to me that it would defeat the whole object of the Legislature if we were to adopt the construction for which the appellant contends. We should practically have to read section 3, which expressly includes ice-cream shops, as not applying to any ice-cream shops which were in existence at the time when the Act was passed, but as only having a possible application to subsequently established places of refreshment of the same kind.

I think there is a sufficiently clear indication in the statute that the exemption clause does not apply to places with which the main clause expressly deals, and that view is confirmed by a consideration of section 4, the effect of which appears to be that, after the expiration of three months from the date of the passing of this 1911 Amendment Act, all the regulations existing under previous bye-laws or statutes applicable to ice-cream shops are swept away. If the appellant's contention were well founded, he would now be in the privileged position of being able to carry on his business without regulation by the local authority. Plainly the Act was not intended to have this effect. The exemption clause may reasonably be accounted for on the supposition that it was intended to apply to places of public refreshment—a theatre where there are bars was suggested by way of illustration — where there is a certificate or licence or sanction in the proper sense issued by the local authority in respect of the premises, and which being already under public control required no further regulation in the public interest.

LORD DEWAR—I concur.

The Court answered the first question in the affirmative and the second in the negative, and refused the appeal.

Counsel for Appellant—Sandeman, K.C. —Lippe. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for Respondent—A. O. M. Mackenzie, K.C.—M. P. Fraser. Agents—Campbell & Smith, S.S.C.

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# COURT OF SESSION.

*Wednesday, June 24.*

## SECOND DIVISION.

[Lord Hunter, Ordinary.

## GIBSONS *v.* FOTHERINGHAM.

*Arbitration — Lease — Oversman — Devolution on Oversman—Award by Oversman Incorporating Decisions by Arbiters.*

A minute of submission in an agricultural reference relating to valuation authorised the arbiters to pronounce decrees interim or final. In an action by one of the parties to the reference for reduction of two awards made by the oversman, the Court *held* that (1) the awards were valid although they proceeded without formal minute on partial devolutions which the arbiters made from time to time of questions on which they had disagreed; (2) an award was valid though it incorporated previous decisions by the arbiters; and (3) where a deadlock had arisen owing to the arbiters having failed to agree on a crucial point of procedure, it was competent for one of them to make a devolution on the oversman although the other dissented from his so doing.

Miss Jane Elizabeth Gibson and others, all residing at Kair House, Fordoun, Kincardine, lessors of the farm and lands of Shepherdshaugh, *pursuers*, brought an action against Alexander Fotheringham, farmer, residing at Pitnamoon, Fordoun, Kincardine, formerly tenant of the farm and lands of Shepherdshaugh; Charles Cargill, farmer, Mains of Pitarrow, by Laurencekirk; John Milne, auctioneer, Brechin; and James Ebenezer Esslemont, farmer and valuator, residing at Little Barras by Stonehaven, *defenders*, for reduction of (first) an award, dated 1st August 1913, issued by the defender James Ebenezer Esslemont as oversman, acting under minute of submission between the defender Alexander Fotheringham and the pursuers, dated 21st and 23rd May 1913, and (second) an award, dated 8th January 1914, issued by the defender the said James Ebenezer Esslemont as oversman foresaid. Alexander Fotheringham was the only compearing defender.

The pursuers pleaded, *inter alia*—"(1) The reference not having been devolved upon the oversman by a formal minute of devolution, or other writing under the hand of the arbiters, *et separatim* the arbiters not having differed upon any question falling within the scope of the reference, no part of the reference devolved upon the oversman, and he had no power or authority to intervene in the reference, and to execute and issue the pretended awards complained of, and the same accordingly fall to be reduced as concluded for."

The defender pleaded, *inter alia*—"(3) The awards libelled being within the powers conferred upon the arbiters and oversman, and the procedure in the arbitration having been in all respects regular and proper, the defender is entitled to absolvitor, with expenses."

The action was conjoined with an action by Alexander Fotheringham for payment of a sum found due under the first award against the pursuers in the action of reduction.

The *facts* are given in the opinion of the Lord Ordinary (HUNTER), who on 22nd April 1914, after a proof led, assoilzied the defenders in the action of reduction and granted the decree sought in the action for payment.

