possession of the potatoes. In my opinion this contention is not well founded. It seems to me that the farmer possessed the potatoes from the moment the seed was planted in soil of which he was tenant and of which he had not divested himself. In any event he obtained possession at the time the crop was pitted, and his possession continued without break thereafter.

It follows that the third and fourth questions of law which relate to the second form of contract should be answered in the affirmative.

LORD ORMIDALE did not hear the case.

The Court answered the questions of law in the affirmative.

Counsel for the First Party—Chree, K.C. —Thom. Agents—Arch. Menzies & White, W.S.

Counsel for the Second, Third, and Fourth Parties—Aitchison, K.C.—Gilchrist. Agent —Herbert Mellor, S.S.C.

Friday, July 13.

SECOND DIVISION.

[Lord Constable, Ordinary.

NORFOR AND OTHERS *v.* EDUCATION AUTHORITY OF COUNTY OF ABERDEEN.

Arbitration—Jurisdiction—Statutory Reference to Government Department—Whether Jurisdiction of Courts Excluded—Scope of Reference—Question of Fact—Question of Law—Education (Scotland) Act 1918 (8 *and* 9 *Geo. V, cap.* 48), *sec.* 18, *sub-secs.* (3), (4), *and* (9).

By the Education (Scotland) Act 1918, sec. 18, sub-sec. (3), provision is made for the maintenance of transferred schools by the education authority.

By sub-sec. (4) it is enacted as follows: —"Any question which may arise as to the due fulfilment or observance of any provision or requirement of the preceding sub-section shall be referred to the department, whose decision shall be final."

By sub-sec. (9) it is provided that after the expiry of ten years from the transfer of a school the department may in certain circumstances discontinue the school or maintain it as a public school free from the conditions prescribed in sub-sec. (3).

The trustees of a voluntary school transferred it under the provisions of the Education (Scotland) Act 1918 to the county education authority. Prior to the transfer the school was carried on as a primary school, providing a full primary course of instruction together with a supplementary course. Two years after the transfer the education authority resolved to alter the status of the school by discontinuing the giving of primary instruction therein to pupils beyond the infant or junior stages, whereupon the former trustees of the school brought an action against the education authority for declarator that the defenders were bound for the space of at least ten years from the date of the transfer to maintain the school as a primary school providing a full and supplementary course of instruction, and for interdict against the defenders for the said space of time maintaining the school as a school for infants and junior pupils only, or otherwise than as a school providing a full primary course of instruction. The defenders pleaded that the action was incompetent in respect that the question raised by the pursuers fell to be decided by the Scottish Education Department in terms of sec. 18, sub-sec. (4) of the Act.

The Court (*diss.* the Lord Justice-Clerk, and *reversing* the judgment of Lord Constable, Ordinary) *repelled* the plea of incompetency, *holding* that, although questions as to the due fulfilment or observance of the statutory obligation were questions of fact which fell to be decided by the Department, the question as to the scope of the statutory obligation was a question of law which was not excluded from the jurisdiction of the Court.

Robert Thomas Norfor, C.A., Edinburgh, as secretary and treasurer of the Representative Church Council of the Episcopal Church in Scotland and others, *pursuers*, brought an action against the Education Authority for the County of Aberdeen, *defenders*, for declarator (1) that St John's Episcopal School, New Pitsligo, was at the date of the passing of the Education (Scotland) Act 1918 (8 and 9 Geo. V, cap. 48) on 21st November 1918 a voluntary school within the meaning of "the Education (Scotland) Act 1897" (60 and 61 Vict. cap. 62); (2) that the said school was transferred as and from 15th May 1919 to the defenders, in terms of the said Education (Scotland) Act 1918, by the trustees for behoof of the Congregation of St John's Church, New Pitsligo; (3) that at the date of the said transference the said school was a primary school providing a full primary school course of instruction together with a further supplementary course; and (4) that the defenders as education authority vested in the property, control, and management of the said school in virtue of the said transference and of the provisions of the said Education (Scotland) Act 1918 were bound in terms of the said Act to hold, maintain, and manage the said school for the space of ten years at least from and after the said 15th May 1919 as a primary public school providing a full primary and supplementary course of instruction, subject to the provisions of the said Education (Scotland) Act 1918, and to the defenders' curriculum for the time being applicable to courses of primary instruction in schools under their charge; and for interdict against the defenders holding, maintaining, and managing the said school at any time within the space of ten years from and after the said 15th May 1919 as a school for infants and junior pupils only,

