if as to the particular services for which the joint companies claim to make or to be entitled to make such charges, any of these services should appear to us to be incidental to conveyance, and covered therefore by the mileage rate, or not to be services of the kind to which the power of the companies to make terminal charges applies, we think we are authorised by our Act to decide that in such cases the rates for conveyance cannot be increased by the addition of terminal charges."

It is true that the actual decision on the merits in the series of cases cannot be taken to be law, because they were all reviewed in the case of *Hall & Company*, 15 Q.B.D. 505. But that very case, though altering many of the points on the merits, necessarily confirms the jurisdiction, and in one particular item affords an instance of a charge for a service which under the 1892 nomenclature would not be a terminal, being held and adjudicated on as a "terminal charge." I refer to the conveyance of chalk from Stoat's Nest, in which case (page 507) no use was made of the company's sidings, but the applicants had a private siding, whereas the rate charged exceeded the conveyance maximum (page 511). And finally, as to *Hall & Company's* case, though an appeal in that case from the Divisional Courts was held incompetent, yet the decision of Mr Justice Wills and Mr Justice Manisty was held to be sound and followed by the Court of Appeal presided over by Lord Halsbury in the case of *Sowerby & Company* v. *Great Nothern Railway Company* (7 Railway and Canal Traffic Cases, 156).

It is further on principle, I think, impossible to doubt that the decision was good. For in 1873 it is certain that, as was decided by the House of Lords in *Gidlow's* case (7 E. & I., A.C. 517), a railway company could only charge either for (*a*) conveyance proper, or (*b*) for services incidental to the business of a carrier, and it is also certain that while all Special Acts contain maxima for (*a*), but few did for (*b*). When therefore the Legislature in 1873 proposed to allow the Commissioners to become judges of what were reasonable charges under (*b*), it is extremely unlikely that the scope of the Commissioners' jurisdiction would be less than the scope of the railway's power to charge—there being no means of discriminating one service from another, which fell under the generality of the description "services incidental to the business of a carrier."

I am therefore of opinion that the 3rd sub-section of the 33rd section of the Act of 1888 used the word "terminal charge" in the same sense as the Act of 1873, and that it includes not only "terminals" proper in the nomenclature of 1892 but also special services.

The result is that in my opinion the Sheriff-Substitute was right to convict, and the appeal ought to be refused. But I think it necessary to append to my opinion one portion of the Sheriff-Substitute's note:—"The Sheriff is not required under the 1888 Act to consider the technical question what details should be supplied. The Act simply says that they shall be supplied, and I suppose if a railway company made an *ex facie* reasonable specification of details that a Sheriff would hold that the Act had been complied with. If the charges so detailed were unsatisfactory, then the trader would have his ultimate remedy under the 1892 Act. In fact the 1888 Act and the 1892 Act work together, and the final arbiter as to the propriety of the charges is not the Sheriff but the Board of Trade." With that passage I entirely agree.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court answered the third question in the case in the affirmative.

Counsel for the Appellants—Guthrie, K.C.—King. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Respondents—Hunter, K.C.—Mercer. Agents—Gray & Handyside, S.S.C.

Thursday, June 21.

FIRST DIVISION.

[Sheriff-Substitute at Forfar.

MILNE (CHRISTISON'S TRUSTEE) *v.* CALLENDER-BRODIE.

Arbitration—Procedure—Plea Prejudicial to Arbitration Stated after Arbiter has entered upon Arbitration—Competency—Agricultural Holdings (Scotland) Acts 1883 *and* 1900 (46 *and* 47 *Vict. c.* 62, 63 *and* 64 *Vict. c.* 50).

In an arbitration under the Agricultural Holdings (Scotland) Acts 1883 and 1900, the proprietrix, after the arbiter who had been nominated by the Board of Agriculture had entered upon the arbitration and considered the claim and counter-claim stated, desired to withdraw her counter-claim. The arbiter being in doubt as to whether she could competently do so, framed a case to the Sheriff-Substitute under rule 9 of Schedule II of the Agricultural Holdings (Scotland) Act 1900 asking his opinion on the matter. Thereupon, on the crave of the proprietrix, certain questions equivalent to pleas prejudicial to the arbitration were added. These had not been raised in the pleadings before the arbiter, although objections to a similar effect had been stated to the nomination of an arbiter. Objection was taken to the competency of the questions at that stage of the case, the proper and only remedy having been, as maintained, to have interdicted the arbiter from proceeding.

Held that the questions could competently be considered.

Observations (*per* the Lord President) as to rules of pleading in arbitrations.

