seven years there would certainly be some and possibly many individual changes. If it were attempted to individualise the 9, one or more would cease to be paupers before the expiry of the seven years. His place would be taken by another; and I am unable to see how the liability to maintain that latter person, who did not or might not have become a pauper till after the date of the Order could be an existing liability at the date of the Order. But if I am wrong in this the liability to maintain paupers will always exist, and I see no reason why a perpetual payment should not be ordered, and yet I understood it to be admitted that such an order could not stand.

I cannot distinguish this case from the cases of *Caterham*, [1904] A.C. 171, and *West Hartlepool*, [1907] A.C. 246, referred to by the Lord Ordinary. The *Caterham* case overruled two cases which, as Lord Robertson explains, were decided on the erroneous view that where the Legislature ordered adjustment of liabilities under the English Local Government Act of 1888 it intended to maintain the former balance of rates. In both the *Caterham* case and the *West Hartlepool* case the question of the maintenance of roads and bridges was involved. I am unable to distinguish that question from the present question of the maintenance of paupers. But in the *West Hartlepool* case not only did the question arise in connection with liability for roads and bridges, none of which were in the severed portion, there were also counter-claims in respect of children in district school reformatories, all of which reformatories were in the severed portion; and it was held that under an adjustment clause which I cannot distinguish from clause 51 of the Local Government (Scotland) Act 1889 any payment in respect of these reformatory children would be in the nature of compensation for loss of assessable area, for which there was no statutory warrant.

But it is said that in the *Caterham* case and *West Hartlepool* case the objectionable orders involved a perpetual liability, whereas in this case the liability is to terminate with the assumed death or cessation of pauperism of an assumed average number of paupers, and that in the present case there is an existing liability at the time of severance which could not be maintained in regard to the orders in the *Caterham* and *West Hartlepool* cases. In the latter case it does not appear whether the demand in respect of reformatory children was perpetual or was framed as in the present case. The smallness of the sum asked as compensation suggests that it did not represent a permanent payment. If that were so, then this case is *a fortiori* of the *West Hartlepool* case. Dealing with reformatory school children, who are sentenced by magistrates for a definite number of years, a certain number of individual children could be selected, in regard to whose unexpired sentences it might well have been argued that an obligation of maintenance had been undertaken by the individual area on their reception into the reformatory, and thus a liability incurred which would be a proper subject for adjustment. This view is not open when dealing with the rope-of-sand class of persons who are constantly shifting from self-support to pauperism. But in any case the reasoning of the noble and learned Lords seems to me as applicable to the one case as to the other, both involving although in different degrees payment of compensation for loss of assessable area.

The two cases of *Galashiels* do not seem to me to affect the present question. Admittedly the first does not. At first sight the second appears to do so. But it will be found that the only question raised for decision in that case related to the first branch of the Order, which ordained the increased parish to assume responsibility for paupers effeiring by birth or settlement to the portion annexed to it. The second branch of the Order, the only one which might have raised for decision the question involved in the present case, was not challenged. In addition, as already pointed out, no indication was given in the Order or in any document embodied in it of the way in which or the grounds on which the sums ordered to be paid were arrived at.

The Court adhered

Counsel for the Reclaimers—Sandeman, K.C. — Lippe. Agents — Macpherson & Mackay, S.S.C.

Counsel for the Respondent, the Secretary for Scotland—Solicitor-General (Morison, K.C.) — Pitman. Agent — George Inglis, S.S.C.

Counsel for the Respondents, the Parish Council of Mains and Strathmartine—C. H. Brown. Agents—Warden & Grant, S.S.C.

Tuesday, December 19.

SECOND DIVISION.

BRODIE-INNES *v.* BROWN AND ANOTHER.