or otherwise than as a school providing a full primary course of instruction, subject to the provisions of the said Act according to the defenders' curriculum for the time being applicable to schools under their charge, and transferring, within the said space of ten years, pupils attending the said school at any stage of their primary or supplementary course to the Public School, New Pitsligo, or to any other school under the charge of the defenders.

The defenders pleaded, *inter alia*—"3. The question raised by the pursuers being a question as to the due fulfilment or observance of a provision of sub-section (3) of section 18 of the Education (Scotland) Act 1918 the same falls to be decided finally by the Scottish Education Department, and the action is therefore incompetent and ought to be dismissed."

On 9th January 1923 the Lord Ordinary (CONSTABLE) pronounced an interlocutor in which he sustained the third plea-in-law for the defenders, and dismissed the action.

Opinion.—"This case raises a question of general importance with regard to the transfer of voluntary schools to the education authority under section 18 of the Education (Scotland) Act 1918. The question is whether after such a transfer the education authority are bound to maintain the same type of school, or are entitled so long as they maintain it as a public school to alter the course of instruction and the class of children for whom instruction is provided so as to co-ordinate the system of education in the district.

"Section 18 of the Act of 1918 provides that at any time after the first election of education authorities under the Act it shall be lawful for the vested owners and trustees of any voluntary school to transfer it by sale, lease, or otherwise to the education authority, who shall be bound to accept its transfer on such terms as, failing agreement, may be determined by arbitration. Sub-section (3) provides that 'any school so transferred shall be held, maintained, and managed as a public school by the education authority who shall be entitled to receive grants therefor as a public school and shall have in respect thereto the sole power of regulating the curriculum and of appointing teachers.' To this provision are adjected three express conditions, viz.—(*a*) That the existing staff of teachers shall be taken over; (*b*) that the religious belief and character of all teachers appointed to the staff shall be approved by representatives of the church or denominational body in whose interest the school has been conducted; and (*c*) that facilities shall be provided for religious instruction in the school by a supervisor to be approved as aforesaid. Sub-section (4) provides that 'any question which may arise as to the due fulfilment or observance of any provision or requirement of the preceding sub-section shall be referred to the Department whose decision shall be final.' Sub-section (5) provides that after the expiry of two years from the passing of the Act no grant from the education fund shall be made to any school to which the section applies unless it shall have been transferred to the education authority. Sub-section (9) provides that if at any time after the expiry of ten years from the transfer of a school the education authority are of opinion that the school is no longer required or that the conditions prescribed in sub-section (3) ought no longer to apply thereto, it may with approval of the Department discontinue the school or maintain and manage it free of the said conditions.

"Provision for the transfer of voluntary schools had already been made in previous statutes, section 38 of the Act of 1872 applying to voluntary schools generally, and section 29 of the Act of 1908 to secondary and intermediate schools. The distinctions between the old and new transfer provisions were (1) that in the former case the transfer was a voluntary act on both sides whereas in the latter it was compulsory—expressly compulsory on the education authority to accept the transfer and virtually compulsory on the existing owners and trustees to make it, because otherwise they would forfeit the grant from the education fund; (2) that in the former case the transfer was gratuitous whereas in the latter case it was on arbitration terms; and (3) that in the former case the transfer was unqualified whereas in the latter case it was subject to various conditions which have given rise to the present question.