*Opinion.* — "In the action of reduction the pursuers seek to set aside two awards issued by Mr James Ebenezer Esslemont as oversman acting under a minute of submission between the defender Alexander Fotheringham and them. Prior to Whitsunday 1913 the said defender was tenant under the pursuers of the farm and lands of Shepherdshaugh, in the county of Kin-

cardine, his tenancy coming to an end as regards the houses, farm offices, pasture and fallow land in preparation for the green crop, at that date, and as to the remainder of the farm at the separation of the hay and grain crops of that year.

"In terms of the defender's lease it was provided that the tenant should leave, and the landlord or incoming tenant should take, at the valuation of arbiters mutually chosen, or their oversman—(*First*) The work performed prior to the term of removal from the houses and others on the fallow ground in preparation for the green crop; (*Second*) The whole of the manure at the said term so far as made subsequent to the sowing and proper manuring of the preceding green crop, provided it shall not exceed the quantity usually on the farm about the term of Whitsunday; (*Third*) The machinery of the threshing-mill, but not exceeding £50, and if below that sum then only its actual worth; (*Fourth*) All the fencing so far as belonging to the said Alexander Fotheringham; (*Fifth*) The one-half of the grain and straw as the crop stands in the fields about the middle of August, but under deduction of a reasonable allowance for cutting, harvesting, and stacking; and (*Sixth*) The value to the ingoing tenant of the grass of two years old or upwards, in so far as such grass shall exceed 40 acres in extent but not exceed 80 acres.

"By minute of submission, dated 21st and 23rd May 1913, the pursuers and the defender Fotheringham nominated and appointed the defenders Charles Cargill and John Milne as arbiters, mutually chosen, to value the said subjects. By minute dated 9th June 1913, endorsed on the minute of submission, the arbiters appointed the defender Mr Esslemont to be their oversman.

"The awards issued by Mr Esslemont are challenged upon the ground that there was no valid devolution of the reference upon him. The pursuers allege that there was neither a formal nor real difference of opinion between the arbiters. They also maintain that so far as the first award is concerned, it was, as regards certain matters dealt with, *ultra fines compromissi*.

"The facts as proved are briefly these. On 26th May 1913 the arbiters had a meeting on the ground with a view to fixing the value of the subjects. As is usual in such references, they were accompanied by the oversman. It had been agreed between parties that in addition to the subjects mentioned in the minute of submission, the arbiters should value the grates in the farm-house and two small sheds at the cottar-house. These were the matters that were first considered. Thereafter the arbiters and oversman went over the farm and noted the various fields and fences. The value of the grass, the machinery at the mill, and the dung was in turn considered. There is a material discrepancy in the evidence given on the two sides as to the part played by the oversman on this occasion. Mr Milne says that while he and Mr Cargill started by each giving a different figure as the value of the subjects dealt with, they always agreed upon figures on the suggestion of the oversman. On the other hand, Mr Cargill says that he and his co-arbiter agreed upon nothing, and that in each case of difference of opinion as to price it was left to the oversman to fix a price, and he did so. I think that the account given by Mr Cargill is more in accordance with what actually occurred than is the account given by Mr Milne. The oversman, Mr Esslemont, who appeared to me to give his evidence fairly and candidly, explained that in agricultural references as to the value of the subjects on a farm, the oversman, without disclosing any figure as his own, may make a suggestion to the arbiters which they accept as an agreed-on figure; but that in this case the prices fixed by him were his own independent figures and were not accepted by the arbiters. I understood from his evidence that in such references, even if the oversman is left to fix the price of one subject, the arbiters proceed to consider the other subjects with a view to seeing if they can agree upon their values. From awards exhibited to me by the parties in the course of the proceedings it appears to be not unusual for both arbiters and oversman to sign the award, though, in view of the decision in the case of *Davidson*, 1908 S.C. 350, 45 S.L.R. 142, this practice is not unattended with risk.

