here, is raised by an individual workman, although the question is of very general interest, the question for him can never be more than the very small sum of money that is involved, and it may be that the remedy of the other party against whom many actions might be raised, if he wishes a higher tribunal, would be to raise the matter in some form like a declarator.

LORD JOHNSTON — I agree with your Lordship. Where the statute says that "summary cause includes," *prima facie* one would understand that although it is to include the specified causes, it may include something else. But it is necessary to read it as if "includes" means "means and includes," because in point of fact there is nothing else it can include except the specified causes. And therefore the conclusion is that, whether purposely or by inadvertence, there is a *lacuna* covering the class of cases between £1 and £20.

I think it is worth while noting, going back to the Small Debt Act of 1837, that things are left by the Act of 1907 precisely where they were in 1837. Because that statute, in section 14, provided that no record was to be made up of the pleadings unless with the leave of the Court in consequence of any difficulty in point of law, or special circumstances of any particular case, which would, of course, cover a case such as we have here; "provided always that when the Sheriff should order any such pleadings to be reduced to writing, then every such case should proceed as an ordinary civil cause and be disposed of in all respects as if this Act had not been passed."

Now that places any case such as the present in the position of an ordinary action. But then it does not go on to provide any special appeal for cases of that sort. There is a special means of appeal to the Justiciary Court, under sections 30 and 31, which would not affect cases of this sort if they were tried in the ordinary court and were disposed of in all respects as if that Act had not been passed; and therefore cases of that sort were left in the position that being under £25 no appeal was possible. This Act of 1907, therefore, though raising the limit of small debt actions to £20, leaves the small debt cases remitted to the ordinary court precisely in the same position as regards appeal as they would have been under the 1837 Act, and does not give them the benefit of the latter part of section 8 of the Act of 1907, which allows important questions of law arising out of summary causes to be stated to the Court of Session on leave to appeal.

LORD SKERRINGTON concurred.

LORD KINNEAR and LORD MACKENZIE were sitting in the Extra Division.

The Court sustained the respondents' objection to the competency of the appeal and directed the clerk to re-transmit the process to the Sheriff-Clerk.

Counsel for the Pursuer (Appellant) — Armit. Agent—Arthur A. Ross, S.S.C.

Counsel for the Defenders (Respondents) —Mair. Agents—Webster, Will, & Company, W.S.

Tuesday, March 7.

FIRST DIVISION.

[Sheriff of Ayr.

FERGUSSON *v.* M'QUATER.

Lease — Outgoing — Compensation — Improvements—Agricultural Holdings (Scotland) Act 1908 (8 *Edw. VII, cap.* 64), *sec.* 1, *Schedule I, Part* 3—*Tenant Bound by Lease to Apply Artificial Manure Claiming Compensation for Unexhausted Value thereof.*

The Agricultural Holdings (Scotland) Act 1908 enacts, sec. 1, sub-sec. (1)—"Where a tenant of a holding has made thereon any improvement comprised in the first schedule to this Act he shall, subject as in this Act mentioned, be entitled, at the determination of a tenancy, on quitting his holding, to obtain from the landlord, as compensation under this Act for the improvement, such sum as fairly represents the value of the improvement to an incoming tenant." Sub-sec. (2)—"In the ascertainment of the amount of the compensation payable to a tenant under this section there shall be taken into account—(*a*) any benefit which the landlord has given or allowed to the tenant in consideration of the tenant executing the improvement; (*b*) as respects manuring as defined by this Act, the value of the manure required by the lease or by custom to be returned to the holding in respect of any crops sold off or removed from the holding within the last two years of the tenancy or other less time for which the tenancy has endured, not exceeding the value of the manure which would have been produced by the consumption on the holding of the crops so sold off or removed."

The first schedule to the Act specifies in Part 3 "Improvements in respect of which consent of or notice to landlord is not required. . . . (23) Application to land of purchased artificial or other purchased manure."

A lease contained provisions which required the tenant to manure the land with a certain amount of farmyard manure per acre, and so far as he did not make on the farm sufficient farmyard manure to apply artificial manure. *Held* that the application of the artificial manure was an "improvement," that it could not be assumed that the landlord in fixing the rent had given "any benefit" in consideration of this

improvement, and that the tenant was entitled at his outgoing to claim compensation for the unexhausted value of the artificial manures which he had applied.

