Counsel for the First, Second, Third, and Fourth Parties — Henderson. Agents — Arch. Menzies & White, W.S.

Counsel for the Fifth Parties—Gentles. Agents—Arch. Menzies & White, W.S.

Counsel for the Sixth Parties—King. Agents—Campbell & Smith, S.S.C.

Counsel for the Seventh and Eighth Parties—Hunter. Agents—Campbell & Smith, S.S.C.

Saturday, June 25.

SECOND DIVISION.

[Lord Sands, Ordinary.

ROGER *v.* HUTCHESON AND OTHERS.

Landlord and Tenant—Arbitration—Undertaking by Incoming Tenant to Relieve Landlord of Outgoing Tenants' Claims for Improvements—Reference of Question of Amount to Two Arbiters and an Oversman—Competency—Agricultural Holdings (Scotland) Act 1908 (8 *Edw. VII, cap.* 64), *sec.* 11 (1).

The Agricultural Holdings (Scotland) Act 1908 enacts—Section 11 (1)—"All questions which under this Act or under the lease are referred to arbitration shall, whether the matter to which the arbitration relates arose before or after the passing of this Act, be determined, notwithstanding any agreement under the lease or otherwise providing for a different method of arbitration, by a single arbiter in accordance with the provisions set out in the Second Schedule to this Act."

Where an incoming tenant, under his lease, undertook responsibility for the proprietor to pay compensation to the outgoing tenant for improvements under the Agricultural Holdings (Scotland) Act 1908, and by deed of submission the question as to the amount of the compensation was referred by the incoming and outgoing tenants to two referees and an oversman, *held* (*rev.* Lord Ordinary (Sands)) that the reference to two referees and an oversman was not prohibited by the Agricultural Holdings (Scotland) Act, sec. 11, sub-sec. 1, it being neither under the Act nor under the lease, but under the agreement expressed in the submission.

Opinion per Lord Salvesen—"I think that a statutory privilege which is conferred even in such absolute terms as are expressed in section 11, sub-section 1, may be waived."

Landlord and Tenant—Compensation for Improvements — Whether Claim Timeously Made — Agricultural Holdings (Scotland) Act 1908 (8 *Edw. VII, cap.* 64), *sec.* 6 (2).

The Agricultural Holdings (Scotland) Act 1908 enacts—Section 6 (2)—"A claim by the tenant of a holding for compensation under this Act in respect of any improvement comprised in the First Schedule to this Act shall not be made after the determination of the tenancy. . . ."

An incoming tenant under his lease undertook responsibility for the proprietor to pay compensation to the outgoing tenant for improvements under the Agricultural Holdings (Scotland) Act 1908, and by deed of submission executed prior to the determination of the tenancy the question as to the amount of the compensation was referred by the incoming tenant and the outgoing tenant to arbitration. The deed contained, *inter alia*, the following clause in the enumeration of the matters referred:—"*Sixth.* What sum shall be payable by the second party . . . to the first party as compensation for improvements under the Agricultural Holdings Act?" No statement containing the particulars and amount of the intended claim was, however, made until after the expiry of the tenancy.

Circumstances in which *held* (*rev.* Lord Ordinary (Sands)) that the existence and nature of the claim had been sufficiently certiorated, and that accordingly it had been timeously made.

Harry Stevenson Roger, sometime farmer at Manorhill, Makerstoun, Roxburghshire, *pursuer*, brought an action against William Hutcheson, farmer, Courthill, Kelso, *defender*, and also against Thomas Greenshields and Thomas Steel Greenshields, farmers, Manorhill aforesaid, and Hugh James Elibank Scott MakDougall of Makerstoun, for any interest they might have, in which the conclusions were that "It ought and should be found and declared, by decree of the Lords of our Council and Session, that the defender has validly and effectually accepted the office of oversman under and in virtue of (*first*) a deed of submission, dated 26th and 27th May 1919, entered into between the pursuer and the said Thomas Greenshields and Thomas Steel Greenshields, under which Thomas Templeton, farmer, Sandyknowe, Kelso, and Peter Purdie Campbell, land agent, 20 Rutland Square, Edinburgh, were appointed arbiters; (*second*) minute, dated 29th May 1919, by the said arbiters accepting office under the said deed of submission, and appointing the defender to be oversman in the event of their differing in opinion, and by the defender accepting office as oversman foresaid; and (*third*) minute of devolution by the said arbiters, dated , devolving the reference under the said deed of submission upon the defender as oversman, and that the defender as oversman foresaid is bound to proceed in the said submission and bring the matters submitted to him to a final conclusion; and the defender ought and should be decerned and ordained by decree foresaid to proceed in the said submission, and to decide upon and bring to a final conclusion the matters submitted to him by issuing a final decreet-arbitral or award in such terms as he may think right; and in particular, the defender as oversman foresaid ought and should be decerned and ordained to ascertain, fix, and

determine the amount of compensation for unexhausted manures and feeding-stuffs payable to the pursuer by the said Thomas Greenshields and Thomas Steel Greenshields as representing and undertaking responsibility for the said Hugh James Elibank Scott MakDougall, being one of the matters specifically referred to the determination of the said arbiters and oversman under the said submission; and the defender the said William Hutcheson, and in the event of their appearing and opposing the conclusions thereof the said Thomas Greenshields and Thomas Steel Greenshields and Hugh James Elibank Scott MakDougall ought and should be decerned and ordained to make payment to the pursuer of the sum of £100 sterling, or such other sum as our said Lords shall modify as the expenses of the process to follow thereon, conform to the laws and daily practice of Scotland used and observed in the like cases as is alleged."

