should be an open space behind. The Dean of Guild had gone beyond his powers in allowing a building to be erected which would not merely "reduce" that space, but abolish it. (3) Further, the Dean of Guild had not provided for the appellant's ventilation being respected. (4) If this were not "a house," but "a building to be used for business premises," then the Dean of Guild could only sanction the erection of "a saloon," which was a building of one storey, whereas the buildings to be erected were to be of two storeys.

Argued for petitioners—The appellant's averments were irrelevant. (1) He had no right to appear and draw attention to the 50th section of the Municipal Act. (2) He had said nothing about ventilation upon record. (3) But looking at the statute, the Dean of Guild was justified in what he had done, for this was either "a house," in which case he could reduce the open space behind to any extent upon being satisfied that there would still be sufficient ventilation—see *Pitman, &c.* v. *Burnett's Trustees*, January 26, 1882, 9 R. 444 (Lord President Inglis, 450, and Lord Shand, 452), which related to the corresponding section (163) in the Edinburgh Municipal and Police Act 1879; or this was "business premises," in which case he could grant warrant to erect a saloon, which was really what was to be erected here. (4) As indicated by the trustees in *Pitman's* case, it was only the ventilation of the house to be erected the Dean of Guild had to consider.

At advising—

LORD PRESIDENT—I think this judgment can be supported, and should be affirmed on the ground stated by the Dean of Guild towards the close of his note. He says—"Even supposing this is 'an existing house having an open space adjacent thereto,' and that the provisions of this section (50th) must apply to it, the Dean of Guild thinks that it would still be open to him to permit the present proposals if he were satisfied that the ventilation of the premises were satisfactorily secured." Although this was not a new house, it had an open space adjacent to it, and accordingly under the last proviso of the 50th section the provision in question applied to it. Well, then, the Dean of Guild has proceeded to exercise his jurisdiction under this section, and he does so for the purposes and under the conditions stated in the case of *Pitman*. He has to consider the interests of the ventilation of the house in question, and make up his mind whether it is secured. That is a matter with which the neighbour has nothing to do, and to say, as this appellant says, or said in his original statement, that the proposed building will injure the light, ventilation, or sanitary state of his property is to introduce a question alien to that which has to be considered under the 50th section. Accordingly, I think that so far as this section is concerned, the appellant has no business to interfere, and that his statements are irrelevant.

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

The Court dismissed the appeal.

Counsel for Petitioners and Respondents — Dickson — Craigie. Agents—Ronald & Ritchie, S.S.C.

Counsel for Respondent and Appellant—C. K. Mackenzie. Agents — Macandrew, Wright, & Murray, W.S.

Friday, June 17.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MAGISTRATES OF GLASGOW *v.* CALEDONIAN RAILWAY COMPANY.

Arbitration — Question to be Decided by Arbiter in terms of Statute—Exclusion of Ordinary Action.

The Glasgow Central Railway Act 1888, passed for the purpose of permitting the Caledonian Railway Company *inter alia* to construct a railway under a part of Glasgow, provided in section 39 that the company should not at any one time be entitled to enclose for the construction of the railway a greater extent of the surface of Argyle Street than 50 feet long by 17 feet wide with intervals of not less than 200 yards between such enclosure. The Act further provided in section 41, that if the railway company and the Glasgow Corporation should differ as to any of the provisions of that or the two preceding sections, such differences should be referred to the determination of an arbiter, to be mutually agreed upon by the company and the corporation.

A dispute having arisen between the company and the corporation as to whether the former were entitled to occupy a greater extent of the street than that specified in section 39 of the Act by covering it with materials, &c., beyond the enclosures—*held* that such a dispute was, in terms of section 41 of the Act, a difference to be determined by the arbiter, and that the Court had no jurisdiction in the matter.

