LORD MONCREIFF—I am of opinion that the Lord Ordinary's judgment should be affirmed, on the ground, as stated by him, that the special circumstances of the case are against the pursuer's claim. It may be conceded that where there is clear proof of services rendered and no wages paid, there is a presumption, even as between parent and child, that wages are due. But that presumption, especially as between parent and child, is but slight, and will be readily overcome if the fair inference from the evidence be that the services were rendered gratuitously. The mere fact that there was no agreement between parent and child that wages should be paid would not, in my opinion, be sufficient to overcome the presumption. If, for instance, it were proved that a grown-up son had often asked for wages and been put off by the father from time to time with assurances that the demand would be considered, I should be disposed to sustain a claim made by the son within the years of prescription. But in the present case I see no evidence that the pursuer mentioned the subject of wages to his father before he left him, or even that he thought of claiming wages till then.

The Lord Ordinary says (and he is supported by the evidence) "he" (the pursuer) "never asked for wages, and left without hinting at such a claim."

The conclusion at which I arrive is that the claim for wages is an afterthought, and that the pursuer, till he quarrelled with his father, was content to give his services for his board, clothing, and pocket-money, such as it was.

LORD TRAYNER—This may, in one view of it, be a hard case for the pursuer, but I see no sufficient ground for interfering with the interlocutor of the Lord Ordinary.

The Court pronounced the following interlocutor:—

"Refuse the reclaiming-note: Adhere to the interlocutor reclaimed against, and decern: Find the pursuer liable in expenses since 8th February 1898, and remit," &c.

Counsel for the Pursuer — R. L. Orr. Agents—George Inglis & Orr, S.S.C.

Counsel for the Defender — Aitken. Agents—J. & J. Milligan, W.S.

Friday, June 10.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

CALEDONIAN RAILWAY COMPANY *v.* MORRISON.

Railway—Compulsory Acquisition of Lands—Double Claims—Compensation—Lands Clauses Consolidation Act 1845 (8 *and* 9 *Vict. cap.* 19), *sec.* 143.

A agreed to purchase from N certain subjects for a price payable partly by money borrowed on the security of the subjects, and partly by cash instalments to be spread over a number of years. The purchaser was not entitled to claim a conveyance of the subjects until the last instalment was paid, and the seller retained power to call for payment at any moment of the balance of the price unpaid, and in default to sell the subjects or resume possession.

Under this agreement A entered into possession of the subjects which he occupied, along with adjoining premises held under a verbal lease, as an hotel, and on his death in 1891, M, his widow, continued in possession for several years, during which several instalments of the price were paid. Before the last instalment had been paid, or a conveyance of the subjects obtained, a railway company constructed a tunnel under one of the streets on which the hotel abutted. A notice of claim was lodged by M "as tenant and occupier" of the premises for compensation for the injurious affection of her interests as such, and on being called upon to state the nature of her occupancy, she referred to the agreement above mentioned. Arbiters were nominated by M and the railway company, and a proof was ordered. Two days after M's notice of claim had been lodged, a notice of claim was lodged by N (the undivested sellers) as "proprietors" of the subjects "with the consent and concurrence of M" for structural damage, injurious affection, "and all other loss arising to us" in consequence of the operations. In this case also arbiters were nominated, and a proof was fixed.

The company presented a note of suspension and interdict against M and the arbiters, craving the Court to interdict them from proceeding with the reference upon the claim made by M, on the ground (1) that M was merely a tenant at will, and that her claim, in terms of sec. 114 of the Lands Clauses Act, could only competently be made before the Sheriff, and that in any event as regards part of the premises she was in this position; and (2) that by assenting to the claim made by N. she had barred herself from making a separate claim *qua* proprietor. The Court *refused* to grant interdict.

