dential settlement in Govan was admitted to and detained in Gartnavel Asylum as a private patient from 10th August 1864 to 30th November 1868, when, her funds being exhausted, she became a pauper lunatic. Now, Gartnavel being in Govan, there happened in this case to be no change of residence occasioned by the committal to the asylum. Had there been, there would *de facto* have been absence from Govan for more than four years, and the residential settlement would admittedly not have been retained. The late Lord President personally held the opinion, which is not generally received, that mental capacity was requisite for the retention as well as for the acquisition of a settlement, and hence it would have followed that the pauper's residential settlement would have been lost by more than four years' residence as a lunatic in an asylum though locally situated in the parish of residential settlement. If in the late Lord President's opinion this ground of judgment was not to receive effect, resort must be had to the 75th section of the Act of 1857, and on consideration of its provisions his Lordship held it to apply; and if it properly applied in that case I admit that it must *a fortiori* apply in the present. The judgment is, I admit, not merely an *obiter dictum* of the late Lord President; it is his judgment in deciding the cause. But it is not the judgment of the Court Lord Kinloch differed from the Lord President in thinking it necessary to have recourse to the statute, which he therefore did not attempt to interpret. For he held, disagreeing with the Lord President, that mental capacity is not necessary for the retention of a residential settlement, and based his judgment in favour of the liability of Govan, on the ground that *de facto* there had been continued residence in Govan, though in an asylum. Lord Deas, again, does not adopt the interpretation put upon the 75th section by the Lord President, but bases his judgment on the view that the discovery of certain funds did not take the lunatic out of the category of a pauper lunatic, in which he thought the pauper was at the date of her confinement. And I think, though his Lordship's meaning is not very clear, that Lord Ardmillan agreed with Lord Deas. In these circumstances the interpretation of the 75th section of the statute contended for is that of the Lord President Inglis alone. The Court is therefore not precluded from consideration of the question as an open question, though bound to recognise the weight of the great authority of the late Lord President in favour of the respondent's contention. I have given the most respectful consideration to his Lordship's judgment in *Kirkwood* v. *Lennox*, but for the reasons I have stated I am unable to follow it. I think, therefore, that this appeal should be sustained.

The Lord President and Lord Pearson were absent.

The Court dismissed the appeal and affirmed the interlocutor of the Sheriff.

Counsel for the Pursuer and Respondent (M'Innes) — J. H. Orr. Agents — Bonar, Hunter, & Johnston, W.S.

Counsel for the Defender and Appellant (Rigg)—Dean of Faculty (Campbell, K.C.)—Chree. Agents—Purves & Simpson, W.S.

Counsel for the Defender and Respondent (Bell) — Deas—J. G. Jameson. Agents — Scott & Glover, W.S.

Tuesday, June 16.

SECOND DIVISION.

(With the Lord President, Lords M'Laren and Kinnear.)

[Sheriff Court at Dumfries.

BELL *v.* GRAHAM.

Landlord and Tenant — Lease — Improvements — Compensation — Arbitration — Statutory Arbitration — Agricultural Holdings (Scotland) Act 1883 (46 *and* 47 *Vict. cap.* 62), *sec.* 5—*Agreement Providing Compensation in Lieu of Statutory Compensation*—"*Fair and Reasonable Compensation*"—*Judge—Review.*

The Agricultural Holdings (Scotland) Act 1883, section 5, enacts — "Where, in the case of a tenancy under a lease beginning after the commencement of this Act, any particular agreement in writing secures to the tenant for any improvement specified in the third part of the schedule hereto, and executed after the commencement of this Act, fair and reasonable compensation, having regard to the circumstances existing at the time of making such agreement, then in such case the compensation in respect of such improvement shall be payable in pursuance of the particular agreement and not under the Act."

Held (*diss.* Lords Stormonth Darling and Ardwall) that in an arbitration under the Agricultural Holdings (Scotland) Acts 1883 to 1900, between a landlord and tenant, to ascertain the amount due by the landlord to the tenant in respect of improvements, the arbiter was bound, if the fairness and reasonableness of an agreement for compensation was challenged, himself to decide whether the agreement was fair and reasonable or the contrary, and, according to his decision of that question, either to award compensation in terms of the agreement, or to disregard the agreement and fix the compensation due under the Act; subject always to the following considerations:—(1) that the fairness and reasonableness of the agreement was to be judged as at the time when it was entered into; (2) that no objections to its fairness and reasonableness could be entertained by the arbiter unless the party objecting condescended specifically on the particular provisions objected to with the reasons for his objections.

Held further, that on the question of the fairness and reasonableness of an agreement the arbiter's judgment was not final but could be challenged by either party, the method of doing so being not by way of appeal or a stated case under the Act of 1900, but by interdict or other remedy open to any party in an ordinary arbitration in which an arbiter has acted *ultra vires*.

The following narrative is taken from the opinion of the Lord President. The sections of the Act are fully quoted in his opinion *infra*:—"In November 1899 the respondent Major-General Graham entered into a lease with the appellant William Bell whereby he let him the farm of Wyseby Mains. The lease is constituted by offer and acceptance appended to a set of conditions of twenty-one numbered clauses, each of which is signed by both parties. The sixteenth clause is in these terms—'The landlord hereby undertakes to execute all the improvements specified in the first and second parts of the schedule to the Agricultural Holdings (Scotland) Act 1883, on such terms as may from time to time be agreed upon in writing; and the tenant agrees that the landlord shall have the sole right to execute said improvements at such times and whenever the landlord considers them necessary. As to the improvements specified in the third part of the schedule to the Agricultural Holdings (Scotland) Act 1883, it is hereby agreed that the tenant shall be entitled, on quitting his holding at the termination of his tenancy, to obtain from the landlord compensation only in accordance with the following scale,' and then follows a long scale applicable to various classes of improvements.

"At the expiry of the lease the tenant gave notice of a claim for compensation and instituted a proceeding of arbitration under the Agricultural Holdings Act 1900. The arbiters appointed by the tenant and the landlord having declined to act, the reference devolved on the oversman, who had been appointed, in default of agreement, by the Board of Agriculture.

"The present case arises out of a question of law submitted by the oversman in terms of clause 9 of part I of the second schedule to the Act.

