cessary to attempt to improve on the statement of the law applicable to such cases which has already been made by many eminent judges. I am content to take the statement quoted by your Lordship from the opinion of Lord Lindley in the *Citizens Life Assurance Company* v. *Brown*, [1904] A.C. 423. Applying that law, I think the facts must be ascertained, unless it clearly appears from the pursuer's own averments that the servant was *not* acting in the course of his employment.

LORD LOW—I am of the same opinion. We are asked to throw out this action upon three grounds—*first*, that there are no relevant averments of an actionable wrong; *second*, that upon the averments it is evident that the manager was not acting within the scope of his employment or in the course of his duty; and *third*, that in any event the whole affair was trifling and the damage suffered negligible. In regard to the first of these grounds I have no doubt that a wrong, and in my view not a trifling wrong, has been averred. It is averred that the manager detained this lady in his room for fifteen minutes after the assault had been committed, and refused to let her go until she made an apology. If that be true, it was an outrage, and a relevant case has been stated.

As to the second ground I have nothing to add to what has been said by your Lordship. It cannot be doubted that the manager, at first at all events, intervened in his capacity as manager, and there must be inquiry to find out whether in his subsequent actings he abandoned that capacity and acted as a private individual. As to the third ground, if an actionable wrong was committed, it does not matter that *prima facie* the pursuer sustained but little injury; she is, at any rate, entitled to ask a jury to assess the damage.

LORD ARDWALL—I regret that I feel bound to concur with the opinion your Lordships have expressed that this case must be sent to a jury. I cannot accept without considerable qualification the law laid down by the Lord Ordinary, and although the case is a narrow one I am not prepared to say that it is irrelevant. While there is much force in Mr Murray's contention that the whole affair was really one incident, which a jury have already considered, and for which they have already awarded the pursuer a certain sum of damages, still, if the averments are carefully scrutinised, it is apparent that two separate wrongs are complained of—*firstly*, slander and assault by Robertson (the case already considered by a jury); *secondly*, illegal detention by the manager (the case in which an issue is now asked). It cannot, therefore, be maintained that the pursuer is not entitled in law, if not in equity, to bring a second and separate action. I express no opinion as to the nature of the injury she sustained—that is a question for the jury.

The Court recalled the interlocutor of the Lord Ordinary, and allowed the following issue:—"Whether . . . the defenders' manager, Thomas M'Nair, acting within the scope of his employment by the defenders, having induced the pursuer to enter his private room in the defenders' hydropathic establishment, wrongously detained her there, to her loss, injury, and damage."

Counsel for the Pursuer (Reclaimer)—G. Watt, K.C.—Spens. Agents—Bryson & Grant, S.S.C.

Counsel for the Defenders (Respondents)—The Solicitor-General (Ure, K.C.)—C. D. Murray. Agent—Robert Stewart, S.S.C.

Friday, November 29.

SECOND DIVISION.

[Lord Ardwall, Ordinary.

DAVIDSONS *v.* LOGAN.

Arbitration—Landlord and Tenant—Omission to Consider Subject Referred—Decree-Arbitral—Reduction—"Tenantable Condition and Repair"—Obligation of a Landlord and of a Waygoing Tenant.

A, the owner of a farm in his own occupation—who was thus in the position both of landlord and of outgoing tenant—let it for a period of nineteen years to B and C, the latter binding themselves in the lease "to accept of the whole houses and buildings, &c., on the said farm, when the same have been put into good order . . . as being in tenantable order and condition." A submission to arbiters and an oversman was subsequently prepared, which, proceeding on the narrative that B and C had by the lease become "bound to accept the buildings and others . . . as in good tenantable condition and repair when the same had been put into good order," referred to arbitration, *inter alia*, the sum payable by A to B and C in "respect of any of the houses and buildings, &c., not being in tenantable condition and repair, all as at the entry thereto" of the tenants. The arbiters awarded a sum which they arrived at by calculating the amount which an outgoing tenant would have had to expend to put the houses, &c., into tenantable condition and repair in a question with his landlord or an incoming tenant.

In an action of reduction at the instance of the tenant the Court reduced the award, *holding* (1) that at common law an obligation on the part of a landlord at the beginning of a lease to put buildings, &c., into tenantable condition and repair was more onerous and involved a higher standard than the obligation on the part of an outgoing tenant to leave them in the like condition; (2) that on a proper construction of the lease and submission it was the amount of the owner's obligation *qua* landlord, and not *qua*

outgoing tenant, that had been referred to arbitration; (3) that accordingly the arbiters had neither considered nor determined the question which had been submitted to them.

Arbitration—Decree-Arbitral—Reduction—Submission to Arbiters and, in the Event of their Differing, to Oversman—Award Signed by Oversman and Arbiters.

The landlord of a farm and his incoming tenant submitted certain questions—including the amount required to enable the landlord to implement his obligations as to buildings and fences—"to A and B, arbiters mutually chosen, and, in the case of their differing in opinion, to an oversman to be named by the said arbiters before entering on the business of this submission."

Held (*diss.* Lord Stormonth Darling) that an award bearing to be the award of, and signed by, the two arbiters and the oversman was bad, and that it was incompetent by parole evidence to prove that *de facto* the oversman never acted, and that the award was an award of the arbiters alone.

Hope v. *Crookston Brothers*, June 6, 1890, 17 R. 868, 27 S.L.R. 709, *distinguished.*

Process—Record—Reduction—Proof—New Ground for Reduction Appearing at Proof—Absence of Averments on Record.

A, the landlord of a farm in his own occupation, having let it on lease to B and C, the question of the amount payable by A in respect of an obligation he had undertaken to put the buildings, &c., into habitable condition and repair was submitted to arbitration. B and C, who were dissatisfied with the amount awarded, raised an action of reduction against the arbiters and oversman, the ground as set forth on the record being corruption, unwarranted delegation of their duties, and failure to comply in various respects with the technical formalities required in arbitrations. At the proof it transpired that the smallness of the amount awarded was due to the fact, in no way disclosed in the defences, that the arbiters had estimated the amount of A's obligation *qua* outgoing tenant and not *qua* landlord. *Held* that the pursuers were not debarred by the absence of any pertinent averments on their record from seeking reduction of the award upon the new ground that the arbiters had not in fact considered the question which had been submitted to them by the parties.

By lease executed in February 1904 Abraham Logan let to the pursuers, Alexander Davidson senior and Alexander Davidson junior, the lands and farm of Whitton, —which up to date of their entry he formed himself, being accordingly both landlord and outgoing tenant—at a yearly rent of £1150, for the period of nineteen years from and after the term of Whitsunday 1904, with a break in favour of either party at the terms of Whitsunday 1914 and Whitsunday 1919, on giving one year's written notice.

The lease provided, *inter alia*, as follows —"The second parties (*the pursuers*) hereby agree to accept of the whole houses and buildings with the water supply thereto, and pipes and connections thereof, roads, drains, ditches, dykes, and fences on the said farm, when the same have been put into good order, and the alterations and additions upon the steading made as arranged, as being in tenantable order and condition, and they bind and oblige themselves and their foresaids to keep and maintain the same in said tenantable order and condition during the currency of this lease, and at its expiry to leave them in the like order and condition. . . . And the second parties bind and oblige themselves and their foresaids to take over at a valuation, to be made by two neutral persons, or an oversman chosen and appointed as after mentioned, the whole dung upon the said lands at his entry thereto, as also the way-going crop of the year 1904; the second parties also bind and oblige themselves and their foresaids to take over at a valuation as aforesaid. . . . [*a number of articles in connection with the farm and dwelling-house*]. . . ."