Expenses—Arbitration—Agricultural Holdings (Scotland) Act 1908 (8 *Edw. VII, cap.* 64), *Schedule II, sec.* 14—*Expenses of Proceedings before Sheriff in Case Stated.*

The second schedule of the Agricultural Holdings (Scotland) Act 1908 enacts as to expenses:—"14. The expenses of and incidental to the arbitration and award shall be in the discretion of the arbiter . . . and the expenses shall be subject to taxation by the Auditor of the Sheriff Court on the application of either party, but that taxation shall be subject to review by the Sheriff." The schedule makes provision for the statement by the arbiter of a Stated Case for the opinion of the Sheriff.

Held that the expenses of a case stated for the opinion of the Sheriff by an arbiter under the Act fell to be dealt with by the Sheriff.

The Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64), sec. 1 (1) (2), Sched. I, Part 3 (23), Sched. II (14), are quoted *supra in rubrics*. Section 5 enacts —". . . Any contract or agreement made by a tenant of a holding by virtue of which he is deprived of his right to claim compensation under this Act in respect of any improvement comprised in the first schedule hereto, shall be void so far as it deprives him of that right."

A Case was stated on 20th July 1910 for the opinion of the Sheriff at Ayr in an arbitration under the Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64), between Sir Charles Fergusson, Baronet, proprietor of the estate of Kilkerran, and James M'Quater, formerly tenant of part of the farm of Aird on that estate, in respect of a claim under the above Act, on the determination at Martinmas 1909 of the tenancy.

The Case stated as follows:—"Under the lease of said holding it is provided 'that the said lands shall be managed and cultivated in six divisions as nearly equal as the present fences with the aid of subdivision fences may admit, and according to the rules and regulations following, that is to say, the tenant shall never break up more than one of said divisions in any one year of this lease, and which division, after being broken up, shall bear a white crop, next year it shall be in drilled green crop (beans excluded), properly prepared with a sufficient number of ploughings and harrowings, thoroughly cleaned and sufficiently manured with not less than 25 tons of good farmyard dung per imperial acre, so far as the tenant may have dung, and so far as he may not have dung to manure the same, with 40 bushels of bone dust or with 5 hundredweights of the best Peruvian guano or other similar manure of equal value per imperial acre.' The said lease is referred to and held to be part of this case. Sufficient artificial manure was applied to the green crop in the years 1907, 1908, and 1909 to meet the said regulation.

"It is contended by the said Sir Charles Fergusson that the said James M'Quater is not entitled to claim for the unexhausted value of the purchased artificial manures applied to the land, except in so far as these artificial manures exceed the quantity which he was bound to apply in terms of the foregoing provision. The said James M'Quater contends that he is entitled to the unexhausted value of the artificial manures purchased and applied as directed by said lease, and that the clause of the lease above founded on is, in terms of sec. 5 of the Agricultural Holdings (Scotland) Act 1908, void in so far as it deprives him of any right to claim compensation."

The *question of law* submitted for the opinion of the Court was—"Is the said James M'Quater entitled to claim compensation for the unexhausted value of artificial manures which under the said lease he is bound to apply to the holding?"

On 6th October 1910 the Sheriff-Substitute (SHAIRP) answered the question of law in the negative.

Note.—"As to the question of law submitted to the Court, the answer is in the negative. It was contended for Mr M'Quater that section 5 of the said Act prevented the clause in the lease quoted in the Stated Case from barring his present claim. If that is a sound contention it ends the matter, but I am unable to give an interpretation to the section which I think would work a manifest injustice to landlords in such circumstances as the present. I refer to section 1, sub-section 2*a*, of the foresaid Act. A contract was entered into in terms of the clause of the lease quoted in the Stated Case, under which the landlords agreed to accept a certain rent on certain conditions, viz., that manure should be applied to their land at the rate of 25 tons of good farmyard manure per imperial acre, so far as the tenant might have such manure, and in the case of his not having such manure, 40 bushels of bone dust or 5 cwts. of the best Peruvian guano, or other similar manure of equal value. It was distinctly on the footing that the tenant should carry out these obligations that the landlords agreed to let him the farms in question at the rent named in the lease. In carrying out these obligations the tenant has merely fulfilled his side of the bargain, and I am unable to hold that he is entitled to any additional payment for doing so.

"The view I am inclined to take of section 5 is that it was framed for the purpose of preventing a tenant contracting himself out of the benefits of the Act, but I am unable to hold that it was intended to make, as it were, a double payment to the tenant for fulfilling his contract.