"The question as submitted is, 'Whether the oversman is entitled to set aside or ignore as void the agreement contained in said lease providing compensation to the tenant for improvements on the scale and as therein specified, in lieu of compensation under the third part of the schedule to the Agricultural Holdings (Scotland) Act 1883, if in his opinion "fair and reasonable" compensation is not thereby substituted for the compensation exigible under said Act; or must the oversman give effect to this agreement and scale of compensation unless or until the same is set aside or reduced by a competent Court?'

"The Sheriff [Fleming] has found that 'the oversman must give effect to the agreement and scale of compensation therein mentioned unless and until the same is set aside or reduced by a court of law.'

"The present case is an appeal from that judgment."

The Sheriff's note was as follows:—"The Agricultural Holdings (Scotland) Acts give to a tenant farmer compensation for improvements. The value of this right is if possible to be ascertained by agreement between the landlord and tenant. This agreement may be entered into not only at the termination of the lease after the claim for compensation is lodged, but also at any earlier stage even in the lease itself. It may be complete in that it contains all the factors for ascertaining the money value of the compensation, or partial, containing only certain of such factors.

"When the parties have not been able to come to any agreement either before or after the termination of the lease, or when the agreement is only partial, the Acts provide for the ascertainment of the value of the compensation by a statutory reference. What the reference includes is the ascertainment of the said value with or without any factors that may have been agreed upon. But the Acts provide that the agreement, if entered into in anticipation of the claim, shall only be held as substituting the particular factors agreed upon for those which the parties themselves or the referee may adopt if they will result in 'fair and reasonable compensation, having regard to the circumstances existing at the time of making such agreement.'

"It may be that such an agreement is challenged by one or other of the parties, but that challenge does not extend the limits of the reference. The factors to be used by the referee are agreed upon, and until that agreement is set aside the referee has no option but to use them.

"I was asked to interpret the Acts by what was argued was their obvious intention, viz., that the tenant should be free from any obligation which he had undertaken unless it was approved of by the referee. I cannot do so. In the first place, it seems to me that a much more obvious intention of the Acts is to retain the binding effect on obligations solemnly entered into, unless there are substantial grounds for setting them aside. In the second place, I am not prepared, by presuming the intention of an Act, to hold that it has altered the law of the land. If the Legislature wished to make the referee under these Acts the judge of the validity of the agreement as to what was to be referred, and thus the judge of the extent of his own jurisdiction, it could easily have said so, but it has not."

The tenant appealed. The case was heard before the Second Division and three Judges of the First Division.

Argued for the appellant—There was no ambiguity about section 5 of the Act of 1883. Reasonably construed its meaning was that compensation was payable according to the scale provided by the Act in all cases except one, viz., where there was an agreement which provided *fair and reasonable compensation*. In that case the agreement and not the scale provided by the Act was to rule. It was not any agreement

that would do, but a fair and reasonable one only, and it was accordingly absolutely impossible for the arbiter to know whether to proceed under the Act or the agreement until he had made up his mind whether the agreement was fair and reasonable or the opposite. The respondents' contention had the effect of taking the proviso as to fairness and reasonableness entirely out of the section. He argued, however, that the agreement must be at anyrate applied until formally reduced; that, however, was inconsistent with section 36 of the Act of 1883, which provided that all agreements as to compensation except those recognised by the Act were void *ab initio*, and the only agreement the Act recognised was one which was fair and reasonable. Further, the arbiter's decision of the question of fairness and reasonableness was final. It was a question of fact. An appeal on a question of law by stated case was given by Schedule II, Part I, sec. 9, of the Act of 1900, and the Sheriff could set aside his award if the arbiter had misconducted himself—Schedule II, Part I, sec. 13—but there was no provision for an appeal on a question of fact. The only possible way by which, perhaps, his decision might be overturned was by a reduction on the ground that he had acted *ultra vires, e.g.*, in setting aside as unfair and unreasonable an agreement which was in fact both fair and reasonable. Considerations of expediency were all in favour of the appellant's view, an agricultural arbiter being a far better judge of an agricultural agreement than a court of law. The following sections were also referred to:—Agricultural Holdings (Scotland) Act 1883, secs. 1, 3, 4, 8, 16, 20, 41; Agricultural Holdings Act 1900, secs. 1, 2, 7, 10 (4).

Argued for the respondent—In dealing with arbiters the practice of the Court was to confine them strictly within the limits of their jurisdiction. In the present case the arbiter's rights and powers were statutory, but nowhere in the statutes was any power conferred on him of deciding whether or no an agreement was just and reasonable. That was a question for the Courts, —*cf. Sinclair* v. *Clyne's Trustee*, December 17, 1887, 15 R. 185; *Roddan* v. *M'Cowan*, June 26, 1890, 17 R. 1056, 27 S.L.R. 984; *Hamilton Ogilvy* v. *Elliot*, November 3, 1904, 7 F. 1115, 42 S.L.R. 41. Accordingly, until the agreement was reduced in an action of reduction it must stand. The following considerations were also in favour of the respondent's view; presumably the parties who entered into the agreement knew what was just and reasonable at the time when the agreement was entered into, whereas the arbiter had no means of ascertaining the state of affairs which existed at the commencement of the lease, and was almost sure, consciously or unconsciously, to make his award according to presently existing circumstances. The following were cited:—Agricultural Holdings (Scotland) Act 1883, sections 3, 4, 5, 8, 20, 40; Agricultural Holdings Act 1900, section 2 (1). [The LORD PRESIDENT referred to *Newley* v. *Eckersley*, 1899, 1 Q.B. 465.]

At advising—

LORD PRESIDENT—[*After narrating the facts ut supra*]—The question is one of considerable practical importance in the working of the Act, and as I am aware that there is a difference of opinion among your Lordships I do not wonder at finding that it is not of easy solution. Nevertheless, the solution must depend on the terms of the statute, and the question of what consequences will follow is not, I think, one for which this tribunal is responsible.

I think it will conduce to clearness if I for the moment leave on one side the judgment of the learned Sheriff and approach the matter from the outset.