The Glasgow Central Railway Act 1888 (51 and 52 Vict. cap. 194) authorised the Caledonian Railway Company to construct certain railways in tunnel and otherwise throughout the City of Glasgow, and other works in connection therewith. By section 39 of the said Act it is enacted—"Subject to the provisions of this Act, the company may, for the purpose of constructing the railways (whether the same be shewn on the deposited plans as to be constructed in tunnel or otherwise), temporarily cross, alter, break open, stop up, or divert any streets, . . shewn on the deposited plans and described in the deposited book of reference, and may during such construction, use and appropriate any of the streets, . . so stopped up or diverted, and may also from time to time during such construction

break or open any such streets, . . when necessary for the protection or repair of any sewers, drains, or pipes under the same . . . Provided that, except as in this Act otherwise provided, the company shall not at any one time be entitled to enclose, for the construction of the said railways and works and operations, a greater extent of the surface of Canning Street, Trongate, and Argyle Street than 50 feet long by 17 feet wide, with intervals of not less than 200 yards between each such enclosure, within which intervals no enclosure shall be placed (except with the consent of the Corporation of Glasgow as hereinafter defined)." By section 41 sub-section (B) of the said Act it is enacted—"The company shall not, except as after mentioned, without the consent of the Corporation, open or in any way interfere with the surface of Canning Street, Trongate, or Argyle Street, or the pavements or footpaths thereof, for the purpose of the construction of the railways by this Act authorised unless and until they shall to the reasonable satisfaction of the Corporation provide for the free passage of the traffic thereon by a temporary carriageway and footpath equal in extent to the portion of surface so interfered with, but for the purpose of providing such temporary carriageway they may open the surface of such streets between the hours of 9 p.m. and 7 a.m. of the next lawful day" subject to a provision in favour of the Glasgow Tramway Company contained in sub-section (E) to the effect that any operation which would cause interruption or interference with the tramway traffic should be conducted between the hours of 12 p.m. and 5 a.m. of the next lawful day." By section 41, sub-section (P), of the said Act, it is enacted—"If the Corporation . . . and the company shall differ upon or with reference to any plans, elevations, sections, or other particulars, which under the provisions hereinbefore contained are to be delivered by the company to the Corporation . . . or as to the mode of carrying out the same, or as to any other matter or thing arising out of the said plans, elevations, sections, or particulars, or any of the provisions of this and the two next preceding sections of this Act, every such difference shall, on the application of the company, or of the Corporation, . . . be referred to the determination of an arbitrator, to be mutually agreed upon by the Corporation . . . and the company, before the construction of the railway and works, hereby authorised, are commenced, and failing such agreement, as may be appointed on the requisition of either of them by the Board of Trade, and such arbitrator shall have power to determine the matter in difference, and the costs of and incidental to the reference shall be paid by the company. In the event of the death, incapacity, or failure to act of the arbitrator so appointed, and the Corporation . . . and the company failing to agree as to another arbitrator, the Board of Trade shall, as often as occasion requires, appoint another arbitrator in room and place of the arbitrator previously appointed as aforesaid."

Operations were commenced and carried on in Argyle Street by the railway company under the powers conferred upon them by the said Act. On 20th February 1892 the Corporation, with the view of expediting the work in such a busy thoroughfare as Argyle Street, consented to the intervals between the enclosures of the railway company being reduced from 200 yards to 100 yards.

In February 1892 the Corporation complained to the railway company that although their enclosures in Argyle Street were restricted to the length allowed by the Act, yet they were occupying the street to a further extent of 90 feet by covering the surface outside the barricades with material, stones, barrows, &c.

The railway company admitted they were occupying portions of the street outside their enclosures. They contended that although they were not entitled to enclose within barricades any portion of Argyle Street to a greater extent than 50 feet in length and 17 feet in breadth, they were entitled to occupy without enclosing any part of the street so long as their occupation was not inconsistent with the provisions of section 41, sub-sections (B) and (E) of their Act.