The following *narrative* is taken from the opinion *infra* of the Lord Justice-Clerk—"The pursuer was tenant of the farm of Manorhill, of which Mr Scott MakDougall was proprietor. In December 1918 they signed a formal renunciation of the lease, and the farm was let to the defenders Greenshields, who entered into possession thereof as tenants. Thereafter the pursuer and said defenders entered into a submission to two arbiters and the defender Hutcheson as oversman, dated May 1919. The submission narrated, *inter alia*—"And whereas it has been agreed between the parties hereto that the full implement of the conditions affecting the outgoing tenant contained in said lease should be submitted to arbitration along with the other claims competent to the outgoing tenant against the proprietor (who is represented for the purpose of this submission by the ingoing tenants the said Thomas Greenshields and Thomas Steel Greenshields), and also against said ingoing tenant (*sic*), all as hereinafter mentioned." Seven different heads of claim were submitted, the 6th and 7th of which were as follows:—"What sum shall be payable by the second party representing and undertaking responsibility for the said Hugh James Elibank Scott MakDougall, proprietor of the said farm of Manorhill, to the first party as compensation for improvements under the Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64), and (seventh) generally to settle all claims, disputes, questions, and differences between said first and second parties as outgoing and incoming tenants respectively in said farm of Manorhill." Some of these claims arose under the lease, while others did not. The arbiters and oversman accepted office by minute appended to the deed of submission and dated 29th May 1919. All of the claims have been disposed of under the submission except the 6th. The oversman objected in May 1920 that the 6th claim could not be dealt with under the submission but must be disposed of by a single arbiter in terms of section 11 (1) of the Act of 1908. The pursuer then brought this action to have the submission proceeded with and exhausted by dealing with the 6th claim. The pursuer duly quitted the farm in terms of the renunciation."

The pursuer *pleaded*—"1. The defender as oversman under the said deed of submission being bound to bring the matters submitted to him to a final conclusion, decree of declarator should be granted as concluded for. 2. The defender as oversman foresaid being bound to ascertain, fix, and determine the amount of compensation for unexhausted manures and feeding-stuffs payable to the pursuer by the said Thomas Greenshields and Thomas Steel Greenshields, the pursuer is entitled to decree as concluded for. 3. The defenders, the incoming tenants, being barred by their actings from taking exception either to the form or specification of the notice of claim or the substitution of a special for the statutory arbitration tribunal, the defence stated by them should be repelled."

The defender William Hutcheson pleaded—"1. The action being premature and unnecessary *quoad* this defender should be dismissed. 2. The conclusion for expenses against the defender being unwarranted, decree in terms thereof should be refused."

The defenders Thomas Greenshields and Thomas Steel Greenshields pleaded—"1. The action as laid is incompetent in respect that it seeks to invoke the decision of the Court *ab ante* upon a question upon which the arbiters and oversman are bound to adjudicate in the first instance, and it should therefore be dismissed. 2. Pursuer's averments being irrelevant and insufficient to support the conclusions of the summons the action should be dismissed. 3. The defender William Hutcheson having all along been ready and willing to proceed with all matters competently referred to him, the present proceedings are unnecessary and the action should accordingly be dismissed. 4. The pursuer not having timeously made any claim under the Agricultural Holdings (Scotland) Act 1908 there is no claim for unexhausted improvements upon which the oversman can be called upon to adjudicate, and the action so far as directed to ordaining the oversman to ascertain, fix, and determine the amount payable to pursuer in respect of an alleged claim for unexhausted improvements falls to be dismissed. 5. *Separatim*—Any claim competent to pursuer for unexhausted improvements under the Agricultural Holdings (Scotland) Act 1908, being referred to the exclusive determination of a single arbiter by the said Act in terms thereof, the defender William Hutcheson has no jurisdiction to entertain any claim by pursuer for unexhausted improvements, and the action so far as directed to ordaining the said William Hutcheson to ascertain, fix, and determine the amount payable to pursuer in respect of an alleged claim for unexhausted improvements falls to be dismissed."

On 10th November 1920 the Lord Ordinary (SANDS) sustained the fourth and fifth pleas-in-law stated for the defenders Messrs Thomas and Thomas Steel Greenshields, dismissed the action, and found the said defenders and the defender William Hutcheson both entitled to expenses against the pursuer.

Opinion.—"The object of this action is to compel an oversman to proceed with the adjudication upon a claim for compensation under the Agricultural Holdings (Scotland) Act 1908. The first objection taken by the defenders is that this crave is premature and is an interference with the conduct of a reference before final adjudication either by way of dealing with the claim or by holding it not to be within the arbitration. This plea was very ably urged by junior counsel for the defenders, but eventually Mr M'Phail, as senior counsel for the defenders who have the substantial interest, did not press it, though in view of possible ulterior proceedings I do not say that he formally abandoned it. He recognised, however, that there are here tabled two other questions of law, the ultimate determination of which must rest with the Court, and that it would be inexpedient to send the case back to the oversman, on the footing that whatever view he might take on these two questions of law, the matter would come straight back to the Court in a new process.

"These two questions are—(1) Whether it is competent under such circumstances as here obtain to refer a claim for compensation for improvements under the Agricultural Holdings Act 1908 to two referees and an oversman? And (2) Whether in the present case the requirements of the statute as to the date of lodging a claim have been sufficiently complied with?