John Milne junior, auctioneer, Brechin, trustee on the sequestrated estates of Charles Christison, sometime tenant of the farms of Bractullo and Gateside on the estate of Idvies, Forfarshire, brought an appeal against an interlocutor of the Sheriff-Substitute (LEE) at Forfar, pronounced on 2nd April 1906 in a special case presented for David A. Spence, arbiter in an arbitration under the Agricultural Holdings (Scotland) Acts 1883 to 1900 between the said John Milne junior and Mrs Callender-Brodie, proprietrix of the said estate. The Sheriff-Substitute had, *inter alia*, decided favourably for Mrs Callender-Brodie two questions of law submitted *inter alia* to him, and the point with which this report deals is whether these questions could competently be considered at the stage which the case had reached.

The two questions were—"(1) . . . (2) Was the said John Milne junior, as trustee foresaid, on 7th November 1905 a 'tenant' within the meaning of the Agricultural Holdings Acts 1883 to 1900, and particularly section 42 of the first-recited Act, and as such entitled to make the foresaid claim and to apply to the Board of Agriculture and Fisheries for the appointment of an arbiter? (3) If the foregoing question be answered in the affirmative, was there, at Martinmas 1905, a 'determination of the tenancy' within the meaning of the Agricultural Holdings Acts, and was the said John Milne junior, as trustee foresaid, entitled to claim compensation under the said Acts, in view of the fact that the said Charles Christison abandoned the said holding of Bractullo and Gateside, and failed to implement his part of the said contract of lease, to the pursuer's loss and damage? (4) . . ."

The Sheriff-Substitute's finding was—'. . . And with respect to the second and third questions of law, finds that John Milne junior, as trustee for the creditors of Charles Christison, sometime tenant of the farms of Bractullo and Gateside, was not, within the meaning of the Agricultural Holdings Acts 1883 to 1900, a tenant whose tenancy determined at Martinmas 1905, and was not under said Acts entitled to compensation from the proprietrix of said farm for unexhausted improvements."

The following narrative of the facts is taken from the Lord President's opinion:—"This is an appeal from a decision of the Sheriff-Substitute of Forfarshire, answering certain questions submitted to him by an arbiter under the provisions of the Agricultural Holdings Acts. The circumstances out of which the matter arose are these:—A farm of the name of Bractullo was let by the landlord, Mrs Callender-Brodie, for nineteen years from November 1896, to one Anderson. In 1902 Anderson, with consent of the landlord, assigned his lease to Charles Christison. It was part of the arrangement under which the assignment was made that Anderson, and Christison's brother Robert, and his sister Mrs Hunter, should become bound as principals and full debtors for all the provisions of the lease. In 1903 Christison, the tenant, got into difficulties and granted a trust-deed in favour of one Milne. Milne managed the farm up till Martinmas 1905, when admittedly—because there is no controversy on that point—the farm was re-let on a new lease altogether to Mr Milne as an individual. At or about the same time payment was taken from two of the parties who had become bound to see that the stipulations of the former lease were carried out—I mean Mr Christison and Mrs Hunter—the reason of this payment being that the rent which Milne was to pay was a less rent than the original rent under the nineteen years' lease. Milne then presented a petition to have compensation paid to him as an outgoing tenant for unexhausted manures under the Agricultural Holdings Acts, and he applied—as under the recent Act is necessary—to the Board of Agriculture for the nomination of an arbiter. The landlord objected before the Board of Agriculture to any arbiter being nominated, and said that there was no state of circumstances which allowed of a claim being made. The Board of Agriculture, however, did not go into that matter, but appointed an arbiter. Parties met before the arbiter, and the claimant proponed his claim, which was met by a counter-claim. Certain procedure seems to have taken place before the arbiter, but before any final decree was pronounced by the arbiter the landlord proposed to withdraw his counter-claim. That being objected to, the arbiter seems to have taken the view that that was a question of law on which he required instruction, and therefore proceeded to frame a case to the Sheriff, asking his opinion on that matter of law. Thereupon, on the crave of the landlord, three other questions were added, two of which really raised the same question as had been attempted to be raised before the Board of Agriculture, namely, whether there was any matter which could be adjudicated upon; and it is on these questions that the Sheriff-Substitute has given his opinion which is now under review.

"As finally put there were four questions, on the first of which no appeal has been taken, nor has any appeal been taken on the fourth, but the two questions on which the argument has turned were, first, whether the said John Milne was a 'tenant' within the meaning of the Agricultural Holdings Acts; and secondly, if that question be answered in the affirmative, whether there was at Martinmas 1905 a 'determination of the tenancy' within the meaning of the Agricultural Holdings Acts, and was the said John Milne as trustee entitled to claim compensation."