The Act of 1900 partly repeals and partly embodies the earlier Act of 1883. We must therefore read the Act of 1900 with the unrepealed clauses of the Act of 1883 written into it.

The right to compensation is given by the 1st section of the Act of 1900—"Where a tenant has made on his holding any improvement comprised in the First Schedule to this Act, he shall, subject as in the Agricultural Holdings (England) Act 1883 (in this Act referred to as the principal Act)"—this is by the application clause to be read for Scotland as Agricultural Holdings (Scotland) Act—"and in this Act mentioned, be entitled, at the determination of a tenancy, on quitting his holding, to obtain from the landlord as compensation under the said Acts for the improvement such sum as fairly represents the value of the improvement to an incoming tenant," and then follows a proviso which does not apply to the present case. That is the charter of the tenant.

Logically the section that next follows is the 36th of the Act of 1883—"Any contract or agreement made by a tenant by virtue of which he is deprived of his right to claim compensation under this Act in respect of any improvement specified in the schedule hereto (except an agreement providing such compensation as is by this Act permitted to be substituted for compensation under this Act) shall, so far as it deprives him of such right, be void." That maintains the charter of the tenant.

I now assume that the tenant has made an improvement mentioned in the schedule. The question of the position of agreements as to improvements outside the schedule, to which some of the cases cited referred, is a different one, and really does not touch the present question.

What, then, is the tenant to do? That is fixed by section 2 (1) of the Act of 1900—"If a tenant claims to be entitled to compensation, whether under the principal Act or this Act, or under custom, agreement, or otherwise, in respect of any improvement comprised in the First Schedule to this Act, and if the landlord and tenant fail to agree as to the amount and time and mode of payment of such compensation, the difference shall be settled by arbitration in accordance with the provisions, if any, in that behalf in any agreement between landlord and tenant; and in

default of and subject to any such provisions, by arbitration under this Act in accordance with the provisions set out in the Second Schedule to this Act."

Now, reverting to section 1, it will be remembered that the right to compensation is "subject to the principal Act." That lets in as one of the conditions the unrepealed section 5, and the bit of section 5 which applies to the matter in hand is the second paragraph, which is as follows:— . . . . (*quotes, supra in rubric*) . . . . .

Taking, now, the phrase in section 2—"whether under the principal Act or this Act, or under custom or agreement, or otherwise"—I come to the clear conclusion that the result is that in default of provision in the agreement itself for arbitration (which is the case here) *there must be an arbitration under the Act to determine the compensation.* I emphasise this because I understand that at least one of your Lordships is of opinion that the true operation of an agreement such as we have here is to take the matter out of the arbitration clauses altogether, leaving the tenant to recover by an action at common law, founding upon an arithmetical calculation of the sums due and reckoned in accordance with the factors set forth in the agreed-on scale calculated according to averred facts of expenditure. I do not hold that view, but I remark, in passing, that if it were right the question would not fall to be answered as the Sheriff has done, and indeed could not, in the terms put, be answered at all.

There being then (to revert to my own opinion) an arbitration, what is the arbiter to do? He has presented to him an agreement which substitutes an agreed-on scale of compensation for the scale which, so to speak, resides in his own breast, and which he would apply in an ordinary case. Such substitution is not against the terms of the Act. It is expressly recognised and legalised by the terms of section 36—"An agreement providing such compensation as is by this Act permitted to be substituted for compensation under this Act."

But it is not every substituted scale which is "permitted." It is only one in terms of, *inter alia*, section 5, and that is not absolute, it is conditional—conditional on being "fair and reasonable, having regard to the circumstances at the time of making" the agreement.

Now, I will revert in a little to an examination of what is the true meaning of this condition, but for the moment I pursue the duty of the arbiter. He has got to go on with the arbitration. He has tabled to him an agreed-on scale. He is told by the statute that he is to take that scale and not any notions of his own, but only if that scale is fair and reasonable having regard to the circumstances existing at the making of the agreement. The agreement is challenged by one of the parties as not fulfilling these conditions. I ask how is it possible that the arbiter should not be obliged to make up his own mind on the subject in order to see what he is to do next?

The learned Sheriff says no. There is the agreement. It gives the factors of computation, and the arbiter must take those, and not those of his choice, unless and until the agreement is put out of existence by appropriate process of law. That reasoning seems to me simply to cut out of the section of the Act of Parliament all the words (if I may coin an expression) of conditionality. It might well have been so. One might well think that if parties of full age set their minds to an agreement, that that might be allowed to stand. But that is not what the Act says. It does not say "If an agreement duly signed"; it says, "If an agreement which secures fair and reasonable compensation having regard to," &c.

Accordingly, I reluctantly am compelled to differ from the Sheriff, and to hold that the arbiter, if a tabled agreement is challenged, must proceed to determine the question whether such agreement is, as the 36th section phrases it, a "permissible" agreement, in order to explicate his own jurisdiction to give or not to give compensation under the Act according to a scale deemed right by himself.

But now I hasten to say that the opposing contention, which seems from the learned Sheriff's note to have been pressed upon him as the proper alternative to his judgment, and which he repelled, is, in my opinion, entirely wrong and fallacious. The learned Sheriff says—"I was asked to interpret the Acts by what was argued was their obvious intention, viz., that the tenant should be free from any obligation which he had undertaken unless it was approved of by the referee. I cannot do so," and then he gives his reasons.

Perhaps it was the horror against such an obviously unjust result which was partly the reason which led the Sheriff to his judgment. But in my view not only is the contention that the tenant should be freed from any obligation which he has undertaken unless it is approved of by the referee wrong, but it is fallacious because it does not present itself as a necessary alternative.