"Possibly the defenders are more logical in placing their questions in their pleas in the reverse order, but I find it more convenient to take them in the order in which I have stated them. 1. By section 11 (1) of the Act of 1908 it is provided—'All questions which under this Act or under the lease are referred to arbitration shall be determined, notwithstanding any agreement under the lease or otherwise providing for a different method of arbitration, by a single arbiter in accordance with the provisions set out in the Second Schedule to this Act.' In construing this direction it is proper to keep in view the object of the provision, and in particular of the interference with contract, for the intendment of the Legislature, whilst it cannot control, may aid in the interpretation of a provision. Certain of the interferences with freedom of contract in this branch of the law were undoubtedly dictated by the idea that the landlord letting a farm is in the stronger position and that would-be tenants are apt not to take long views ahead. But this particular provision is not of this character. Reference to two arbiters and an oversman was a system deeply intrenched in custom and supported by a conservative tradition which was stronger among tenants than among landlords. In the view of the Legislature the system was a bad one, causing delay, encouraging evidence and debate upon practical questions, and increasing expense, and the Legislature accordingly made provision to bring it to an end. It has been suggested by a commentator upon the Act that perhaps the provision does no more than make any bargain or agreement to refer to two arbiters not binding, and does not invalidate an actual reference to two arbiters if parties voluntarily chose to make it. There is plausibility in this view, and it is consonant with common law and equitable principles. I have come, however, to be of opinion that, having regard to the object of the Legislature and to the fact that the compensation is purely statutory and is recoverable under a statutory code, the contention falls to be rejected, and that a reference to two arbiters is null or at least voidable at the instance of either party, as being made in disregard of a statutory direction. In the present case the reference is entered into not by the outgoing tenant and the landlord, but by the outgoing tenant and the incoming tenant who has taken over the landlord's obligations. The question arises whether this makes any difference. I am of opinion that it does not. The incoming tenant has just taken over the landlord's obligations according to an arrangement which is common and is contemplated by the Act (section 7), and it would go far to defeat the object of the provision requiring the reference to be to a single arbiter if this provision were held not to apply in such a case. 2. The second question does not necessarily arise if I am right in the view which I take of the first. But as it has been fully argued and both parties wished a judgment upon it, in my view it would be pedantic to reserve it and send parties away to start a reference to a single arbiter. By section 6 (2) it is provided—'A claim by a tenant of a holding for compensation under this Act in respect of any improvements comprised in the First Schedule to this Act shall not be made after the determination of the tenancy.'

"The facts as disclosed by the documents, which are all admitted, are as follows:—The landlord agreed to accept a renunciation of the lease at Whitsunday-Martinmas 1919, the outgoing tenant to have waygoing privileges as if it were the natural expiry of the lease. Upon 30th January 1919 the agents of the pursuer, the outgoing tenant, wrote to the agents of the landlord—'We shall put in hand the preparation of a claim on behalf of the Messrs Roger for compensation under the Agricultural Holdings Act and hope to communicate with you further on the subject later on.' The claim here adumbrated was not presented either to the landlord or to the incoming tenant until long after Martinmas 1919 the date of the termination of the tenancy, as regards the requirement for making a claim. The landlord let the farm to the present defenders with entry at Whitsunday-Martinmas 1919, and took them bound to meet any claim which the outgoing tenant might have under the Agricultural Holdings Act. Upon 2nd April 1919 the pursuer's agents wrote to the defenders' agents—'We are now preparing a submission between Mr Roger and the incoming tenant and shall be glad to learn whether you would like us to include in the submission Messrs Roger's obligations to the landlords under the lease as to buildings, fences, &c., and also the valuation of unexhausted manures, &c.—if the latter is in-

cluded Mr Scott Makdougall will of course continue to be responsible until a settlement is made by Mr Greenshields.' To this the landlord's agent replied upon 3rd April—'What is proposed with regard to the valuations, &c., seems to be all in order, but before the draft submission is engrossed for signature perhaps you will kindly send it us for perusal and our client's instructions if thought necessary with regard to the arbiters appointed and the subject-matter of the reference.'

"The deed of submission was duly prepared and was executed upon 26th, 27th May 1919, and it contained, *inter alia*, the following clause in the enumeration of the matters referred—(*Sixth*) 'What sum shall be payable by the second party representing and undertaking responsibility for the said Hugh James Elibank Scott MakDougall, proprietor of the said farm of Manorhill, to the first party as compensation for improvements under the Agricultural Holdings Act.'

"As it appears to me this clause did no more than leave open or at most adumbrate a claim. It did not certiorate the existence of a claim, still less indicate under what branch or branches of the schedule to the Act any claim would be made. There was indeed no call for a claim at this time. The outgoing tenant had still, under the statute, six months to prepare and tender a claim.

"Nothing more, however, was done until long after Martinmas. But the pursuer maintains that by the communings and deed of submission he has satisfied the requirement that the claim shall be made before the determination of his tenancy. The landlord has intimated that while he does not personally desire to stand upon the statutory requirements, the matter is for the defenders who have taken over his obligations. The defenders maintain that there was no timeous claim.