On 8th March 1892 the Corporation presented a petition in the Sheriff Court of Lanarkshire, praying the Court (1) to interdict the railway company "from appropriating, using, enclosing, or occupying for the construction of railways and works and operations under the powers contained in the Glasgow Central Railway Act 1888 a greater extent of the surface of Argyle Street, Glasgow, than 50 feet long by 17 feet wide, with intervals of not less than 100 yards between each enclosure, within which intervals no enclosures are by said Act to be placed except with the consent of the pursuers, unless in so far as any such appropriation, use, enclosure, or occupation is made in accordance with the provisions, and subject to the conditions set forth in section 38 and sub-sections (B), (E), and (L) of section 41 of said Act, and is for the purpose of providing a temporary carriageway or in connection with sewers or drains; and (2) to grant interim interdict."

The pursuers pleaded, *inter alia*—"(6) The matter in issue being the construction of an Act of Parliament, is not one falling within the clause of reference."

The defenders pleaded, *inter alia*—"(4) The question as to what extent of occupation of the streets affected by the defenders' operations is to be allowed to the defenders, being a difference between the Corporation and the defenders at present referred to, and depending before the arbitrator appointed in terms of said Act, the present action is incompetent. (5) All differences between the parties as to the proper mode of carrying out the defenders' operations having been committed to the said arbitrator under the provisions of the said Act of Parliament, the present application is incompetent."

On 11th March 1892 the Sheriff-Substitute

(SPENS) found "that the defenders are not entitled to occupy or enclose a greater extent of the surface of Argyle Street than 50 feet long by 17 feet wide, at intervals of not less than 200 yards between each enclosure or post of occupation, except with the consent of the Corporation of Glasgow," &c.

The defenders appealed, and on 22nd March the Sheriff (BERRY) recalled the interlocutor appealed against, and found "that save in regard to the opening of the street for the purpose of providing a temporary carriageway as set forth in sub-section (B) of section 41 of the Glasgow Central Railway Act 1888, and within the times and under the conditions set forth in that sub-section and in sub-section (E) of the same section, the defenders are not, without the consent of the Corporation of Glasgow, entitled to use or appropriate any portion of the surface of Argyle Street for the construction of their railways, works, and operations except within enclosures of such dimensions and with such intervals and under such conditions as are provided in section 39 of the said Act, and with this finding remits the case to the Sheriff-Substitute for further procedure."

On 25th March the Sheriff-Substitute granted interim interdict against the defenders.

On 18th May the Sheriff-Substitute pronounced the following interlocutor:—"Recals the interim interdict formerly granted: Repels the whole defences of new, and in lieu of the interim interdict formerly granted, grants interdict against the defenders, or anyone acting under their authority or directions, during any days of the week—Sundays excepted—between the hours of 7 a.m. and 9 p.m., appropriating or using any greater extent of the surface of Argyle Street than 50 feet long by 17 feet at any one point of occupation, said points of occupation to be separated by intervals at least of 100 yards, excepting in so far as operations are authorised by section 38 of the Glasgow Central Railway Act 1888, and are executed in terms of said section, for underpinning, as also such proper and necessary temporary carriageway and footpath as is contemplated and provided for in sub-section (B) of section 41 of said Act, as also any works authorised by sub-section (L) of the said 41st section in connection with sewers, &c., provided these are done under the conditions set forth in sub-section (L), and declares the said interdict perpetual, and decerns: Finds defenders liable in expenses, &c.

"*Note.*—. . . . The main question argued before me was as to the effect of the clause of reference. I do not think it was disputed that this Court had power to regulate the *status quo*, and that therefore, in accordance with the views already stated both by the Sheriff-Principal and myself, interim interdict fell to be granted, until at least a decision was arrived at by Mr Copland, although there are pleas to the effect that the present action is incompetent in respect of the clause above referred to. These pleas, however, were not seriously argued before me, and in my opinion they are clearly unsound, looking to the position taken up by the railway company. . . . .