The lease further contained a reference clause in the following terms—"And it is further provided that when any question shall arise under this lease, whether hereinbefore referred to arbitration or not, they [*i.e., the parties to the lease*] shall enter into a submission to two neutral men of skill, mutually chosen, who, after having named an oversman, shall proceed to act under such submission, and the award of the said arbiters upon any matter embraced in such submission shall, if they agree, be final and binding on the parties, and in the event of said arbiters not agreeing on the said matter they shall have power to devolve such question or matter upon the oversman for his award, and power is hereby conferred on the said arbiters or oversman to pronounce interim or final decrees-arbitral as they or he shall see fit."

In April 1904 a submission was entered into between the parties, the material clauses of which were as follows—". . . Considering that by lease of the farm and lands of Whitton entered into between us, dated first and fifth February Nineteen hundred and four, we, the said second parties, became bound to take over certain subjects and others therein mentioned at a valuation to be made by two neutral men of skill mutually chosen, who, before acting, under a submission to them, are thereby directed to appoint an oversman on whom to devolve any such submission in the event of the said arbiters disagreeing in regard thereto, all as the said lease in itself more fully bears: Further, considering that by said lease we, the said second parties, also became bound to accept the buildings and others as therein mentioned on the farm as in good tenantable condition and repair when the same had been put into good order, and the alterations and additions upon the

steading made by me the said Abraham Logan as arranged, and that I am in course of executing these alterations and additions, and that I have agreed to pay such sum (if any) as shall be fixed by said arbiters or oversman as aforesaid in respect of any buildings and others not being in good order, which sum we, the said second parties, have agreed to accept as in full of all that we could ask in that respect: . . . therefore we, the whole parties hereto, have submitted and referred, and hereby submit and refer, to the amicable decision, final sentence, and decree-arbitral to be pronounced by John Watson, residing at Greatridgehall in the county of Roxburgh, and John Brown, residing at Hundalee in the county of Roxburgh, arbiters mutually chosen, and in the case of their differing in opinion to an oversman to be named by the said arbiters before entering in the business of this submission, to ascertain, fix, and determine, in the first place, the sums payable by us, the said Alexander Davidson senior and Alexander Davidson junior, to me, the said Abraham Logan, for (first) the value of" a number of items specified, including the waygoing corn crop; "and in the second place the sums payable by me the said Abraham Logan to us the said Alexander Davidson senior and Alexander Davidson junior in respect of any of the houses and buildings, with the water supply thereto, pipes, and connections thereof, roads, drains, ditches, dykes, and fences on the said farm not being in tenantable condition and repair, all as at the entry thereto (Whitsunday Nineteen hundred and four) of us the said second parties."

John Elliot, farmer, Meigle, was appointed oversman, and in August, after sundry investigations, the result of the arbitration was practically embodied in the following three awards (another award referred to as No. 3, and No. 21 of process, not being attacked is consequently not here set forth):— "*Whitton Reference*, 1904.

"INTERIM AWARD.

(*No.* 16 *of Process.*)

"The arbiters and oversman in the reference between A. Logan, Esq., of Whitton, and Messrs Davidson, hereby request Messrs Davidson to pay to Mr Logan on or before the 31st day of August curt. the sum of Six hundred and eighty-two pounds 17s. stg. This payment is intended to cover all claims between the parties, the one against the other, in respect of the matters stated below; but the arbiters reserve power to rectify any error or omission which may be brought to their notice before the issuing of their final award. JOHN WATSON.

"*Kelso*, 24*th August* 1904. JOHN BROWN.

"All matters mentioned in the deed of submission except the corn crop."

"*Amended Award.*

"*Whitton Reference* 1904.

"INTERIM AWARD.

(*No.* 17 *of Process.*)

"The arbiters and oversman in the reference between A. Logan, Esq., of Whitton, and Messrs Davidson hereby request Messrs Davidson to pay to Mr Logan on or before the 31st day of August curt. the sum of Six hundred and seventy-four pounds 2s. 8d. stg. This payment is intended to cover all claims between the parties, the one against the other, in respect of the matters stated below; but the arbiters reserve power to rectify any error or omission which may be brought to their notice before the issuing of their final award.

JOHN WATSON.

"*Kelso*, 24*th August* 1904. JOHN BROWN.

JOHN ELLIOT.

"All matters mentioned in the deed of submission except the corn crop."

"*Whitton Waygoing* 1904.

(*No.* 18 *of Process.*)

"The arbiters and oversman in the reference relative to the above hereby direct Messrs Davidson to pay to Mr Logan on or before the 17th day of February curt. the sum of Four hundred and fifty pounds stg. to account of value of corn crop of

JOHN BROWN, Arbiter.

JOHN ELLIOT, Oversman.

"*Kelso*, 10*th February* 1905."

Messrs Davidson being dissatisfied with the result of the arbitration, brought an action of reduction of the three awards above set forth against Mr Logan, the arbiters, oversman, and Robert Dodds, a timber merchant, to whom the pursuers averred that the arbiters had illegally delegated their duties.

The nature of the pursuers' case, as originally made upon record, is indicated by the following pleas-in-law, of which none were ultimately pressed in the Inner House except (1) and (4) of plea I—"1. The whole proceedings in the said arbitration, and *separatim* the said pretended interim awards, are null and void, and the pursuers are entitled to decree of reduction as craved with expenses, in respect that—(1) the arbiters in issuing said awards acted *ultra vires* and in an incompetent manner; (2) the said arbiters incompetently delegated their functions to the defender Robert Dodds; (3) the said arbiters and the said Robert Dodds, for whom they are responsible, have been guilty of corruption in the sense of the Act of Regulations 1695; (4) the awards complained of are not the awards of the tribunal constituted by the parties submitters (*i.e.*, the two arbiters, and in the event only of their devolving the reference, the oversman), but are the awards of the arbiters, or one of them, incompetently acting along with the alleged oversman; (5) the arbiters did not accept office in writing; (6) the alleged oversman was not appointed in writing, and *separatim* was not appointed before the arbiters entered on the business of the reference; (7) the alleged oversman did not accept office in writing; (8) there was no devolution to the alleged oversman; and (9) the awards complained of are neither holograph nor tested. . . . 5. The acceptance of office by the defenders nominated as arbiters, the appointment of the alleged oversman, the acceptance of office by him, and the devolution of the reference on him, can be constituted only by probative writs, or, in any view, only by writings subscribed by the said parties respectively."

The nature of the defence originally made on record by the defenders appears from the following pleas - in - law — "II. The action should be dismissed in respect that—(1) The reference having been conducted informally in accordance with a recognised practice in the district, of which the pursuers were well aware, it was unnecessary to observe the formalities founded on by the pursuers as the grounds of reduction. (2) The arbiters have not acted *ultra vires* or incompetently, nor have they been guilty of corruption. (3) The arbiters did not delegate their functions to the said Robert Dodds, and that, in any event, the said Robert Dodds did not act corruptly. (4) The said awards are not invalidated by being signed by the said John Elliot along with the arbiters, or one of them. (5) The said awards are not invalid, although neither holograph nor tested. . . . IV. The pursuers are barred by their actings from challenging the validity of the appointment and acceptance of the arbiters and oversman. V. The acceptance of office of the arbiters, and the appointment and acceptance of the oversman, can be constituted otherwise than by probative writ or by writings of the parties themselves."

On 5th September 1905 the Lord Ordinary (ARDWALL), without proof, granted decree of reduction.