By the Glasgow Central Railway Act 1888 the company was authorised to make a railway in Glasgow passing along and under Argyle Street in a tunnel. The Caledonian Railway Company by their Act of 1889 became vested in the powers of the Glasgow Central Railway Company, and constructed the railway, which passed underneath Argyle Street, *inter alia*, opposite the property known as Steel's Hotel, consisting of parts of No 78 to 96 Argyle Street and 1 to 9 Queen Street. On 31st August 1896 a notice of claim was served on the Caledonian Railway Company by Mrs Catherine Morrison, and her husband Mr Angus Morrison. The notice bore that, "I, Mrs Catherine Forbes or Morrison, hotel-keeper, Steel's Hotel, Queen Street,

Glasgow, wife of Angus Morrison, hotelkeeper, Steel's Hotel, Queen Street, aforesaid, and I, the said Angus Morrison, hereby give you notice that we are tenants and occupiers of the premises situate at the northwest corner of Argyle Street and Queen Street, Glasgow, known as Steel's Hotel, and that the said premises have been structurally damaged and injuriously affected by the construction in Argyle Street of the railway and relative works authorised by the Glasgow Central Railway Act 1888, and the operations in connection therewith, and that we claim from the Caledonian Railway Company, incorporated by Act of Parliament, as compensation for the injurious affection of our interests as tenants and occupiers of said subjects, and for loss and interruption to business, and for damage to furniture and fittings, and for all inconvenience, loss, and damage sustained by us, resulting from the said operations, the sum of two thousand five hundred pounds."

Arbiters were named by the parties, and the claimants having been ordered to lodge a statement of their claim, on 19th December put in their claim, in which they stated that they were "tenants and occupiers" of the premises in question. The Caledonian Railway Company having called upon them to state the character and duration of their tenancy, the claimants substituted for the above statement the following—"The claimant Mrs Morrison has occupied since 1891, and still occupies, the premises forming the northmost corner of Argyle and Queen Streets, Glasgow, consisting of the four flats above the shop forming No. 78 Argyle Street, Glasgow, occupied by Macpherson Brothers, ironmongers, Glasgow, and the two upper flats and attics of the tenement adjoining to the west, under and in virtue of an agreement dated 14th May 1890, for the purchase of the premises above described, entered into between The Northern Heritable Securities Investment Company, Limited, incorparated under the Companies Act 1862, and the Companies Act 1867, and her former husband, William Anderson, therein described as of Steel's Hotel, No. 5 Queen Street, Glasgow, the provisions of which agreement Mrs Morrison has been implementing on her own behalf and in her own interest since the death of her husband on 19th January 1891. A copy of the said minute of agreement is herewith produced. All the purchasers' rights under the said agreement are now vested in the claimant Mrs Morrison. Further, the claimants Angus Morrison and the said Mrs Morrison are joint-lessees and occupants of the third flat of the tenement to the west of and adjoining the flats last referred to, under a lease for five years from Whitsunday 1896, entered into between Mrs Ridge-Beedle and them, dated the 26th day of January 1897, which is produced herewith. The claimant Mrs Morrison occupies the rooms forming the kitchen, pantry, bar, bar-barlour, and smoke-room of the premises occupied as hotel premises, entering by No. 5 Queen Street, under and in virtue of a tack, dated 6th and 14th June 1893, for seven years from Whitsunday 1893, between Archibald Fraser & Son, wine merchants in Glasgow, and Melville Fraser, wine merchant there, and The Northern Heritable Securities Investment Company, Limited, incorporated under the Companies Acts 1862 and 1867. With consent of both parties to said tack, Mrs Morrison pays the rent, executes the repairs, and implements all the obligations undertaken by the lessees by said tack. The whole of the several premises above described form together, and are occupied by the claimants as the hotel known as Steel's Hotel."