Let me now revert to the true meaning of the condition. It really is quite plain, and it is difficult to find words to make it plainer than the words used. The criterion of fairness is not what the arbiter would apply as his scale now, or what anyone else would apply now, but it is, Was it fair when entered into? *i.e.*, in view of what was known and expected then—not what has happened since. But I go farther. If parties of full age sign an agreement the presumption of fact is very strong that it is fair and reasonable. Take the agreement in the present case with its careful wording and its signature to each clause. If ever agreement bore upon the face of it the marks of careful consideration this one does. And the matter was one in which the tenant was probably more rather than less of an expert than the landlord. In such a case not only is the presumption of fact in favour of the agreement being fair and reasonable one of

enormous strength—I do not hesitate to use the epithet—but I have no hesitation in saying that an averment in mere general terms that it is not fair and reasonable is an irrelevant averment, because wanting in specification. In other words, I say that the arbiter here would be wrong in considering the challenge of the agreement at all unless the tenant should particularise on the exact points in which the agreement was not fair and reasonable, and should condescend upon the reasons for so holding. I trust that arbiters who hereafter may be appointed in such cases will bear these words—which I hope I have expressed so clearly as not to admit of misunderstanding—steadily in mind; for if they do not, and merely—to use what I consider the unhappy phrase used here in the question—"ignore" the agreement, because its scale is not the same as their scale, they will not be doing their duty.

I will add a further word which may, perhaps, if what I have said is not sufficient, induce caution.

It is a clear corollary from my judgment so far—in the result of which I am aware the majority of your Lordships concur—that though the arbiter must, as I have said, decide this question upon the agreement if challenged, yet his judgment will not be final. If he holds the agreement not fair and reasonable he will then proceed to award compensation according to his own scale. But to do so, if the agreement is really fair and reasonable, is to do something *ultra vires*, because the statute says that the agreement compensation is to be substituted for the ordinary compensation. Nothing, therefore, short of a positive enactment that on the point of the reasonableness of the agreement the arbiter's judgment was to be final, and no such enactment is to be found, could save his proceeding from the ordinary fate of a proceeding *ultra vires*. In other words, I am clear that if an arbiter treats as void a signed agreement as being not fair and reasonable, he may be interdicted from proceeding further, so that a court of law may forthwith determine whether the agreement is fair and reasonable in regard to the circumstances under which it was entered into or not.

The question was mooted as to whether this point could not be raised by appeal on case stated. I think not; such appeal seems to me to be given on points arising within the jurisdiction, not for determining the limits of the jurisdiction. Further, I do not see how it could be conveniently tried in a form of process which does not allow the reviewing Court to have an inquiry into facts, for the "having regard to circumstances existing," &c. necessitates an inquiry into fact, and the question on the merits is one in which fact and law are, in my opinion, inextricably involved. But even if it could be raised I do not think that, viewing the question as I do as being one of *ultra vires*, the common law jurisdiction of the Supreme Court could be held as excluded.

The result on the whole is that I think we should answer the question, but not exactly, in the terms put, which, as I have indicated, are, I think, badly chosen and apt to be misleading, and that we should say:—

That the arbiter, if the agreement tabled is challenged by the tenant as not being fair and reasonable under the circumstances existing at the time of making such agreement, is bound to decide that question for himself in order to determine his further procedure, but that he must bear in mind, first, that the criterion is the fairness and reasonableness of the agreement as viewed in the light of the circumstances at the time of making, and not the question as to whether it does or does not tally with the scale which the arbiter if left to himself would now apply; and second, that the agreement being signed by both parties it is necessary for the party seeking to hold it not fair and reasonable to condescend specifically on the provisions objected to and the reasons for holding these provisions not fair and reasonable.

LORD STORMONTH DARLING — Major-General Graham of Mossknow is the landlord, and William Bell is the outgoing tenant, of the farm of Wyseby Mains in Dumfriesshire. The lease of the farm, by clause 16, contains an agreement entitling the tenant, "on quitting his holding at the termination of his tenancy, to obtain from the landlord compensation only in accordance with the following scale," and then follows a scale defining for the last few years of the lease certain allowances for lime and bones and artificial manures and feeding stuffs, coupled with an obligation on the part of the tenant, whenever required by the landlord or his agent, to give a detailed account of the quality and quantity of the manures and feeding stuffs, and a corresponding right on the part of the landlord or his agent to take samples of such manures or feeding stuffs and to get them analysed. All this is described as "agreed to and signed" by both landlord and tenant.

The Agricultural Holdings (Scotland) Act 1883 provides by section 5 that ". . . (*quotes, supra, in rubric*). . . ."

The unrepealed portion of section 16 of the Act of 1883 must be read along with section 5. It provides that "in any case provided for by sections 3, 4, or 5, if compensation is claimed under this Act, such compensation as under any of those sections is to be deemed to be substituted for compensation under this Act, if and so far as the same can consistently with the terms of the agreement, if any, be ascertained by the referees or the oversman, shall be awarded in respect of any improvements thereby provided for." The important words which are thus left standing are "if and in so far as the same can consistently with the terms of the agreement, if any, be ascertained by the referees or the oversman"; and the question arises whether the determination of fairness and reasonableness of the agreed-on compensation can, consistently with the terms of the agree-

ment, be left to the referees or the oversman, or whether the mere fact of the compensation having been agreed on excludes all inquiry into the fairness and reasonableness of the compensation.

The only other section of the Act of 1883 requiring to be noticed is the 36th section, which provides that "any contract or agreement made by a tenant by virtue of which he is deprived of his right to claim compensation under this Act in respect of any improvement specified in the schedule hereto (except an agreement providing such compensation as is by this Act permitted to be substituted for compensation under this Act) shall, so far as it deprives him of such right, be void." But it is not maintained that this lease contains any contract or agreement which deprives the tenant of his right to claim compensation under the Act, so the 36th section does not seem to have any application to this case.

An arbitration was instituted under the Agricultural Holdings (Scotland) Acts 1883 to 1900 for the purpose of settling certain differences which had arisen between the landlord, General Graham, and the outgoing tenant, Mr William Bell, and the arbiters appointed by the landlord and tenant having declined to act, Mr Dudgeon of Cargen was appointed by the Board of Agriculture and Fisheries to be oversman in the reference, and the arbitration devolved upon him.

In the course of the arbitration Mr Dudgeon stated this case for the opinion of the Sheriff on a question of law, and the question of law which he stated is appended to the case. The oversman, after setting out the opposing contentions of parties, stated that he had difficulty in deciding between these two contentions, and practically referred the question to the Sheriff without indicating any opinion of his own. The Sheriff, Mr Fleming, found, "in answer to the question put by the oversman, that the oversman must give effect to the agreement and scale of compensation therein mentioned unless and until the same is set aside or reduced by a court of law." The tenant has now appealed to this Court under the 6th sub-section of section 2 of the Act of 1900.

