion the only effect of the 4th section is this, that where under an ordinary agricultural lease current at the commencement of the Act, a holding (which I assume may be part of land let for other purposes) is in use with the knowledge of the landlord as a market garden, and where the tenant has by that date (that is, at the commencement of the Act) made any improvements of the character specified in section 3, sub-section (3), the result is, not that the tenant shall have any claim for those past improvements, but that he is freed from the necessity in the future of having an agreement in writing with the landlord. The words are — "The provisions of this Act shall apply in respect of such holding as if it had been agreed in writing after the commencement of this Act that the holding should be let or treated as a market garden." He is therefore at liberty for the future to use "the holding" as a market garden, and at the termination of his lease he will be entitled to compensation for improvements made after the commencement of the Act.

I do not agree with the Lord Ordinary in his interpretation of the word "then" in section 4. I think that the words "has then executed" mean "has executed previously to the commencement of the Act;" but I agree in the result. viz., that the fourth section does not authorise a claim for improvements executed previously to the commencement of the Act.

The scheme of the principal Act was prospective with certain limited exceptions mentioned in the second section, by which in certain cases compensation is allowed in respect of improvements executed before the commencement of the Act. But then this is made plain; the section concludes with these words—"The tenant may claim compensation under the Act in respect of the improvement which he has executed *in the same manner as if this Act had been in force at the time of the execution of such improvement.*" No such words occur in the fourth section of the Act of 1897, and there is no time limit within which the improvements specified in section 4 must have been executed.

It is also to be observed that the exceptions in the Act of 1883 are improvements which make the land more valuable for the purposes for which it was originally let. Here the alleged improvements are *prima facie* a misuse of the ground and a violation of the lease. By so using 20 acres of

the farm the tenant has committed a breach of the regulations of the lease. He has done so, I assume, with the tolerance of the landlord, but the landlord will be sufficiently punished for his remissness in not interfering sooner by having to compensate the tenant for improvements made subsequently to the commencement of the Act.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Complainer—Guthrie, Q.C.—Deas. Agents—John C. Brodie & Sons, W.S.

Counsel for the Respondent, David Whytt Ewart Smith—Salvesen, Q.C.—Cook. Agent—John Richardson, Solicitor.

Wednesday, July 11.

FIRST DIVISION.

SHAW'S TRUSTEES *v.* WHITE.

Succession—Vesting—Legacy—Direction to Trustees to Pay Interest and Convey Capital at Majority—No Destination-over or Survivorship Clause—Dies incertus—Condition of Gift or Merely Postponement of Payment.

By his trust-disposition and settlement a truster directed his trustees, *inter alia*, "to invest the sum of £1500 and pay the annual interest or produce thereof to my grandniece A B; and I provide and declare that during the years of her pupilarity and minority the said interest be paid to her legal guardian, and on the said A B attaining her majority my said trustees shall pay over to her the said sum of £1500." There was no destination-over as to this particular legacy, but the trust-deed contained a general residue clause. A B survived the truster, but died in minority, leaving a settlement by which she disposed of her whole estate. *Held*, on a construction of the testator's intention, that the legacy of £1500 vested in A B *a morte testatoris*.

Opinion (*per* Lord M'Laren) that in a case where there is an unconditional gift of income to a legatee and there is no destination-over, there is a strong presumption that a direction to pay at majority is to be regarded as merely an administrative direction.

John Shaw, residing in Thorn Street, Earlston, died on 5th September 1892 leaving a trust-disposition and settlement whereby he conveyed his whole estate to David Allan and others, as trustees for the purposes therein mentioned.

The sixth and seventh purposes were in the following terms:—(Sixth) "I direct my trustees to invest the sum of £1500, and pay the annual interest or produce thereof to my grandniece Jessie White, daughter of Thomas White, draughtsman, Glasgow; and I provide and declare that during the years of her pupilarity or minority the said interest be paid to her legal guardian, and on the said Jessie White attaining her majority my said trustees shall pay over to her the said sum of £1500." (Seventh) "I direct my trustees to pay over to my grandniece, the said Alison Gow, one-half of the residue and remainder of my means and estate, and the other half thereof I direct my trustees to hold, apply, and convey on such conditions and under such restrictions as I may direct by any writing under my hand, and failing any such writing then the same shall be dealt with and disposed of by my said trustees in such way or ways as to my trustees may seem best; my wish being that failing such instructions my trustees should have full power and liberty to dispose of such residue in any manner that may approve itself to them."

Jessie White, referred to in the sixth purpose *supra*, survived the truster, but died on 15th November 1899 while still in minority. She left a settlement, by which she conveyed her whole estate to her mother Mrs Jessie Shaw or White. During her lifetime the trustees had paid the income of the sum of £1500 first to her father, and on his death to her mother, the said Mrs Jessie Shaw or White.

The truster left no writing dealing with the one half of the residue of his estate (other than the half bequeathed to Alison Gow), and in an action of multiplepoinding Mrs Jessie Shaw or White and Alison Gow, as his sole next-of-kin, were found entitled thereto on 14th November 1893.

Questions having arisen as to whether the legacy of £1500 had vested in Jessie White, a special case was presented for the opinion and judgment of the Court by (1) John Shaw's trustees, (2) the said Mrs Jessie Shaw or White, and (3) the said Alison Gow as residuary legatee. The second party maintained that the said legacy vested in the said Jessie White *a morte testatoris*, and was carried by her settlement to the second party. The third party maintained that in consequence of the said Jessie White having died before attaining majority the said legacy fell into residue.

The questions for the opinion of the Court were—"(1) Did the said legacy of £1500 vest in the said Jessie White? or (2) Did it fall into residue?"

Argued for the third party—This was a case in which there were two gifts, an absolute gift of the income and a conditional gift of the fee. The latter gift was conditional because it was only to take effect on Jessie White attaining majority—*dies incertus pro conditione habetur*. There was no gift of the fee before majority, and there was no authority for holding that a gift of income implied a gift of fee. That would be to read in to the direction to invest a direction to invest "for behoof of" Jessie White. In all the cases cited on the other side there were words of gift and postponement of payment. The fact that