The agreement referred to proceeded on the narrative that the first parties The Northern Heritable Company had agreed to sell to the second party William Anderson the subjects known as Steel's Hotel, at the price of £23,500, and that the second party had discovered he was unable to implement the purchase. It contained, *inter alia*, the following conditions:—"*First*—That the first parties shall depart, and do hereby depart, from their right to obtain payment of the price of said subjects at Whitsunday 1890, as stipulated in the said missives, but that the said price shall be payable as hereinafter provided; and that until said price be paid, and the whole provisions of these presents are implemented, the second party shall not demand, and shall not be entitled to demand, a conveyance of said subjects and others, but the title to the same shall, until that event, remain in the person of the first parties. . . . *Third*—That the second party shall obtain a loan of £17,000 from a third party or parties at Whitsunday 1890 on the security of said subjects and others, exclusive of the furniture, etc., therein, and shall pay over said sum to the first parties. . . . *Fourth*—That the second party shall grant forthwith a personal bond for the balance of said price, *videlicet*, £6000, in favour of the first parties, and shall assign to them as a further security for the payment of said price his whole available assets. . . . *Fifth*—That the second party shall pay the said sum of £6000 to the first parties in the following manner, *videlicet*, during the first year from said term of Whitsunday 1890 he shall make payment of the sum of £100 at least on the last day of each calendar month, except on the last days of the months of May and November 1890; further, at the term of Whitsunday 1891 he shall make payment of the sum of £2000, and thereafter shall make payment of the balance at the rate of not less than £1000 a-year until the same be fully paid up, said balance to be paid by two half-yearly instalments at Martinmas and Whitsunday in each year, beginning the payment of the first of these instalments at Martinmas 1891. . . . *Eighth*—That notwithstanding anything contained in these presents, the first parties shall be entitled at any time they may see fit, and without assigning any reasons therefor (they being the sole judges of the expediency of the course to be followed), to take proceedings against the

second party for the recovery of any balance which may be due to them, and that in such manner as may seem best to them, or to sell the said subjects and others by private bargain or public roup for such price and in such manner as they may deem proper, and generally to exercise all the powers and privileges of absolute proprietors of said subjects and others. *Ninth*—That as and from the term of Martinmas 1889 (notwithstanding the date or dates hereof) the second party shall pay all and every outlay in connection with and burden upon the said subjects and others, including interest on the said sum of £17,000, as if he were already absolute proprietor thereof." . . .

By interlocutor dated 9th February 1897 the arbiters allowed parties a proof of their averments.

On the 2nd September 1896, two days after the notice of claim had been lodged by the Morrisons, a notice of claim against the Caledonian Railway Company was lodged by the Northern Heritable Securities Investment Company "with the consent and concurrence of" Mr and Mrs Morrison "for all their right and interest in the premises." The claimants stated that they were "proprietors" of Steel's Hotel, and of a certain shop, and that the said subjects had been "structurally damaged and injuriously affected" by the operations of the Railway Company, and that they claimed "as compensation for the structural damage done to the said properties, and the injurious affection thereof, and all other loss arising to us in consequence of the said operations, the sum of one thousand pounds."

Arbiters were nominated by the parties, and a statement of claim and answers having been lodged, a diet of proof in the reference was fixed. In article 3 of their statement of claim the claimants set forth—"3. The respondents commenced the construction of their railway and relative works at or near the claimants' property early in the year 1891, and carried on their operations continuously until late in the year 1895. By their operations serious structural and other injuries were caused to the claimants' property. It has been rent and cracked both externally and internally, whereby the floors have been thrown off the level, door and window frames twisted, the plaster on the walls and ceilings has been broken and has fallen, thereby necessitating constant repair at considerable cost. To keep the premises in reasonable tenantable condition, they have from time to time been repaired, but the damage has gone on increasing, and the property has been seriously and permanently injured and depreciated."

The Caledonian Railway Company raised an action of suspension and interdict against Mr and Mrs Morrison and the arbiters and oversman in the first reference, craving the Court to suspend the proceedings in the reference, and to interdict the respondents from going on therewith.

Interim interdict was granted by the Lord Ordinary (PEARSON) on 2nd March 1897, and answers were lodged by Mr and Mrs Morrison.