The particular school which is now in question is St John's Episcopal School, New Pitsligo, Aberdeenshire, which was formerly vested in trustees for behoof of the congregation of St John's Episcopal Church, New Pitsligo, and formed one of many schools provided and conducted by the Episcopal Church in Scotland in pursuance of its educational activities. After the passing of the Act of 1918 the majority of these church schools were transferred to the education authorities, and among those so transferred was St John's School. The transfer was by way of sale, and the conveyance which was so far as appears unqualified in its terms operated from 15th May 1919. Prior to the transfer the school was carried on by the managers as a primary school providing a full primary course of instruction together with a supplementary course. After the transference the education authority continued to carry on the school on the old lines till 1921 when, taking advantage of the resignation of the headmaster, they resolved to make a change. The old public school and St John's School are situated within a comparatively short distance of each other, and in August 1921 the education authority resolved to run the schools in sequence, providing in St John's School for four classes only composed of infants and juniors and transferring the higher classes to the old public school, in which at the same time a new intermediate course was introduced.

"In these circumstances the pursuers, who consist of the Representative Church Council and the former trustees of the school, with concurrence of the Central and Local Education Boards of the Church, have brought the present action against

the education authority for the county of Aberdeen. They maintain that the actings of the defenders are illegal and *ultra vires* and in breach of their obligations under the Education Act 1918, and the leading conclusions of the action are to have it declared, *inter alia*, that the defenders are bound in terms of the Education Act 1918 to hold, maintain, and manage the school for the space of ten years at least from 15th May 1919 as a primary public school providing a full primary and supplementary course of instruction subject to the provisions of the Act and to the defenders' curriculum for the time being applicable to courses of primary instruction in schools under their charge, and to have the defenders interdicted from holding, maintaining, and managing the school at any time within the said period as a school for infants and junior pupils only or otherwise than as a school providing a full primary course of instruction.

"The defenders plead in the first place that the pursuers have neither title nor interest to insist in the action. Except in so far as these pleas merely re-echo the question of statutory construction upon which the parties are at issue on the merits I think that both are bad. It appears to me that the pursuers have an undoubted interest to preserve not only a certain system of religious instruction in the transferred schools but also the status of these schools as secular educational institutions, if such preservation be the effect of the statutory conditions by which the transfers are regulated. Even on the assumption, which the defenders' counsel grudgingly conceded, that the interest of the Church was limited to securing appropriate religious instruction, it is obvious that that object would be materially affected by the type of school which the transferees continued to maintain.

"The defenders' next plea is more serious. They plead that the action is excluded by section 18 (4) of the statute which requires any question which may arise as to the due fulfilment or observance of any provision or requirement of sub-section (3) to be referred to the Education Department. This plea which goes to the jurisdiction of the Court must be disposed of before the merits of the question at issue; but the pursuers maintain that the question raised is not one as to the due fulfilment or observance of a provision of sub-section (3). It is therefore necessary to consider exactly what the question at issue between the parties really is.

"Sub-section (3) as already pointed out consists of one main obligation and three provisos. No question is raised as to the provisos but only as to the main obligation. The defenders maintain that their only obligation is to maintain a public school, and that it is not averred that they have failed to do so. The pursuers on the other hand maintain that the defenders' obligation is to maintain as a public school the particular school which is transferred, considered not as a mere building but as an educational establishment of a certain type and character, and that in the case of St John's School they have committed a breach of their obligation by converting it from a primary school into an infant or junior school. The result is that the question at issue between the parties is a question of the construction of the statutory obligation which is imposed upon the transferee.

"Turning to section 18 (4) it is obvious that a dispute may arise as to the due fulfilment of the previous sub-section either because parties differ as to the meaning of a provision or requirement or because they differ as to whether a provision or requirement of admitted meaning has been fairly or reasonably complied with. In one case the dispute would be as to the measure of the obligation, in the other case as to the adequacy of the means adopted for its fulfilment. The question is whether the statutory clause of reference applies to both classes of dispute—in which case it would apply to the dispute in the present case—or whether it applies only to the latter class of dispute—in which case it would not.

"The pursuers' counsel endeavoured to exclude the application of the statutory clause of reference on the special ground that the question at issue between them on the merits depends not only on sub-section (3) but also on sub-section (9). I do not think that the argument is well founded. Sub-section (9) deals exclusively with the powers of the education authority after the expiry of ten years from the transfer. It may perhaps be legitimately appealed to as throwing a certain light upon the proper construction of sub-section (3), but the substantive provisions or requirements which must be observed by the education authority for the first ten years are wholly contained in sub-section (3).