Opinion—"There are various grounds of reduction set forth in this action. One is that the oversman interposed in the reference, consulted with the arbiters, and in some cases signed the awards without there ever having been a difference of opinion between the arbiters and a devolution following thereon, and it is admitted that this was the case. I am of opinion that this is fatal to the awards under reduction. Undoubtedly in mere cases of ordinary agricultural valuations such procedure is common and might not invalidate an ordinary valuation under a lease. I may refer to a case of *Nivison* v. *Howat*, 11 R. 191, and I was also referred to a case decided upon similar principles—*Hope* v. *Crookston Brothers*, 17 R. 868. There, however, the matter turned upon the terms of the contract between the parties, which stated that 'any dispute under this contract was to be settled by arbitration here in the usual way,' and it was held that this entitled the arbiters and oversman to follow the custom of Liverpool in valuing the goods in question. But I cannot regard the present as a mere valuation. It is a submission constituted by a formal deed outwith the lease altogether, although arising out of it, and therefore the terms of that submission must be looked to. Now that submission bears that the reference is to John Watson and John Brown, 'arbiters mutually chosen, and in the case of their differing in opinion to an oversman to be named by the said arbiters before entering on the business of this submission,' and the subjects of the submission involve a very wide range, including the sums necessary to put the houses, fences, drains, and everything else on the farm in tenantable condition and repair. It was accordingly a very different affair from a valuation concerned only with a corn crop and dung, and I think it must be presumed to have been the intention of the parties that matters should be gone about regularly and solemnly, that the arbiters should endeavour to come to an agreement, and that only in the event of their differing should there be a devolution on the oversman. I accordingly think that the law laid down in *Lang* v. *Brown*, 2 Macq. 93, applies, and that the procedure in this submission and the issuing of the awards thereunder is inept, because the procedure was not in accordance with the contract of the parties in respect that the arbiters did not apply their minds to the matter in the first place, and that the oversman interfered without any difference of opinion between the arbiters or any proper devolution. I consider this case is practically on all-fours with the case of *Frederick* v. *Maitland & Cunningham*, 3 Macph. 1069. I notice Mr Elliot, the oversman, signs the interim amended award, dated 24th August 1904, and also the award entitled No. 3. It is in my opinion clear that these awards are bad, and as it is apparently admitted by the defenders that Mr Elliot intervened all through the reference I think the other awards must be reduced also. . . ."

Mr Logan reclaimed, and on 25th May the Second Division recalled the Lord Ordinary's interlocutor and allowed a proof before answer, the result of which is stated by the Lord Ordinary in his opinion *infra*. The most important fact, however, which the proof disclosed was one which had not been disclosed by the defenders in their defences, and had not occurred to the minds of the pursuers, viz., that in calculating the amount which fell to be paid by Mr Logan on account of his obligation to put houses, buildings, and fences into tenantable condition and repair, the arbiters had taken his obligation to be not that of a landlord at the beginning of a lease to an incoming tenant, but that of a tenant at the end of his lease to his landlord or another incoming tenant.

On 22nd January 1907 the Lord Ordinary granted decree of reduction.

Opinion.—"The following facts are in my opinion established by the proof which has been taken:—

"The pursuers are the incoming tenants of the farm of Whitton under the lease The defender Logan is landlord of that farm, but for several years back it has been in his own occupation; he was accordingly the outgoing tenant as well as the landlord at the date of the pursuers' entry.

"The arbiters after they had received the deed of submission proceeded in April 1904 to inspect and value the dung and fallow ground on the farm of Whitton. In this inspection they were accompanied by the oversman. They also made a very general inspection of the fences and the farm generally, which apparently convinced them that both fences and drains were in need of repairs. At or before this inspection both the arbiters and the overs-

man had made up their minds that what they had to value with regard to the houses and buildings, drains, ditches, dykes, and fences was the amount which would be required to put them in such tenantable condition and repair as an outgoing tenant would have been required to do in a question with the landlord or incoming tenant. Having taken this view of the matter they remitted to a Mr Dodds as a man of skill, and who, it is proved, is accustomed to act in such matters between outgoing and incoming tenants, to estimate what sum would be required to put the fences, drains, and ditches in order. I shall not further allude to the other subjects which required to be put in order, as the present dispute really arises as to fences, drains, and ditches. The arbiters and oversman paid a second visit to the farm in June 1904, and again for the purpose of valuing the corn crop in August 1904. By this time Mr Dodds had made his report bringing out a sum for repairs of fences and drains which in my opinion is proved to be totally inadequate to put these subjects in tenantable order and repair in the sense in which a landlord is bound to put farm subjects at the commencement of a lease, but which possibly was sufficient to put them in such tenantable order and repair as would have satisfied the obligations of an outgoing tenant at the end of a lease, and would, as Mr Dodds himself said, have kept things going for a year.

"The senior pursuer on the occasion of the visit of the arbiters and oversman in the autumn of 1904 made a complaint about the smallness of the sum, and on that occasion said, as he subsequently said in a letter to Mr Dodds, that he would give £100 in addition to the sum found due by Mr Dodds if they or Mr Dodds would put the subjects in tenantable order and repair for that, and he asked them to look over the fences and ditches again. Mr Brown, who was the arbiter nominated by the pursuers, brought the matter up at a meeting that he and the other arbiter and oversman had subsequently to this date, and suggested that the matter might be gone into again. It appears, however, that he did not press the matter very strongly, and did not support it by very sufficient reasons, and Mr Watson, the other arbiter, declining to reopen the matter, he did not press the proposal to the extent of asking a devolution on the oversman, and nothing further was done. This was not surprising, on the footing that they were all agreed, as they frankly admit, that all that was to be awarded was a sum such as would have satisfied the obligation of an outgoing tenant, and Mr Dodds himself says that he made the valuation upon that footing. The only notice that I can find given on record to the effect that the defender Logan and the arbiters and oversman and Mr Dodds treated this matter as a question between an outgoing and an incoming tenant occurs in Ans. 8 to the defenders' statement, where it is said that it is a recognised practice in a submission between 'outgoing and incoming tenants' to dispense with acceptances. Now, the submission under consideration was undoubtedly, so far as regards dung, fallow, and corn crop, one between outgoing and incoming tenants, but in my opinion it was also one between landlord and incoming tenant. With regard to the actings of the oversman in the submission, it is proved by Mr Elliott's own evidence that while, in accordance with the custom in such matters, he accompanied the arbiters on their various inspections, there was never any devolution of any kind whatever upon him, and he never applied his mind to the amount awarded, because the arbiters had agreed upon that amount, and he states that he signed the interim awards No. 17 and 21 of process in accordance with the general practice that an oversman signs such interim awards to show that he had taken part in the inspections, had acted in the reference, and was thus entitled to the ordinary remuneration. He only justifies his signing the award No. 18 of process along with one of the arbiters by saying that it was the unusual case of one of the arbiters being absent in South Africa, and that he signed it just as he would have done if both arbiters had signed it.