Landlord and Tenant—Arbitration—Outgoing—Compensation for Unexhausted Improvements—Powers of Arbiter—Agricultural Holdings (Scotland) Act 1908 (8 *Edw. VII, cap.* 64), *sec.* 1 (1), *and First Schedule, Part iii.*

The proprietor of an estate let a farm by a lease which provided, *inter alia*, that the tenant was to farm the whole land according to the rules of good husbandry. On the termination of the tenancy the tenant claimed compensation for unexhausted improvements, and, *inter alia*, for the increased fertility of the farm due to "continuous good farming." *Held* that the arbiter in granting an award for "continuous good farming" had acted *ultra vires*, it not being an improvement specified in the schedule to the Agricultural Holdings (Scotland) Act 1908, and that averments to the effect that such award was for the unexhausted value of manures and feeding-stuffs purchased and applied prior to those which had been vouched,

and for which compensation under another head had been allowed, could not be submitted to probation.

The Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64), section 1, enacts —"*Right of Tenant to Compensation for Improvements* — (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 his landlord, as compensation under this Act for the improvement, such sum as fairly represents the value of the improvement to an incoming tenant . . ." First Schedule, Part iii—"Improvements in respect of which consent of or notice to landlord is not required"—enumerates ten definite operations numbered (18) to (27) inclusive.

John William Brodie-Innes, Milton Brodie, Elginshire, *pursuer*, brought an action against James Brown, Burnside of Dipple, Fochabers, and George Alexander Ferguson of Surradale, Elgin, *defenders*, to reduce an award, so far as it awarded £95 in respect of continuous good farming, by the said George Alexander Ferguson in an arbitration between the pursuer and the first-named defender.

The *facts* of the case were—The pursuer, the proprietor of the estate of Milton Brodie in the county of Elgin, which included the farm and lands of Miltonhill in the parish of Alves, by lease, dated 3rd August and 4th September 1906, let the said farm to the defender James Brown for the period of nineteen years from Whitsunday 1905. The said lease provided, *inter alia*, that the whole land was to be farmed according to the rules of good husbandry, the tenant being bound to pay the sum of £5 per acre of additional rent for every acre not so farmed. By arrangement between the parties the tenancy terminated at Whitsunday and separation of crop 1915, whereupon the defender claimed £240 from the pursuer as compensation for unexhausted improvements under the Agricultural Holdings (Scotland) Act 1908. The furthest back date of any voucher for manures or feeding stuffs embraced in the claim was 18th April 1911. The first three items of the schedule to the after-mentioned award were—

	Amount Claimed	Awarded.
"1. Application to land of purchased artificial or other purchased manures . . .		£40 12 0
2. Consumption on the holding by cattle, sheep, or pigs, or by horses other than those regularly employed on the holding, of corn, cake, or other feeding stuff not produced on the holding	£145 0 0	19 8 6
3. Consumption by animals as above of corn proved by satisfactory evidence to have been produced and consumed on the holding		4 14 3
		£64 14 9"

The concluding item, which was the subject of litigation, was as follows — "For continuous good farming during the whole tenancy whereby the fertility of the farm s greatly increased, £95." On 11th January 1916 the pursuer and defender having failed to come to any agreement, the other defender George Alexander Ferguson was appointed arbiter by the Board of Agriculture for Scotland acting under the Agricultural Holdings Act 1908 for the purpose of settling the differences which had arisen between them. The pursuer on 28th January 1916 lodged answers in the arbitration proceedings, contending that the aforesaid item of claim for continuous good farming was incompetent, and that in any event the defender had merely implemented the legal obligations incumbent on him under his lease. The parties were heard by the arbiter on 6th March 1916, and thereafter on 29th March 1916 they lodged in the arbitration proceedings a minute whereby they renounced probation. On 12th May 1916 the arbiter issued his award, by which he awarded £64, 14s. 9d. to the defender in respect of the items stated above. The *claim* had been summarised thus—"Total of the foregoing claim for the application of purchased artificial manures and the consumption of feeding-stuffs on the holding during the whole tenancy the manurial residuum of which is unexhausted, £145. For continuous good farming during the whole tenancy whereby the fertility of the farm is greatly increased, £95."