"There is no doubt that the language of sub-section (4) is capable of including both classes of dispute above referred to. In favour of the more limited construction it may be said that the meaning of the obligation and the means adopted for its fulfilment are different things and that the words 'fulfilment' and 'observance' in the section point more directly at the latter than at the former. If the Legislature had meant to include questions of construction it might easily have said so; and reference might be made to the conveyancing practice with regard to ancillary clauses of reference in contracts in which it is usual if not invariable to refer expressly both to the construction and performance of the contract. It may also be said that while the Department is a peculiarly appropriate tribunal to determine the administrative question whether the statutory requirements have been reasonably complied with, it is not so obviously appropriate to determine the legal question of statutory construction.

"On the other hand in favour of the broader construction it may be said that *prima facie* the language of the statutory clause of reference includes both classes of dispute, because the determination of what is due fulfilment cannot be reached without

an interpretation of the provision or requirement to be fulfilled. In this view the detail adopted in conveyancing practice is superfluous and in any case cannot affect the construction of an Act of Parliament. It may also be said that while in theory the measure of the obligation may be distinguished from the adequacy of its fulfilment, it is very difficult to maintain the distinction when a practical question arises. It happens that in the present case the alterations made by the defenders have been very marked and have undoubtedly changed the character of the school. But if the alterations had been slighter the question arising would have been partly one of construction and partly one of reasonable compliance, and it would have been very difficult on the assumption that the construction of the obligation was for the Court and the adequacy of its fulfilment for the Department to distinguish between their respective functions. Even if not impossible the distinction would be obviously inconvenient to work out. The result of insisting on the distinction in the present case has been to compel the pursuers to peril their case upon a rigid rule of construction, but a tribunal exercising both powers might to the possible advantage of the pursuers give effect to a more elastic rule. In any case I think that a tribunal which has been selected as peculiarly appropriate to determine a dispute as to reasonable compliance is in the circumstances also the most appropriate to determine a dispute which involves construction of the rule to be complied with. These considerations would not be sufficient to warrant the application of the statutory clause to a question which its language did not *prima facie* include, but they seem to me to be a good answer to the exclusion of the clause from a question which I think its language does *prima facie* include.

"There is little guidance on the question to be obtained from authority. The well-settled distinction explained by Lord Dunedin in *Sanderson & Son* v. *Armour & Company* (1922 S.C. (H.L.) 117) between general clauses of reference in a contract and clauses which only apply during the currency of the contract is not in point; and the circumstances of *Cowdray* v *Ferries* (1919 S.C. (H.L.) 27), to which I was also referred, were very different from the present. But both cases illustrate the general rule that clauses of arbitration whether statutory or contractual will be fairly interpreted and applied according to their terms.

"Applying that rule in the present case, I think that I am bound to sustain the third plea-in-law for the defenders and dismiss the action."

The pursuers reclaimed, and argued—It was for the Court and not for the Scottish Education Department to construe the meaning of the obligation to "maintain," imposed by the Education (Scotland) Act 1918 (8 and 9 Geo. V, cap. 48), sec. 18, subsecs. (3) and (9). To "maintain" meant "to retain the character of." There was no express exclusion of the jurisdiction of the Court. The question raised in the present case was with regard to the ascertainment, not the fulfilment of the statutory obligation, and the question as to the meaning of the obligation to maintain was not the class of question referred to in sec. 18, sub-sec (4). The language of sub-sec. (4) indicated that the questions therein referred to were questions of fact as to the due fulfilment of a known and disputed obligation. A question such as that which was raised in the present case was not in the contemplation of the Legislature at the time when the Act was passed, and a Government Department was an unsuitable tribunal to decide it. It was a question of law—*Attorney-General* v. *West Riding of Yorkshire County Council*, [1907] A.C. 29, *per* Lord Chancellor (Loreburn) at 35, Lord Davey at 38, and Lord Robertson at 41, and clear words of implication were necessary in order to exclude the jurisdiction of the Court where the question was a question of law — Maxwell, Interpretation of Statutes (6th ed.), p. 235; *Martin* v. *Eccles Corporation*, [1919] 1 Ch. 387, *per* Younger, J., at 405; *West Suffolk County Council* v. *Olorenshaw*, [1918] 2 K.B. 687, *per* Shearman, J., at 690; *Gillow* v. *Durham County Council*, [1913] A.C. 54; *Wilford* v. *West Riding of Yorkshire County Council*, [1908] 1 K.B. 685, *per* Channell, J., at 697 and 698. The case of *Cowdray* v. *Ferries*, 1919 S.C. (H.L.) 27, 56 S.L.R. 220; the Education (Scotland) Act 1918, sec. 18, sub-sec. (7); the Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62), sec. 36; the Education Act 1902 (2 Edw. VII, cap. 42), sec. 7, were also referred to.