"With regard to the alleged custom in the counties of Roxburgh and Berwick set forth for the defenders, it is not, in my opinion, proved that it is a recognised practice to dispense with written acceptances by the arbiters and oversman, though it has been proved that in frequent instances that has been done without objection being taken afterwards; nor is it proved that there is a practice of dispensing with the written appointment of the oversman. This, however, is not, in my opinion, of much importance, as I think that the parties, by acquiescing in the arbiters acting without written acceptances, are barred from reducing the submission on the ground that such acceptances did not exist, while with regard to the oversman, as it now appears that he never gave any decision as oversman or applied his mind to the subject, the manner of his appointment does not necessarily enter into the decision of the case. It ought, however, to be observed at this stage that it is amply proved by the witnesses on both sides that the arbiters and oversman acted perfectly rightly in proceeding together to make the inspections. This practice is universal. The inspection of such things as dung, fallow land, and corn crop must be made when these subjects are in existence, and therefore the oversman's inspection of them cannot be put off till the close of the reference when the fallow land would have been broken up, the dung used up, and the corn crop ingathered, thrashed, and possibly sold, and it seems to me absurd that there should be two inspections, one by the oversman and the other by the arbiters; further, the system of inspecting the subjects together provides for a convenient devolution on any point to the oversman should that become necessary. This practice is similar to the familiar practice of arbiters under the Lands Clauses Act, under which prac-

tice the parties agree, before there has been any devolution, to the oversman inspecting the subjects to be valued, and being present at the proof along with the arbiters, thus saving the parties the needless expense of a double inspection and proof.

"The first ground on which at the close of the proof counsel for the pursuers maintained that they were entitled to reduction, was that the arbiters had acted *ultra vires* and in an incompetent manner, in respect that they never applied their minds to the valuation of the subject, the valuation of which was submitted to them. He maintained that under the submission the sum that they were to fix and determine was the sum which would be sufficient to put the houses, buildings, drains, fences, and others on the farm 'in good tenantable order and repair,' as in a question between a landlord and an incoming tenant on a nineteen years' lease, whereas the sum which the arbiters had fixed was only the sum which would have satisfied the obligation of an outgoing tenant at the close of a nineteen years' lease to leave the subjects in 'tenantable condition and repair.' I have felt some difficulty in entering on a consideration of this ground of reduction, because while there is a plea on record which I think is sufficient to cover it, yet the averments in the condescendence do not exactly meet the case now made upon the proof. But I do not think that this objection should be stringently enforced against the pursuers, for they had no proper notice on record or otherwise that the arbiters and the reporter, Mr Dodds, in arriving at the sum they did were proceeding on the footing that the defender Logan was, as regards the whole submission, merely to be treated as an outgoing tenant. The pursuers all along thought, as in my opinion they were entitled to think, that what the arbiters endeavoured to do, and ought to have done, was to ascertain the sum that would have been payable by a landlord to an incoming tenant, and in this belief their record is framed on the footing that the inspections and valuations made were insufficient and inadequate to enable the reporter or arbiters to arrive at a proper conclusion on the subject, and this, I think, they have succeeded in establishing. But when they were met at the proof, for the first time so far as I can see, with the answer to their complaint that this was merely a valuation of repairs as between an outgoing and incoming tenant, I think they are entitled to take up the ground in law which they might have taken up without a proof at all had they known of it, that the arbiters had not valued the subject submitted to them. I shall therefore proceed to consider the question.

It is, I think, established by the proof that the words 'tenantable condition and repair,' according to the custom of the country and the understanding both of landlords and tenants represent two totally different things, according as they are used with reference to the obligations of a landlord to an incompetent tenant at the commencement of a nineteen years' lease, and the obligations of an outgoing tenant to the landlord or an incoming tenant at the close of a lease. It is, I think, obvious in point of fact that this must be so. An outgoing tenant is not liable for tear and wear. The houses and fences may have been old when he entered the farm, and with the effects of tear and wear during the years of his tenancy may have got into such a state as to need renewal in whole or in part instead of mere repair in order to render them in tenantable order and condition as at the commencement of a new lease, but it would be manifestly unfair to an outgoing tenant to require him either to rebuild houses in whole or in part, or, for instance, to put new sarking on offices where the wood had become so old that slates could not be securely nailed on to it, or that he should be bound to renew stob and wire fences where these were in such a state that no amount of patching would make them good tenantable fences; and accordingly all that an outgoing tenant is bound to do is to put the houses and fences in such order as that for the time they can serve their purposes, as Mr Dodds, the valuator in this case, said, for say a year. The obligation on a landlord at the beginning of a nineteen years' lease is in fact and according to custom of a very different character. He must put the farm into such a condition as that it will be serviceable without serious repairs till the ish of the lease, and although some descriptions of fences cannot be expected to last nineteen years, yet the fences must be such as to last well into the lease, and not necessitate a new tenant making extensive repairs on them from the day he enters the farm. All this, I think, is established by the evidence, but it is not merely matter of fact, but, by reason of inveterate custom, has become matter of law. Mr Bell in his Principles (paragraph 1253) says—'From the nature of the contract, warrandice is implied on the landlord's part to make the subject effectual to the tenant or fit for its purpose, and so to put the houses and fences in due repair;' and this is supported by a number of decisions; whereas with regard to the tenant's obligations (see Bell's Principles, 1254) it does not extend to natural decay which results from the lapse of time and is known under the common expression 'tear and wear,' nor yet essential defect of structure necessitating such thorough repair or renewal as to amount to extraordinary expenditure. The distinction both in fact and in law between these two obligations is increased in the case of old buildings or old fences, because when either buildings or fences become very old, nothing but extraordinary expenditure, often amounting to practically what would be necessary for renewal, would put them in tenantable order and condition, and applying this to the present case, it is proved that the fences other than the stone dykes were for the most part old and dilapidated, so as in some cases practically to require renewal. The difference, accordingly, between the sum which would have enabled an outgoing tenant to fulfil his obligation, and the sum that would be

required under an express or implied condition on the landlord to put the fences in tenantable order and condition is proved in the present case to be very considerable. According to Mr Dodds' valuation, which has been adopted by the arbiters, the amount allowed for putting the fences and dykes in tenantable order is £37, 0s. 7d., and for drains and ditches £21, 16s. 2d., whereas, according to the report of the witnesses Alexander Johnston and John Rutherford, the amount that would be necessary to fulfil the landlord's obligation to put the fences and drains in tenantable order and repair is—for fences and dykes, £311, 12s., and for drains and ditches, £123, 9s. 1d. This report and estimate was carefully prepared by these witnesses, and it is approved of as moderate by so skilled and reliable a witness as Mr James Inglis Davidson of Saughton Mains, and by other witnesses. It was strongly argued for the defenders that all that the arbiters were directed to do was 'to ascertain, fix, and determine the sums payable by the defender Logan to the pursuers in respect of the houses, buildings, with the water supply thereto, pipes and connections thereof, roads, drains, ditches, dykes, and fences on the said farm not being in tenantable condition and repair,' and that they were entitled to follow what method they pleased in ascertaining and determining that amount. If they made a mistake and took a wrong method, that would not, it was argued, invalidate the award, provided they did not act corruptly. I am unable to accede to this argument, because, for the reasons above stated, I think that what the arbiters were bound to do was to ascertain the sum sufficient to fulfil the landlord's obligation to put the subjects in 'good tenantable condition and repair' as at the commencement of a nineteen years' lease, whereas it is admitted that what the arbiters did fix and determine was the sum which would have been sufficient for an outgoing tenant to pay at the end of his lease in order to put the subjects into such condition as that they would stand for a year or less. The arbiters and oversman admitted that they did not consider they were concerned with any part of the submission except the passage I have just quoted, but in my opinion they were bound to read the whole submission in a case where there were words in the operative clause which were capable of two different meanings, and if they had done so and applied the narrative to the construction of the operative clause in the same deed, they would not have fallen into the mistake which I consider they have. The narrative clause is in these terms—'Further, considering that by said lease we, the said second parties, also became bound to accept the buildings and others as therein mentioned on the farm as in good tenantable condition and repair when the same had been put into good order, and the alterations and additions upon the steading made by me the said Abraham Logan as arranged, and that I am in course of executing these alterations and additions, and that I have agreed to pay such sum (if any) as shall be fixed by said arbiters or oversman as aforesaid in respect of any buildings and others not being in good order, which sum we, the said second parties, have agreed to accept as in full of all that we could ask in that respect.' It is noticeable from this narrative, in the first place, that the phrase 'good tenantable condition and repair' appears as being used in the new lease of nineteen years, but it is said that the tenants were only to accept the buildings and others as in good tenantable condition and repair when the same had been put into 'good order,' and it further proceeds to say that the defender Logan had agreed to pay such sum as should be fixed by the arbiters or oversman in respect of any buildings or others not being in 'good order,' and it is that sum alone which the pursuers, it is stated, have agreed to accept in full of all that they could ask in that respect. I think it plainly follows from this that the pursuers did not agree to accept a sum such as would have satisfied the obligation on an outgoing tenant to put the drains and fences in 'tenantable condition and repair,' and that the arbiters in awarding such sum only have fixed and determined the value of a totally different thing from that which it was referred to them to value. They have valued the obligation on an outgoing tenant to a landlord, and not the obligation of a landlord to an incoming tenant on a nineteen years' lease in reference to putting the subjects in question in tenantable condition and repair. It is, I think, plain from the narrative clause that the tenantable condition and repair mentioned in the operative clause was the same state of repair as is referred to and called by the name of 'good order' in the narrative clause. On the subject of a tenant's obligation to keep houses tenantable I would refer to the case of *Mossman*, 1810, Hume's Decisions, 850, where some instructive remarks by the Lord President are reported. I am accordingly of opinion that the arbiters acted *ultra vires* and incompetently in respect that they did not apply their minds to value the obligation which they were directed to value, but an obligation totally different not only in extent but in character. I accordingly think on these grounds that the award falls to be reduced.