With regard to the item in dispute the defender *averred*—"(*Ans.* 3) . . . The sum of £64, 14s. 9d. was the amount which the arbiter held to be due to this defender for unexhausted manures and feeding stuffs purchased by him and applied to the farm since the year 1910, and which were vouched for by the vouchers lodged in process. The sum of £95 was the amount which he held to be due to this defender for accumulated increased fertility of the farm due to unexhausted manures and feeding stuffs purchased by this defender and applied to the farm prior to 1910, and was a moderate allowance in view of the condition of the farm, the exceptional fertility of which had been built up by the tenant prior to 1910. . . . This defender believes and avers that the arbiter was fully satisfied from his previous inspections, visits, and knowledge of the farm, of extensive purchases and application to the farm of feeding stuffs and manures prior to 1910, the benefit of which was unexhausted at this defender's waygoing, and which increased the value of the holding by the resulting accumulated fertility."

The pursuer pleaded, *inter alia*—"1. Compensation for continuous good farming not being an improvement specified in the schedule to the Agricultural Holdings (Scotland) Act 1908, the award therefor is *ultra fines compromissi* and incompetent. 2. The defender George Alexander Ferguson as arbiter having acted oppressively and *ultra vires* in awarding the defender James Brown as tenant the sum of £95 in respect of continuous good farming, decree should be pronounced in terms of the conclusions of the summons."

The defender pleaded, *inter alia*—"3. The award pronounced by the arbiter having

been *intra vires*, and the whole procedure in the arbitration having been regular and proper, this defender is entitled to absolvitor."

On 10th November 1916 the Lord Ordinary (HUNTER) allowed a proof before answer.

Opinion.—"If this award fell to be looked at strictly I think I should have to hold that it was a bad award so far as the pursuer complains of it, because the arbiter appears to have awarded a sum for continuous good farming, and under the Agricultural Holdings Act 1908, Schedule I, part 3, there is no express provision for giving an award under this head. The defender, however, says that claims in these arbitrations are not to be so strictly examined as claims in ordinary arbitrations, and that in reality his claim was one that fell under part 3, section 23, of Schedule I.

"I do not know that I can conclusively determine, or at all events satisfactorily determine, this point unless I know from the arbiter himself what were the elements he had in view when he gave the award of £95. Certainly if this is a matter of importance—and it is said to be a matter of importance to the agricultural community, seeing that claims couched in more or less similar language seem to have been entertained in preceding arbitrations—I think it might be rash on my part to proceed before knowing what the arbiter had to say.

"I therefore propose in this case, without dealing with any of the pleas-in-law, before answer to allow the defender a proof of his averments in answer 3 relative to the elements taken into account by the arbiter as to the £95 award."

The pursuer reclaimed, and argued—The award being unambiguous the Lord Ordinary was wrong in thinking it competent to hear parole evidence of the arbiter—*Miller* v. *Oliver & Boyd*, 1903, 6 F. 77, *per* Lord Trayner at p. 89, 41 S.L.R. 26. The arbiter could not as a witness remedy the award. The case of the *Glasgow City and District Railway Company* v. *MacGeorge*, 1886, 13 R. 609, 23 S.L.R. 414, was different. In the present case the error appeared *ex facie* of the award, and the award must therefore speak for itself. In the case of *MacGeorge* (*cit.*) the award was *ex facie* valid, but it could be shown that the arbiter had in reality sustained incompetent claims. It was quite incompetent to examine an arbiter as to how he had made up his award—*Edinburgh and District Water Trustees* v. *Clippens Oil Company*, 1901, 3 F. 1113, *per* Lord Kinnear at p. 1128, 38 S.L.R. 354; *The Great North of Scotland Railway Company* v. *Highland Railway Company*, 1896, 23 R. (H.L.) 80, 33 S.L.R. 812; *North British Railway Company* v. *Lanarkshire and Dumbartonshire Railway Company*, 1895, 23 R. 76, 33 S.L.R. 56; *Lanarkshire and Dumbartonshire Railway Company* v. *Main*, 1895, 22 R. 912, 32 S.L.R. 685; Bell's Arbitration, 342. The arbiter was not the proper person to interpret the award but the Court. It was incompetent to cite an arbiter as a witness in order to get him to contradict his own award, and particularly so after the lapse of many months. "Continuous good farming" was not an improvement in any schedule of the Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64). The arbiter had no jurisdiction to give an award for what was not a statutory improvement.