The question which we have to decide, and which must equally with the question put to the Sheriff be a question of law, is whether the Sheriff was right or wrong in the answer he gave.

There is perhaps not much practical difference between the opinion expressed by the majority of your Lordships and the learned Sheriff, for I do not understand that your Lordships any more than the Sheriff give any countenance to the notion that the opinion of the oversman can be a final opinion, or indeed any opinion at all on a question of law. That must always be in the end a question for a court of law. The oversman may have to apply the scale of compensation to the facts as he finds them, and work out the figures accordingly. The only relevant ground on which he could find that the compensation "secured" by the agreement was not fair and reasonable would be by holding that it was illusory, and therefore void under the 36th section of the Act of 1883. But that, as I have said, is not alleged with regard to this agreement, and therefore I do not see what there is to prevent our getting at once to the real question of law, and answering it as the Sheriff has done—that is, by telling the oversman that he must give effect to the agreement and scale of compensation therein mentioned unless and until the same is set aside by a court of law.

When the landlord or tenant, as the case may be, has once put his hand to an agreement bearing in all its several particulars (including the scale of compensation) that it had been "agreed to and signed" by both landlord and tenant, what did or could that mean but that each of them, being *sciens et prudens*, and taking all the terms of either side into consideration, thought the particular stipulation a fair and reasonable one to make as between man and man? It is the first and most cardinal rule of all written contracts. And it clearly implies, not that somebody else thinks it fair and reasonable in itself, but that the party to the contract himself is satisfied with it as being fair and reasonable. If he is not so satisfied, is there any rule more firmly established than this, that the party to a contract who proposes to repudiate it must be prepared to allege some reason for his repudiation which will be judged of by the ordinary laws of relevancy? That would have to be done if the tenant in this case raised the action which the Sheriff invites. Here the only introduction of the element of fairness and reasonableness of the proposed compensation is to be found in the statute itself, and the statute nowhere declares or even indicates that the judge of the fairness and reasonableness is to be the arbiters or oversman. Indeed, every indication in the statute is that agreement between landlord and tenant is favoured wherever it can be reached, and it is only where the determination of fairness and reasonableness can be left to the referees or the oversman, *consistently with the terms of the agreement*, that they are invoked at all. In my view it is not consistent with the terms of the agreement that they should be so invoked. Moreover, I do not see how the question of law, which everybody admits must be decided in the end, could be raised better or more sharply than it is in this case. So far as raised on the present averments of the tenant, these are plainly irrelevant for want of specification.

I should therefore be for refusing the appeal and answering the question substantially as the Sheriff has answered it.

LORD LOW—The Agricultural Holdings Acts provide that a tenant at the determination of a tenancy, on quitting his holding shall, subject to certain conditions, obtain from the landlord as compensation for the improvements specified in the first schedule such sum as fairly represents the

value of the improvements to an incoming tenant.

The third part of the schedule comprises improvements in respect of which consent of or notice to the landlord is not required, and it is with such improvements only that the present case is concerned.

It is provided by the second section of the Act of 1900, which your Lordship has read, that if the landlord and tenant fail to agree in regard to the amount and time and mode of payment of compensation, the difference shall be settled by arbitration. Accordingly, in regard to all of these matters the jurisdiction of the ordinary Courts is excluded, and if the parties cannot agree, the only way in which their difference can be settled is by arbitration.

In this case there is an agreement between the landlord and the tenant (of a kind which I believe to be very common) fixing the scale upon which compensation for certain improvements of the kind enumerated in the third part of the schedule is to be calculated. Of course under such an agreement the amount of money to be paid to the tenant as compensation depends upon the quantity of lime or other substance which has been applied to the land, and the time at which it has been so applied. If the parties cannot agree upon these points, and therefore cannot arrive at the amount of compensation to be paid, it is necessary for them to go to arbitration. That is what happened in this case, and if the only question had been the ascertainment of the amount of the compensation by applying the agreed-on scale to such quantities of fertilising material as might be found to have been put into the land, the duty of the arbiter and the procedure to be adopted by him would have been clear enough.

The tenant, however, founding upon the 5th section of the Act of 1883, maintains that the agreement does not secure to him "fair and reasonable compensation, having regard to the circumstances existing at the time of making such agreement," and accordingly he asks the arbiter to settle the amount of compensation to be paid to him, not in accordance with the agreement, but according to the rule which the statute enacts for cases in which there is no agreement. The statute makes no express provision as to the tribunal which is to determine whether or not an agreement is fair and reasonable, and accordingly the question arises whether it is the duty and within the province of the arbiter to consider and dispose of the tenant's objection, or whether he is bound to give effect to the agreement unless and until it is set aside or reduced by a competent Court?

In the ordinary case the first thing which an arbiter has to do is to ascertain what is the extent of the jurisdiction committed to him, or, in other words, what precisely is the question which he has to determine. In this case that depends upon whether or not the agreement is one to which the arbiter is bound to give effect. If the agreement is to rule, his jurisdiction is confined to the ascertainment of the quantities of lime and the like put into the land, and by applying thereto the agreed-on scale to arrive at the amount of compensation to be paid; while, on the other hand, if the agreement is not to rule, his jurisdiction is to fix the compensation due under the Act—that is to say, the fair value of the improvements to an incoming tenant. Therefore, until the tenant's objection to the agreement is disposed of the arbiter cannot tell what is the precise extent of his jurisdiction.

Now it is a well established rule that a judge has an implied power to do what is necessary to explicate his jurisdiction, and can therefore determine incidentally any question which is necessary for that purpose, even although that question be one which is not in itself within his jurisdiction.

It therefore seems to me that it is presumably in the power, and therefore the duty of the arbiter in this case, for the purpose of explicating his jurisdiction, to deal with the tenant's objection, and I am unable to find anything in the statutes which, either expressly or by implication, deprives him of that power.

It is said, however, that if the arbiter can deal with the question at all his decision must be final, because the only review of an arbiter's decision which the statutes allow is upon a question of law to be formulated in a stated case; and the question whether an agreement is fair and reasonable could not be made the subject of a stated case because it is a question of fact.