"The objects of the requirement that the claim shall not be made after the determination of the tenancy is well understood. The landlord is to have an opportunity of inspecting the holding in the knowledge of the claim before anything is disturbed. He can ascertain the appearance and state of the holding and he can also determine as to a counter claim. Under the original Act of 1883 notice of an intention to claim compensation under the Act required to be given four months before the determination of the tenancy (section 7). There was no requirement that the claim itself should be made at any particular time, and in practice it was generally reserved for the arbitration, but it was required that the notice 'shall state as far as reasonably may be the particulars and amount of the intended claim.' An argument might perhaps be derived from this provision that the requirement of particulars being contained in the Act of 1883 and omitted from the Acts of 1900, 2 (1), and 1908, shows that particulars were not contemplated by the later Acts. But the Act of 1883 deals not with a claim but with a notice of an intention to make a claim, which is quite a different thing, and the reasonable inference appears to be that the reason why there is no similar requirement as regards the claim is that according to ordinary understanding a claim in the later Acts necessarily infers reasonable specification of its nature and amount. This view is strengthened by the proviso in the later Acts that 'when the claim relates to an improvement executed after the termination of the tenancy but while the tenant lawfully remains in occupation of part of the holding, the claim may be made at any time before the tenant quits that part.' It cannot, I think, be reasonably suggested that the Legislature contemplated that the tenant might start some new kind of improvement not previously contemplated during this fag end. But it was contemplated that he might be feeding cattle with cake or something of that kind which could not be reasonably estimated until his final removal.

"It is not necessary in the view I take to determine what particulars are necessary for a claim which in terms of the statute must be made before the termination of the tenancy. But I think there must be such a definite statement of claim as reasonably satisfies the purpose of the requirement. It is not in my view sufficient that the outgoing tenant shall merely indicate an intention to make a claim with no further specification than perhaps a reference to certain heads of improvement mentioned in the schedule, *e.g.*, as in the present case 'Compensation under the Agricultural Holdings Act,' or 'Valuation of unexhausted manures, &c.'

"It is suggested by the pursuer that the defenders, the incoming tenants, have not acted in *optima fide*, that they have lain-by well knowing that the pursuer understood he had a claim, and that in the particular circumstances of the case they are seeking to take advantage of the neglect of a technical requirement. That may be so, but in my view if equipollents for the statutory requirement of making a claim before the termination of the tenancy were admitted it would be to allow a hard case to make bad law.

"I shall accordingly sustain the fourth and fifth pleas-in-law for the defenders Messrs Greenshields, and dismiss the action with expenses to both sets of defenders."

The pursuer reclaimed, and argued—(1) It was competent to refer the claims to two referees and an oversman. Section 11 (1) of the Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64) did not apply, because some of the claims in the submission were claims which arose under neither the Act nor the lease—*Newby* v. *Eckersley*, [1899] 1 Q.B. 465. Johnston, Agricultural Holdings (Scotland) Act 1908 (6th ed.), p. 50, footnote 2. In any event the terms of the section were not peremptory and might be waived — Maxwell, Interpretation of Statutes (6th ed.), p. 678. In a similar way the Statute of Limitation might be waived —*East India Company* v. *Paul*, 1849, 7 Moo. P.C. 85. Accordingly, even if the terms of the section applied, the parties must be held to have waived the section by signing the submission. (2) The claim had been

duly made. The requirements for constituting a valid claim under the Agricultural Holdings (Scotland) Act 1908 were no higher than those under the Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), section 2, and under the latter Act the claim need not be for a specific sum—*Thompson* v. *Goold & Company*, [1910] A.C. 409, *per* Lord Loreburn, L.C., at 410—nor need it be in writing—*Lowe* v. *M. Myers & Sons*, [1906] 2 K.B. 265, and a request for arbitration was in itself a sufficient claim—*Fraser* v. *Great North of Scotland Railway Company*, 1901, 3 F. 908, 38 S.L.R. 653. The claim need not be detailed. In the style given by Jackson in his commentary on the corresponding English Act no particulars whatever are given—Jackson, Agricultural Holdings Acts 1908-14 (4th ed.), p. 153. In any event the defenders had led the pursuers to believe that the claim was amply disclosed and therefore they were now barred from objecting to its sufficiency—Rankine, Personal Bar, pp. 4 and 5.

Argued for the respondents Thomas Greenshields and Thomas Steel Greenshields—1. In the circumstances the Court ought not to interfere with the arbitration proceedings, because the crave was premature—*Licences Insurance Corporation and Guarantee Fund, Limited* v. *W. & R. B. Shearer*, 1907 S.C. 10, 44 S.L.R. 6, *per* Lord Kyllachy at 1907 S.C. 15, 44 S.L.R. 9. 2. It was not competent to refer the claim to two referees and an oversman. The Agricultural Holdings (Scotland) Act 1908, sec. 11 (1), had laid down a code of procedure which must be followed, viz., arbitration by a single arbiter in accordance with the rules prescribed in the Second Schedule of the Act—*Stewart* v. *Williamson*, 1910 S.C. (H.L.) 47, 47 S.L.R. 536, *per* Earl of Halsbury at 1910 S.C. (H.L.) 48, 47 S.L.R. 537. The Agricultural Holdings (Scotland) Amendment Act 1910 (10 Edw. VII and 1 Geo. V. cap. 30) prescribed the limits of the system of arbitration established by the principal Act, but within these limits the prescribed code must be strictly carried out, for the words of the section were peremptory and clear—*Sellar* v. *Highland Railway Company*, 1919 S.C. (H.L.) 19, 56 S.L.R. 216, *per* Lord Finlay at 1919 S.C. (H.L.) 25, 56 S.L.R. 220. The consent of the defenders could not give jurisdiction—*Lismore* v. *Beadle*, 1842, 1 Dowling (N.S.) 566, *per* Wightman (J.) at 569; Maxwell, Interpretation of Statutes (6th ed.), p. 683. 3. The claim had not been duly made. No claim had been disclosed which was a claim within the meaning of the Act. Even if there had been a claim within the meaning of the Act it was a bad claim in respect that it did not state its pecuniary amount and was vague, irrelevant, and lacking in specification—*Sinclair* v. *Brown*, 1892, 19 R. 780, 29 S.L.R. 652, *per* Lord President (Robertson) at 19 R. 784, 29 S.L.R. 655. *Cowdray* v. *Ferries*, 1919 S.C. (H.L.) 27, 56 S.L.R. 220; *Sylvester* v. *Brown*, (1916) L.J., 85 C.L. 1173; *Thompson* v. *Goold & Company* (*cit.*), *per* Lord Loreburn, L.C., at 411, and *Newby* v. *Eckersley* were also referred to.

