nock Dock was not a place to which the Workmen's Compensation Act 1897 applies. Unfortunately not one of the questions is appropriate.

The Court pronounced this interlocutor:—

"In answer to the questions of law therein stated, Find that the Cessnock or Prince's Dock was not a place to which the Workmen's Compensation Act 1897 applies: Therefore recal the award of the arbitrator: Remit to the Sheriff-Substitute to dismiss the application."

Counsel for the Pursuer — Younger — Chree. Agent—Harry H. Macbean, W.S,

Counsel for Defender — W. Campbell, Q.C.—J. Wilson. Agents—Morton, Nelson, & Macdonald, W.S.

Wednesday, January 31.

SECOND DIVISION.

[Lord Stormonth-Darling, [Ordinary.

BUCHANAN *v.* RIDDELL.

Custom—Averment of Custom — Discount — Whether Term Added to Lease by Custom of District — Lease — Outgoing — Taking over Stock at Valuation.

A lease provided that as the tenant at his entry took over the regular sheep stock and others at a valuation of arbiters and an oversman, the proprietor or incoming tenant should be bound at the termination of the lease to take over certain sheep stock and others according to the valuation of arbiters and an oversman. At the tenant's entry he had entered into a minute of reference with the proprietor regarding the valuation of the stock and others, which provided that the tenant should be allowed six months' credit or alternatively 2½ per cent. discount on the amount of the valuation. At the tenant's waygoing a minute of reference was also entered into, which nominated arbiters and an oversman for the purpose of the valuation, but contained no provision as to credit or discount. It was agreed that the property in the stock should not be held as delivered until the price was paid. The landlord made prompt payment of the sum fixed by the oversman as the amount of the valuation, less 2½ per cent. discount, which he claimed should be allowed to him in accordance with the custom of the district. *Held* that in these circumstances proof of the alleged custom was not admissible.

This was an action at the instance of Angus Buchanan, sometime farmer, Drimnatorran, Strontian, now farmer at Kilvaree, near Connel, in the county of Argyle, against Sir Rodney Stuart Riddell of Ardnamurchan and Sunart. The pursuer concluded for payment of £183, 7s., being a balance still unpaid of the sum which was found by arbiters and an oversman to be the value of the stock and others handed over by the pursuer to the defender upon quitting possession of the farm of Drimnatorran, which was the property of the defender.

In defence the defender claimed that he was entitled to retain the sum sued for as discount in respect that by custom binding upon the parties he was entitled either to six months' credit or discount at the rate of 2½ per cent.

By lease, dated 7th and 23rd May 1889, entered into between the defender and the pursuer, the defender let to the pursuer the farms and grazings of Drimnatorran and Ariundle, on the estate of Suinart in the county of Argyle, for the space of fifteen years from and after the term of Whitsunday 1887, with a break in favour of both parties at the end of the fifth and tenth years respectively. The pursuer entered into the farms, and continued therein down to the second break at Whitsunday 1897, of which he took advantage.

By the lease it was stipulated, *inter alia*, as follows:—"Further, as the said tenant at his entry took over the regular sheep stock and crop on the said farms at a valuation of arbiters and oversman, it is hereby provided and declared that the proprietor or incoming tenant shall, at the termination hereof, whether at the natural expiry or at either of the breaks, be bound to take over not exceeding 4000 of said stock of sheep if the tenant takes advantage of the first break, and the average stock of sheep of the previous three years [altered by minute appended to the lease to "the average stock of sheep of the previous five years"] if the tenant takes advantage of the second break or at the end of the lease, and also at the termination of the lease, at whatever term that may be, the crop, horses, farm implements, sheep dipping-machine, and utensils, and pay for the same according to the valuation of arbiters, one to be appointed by the tenant and another by the proprietor or incoming tenant, and an oversman mutually chosen in case said arbiters shall differ in opinion." The lease contained no provision as to six months credit or discount being allowed.

When the pursuer entered into possession of the farms he took over the sheep stock and others at valuation. With reference to this valuation the parties entered into a contract of submission dated 24th June 1887, which contained, *inter alia*, the following clause:— "With power also to the said arbiters and oversman respectively to decern against the said second party for payment of such sum as they or he may determine to be due and resting owing by him to the said Sir Rodney Stuart Riddell as the value of said sheep stock, crop, threshing-mill, and moveables, payable said sum immediately on delivery of the said stock, &c., or in the option of the said second party six months after delivery of said stock, &c., and in the event of the said second party making

immediate payment he shall be entitled to discount on the sum paid at the rate of 2½ per cent." . . . .