I entirely dissent from the view that the question is only one of fact. It is a question of mixed fact and law—a question of the inference in regard to the rights and obligations of parties which may legitimately be deduced from certain facts. I am therefore of opinion that the contention that the decision of the arbiter upon the question could not be made the subject of a stated case because there is no question of law to be stated is untenable. In the next place, although it is true that the only procedure in the nature of an appeal against the decision of an arbiter in performing his statutory duties is by way of stated case upon a question of law, I cannot read the statutes as depriving a party to a statutory arbitration of the remedies which the law allows to a party to an arbitration in the event of the arbiter having exceeded or mistaken his jurisdiction.

The question, however, suggests itself (and a very important question it is), whether the provisions of the statute in regard to a stated case are applicable to the decision of an arbiter in regard to the fairness and reasonableness of an agreement? If that question were answered in the affirmative a somewhat anomalous state of matters would result, if I am right in thinking that the common law remedies of a party to an arbitration are not excluded. If the procedure were by way of stated case the facts would be supplied by the arbiter, and the only question left to the Court would be what was the sound legal inference to be deduced from these facts; while, if the procedure were by way of suspension

and interdict or reduction, the ascertainment of the facts, as well as the determination of the legal inference, would be for the Court. Again, if the question were raised by stated case, the decision of this Court would be final, whereas a suspension and interdict or a reduction could be carried to the House of Lords. That would be a somewhat unfortunate state of matters, although, of course, if it be the result of a sound construction of the statutes, the Court cannot give effect to considerations of convenience. Such considerations may, however, legitimately be taken into account when the question arises, what is the sound construction of the statutes.

My first impression was that a stated case was a competent mode of bringing under review the decision of an arbiter upon the question of the fairness of an agreement, and I confess that I was largely influenced by the apparent analogy furnished by the Workmen's Compensation Act, under which the question whether an accident was due to the serious and wilful misconduct of a workman has been held to be a question of law. Upon consideration, however, I have come to the conclusion that the analogy is by no means complete. In the first place, the question of serious and wilful misconduct falls within the jurisdiction of an arbiter under the Workmen's Compensation Act, and is not, like the question of the fairness of an agreement under the Agricultural Holdings Acts, one with which the arbiter has no power to deal except incidentally and for the purpose of explicating his own jurisdiction. In the next place, it seems to me that there is, or is likely to be, a material difference in the nature of the facts and circumstances which require to be ascertained in the one case and in the other. The facts upon which the question of serious and wilful misconduct depends are, I should think, in the general case pure questions of fact. All that requires to be ascertained is what was the nature of the accident and how it happened. The question of the fairness of an agreement, on the other hand, is to be determined upon a consideration of the circumstances existing at the time of making the agreement; and I imagine that nice questions would be likely to arise as to what circumstances were relevant to the issue, or what circumstances could competently be taken into consideration. It therefore seems to me that, from the outset, fact and law would be likely to be (as your Lordship has put it) inextricably involved. I think that the typical case which the Legislature had in view in providing that questions of law might be raised by a stated case was a case where upon the one hand there were matters of fact only, and upon the other hand a question of law only. No doubt an absolutely pure case of that sort may seldom arise, and it may be a matter of difficulty to determine in a particular case whether there can be a sufficiently clear separation of the question of law from the matters of fact to bring the case within the scope of such an enactment. In the present case, however, I have come to the conclusion, although not without hesitation, that facts and law would be likely to be so immixed that no Court could safely decide whether or not the agreement was fair and reasonable within the meaning of the statutes unless it had control of the whole proceedings in which that question fell to be determined.

I therefore agree with the result arrived at by your Lordship in the chair; and perhaps I may be permitted to emphasise my concurrence with the remarks which have fallen from your Lordship in regard to the duty of the arbiter in dealing with the question whether the agreement is or is not fair and reasonable.

LORD ARDWALL—This case raises a question of general importance, and, I venture to think, of considerable difficulty.

The question for decision has arisen in the course of an arbitration under the Agricultural Holdings (Scotland) Acts 1883 and 1900, between William Bell, lately tenant of the farm of Wyseby Mains, Dumfriesshire, and Major-General John Gordon Graham of Moss Knowe, landlord of the said farm. The tenant (the appellant) contended before the oversman that an agreement regarding the compensation which he was to receive for certain improvements specified in the third part of the schedule of the Agricultural Holdings (Scotland) Act 1883 did not secure to him fair and reasonable compensation for such improvements, and he accordingly desired the oversman to disregard it altogether, and to fix the compensation due to him without reference to it. It may be here noted that the agreement which is made by the lease is a carefully drawn one, and was entered into so recently as November 1899. The landlord, on the other hand, contended that the oversman was not entitled at his own hand to set aside or disregard said agreement, but was bound to give effect to it unless and until it was declared *not* to be fair and reasonable by a court of law. The oversman having difficulty in deciding between these two contentions, and in particular whether he was entitled to disregard the agreement as being unfair and unreasonable without any legal process, stated the present question of law for the opinion of the Sheriff.

The Sheriff has found in answer to the question that the oversman must give effect to the agreement and scale of compensation therein mentioned unless and until the same is set aside or reduced by a court of law. But as a summons of reduction seems to be inappropriate if not incompetent, the case may be taken as if the Sheriff had decided that a decree in an action of declarator or other competent legal process was needed in order to entitle the oversman to disregard the agreement.

The statutory provision which applies to this case is to be found in the second paragraph of the fifth section of the Act of 1883, which is in these terms — . . . [*Quotes, supra, in rubric*]. . . .

Along with this may be read section 36, which provides as follows:—"Any con-

tract or agreement made by a tenant by virtue of which he is deprived of his right to claim compensation under this Act in respect of any improvement specified in the schedule hereto (except an agreement providing such compensation as is by this Act permitted to be substituted for compensation under this Act) shall, so far as it deprives him of such right, be void."