At advising—

LORD JUSTICE-CLERK—[*After the narrative quoted supra*]—The oversman and the incoming tenants lodged defences, and the latter pleaded, *inter alia*—(Plea 4) "The pursuer not having timeously made any claim under the Agricultural Holdings (Scotland) Act 1908, there is no claim for unexhausted improvements upon which the oversman can be called upon to adjudicate, and the action, so far as directed to ordaining the oversman to ascertain, fix, and determine the amount payable to pursuer in respect of an alleged claim for unexhausted improvements, falls to be dismissed." (Plea 5) "*Separatim*—Any claim competent to pursuer for unexhausted improvements under the Agricultural Holdings (Scotland) Act 1908, being referred to the exclusive determination of a single arbiter by the said Act, in terms thereof the defender William Hutcheson has no jurisdiction to entertain any claim by pursuer for unexhausted improvements, and the action so far as directed to ordaining the said William Hutcheson to ascertain, fix, and determine the amount payable to pursuer in respect of an alleged claim for unexhausted improvements falls to be dismissed." The Lord Ordinary has sustained both of these pleas and has dismissed the action.

I am unable to agree with the Lord Ordinary. In my opinion this action falls to be dealt with on its own special circumstances, and does not require us to determine any general question.

Dealing in the first place with the fifth plea as to the effect of section 11 (1) of the statute, I cannot accept the view that the submission in this case under the deed of 29th May 1919 cannot be carried into effect because of the terms of said section. The parties to the submission were *sui juris*, and they agreed that the sum to be paid by the incoming tenants—who had agreed to relieve the landlord of any claim at the pursuer's instance for improvements under the Agricultural Holdings (Scotland) Act 1908—should be determined by two arbiters and an oversman. This reference proceeded until it was devolved on the oversman, and, as already stated, all the claims submitted have now been determined and paid for except the sixth. The Statute of 1908, by section 5, provides that an agreement by which a tenant is deprived of his right to claim compensation under the Act for certain improvements shall be void, but it does not enact that any agreement such as is contained in the deed of submission now under consideration shall be void. Section 32 of the statute provides—"General Saving of Rights—Except as in this Act expressed, nothing in this Act shall prejudicially affect any power, right, or remedy of a landlord, tenant, or other person vested in or exerciseable by him by virtue of any other Act or law, or under any custom of the country or otherwise, in respect of a lease or other contract, or of any improvements, deteriorations, awaygoing crops, fixtures, tax, rate, teind, rent, or other thing." In my opinion there is nothing expressed in the Act of 1908

which limits the tenant's freedom of contract so as to make the deed of submission illegal or void. I cannot read section 11 (1) as prohibiting a bargain between an outgoing and an incoming tenant such as is contained in the deed of submission. The incoming tenants were under no liability to the pursuer under the Act or the lease, but they agreed to accept liability for the pursuer's claim under the Act subject to the conditions that the sum to be payable by them to the pursuer should be settled in the manner provided by the submission. The claim is in my opinion neither under the Act nor under the lease but under the agreement expressed in the submission, and I am unable to find anything in the statute to justify us in saying that that agreement shall not receive effect according to its terms. Section 11 (1) deals with all questions which under the Act or under the lease are referred to arbitration, but the only claim we are now concerned with is referred to arbitration neither under the Act nor under the lease but under the submission of May 1919.

Section 1 of the Act deals with any sum which the tenant is to obtain from the landlord under the Act, and section 6 provides for arbitration if the landlord and tenant fail to agree. But the claim here in dispute is by the old tenant against the new tenant. In my opinion an ingoing and an outgoing tenant are not debarred from entering into such a submission as we are here concerned with. The views expressed in the cases of *Newby* ([1899] 1 Q.B. 465) and *Pearson* ([1899] 2 Q.B. 618) seem to me to support the result I have arrived at so far as support can be derived from cases which in my opinion ought only to be regarded as supplying analogies.

In my opinion the defenders' fourth plea is also bad. The correspondence between the parties, the documents therein referred to, and the actings of parties, I think sufficiently instruct that a claim by the tenant was in the sense of the statute made before the determination of the tenancy, and that the requirements of section 6 (2) were complied with. It is in my opinion unnecessary to determine the precise form or details required for the making of a claim in terms of that sub-section. Certain particulars are necessary under section 9 as regards game damage, but there is no similar provision as regards the compensation with which we are concerned in this case.

As to Mr Hutcheson's expenses, I agree with the result arrived at by your Lordships. The position taken up by the defenders Greenshields before us as to their first plea was the same as before the Lord Ordinary, and they asked for a judgment from us on pleas four and five, which I have dealt with. These were the only pleas which the parties argued before us.