In terms of this agreement, the pursuer having made prompt payment for the stock and others taken over by him, was allowed discount at the rate of 2½ per cent. on the sum in the valuation.

Between the date of the pursuer's entry in 1887 and the date of the lease the pursuer possessed upon missives which provided for the taking over of the sheep stock at valuation, but contained no stipulation as to discount.

After the expiry of the lease at Whitsunday 1897 the parties entered into a minute of agreement dated 28th May 1897, whereby they nominated arbiters and an oversman to value the stock and others in terms of the lease. The arbiters were appointed "to value the said average sheep stock," &c. The oversman was appointed "to fix and determine the price and value of the said average sheep stock, crop, horses, implements, and others aforesaid in the event of the said arbiters differing in opinion, and to settle all questions that may arise in regard to the valuation."

The minute of agreement also provided as follows:—"(*Third*) It is hereby specially provided and agreed that although the said sheepstock are counted, marked, and valued, and the said crop, horses, implements, and others are valued, yet the same shall not be held as delivered, and the property therein shall not pass from the first party until the price thereof is paid. (*Lastly*) Both parties bind and oblige themselves respectively that the decision of the said arbiters or oversman shall be final, and to abide thereby." . . .

The valuation took place on 28th and 29th May 1897. The amount of the valuation as finally fixed was £7346 odds, and the defender made payment of the whole of this sum with the exception of £183 odds which he claimed to retain as discount.

Thereupon the pursuer raised the present action.

The defender averred as follows:—(Referring to the valuation which took place at the pursuer's entry in 1887)—"(Stat. 2) On the adjustment of the draft submission for the valuation of said subjects the pursuer asked the defender's agent to insert a special clause relating to discounts. He said he thought a clause bearing on the matter should be inserted as he was entitled to get from the defender the usual six months' credit before payment for the sheep stock and others upon valuation, or alternatively an allowance of 6d. per £ on the price if payment should be made by him as at the date of valuation and delivery. He explained to defender's agents that these terms were embodied in the bargain, as they were in accordance with the local custom of the district of Argyleshire, where said farms are situated, when stock, crop, and implements were taken over with a farm. The defender's agents upon inquiry found that pursuer's statement was accurate in point of fact; and as the arbiters and oversman were given power to decern for the amount due upon their valuation, a special clause was inserted in the draft contract of submission providing for effect being given to said custom."

He further averred as follows—(Referring to the valuation at the ish of the lease)—"(Stat. 7) The defender . . . has implemented his whole obligations under said lease and minute of reference. The present dispute relates to the retention by him of the foresaid sum of £183 (odds). It has been retained in respect of the local custom of the district. *By the said custom, in the case of a written lease whereby either the landlord or the tenant is bound to take over and pay for the stock or other moveables at a valuation, the party so taking over the stock, &c., is, in the absence of express stipulation to the contrary, entitled to six months' credit from the date when the stock is delivered after valuation, or in his option is entitled to a discount of sixpence per £ if he pays as at the date of valuation and delivery of the stock, &c. The said custom was well known to both parties, and they had it in view when they entered into the said lease.* In accordance with said custom the pursuer claimed and was conceded by the defender the right to said discount upon his purchasing stock from the defender in 1887. The defender upon a repurchase claims the same right, which the pursuer now refuses to recognise. The difference between the parties falls within the reference clause contained in the minute of agreement above quoted and should be determined in terms thereof. The defender has offered to refer the matter in dispute but the pursuer has refused to do so."

The part of the averment which is printed in italics was added by way of amendment when the case was before the Second Division on the reclaiming-note.

The defender also averred that the oversman did not issue his decision till the middle of June 1897, that his award did not fix the sum payable by the defender but only fixed the price per score, and that prompt payments were made by the defender as pursuer's claims were intimated, the stock delivered in July being paid for on 13th and 16th July, the crop claimed for on 1st September being paid for on 7th September, and the stock delivered in November being paid for on 7th December, but under deduction from each payment of the discount claimed.

The defender pleaded, *inter alia*—"(2) The present action being excluded by the clause of reference in said agreement should be dismissed. (3) On a sound construction of the lease founded on, the defender was only bound to take over the stock and others on the same terms as the pursuer had done at his entry, and the pursuer having received discount, the defender is also entitled thereto. (4) The defender being entitled to said discounts in respect of local usage and custom, decree of absolvitor should be pronounced."

After hearing counsel in the procedure roll the Lord Ordinary (STORMONTH DARLING) on 2nd June 1899 repelled the defences and decerned against the defender.