The complainers averred that no right was vested in the respondents in respect of the agreement between Mr Anderson and the Northern Heritable Securities Investment Company, and that their occupancy of the premises since 1890 had been merely at the will of others, and that they could be evicted from the premises at any time; and pleaded—"(1) Interdict should be granted as craved in respect that (*a*) the said respondents Mrs Catherine Forbes or Morrison and Angus Morrison have no title to the subjects in respect of which the said pretended claim is made; and (*b*) that the pretended claim is incompetent to be settled by arbitration under the Lands Clauses Consolidation (Scotland) Act 1845, the Railways Clauses Consolidation (Scotland) Act 1845, and the Acts amending the same, in respect they have no greater interest in the subjects than as tenants from year to year. . . . (3) The said respondents Mrs Catherine Forbes or Morrison and Angus Morrison having consented and concurred, for all their right and interest in the premises, in the said claim by the Northern Heritable Securities Investment Company, Limited, cannot make any separate claim in respect of the same premises, and interdict should be granted as craved in respect that they are doing so by their said pretended claim."

The respondents averred that Mrs Morrison stood in her late husband's place under the agreement with the Heritable Securities Company, there being an understanding with the company to that effect, and that the occupancy was not defeasible at the pleasure of the company.

The Lord Ordinary (KYLLACHY) on 20th November pronounced an interlocutor recalling the interim interdict and refusing the prayer of the note.

Opinion.—"In this case I find no sufficient ground for interfering with the proceedings in the arbitration. Some of the questions raised may require to be considered by the arbiters, and may perhaps be questions on which their judgment may not be final. But I am unable to say upon the statement of the respondents' claim that it is a claim which cannot be made the subject of a statutory arbitration.

"I heard, in the first instance, some argument against the relevancy of the claim — an argument founded on the doctrine of the case of *Ricketts* v. *The Metropolitan Railway Company*, 2 E. and I. App. 75. As to that argument I have, I confess, great doubt whether the doctrine in question at all applies to a case like the present, especially having in view that the damage here claimed is, in part at least, attributed to structural injury, caused by the construction of the railway, to the respondents' premises. It may also, I think, be doubted whether the doctrine of that case is not to be now held as qualified by more recent decisions, of which the case of *Walker* v. *The Caledonian Railway Company*, 9 R. (H.L.) 19, is the best known example. But however that may be,

I am relieved from dealing with that matter by Mr Balfour's concession—which, I confess, I think was inevitable — that the relevancy of the claim cannot properly be determined *ab ante*, but must be left—at least in the first instance — for the consideration of the arbiters.

"The complainers' main objection, however, was of a different kind, viz., that the respondents have no title of occupation to the premises in respect of which the claim is made — their occupation being, it was said, in law the possession of the owners, who have made a separate claim. That was the complainers' leading contention; but it was also maintained, alternatively, that if the respondents have alleged what can be held to be a separate title, they have in any view no greater interest in the premises than as tenants for a year, or from year to year; and are therefore bound, under the 114th section of the Lands Clauses Act, to prosecute their claim before the Sheriff.

"Now there can, in my opinion, be no doubt that the respondents have for a number of years possessed and conducted, for their own profit, a certain hotel in Glasgow, of which the business is said to have been injured by the construction of the railway. That is not disputed. It is also certain that, with the exception of an attic flat and some rooms entering from 5 Queen Street, which are separately owned, the hotel premises have been so possessed and occupied in virtue of a written agreement which is of a quite intelligible—and I should think, not very unusual—character. Putting aside, in the meantime, the fact that it was originally made with the first husband of the female respondent, it may be described as an agreement by which the respondents became purchasers of the hotel premises at a certain price, payable partly by money borrowed under a certain arrangement on the security of the property, and partly by cash instalments spread over a period of years. The sellers, who are a Heritable Investment Company, remain, of course, the owners of the property — the title standing in their name until the price is paid. And they possess for their security very drastic powers in the event of default. But the respondents are in possession *qua* purchasers, and have been so since 1891. They have paid—at least they so allege—instalments forming a large part of the price. And while they are not, and have never been, in the position of owners, they yet possess under a good title of occupancy—a title defeasible perhaps in certain events, but yet a good title, and a title duly derived from the owners. It seems to me to be impossible in these circumstances to contend that they are not occupiers in the sense of the 6th section of the Railways Clauses Act; or that they are not entitled under that section to maintain a claim for injurious affection by the construction of the railway—a claim quite separate and distinct from the claim of the owners the Investment Company.