The respondent argued—There should be an inquiry. Although the claim was not in the terms in which it ought to have been, nevertheless the award was good. The disputed item was arrived at by statutory methods although the setting forth was not clear. In this case there was an ambiguity. In those cited by the pursuer the desire was to open them up in order to add something which was not in them. In an agricultural arbitration one did not look so strictly at the manner in which the claim was framed as in the case of other kinds of arbitrations. However the claim was framed the arbiter had not gone outwith the provisions of the statute in his award. Awards were examinable although *ex facie* bad on averments that they included only legitimate elements. The real question was what the subject-matter of the judgment was. An arbiter could be examined as to that, but not as to the items which weighed with him most in arriving at a figure. Parties joined issue knowing quite well what was claimed, *i.e.*, improvements made prior to 1910. An agricultural award was not to be so rigidly treated as, *e.g.*, one under the Lands Clauses Act. Competent evidence would have on examination of the claim and the award shown that the arbiter did not exceed his powers.

At advising—

LORD JUSTICE-CLERK—Mr Macmillan has quite properly argued the case on the record as it was before the Lord Ordinary and as it now stands, and the question we have to decide is whether the averments made by the defender in answer 3 ought to be remitted to probation. The Lord Ordinary has allowed proof before answer, but truly all proofs are before answer, and it becomes us therefore to look at the nature of the averments and the state of the proceedings in which they were made.

The defender on leaving his farm put in a claim for improvements under the Agricultural Holdings Act 1908, and after giving a great many of the items of claim sums up the whole claim thus—"Total of the foregoing claim for the application of purchased artificial manures and the consumption of feeding-stuffs on the holding during the whole tenancy the manurial residuum of which is unexhausted, £145; for continuous good farming during the whole tenancy whereby the fertility of the farm is greatly increased, £95."

The first of these heads of claim is amply justified by the statute, because in the third part of the First Schedule provision is made for improvements which can be made without the consent of or notice to the landlord, and for which, if made, compensation is to be awarded. These improvements include the following items:—"(23) Application to land of purchased artificial or other purchased manure. (24) Consumption on the

holding by cattle, sheep, or pigs, or by horses other than those regularly employed on the holding, of corn, cake, or other feeding-stuff not produced on the holding. (25) Consumption on the holding by cattle, sheep, or pigs, or by horses other than those regularly employed on the holding, of corn proved by satisfactory evidence to have been produced and consumed on the holding."

The first item, representing the £145 in the claim, is dealt with by the arbiter in this manner. He narrates the claim as being in respect of the application of artificial manures and the consumption of feeding-stuffs during the whole tenancy, and then having been requested so to do in terms of the statute states the award under three heads, corresponding to the three heads in the schedule which I have just quoted, and the total sum brought out, £64, 14s. 9d., is given partly under head (23), partly under head (24), and partly under head (25). That £64 odds represents the amount which the arbiter thought proper to award in respect of the original claim for £145, which was, as I have pointed out, for improvements made during the whole tenancy.

With regard to the next item in the claim, which the arbiter narrates as being for continuous good farming during the whole tenancy whereby the fertility of the farm is greatly increased, £95, the arbiter awards the whole amount claimed.