Argued for the respondents—The words of reference in sec. 18, sub-sec. (4), of the Education (Scotland) Act 1918 were, *prima facie*, apt to include the question raised in the present case. The words of the sub-sec. were universal, viz., "any question . . . . shall be referred." The word "maintain" was not a new word—Education (Scotland) Act 1872, sec. 36. The mere fact that the question might be an important one was not enough to exclude the jurisdiction of the Department. Nor was it enough to exclude the jurisdiction of the Department that a question of law was involved. The class of questions which the section referred to the Department for decision might include questions of law as well as questions of fact. The Department had implied power to determine the measure of the obligation, because an arbiter must explicate his own jurisdiction—*Scott & Sons* v. *Del Sel*, 1922 S.C. 592, 59 S.L.R. 446, *per* Lord Ormidale at 1922 S.C. 602, 59 S.L.R. 451; *Sanderson & Son* v. *Armour & Company*, 1922 S.C. (H.L.) 117, 59 S.L.R. 268, *per* Lord Dunedin at 1922 S.C. (H.L.) 126, 59 S.L.R. 272; *Caledonian Railway Company* v. *Clyde Shipping Company*, 1917 S.C. 107, 54 S.L.R. 105, *per* Lord President (Strathclyde) at 1917 S.C. 113 and 114, 54 S.L.R. 109, and Lord Skerrington at 1917 S.C. 115, 54 S.L.R. 110; *North British Railway Company* v. *Lanarkshire and Dumbartonshire Railway Company*, (1895) 23 R. 76, 33 S.L.R. 56, *per* Lord President (Robertson) at 23 R. 79, 33 S.L.R. 58; *Midland Railway* v. *Loseby & Carnley*, [1899] A.C. 133, *per* Lord Macnaghten at 137, and Lord Shand at 139 and 140. The English

law of arbitration was different from the Scottish law of arbitration — Arbitration Act 1889 (52 and 53 Vict. cap, 49), secs. 4, 10, and (*especially*) 19. Not much assistance was to be obtained as to the terms of reference from decisions arising out of the construction of other Acts. *Wilford* v. *West Riding of Yorkshire County Council, cit., per* Channell, J., at 698, 699, and 700 was also referred to.

LORD JUSTICE-CLERK — I have the misfortune to differ from the conclusion at which your Lordships have arrived.

I am of opinion that the judgment of the Lord Ordinary is right, and that it should be affirmed. Let me say at the outset that in my view the question between the parties falls to be decided solely by reference to the terms of sub-section (3) of section 18 of the Education Act of 1918. It humbly appears to me that little if any help can be got by canvassing statutes and decisions, whether English or Scottish, in which the terms of the reference clauses are different, and in which the scheme of the statutes in general and the reference clauses in particular is not the same as that with which we are here concerned.