LORD DUNDAS—We heard some argument in support of the first plea-in-law for the defenders Greenshields, but Mr Macphail ultimately stated, as I understood, that so long as this plea was left open to him in the event of an appeal—as I think it would be—he recognised the expediency of the Court dealing with his fourth or fifth pleas, which it could not logically entertain if his first plea were sustained.

As regards the first of the two questions which the Lord Ordinary tables as matters of discussion, if I were able to hold, as his Lordship does, that the pursuer's claim must be regarded as one "under this Act," I should agree with him that "having regard to the object of the Legislature and to the fact that the compensation is purely statutory and is recoverable under a statutory code . . . a reference to two arbiters is null or at least voidable at the instance of either party as being made in disregard of a statutory direction." The language of section 11 (1) is strict and unambiguous, it seems to me hardly to admit of construction. It directs that arbitrations under the Act shall be determined by a single arbiter in accordance with the provisions of Schedule II. The Schedule provides that the parties may appoint this single arbiter; failing which he shall be nominated by the Board of Agriculture. It is difficult to see how in face of these enactments the parties could proceed to submit questions under the Act to the determination of two arbiters and an oversman—*cf.* Rankine on Leases (3rd ed.), p. 281. The Lord Ordinary, rightly as I think, looks to the general policy of the Legislature on this matter. There is a broad distinction between the case of a privilege conferred by Parliament, which may be waived at will by the person in whose interest it is conceived, and that of an injunction imposed by a general statute for the intended benefit of the community upon all those concerned, which they are not at liberty to waive or to ignore. I learn from the text books—Craies (4th ed.), pp. 239, 240; Maxwell (6th ed.), pp. 678, 681—that the two guiding brocards are, on the one hand, *quilibet potest renunciare juri pro se introducto*, and on the other hand *privatorum conventio juri non derogat.* The procedure in a question to be determined by arbitration under the Act would in my judgment fall under the latter, not the former, of these brocards.

I have, however, come to the conclusion that the present claim is not, strictly speaking, one referred to arbitration "under this Act." The normal course of events contemplated by the statute has been departed from or varied by the parties. In particular, whereas the statute contemplates arbitration as between the outgoing tenant and the landlord, the present reference is, in form at least, one between the outgoing tenant and the incoming tenant, not the landlord. The statute does not expressly provide for an arbitration in this form. The Lord Ordinary was of opinion that the form of the reference made no difference, and I confess that my first impression was to that effect, looking to the facts of the case and the terms of the submission. But I have come to think that the sounder view is to regard the reference as not under the Act but outside of it, and therefore not subject to the statutory provision anent a single arbiter. *Newby's* case, [1899] 1 Q.B.

465, was referred to as supporting this view. The decision which, though not binding upon us, is entitled to the high respect due to the learned Judges who pronounced it, is not directly in point; it proceeded under the English Act of 1883, and the precise question now raised was not, and could not have been, there in issue, but part of the reasoning that underlies the judgment does seem to lend colour to the pursuer's contention. The case of *Pearson*, [1899] 2 Q.B. 618, not cited by counsel, should also be referred to. I think, therefore, that the Lord Ordinary was wrong in sustaining the fifth plea for the defenders Greenshields.

I now proceed to consider the question—as to which the Lord Ordinary, though he did not require to determine it, has very properly given us the benefit of his opinion—whether or not the fourth plea stated by these defenders is well founded. I think it is not. It seems to me that in the special circumstances of this peculiar case the requirements of the statute as to the date of making a claim have been sufficiently complied with. The Lord Ordinary quotes the (sixth) clause of the submission, and observes that "it did not certiorate the existence of a claim, still less indicate under what branch or branches of the schedule to the Act any claim would be made." With the first part of the sentence quoted I respectfully disagree. I think the language of the clause does certiorate plainly the existence, *i.e.*, the assertion, of a claim. As regards the later words, it seems clear from the correspondence that it had been timeously brought to the landlord's notice that the nature of the intended claim was for statutory compensation in respect of unexhausted manures and feeding stuffs, and that the (sixth) clause was inserted in the submission with the knowledge and assent of his agents. The Lord Ordinary ought not therefore, in my judgment, to have sustained the fourth plea for the said defenders. It is not, I think, necessary here to determine what particulars may be necessary for a claim which in terms of the Act must be made before the determination of a tenancy. I express no opinion as to whether any, or if so what, particulars it may be necessary for a tenant to intimate before that period arrives.

In my judgment we ought to recal the Lord Ordinary's interlocutor and pronounce decree of declarator and decerniture as craved in the summons. But I think that in the circumstances it would be reasonable and right that the expenses of Mr Hutcheson's appearance should be borne by the other defenders and not by himself.