"Neither do I think it possible to represent that the character of the respondents' occupancy is that of yearly tenants, or tenants from year to year. They are not tenants, at least in the ordinary sense, at all. Their right may in some respects be lower, but in other respects it is certainly much higher than that of yearly tenants. Assuming, therefore, that it must now be taken as law—at least in this Court—that the 114th section of the Lands Clauses Act applies to the case where no land is taken by a railway company, it does not strike me as a feasible proposition that the respondents, although *ex hypothesi* entitled to compensation, are yet bound by the section in question to proceed before the Sheriff. The 114th section at best only applies where the interest to be compensated is not greater than that of a yearly tenant. And for the reason which I have stated, that cannot, I think, be affirmed of the interest of the respondents in these premises.

"It is quite true that as regards a small part of the subjects, viz., the attic flat and certain rooms entering from 5 Queen Street, the respondents' title is that of tenants, and was (at least during the period of the construction of the railway) a title not higher than that of yearly tenants. The respondents do not seem, as regards the flat, to have had during that period any written title at all; and as regards the rooms, they were, it appears, sub-tenants of the Heritable Investment Company—it is not said whether under written lease or not. But they have all along (that is, since 1891) possessed both sets of subjects as accessories of their main premises; and the whole building has throughout formed a single hotel, where the business said to have been affected has been carried on as a single business. For the purposes, therefore, of this question, the whole hotel must, I consider, be taken as a *unum quid*, and it would, I think, be out of the question that part of the claim (supposing it separable) should go before arbiters, and part before the Sheriff. The accessory must follow the principal—or if it is preferred to put the point otherwise, it cannot, in my opinion, be affirmed of the claimants' interest in the premises to which their claim applies, that it is an interest not greater than that of yearly tenancy.

"It remains to consider the effect, if any, of the circumstance that the agreement under which the respondents hold the main premises was made with the female respondent's first husband Mr Anderson, who died in 1891. As to this, it appears to be enough for the present purpose that since 1891 the respondents have been recognised by the owners of the property as having all the rights, and as being subject to all the obligations, of the original second party to the agreement. That, at least, is alleged, and is not disputed, and that being so, it appears to me to be *jus tertii* of the railway company, in a claim for compensation for injury to the hotel business, to inquire further. But even if that were otherwise, I do not, I confess, feel much doubt as to the respondents' right to stand on the agreement—I mean their right to do so

even in a question with possible third parties. Mr Anderson having died, his obligations were in default, and the Investment Company became, by express stipulation, entitled to terminate the agreement and resume possession. What happened, I think, was that they in effect did so, and renewed the agreement with the respondents—whether they did so formally or informally being a matter between the respondents and them.

"On the whole matter, therefore, my judgment is for the respondents, and I shall accordingly refuse the note of suspension and interdict."

