question as to the boundaries of these parishes that we have here to deal with.

The law of settlement is entirely statutory, and I do not find in the statutes any guide or assistance in answering the questions which have been submitted to us. What we are asked is this—[*His Lordship then referred to the questions*]. Now, these are either questions depending for their answer upon the statute, or they are not questions of law at all. For my own part, I may say that I can find nothing in the long list of statutes between 1579 and 1848 that can in any way aid us in the determination of these questions, and I therefore come to the conclusion that there is no question of law here at all.

The Legislature has placed these parishes in an anomalous and not very intelligible position. When they altered the law, so far as the division of parishes was concerned, they did not consider what would be the effect of the alteration upon residential settlements. The difficulty is one entirely created by the Legislature, and the Legislature must remove it. I am therefore of opinion that there is no question of law here at all.

There is no question of common law, because there is no common law upon the subject. The question is one of statute law, and we look in vain to the statute for any light on the subject.

LORD ADAM concurred.

LORD M'LAREN—Under the statute the Commissioners are empowered to deal with and to settle just such questions as are here submitted to us. No doubt such questions relating to settlement would be better determined by lawyers, as it is a subject not free from difficulty; but it does not by any means follow that the questions which have been presented to us, and which involve this and other matters, are really questions of law. I view them as belonging to the class of questions which the Legislature contemplated that the Commissioners themselves should determine.

LORD KINNEAR—The whole argument was directed to point out the convenience which might arise from the solution of the present question in one way or another. But none of these arguments affect any question of law, or present any question of law for our consideration. No doubt the effect of the statute is to put these two parishes in a very anomalous position towards each other, but the Legislature might have taken another course, and it appears to me to be very probable that it may have intended that all questions should be settled and decided on the principle of convenience, as cases might arise, by the Commissioners, to whom they had committed the practical resolution of the scheme of the Act.

If there is any question of liability arising between the two parishes in consequence of the detachment of one portion and its junction with another parish, that looks like a question of liability which the Commissioners might decide. At all events, I am clear that the Commissioners have not presented to the Court any question of law which they can ask us to decide or which we are able to decide.

The Court dismissed the case.

Counsel for the Parish of Borthwick—Wallace—C. K. Mackenzie. Agent—A. J. Napier, W.S.

Counsel for the Parish of Temple—J. A. Reid. Agents—J. & F. Anderson, W.S.

Saturday, July 18.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

GILMOUR *v.* THE CALEDONIAN INSURANCE COMPANY.

Insurance—Action on Policy—Arbitration—Arbiters not Named.

A policy of fire insurance provided, *inter alia*, that if a difference arose at any time between the company and the insured as to the amount payable in respect of any alleged loss or damage by fire, any such difference when it arose should be referred to the arbitration of a person or persons to be chosen by the parties.

Held that the terms of the clause of reference imputed more than a mere assessment of damages and that the reference being to arbiters unnamed, was invalid, and could not exclude an action by a party suing under the policy.

Andrew Gilmour, Blantyre, founding on a fire insurance policy, sued the Caledonian Insurance Company, Edinburgh, to recover the loss occasioned by a fire which took place on his premises in February 1891. The property was insured for £1700.

After the fire the defenders tendered £1350, which sum the pursuer refused. The policy provided—"Where the company does not claim to avoid its liability under the policy on the ground of fraud or non-fulfilment of any of the conditions hereinbefore set forth, but a difference at any time arises between the company and the insured, or any claimant under this policy, as to the amount payable in respect of any alleged loss or damage by fire, every such difference, when and as the same arises, shall be referred to the arbitration of one person to be chosen by both parties, or of two independent persons, one to be chosen by the party claiming and the other by the company, and in case either party shall refuse or neglect to appoint an arbitrator within twenty-eight days after notice, the other party shall appoint two arbitrators to act for both parties. Where two arbitrators are appointed they shall choose an umpire before entering on the reference, to provide for the possibility of a disagreement between them. And in

case of the death of the arbitrators, or of one of them, or of the said umpire, another or others shall be appointed in his or their stead; each party shall pay his or their own costs of the reference, and a moiety of the costs of the award; and the award of the arbitrator or arbitrators, or umpire, as the case may be, shall be finally binding upon all parties, and shall be conclusive evidence of the amount payable in respect of the said loss or damage. And it is hereby expressly declared to be a condition of the making of this policy, and part of the contract between the company and the insured, that where the company does not claim to avoid its liability under the policy on the ground of fraud or non-fulfilment as aforesaid, the party insured or claimant shall not be entitled to commence or maintain any action at law or suit in equity on this policy till the amount due to the insured shall have been awarded as hereinbefore provided, and then only for the sum so awarded, and the obtaining of such award shall be a condition-precedent to the commencement of any action or suit upon the policy."