On the face of it the award purports to deal with the claim for £145 and the items included in that sum quite properly, but I think it clearly purports to deal with this claim for the whole period of the tenancy. The fourth item deals with what is admittedly on the face of it not a claim which the statute recognises, and the arbiter gives the full sum claimed for the whole period of tenancy. But the defender avers in answer 3 that the arbiter gave the £64, 14s. 9d. as being the amount due to the defender for unexhausted manures and feeding-stuffs purchased by him and applied to the farm since the year 1910, and contends that the sum of £95 was the amount which the arbiter held to be due to the defender for accumulated fertility of the farm due to unexhausted manures and feeding-stuffs purchased by the defender and applied to the farm prior to 1910. The defender also avers that the arbiter was fully satisfied from his previous inspections, visits, and knowledge of the farm, of extensive purchases and application to the farm of feeding-stuffs and manures prior to 1910, the benefit of which was unexhausted at the defender's waygoing.

It seems to me that these averments are not in the least relevant so far as the controversy between the pursuer and the defender in this action is concerned. The pursuer quite clearly says, "I was met here by a claim which shows on the face of it an item for £95 not authorised by the statute," and the arbiter in his award deals with it as if it were duly authorised by the statute although the claim on the face of it is an item not so authorised. It seems to me that it is no answer to say that while the claim was bad on the face of it and the award was bad on the face of it the arbiter considered that he was entitled to interpret the item of continuous good farming in a sense in which nobody else would interpret it, and which was certainly not the view in which the landlord understood it, for he took distinct objection to it before the arbiter on the ground that the claim was incompetent.

I think it is an incompetent claim, and it is no answer for the tenant to say that if he were allowed to examine the arbiter he would get the arbiter to state that he did not make the award in respect of continuous good farming but made it in respect of applying artificial manures and extra feeding-stuffs to the farm prior to the year 1910. If the view taken before the arbiter had been that both parties had assented to "continuous good farming" being interpreted in that way it might have been possible to have altered the claim so as to bring about a similar result to that in the case of *Miller* v. *Oliver & Boyd*, where it was held that the parties had extended the arbitration, and it might have been possible to make averments which would have entitled us to find that the parties had introduced into the proceedings an abnormal construction of the phrase "continuous good farming." But no such averment has been made; all that is said is that the arbiter took a certain view. I do not think he was entitled to take that view. I think the award, so far as it deals with the item of £95, is a bad award and that it is *ultra vires*, and accordingly I think we should recal the Lord Ordinary's interlocutor, sustain the first, second, and fourth pleas-in-law for the pursuer, and grant decree of reduction as craved.

LORD DUNDAS—I am of the same opinion. The Lord Ordinary's judgment seems to show that he had difficulty as to the procedure, being at first inclined to throw the action out, but latterly deciding to allow a proof before answer. I think the Lord Ordinary's first thoughts were best.

The principal object of the proof would, I take it, be to ascertain whether or not the arbiter had gone *ultra fines compromissi*, but I think before one could go to that one has to look at what the claim before the arbiter was. The first and larger part of the claim refers to matters for which compensation may be properly given under the Agricultural Holdings Act 1908, Schedule I, part 3, heads (23), (24), and (25). They are summed up thus—"Total of the foregoing claim for the application of purchased artificial manures and the consumption of feeding stuffs on the holding during the whole tenancy the manurial residuum of which is unexhausted, £145." The remaining head of claim—the one objected to—is "For continuous good farming during the whole tenancy whereby the fertility of the farm is greatly increased, £95."

That does not seem to correspond with anything for which the Act gives compensation, and it is important to observe that

this claim is clearly different from and exclusive of the claims which go before. Then it seems that the award really followed the claims, because I find that the arbiter narrates the heads of claim—for the application of purchased artificial manures and the consumption of feeding-stuffs on the holding during the whole tenancy the manurial residuum of which is unexhausted, the sum of £145, and for the continuous good farming during the whole tenancy whereby the fertility of the farm is greatly increased, the sum of £95. His award is quite properly divided into the heads of claim, and he awards what he thinks right under the first three heads, to which no objection is taken, and then he awards "for continuous good farming, £95."