"After the meeting of the 26th May 1913, the arbiters and oversman had several meetings upon the ground. These were devoted to considering the extent of the fencing belonging to the outgoing tenant, the ownership of the mill-wheel, and the amount of dung usually on the farm. Information was got upon these points principally from the parties themselves in an informal way. A considerable amount of time was being wasted without any progress being made; and for this I think Mr Milne was largely responsible. Accordingly on 1st July 1913 Mr Cargill intimated to his co-arbiter that as they had differed in opinion and failed to pronounce a finding, he was applying to the oversman to act in the submission. In terms of this intimation he sent a request to the oversman to act. Mr Milne took up the position that he would not agree to devolve the reference upon the oversman and that he would resist any interference on his part. On 7th July Mr Esslemont wrote to Mr Milne saying he was prepared to act on Mr Cargill's request, and stating that he would be on the ground on Saturday, 12th July, to hear parties on disputed points. About this time agents were consulted and a certain amount of correspondence passed. On 10th July Mr Reed, who was acting for the defender Mr Fotheringham, wrote Mr Cargill saying that he had seen Mr Ferguson, who acts for the pursuers, that 12th July would not be a suitable date for them, and suggesting an alteration of the date. On 14th July Mr Esslemont wrote to Mr Ferguson as agent for the pursuers asking him to state definitely within four days if he wished a proof on the subjects of valuation, and if so, on what points, and intimating that if he got no notice that

proof was desired he would proceed in terms of the submission. A similar notice was sent to the agent of the compearing defender. On 15th July Mr Ferguson wrote to Mr Cargill asking him to fix a meeting so that he might learn on what points the arbiters had differed, and what is said to be devolved upon Mr Esslemont. On the same date he replied to the latter gentleman that he did not recognise him as oversman and that any award issued by him would be taken exception to. Mr Esslemont maintained that he was entitled to act, and on 1st August issued his award dealing with the valuation of the subjects of the reference other than the grain crop. The prices fixed in the award are those which he had intimated to the parties as his valuation at the time when the arbiters stated that they disagreed and desired him as oversman to state his price. The subjects included are those which, on the information submitted at the various meetings on the ground, the oversman considered fell within the reference.

"The valuation of the grain crop had, by the provisions of the lease and of the minute of submission, to be made about the middle of August. Correspondence passed between the agents of parties as to fixing a date for a joint meeting at the farm. After a certain amount of procrastination, Mr Milne on 20th August wrote to Mr Cargill, saying —'I am quite ready to fix a day for the valuation, but before doing so it will be necessary for us to appoint a clerk to the reference seeing there has been so much irregularity up to the present, and that we have still to issue an award not only for the half of the grain crop but for the whole of the other articles submitted to us which were valued by us at the term of Whitsunday.' The appointing of an agent to act as clerk is unusual and unnecessary in such a reference as that on which Mr Cargill and Mr Milne were engaged. On 21st August 1913 Mr Cargill, although expressing the view that a clerk was unnecessary, said—'If, however, you desire to have a clerk appointed, I am willing that any solicitor in Kincardineshire be nominated, but I think it right to state now, to save any misunderstanding, that I decline to open up again the question of the Whitsunday valuations.' On 23rd August he also intimated that as Mr Milne had failed to make an appointment for a joint inspection of the grain crop, he had personally examined the crop and arrived at certain valuations, which he stated. On the same date Mr Milne wrote that he agreed to appoint Mr Mitchell as clerk to the reference, and saying that he would meet his co-arbiter. A meeting took place on the 28th August, On the request of Mr Milne, Mr Mitchell attended this meeting. There was no necessity for his being present. Mr Milne, though agreeing with Mr Cargill as to the fields that were to be taken over by the landlord, would not proceed with the valuation unless Mr Cargill put the submission in the hands of Mr Mitchell as clerk to the reference. To this Mr Cargill objected, as the oversman's award upon the Whitsunday valuations was appended to the document. By this time the award had been delivered to the defender Fotheringham, and I think that the request of Mr Milne was in the circumstances unreasonable. After further communication with Mr Milne, Mr Cargill wrote to Mr Esslemont, the oversman, on 1st September, requesting him, in view of the arbiters having failed to agree as to the value of the half of the grain crop to be taken over by the proprietors, to issue an award fixing the value. Mr Esslemont seems to have made an independent examination of the fields on the 4th September and fixed the valuation. The fields selected by the proprietors had previously been pointed out to him by both arbiters. His award was not actually issued until 8th January 1914. Nothing in the proof suggests to my mind that Mr Esslemont acted other than fairly and impartially in a position which Mr Milne's attitude rendered unnecessarily difficult and trying. I do not, in the circumstances of this case, attach importance to Mr Esslemont before issuing his awards asking for and getting an undertaking from Mr Reed, as agent for Mr Fotheringham, to keep him free of costs in connection with any proceedings in consequence of his issuing his awards as requested.