The defenders pleaded, *inter alia*—"(1) The present action is excluded by the clause of reference in the policy. (2) In any view, the action ought to be sisted pending the decision of the pursuer's claim by arbitration in terms of the policy."

By interlocutor of 23rd June 1891 the Lord Ordinary (STORMONTH DARLING) repelled the first and second pleas-in-law for the defenders.

"*Opinion.*—This is an action on a fire insurance policy to recover the loss occasioned by a fire which took place last February. The parties are at issue as to the amount of the loss, the pursuer claiming £1700, which is the full sum in the policy, and the defenders refusing to pay more than £1350.

"What I have to dispose of now is the defence that the action is excluded by the clause of reference in the policy, or if not excluded, that it ought to be sisted pending the decision of the pursuer's claim by arbitration. To this the pursuer replies that the clause is ineffectual because no arbiters are named.

"The clause is set out in answer 5. The substance of it is, that when a difference at any time arises between the company and the insured as to the amount payable in respect of any loss or damage by fire, there being no question of fraud or non-fulfilment of the conditions of the policy, such difference is to be referred to the arbitration of a person or persons to be chosen by the parties. Then there are provisions for working out the reference, and a declaration that the insured is not to be entitled to commence or maintain any action on the policy till the amount shall have been fixed by arbitration. Of course the efficacy of this last declaration must depend on whether there is an effectual agreement to refer.

"The general rule of the law of Scotland that an agreement to refer future disputes or differences to unnamed arbiters is ineffectual, cannot at this time of day be called in question, and it received very recent recognition by the House of Lords in the case of *Tancred, Arrol, & Company* v. *Steel Company of Scotland*, 17 R. (H.L.) 31. There is an exception to the rule where the agreement to refer, to quote the words of Bell on Arbitration, p. 87, 'does not contemplate the decision of proper disputes between the parties, but the adjustment of some condition, or the liquidation of some obligation, contained in the contract of which the agreement to submit forms a part.' Examples of this exception are to be found in the common case of a landlord being bound in a lease to take the tenant's stock off his hands at valuation, or to pay a certain proportion of the value of buildings on the ground (as in the recent case of *Lord Advocate* v. *Earl of Home*, 18 R. 397), or of a mineral tenant being entitled to relinquish the lease when, in the opinion of skilled men mutually chosen, the minerals have become incapable of being worked to profit (as in *Merry & Cuninghame* v. *Brown*, 21 D. 1337). But these are all cases where the right, whether it be a right to receive money or to be rid of an obligation, is conferred by and made dependent on the very clause which binds the parties to nominate arbiters. There are also cases in which the fact to be ascertained, or the sum to be assessed by the arbiter is something quite subsidiary to the main purposes of the contract. In the present case the position is altogether different. The right to recover for damage by fire is the cardinal right conferred on the insured by the policy. It in no way depends on the agreement to refer; and the arbitration clause is simply an attempt to oust the jurisdiction of the courts of law from every action which the insured could have any possible interest to raise, except in the single case where the insurance company has intimated a defence of fraud or non-fulfilment of the conditions of the policy.

"It seems to me, therefore, that this clause falls under the rule, and not under the exception, and that it offers no obstacle to the action going on in the ordinary way. This view renders it unnecessary for me to consider the pursuer's plea that the defenders are barred by their actings from founding on the arbitration clause."

The defender reclaimed (with leave), and argued—The question of liability being admitted, all that remained was an assessment of damages. The case thus fell under the exception mentioned by Bell on Arbitration, p. 87, and the reference was not void from the arbiters not being named—*Merry & Cuninghame*, July 15, 1859, 21 D. 1337. The liability being admitted, the present action was excluded by the clause of reference—*Ramsay* v. *Strain*, February 6, 1884, 11 R. 527.