"In a word, the landlords have (in terms of section 1, sub-section 2*a*, of the said Act) given the tenant the benefit of obtaining the farm at the rent stated in the lease in consideration of the tenant executing the

improvement of applying the manure covenanted for in the lease.

"It seems not to fall upon me, but to be the duty of the arbiter, under the 14th paragraph of the second schedule to said Act, to deal with the expenses of parties in connection with the Stated Case."

The tenant appealed, and argued—The obligation in the lease as to manure did not exclude the tenant's right to claim compensation, and he had received no benefit in lieu thereof. The provisions of the Act as to the right to receive compensation were peremptory. If the tenant's right to compensation were to be excluded, that would have to be specifically provided for. The Sheriff had misconstrued subsection (2) of section 1. If his view was sound, the right to compensation could always be defeated by provisions in a lease specifying what manure would be applied. The provisions of the Agricultural Holdings (Scotland) Act 1883 (46 and 47 Vict. cap. 62), sec. 6, were repeated in the present Act, sec. 1 (2) (*b*).

Argued for the respondent—Any obligation imposed upon a tenant was part of the contract contained in his lease; therefore the agreement embodied in the lease covered any benefit which the landlord gave in fixing the rent, and it could not be said that the appellant had received no benefit. He would be paid twice over if his claim for compensation was sustained. The respondent would have had a just claim against the appellant if the manure in question had not been applied. The rent was not the only consideration due by the tenant, the obligation to apply manure was a further consideration.

At advising—

LORD PRESIDENT—This is a question under the Agricultural Holdings Act. In a lease it was provided that the land should be managed under a certain shift, provided that the tenant "shall never break up more than one of said divisions in any one year of this lease, and which division, after being broken up, shall bear a white crop, next year it shall be in drilled green crop (beans excluded) properly prepared with a sufficient number of ploughings and harrowings, thoroughly cleaned and sufficiently manured with not less than twenty-five tons of good farmyard dung per imperial acre, so far as the tenant may have dung, and so far as he may not have dung to manure the same with forty bushels of bone dust or with five hundredweights of the best Peruvian guano or other similar manure of equal value per imperial acre." Now the lease having come to an end, the tenant has made a claim, *inter alia*, for the unexhausted value of the artificial manure consumed upon the holding, being an improvement in respect of which the consent of or notice to the landlord is not required under heading 23 of Part III of the schedule to the Agricultural Holdings Act. The landlord, on the other hand, maintains that, in so far as the artificial manure has been applied to the land in respect of the stipulation which I have just read, the claim cannot be given effect to; and the Sheriff, upon a stated case by the arbiter, has given effect to that contention.

I am unable to come to the same view as the Sheriff-Substitute. The Agricultural Holdings Act provides that where a tenant has made an improvement comprised in the First Schedule he is to be entitled to compensation (I am glossing the words), and accordingly it seems to me that the moment that you find that an improvement is an improvement under the Act there is no more to be said, unless in some way you can get out of the provision. Now the only way in which it is said you can get out of the provision is in respect of the terms of section 1 (2) (*a*) of the Act. That section provides that "In the ascertainment of the amount of the compensation payable to a tenant under this section there shall be taken into account (*a*) any benefit which the landlord has given or allowed to the tenant in consideration of the tenant executing the improvement."

Now it is said that here there is a benefit allowed by the landlord in the sense of that sub-section, viz., that if it had not been for the stipulation in the lease the landlord would have asked more rent. I cannot so read the sub-section. I think any benefit must be a benefit specially mentioned and allowed, and that it cannot mean the mere consideration that if the stipulations had not been exactly as they are the landlord would have asked for more rent; and that therefore the so-called benefit is the fact that the tenant got the land for the particular rent which was stipulated. I think you are there going into the region of speculation; whereas I think the subsection clearly applies not to a speculative question but to the case where a particular benefit is mentioned as having been given in respect of a particular thing.

Now no doubt it seems a little unjust at the first sight that a person should have to pay a certain sum for a thing being done which he stipulated should be done. But I think the answer is that after all persons must contract with the Agricultural Holdings Act before them. And they knew perfectly well in this case that manure was and would be an improvement under this Act; and therefore if they wanted to get out of what would be the obvious operation of the Act, then they must get out of it in the only way which the Act permits. Of course the simplest way would be to contract yourself out of the Act, and this is what anybody could do if it were not for the section in the Act which prevents it being done. That just accentuates the consideration that the only way in which you can escape the operation of the Act is the one way in which the Act allows you to escape it.