"But (2) a somewhat larger question comes up for consideration—viz., whether it can be held that the question of the legal construction to be given to section 39 properly falls within the arbitration clause? Apparently the railway company, by their law-agent, originally took the view that it did not, although no doubt in the letter of 7th March the refusal to agree to the matter being one for the arbitrator is qualified by the phrase 'in the meantime.' Sub-section P of section 41 is no doubt very sweeping. [*Here his Lordship read the sub-section.*]

"I have thought it desirable to quote the whole clause in view of certain comments which fall to be made upon it. It appears that under this clause both parties agreed in the first place to the appointment of the late Mr Galloway, C.E., and subsequently to that of Mr Copland, C.E. The question which arises in the selection of these gentlemen in the first place is, was it the intention of parties to refer any legal question that might arise as to the construction of the statute to the decision of a civil engineer? Is the fair inference to be drawn from the appointment of a civil engineer that the parties merely refer to him any questions requiring the consideration and determination of a practical man thoroughly conversant with engineering works? . . .

"I have been referred to certain cases by counsel for the Corporation. One of these cases is the *Parochial Board of Greenock* v. *Coghill & Sons*, March 5, 1878, 5 R. p. 732. The contract entered into between pursuers and defenders in that case contained a provision as to the employment of 'sharp freshwater sand.' There was a clause of reference in wide terms to a Mr Starforth, by which any dispute or difference of opinion arising as to the meaning of the contract was referred to this gentleman. I only wish to refer to one passage of the late Lord President Inglis' opinion—'The Parochial Board then said, "Well, if there is to be a dispute, let us go to the arbiter." That was a mistaken course for the board to take. The arbiter was not entitled to construe this clause of the contract, because it does not contain matter for construction. If an arbiter was to decide that yes meant no, his award would be set aside altogether, and that was very much what he was asked to do here. If, then, the Parochial Board had put their application to this Court in the form of a suspension against using anything but "sharp fresh water sand," I should not hesitate for a moment to grant the prayer of the application.' Now, the question in the present case, it might be argued, is not so absolutely clear as the interpretation of the words 'sharp fresh water sand' in the case just referred to, but it seems to me to adopt any other interpretation of the 39th section than that which has been adopted by Sheriff Berry and myself would necessarily be to hold that the railway company were entitled to occupy the whole of Argyle Street at one

time, which would simply infer that the restrictions in clause 39 had no meaning whatever. In the case of *Mungle* v. *Young*, 10 Macph. 901, a question arose in the construction of a mineral lease as to whether the jurisdiction of the Court was excluded by an arbitration clause. It was provided that in the event of any dispute arising between the parties 'with regard to the true import of this lease,' such dispute should be referred to two arbiters named, with power to them to fix an oversman. Questions did arise, and the pursuers raised a declaration where, notwithstanding the arbitration clause, there were various conclusions to the effect that the defenders were not entitled, 'under the lease or otherwise, to do certain things,' Lord Barcaple (the Lord Ordinary) repelled the plea, that the action was excluded by the arbitration clause. The Court adhered to the Lord Ordinary's view. One passage from Lord Deas' opinion I may excerpt with reference to the point as to intention of parties adverted to above—'The case of *Pearson and Oswald*, 4th February 1859, 21 D. 419, comes nearer to this, and there as here there was a reference to a mining engineer in very broad terms of all disputes or differences "as to the meaning of these presents," and one consideration amongst others was the improbability of such a question of law as that which was there raised being referred to such an arbiter possessed of no legal knowledge.' In the case referred to by Lord Deas the clause of reference was to a mining engineer of all disputes 'as to the meaning or execution of these presents,' viz., a certain mineral lease. Notwithstanding the broad terms of this clause of reference it was held that the clause was meant to be executorial of the lease and to provide for carrying out of the stipulations according to their true meaning, but did not empower the referee to judge of such a question as to whether a working contract between the tenant and a third party was truly an assignation which the tenant had no right to grant or to deal with, a claim of excessive working after the lease was at an end. The case of *Lockerby* v. *City of Glasgow Trustees*, 10 Macph. 971, may also be adverted to. It was a decision of Lord Gifford's which was acquiesced in, in which, *inter alia*, he held that certain arbiters appointed under the Lands Clauses Act 'had no power to decide any question of law affecting the pursuers' right to compensation.'

"The conclusion at which I have therefore arrived is, that the question of the legal clause 39 is not a question which is excluded by the arbitration clause in the Act, the reference clause being meant to be executorial, a view confirmed by the fact that the arbiter chosen is a civil engineer."