"Mr Milne is now tenant of Shepherdshaugh. He has consumed or is in possession of practically all the subjects that fell to be valued, and for the price of which the outgoing tenant has until now received no payment. If the awards made by Mr Esslemont are set aside it will be extremely difficult, if not impossible, for other arbiters or oversman to arrive at a fair valuation of the subjects. I should not, however, allow this circumstance to weigh with me if the pursuers have made out a case for reduction.

"The pursuers did not in argument insist on the first part of their first plea-in-law that a formal minute of devolution or other writing was necessary in order to entitle the oversman to act. It has been settled by the cases of *Colquhoun*, July 27, 1784, 2 Pat. 626, and *Dick* v. *Inglis*, November 27, 1907, 15 S.L.T. 615, that where there is a written appointment of an oversman it is not necessary that the devolution upon him should be in writing. There must, however, be evidence that the arbiters have applied their minds to the subject of reference, and have differed in opinion. The inference I draw from the proof is that there was such difference of opinion in this case. I had most difficulty with the question of the grain crop, but I think the opinion expressed by Lord Salvesen in the case of *Dick* is consistent with and supports the view I take that Mr Milne's silence after Mr Cargill's communication to him of the figures he had arrived at justified the latter gentleman in holding that a difference of opinion had arisen and in referring the matter to the oversman.

"It was contended for the pursuers that there was no room for a partial devolution, the arbiters being bound to make a partial award so far as they agreed, and *quoad ultra* to devolve everything upon the oversman. I think that there were informalities

about the procedure in this case which would or might have invalidated a formal reference. In the case of *Nivison*, November 22, 1883, 11 R. 182, 21 S.L.R. 104, however, Lord Young, dealing with valuation by arbiters on the termination of a lease, said—'No formalities require to be observed by two farmers in valuing a crop, or by a third who is competently called in to decide where they differ. All the parties here desired or bargained for was the intelligent opinion of two skilled persons, and if they differed then the decision of another skilled man.' The pursuers founded upon the decision in the recent case of *Davidson*, 1908 S.C. 350, 45 S.L.R. 142, and particularly upon Lord Ardwall's opinion therein. The ground of judgment in that case, where an award was set aside, was that the arbiters had not determined the question submitted to them. The technical grounds upon which Lord Ardwall thought the award fell to be reduced, with one exception (*i.e.*, the signing of the award by the two arbiters and the oversman), were not approved by the Inner House. Lord Low, at 1908 S.C. 367, 45 S.L.R. 153, said—'The submission was substantially one for valuation, and in such a case if it appeared that the parties had obtained the honest opinion of the gentlemen selected upon the questions submitted to them, I should not regard mere irregularities of procedure as being sufficient to nullify the award.' In the present case I think that the parties have obtained the honest opinion of the oversman on the value of the subjects after the arbiters had failed to agree. I also think that what I may describe as the in-and-out method of referring to the oversman from time to time as differences arose between the arbiters, may be irregular procedure in a formal reference, but is not of such materiality as to invalidate a valuation under a lease." [*His Lordship then dealt with the pursuers' contention that the first award was ultra fines compromissi.*]