Accordingly I think that anybody entering into a lease and knowing that something was to be put upon the ground which would constitute an improvement, must look at this sub-section, and if he wants to get out of it contract accordingly. It is quite clear, I think, that the result could have been reached by a proper stipulation,

because it might easily have been said that one was to do so and so, and that if that were done a reduction of so much would be allowed. That would be a class of stipulation that would come directly under the provisions.

I have made my remarks entirely upon the present Act; but of course upon these matters the prior Act, under which this lease was constituted, is the same.

Accordingly I am of opinion that the second question should be answered in the affirmative, leaving it of course for the arbiter to say what the amount is of the value of the improvement to an incoming tenant.

LORD KINNEAR—I am entirely of the same opinion, and for the same reasons. I think that the benefit which is to be taken into account, in terms of section 1 (2) (*a*), must be a particular benefit in consideration whereof the tenant has executed the specific improvements that are in question. I do not think it possible to ascribe the execution of particular improvements to the general benefit which the tenant may be supposed to take from paying a certain rent. It is mere conjecture that the rent would have been higher if this obligation had not been laid on the tenant; and however probable the conjecture may be, we cannot tell that an allowance on this account was made matter of agreement between the parties.

LORD JOHNSTON—Your Lordship has read the provisions of section 1 (2) (*a*) of the Agricultural Holdings Act 1908. It was, I at first thought, one of the minor considerations of the lease that the tenant shall apply a certain quantity of manure to the green crop break of the year—farmyard manure if he so conducted his operations as to make sufficient farmyard manure, and a specified quantity of artificial manure as a substitute if he did not. All these minor considerations seemed to me necessarily to affect the rent, because in view of all such conditions in a lease is the rent fixed, and also because I thought that in consideration of the particular obligation the tenant had got a freer hand in the management of the farm than he otherwise would. I thought therefore that the landlord had already given a *quid pro quo* or consideration for this specified obligation as to manuring.

But I have, on a more full study of the lease as a whole, come to see that this is neither a sound view of the lease nor of the statute.

Under the lease the farm must be cultivated on a six years' shift. All green crop, straw, and other fodder (rye grass, hay, and potatoes excepted) must be consumed, and therefore turned into manure, and all manure made must be applied to the land. It follows that the farm cannot be cultivated so as to reduce purposely the amount of farmyard manure made and to be applied to the land. It follows, further, that the stipulation relied on is an obligation to do merely that which the tenant ought to do, as a good husbandman, to keep the farm in good heart, not only during but to the end of his lease, by applying the necessary additional artificial manure to a conventional minimum.

That this may be done in respect of agreement and not of mere freewill does not, I am now satisfied, disentitle the tenant to his compensation under the Act, and I therefore agree that the second question falls to be answered in the affirmative.

LORD MACKENZIE—The Agricultural Holdings (Scotland) Act 1908 by section 1 provides that "where a tenant of a holding has made thereon any improvement comprised in the first schedule to this Act, he shall, subject as in this Act mentioned, be entitled, at the determination of a tenancy, on quitting his holding, to obtain from the landlord as compensation under this Act for the improvement such sum as fairly represents the value of the improvement to an incoming tenant."

The outgoing tenant here says he has made an improvement under the First Schedule, Part III (23), which provides for the application to land of purchased artificial or other purchased manure. He seeks to have the value of this to the incoming tenant ascertained in the mode prescribed by section 2 of the Act, *i.e.*, by an arbiter.

He is met by the defence stated for the landlord, that this is a case to which section 1 (2) applies, which provides—". . . (*quotes, v. sup.*) . . ." The way in which this is said to apply is that because the manure in question was applied by the tenant to the land under an obligation imposed by the lease, therefore he must be held to have got a corresponding benefit from the landlord in the shape of a reduced rent. The argument is that but for his undertaking to apply the quantity of manure stipulated (which is all he put on) his rent would have been so much higher. This may or may not be the case, but in the absence of any express declaration in the lease upon the matter the question is one for the arbiter. He will have to decide (1) whether the outgoing tenant made an improvement in terms of the Act; (2) whether this is of value to the incoming tenant; and (3) if so, what amount of compensation, if any, is due by the landlord. Of course the arbiter may, if he thinks it just on a consideration of the facts of the case, come to the conclusion that the rent was fixed to cover not only the purchased manure that the land received during the tenancy, but also to cover the resulting value that remained, if any, on the determination of the tenancy, In the absence, however, of an express declaration to this effect in the lease itself, I am of opinion that the matter is one which the arbiter must determine. Section 5 does not appear to me to affect the present question.