Against this interlocutor the defenders appealed, and argued—Under section 41, sub-section P, of the Act this was a question for the arbiter and not for the Court. The question between the parties was simply whether the word "enclose" in section 39 meant "enclose" in its usual sense, or whether it was to be widened so as to include "cover or appropriate without enclosure." The parties had "differed with reference to the provisions" of section 39, and the decision in such a case was expressly referred by the statute to the arbiter. The Court's jurisdiction was therefore excluded—*Mackay* v. *Parochial Board of Barry*, June 22, 1883, 10 R. 1046, adopted by Lord President Inglis in *Beattie* v. *Macgregor*, July 5, 1883, 10 R. 1096; *Caledonian Railway Company* v. *Greenock and Wemyss Bay Railway Company*, March 30, 1874, 1 R. (H. of L.) 8; *Wright* v. *Greenock and Port-Glasgow Tramway Company*, October 22, 1891, 29 S.L.R. 53. None of the cases quoted in the Sheriff-Substitute's note were in point, as in none of them did the clause in dispute contain matter for construction.

Argued for the pursuers and respondents —No doubt under the clause of reference all questions as to the practical carrying out of the work were for the arbiter, but here there was no question of construction, as the clause of reference did not cover the matter in dispute. The question was not as to the expediency of adopting certain plans, but was whether it was competent to take the matter in dispute to the arbiter. When the arbiter was asked to decide a point indisputably illegal the Court would not allow its jurisdiction to be excluded. Where the matter was perfectly clear the Court would not allow it to be referred to arbitration. The Sheriff-Substitute's grounds of judgment were sound.

At advising—

LORD YOUNG—The parties before us here are in a true sense public bodies. The applicants to the Sheriff are the Provost and Magistrates of Glasgow, as Commissioners of Police, and as such charged with the public interest in the streets and thoroughfares of Glasgow. The respondents in that application are the Caledonian Railway Company, who have been authorised by statute to make and maintain certain railways, which the statute in this preamble refers to as being such that the making and maintaining of them would be of local and public advantage. They are both really therefore in the true sense of the term public bodies. The railway company, on the one hand, are seeking to proceed in the way which they think lawful and best in making the railway, which the Legislature says will be of local and public advantage; the Commissioners, on the other hand, maintain that they are obstructing—disturbing—the traffic upon one of the great streets of this great town, with the public interest in which they are charged. And the questions between them really regard the works and operations which the railway company are proceeding with, or proposing to proceed with, as exhibited upon certain plans and details which have been given in by them in terms of the statute, and these questions arise out of these plans, elevations, and sections, or particulars, and the provisions of the Act of Parliament under which alone the railway company have any authority to con-

struct them. In the petition the Sheriff is prayed to interdict the operations with which they are proceeding or proposing to proceed—to interdict the respondents from appropriating, using, enclosing, or occupying for the construction of railways and works and operations, under the powers contained in their Act of Parliament, a greater extent of the surface of Argyle Street than 50 feet long by 17 feet wide, with intervals of not less than 100 yards between each enclosure, and the Sheriff has in the result granted interdict as craved. But the material pleas in the Sheriff Court proceedings, and upon which argument before us proceeded, or to which that argument related, are these—[*Here his Lordship read the fourth and fifth pleas-in-law for the defenders*]. These are the pleas upon which we heard argument, and of which we have now to dispose. I may state—but it is really only for the purpose of showing that I understand the position taken up by the Police Commissioners, and appreciate and am prepared to take all proper account of their views and the arguments in support of them—I may state for that purpose, with advantage I think, how the question, upon its merits and irrespective of these pleas to which I have referred, arose between parties and was presented to the Sheriff, whose jurisdiction to dispose of this question is the matter now in dispute. I may observe, to begin with — but it is the merest truism — that of course the operations referred to, whether actually in course or merely proposed and threatened, would of course be illegal if not authorised by the statute. They are against the rules of the common law and against the local Police Act applicable to Glasgow, which are similar in that respect to corresponding Acts in other places. The railway company could not for a moment pretend any right to do what they are doing unless specially and exceptionally authorised by the statute. It is to enable work which the Legislature has been satisfied would be of great local and public advantage to be executed that these exceptional powers are given.