Turning then to section 18, sub-section (4), I find that "*any* question which may arise as to the due fulfilment or observance of *any* provision or requirement of the preceding sub-section shall be referred to the Department, whose decision shall be final." I pause for a moment to note the universality of the reference—"*any* question," "*any* provision," and also to mark its imperative character—"shall be referred." What then is the question which has arisen in this case? It is obviously necessary to appreciate its precise character in order to reach a sound conclusion. According to the learned Vice-Dean what the question is does not admit of any doubt. It is not as to the *holding* or as to the *managing* of a transferred school. It is as to the *maintenance* of a school of that character. The inquiry does not *prima facie* strike me as being obscure or even difficult. The question simply is, are the education authority fulfilling or observing the provision that "any school so transferred shall be maintained as a public school," or are they not? Now it is manifestly impossible to decide whether the provision of a statute is fulfilled or observed without knowing what the provision means and what obligations it imposes. The argument of the pursuers seems to involve that when there is a challenge as to the meaning of a provision in the sub-section the question goes to the Court for decision, but that where there is none the question goes to the Department for decision. I can find no justification in the statute for this, as I think, arbitrary and unwarrantable distinction. The question which has arisen in this case is one which the Department must decide in order to explicate the jurisdiction expressly conferred upon it. The question is in fact incidental to the decision of the question of fulfilment which is confided to the Department by the statute. The language of the Act seems to me not only to foreshadow but positively to forbid the split inquiry for which the pursuers contend. The sub-section contains no hint of separate tribunals.

I do not base my opinion on the inconvenience of the double inquiry suggested, nor upon the appropriate or inappropriate character of the tribunal selected, although I agree with the Lord Ordinary that the considerations *hinc inde* on these matters fell in favour of the defenders rather than in favour of the pursuers. Nor do I think that an inquiry as to whether the dispute is of an important or of a merely subordinate character affords a sound criterion for our judgment. I base my opinion on this alone — that the sub-section remits a decision as to the due fulfilment or observance of any provision contained in it to the Scottish Education Department; that a question has arisen whether there is due fulfilment or observance by the education authority of the provision in the sub-section which enjoins that a transferred school shall be maintained as a public school; and that accordingly to the Scottish Education Department that question must go. The ambit of the reference clause is wide enough to cover the dispute which has arisen, and, as I have indicated, I can find no hint or suggestion in the sub-section or elsewhere that the aid of two tribunals must be invoked for its determination. I think, therefore, that the parties have contracted themselves out of the jurisdiction of this Court in reference to the dispute which has arisen between them, and that they have substituted a statutory tribunal, to wit, the Scottish Education Department, for its solution. I am accordingly for refusing the reclaiming note.

LORD HUNTER—The Lord Ordinary has sustained the third plea for the defenders, which is to the effect that the Court has no jurisdiction, and has dismissed the action. The only question which we have to consider at this stage is whether or not he was right in taking this course. It is not necessary to consider the conclusions of the action or the averments of the pursuers in great detail. The main contention of the reclaimers is that the defenders, who are the education authority of the county of Aberdeen, are not entitled to alter the status of St John's School, New Pitsligo, from that of a primary school to that of an infant or junior school by discontinuing the giving of primary instruction therein to pupils beyond the infant or junior stages. They desire the Court to pronounce a declarator to this effect.

St John's School was a voluntary school transferred to the defenders as and from 15th May 1919 in terms of section 18 of the Education (Scotland) Act 1918. That section provides the conditions under which transfers are to take place, and imposes certain obligations upon education authorities to whom the transfers are made. The question whether these obligations include the maintenance of the character and status of the school can only be determined on a sound construction of the provisions of the

statute. From the pleadings it appears that there is a sharp conflict of views between the pursuers and defenders on this point. The pursuers seek to have the dispute determined by the Court, but the defenders maintain that the Legislature has entrusted the Education Department with the duty of finally determining the matter.

Sub-section (4) of section 18 provides that "Any question which may arise as to the due fulfilment or observance of any provision or requirement of the preceding subsection shall be referred to the Department, whose decision shall be final." I assume that the present question arises upon the sub-section referred to, althought it may well be that other provisions of the statute may throw light upon the proper solution of the problem. What then is the scope of the clause of reference? It is not to be assumed that the jurisdiction of the Court is excluded. This is particularly the case where a claim is made that the Legislature have made a Government Department final judges of the interpretation to be put upon the provisions of an Act of Parliament, a matter that may vitally affect individual rights. It may, of course, be done if the language used is clear, just as parties in a contract may select an arbiter to settle disputes either of fact or law.