I think the second question should be answered in the affirmative.

In support of a motion for expenses in the Court of Session and the Sheriff Court, the Sheriff not having dealt with the latter for reasons stated at the close of his note,

counsel for the appellant referred to section 31 of the Act of 1908.

LORD PRESIDENT — As regards the expenses of the proceedings before us, there can be no doubt of course that the winning party must have them; but the Sheriff in answering the question put before him by the arbiter did not deal with the expenses, his view being that those expenses fell to be dealt with by the arbiter in respect of rule 14 of the second schedule, which directs that the expenses of and incidental to the arbitration shall be in the discretion of the arbiter.

I do not think that the Sheriff was right in that view, and I think he ought to have dealt with the expenses of the proceedings before him, and that upon this ground, that whenever you are told in an Act of Parliament that you may go by way of stated case to a court of law (which the Sheriff is), then the usual incidents of a court of law follow, one of which is that that court of law shall have a power of disposing of the expenses of the proceedings before it. It seems to me that the Sheriff is obviously very much better qualified to dispose of the expenses of what has been before him than the arbiter to whom the case goes back, and who can only judge by what his view of the result is. There might be things, for instance, in the conduct of the case of which he has no knowledge.

Accordingly I think that we should put that matter right, and that we should award the expenses of the proceedings before the Sheriff as well as the proceedings here. Of course the general expenses of the arbitration are a different matter and are in the determination of the arbiter.

LORD KINNEAR—I agree. I think that the rule is exactly what your Lordship has stated. In this statute it is enacted that either of the parties may apply to the Sheriff for the purpose of obtaining his decision upon a question of law, and upon such application being made the Sheriff is to direct the arbiter to state a special case for his opinion. Now I think with your Lordship, when Parliament directs a question to be taken before one of the ordinary courts of the country, it means that the Court shall dispose of such question according to the usual rules by which its procedure is regulated, and one of these is that the expenses of process must be awarded according to the discretion of the Judge. Unless the Sheriff's power of awarding expenses to a successful party before him is expressly taken away by the statute, I apprehend it must remain as part of his ordinary jurisdiction.

LORD JOHNSTON—I concur.

LORD MACKENZIE — I am of the same opinion. I would only add that the provision in rule 15 of the second schedule, which sets out the matters that the arbiter has to take into consideration in awarding expenses, certainly does not seem to support the view that the Legislature intended tha he should have to do with the expenses of a special case stated under rule 9.

The Court pronounced an interlocutor sustaining the appeal and answering the question of law in the affirmative, and upon expenses the interlocutor was in the following terms—

". . . Find the appellant entitled to expenses both in this Court and in the Sheriff Court, and remit," &c.

Counsel for the Appellant—Chree—Mair. Agents—Connell & Campbell, S.S.C.

Counsel for the Respondent—C. N. Johnston, K.C. — Pitman. Agents — J. & F. Anderson, W.S.

Tuesday, March 7.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

M'CONNELL & REID *v.* SMITH.

Contract—Sale—Condition of Contract—Reference to Arbitration—Notice.

Flour was sold under contracts which were embodied in sale-notes. On each of the sale-notes there was printed a side-note (on the margin)—"Any dispute under this contract to be settled according to the rules of the Glasgow Flour Trade Association." The rules of the association provided, *inter alia*, as follows—"All disputes of whatever kind, including claims of damages, disputes as to whether or not there is a concluded contract, and claims to reject goods arising out of transactions connected with the trade, shall be referred to two arbiters, one chosen by each party." The purchaser was not a member of the association, nor were the rules thereof brought to his notice otherwise than by the side-note.

Held that the terms of the contract were not such as to give the purchaser reasonable notice that, in event of disputes arising thereunder, the ordinary jurisdiction of the Courts was ousted and procedure by way of arbitration substituted.

Arbitration—Award—Incomplete Award—Action to Enforce Award—Competency.

M sold flour to S by sale-notes, which by side-note provided for disputes being settled according to the rules of the Glasgow Flour Trade Association. S having refused to take delivery of certain portions of the flour in respect of disconformity to contract, M called upon him to refer the dispute between them to arbitration, and nominated an arbiter to act for himself. S having refused to appoint an arbiter to act on his behalf, M, as provided in the rules of the association, applied to it to appoint an arbiter to act for S, and the association having done so, the arbiters found that M was acting in accordance