Now, by clause 39 of their statute they are authorised for the purpose of constructing the railways, whether the same be shown on the deposited plans or otherwise, "temporarily to cross, alter, break open, stop up, or divert any streets, &c., shown on the deposited plans, and described in the deposited books of reference, and they may during any such construction use and appropriate any of the streets so stopped up or diverted, and may also during such construction from time to time break or open any such streets when necessary for the protection or repair of any sewers, drains, or pipes under the same." Now, it is said—the Sheriff says, and I suppose it was conceded by the local authorities of the city—that if the proviso had stopped there, there could have been no question as to the statutory right of the railway company to do what they are proposing, subject only to such check as may be found in the statute to be imposed by the arbitrator who is there appointed, and who may restrain and prevent the full execution of the statutory powers if in his opinion it is unecessary to exercise them to the full extent for the construction of the line, and to do so would be inconvenient to the citizens. But then it goes on with a proviso applicable to Argyle Street, "that except as in this Act otherwise provided, the company shall not at any one time be entitled to enclose for the construction of said railways and works and operations a greater extent of the surface of Canning Street, Trongate, and Argyle Street" (the street with which we are immediately and indeed alone concerned) "than 50 feet long by 17 feet wide, with intervals of not less than 200 yards." Now, the dispute between the parties, and upon which the Sheriff has delivered his opinion, and indeed pronounced his judgment, was this, whether this proviso containing a restriction and limitation applicable to Argyle Street is confined to enclosing, or extends to any use or occupation of the street. The railway company, on the one hand, say that it is confined to enclosing, that using and occupying otherwise is not a matter dealt with by this limiting part of the clause, and that the construction of the railway would be altogether impossible upon any other reading than that which they propound, namely, that outwith the enclosures they may deposit upon and occupy other places in the manner in which they propose. The Commissioners of Police, upon the other hand, say—"As matter of good sense, and particularly having regard to the local Police Act, no occupation can be taken of the street for the purpose of depositing materials upon it without enclosing it for the public protection, and that therefore the limitation, although expressed as applicable to enclosing only, really applies to any occupation of the kind proposed, which would only be the more objectionable if the rule of common law and the rule of the local statute was not observed, of enclosing for the public protection the place which was so occupied." Now that is the dispute.

Then upon the application to the Sheriff for the interdict, the railway company say—"Well, but this is a matter arising out of our proposed works, and the provisions of our Act of Parliament, under which alone we quite admit that it is possible for us to make them, and the Legislature has established a special tribunal for the determination of any such controversy." Whether the Legislature has done so or not is the question we are now to determine. The matter was pleaded before the Sheriffs, as I have shown, by reading the pleas-in-law which comprehend it. It was also argued before them and the Sheriff-Substitute, and possibly the Sheriff-Principal also thought that the pleas were unfounded. Now, the provisions in the Act of Parliament is contained in sub-section P of clause 41 of the Act of Parliament. Before reading it I have just to observe, or call attention to the fact, in this connection, that clause 39,

the meaning and effect of which is in dispute, is the penult clause before that. I notice, though it is hardly worth while, that the Legislature commits a duty to, or assumes that the duty will be performed by, various public bodies, and in particular by the Corporation or the Police Commissioners of Glasgow who are charged with interests which may be—indeed, certainly will be—affected by the construction of the railway which the Legislature is hereby authorising; the character of the duty being that they will see and take care to the best of their judgment and ability that the railway company shall not, in the course of the construction, interfere excessively, or in a manner which may be avoided, with the public interest and convenience in the use of the streets. Now, this sub-section P of clause 41 provides that — [*Here his Lordship read the subsection*]. Now the railway company say that here you have instituted by the Legislature a tribunal which is to determine any such difference, and if that be so, then this application to the Sheriff is necessarily incompetent. Now, has a difference arisen here relating to these matters as to any matter or thing arising out of the plans, elevations, sections, or particulars, or any of the provisions of this and the two preceding sections? Is it possible to represent that the dispute upon its merits, as I have, I think, quite accurately stated them, is not of that character, not such that these words directly and distinctly apply to it? If so, then the statute law of the matter is that the Sheriff has no jurisdiction, that this Court has no jurisdiction, but jurisdiction is conferred upon an arbitrator to be chosen by the parties if they can agree, and if they cannot, then upon an arbitrator appointed by the Board of Trade—that is, a department of the Government.