I think that the pursuers are right in contending that there is a distinction between what amounts to due fulfilment or observance by the defenders of their statutory obligation and a question as to the ascertainment of the scope of this obligation. The first question is essentially a question of fact; the second is rather a question of law involving construction of statutory provisions. If these questions are separate and independent, I think it follows that to hold that both are remitted to the Department for determination is to give an unwarrantable extension to the language used. For the defenders, it was argued that the Department cannot say whether in any particular case there has been due fulfilment or observance of the statutory obligation without ascertaining what the obligation is, and that power to determine the latter question is to be implied on the ground that it is necessary for the Department to expiscate the jurisdiction conferred upon them. I think, however, that there is a fallacy in this reasoning. If the questions are distinct there appears to me no good reason for holding that the jurisdiction of the Court is excluded as to both. When the Court has determined the scope of the statutory obligation it will remain for the Department to say whether in fact there has been compliance therewith in any particular case. The cases to which we were referred by the defenders appear to me to be quite distinguishable, because in none of them was the reference clause that was the subject of interpretation expressed in terms similar to the present.

A number of English cases were cited to us which were not brought to the notice of the Lord Ordinary, *e.g.*, *Attorney-General* v. *West Riding of Yorkshire County Council*, [1907], A.C. 29; *Wilford* v. *County Council of West Riding of Yorkshire*, [1908] 1 K.B. 635; *Gillow* v. *County Council of Durham*, [1913] A.C. 54. In these cases the Court in England exercised jurisdiction to the effect of interpreting the provisions in the English Education Act 1902, although there was a provision in section 7 (3) of that Act that if any question under the section arose between the local education authority and the managers of a school not provided by the authority that question should be determined by the Board of Education. The clause of reference in that Act appears to me to have been as wide, if not wider, than it is in the Scotch Education Act. The cases afford, therefore, useful illustrations of what I have indicated as the general rule that the Court is bound to exercise jurisdiction unless the words of the reference clause clearly indicate that the matter in dispute is referred to the arbitrament of another tribunal. I think the reclaiming note ought to be allowed, the third plea-in-law for the defenders repelled, and the case remitted to the Lord Ordinary to proceed.

LORD ANDERSON—I have no doubt that the teaching arrangements which the defenders have made at New Pitsligo are in the best interest of the ratepayers both from the point of view of cost and of educational efficiency. The pursuers, however, have challenged these arrangements on the ground that they have been made without statutory sanction.

The construction which the pursuers put upon section 18, sub-section (3) of the Education (Scotland) Act 1918, when read along with sub-section (9), is that the statutory duty of the defenders is to maintain for a period of ten years the voluntary school as a public school of the same type as it was when transferred in 1919. It was then a school which provided a full primary course of instruction together with a supplementary course. Now the school has only infant and junior departments, and its doors are closed, so far as ordinary education is concerned, to pupils of maturer years. The defenders, on the other hand, contend that so long as they maintain the said school as a public school, which they are admittedly doing, there is nothing in the Act which prevents them from limiting its teaching functions to infant and junior departments. This is the issue on the merits between the parties, but the only question raised by the reclaiming note is as to the mode in which this question should be determined.

The defenders allege that by virtue of sub-section (4) of section 18 the Scottish Education Department is the appropriate tribunal for settling the dispute between the parties; the pursuers maintain that the dispute must be determined by a court of law. The Lord Ordinary has decided this matter in favour of the defenders and has dismissed the action.

Prima facie the decision of a point of law is not for a department of the executive; *prima facie* the determination of a legal question which affects the rights of the

subjects is for the King's Courts. Matters of law may, however, be referred to arbitration either by agreement or by statute, but to exclude the jurisdiction of the Courts as to a question of law its reference to arbitration must be clear and indubitable—Maxwell, Interpretation of Statutes, p. 235.

There is no difficulty in framing a reference clause which makes it clear that questions of law as well as matters of fact have been referred. It is common ground that sub-section (4) does not do this *per expressum*. I am of opinion that the sub-section does not refer questions of construction to the Department by implication. The terms of sub-section (4) show (1) that the reference is not unlimited, and (2) that the questions referred seem to be all questions of fact—whether *in fact* there was "due fulfilment or observance" of the provisions of the preceding sub-section.