The Act of 1883 was introduced with a view to securing that tenants in every case should receive fair and reasonable compensation for improvements so far as these benefited the incoming tenant or landlord. With this view it introduced certain arbitration procedure with a view to the expeditious and economical determination of such matters. But at the same time it did not abolish, and was not intended to abolish, agreements for the settlement of compensation, especially for manurial improvements, which agreements were in vogue before the passing of the Act, and had proved useful in practice, and since the passing of the Act I believe it to be the fact that such agreements regulating the scale on which improvement outlay in the way of application of manures to land and the consumption of feeding stuffs not grown on the farm are to be compensated are exceedingly common, and in some parts of the country almost universal; and I see that in a recent legal work, Green's "Encyclopædia of Scots Law," in a form of a lease there is appended thereto what are supposed to be model forms for regulating such compensation, and similar schedules and tables of compensation in use upon various large estates throughout Scotland are to be found in Sheriff Johnston's edition of the "Agricultural Holdings Acts." It may therefore be taken that such agreements and accompanyiug scales of compensation are carefully considered by the parties to them before being entered into. The object of entering into them is manifest. An agreement allows the tenant to know how much compensation he may expect to get for improvements of the nature specified, and it allows the landlord to know what compensation he will require to pay; and I need hardly point out that a scale of compensation arrived at between parties who are presumably on good terms with each other and in cool blood is likely to be much more just than a scale of compensation fixed by arbiters or oversmen who may possibly be swayed to partial judgments by sentiments or considerations which may arise at the time of a tenant leaving a farm, and which ought to have nothing to do with the matter. Indeed, if the parties are reasonable, such agreements might enable them in numerous cases to dispense altogether with the expense and trouble of an arbitration, or in any view to restrict the scope of arbitrations.

Accordingly, under the Act there are two methods for ascertaining compensation for any particular improvement or class of improvements—first, the arbitration under the Act, and second, agreement of the parties. But in order that a tenant should not be deprived of his compensation under the Act, either by an agreement surrendering his rights altogether or by an illusory agreement, section 36 was enacted, and the clause was inserted in section 5 providing for compensation being payable according to the agreement only if the compensation so provided is fair and reasonable.

The only clause where the two methods of ascertaining compensation are brought together in the Act of 1883 is in section 16, and that section provides—"In any case provided for by sections 3, 4, or 5, if compensation is claimed under this Act, such compensation, as under any of these sections, is to be deemed to be substituted for compensation under this Act, if and so far as the same can consistently with the terms of the agreement, if any, be ascertained by the referees or the oversman, shall be awarded in respect of any improvements thereby provided for, and the award shall when necessary distinguish such improvements and the amount awarded in respect thereof; and an award given under this section shall be subject to the appeal provided by this Act."

But from this I think it appears that the compensation is only to enter the referees' or oversman's award "if and so far as the same can consistently with the terms of the agreement, if any, be ascertained by the referees or the oversman." Accordingly, even in this section the validity and effective force of an agreement is maintained. But excepting this section there seems to be nothing in the Act to suggest that the arbiters or oversman are to be the judges of the validity of an agreement under the Act, except in so far as it may be said that when an agreement regarding certain improvements is tabled in a reference they must decide whether they are to give effect to the agreement or not.

The question that thus arises is one, I think, very much of *onus*. On the one hand, it is said that as the statute gives the tenant a right to compensation he can only be deprived of that by the landlord producing an agreement by which fair and reasonable compensation is secured, and that if the arbitration tribunal do not think that the agreement so tabled to them does secure such compensation they are bound to proceed to value the improvements themselves, and that it follows that they should, at all events in the first place, be the judges of whether the agreement is fair and reasonable. On the other hand, it is said that unless an agreement is obviously void under the 36th section of the Act, or clearly inapplicable under section 5 of the Act, as not securing fair and reasonable compensation, it must be presumed that an agreement fixing a scale of compensation is fair and reasonable otherwise the parties would not have entered into it, and that at all events it must be presumed to be fair and reasonable until the reverse is declared by a court of law.

I am of opinion that the latter contention is the right one. In interpreting statutes they must always be read so far as possible consistently with the rules of the common law unless these are expressly excluded.

In the statute presently under consideration I do not think these rules are excluded, and accordingly an agreement deliberately entered into by persons under no legal or mental incapacity must be regarded as binding until it is set aside in some competent proceeding. To hold anything else I think would be practically to put a premium on dishonesty, and I am unwilling to believe that the statute intended to do this. But I may mention that it has come under my personal observation, as formerly Sheriff of Perthshire and otherwise, that there is an idea abroad that the statute did intend to do this, and that a tenant may sign any agreement he pleases, believing at the time he signs it that it is not fair and reasonable, and not intending to be bound by it, because he supposes that the Act puts it in the power of arbiters at the termination of the tenancy to say whether the compensation is in their view fair and reasonable or not, and that therefore it does not matter what agreement he signs, because in the long run everything must be determined by the arbiters or oversman. I think it would be very undesirable to give any countenance to this view of the Act; and if it be decided in this case that the question whether an agreement is fair and reasonable rests with the arbiters and the oversman, I fear that such a view will be countenanced. I fear also that such an interpretation will practically make agreements quite valueless and thus lead to their disuse altogether, and this certainly was not the intention of the Act, which very properly recognises and to a certain extent encourages them.

It is, however, I understand, suggested by the majority of your Lordships that the arbiters or oversmen are inferentially constituted judges of the validity of an agreement in the sense of the Act, because in order to explicate their own jurisdiction it is necessary for them to decide whether or not any particular agreement is to be given effect to, and then, if they decide wrongly, that their decision may be upset as illegal. I will say no more on this last point than that I think it open to doubt whether such remedy will be available when the arbiters have once decided the compensation payable in any case. In any view, however, I hold it more consistent with ordinary law and practice that the arbiters (except where an agreement is *ex facie* absolutely unjust or illusory) should hold it binding to the effect of ousting their jurisdiction on the matters dealt with by agreement till the agreement is decided by an ordinary court of law not to secure fair and reasonable compensation in terms of the statute. This course will at once explicate the arbiter's jurisdiction and lay on the party who is repudiating his own agreement the *onus* of having it set aside, which appears to me to be more in accordance with legal principle and practice than laying on the party founding on an agreement the *onus* of proving to the arbiters that it provides fair and reasonable compensation to the tenant. There would be no hardship in the course I venture to suggest, because no tenant would require to take legal proceedings to set aside an agreement unless he had himself been to blame for entering into an unreasonable one. And as to expense, a tenant could obtain a declarator in the Sheriff Court that the agreement was not fair and reasonable without much expense, whereas if an arbiter's award is, as suggested, to be challenged, the proceedings must be taken in the Court of Session.