Argued for appellant—It was too late after entering upon an arbitration to state a plea prejudicial to the arbitration. An arbitration was a contract between the parties which was binding. If the proprietrix thought the arbitration ought not to have gone on, she should have interdicted the arbiter from proceeding with the reference—*Sinclair* v. *Clynes Trustees*, December 17, 1887, 15 R. 185, 25 S.L.R. 172.

Objection ought also to have been taken before the arbiter. Not having done so, and having joined issue, she was bound by the contract to arbitrate, and any competent objections to the arbitration not having been stated must be held to have been waived. The Sheriff-Substitute had no right to deal with these questions, as they were not questions of law arising in the course of an arbitration in the sense of rule 9 of Schedule II of the Agricultural Holdings Act 1900.

The Court did not call for a reply.

At advising—

LORD PRESIDENT—[*After narrating the facts of the case ut supra*]—Now, before we get to the merits there was a preliminary question raised which practically goes to competency. That question may be stated thus—the original appellant, Milne, holds that, inasmuch as the parties had gone before the arbiter, and that a claim had been lodged on the one side and a counter-claim on the other, and the arbiter had been allowed to apply his mind to these claims with the view of coming to a decision on the matter, it was too late to raise the question of whether there was any matter to be adjudicated upon, or in legal language too late to raise a prejudicial plea, and the argument of counsel was that the only competent way to raise this question was by an action of interdict. I have not been able to see that there is actually any incompetency here. If a man who can show *prima facie* ground for saying he is a tenant—I mean not a mere man in the street—proceeds to make a claim against his landlord for compensation, which the landlord does not admit, and then the tenant goes to the Board of Agriculture and says "I want you to appoint an arbiter," I think it is clear what the Board of Agriculture will always do, and rightly do, as they did in this case—they will refuse to constitute themselves a legal tribunal to find if this is a proper claim or not, but will appoint a gentleman to act as arbiter, and leave the parties to work out the question in the arbitration. Now, I am not doubtful that as a matter of competency the next step might have been taken by way of interdict, because the case was of a class that raised the point clearly and plainly before any proceedings had been taken, and so, no doubt, the arbiter could have been interdicted from proceeding, just as in many cases arbiters have been interdicted from proceeding under Lands Clauses References. But I am far from thinking that that is the only procedure competent, or that in not taking that procedure the party must be held to have waived all other remedy. But I hesitate from laying down any general rule, because I think that the matter must really depend on the circumstances of each case, and I cannot bring myself to think that one is in a position to see so clearly *ab ante* all the different classes of circumstances that might arise as to be able to lay down a general rule and say that in such and such a case you ought to raise an interdict and in such and such a case you ought not. But you are well aware there are many cases in the books on what is certainly an analogous subject, namely references under the Lands Clauses Act, as to stopping arbitration proceedings where it is said an arbiter is proposing to exceed his jurisdiction or for other reasons; and I do not think I am going too far when I say that the tendency of judicial opinion has been rather against raising the matter *ab ante* by interdict, and rather in favour of considering the question after it has been before the arbiter himself. At the same time I am not wishing to say for an instant that interdict might not quite well be used, yet I hesitate to go so far as the Sheriff-Substitute in his note, where he says that clearly interdict was the right method. I think the matter would have been equally well and properly done had they gone before the arbiter, and then on the pleading before the arbiter put in a prejudicial plea. Now, that was not done here, and I think that it is a pity it was not done. After all, every arbiter has to settle his own jurisdiction, and decide that he has jurisdiction before proceeding to consider the matters referred to him, though, of course, his settling his jurisdiction is not final, because it can always be reviewed by the Court if wrong. But still he is bound to take the first step, and if he comes to a negative conclusion he would be bound to say so and refuse to go on. But though this was possibly the best course, as a matter of strict pleading one must remember there is no absolutely strict rule of pleading in a reference to an arbiter. Though the general practice known as making up records obtains before an arbiter, yet that is merely a matter of convenience; and a good illustration of how much it is a matter of convenience may be taken from this fact—that anyone who has had, as I happen to have had, acquaintance with English arbitrations, knows that the forms there are quite different from the forms we use here. Accordingly, although this arbiter was not asked to give a decision on this plea, I cannot think, as a matter of competency, that it can be held to be now too late to raise it; because to hold otherwise would be to hold that if a person in an arbitration does not put in a prejudicial plea in the initial stages he must be held to have waived it altogether. To hold that would be to hold that rules applied to arbitration proceedings which do not apply in ordinary actions, for everyone is well aware that if such a thing happened in Court, although there might be a salutary award of expenses, yet even at the last moment of the day before the actual judgment has gone forth there is always time to put in a plea, though that plea might go to render nugatory the whole proceedings that had taken place. I know no better instance than what happened in this Court very recently. I am alluding to the *Clippens Oil Company* against the *Edinburgh and District Water Trust* (July 6, 1905, 42 S.L.R. 698), in which case, after there had been judgment of the Lord Ordinary following on a proof extending for many days, a plea

was allowed to be put in based on the Public Authorities Protection Act, which plea, if good, would have obviated the necessity for any inquiry into the case at all. Accordingly, as undoubtedly this plea did get into the arbitration—because here it is—I cannot think there is any incompetency in considering it, although I quite think that, as bearing on the expenses of the arbitration, the tardy production of the plea might be an element for consideration.