I think we must take it that the £95 has here been given for continuous good farming during the whole tenancy, and that, I think, is not a claim allowed by the Agricultural Holdings Acts. It seems to me hardly possible for the defender to aver that the arbiter or the parties or the agricultural community understood the language of the fourth head of the award as meaning something other than it does mean according to its plain terms. I think the defender's averments, and in particular the material passages in answer 3, are quite irrelevant. I do not think it would be permissible for the arbiter to go into the witness-box and practically contradict both the claim and the award. It seems to me therefore that we must sustain the first, second, and fourth pleas for the pursuer and grant decree of reduction.

I confess that part of Mr Macmillan's argument did cause me to feel a considerable amount of sympathy for the tenant, but after all we must decide cases not on sympathy but to the best of our ability according to law. I think that arbitrations under these Acts must be conducted as the statutes provide and in no other way.

LORD GUTHRIE—I agree. We have heard a good deal about the practice in such matters, but I cannot imagine that it is the practice to state claims as they are stated here. Mr Macmillan's argument ignores what your Lordship in the chair pointed out, that the occurrence of the words "during the whole tenancy," both in the claim and in the award, is fatal to the defender's case. There may be a practice of taking the prior part of the lease when a great deal of the manure has disappeared and to give a slump sum under the statute, and to call that an award in respect of continuous good farming, but it surely cannot be a practice to sustain a claim which covers not only the first part of the lease but the whole tenancy.

In view of these words I agree that unless the parties were prepared to aver that the matter was fully explained to the arbiter in the arbitration, accepted by both parties, and acted upon by the arbiter, there is no room for question as to the result that must be arrived at.

The Court recalled the Lord Ordinary's interlocutor, sustained the first, second, and fourth pleas-in-law for the pursuer, and granted decree of reduction as craved.

Counsel for the Pursuer and Reclaimer—Chree, K.C.—Scott. Agents—Connell & Campbell, S.S.C.

Counsel for the Defender and Respondent—Macmillan, K.C.—Morton. Agents—Charles George, S.S.C.

Thursday, December 21.

FIRST DIVISION.

HOOLACHAN, PETITIONER.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Second Schedule, sec.* 17 (*b*)—*Process—Date of Award of Arbitrator—C.A.S., L, xiii,* 11 (2) *and* 17 (*a*).

On 11th November 1916 an arbitrator under the Workmen's Compensation Act 1906 issued an award, which, however, had not the date filled in. On 13th November it was handed by an assistant of the Sheriff-Clerk to the workman's agent with the remark that the award had been issued that day, and the agent in the presence of the assistant then filled in 13th November as the date of the award. No notice of the award was sent to the workman or his agent. On 20th November the workman, who wished to appeal against the award, lodged a minute craving the arbitrator to state a case for appeal. The arbitrator refused on the ground that the minute was not timeously lodged, and that C.A.S., L, xiii, 11 (2) and 17 (*a*), were peremptory and left him no discretion. *Held*, in a petition by the workman for an order ordaining the minute to be received, that the date of issue of the award was 13th November, and the minute timeously lodged, and prayer of petition *granted*.

The C.A.S., L, xiii, enacts—Section 11 (2)—"An award by a Sheriff under the Act, or a certified copy thereof, shall be forthwith recorded by the sheriff-clerk in the said register as if it were a memorandum, and written notice of such recording and of the terms of the award shall be forthwith sent by him to the parties interested." Section 17 (*a*)—"An application to a Sheriff to state a case on a question of law determined by him shall be made by minute lodged in the process within seven days after the Sheriff has issued his award. . . ."

James Hoolachan, *petitioner*, presented a petition craving an order on the Sheriff-Substitute at Hamilton to receive a minute on his behalf asking for a Stated Case in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58).

The *facts* of the case were—On 3rd August 1915 the petitioner sustained personal injury by accident arising out of and in the course of his employment with the Bent Colliery Company, Limited, coalmasters, Bent Colliery, Hamilton, and claimed