The complainers reclaimed, and argued—The respondents were, with reference to the subjects covered by the agreement, in the position either of proprietors under a suspensive condition, or else of tenants at will. They were unable to take themselves outside one or other of these categories, and that being so, were in the following dilemma. If they were proprietors, they had forfeited their claim by having consented to and concurred in the claim made by the Heritable Company *qua* proprietors. But if, on the other hand, they were tenants at will, they were less than yearly tenants, and should have claimed under section 114 of the Lands Clauses Act, by which section it was provided that such claims should be prosecuted before the Sheriff. 1. A submission was constituted by the original notice of claim and appointment of arbiters, and the respondents were not entitled to go behind it and examine the condescendence in the specific claim subsequently lodged. Accordingly, if the whole claim *qua* proprietor appeared in the notice of claim at the instance of the Northern Heritable Securities Investment Company with consent of the respondents, they could not argue that the terms of the condescendence showed that the whole claim *qua* proprietor was not exhausted. But on looking at that notice of claim it appeared that it was for "all other loss" in addition to structural damage. 2. Alternatively, the respondents were nothing more than tenants at will. They had not even produced any document to connect themselves with this agreement, but even if they were in the position of the grantee thereunder, the conditions had not been fulfilled, and they could have been ejected at any moment. A person in occupation of the premises of another was presumed to be a tenant even though there was no stipulated ish or rent—*Glen* v. *Roy*, November 28, 1882, 10 R. 239. Accordingly, their tenancy being at will, they could only claim before the Sheriff in terms of section 114 of the Lands Clauses Act — *Glasgow District Subway Company* v. *Albin & Son*, November 6, 1895, 23 R. 81; *Caledonian Railway Company* v. *Barr*, January 27, 1855, 17 D. 312. 3. As regards the third or attic flat and certain other rooms, the respondents certainly had no title higher than that of yearly tenants. To the flat they had no written title at all during the time the railway was being constructed, their lease being posterior in date, while they were only sub-tenants of the other rooms.

Argued for respondents—There were two grounds for claiming compensation in such cases as this—the one for structural damages and the other for damages to business, &c. The occupancy claim which had been made for damages upon the second of these two grounds was the first to be lodged. The reclaimers had consented to the nomination of arbiters, and there were no grounds for interfering with the pending submission. The Court would be slow to interfere with a statutory arbitration, and would not do so unless it were shown that the arbiter was asked to exercise powers he did not possess—*Dumbarton Water Commissioners* v. *Blantyre*, November 12, 1884, 12 R. 115; *Glasgow, Yoker, and Clydebank Railway Company* v. *Lidgerwood*, November 27, 1895, 23 R. 195; *Wemyss* v. *Ardrossan Harbour Company*, March 7, 1893, 20 R. 500. The reclaimers' argument as to the position of the respondents if they were considered as proprietors overlooked the point that they might have a claim both as owners and as occupiers. Accordingly there was nothing to prevent the Heritable Company from claiming for damage to stone and lime, and the respondents for the second class of damage. Moreover, the claim of the Heritable Company was not for precisely the same subjects, since it included shops not in the respondents' occupation, and did not include the attics. They were quite entitled to look at the amended details of their claim in order to interpret it, and were not limited to the description given in the notice of claim. In any view, they had not by their conduct in any way prejudiced the complainers' position, the two claims having been made almost simultaneously, and accordingly they had not barred themselves from claiming *qua* occupiers. As regards their title, it was not a true interpretation of the agreement to say that they could be turned out at any moment. Their right was of a somewhat peculiar nature, and might be described as "equitable ownership." But it was really unnecessary to define its exact nature, which it was not so necessary for the reclaimers to ascertain as it would have been had they been acquiring these lands under their compulsory powers. They were certainly not entitled to profit by the somewhat indefinite nature of the respondents' right—*Fleming* v. *District Committee of Middle Ward of Lanarkshire*, November 15, 1895, 23 R. 98; *Solway Junction Railway Company* v. *Jackson*, March 12, 1874. 1 R. 831. It was enough for the respondents to show that they were not less than yearly tenants, and the reclaimers' argument as to section 114 would fall to the ground. That section applied only to subjects held under leases. It was clear from the agreement that whatever they were they were not tenants, for they paid landlord's taxes, feu-duty, &c.—*List* v. *Tharp* (1897), L.R., 1 Ch. 260; *Heritable Securities Investment Association* v. *Wingate & Company's Trustees*, July 8, 1880, 7 R. 1094. 3.

As regards the small part of the premises in the attics and some other rooms, it was true that during the construction of the railway the respondents' title may not have been higher than that of yearly tenants, but the building must be taken as a *unum quid*, and this small part—a mere accessory—must follow the main building. It would obviously be out of the question to adopt a different tribunal for a part of the claim—*Bexley Heath Railway Company* v. *North* (1894), L.R., 2 Q.B. 579, at 585.

