LORD M'LAREN—As regards the 2nd objection, I agree that it would be an innovation to allow the expense of excerpts from printed reports because they are referred to merely as precedents. Where a reference to old documents is necessary in the course of a historic inquiry, the rule might be different.

The LORD PRESIDENT and LORD KINNEAR concurred.

The Court disallowed the charge objected to, and *quoad ultra* approved of the Auditor's report.

Counsel for the Pursuers — Solicitor-General (Dickson, Q.C.)—C. N. Johnston. Agents—Thomson, Dickson, & Shaw, W.S.

Counsel for the Defender—Dundas, Q.C. —Blackburn. Agents—Dundas & Wilson, C.S.

Wednesday, November 14.

FIRST DIVISION.

MACKNIGHT'S TRUSTEE *v.* CORPORATION OF EDINBURGH.

Arbitration — Procedure — Statutory Arbitration—Housing of the Working Classes Act 1890 (53 *and* 54 *Vict. c.* 70), *Sched. II., sec.* 26—*Appeal against Award of Arbitrator.*

The Housing of the Working Classes Act 1890, Schedule II., section 26, provides that a party to whom compensation exceeding £1000 has been granted in an arbitration under the Act, if dissatisfied with the amount awarded, may apply to the Court for leave to submit the question of the proper amount of compensation to a jury, and that the Court may grant leave "upon being satisfied that a failure of justice will take place if the leave is not granted."

Circumstances in which leave *refused.*

Observations on the considerations by which the Court should be guided in considering whether leave should be granted.

This was a petition at the instance of Hugh Martin, S.S.C., trustee upon the testamentary estate of the late A. E. Macknight, advocate, under section 26 of Schedule II. of the Housing of the Working Classes Act 1890. That section enacts —"(*a*) Where the party named in any certificate issued under the provisions hereinbefore contained of the amount of the compensation ascertained by any award under Part I. of this Act (or any party claiming under the party so named) is dissatisfied with the amount in such certificate certified to be payable, and such amount exceeds £1000, . . . the party dissatisfied may, upon obtaining the leave of the High Court, which leave may be granted by such Court, or any judge thereof at chambers in a summary manner, and upon being satisfied that a failure of justice will take place if the leave is not granted, submit the question of the proper amount of compensation to a jury, provided that such party give notice in writing to the other party of their intention to appeal within ten days after the cause of appeal has arisen. The cause of appeal shall be deemed to have arisen (1) where a certificate has been issued as aforesaid, at the date of the issue of the certificate." By article 30 of said schedule, sub-sec. (*e*) it is provided that in Scotland "any reference to the High Court shall be construed as a reference to the Court of Session."

The Lord Provost, Magistrates, and Council of Edinburgh, acting under the Edinburgh Improvement Scheme Provisional Order Confirmation Act 1898, on 6th December 1899 served a notice on Mr Martin intimating that they proposed to purchase under their statutory powers certain property in Allan Street, which formed part of the trust estate under his charge.

Mr Martin claimed £2500 as compensation, and as parties were unable to agree as to the amount, Mr Hall Blyth, C.E., was appointed by the Secetary for Scotland as sole arbitrator under the provisions of the Housing of the Working Classes Act 1890.

Proof was led before the arbitrator on 12th May 1900. For the claimant Mr Marwick, architect, and Mr Lawrence, surveyor, valued the subjects at £2470. It was also proved that when the Corporation first resolved to acquire the property, their own valuators had valued the subjects at £2117. For the Corporation, Bailie Brown, a valuator, who was also Convener of the Improvement Schemes Committee, valued the subjects at £1133. No other witnesses were examined.

The arbitrator having visited the subjects in question and considered a representation against his proposed findings, issued an award by which he fixed the compensation at £1556.

On August 17th he granted a certificate of the amount of compensation.

Mr Martin thereupon presented this petition to the First Division of the Court of Session, in which, after narrating the facts above set forth, he prayed the Court "to grant leave to the petitioner, as trustee foresaid, to appeal in the manner provided in the said Act against the award of Benjamin Hall Blyth, Esq., dated 6th June 1900; and to submit to a jury the question of the proper amount of compensation in respect of the said lands and others situated in Allan Street, Stockbridge, belonging to the trust estate of the said late Alexander Edward Macknight, required to be taken by the Lord Provost, Magistrates, and Council of the City and Royal Burgh of Edinburgh, as local authority aforesaid, in respect of which the sum of £1556 was so awarded."