But then it was said that the meaning of the statute was too clear for argument. Well, that is almost familiar forensic, and I am afraid also judicial language—"That is very clear; it is too clear for argument; it cannot be disputed; the meaning of the statute is so and so, and no tribunal in the possession of its senses can say anything else." Therefore the tribunal to be appealed to on the subject is to be the Sheriff-Substitute of Glasgow and not the arbitrator appointed by the statute. Now, I am altogether unable to assent to that. And the reason and expediency in the public interest is, I think, manifest. It is impossible, everyone knows, for a railway to be constructed through the streets of a great and populous town without disturbance. There is or certainly will be serious obstructions to the traffic upon the streets, and the public will suffer. But what the Legislature has to consider before exceptionally authorising such obstructions in the public thoroughfares of a great town is, whether the public interests in the end to be affected through the medium of these temporary obstructions is such as to justify their being authorised. Now, the Legislature necessarily when it grants such powers as were granted to the Caledonian Company here, and must be granted to any company about to construct a railway through a town, is satisfied that the local and public interest require that the public should be subjected to these obstructions temporarily in view of the advantage which will be obtained in the end. But then it was very proper to impose a check so that the powers granted by the statute in that manner should not be abused. And that is the meaning of committing these duties to the corporations who are charged with the public interest, to see that nothing is done contrary to the statute, and to see that even the statutory powers are not exercised to the public detriment where the end in view can be accomplished without going the full length of the statutory powers. Now that this duty, if the public bodies and the railway company could not agree, should be performed by the Sheriff-Substitute with appeal to the Sheriff, and with appeal again to the Court of Session, and ultimately to the House of Lords—if that had been proposed to the Legislature—I do not fancy that anybody would have been foolish enough to do it—it would have been instantly rejected as not at all applicable to the matter in hand. The language of the statute is necessarily of a general and comprehensive character. You cannot particularise about disturbance and interruption of traffic upon the streets of a town in the course of the construction of a railway. Only general language can be used, and the purpose of such a reference of any disputes or differences to an arbitrator is just that he may on the spot and instantly, and without appeal, dispose of all such differences. The convenience of that in the interest of the public is manifest. If the powers in the statute are violated it is his duty to stop it. If the powers in the statute are excessive as applied to the particular case that they may be limited in the actual execution, he can limit them.

Now, the opposing constructions here I am not to express any opinion of. I have stated the views of parties *hinc inde* in order to show that I understand and appreciate them, and take all due account of them. I think they are for the arbitrator. The railway company say—and it may be very material in the construction of the statute—that according to one construction, namely, that which is maintained by the Corporation, the execution of the work authorised by the statute, the construction of the railway is physically impossible, whereas according to the other construction, the making of the railway, which is the object of the statute, is possible. That may or may not be a legitimate argument upon the true meaning and effect of the general and comprehensive words which are used. It must be addressed to the arbitrator—I should think a very fitting party to address it to—and the more so because he is a practical engineer, and chosen by the parties as best fitted for the performance of the duties in question, for the very reason that he can go to the place, can see exactly how matters stand, and his

skilled and instructed mind can exactly comprehend what is to be done. He can read the provisions of the Act of Parliament just as well as we can, and what he has got to say is whether the restriction as to Argyle Street is limited, as the one party says, to enclosure, which is really the language of the statute, or whether the limitation extends to any sort of use or occupation. How he may decide that question I do not anticipate; and I should greatly desire to avoid saying one word which should indicate an opinion as to the true meaning and effect of the statute in the circumstances. I avoid that, because the Legislature has expressly and exceptionally deprived us of jurisdiction in the matter, and conferred the jurisdiction upon another tribunal better fitted in the opinion of Parliament to exercise it. I am of opinion, therefore, that this matter must go to the arbitrator unless the parties can agree.