At advising—

LORD KINNEAR — The question that we have to consider is not whether the respondents' claim is well founded or not, but whether the complainers have made out a sufficiently clear ground for interrupting the proceedings in a statutory arbitration. The general rule, as laid down in *Lord Blantyre* v. *Dumbarton Water Commissioners*, is that it is inexpedient to interfere with the progress of such an arbitration unless it is made perfectly plain to the Court that an arbiter is called on to exercise powers which he does not possess. I do not think that the complainers have succeeded in showing that this is the position of the present case. Their averment is that the respondents have served upon them a notice of claim as tenants and occupiers of Steele's Hotel, on the ground that their premises have been injuriously affected by the construction of the complainers' railway, and claiming compensation "for the injurious effect on their interests as tenants and occupiers of the said subjects, and for loss and interruption of business, and for damage to furniture and fittings."

The complainers do not maintain at present that this is an irrelevant claim, but concede that the question of relevancy must be left at least in the first instance for the consideration of the arbiter. We are therefore to consider the question whether the arbitration should be allowed to proceed on the assumption that the occupier of the subjects in question may have a good claim for compensation for the injuries alleged irrespective of any claim in respect of injury to the proprietary interests of the owner. On that assumption it seems to follow that the respondents must have a good title to insist before the arbiters, because if there be a valid claim for compensation for injury to the interests of the occupiers, and for interruption to business, it must of necessity be vested in the persons who were in fact in occupation of the premises, and were carrying on business there at the time when the damage occurred. The concession, therefore, that the question of relevancy is, in the first instance at least, for the arbiter, involves the concession that the question of title must be determined by him also in like manner.

But then it is said that the respondents claim shows that they are in the position of yearly tenants or tenants at will, and are therefore not entitled to go to arbitration, but under the 114th section of the Lands Clauses Act are bound to proceed before the Sheriff. That would be a good ground for interdict if it were well founded in fact. But the provisions of the 114th section apply only to the case of lands subject to leases, and whatever be the exact legal definition of the respondents' title, it is at least certain that it is not a lease. I assent entirely to the doctrine laid down in the case of *Caledonian Railway Company* v. *Barr*, that persons who claim as tenants under a lease, and who can produce no written title, must be dealt with as tenants from year to year. But the right alleged by the respondents is not a leasehold right in any sense. In considering whether their claim may competently be submitted for arbitration under the statute, we must take their own account of it and assume that they will be able to prove their averments to the satisfaction of the arbiters, and I cannot assent to the argument of the reclaimers' counsel that for this purpose we are confined to the original notice of claim, and are not to consider also the more specific claim which was lodged in obedience to the arbiter's order, and the documents which were produced. We are asked to stop the prosecution of an arbitration which has proceeded to a certain extent, and we must consider that application with reference to the stage of procedure to which the arbitration has already advanced. Now the case which the arbiters are asked to consider is that of purchasers of an hotel for a price payable partly by borrowed money and partly by instalments spread over a period of years, who on the faith of that contract of purchase and sale have been allowed by the seller to enter into possession and to remain in possession for several years, during which they have by instalments paid a part of the price, although they have not yet paid the whole, and are therefore not yet in a position to demand a conveyance. I agree with the Lord Ordinary, in the first place that that is a good title of occupancy if it be established by proper evidence, and in the second place that it is not a lease. Whether occupiers in possession under such a title have a good claim for compensation for disturbance of their business and for injury to their premises, I do not say. The assumption on which our judgment is asked is that that is a question for the arbiters, and all that it is necessary for us to determine is, that if it is a good claim it is one that may be prosecuted before the arbiters who have been already nominated in terms of the statute, and not before the Sheriff, because it is not the claim of a yearly tenant under a lease. This being the position as regards the main part of the hotel, it makes no difference in my opinion that as regards a small part of the premises the title is that of tenants with no higher right than yearly tenants. The arbiters may or may not be required to consider whether this part of the claim can be separated from the other. But there are

no materials before us to justify us in holding that it must be separated so as to send the claim as regards this larger part of the premises to arbitration, and as regards the attic flat to the Sheriff. The claim alleged is for injury to the respondents' interests as occupiers of the hotel as a whole, and I think the Lord Ordinary puts his decision on this point on the right ground when he says that "it cannot be affirmed of the claimants' interest in the premises to which their claim applies, that it is an interest not greater than that of yearly tenancy."