LORD SALVESEN—The Lord Ordinary has stated with great precision the questions which arise for our determination, and although I differ from him in the conclusions at which he has arrived, it is only necessary to state the grounds of my difference. Section 11 (1) of the Act of 1908 (8 Edw. VII, cap. 64) does no more in my view (I quote from the Lord Ordinary's opinion) "than make any bargain or agreement to refer to two arbiters not binding, and does not invalidate an actual reference to two arbiters if parties voluntarily choose to make it." The purpose of the section was to enable any party to a lease, notwithstanding that he had entered into an agreement to refer certain matters arising out of the lease to two arbiters and an oversman in accordance with an old-standing practice, to avoid what the Legislature, no doubt, deemed to be a wasteful method of inquiry. It was found in practice, and of this there can be no better illustration than the proceedings in the reference with which we are now dealing, that the arbiters acted not in a truly judicial capacity but merely as agents for the persons by whom they were appointed, and that in the end the determination of all matters in dispute fell to be settled by a single arbiter, to wit the oversman. Nevertheless it had long been the settled practice to insert in agricultural leases, which in Scotland are generally of long duration, a clause referring questions that might arise at the end of the lease to two arbiters and an oversman. The Act therefore, in my opinion, receives full effect when it leaves it open to either the landlord or the tenant at any time to maintain that the dispute must be settled by a single arbiter in the manner provided by the Act, but it does not prevent parties, if they both think that the pre-existing customary method of settlement is to be preferred, from adopting that method. In the present case there were excellent reasons why parties should adopt this method of settling their disputes, for some of these did not arise under the Act, nor were they referred to arbitration under the lease. To insist in such circumstances that there should be two arbitrations would certainly not be in the interests of economy. It appears to me that no statutory provision which interferes with freedom of contract is to be stretched beyond the precise language used, and I cannot conceive any ground of public policy which would be served by preventing parties from settling their disputes in the way which they consider most appropriate, although it may be a matter of sound public policy to set parties free from an agreement entered into it may be long before the dispute has emerged and to give them the alternative which the Legislature deemed to be a better and more economical mode of settling the claims on one side or the other which are certain to arise on the termination of an agricultural lease. As the Lord Ordinary observes, such a solution is quite consonant with common law and with equitable principles. But further, I think that a statutory privilege which is conferred even in such absolute terms as are expressed in section 11 (1) may be waived. The parties are presumably the best judges of their own interests, and if, having fully before them the privilege conferred by the statute they have elected not to take advantage of that privilege, I cannot see any ground of public policy in accordance with which they should be debarred from doing so. I am therefore of opinion that the reference, which was in fact made, did not fall within section 11 (1).

Moreover, the questions which are to be determined in terms of the section are those which arise under the Act or under the lease—that is to say, those which the parties to the lease could be required to submit. Now the parties to the reference with which we are concerned were the outgoing and incoming tenant, and between these parties no question arose under the Act or under the lease. Even if the case had arisen with the landlord, as the reference was made not at the expiry of the lease according to its natural ish, it depended entirely on the agreement under which the tenant's renunciation of the lease was accepted whether any questions fell to be referred or not. If, for example, the outgoing tenant had accepted the landlord's first offer to agree to a renunciation only on the footing that no claim for unexhausted manures or feeding stuffs was to be made, I cannot see how such a bargain would have been in any sense illegal. It might have been a desirable thing for the tenant to be relieved of his obligations with regard to rent and otherwise in consideration of his renouncing a claim which in the ordinary course would only emerge on the expiry of the lease. But here a further agreement had to be made, viz., an agreement on the part of the incoming tenant to relieve the landlord of such claims, and the fact that he had entered into this agreement was the determining ground of the form which the reference took. The claim therefore did not arise under the Act, but out of the agreement between the three parties concerned, and while the measure of the claim was to be the same as if it had arisen under the Act, it was in no sense a claim under the Act. I find it impossible to distinguish this case from that of *Newby* ([1899] 1 Q.B. 465), where in somewhat similar circumstances a tenant of agricultural land and his landlord agreed that the land should be given up before expiration of the term, and that the tenant should receive compensation in respect of feeding stuffs, which is an improvement comprised in the First Schedule of the English Agricultural Holdings Act 1883. It was held that this agreement was not prohibited by the Act, which provides that the amount to be paid is to be ascertained by two valuers appointed by the landlord and the tenant respectively, and that accordingly, the claim not being for compensation under the Act, the procedure prescribed by the Act did not apply. The case for the pursuer here is stronger, because the Act of 1908 does not contemplate or provide for a reference between outgoing and incoming tenants, and accordingly on this quite separate ground I am of opinion that the Lord Ordinary reached an erroneous conclusion when he gave effect to the defenders' fifth plea-in-law.

In this view the second question does not necessarily arise at this stage, nor did it in the view that the Lord Ordinary took of the first. I agree with him, however, that as the matter was fully argued it is not expedient that it should be reserved for the determination of the oversman with the possible result that there might be a subsequent litigation. All the more is this so, as the oversman might take the same view as the Lord Ordinary, and indeed hold himself bound by his opinion, and as we all take a different view of the merits this would be eminently undesirable. The ground upon which the Lord Ordinary reaches the conclusion that the pursuer's claim is excluded because it was not timeously made under the Act of 1908 is not expressed with his customary lucidity. I take it, however, that in his view a notice of a claim accompanied with a statement of the subject-matter of it is not a compliance with section 6 (2) in respect that it does not contain the particulars and amount of the intended claim. I see no warrant for this in the language of the section. I am unable to agree with the Lord Ordinary's view that the word claim as used in the section "necessarily infers reasonable specification of its nature and amount." The contrary has been decided in connection with claims under the Workmen's Compensation Act, and having regard to the fact that a special mode of ascertaining the amount of the claim is prescribed, to wit by a single arbiter, I can see no good reason why the particulars and amount should not be set forth in the claim lodged before the arbiter and should not be deferred until then, provided always that intimation that a claim would be made has been given before the expiry of the tenancy. This provision was, no doubt, conceived in favour of the landlord so as to protect him against claims which might be put forward after the means of verifying and testing them had disappeared. It has little application to the case of an incoming tenant who necessarily made himself familiar with the condition of the farm when he took over the occupancy, and yet it is he and not the landlord who puts forward this technical plea. As the Lord Ordinary indicates, it would be an excellent reason for not stating the amount of the claim prior to the expiry of the lease that the amount in many cases cannot be definitely ascertained until the lease itself has come to an end. I am accordingly of opinion that on this point also the Lord Ordinary has erred.