The pursuers in the action of reduction reclaimed, and argued — (1) The parties having adopted the form of a formal reference were bound to follow the rules which applied to formal references—*Davidson* v. *Logan*, 1908 S.C. 350, *per* Lord Justice-Clerk (Kingsburgh) at 369, 45 S.L.R. 142, at 154. *Dick* v. *Inglis*, November 27, 1907, 15 S.L.T. 615, merely decided that a written minute of devolution was not necessary for the validity of an award. *M'Gregor* v. *Stevenson*, May 20, 1847, 9 D. 1056; *Paterson & Son, Limited* v. *Corporation of Glasgow*, July 29, 1901, 3 F. (H.L.) 34, 38 S.L.R. 855; and *Nivison* v. *Howat*, November 16, 1883, 11 R. 182, 21 S.L.R. 104, were different, because in these cases the arbitrations were informal. (2) The rules which applied to formal references had been broken, inasmuch as, assuming what was contended for by the appellants, viz., that there was no difference of opinion between the arbiters on any of the three important dates, 26th May, 1st July, and 1st September, the devolution to the oversman was incompetent, because a devolution was only competent where there was a sufficient difference between the arbiters—*Colquhoun* v. *Corbet*, July, 27, 1784, 2 Pat. 626; *Frederick* v. *Maitland & Cunningham*, July 7, 1865, 3 Macph. 1069; *Davidson* v. *Logan, cit.;* Bell's Arbitration (2nd ed.) sec. 353; Russell's Arbitration (9th ed.) p. 180. (3) *Alternatively*, assuming that there was a difference of opinion on 1st July and also on 1st September, although not on 26th May, the oversman's award was invalid, because it dealt with matters which had been agreed upon on 26th May, and it was incompetent to devolve matters which had been agreed upon. That was a necessary corollary of the principle that there could only be a devolution where there was a difference. (4) *Alternatively*, assuming that there was a difference of opinion on 26th May, the devolution having once been made, it was incompetent for the arbiters to resume without special powers to do so—*Lang* v. *Brown*, May 8, 1855, 2 Macq. 93, *per* Lord Cranworth, L.C., at 95. (5) The appellants had no other remedy than to bring the present case—*Marshall* v. *Edinburgh and Glasgow Railway Company*, March 26, 1853, 15 D. 603; *Forbes, &c.* v. *Underwood*, January 22, 1886, 13 R. 465, 23 S.L.R. 324, *disapproving Sinclair* v. *Fraser*, July 19, 1884, 11 R. 1139, 21 S.L.R. 768.

Argued for the respondent—(1) The procedure in an agricultural reference was not so strict as in a formal reference. Before the Court would set aside an oversman's award there must be substantial injustice — *M'Gregor* v. *Stevenson, cit., per* Lord President (Boyle) at 1059; *Paterson & Son, Limited* v. *Corporation of Glasgow, cit., per* Lord Robertson at 3 F. (H.L.) 40, 38 S.L.R. 859; *Davidson* v. *Logan, cit., per* Lord Low at 1908 S.C. 366, 45 S.L.R. 152, and Lord Stormonth Darling at 1908 S.C 368, 45 S.L.R. 153. (2) The oversman did not intervene until he was aware that the arbiters had differed, and by 30th June there was a difference of opinion between the arbiters regarding the value, ownership, and quantity of the dung sufficient to entitle the oversman to act. The disagreement was as great as it was in *Nivison* v. *Howat, cit.* Whenever there was a sufficient disagreement between the arbiters the jurisdiction of the oversman emerged, and it was not necessary that the arbiters should take the initiative by submitting the matter to him—*Middleton* v. *Chalmers*, June 9, 1721, Rob. 391; *Dick* v. *Inglis, cit., per* Lord Ordinary (Salvesen) at 616; *Sinclair* v. *Fraser, cit.; in re Tunno & Bird*, 1833, 5 B. & A. 488; *Winteringham* v. *Robertson*, 1858, 27 L.J. (Ex.) 301, *per* Watson, B., at 304; *Cudliff* v. *Walters*, 1839, 2 Moo. & R. 232. (3) Even if the arbiters were in agreement on certain matters on 26th May, that fact did not disentitle the oversman from issuing an award on 1st July which decided the matters still in dispute and at the same time embodied the previous decisions of the arbiters—*Nivison* v. *Howat, cit.* (4) A devolution on specific points from time to time was competent, because such a devolution merely consisted of a number of partial devolutions, and partial devolutions were competent—*Davidson* v. *Logan, cit., per* Lord Ordinary (Ardwall)

at 1908 S.C. 358, 45 S.L.R. 146; *Nivison* v. *Howat, cit., per* Lord Craighill at 11 R. 191.