But then it is said that if the respondents are not tenants they must be proprietors, and that the owners from whom they purchased having, with their consent, made a separate claim, which the arbiters have already disposed of, they cannot now be allowed to maintain the same claim for themselves. This resolves into a plea of bar, because it is obvious that it is no answer to the respondents' claim to say that the compensation they demand has already been paid to somebody else, unless they are themselves responsible for such payment having been made. But the claim made by the Heritable Investment Company with the respondents' concurrence is a claim for structural changes, or as it is stated in their more specific claim, for permanent injury and depreciation. That is a claim quite separate and distinct from the claim of the respondents. There is nothing inconsistent in their position when they consent to the compensation exigible for permanent injury to the structure being paid to the Heritable Investment Company and not to them, and at the same time insist on their own claim for disturbance of their business and injury to their interest not as owners but as occupiers for the time. It must also be observed that their notice of claim as occupiers had been served upon the complainers before the notice of the Heritable Investment Company as owners; and that the nomination of arbiters by the complainers was made for both claims on the same day. It cannot therefore be maintained that the complainers were in any way misled by the respondents' concurrence in the claim of the owners so as to alter their position to their prejudice; and if not, there is nothing in the respondents' conduct to give rise to a plea in bar. If in fact any ground of compensation which may be included on the respondents' claim has been already taken into account in determining the owners' claim, it will be for the arbiters to consider what effect should be given to that circumstance. But nothing of the kind is alleged on record, and if it were, it would not be a reason for stopping the arbitration by interdict. The point, if it arises, is more suitable for the arbiters than any other tribunal.

In what I have said I am not to be understood as expressing any opinion on the merits of the respondents' claim. That is a question for the arbiters. But I am of opinion that no sufficient ground has been stated for interfering with the arbitration, and that is all that it is necessary for us to decide.

The LORD PRESIDENT, LORD ADAM, and LORD M'LAREN concurred.

The Court adhered.

Counsel for the Complainers — Clyde—Deas. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Respondents — Vary Campbell—W. Thomson. Agent—

Friday, June 10.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

BRUCE'S TRUSTEES *v.* BRUCE.

Succession—Terce and Jus Relictæ—Election Between Legal and Conventional Provisions—Forfeiture of Conventional Provisions in Event of Re-Marriage.

A husband died leaving a trust-disposition and settlement whereby he conveyed his whole means and estate to three trustees, including his law-agent and his wife, to be held by them for behoof of his widow in liferent as long as she survived and remained unmarried, with an obligation on her to maintain and educate the children of the marriage, and for behoof of the children in fee. It was declared that these provisions were to be in full of terce, *jus relictæ*, and legitim, and that the widow, if she married again, was to forfeit her provision under the will.

The testator was survived by his widow and two children aged sixteen and thirteen. The trustees accepted office, and the truster's law-agent acted as law-agent under the trust. Three months after her husband's death the widow signed a deed prepared by the law-agent, electing to take the provisions in the trust-settlement. In making her choice the widow had no separate legal advice, but derived her information from a written statement prepared by the law-agent to the trust, which did not set forth the following facts—(1) that if she elected to take her legal rights she would also receive an annual sum for the maintenance of the children; (2) that her testamentary liferent would be diminished if the children demanded their legitim on attaining majority; and (3) that the largest item of the estate, which consisted of shares in a prosperous industrial company valued in the statement at £12, 10s. and yielding about 13 per cent. on this valuation, might be valued by others at a much higher figure.

Two years and a-half after the death of the testator, the trust-estate being still intact, the widow brought an action to reduce the deed of election signed by her, and during the dependence of this action she married again.

Held that the deed of election fell to be reduced (1) because the election had been made at too early a date after her