"The case of *Mackay*, 20 R. 1093, was referred to as an authority for the proposition that it was for the Court and not the arbiters to determine the construction of a contract of submission unless that was specially reserved to the arbiters. The case of *Alexander* v. *Bridge of Allan Water Company*, 7 Macph. 492, was also referred to, and is, in my opinion, an authority for the pursuers' contention in the present case, and the result of that decision was approved of by Lord Watson in the case of *Adams* v. *Great North of Scotland Railway*, 18 R. (H. L.) 1, although the method in which the decision had been arrived at was disapproved of in respect that the case was held not to be one of constructive corruption under the regulations,

although the judgment of the arbiters was bad because it fell under the category laid down by Lord Watson to the effect that it will be a good ground of reduction at the instance of either party to a submission if he is able to shew independently of the regulations, either that the arbiter has exceeded what are called in Scotland the *fines compromissi*, or that in the course of the arbitration he has disregarded any one of the express conditions contained in the contract of submission, or any one of those important conditions which the law implies in every submission. I am of opinion in the present case that the arbiters went beyond their jurisdiction in considering what an outgoing tenant should pay as the value of repairs, and that they disregarded altogether the matter submitted to them, and thus failed to perform their proper duty under the submission or to comply with the conditions thereof.

"The award was attacked on behalf of the pursuers on several other grounds. One was that there was an award with a lump sum, the claims not being *ejusdem generis*, and they founded on the case of *Miller* v. *Oliver & Boyd*, 1903, 6 F. 77. [*The Lord Ordinary disposed of this objection on the proof.*]

"The objections to the defects in the proceedings must now be considered. The first of these is that there was no written acceptance of office by the arbiters. I am of opinion that that objection cannot be sustained as a ground of reduction. The arbiters being duly named in the submission, their acting under the same implied acceptance, and the pursuers were unable to cite any authority for the proposition that it was necessary to the validity of a submission that the arbiters should accept in writing. The authorities indeed seem to be the other way—*Gardner* v. *Ewing*, M. 659, and *Brysson* v. *Mitchell*, 2 Shaw 382. Even had an acceptance in writing been required by law I should have been prepared to hold that the title of the arbiters to deal with the matter being contained in the submission, and they having acted thereunder without objection by either party, both parties are barred by acquiescence in their so acting from calling their decision in question. I ought to add, however, that in my opinion it is in accordance with the proper practice in arbitrations that arbiters should accept the submission in writing, and I am glad to notice that that is the practice followed in the Border counties in regard to such submissions.

"The next objection is that there was neither a written nomination nor acceptance by the oversman. In view of the fact which has been established at the proof, namely, that none of the awards in question are judgments of the oversman, and that he never applied his mind to the matter as a judge, it is unnecessary for the purposes of the decision of this case to enter on the subject, but I think it right to say that in my opinion where there is a formal written submission, as here, the nomination of the oversman ought to be in writing, and that such nomination should be made before the work of the submission is entered upon. Without such written nomination the oversman has no title nor authority to act at all, and any actings of his without such nomination would be inept. I am also of opinion, following on the decision in the case of *Frederick* v. *Maitland & Cunningham*, 3 Macph. 1069, that to entitle an oversman to act there must be a written devolution of the reference upon him.

"Coming now to the documents under reduction, these documents, or awards as they are called on the face of them, are documents written on forms prepared and furnished to the arbiters by Mr Christopher Dodds, who gave them what he calls clerical assistance in the submission, though he was not a regularly appointed clerk. It is obvious that they are intended to be rather interim orders for payment than awards, and were evidently intended as a convenient form to enable arbiters to decern for payment by an incoming to an outgoing tenant as the subjects of the submission were, one by one, taken over, because in the usual case it might cause very great inconvenience to an outgoing tenant were he not to be paid by the incoming tenant until there was a final award or decree-arbitral pronounced, perhaps late in the autumn after the waygoing crop had been valued. But although the intention of the persons interested in having these documents made out in the way that has been done was perfectly intelligible, they must be looked at in this action as what they purport to be, namely, awards; and indeed the parties have treated them so, because the present defender, Logan, has raised an action against the pursuers in the Sheriff Court for payment of the sum contained in the award of 24th August 1904, which embraces the sum truly in dispute in this action, namely, the amount allowed for repair of houses, fences, and drains. Accordingly, I am of opinion that these cannot be looked at as notes of proposed findings or as other than a series of partial awards which seem to have been concluded by another award which is not under reduction, and which deals with the corn crop and expenses and is dated 11th May 1905. Taking these documents accordingly as they stand, No. 16 does not require attention, because it is superseded by No. 17, which, although it contained a reservation to rectify any error or omission, has I think been treated as a final award. That document purports to be an award by the arbiters and oversman. It commences with the words 'the arbiters and oversman in the reference,' and it is signed by two arbiters and the oversman. Now though, as I have already said, I do not think that a proper award by arbiters would be invalidated by the oversman or anyone else putting his signature thereto to show that he had been present at the proceedings or was a witness to the agreement of the arbiters, the matter is a very different one where, as in the case of the document No. 17 of process, it bears to be

an award of the arbiters and oversman, because such an award is practically in contravention of the very fundamental conception of a submission of the kind now under consideration. Every award or judgment in such a submission must be either (1) a judgment of the arbiters who both concur in it, or (2) a judgment of the oversman, who is only entitled to give his judgment when the arbiters have differed and devolved the submission upon him. Nothing, therefore, could be more glaringly incompetent than an award which on the face of it professes to be a judgment of the arbiters and oversman as the persons who issued the judgment, and I think it is incompetent by parole proof to qualify or explain away the document in question by proving that *de facto* the oversman never acted, and that it is a judgment of the arbiters alone. To allow such proof would be to allow a proof by parole to set aside and qualify a written document. In my opinion the document must be taken as it is, and so taken it seems to me to embody an absolutely incompetent judgment.