At advising—

LORD SALVESEN—We have had a very full and able argument from the reclaimers in this case, but in the end I have come to be of opinion that we ought not to disturb the result at which the Lord Ordinary has arrived. I accept generally his statement of the facts. I think, according to the weight of the evidence, what happened on the 26th of May was, that the arbiters, having differed as to the prices, referred their differences one by one to the oversman, who there and then decided the points so referred. Even, however, if one accepted the view of the reclaimers—that the oversman merely made suggestions which the arbiters accepted—I do not think the result would be different, although perhaps technically there ought to have been an award by the arbiters as to the matters which they settled and a separate award by the oversman on the points which were still in dispute and were devolved upon him. In the present case there is no substance in the distinction, because the oversman's award proceeded on the basis of the prices fixed at the meeting on the 26th of May; and I cannot see that it makes his award bad that it included the sums which the arbiters had agreed to be due to the tenant. To put it no higher, the reclaimers have no interest to contend that they should pay the sum found due by the arbiters under an award bearing their signatures rather than pay the same sum under an award issued by the oversman.

The next question raised by the reclaimers is whether the reference was competently devolved on the oversman. It would not have been so unless the arbiters had differed in opinion; and the main controversy between the parties—as to which the bulk of the proof has been led—was whether in fact there was a difference of opinion which justified the oversman in intervening. The peculiarity of the case is that one of the arbiters—Mr Milne—from the first strenuously protested that the arbiters had not differed. It seems probable that Mr Milne never applied his mind to the merits of the various claims put forward, but it is plain that matters had come to a deadlock so far as the arbiters were concerned on questions of procedure. To take only one instance—the valuation of the corn crop—Mr Milne insisted that a clerk to the reference should be appointed before anything further was done. Mr Cargill, the other arbiter, thought such an appointment entirely unnecessary. It is not for us to decide the merits of this dispute, although I fail to see how in a question of mere valuation a professional gentleman would have been of much assistance to the arbiters. It is sufficient that on a crucial point of procedure on which each of the arbiters had definitely made up his mind they were unable to come to an agreement. In these circumstances, which were known to the oversman, I think he was entitled to act at the request of only one of the arbiters, notwithstanding the express dissent of the other. I adhere to the views which I expressed on this subject in the case of *Dick* v. *Inglis*, November 27, 1907, 15 S.L.T. 615.

The only other argument which it is necessary to notice is that it was incompetent for the arbiters to partially devolve the subject-matter of the reference while retaining in their own hands the decision of claims which at the time of the partial devolution they had not considered. That argument is, in my opinion, met by the terms of the submission which authorises the arbiters to pronounce decrees, interim or final. It is therefore obvious that the arbiters were authorised to dispose of the questions submitted to them by awards issued at different times. Indeed, as some of the subjects fell to be valued at Whitsunday, and others about the middle of August, I think it was clearly contemplated that they should exercise the power so conferred. I see no inconvenience or injustice, but much the reverse, in a reference of this description which involved for the most part valuations by practical men, that any difference of opinion with regard to the price of crop or the like should be settled on the spot by invoking the decision of the oversman, while the arbiters still retained the right to dispose of matters which involved further inquiry. What the parties contracted for was the joint decision of the arbiters on any claim which they fell to dispose of, or, failing their agreement, the decision of the oversman appointed by them. Whatever view might be taken of the facts, I think this is what the parties here have got. All the claims put forward were capable of being separately dealt with, and there was no interdependence between them. I need not, however, pursue the subject further, as I adopt entirely the Lord Ordinary's conclusions in fact, as well as the reasons in law on which his judgment has proceeded.

LORD GUTHRIE — In these conjoined actions the Lord Ordinary has found in favour of the outgoing tenant, and has refused to reduce the awards of 1st August 1913 and 8th January 1914, which the landlord disputes on two grounds—first, because the reference had not been devolved on the oversman by whom the awards were pronounced; and second, because so far as the first award is concerned, it was as regards certain matters dealt with *ultra fines compromissi*. The Lord Ordinary's judgment disposing of the second ground adversely to the reclaimers was not questioned before us by them.