The Lord Ordinary is right in pointing out that under said sub-section there may be a dispute (*a*) as to the measure of the obligation, or (*b*) as to the adequacy of the means adopted for its fulfilment. He is, in my judgment, wrong in reaching the conclusion that both of these matters have been referred to the Department. As I read the Lord Ordinary's opinion, his view seems to be that as the words of the sub-section are habile to confer jurisdiction as to both matters on the Department this jurisdiction has in point of fact been conferred. This is, in my opinion, to approach the question from the wrong standpoint. The proper mode of determining the point at issue is to inquire whether the statutory terms necessarily exclude the jurisdiction of the Courts. If they do not, then it seems to me this jurisdiction must be held to subsist.

These views seem to be supported by the decisions on the English Education Act of 1902 to which we were referred, and which the Lord Ordinary had not the advantage of considering. These cases have already been mentioned by Lord Hunter.

On the whole matter I have reached the conclusion that the reclaiming note should be disposed of as suggested by Lord Hunter.

LORD ORMIDALE concurred with Lord Hunter.

The Court recalled the interlocutor reclaimed against, repelled the third plea-in-law for the defenders, and remitted to the Lord Ordinary to proceed as accords.

Counsel for the Reclaimers (Pursuers)—Vice-Dean of Faculty (C. H. Brown, K.C.)—Burnett. Agents—Wood & Mackenzie, W.S.

Counsel for the Respondents (Defenders)—Wark, K.C.—A. R. Brown. Agents—Alex. Morison & Company, W.S.

HIGH COURT OF JUSTICIARY.

Monday, July 16.

(Before the Lord Justice-Clerk, Lord Hunter, and Lord Anderson.)

[Sheriff Court at Glasgow.

STRATHERN *v.* BEATON.

Justiciary Cases—Statutory Offence—Increase of Rent and Mortgage Interest (Restrictions) Act 1920 (10 *and* 11 *Geo. V, c.* 17), *sec.* 8 (1) *and* (2)—*Payment Required by Landlord as Condition of giving Consent to his Tenant Sub-letting the House—Whether Contravention of Act.*

The Increase of Rent and Mortgage Interest (Restrictions) Act 1920 (10 and 11 Geo. V, c. 17), enacts—Section 8 (1)—"A person shall not, as a condition of the grant, renewal, or continuance of a tenancy or sub-tenancy of any dwelling-house to which this Act applies, require the payment of any fine, premium, or other like sum, or the giving of any pecuniary consideration, in addition to the rent. . . ." By sub-section (2) a person requiring such payment is rendered liable to a fine.

Held that a landlord who had required of his tenant payment of a pecuniary consideration as a condition of his (the landlord's) consenting to the tenant's sub-letting the house had not contravened the Act.

The Reverend D. M. Beaton, The Manse, Leslie, Insch, Aberdeenshire, *respondent*, was charged in the Sheriff Court at Glasgow at the instance of John Drummond Strathern, Procurator-Fiscal of Court, *appellant*, upon a summary complaint in the following terms:—"You are charged at the instance of the complainer that, being the proprietor of subjects at 38 Carnarvon Street, Glasgow, which subjects include a dwelling-house of which Alexander Hutcheson, residing there, is the tenant and occupier, and which house is a dwelling-house to which the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 applies, you did on 15th January 1923, at the Post Office in Insch aforesaid, or elsewhere in Aberdeenshire, post or cause to be posted a letter addressed to said Alexander Hutcheson, at 38 Carnarvon Street aforesaid, which letter was delivered to him at said address, in which letter you required of said Alexander Hutcheson, as a condition of your consenting to his granting a sub-tenancy of said house, the payment of a premium or pecuniary consideration of £50 in addition to the rent of said dwelling-house, contrary to said Act, section 8 (1) thereof, whereby you are liable to the penalties set forth in section 8 (2) of said Act."

On the complaint being called objection was taken to its relevancy in respect that the *species facti* therein set forth did not constitute the contravention libelled.

On 12th March 1923 the Sheriff-Substitute (LYALL) sustained the objection and dismissed the complaint.