I am therefore prepared to give decree in favour of the pursuer substantially as concluded for, for the only other plea-in-law for the defenders on which some argument was submitted, viz., the first plea that the action is premature and unnecessary, is I think entirely without foundation. The oversman, by an interlocutor which he issued to the parties, had definitely stated his own view that he could not competently deal with the claim for unexhausted manures and feeding stuffs, and though in his award, which was issued after the action was brought, he quite properly reserves to himself the right to dispose of the claim should the Court take a different view, he again affirms that according to the advice he had received he could not competently adjudicate upon it. In these circumstances I think the pursuer had no option but to bring the case into Court. In my judgment the oversman would have been well advised to have

adopted the pursuer's suggestion of disposing of the claim on the assumption that he could competently entertain it, and leave the defenders to take such action by way of interdict or otherwise as they thought proper. The pursuer coupled his request that this course should be followed with an offer to relieve the oversman of all expenses connected with such a litigation, but the latter allowed himself to be persuaded to the contrary by the defenders. The defenders therefore are in my judgment wholly to blame for the present litigation and ought to bear the expenses of the oversman as well as of the pursuer. If they had consented, as they well might, to the oversman disposing of the claim in the first instance they could have raised the legal points embraced in their 4th and 5th pleas just as readily in an action of interdict in which they would have been the complainers, and the matter could then have been determined without the necessity of having it remitted back to the oversman. I notice from the correspondence that the oversman's agents pressed the defenders to keep their client scatheless, in which case he was quite willing to do nothing but wait the decision of the Court and in due course act thereon. The defenders, however, refused to give any such undertaking, and the oversman accordingly thought it proper that he should enter appearance and explain his position. I do not blame him for doing so, nor on the other hand do I blame the pursuer for asking a decree for expenses against the oversman, who was the only person against whom he could direct his action. Had he made no such claim for expenses he might conceivably have obtained a decree in absence against all parties convened, in which case he would have had to bear the cost of raising the action—an expense to which he had been put entirely because the oversman chose to act on an unfounded plea proponed by the defenders.

LORD ORMIDALE did not hear the case.

The Court pronounced this interlocutor—

"Recal the said interlocutor: Decern against the defender William Hutcheson in terms of the conclusions of the summons: Find the compearing defenders Thomas Greenshields and Thomas Steel Greenshields liable in expenses in the cause incurred by both the pursuer and the defender the said William Hutcheson, and remit," &c.

Counsel for the Reclaimer (Pursuer)—D. P. Fleming—J. Macdonald. Agents—M'Leod & Rose, S.S.C.

Counsel for the Respondent (Defender)—William Hutcheson—Chree, K.C.—Scott. Agents—Connell & Campbell, S.S.C.

Counsel for the Respondents (Defenders)—Thomas Greenshields and Thomas Steel Greenshields—Macphail, K.C.—Guild. Agents—Guild & Guild, W.S.

Saturday, July 2.

FIRST DIVISION.

[Lord Hunter, Ordinary.

SMITH-SHAND'S TRUSTEES AND ANOTHER *v.* FORBES.

Process—Summons—Competency—Several Pursuers—Community of Interest—Action by Different Superiors of Adjoining Lands Held by the Same Vassal for Redemption of Casualties—Amendment.

A vassal holding adjacent lands under two different immediate superiors subfeued the lands as one feu for payment of a grassum and a nominal feu-duty, neither of which was allocated or apportioned. The superiors sued the vassal in one action for redemption of the casualties belonging to them respectively and for payment to them on their joint-receipt of an undivided capital sum or to each of them of separate sums. They averred that the boundaries of their estates were "in certain portions not easily ascertainable," and that "for the purposes of this action and of the determination of their respective rights in the redemption money or additional feu-duties payable under the Feudal Casualties (Scotland) Act 1914, the pursuers have adjusted the matters of boundary arising between them." *Held* (1) that the pursuers had no common interest and that the action was incompetent, but (2) that the action could be amended so as to proceed at the instance of one or other of the pursuers.

Miss Mary Jane Smith-Shand and others, the testamentary trustees of the late Mrs Anna Stuart or Smith-Shand, and William MacIntosh, factor and commissioner for the trustees of the late The Most Noble Alexander William George, Duke of Fife, owners and factor and commissioner for the owners respectively of the immediate superiority of the two portions of land which made together the whole of the estate of Candacraig, Aberdeenshire, *pursuers*, brought an action against Sir Charles Stewart Forbes of Newe and Edinglassie, the vassal of the trustees of the late Mrs Smith-Shand and the trustees of the late Duke of Fife in the said estate, *defender*, for declarator that the defender was bound to redeem all casualties incident to the superiority of the estate belonging to the trustees of the late Mrs Smith-Shand and all casualties incident to the portion of the superiority of the estate belonging to the trustees of the late Duke of Fife, and for payment "to the pursuers upon their joint-receipt" of the sum of £2006, 7s. 9d. for and on account of the casualties of superiority of the said lands," or alternatively to them respectively of the sums of £1105, 3s. 9d. and £901, 4s. The summons also contained alternative conclusions for the payment of additional feu-duties in the event of the defender deciding to commute the redemption prices into annual payments.