I think the Lord Ordinary has dealt rightly with the two questions of fact involved, and that he has reached the right result in law. The first question of fact is whether the prices contained in the first award were arrived at by the oversman after hearing the arbiters who had been unable to agree, or whether these prices were the arbiters' prices who had been enabled to agree on them by means of suggestions made by the oversman. It seems to me that the difference between these two questions is a slender one, and that equally honest and accurate

witnesses might well differ as to whether what took place fell under the one description or the other. I agree with the Lord Ordinary in accepting the oversman's account of what took place, and in holding that the arbiters validly devolved the determination of the price in each case on him. The case made by the landlords, namely, that "no difference of any kind arose between them (the arbiters) as to the valuation prices to be paid by the pursuers to the defender Alexander Fotheringham," is contradicted by the evidence on both sides. But suppose that the true result of the evidence is to show either that some of the items were adjusted by the arbiters with or without hearing the oversman's suggestions, while others were devolved by them upon the oversman, who thereupon disclosed his own valuation and fixed the prices, or suppose that in all cases the prices were fixed by the arbiters with or without hearing the oversman's suggestions, I agree with Lord Salvesen in thinking that the award although pronounced by the oversman would not be thereby rendered invalid, being in this case admittedly identical with the figures which, according to the landlords, were arrived at by the arbiters without difference of opinion.

In regard to the second award, it is admitted that the arbiters differed in opinion. But the landlords say that this difference not being on the merits of the questions submitted to the arbiters, but on a mere question of procedure, namely, as to whether at a certain stage of the reference a solicitor should be appointed as clerk to the reference, it was incompetent for one of the arbiters to devolve or for the oversman to act. It seems to me on the authorities that it is sufficient to bring the office of an oversman into active operation if there be such a difference of opinion between arbiters, either on the merits of the questions involved or on the proper procedure to be followed, as brings the proceedings to a deadlock. The correspondence read along with the evidence makes it clear that such a deadlock had in point of fact occurred. It is immaterial whether Mr Cargill, the tenant's arbiter, or Mr Milne, the landlords' arbiter, was in fault. It is sufficient that a deadlock had occurred. I therefore think that the Lord Ordinary's interlocutor should be affirmed.

LORD JUSTICE-CLERK—I agree with the opinions delivered. This is a case of a very ordinary arbitration in which the questions relate to skilled valuation only. There was therefore no call for formality of procedure, and the mode in which matters were dealt with up to a certain point was quite in accordance with ordinary practice in such cases. The main difficulty which arose at a later stage was, I think, the consequence of what I cannot characterise otherwise than as the unreasonable conduct of one of the arbiters, by which matters would have been brought to a deadlock unless the oversman had intervened. I am satisfied that when the oversman did intervene to bring the arbitration to a conclusion he did so rightly, and that there is no ground for holding that when he did intervene anything was done which can be impugned on any reasonable ground. The Lord Ordinary has disposed of the case on grounds stated by him, and with his views I entirely concur.

LORD DUNDAS was not present, being engaged in the Extra Division.

The Court adhered.

Counsel for Reclaimers (Pursuers)—Constable, K.C.—Guild. Agents—Guild & Guild, W.S.

Counsel for Respondent (Compearing Defender)—Solicitor-General (Morison, K.C.)—Aitchison. Agents—Dove, Lockhart, & Smart, S.S.C.

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*Thursday, July 2.*

## FIRST DIVISION.

[Sheriff Court at Glasgow.

## WILLIAM SINCLAIR, LIMITED *v.* CARLTON.

*Master and Servant—Workmen's Compensation Act* 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*Arising Out of and in the Course of the Employment*"—*Workman Acting Outwith the Scope of his Employment.*

C, a carter, was instructed by his employer to deliver by lorry certain bags at the warehouse of X. It was the duty of carters to make such deliveries by slinging the bags on to X's tackle, but they had no duty to receive or stow the bags inside the warehouse. In addition to C's lorry there were a number of other lorries belonging to C's employers and in charge of C's fellow servants making deliveries to X at the same time. In accordance with a custom of the carters, which was not proved to be within the knowledge of their employers, one carter slung all the bags not only from his own lorry but from each lorry in turn on to X's tackles, while the remaining carters assisted X's servants to receive and stow the bags in the warehouse. In consideration of this arrangement all the carters, including the carter who slung the bags, were paid sixpence by X. On the occasion in question C slung the bags and the remaining lorrymen assisted X's servants. While engaged in slinging bags not on his own lorry but on one of the other lorries belonging to his employers C was injured.

*Held* that the accident did not arise out of and in the course of C's employment within the meaning of the Workmen's Compensation Act 1906.

John Carlton, carter, 134 Naburn Street, Glasgow, *respondent*, claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) from William Sinclair, Limited, carting contractors, 43 Virginia Street, Glasgow, *appellants*, in respect