Opinion.—"The question here is, whether the defender is entitled to retain discount at the rate of 2½ per cent. on the sum of £7346, 18s. 1d., which was due by him to the pursuer as the value of the sheep stock, crop, and implements, &c., which he took over on the termination of the pursuer's lease of the farm of Drimnatorran at the term of Whitsunday 1897. The defender's demand is by no means inequitable, because it is admitted that the pursuer was allowed a similar deduction when he entered to the farm ten years before. But I apprehend that the question is one not of equity but of contract.

"The stock and other articles were made the subject of arbitration in the usual way. The provision of the lease as modified by subsequent agreement was that the defender should be bound to take over the average stock of sheep of the previous five years, and to pay for the same according to the valuation of arbiters. Accordingly the contract of submission dated 28th May 1897 appointed two arbiters 'to value the said average sheep stock, crop, horses, implements, and others aforesaid, as at the said term' (*i.e.*, the term of Whitsunday 1897). The contract further nominated an oversman 'to fix and determine the price and value of the said average sheep stock, crop, horses, implements, and others aforesaid in the event of the said arbiters differing in opinion, and to settle all questions that may arise in regard to the valuation.'

"Now, the first defence with which I have to deal is that the question now raised ought to be referred to the oversman; and that depends on whether it can properly be described as a question arising 'in regard to the valuation.' I do not think it can. The arbiters having agreed on certain points, but having differed on the valuation of the average sheep stock, what the oversman had to do was to value that stock as at the term of Whitsunday 1897, and he has done so. If the parties had differed as to the numbers of the average stock he might have had to settle that question also, under the general clause which I have quoted. But no such question arose, and therefore it seems to me that he was *functus* when he fixed the value of the stock as at the appointed term. The question whether the landlord was bound to make immediate payment of the value so fixed or was entitled to six months' credit, was one in no way affecting the valuation of the stock, which would have been exactly the same in either case.

"The only other defence is that the defender ought to be allowed a proof of the local usage and custom which he avers in Statements 2 and 7. These two statements are not quite consistent, because the one speaks of the right to discount arising when payment is made 'at the date of valuation and delivery,' and the other speaks of the right arising on 'earlier payment' (*i.e.*, earlier than the period of six months from the date of valuation and delivery). But I take it that the first of these is intended as the ruling averment. I may observe in passing that although the payments made by the landlord were not immediate in the strict sense of the word, I should not be disposed to raise any difficulty on that score. The principal payments were made on 13th and 16th July, within three weeks of the rendering of the account, and the comparatively small payment in December was made in respect of stragglers and other sheep which were delivered long after the date of the valuation.

"Now, I agree that the allegations of local custom have sometimes been admitted to proof as affecting the terms of a written lease. But when this has been done, two conditions, I think, have always been present—(1) that the alleged custom was not inconsistent with the terms of the contract as reduced to writing, and (2) that the omission of any express stipulation might reasonably be ascribed to the parties having contracted with tacit regard to the custom as regulating their rights.

"It seems to me that probably neither of these conditions is present here, and certainly not the second. With regard to the first, the contract of submission contains a stipulation that although the sheep stock and other articles are valued 'yet the same shall not be held as delivered, and the property therein shall not pass from the first party (*i.e.*, from the tenant) until the price thereof is paid.' Now, when it is kept in view that during the six months after valuation the sheep would have to be clipped and the wool probably sold, this clause looks very like a stipulation for immediate payment as a matter of right. Then with regard to the second condition, how is it possible to assume that the parties held the alleged custom to be binding without express stipulation, when we find that on the only previous occasion when they had to consider the matter they dealt on the footing that an express stipulation was necessary? The clause contained in the contract of submission of 24th June 1887 is set out by the defender himself in statement 3, and it is of the most express and unequivocal kind. No doubt he avers that the pursuer induced him to agree to this clause by representing that it was in accordance with local custom, but the fact remains that both parties thought it necessary to have an express bargain on the subject. No amount of proof that it was common so to bargain would help the defender's case. Nothing but clear evidence that it was customary to allow the option of credit or discount without express bargain would do him any good, and I apprehend that the value even of such evidence as that would be entirely taken away by the circumstance that he and the pursuer had formerly acted on a different view. Roughly speaking, it seems no doubt fair to say that the pursuer ought to allow at outgoing the same advantage that he received when he entered the farm. But it must be remembered that the primary right of a seller is to receive payment on delivery, and that any time given or discount allowed is of the nature of a concession. All that can be said, I take it, is that

the landlord made the concession by express paction when he was the seller, and that he omitted to stipulate for the same concession from the tenant when their positions were reversed. I must therefore repel the defences and give decree as concluded for."