Answers were lodged for the Corporation.

The arguments sufficiently appear from the opinions of the Judges.

LORD PRESIDENT—This petition raises an important question, for we are told that it is the first occasion on which such an application has been made to this Court under the Housing of the Working Classes Act 1890, although many cases must have been disposed of under that Act without any attempt being made to set aside the award of the statutory arbitrators. In dealing with the question we must walk entirely by the code which the statute provides for arbitration proceedings and complaints arising out of such proceedings. Such a code we find in the Act of 1890 and the schedules annexed to it. The first matter is the appointment of an arbitrator, and under Schedule II., sec. 4, that appointment is to be made by the Secretary for Scotland. In this case Mr Blyth was appointed, who, it is matter of common knowledge, has had great experience in the kind of matters with which he required to deal, and I cannot doubt that the Secretary for Scotland in nominating him had regard to his obvious qualifications for the duties which he would have to perform. The schedule next goes on to make certain provisions for the procedure in the arbitration. Under section 7 it is provided that "in every case in which compensation is payable . . . the arbitrator shall ascertain, in such manner as he thinks most convenient, the amount of compensation demanded by the claimant, and the amount which the local authority may be willing to pay; and after hearing all such parties interested . . . as may appear before him . . . he shall proceed to decide on the amount of compensation to which he may consider the claimant to be entitled." Under the procedure thus prescribed great latitude is left to the arbitrator. The schedule further, by section 9, provides that "after the arbitrator has arrived at a decision he shall make an award under his hand and seal, and such award shall be final and be binding and conclusive (subject to the provisions concerning an appeal hereinafter contained) upon all persons whomsoever, and no such award shall be set aside for irregularity in matter of form." So that, subject to the provisions regarding appeal, as high a degree of finality is given to a decision of the statutory arbitrator as could well be. The provisions as to appeal, under which this case comes before us, are contained in section 26 of the schedule. It is there provided that the claimant, if dissatisfied with the amount of compensation awarded him, may, if that amount exceeds £1000, "upon obtaining the leave of the High Court, which leave may be granted by such Court or any Judge thereof at chambers in a summary manner, and upon being satisfied that a failure of justice will take place if the leave is not granted, submit the question of the proper amount of compensation to a jury." An appeal is not to be allowed as matter of course, or otherwise than on special cause shown. It would have been a very singular scheme of legislation to have provided that where an arbitration in regard to such a matter is initiated by a high officer of state appointing an arbitrator, his decision should be lightly set aside and a jury-trial granted. Such a scheme is not what we are accustomed to in legislation regarding such matters. It is difficult to imagine language which would more carefully define and limit the grounds upon which alone the Court is to allow the dissatisfied party to have jury-trial, the provision being that it must be satisfied that a failure of justice would take place if it was not granted. This being so, the position of the petitioner in this case is that he must satisfy us that there will be a failure of justice if a re-trial of this case before a jury is not allowed. We have had a full statement of what took place before the arbitrator, and we are therefore in a position to form an opinion as to whether this statutory condition is or is not fulfilled. It appears that Mr Blyth, the arbitrator, examined the property, and one would suppose that such a skilled person would be well able to judge from such an examination what was the class and character of the property with which he had to deal. But he did not rely solely upon his examination of the property—he heard evidence. Two gentlemen were examined as witnesses on one side and one on the other, and the arbitrator seems to have thought that he was entitled to limit evidence, when, as in this case, it amounted to little more than an expression of opinion as to value. One of the matters on which there was a sharp difference between the witnesses was as to the number of years' purchase of the rental which should be allowed in fixing the amount of compensation for property of such a class and in such condition as the property in question, one of the witnesses putting it as high as twelve years' purchase and another at only half of that number. The question as to which of the estimates is right must depend very much on the condition, the age, the class, and the surroundings of the property, whether the rents are well or ill paid, whether the tenants are destructive or careful, and whether the cost of repairs is great or small. Now, the account of this property which we find given in the proof is rather a depressing one. It is situated in an area which we are told has been scheduled as insanitary, but it is said that the particular building is not itself insanitary, though its surroundings are so. No doubt that was duly considered by the arbitrator when he visited the property. On the question of cost of repairs we have some very clear, if somewhat lurid, light, from what Mr Marwick, the petitioner's leading witness, said in reply to a question put by the arbitrator. "A workman's house I would put on a slightly higher scale than this, but here you have the wasters of society, and the 'drunks' who kick the panels out of the doors, and an immense number of children who make holes in the plaster and break it down." That is a sentence from the testimony of the leading witness for the petitioner, and it requires no comment. In view of it I am not surprised that the arbitrator