"Coming next to the document No. 18 of process, the same objection applies to it, and it has this additional defect, that one of the arbiters does not sign and the oversman does. This is precisely the kind of document that was considered in the case of *Frederick* already alluded to, and there the award was held to be void. On these grounds accordingly, apart altogether from the ground of *ultra vires*, I should have been prepared to hold that the pursuers were entitled to reduction of the documents Nos. 16, 17, and 18 of process."

The defender Logan reclaimed, and argued —The Lord Ordinary was wrong. There was no ground for reducing the arbiters' awards. Ultimately the pursuer's case amounted only to this, that the arbiters had awarded them too little; but it was well settled that an arbiter's award could not be upset merely because he had made a mistake in his decision and had awarded too much or too little—it was necessary to show something beyond this, *e.g.*, that he had been corrupt or had exceeded the bounds of his jurisdiction—*Mackay & Son* v. *Leven Police Commissioners*, July 20, 1893, 20 R. 1093, 30 S.L.R. 919; *Alexander* v. *Bridge of Allan Water Co.*, February 5, 1869, 7 Macph. 492, 6 S.L.R. 308; *Adams* v. *Great North of Scotland Railway Company*, November 27, 1890, 18 R. (H.L.) 1, 28 S.L.R. 579; *Holmes Oil Company, Limited* v. *Pumpherston Oil Company, Limited*, July 17, 1891, 18 R. (H.L.) 52, 28 S.L.R. 940; *Caledonian Railway Company* v. *Turcan*, February 22, 1898, 25 R. (H.L.) 7, Lord Watson at p. 17, 35 S.L.R. 404; *Lanarkshire and Dumbartonshire Railway Co.* v. *Main*, July 16, 1895, 22 R. 912, 32 S.L.R. 685; *Glasgow City and District Railway Company* v. *Macgeorge, Cowan, & Galloway*, February 25, 1886, 13 R. 609, 23 S.L.R. 414. The Lord Ordinary too was wrong in the view he took of the extent of a landlord's obligation to an incoming tenant at common law. There was no obligation on him at common law to put buildings and fences into such a condition of repair as would last for the lease; he merely had to put them into a reasonable condition of repair. Accordingly the pursuer's case was in no way helped by the common law—Ersk. Ins. ii, 6, 39; Bankton, ii, 9, 21; *Mossman* v. *Brocket*, Hume's Decisions, 850; *Haining & Douglas* v. *Grierson*, Hume's Decisions, 829. The real question, however, was, had the arbiters considered the question remitted to them? The Lord Ordinary thought they had not; but they had. The remit to the arbiters was to be looked for and found in the operative clause of the submission. The words there were "tenantable condition and repair," an expression with a well-known meaning, viz., that degree of repair in which an outgoing tenant would have to leave the premises as in a question with his landlord or another incoming tenant. It would have been a different matter if the remit had included the word "good," but "good" occurred only in the narrative clause of the submission and in the lease, and a narrative clause and any other explanatory document could only be looked at where the operative clause was ambiguous. Here it was perfectly clear—*Orr* v. *Mitchell*, March 20, 1893, 20 R. (H.L.) 27, 30 S.L.R. 591. If there was any ambiguity at all it was in the lease and the narrative clause of the submission. Further, however, this ground of reduction could not now be considered, the pursuers having laid no foundation for it upon record. As to the formal objection which the Lord Ordinary had sustained, viz., that the award was an award not only of the arbiters but also of the oversman, it was entirely unsubstantial. This was not a formal arbitration governed by strict rules of form—it was simply an agricultural valuation—*Nivison* v. *Howat*, November 22, 1883, 11 R. 182, 21 S.L.R. 104; *Hope* v. *Crookston*, June 6, 1890, 17 R. 868, 27 S.L.R. 709. In *Frederick* v. *Maitland & Cunningham*, July 7, 1865, 3 Macph. 1069, and in *Lang* v. *Brown*, May 8, 1855, 2 Macq. 93, there had been a formal submission. The pursuers had really got the judgment of the persons they wished, viz., the two arbiters, and it was quite immaterial that the documents in which it had been embodied had also been, in accordance with local custom, signed by the oversman.

Argued for the respondents— The Lord Ordinary was right. The award should be reduced. The question in every case was, had the arbiter applied his mind to the question submitted to him—*Dare Valley Railway Co.*, 1868, L.R., 6 Equity 429; *Duke of Buccleuch* v. *Metropolitan Board of Works*, L.R., 5 H.L. 418; *Alexander* v. *Bridge of Allan Waterworks*, *cit. sup.*; *Glasgow City and District Railway Co.* v. *Macgeorge, Cowan, & Galloway*, *cit. sup.* Here the arbiters had not. They had valued the obligation of Mr Logan *qua* outgoing tenant instead of his obligation *qua* landlord. The latter was far more onerous than the former, not only according to the custom of the district, which could be taken into account—*Wigglesworth* v. *Dallison*, Smith's Leading Cases, p. 545;

Hunter's Landlord and Tenant, vol. ii, p. 239—but also according to the common law—Bell on Leases, 238, 321; Bell's Prin. 1254; *Johnstone* v. *Hughan*, May 22, 1894, 21 R. 777, 31 S.L.R. 655. Common sense showed that it was to the latter that they ought to have applied their minds, the submission to arbitration being ancillary to and dependent upon the lease. "Tenantable condition and repair" was an expression which connoted a different standard of repair in different circumstances. It had not the special meaning attributed to it by the defenders, but meant simply "fit for the tenancy." It was accordingly to a certain extent ambiguous apart from its context. The context here was to be found in the narrative clause of the submission and the lease, which showed that the tenancy was for a term of nineteen years, and no fences or buildings could be fit for such a lease if they were not in "good" order and repair. The objection that this ground of challenge was not set forth on record was not open to the defenders, because the pursuers had no means of knowing until it was disclosed by the arbiters at the proof—*cf. Bile Bean Manufacturing Co., Limited* v. *Davidson*, July 20, 1906, 8 F. 1181, 43 S.L.R. 827. The award was further invalid on the separate ground that it bore to be the award of the arbiters and oversman instead of the arbiters only, being in fact the award of a tribunal to whom the matter had never been remitted. Parole evidence to show that in fact the award was the award of the arbiters alone was incompetent—*Duke of Buccleuch* v. *Metropolitan Board of Works*, *cit. sup.*, p. 434; *Miller & Son* v. *Oliver & Boyd*, November 10, 1903, 6 F. 77, 41 S.L.R. 26; *Frederick* v. *Maitland*, *cit. sup.*; *Lang* v. *Brown*, *cit. sup.* The cases of *Nivison* v. *Howat* and *Hope* v. *Crookston Brothers*, *cit. sup.*, were distinguishable.

At advising—

LORD LOW—The Lord Ordinary has reduced the awards of the arbiters which are challenged in this case upon two grounds—first, that they did not determine the question which was submitted to them, but dealt with another question; and secondly, that the awards bear to be the awards of the arbiters and oversman, and are signed by the oversman as well as the arbiters, although the arbiters were agreed upon their award and the matter was never devolved upon the oversman.

In regard to the first of these grounds of reduction I am of the same opinion as the Lord Ordinary. The submission arose in this way. By lease executed in February 1904 the defender Mr Logan let the farm of Whitton in Roxburghshire, of which he is proprietor, to the pursuers for a period of nineteen years from Whitsunday 1904, with breaks in favour of either party at Whitsunday 1914 and Whitsunday 1919. Mr Logan had, prior to the pursuer's entry, farmed Whitton himself, and he was therefore both outgoing tenant and landlord. By the lease the pursuers bound themselves to take over the dung upon the farm, the waygoing crop of 1904, and certain plant, machinery, and house fittings, at a valuation, and they also agreed "to accept of the whole houses and buildings, with the water supply thereto, and pipes and connections thereof, roads, drains, ditches, dykes, and fences on the said farm, when the same have been put into good order and the alterations and additions upon the steading made as arranged, as being in tenantable order and condition."