Another objection to its being left to the arbiters to decide whether an agreement is valid or not under the statute is that, supposing they erroneously reject an agreement the arbitration proceedings, if not interdicted, will go on to completion, and all this will be thrown away should an action for reduction of the award be afterwards brought and carried to a successful issue.

On the whole matter I am of opinion that the Sheriff's judgment is right in substance, though not in form, and that if a tenant who has signed an agreement wishes an arbiter and oversman to disregard it he must bring and succeed in an action of declarator to the effect that the agreement does not secure to the tenant fair and reasonable compensation in terms of section 5, and is therefore void in terms of section 36 of the statute.

LORD M'LAREN—I concur in the Lord President's opinion. I think that Lord Ardwall's opinion may fairly be said to represent what the Legislature ought to have enacted upon this subject, but I think the Lord President's opinion represents what it has enacted.

If I add anything it would only be an observation on the illustration suggested by Lord Low, when he compared the question of serious and wilful misconduct which arises under the Workmen's Compensation Act with the question which is raised by the present case. It is only an illustration, but the two provisions to be considered are so far analogous in that they both are concerned with the mind and conscience of the persons whose acts are under consideration. Now, I would apply the illustration in the following way, which if not exactly is at anyrate substantially the same as Lord Low's. This Court has never held that the question whether a man's misconduct was to be regarded as serious and wilful or not was in every case a question of law which the Court should determine. It has always been my opinion—and I think it is the opinion of the courts who have considered these cases—that if there were a real question of fact, whether there was misconduct at the time of the accident, then it was for the arbiter to consider and determine finally that pure question of fact; but if he chose to state a case in which facts were set forth, then the Court might inquire whether there was the minimum of fact in the case to warrant the arbiter's finding, because if there were no facts to warrant the finding, or fewer facts than the necessary minimum, which is the same thing, then we should be entitled to hold, and have held, that

there was no question for the consideration of the arbiter any more than there is for the consideration of a jury when a pursuer has not adduced any evidence in support of his case.

Well, then, I think that we really proceed in the same way in regard to this matter, because in accordance with the Lord President's opinion, in which I concur, it is for the arbiter to consider whether this agreement between the parties was fair and reasonable, having regard to the facts known at the time. The Court will only interfere with his award if it is satisfied that there was no serious consideration of this question by the arbiter, or if the circumstances upon which his judgment was based were such that no impartial person could have come to the conclusion at which he arrived on the facts. I should not be disposed to think that in every case the question of fairness and reasonableness is one for a court of law, but in every case the arbiter himself must be fair and reasonable in his conduct, and if he ignores the statute and substitutes his own opinion as to the compensation to be awarded, then undoubtedly he has exceeded his jurisdiction and can be corrected.

LORD KINNEAR—I concur in the opinion of the Lord President.

The LORD PRESIDENT stated that the LORD JUSTICE-CLERK concurred in his opinion.

The Court pronounced this interlocutor—

"Find in answer to the question therein stated, that as the agreement tabled is challenged by the tenant as not being fair and reasonable under the circumstances, the arbiter is bound to decide that question for himself in order to determine his further procedure, but that he must bear in mind (1) that the criterion is the fairness and reasonableness of the agreement as viewed in the light of the circumstances at the time of making, and not the question as to whether it does or does not tally with the scale which the arbiter if left to himself would now apply; and (2) that the agreement being signed by both parties, it is necessary for the party seeking to hold it as not being fair and reasonable to condescend specifically on the provisions objected to, and to reasons for holding these provisions not fair and reasonable: Find and declare accordingly, and decern."

Counsel for the Appellant—T. B. Morison, K.C.—Jameson. Agents—Scott & Glover, W.S.

Counsel for the Respondent—Johnston, K.C.—Inglis. Agents—Fraser, Stodart, & Ballingall, W.S.

Wednesday, June 17.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

BEATON *v.* GLASGOW CORPORATION.

Reparation—Slander—Master and Servant—Liability of Corporation for Slander of Servant—Relevancy of Action against Corporation where no Special Averment of Duties of the Servant.

A swimming instructor raised an action for slander against the corporation of a city, in which he averred that the superintendent of certain baths in the city had as such delivered a written report to the city's general manager of public baths; that the latter in the execution of his duty as general manager had forwarded the report to the clerk of the school board of the city, who had previously employed the pursuer as swimming instructor; and that certain statements in the report were false and slanderous, and intended to bring about his dismissal.

The Court, who assumed that the report was slanderous, *held* that the averments were irrelevant, on the ground that the position of general manager of baths did not imply authority from the corporation to make communications on their behalf as to the business of the baths, especially to an outside body like the school board, and that there were no special averments that to make such reports was within the scope of his employment.

Daniel Beaton, swimming instructor, Glasgow, raised an action against the Corporation of the City of Glasgow, in which he, *inter alia*, sought to recover damages for alleged slander, said to be contained in a report written by Robert A. Murray, superintendent of Gorbals Baths, to William Thomson, general manager of the public baths, and sent by him to the Glasgow School Board.

The pursuer's averments relating to the alleged slander were, as amended, as follows (the deletions are in italics, and the amendments within brackets)—"(Cond. 1) The pursuer is a swimming instructor in Glasgow. He has the largest business of the kind in the city, and has been engaged therein for over thirty years. He has been employed by the Glasgow School Board as swimming instructor in connection with their schools for the past seven years, and he is also instructor to several swimming clubs in Glasgow. The defenders are the local authority having the control and administration of the Public Baths of Glasgow under the Glasgow Police Act 1866. . . . . (Cond. 7) *On or about* 1st *May* 1907 *the said Robert A. Murray wrote a letter to the Clerk of the Glasgow School Board (who employed the pursuer as swimming instructor, as before mentioned), in the following terms*—[On or about 1st May 1907 the said Robert A. Murray, as superintendent of the said