took a somewhat moderate number of years in converting the rental into a capital sum. There are clauses in the Act of 1890 which afford some guide to persons charged with the duty of considering the question of compensation. Section 21, sub-sec. (2), provides that when dealing with premises situated within an unhealthy area, evidence may be taken—"(2ndly) that the house or premises are in such a condition as to be a nuisance, within the meaning of the Acts relating to nuisances, or are in a state of defective sanitation, or are not in reasonably good repair," and if the arbitrator is satisfied with the evidence, the estimated expense of putting the property into a proper state is to be deducted from the amount of compensation allowed. It would not be surprising if the arbitrator thought that these provisions had some application to the present case. And again, in the same sub-section, it is provided that evidence may be taken to show (3rdly) that the house or premises are unfit and not reasonably capable of being made fit for human habitation," in which case the compensation is to be the value of the land and the building materials on it. All these provisions show that a moderate standard of compensation should be taken in such cases, and the evidence proves that the property in question if not actually within these classes, is not very far removed from them. We have no reason to suppose that the arbitrator did not apply his mind to all these matters, and he was eminently qualified to fix the amount of compensation which should be awarded. In determining whether injustice would be caused by refusing a re-trial before a jury, we have to consider the provisions of the statute as applied to the information before us, and when we find, as we do here, that the arbitrator has conducted the proceedings in accordance with these provisions, and that there is no reason whatever for thinking that a failure of justice will take place if the leave sought for is not granted, I think that we should refuse to grant that leave. It would be very unfortunate if it came to be regarded as anything like a matter of course that an arbitrator's award upon a question as to the value of urban property which he had examined should be set aside, and the elaborate and costly machinery of a jury trial set in motion, especially in the case of property of small value, where the cost would be quite disproportionate to any likehood of getting a more satisfactory decision from the jury than from the arbitrator.

LORD M'LAREN—It is necessary to keep in view that the present process is not an ordinary process of appeal. It is an application for the re-trial of a matter submitted to a statutory tribunal on the grounds specified in the statute. I think there is much force in an observation made by the Lord Advocate in the course of his argument, that the statutory grounds upon which such a re-trial may be granted are not dissimilar to those upon which a new trial will be granted as against the verdict of a jury. In this connection I would remind your Lordships that in the Act 55 George III., introducing jury trial into Scotland, in the clause dealing with the grounds for a new trial, after specifying as such grounds misdirection by the presiding judge, a verdict contrary to the evidence, &c., the clause proceeds, "or for such other cause as is essential to the justice of the case." This last expression is very nearly the same as that which we have to construe. As a ground of allowing an appeal, viz., "failure of justice," the one expression is affirmative, the other is negative; but the essential condition contemplated by both is that it would be inconsistent with justice that the determination complained of should be allowed to stand. In considering the facts of the present case it is to be observed that this is an award by an arbiter eminent in his profession, and of great experience as a railway engineer in cases of valuation of houses and property. It is not alleged that he has deviated in any way from the procedure enjoined by statute. He has applied his mind to the matter submitted, after hearing evidence and after a personal inspection of the property. I observe from the terms of the award that prior to issuing it, the arbiter submitted it to the parties in draft, and heard their representations in regard to it, so that it is very unlikely that he can have overlooked or omitted any consideration material to the case. The only tangible objection to the award is that the arbiter only heard but one witness for the Corporation, and that witness was a bailie, and therefore biassed in the direction of a low valuation. There might have been some reason in this objection if the arbiter had accepted the figure put forward by this witness, but he has not done so; he has taken as the true valuation one which lies between Bailie Brown's valuation and that proposed by the witnesses for the appellants. Whether he was right or wrong as to the value he has fixed it is not for this Court to inquire. The question for us is, whether there has been in the conduct of this arbitration a failure of justice, and I am very clearly of opinion that no such case has been established, either in law or in fact, so as to entitle us to sustain this application.

LORD ADAM and LORD KINNEAR concurred.

The Court refused the prayer of the petition.

Counsel for the Petitioner—Dewar—J. B. Young. Agents—Hugh Martin & Mackay, S.S.C.
Counsel for the Respondents — The Lord Advocate (Graham Murray, Q.C.)—Cooper. Agent—Thomas Hunter, W.S.