Argued for the respondent—This question was not not one of mere assessment. The value of the articles destroyed, their presence in the building at the time of the fire, whether or not they were included in the policy—these and other question were in-

volved—and therefore the case fell under the general rule, and not under the exception, and the reference being to arbiters unnamed it was bad—*Tancred, Arrol, & Company* v. *The Steel Company of Scotland*, March 7, 1890, 17 R. (H. of L.) 31.

At advising—

LORD PRESIDENT—In this case the holder of a fire policy has raised the present action against the insurance company to recover the loss occasioned by a fire which occurred upon his premises in February 1891. The defence to the claim is that it is excluded by the terms of the clause of reference in the policy.

The Lord Ordinary has repelled that plea and has sent the case to trial. In so doing his Lordship has proceeded upon the general rule of the law of Scotland that an agreement to refer future disputes to unnamed arbiters is ineffectual.

While this, no doubt, is the general rule, there is the exception to it referred to in that part of his note, in which, quoting from Bell on Arbitration, he observes that "there is an exception to the rule when the agreement to refer" does not contemplate the decision "of proper disputes between the parties, but the adjustment of some condition or the liquidation of some obligation contained in the contract of which the agreement to submit forms a part." Now, this rule and the exception to it are fixed by a series of decisions, and they are exemplified in the recent decision of *Tancred, Arrol, & Company* in the House of Lords.

The only question, therefore, which we have to determine is, whether the present case falls within the rule or within the exception, and that of course depends upon the terms of the claim of arbitration—[*His Lordship here read the clause above quoted*]. The case provided for is, "When a difference arises between the company and the insured as to the amount payable in respect of any alleged loss or damage by fire." Now, what does a claim of this kind comprehend? Is it a mere assessment of damages—that is to say, a mere valuation of the loss sustained—or is it an assessment in the wider sense of the word, namely, a determination as to what articles the claim is applicable. Questions may arise as to whether articles alleged to be destroyed fall within the scope of the arbitration clause; or as to whether articles alleged to be destroyed were actually in the premises at the time; or as to the value of articles burnt which could only be got at by an expert, or by some one who knew their intrinsic value.

It appears to me, therefore, that this clause of reference is of the wider kind. If the value of the articles lost was disputed, then I think that the language of this clause would admit inquiry, not only as to whether the articles in dispute were or were not in the building at the time of the fire, but also as to whether they fell under the clause of insurance.

I therefore agree with the Lord Ordinary in holding that this clause of reference falls under the general rule which I have stated, and not under the exception.

LORD ADAM concurred.

LORD M'LAREN—I have already expressed my opinion on clauses of this kind in the joint opinion of Lord Rutherfurd Clark and myself in the Second Division case of *Ramsay* v. *Strain*, 11 R. 527, and I have nothing further to add.

LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer — Salvesen. Agent—T. M'Naught, S.S.C.

Counsel for the Defenders — M'Clure. Agents—T. & R. B. Ranken, W.S.

Saturday, July 18.

FIRST DIVISION.

WHYTE AND OTHERS, PETITIONERS.

Trust—Removal of Trustee—Failure to Carry Out Directions of Trust-Deed—Petition at the Instance of All the Beneficiaries.

Where a sole trustee had wilfully failed to carry out the directions of the trust-deed, a petition for his removal at the instance of all the parties beneficially interested in the trust was *granted.*

The late George Whyte of Meethill, Aberdeenshire, died in April 1869, leaving a trust-disposition and settlement under which, upon the death or second marriage of his wife, his trustees were directed to pay to his three daughters Mary Logan Whyte, Phillis Whyte, and Fanny Whyte the sum of £1000 each, or in their discretion to make these provisions real burdens upon his heritable estate. The residue of his estate was to be held for behoof of his son George Whyte, one of the trustees. His widow died on 18th January 1887, survived by the three daughters and the son.

In 1882 the estates of the son George Whyte were sequestrated, and in the course of the sequestration his whole right to the residue of the trust-estate was assigned to David Hill Murray, S.S.C., Edinburgh. This assignation he ineffectually sought to reduce after obtaining his discharge.

In 1885 the trust-estate was sequestrated and a judicial factor appointed thereon, but on 10th January 1891 the factory was recalled and George Whyte resumed the management of the trust-estate, being the sole accepting and surviving trustee. Thereafter his sisters having failed to obtain payment of their provisions, brought an action of declarator against him to have these provisions constituted real burdens on the trust-estate. Decree in their favour was pronounced by Lord Stormonth Darling on 23rd June 1891 (after-