The defender reclaimed, and argued—There was here a relevant averment of a custom in conformity with which the landlord was entitled to the discount claimed by him. It was not proposed to prove anything inconsistent with the terms of the lease, but merely to supplement it by proof of custom as to a matter upon which it was silent. That was competent—Bell's Comm. i. 465 (7th ed.); Dickson on Evidence, ii. 1093. Proof of custom for this purpose was not confined to the case of mercantile contracts, but was admissible in the case of leases also—*Maclaine* v. *Stewart*, December 16, 1898, 36 S.L.R. 233, *per* Lord Moncreiff, at page 237; *Hamilton* v. *Reid's Trustees*, January 15, 1824, 2 S. 611; *Officer* v. *Nicolson*, February 13, 1807, Hume 827. The arbiters' award merely fixed the sum upon which the deduction claimed fell to be made, and it was no more conclusive against the landlord's claim than a contract fixing a certain price would be against a similar claim by the buyer. See Bell's Comm., *loc. cit.*, and Dickson on Evidence, ii. 1094. The tenant here had received the benefit of the custom alleged at his entry, and he was not now entitled to refuse the same benefit to the landlord at his waygoing.

The argument for the pursuer and respondent sufficiently appears from the opinions of the Judges. Counsel for him referred to the following authorities: *Maclaine* v. *Stewart*, *cit.*; *Gordon* v. *Thomson*, June 14, 1831, 9 S. 735; *Alexander* v. *Gillon*, January 22, 1847, 9 D. 524.

LORD TRAYNER — The point mainly argued before us was whether the defender should be allowed the proof of custom which the Lord Ordinary had refused to allow. I agree with the Lord Ordinary. To admit the proof which the defender now asks would, in my opinion, be a violation of the principle that parole is not admissible to vary or modify a written contract. In saying so I have fully in view the doctrine of our law, that "all contracts made in the ordinary course of trade, and without special provision, are presumed to incorporate the usage and custom of the trade to which they relate"—(Bell's Comm. i. 465), and that such custom may be proved as an addition to or part of the contract as expressed. But that doctrine does not apply to any case where the written contract deals expressly or by implication with the matter which the alleged custom is supposed to affect, and that I regard as the state of matters here. If the lease before us had only stipulated that at the end of the lease the landlord or incoming tenant should be bound to take over the stock of sheep on the farm, then proof of custom might have been allowed to show on what terms and conditions the stock was to be taken over. But this lease does more. It stipulates that the stock shall be taken over at a value or price to be fixed by arbitration, and the arbiters are named. What the defender proposes to prove is, that the stock is not to be taken over and paid for at the price or value fixed by the arbiters, but at that price subject to a certain deduction. If instead of providing that the price or value of the stock should be fixed by arbitration the lease had provided that the sheep should be taken over at the price of say forty shillings per head, would it have been admissible to prove that by custom that stipulated price was to be read as thirty-nine shillings? I think that would be inadmissible; and yet the case I have instanced is not distinguishable in any material respect from that with which we are dealing. The lease, I take it, contained a special provision relative to the particular matter in question which excludes proof for the purpose of modifying or altering it. This I think is in full accordance with the doctrine laid down in Bell's Comm. (from which I have above quoted), and in the decision in the case of *Alexander*, 9 D. 524, to which we were referred.

I am therefore of opinion that the judgment reclaimed against should be affirmed.

LORD YOUNG concurred.

LORD MONCREIFF—I was at first disposed to concur in allowing the defender a proof of his averments as to local custom as amended with the permission of the Court. But on reconsideration I have come to be satisfied that the safer course is to affirm the judgment of the Lord Ordinary, and practically on the same grounds. I do not proceed solely on the ground that we are here dealing with a written contract. Even in the case of a written contract proof of custom may be permissible where the contract neither expressly nor by implication provides for the matter in question; but this can only be done where the circumstances are such as to raise the presumption that the parties contracted with reference to the local custom.

Now, in this case there are two considerations which, taken together, are, I think, sufficient to exclude such proof. In the first place, we are dealing with a formal written lease in which there is a clause which expressly deals with the obligation of the proprietor to take over the stock at the termination of the lease, and the mode in which their value should be ascertained; and further, there is a formal submission dealing with the same matter. Therefore the lease and contract of submission are not silent in regard to the landlord's rights and obligations in connection with the valuation of the stock; and if it had been intended that the price to be paid was to be subject to discount, these are the places where that should have been stipulated.