In April 1904 a submission was prepared, apparently upon Mr Logan's instructions, whereby he and the pursuer submitted to the determination of two arbiters mutually chosen, and in case of their differing in opinion, to an oversman to be chosen by them, in the first place the amount to be paid by the pursuers for the dung and other things which by the lease they were bound to take over at valuation, and in the second place "the sums payable by me the said Abraham Logan to us the said Alexander Davidson senior and Alexander Davidson junior in respect of any houses and buildings, with the water supply thereto, pipes and connections thereof, roads, drains, ditches, dykes, and fences on the said farm, not being in tenantable condition and repair as at the entry thereto of us the second parties."

The matter submitted to the arbiters in the second place involved, in any view, a departure from the terms of the lease, because it substituted for the landlord's obligation to put the houses, fences, and so on in good order, a payment by him to the tenants of the sums required to put these subjects into tenantable condition and repair. It appears that that alteration in the nature of the landlord's obligation had not, prior to the preparation of the submission, been arranged by him and the pursuers, but the latter took no objection to the alterations, and executed the submission.

The pursuers' contention is that what was referred to the arbiters was to estimate the amount which it would cost Mr Logan, as landlord, to put the buildings, fences, and the like in good order as stipulated in the lease. What the arbiters did, however, was to estimate the amount which it would have cost Mr Logan as outgoing tenant to put the subjects into tenantable condition and repair as at the termination of a lease, and it was argued for Mr Logan that they were right upon a sound construction of the submission in making their estimate upon that footing.

Now, it seems to me not to be open to question that the obligation undertaken by Mr Logan in the lease to put the buildings and fences into good order was undertaken by him as landlord, and not as outgoing tenant; and I think that it is equally plain that the intention of the parties to the submission was that the arbiter should determine the amount of money required to fulfil that obligation.

The difference in phraseology between the narrative of the submission and the operative clause which formulated the question which the arbiters were to deter-

mine, was founded on by Mr Logan's counsel, who argued that the words in the latter clause—"tenantable condition and repair"—were invariably used to designate, and were recognised as meaning, the condition and state of repair in which an outgoing tenant was bound to leave buildings and fences at the termination of his lease, and were therefore not open to construction, and could not be modified or controlled in any way by reference to the narrative.

I am of opinion that that argument is not well founded. It is beyond dispute that the obligation which lies upon a landlord at common law to put buildings and fences at the commencement of a lease in tenantable condition and repair, involves more and is more onerous than the obligation which lies upon the tenant to leave these subjects in like condition and repair at the end of the lease. To take one example out of many which might be given—If a fence were, at the beginning of a lease, worn out, so that it was no longer capable of being repaired, the landlord would be bound to renew it, but no such obligation would rest upon a tenant at the end of a lease, because he is not responsible for the effects of inevitable wear and tear, and is not bound to renew what, from that cause, has become worn out. It was therefore essential, in the present case, that the arbiters should know whether the obligation upon which they were to put a money value was the obligation of a landlord at the beginning of a lease, or of an outgoing tenant at the end of a lease. I should have thought that no one could have read the submission without seeing that it was the landlord's obligation which was in question, because the submission itself recites the clause in the lease in regard to the condition of the buildings and fences, and the landlord states that he has agreed to pay such sum as the arbiters shall fix in respect of any buildings and fences not being in the stipulated condition.

It was said that the use of the words "good order" in the narrative, and of the words "tenantable condition and repair" in the operative clause, indicated that what was actually submitted to the arbiters was something different from what was referred to in the narrative, or at all events that the question submitted was more accurately expressed in the operative clause, in either of which cases the latter clause must rule. I do not think that there is any real inconsistency between the narrative and the operative clauses. In the first place, I am inclined to think that a landlord's obligation to put buildings and fences into "tenantable condition and repair" at the beginning of a lease, is substantially equivalent to an obligation to put them into good order, because I cannot imagine such subjects being in "tenantable condition and repair" when intended to serve the purposes of a lease for (say) nineteen years, unless they were in good order. But however that may be, the clause in the lease, which is recited in the submission, shows that in the present case the expression "tenantable condition and repair" was equivalent to "good order," because the tenants bound themselves to accept the buildings and fences "when the same have been put in good order," as being in tenantable condition and repair.

It therefore seems to me to be clear that what was referred to the arbiters was to estimate the amount which would be required to implement the obligation undertaken by the landlord to put the buildings and fences at the beginning of the lease in the condition stipulated by the lease. Therefore, as the arbiters have frankly admitted that what they estimated was the amount which an outgoing tenant would require to expend in order to fulfil his obligation to leave the subjects in tenantable condition and repair at the end of his lease, I am of opinion that the award cannot stand, because the arbiters have not determined the question submitted to them, but another question altogether.

It was, however, argued for Mr Logan that the pursuers were not entitled to decree of reduction upon that ground, because they have neither averred or pleaded it. I agree with the Lord Ordinary that that contention cannot be sustained. I can very well understand that it never occurred to the pursuers that the arbiters had entirely misapprehended the question which was put to them, and the defences do not disclose that what the arbiters had dealt with was the obligation of the outgoing tenant. But that state of the pleadings cannot prevent justice being done between the parties, because whenever the arbiters admitted that they had not dealt with the question referred to them, there was, in my judgment, an end of the case. Further, the alleged defect in the pleadings could even now be put right by an amendment of the record, but I do not think that in the circumstances that formality is necessary.

In regard to the *second ground* upon which the Lord Ordinary has held the awards to be liable to reduction, I have felt some difficulty. I entirely assent to the view that in agricultural arbitrations, where the question is the value of such things as a waygoing crop or the dung upon a farm, and where the arbiters are chosen because their experience in such matters enables them, by inspecting the subjects, to fix the value, it is desirable that there should be as few formalities as possible. Further, I think that in such arbitrations mere irregularities will not vitiate an award even if they are of a kind which would be fatal in other classes of submissions where the duties of the arbiters are more of a judicial character.

In this case the submission was not one purely for valuation, because the arbiters had to fix the amount which would be required to enable the landlord to implement his obligation to put the buildings and fences into good order. No doubt the arbiters might be expected to be able to determine by their own inspection what required to be done, but I think that the probability is that they would further require to call in the aid of tradesmen to advise them as to the cost of such repairs

and renewals as they might deem to be necessary.

Still 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 there is only one matter which has occasioned me difficulty, and that is the fact that the awards under reduction bear to be the awards of "the arbiters and oversman." I have great difficulty in regarding that as a mere irregularity or informality. In the case of *Lang* v. *Brown* (1855, 2 Macq. 93) Lord Chancellor Cranworth laid it down very emphatically that when an award is challenged the question always is whether it is one which the parties agreed should be binding on them. Now in this case the parties agreed to abide by the award of the two arbiters mutually chosen, or in the case of their differing in opinion, of an oversman, but they never agreed to accept a joint award of the arbiters and the oversman. It therefore seems to me that the matter is one of substance and not merely of form.