[*His Lordship then proceeded to consider the merits, and stated his reasons for holding that the questions fell to be answered in the negative.*]

LORD M'LAREN concurred.

LORD PEARSON—I agree in the judgment proposed. In the first place, I have no doubt as to the competency of now taking up and disposing of the preliminary questions which were added to the special case by the Sheriff. These questions were timeously raised by the landlord in his original representation to the Board of Agriculture. They are questions which might have been competently stated by him for the determination of the arbiter at the outset of the arbitration. His determination upon them would not have been final. But he could have decided them in the first instance, and as we are now in a proceeding within the arbitration, upon a case stated by the arbiter, I hold that these questions are competently before us for our decision.

[*His Lordship then considered the merits, in which he arrived at the same conclusions as the Lord President.*]

LORD KINNEAR was absent.

The Court pronounced an interlocutor affirming the interlocutor of the Sheriff-Substitute of 2nd April 1906 in so far as it answered the second and third questions stated in the special case as amended.

Counsel for Appellant—Younger, K.C.—A. R. Brown. Agents—Finlay, Rutherford, & Paterson, W.S.

Counsel for Respondent—Chree—Strain. Agents—John C. Brodie & Sons, W.S.

HIGH COURT OF JUSTICIARY.

(GLASGOW CIRCUIT COURT.)

Wednesday, June 27.

(Before Lord Stormonth Darling.)

HIS MAJESTY'S ADVOCATE *v.* DARINI.

Justiciary Cases — Alien — Expulsion — Aliens Act (5 *Ed. VII, cap.* 13), *sec.* 3—*Act of Adjournal, 1st February* 1906.

Circumstances in which a certificate of conviction and recommendation for expulsion were *granted* under the Aliens Act (5 Ed. VII, cap. 13), section 3, (1) (*a*), and Act of Adjournal of 1st February 1906.

The Aliens Act 1905 (5 Ed. VII, cap. 13), section 3 (1), enacts—"The Secretary of State may, if he thinks fit, make an order (in this Act referred to as an expulsion order) requiring an alien to leave the United Kingdom within a time fixed by the order, and thereafter to remain out of the United Kingdom—(*a*) if it is certified to him by any court (including a court of summary jurisdiction) that the alien has been convicted by that court of any felony, misdemeanour, or other offence for which the court has power to impose imprisonment without the option of a fine, or of an offence under paragraph 22 or 23 of section 381 of the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55) . . . and that the Court recommend that an expulsion order should be made in his case either in addition to or in lieu of his sentence. . . . "

The Act of Adjournal of 1st February 1906, section 2, provides that the forms of certificates set forth in the schedule may be used for the purposes of the Aliens Act 1905. The schedule gives the following form for a certificate of conviction and recommendation for expulsion [section 3 (1) (*a*)]:—

"In the Court of , held at , on the day of , Nineteen hundred and .

"Before .

"I (*or* We) hereby certify that A B, to whom the particulars shown in the annexed schedule relate, having been found by the court to be an alien, was this day convicted of the offence shown in the said schedule, being an offence within the meaning of section 3 (1) (*a*) of the Aliens Act 1905;

(and was committed to one of His Majesty's Prisons to be detained there for the space of).

And that the Court recommend that an Expulsion Order should be made in the case of the said A B (in addition to the said sentence) *or* (in lieu of sentence).

"(Signature of Judge or Judges.)

"Schedule.

Name.....
Nationality.....
Age.....
Dependents (if any).....
Offence .....
Sentence.....
Prison to which committed.....
Parish and County or Burgh in which offence committed.....

"(Signature of Judge or Judges)."

Giovanni Batista Darini was indicted at the instance of H. M. Advocate on the following charges:—That he did "on 21st January 1906, in the back court behind John Toma's ice-cream shop 31½ Ardgowan Street, Port-Glasgow, (1) attempt to break into said shop, with intent to steal therefrom; (2) discharge five chambers of a revolver loaded with ball cartridge at James Duncan, police constable, Port-