But in the next place, in order to admit proof of custom there must be a presumption that the parties contracted with reference to it. Now, it appears that at the tenant's entry to the farm he took over the

stock on the farm at a valuation. But in the submission which was adjusted for the purpose of valuing the stock a special clause was inserted entitling the tenant to discount at the rate of 2½ per cent. on making immediate payment. At first sight it seems not unreasonable that the landlord, who allowed discount at the beginning of the lease, should in turn be allowed it at the close. But another and perhaps a sounder view is, that as at the commencement of the lease a special clause had to be inserted to enable the tenant to obtain the benefit of discount, the reasonable inference from the absence of any such stipulation in the lease and contract of submission at the end of the lease is that the tenant did not contract on the footing that a similar stipulation should apply in the landlord's favour to the valuation at the termination of the lease.

Therefore, although I think the question is one of some difficulty, I am not prepared to alter the Lord Ordinary's interlocutor.

The LORD JUSTICE-CLERK was absent.

The Court adhered.

Counsel for the Pursuer—C. K. Mackenzie—Chree. Agents—J. K. & W. P. Lindsay, W.S.

Counsel for the Defender—W. Campbell, Q.C.—Aitken. Agents—Hamilton, Kinnear, & Beatson, W.S.

Wednesday, January 31.

SECOND DIVISION.

[Lord Low, Ordinary.

CRAIG'S TRUSTEE *v.* LORD MALCOLM.

Compensation—Contract—Stipulations in Mutual Contract—Lease—Bankruptcy of Tenant.

A lease for nineteen years from Whitsunday 1893 contained a clause providing that the proprietor or incoming tenant should take from the outgoing tenant the sheep stock according to the mode of valuation customary in the country.

There was a mutual break in the lease at Whitsunday 1898. Of this the tenant took advantage. His estates were sequestrated on 3rd May 1898, and a trustee was appointed on 10th June.

Thereafter the trustee called upon the proprietor to take over the sheep stock on the farm under the clause in the lease. A minute of submission was entered into, and the stock was valued in terms thereof.

Held that the landlord was entitled to set off against the amount at which the sheep stock was valued arrears of rent incurred during the currency of the lease.

John Craig became the tenant in the farm of Balliemore, Lochgilphead, belonging to Lord Malcolm of Poltalloch, under a lease for nineteen years from Whitsunday 1893. Section 17 of the articles of set applicable to the estate of Poltalloch, which formed part of the lease, provided that "the proprietor or incoming tenants shall take from the outgoing tenants the sheep stock according to the mode of valuation customary in the country." Section 33 provided that there should be a mutual break under the lease at Whitsunday 1898.

Mr Craig took advantage of the break, and terminated the lease at Whitsunday 1898. On 3rd May 1898 his estates were sequestrated, and on 10th June John Fleming M'Laren was appointed trustee on the sequestrated estates.

The trustee called upon Lord Malcolm to take over the sheep stock on the farm under section 17 of the articles of set, and in order to fix the value a reference was entered into between them by minute of submission dated 7th and 9th of June, in which both parties agreed that the price or value determined should be payable as at Whitsunday (old style) 1898. According to the prices fixed by the arbiter the value of the stock found on the farm amounted to £392, 10s. 5d.

Thereafter Lord Malcolm claimed right to set off against that sum arrears of rent due by Mr Craig under the lease amounting to £442, 0s. 3d. of principal and £26, 3s. of interest.

Mr M'Laren as trustee refused to admit this claim, and raised an action against Lord Malcolm for £400, or such other sum as should be ascertained after all the stragglers had come in to be the value and price of the sheep stock on the farm of Balliemore taken over by the defender from the pursuer by valuation, with interest at 5 per cent. per annum from 28th May 1898.

On 17th June 1899 the Lord Ordinary (Low) assoilzied the defender from the conclusions of the summons.

Note.—"Mr Craig, the trustee in whose bankruptcy is pursuer in this action, was the defender's tenant in Balliemore under a lease for nineteen years from Whitsunday 1893. There was a mutual break in the lease at Whitsunday 1898, of which the tenant took advantage. His estates were sequestrated under the Bankruptcy Acts on 3rd May 1898, and the pursuer was appointed trustee upon 10th June of that year.

"By the 17th section of the articles of set applicable to the estate of Poltalloch, which formed part of the lease, it was provided that 'the proprietor or incoming tenants shall take from the outgoing tenants the sheep stock according to the mode of valuation customary in the country.'

"The pursuer, founding upon that section, called upon the defender to take over the sheep stock, and accordingly arbiters were nominated and the stock valued.

"The pursuer has brought this action for the purpose of enforcing payment of the sum at which the sheep stock was