It is true that in this case the arbiters were agreed; and apparently the oversman (who quite properly had accompanied the arbiters when they inspected the subjects) was made a party to the award and signed it, simply to indicate that he approved of the conclusion at which the arbiters had arrived. But that that was the position of matters could not be discovered from the award itself. For anything that appears to the contrary in the award the arbiters might not have agreed, but might have called in the oversman to settle their differences and then issued an award jointly with him. If that had been what actually occurred, I think that there could be no doubt that the award would have been bad, and, in any view, I have difficulty in reconciling myself to the idea that a written award which bears to be a joint award can be proved by general evidence to be an award by the arbiters only, with in addition an irregular, ineffective, and unnecessary concurrence by the oversman.

The case of *Hope* v. *Crookston Brothers* (1890, 17 R. 865) was founded on. In that case a joint award by the arbiters and the oversman was sustained. The parties, however, had agreed that any disputes in regard to a contract for the sale and purchase of hay should be settled by arbitration in Liverpool "in the usual way," and it was proved that the course which had been followed was according to the custom in Liverpool.

If in the present case it had been proved to be the recognised custom in Roxburghshire, in agricultural arbitrations, where the oversman has accompanied the arbiters when inspecting the subjects, for a joint award to be issued by the arbiters and oversman, the question would have been very different, but although there is evidence that that course is somtimes adopted no such general custom is established.

I therefore agree with the Lord Ordinary that the awards, bearing as they do to be joint awards of arbiters and oversman, cannot be sustained.

Lord Stormonth Darling — I concur with Lord Low in the main ground of judgment which he proposes. I think that not only is the common law obligation of a landlord at the commencement of a lease to put the buildings and fences on the farm into "tenantable condition and repair" (which of course could be altered by express contract) equivalent to an obligation to put these into good order, but I think the lease itself in the present case makes it clear that this was the thing submitted to arbitration, because the tenants bound themselves to accept the buildings and fences as being in tenantable condition and repair only "when the same had been put into good order." And as this was (confessedly) not what the arbiters did, I agree that their awards, so far as challenged, cannot stand.

But I do not think that we can avoid, if only as affecting the matter of expenses, the duty of forming and expressing some opinion on the technical grounds of reduction to which also the Lord Ordinary has given effect. It would have been enough, no doubt, for the pursuers to rely solely on the ground that the arbiters had mistaken the nature of the thing submitted. But they did not choose to do so. On the contrary, they chose to state every ground, good and bad, on which the awards could be attacked. On some of these points (I think on most of them) the Lord Ordinary is against them. In particular, he holds that the parties, by acquiescing in the arbiters acting without written acceptances, are barred from reducing the submission on the ground that there were no written acceptances. He also expresses the opinion that the arbiters and oversman acted quite rightly in proceeding together to make the inspection, and he gives very good reasons why any other mode of procedure would be quite unworkable. Further, in view of the fact established at the proof that there never was any devolution upon the oversman, nor any necessity for such devolution, for the simple reason that the arbiters were agreed, his Lordship really comes to the conclusion that the objection founded on there being no devolution in writing, although the oversman signed the awards, had no substance in it. The Lord Ordinary no doubt states his opinion that wherever there is a formal written submission the nomination of both arbiters and oversman ought to be in writing. But that seems to me to be attaching far too much weight to mere matters of formality and procedure, at all events in rural arbitrations, which truly partake much more of the nature of valuations, between which and regular arbitrations our Courts have always drawn broad distinction (see, *e.g.*, the case of

M'Gregor v. *Stevenson*, 9 D. 1056). Indeed, I claim the first part of the Lord Ordinary's opinion as really negativing the idea that these awards ought to be reduced on any ground except the substantial one on which Lord Low has proceeded. Be that as it may, my own opinion is that there is no ground for reducing these awards on any of what may be called the technical grounds. It was because the Second Division, as constituted on 25th May 1906, thought that the Lord Ordinary had erred in accepting these technical objections as sufficient to justify reduction *de plano* that we recalled his Lordship's interlocutor and remitted to him to allow a proof before answer. The proof thus taken has of course been considerably lengthened by the pursuers insisting upon these formal objections and even adding to their number. In the result it seems to me to have been shown that there was no substance in the technical grounds, although it has also been disclosed that there was a very real and sufficient ground for reducing some of the awards, because the arbiters had not applied their minds to the sum which was necessary to put the fences, &c., into good order.

I should therefore be in favour of limiting our judgment to what I consider the true ground, and if your Lordships had agreed with me, of marking our sense of the pursuers' failure to establish their technical objections by modifying the expenses to which they are to be found entitled.

LORD JUSTICE-CLERK—I concur with both your Lordships that the so-called award in this case cannot stand. But upon the technical questions as to the procedure of the arbiters and oversman, and which can only affect the question of expenses, I agree with the views expressed by Lord Low. I entirely assent to the general view that submissions such as this which relate to farming matters are not to be too strictly dealt with as regards procedure. But relaxation of rules of sound procedure must not be carried too far. Where only detail matters are concerned mere technicalities may be held not sufficient ground for setting aside an award evidently fairly arrived at. But the difficulty in this case is that the irregularities which took place make it plain that the party complaining of the procedure did not get the benefit in the arbitration of what was stipulated for, viz., that in the event of the arbiters differing he was entitled to the decision of the oversman. He was entitled to know the fact whether the arbiters differed, and whether they referred the matter on that ground, and to consider whether he should ask the oversman to hear him or bring matters before him for consideration. Now the case as it presents itself to us indicates, if anything, that the award was an award made both by the arbiters and the oversman in conjunction, or in the form of one of the deliverances, an award by one arbiter and the oversman. Such awards presented to a party could give him no certainty as to what had been done—whether the arbiters had considered the case and had differed, and therefore had devolved the matter upon the oversman, or whether the oversman had never had any devolution made to him, but had proceeded without any such devolution to take part in disposing of the matters in dispute. It seems to me that the objection to such procedure is substantial. I cannot hold that the party to the arbitration who felt aggrieved by the so-called award can without injustice be put in the position of having to accept an award as to which it does not appear that the procedure was truly the procedure contemplated by him in entering into the arbitration as shown by the terms of the submission. I have only to say further that I do not think that the case of *Hope* has any bearing on the case. It proceeded on custom of a port. That overruled any ordinary law applicable to such a case. Here there is no ground shown for dealing with the matter on any other footing than that the law must be applied, there being nothing to show any district custom which could justify a decision not in accordance with the legal principles applicable in the circumstances of the case.

LORD ARDWALL was not present.

The Court adhered.

Counsel for the Pursuers (Respondents)—M'Lennan, K.C.—Murray—Hamilton. Agents—Murray, Lawson, & Darling, S.S.C.

Counsel for the Defender (Reclaimer)—The Solicitor-General (Ure, K.C.)—Lord Kinross. Agents—Russell & Dunlop, W.S.

Friday, November 29.

SECOND DIVISION.

[Lord Dundas, Ordinary.

DENHOLM'S TRUSTEES *v.* DENHOLM'S TRUSTEES.

(See *ante*, 1907 S.C. 61, 44 S.L.R. 42.)

Succession — Trust-Disposition — Mutual Settlement—Power to Husband to "Consume" Wife's Estate—Meaning—Onus of Proof in Question with Beneficiaries Entitled to Remainder.

In a mutual trust-disposition and settlement a wife conveyed to her husband her whole means and estate, under burden of the payment of debts and annuities and the maintenance of their children, "with full power to my said husband to consume such parts of the capital during his lifetime as he may find or think necessary, and also power to him to realise, sell, and dispose of my said estates, heritable and moveable, by public roup or private bargain, as he may think proper, and in general to deal and intromit therewith as fully as I could have done myself;" and upon the death of the survivor of herself and her husband she conveyed to her trustees "all and sundry my said estate, or