Now, I have to consider another matter which was not, I think, argued before us, but which does present itself, and in a manner which in my opinion demands our consideration and our judgment. The Sheriff said that he was of opinion, and he understood the parties to admit, that at all events he had jurisdiction to maintain the *status quo*. Now, I think he is quite right there. I am not to determine the matter now, but I think it quite likely that in many cases the Sheriff may have jurisdiction to maintain the *status quo*, and even to grant an absolute and permanent interdict, and that this Court could grant an absolute interdict either reviewing the Sheriff or acting upon its original jurisdiction respecting either the operations of the railway company, or any interference with these operations. I think that quite possible. For example, if the arbitrator condemned what they were doing, or proposing to do, as outwith their statutory powers, or as an unnecessary interference with the public use of the streets in the execution of their works, and if notwithstanding they insisted in proceeding with them after that, I think it probably is the true view that the Sheriff or this Court might have to be applied to for an interdict to stop them. On the other hand, if the arbiter determined that certain operations were within their power, or proper in the construction of the railways, and any parties, even public bodies, obstructed or forcibly prevented them in carrying out these operations, I think the railway company might apply to the Sheriff or to this Court to interdict such interference or obstruction. But I think it is only in such circumstances that a resort can be had to any other than the statutory tribunal. Now, it is not suggested here that the railway company have done or propose to do anything which the arbitrator is of opinion is outwith their statutory powers, or an unnecessary exercise of their statutory powers for the construction of their line; that is not suggested; and as they have done nothing which we can pronounce illegal, I do not myself see that there was any legitimate occasion for the interdict at all; and for the Caledonian Railway Company or any other body to act under an interdict which is to be removed upon the certificate of an arbiter or otherwise is manifestly inconvenient. The Legislature certainly never contemplated that the railway should be constructed under an interdict by the Sheriff of Glasgow against doing anything until the arbitrator had approved. I do not think that would be convenient at all. Therefore I think we should sustain the fourth and fifth pleas-in-law of the defenders. They are against the competency of the Sheriff to entertain this application upon the ground that it refers to a dispute which must go to the arbitrator; and sustaining these pleas, my opinion is that the judgment of the Sheriff should be recalled and the application dismissed, and with expenses.

LORD RUTHERFURD CLARK—I concur.

LORD TRAYNER — The main question raised in this case depends upon the construction to be put on section 39 of the Act of Parliament, under which the appellants are carrying on the operations complained of. That question is one *prima facie* for the determination of a court of law if the Act of Parliament I have referred to does not otherwise provide for its determination. In my opinion the Act does otherwise provide. It appears to me that the question now raised is one of the questions or differences which by section 41 (sub-section P) is referred to the determination of an arbiter mutually chosen by the parties or appointed by the Board of Trade, for it is a difference with regard to the carrying out of certain plans proposed by the appellants which on the one hand are said to be, and on the other hand are said not to be, within the power conferred on the appellants by section 39 of their Act. Whether the difference between the parties is one relating to the carrying out of certain plans, or is one relating to the extent of the powers conferred by section 39, or is a question into which both of these elements may enter, I am of opinion that it falls within the provisions of the Act relative to arbitration, and that it must be determined, not by the Court, but by the arbiter chosen by the parties. I think there is no ground for the respondents' plea that the appellants are barred from maintaining the present contention. With regard to the point your Lordship last dealt with, I think no interdict should be granted until the arbiter has decided that the railway company are wrong.

LORD JUSTICE-CLERK—When I heard the debate in this case I had great doubt about it, and but for the fact that your Lordships are clear upon the subject, I do not think that I could have done otherwise than given an active dissent to the judgment at which your Lordships have arrived. But as your Lordships are so clear upon the matter, I do not think it necessary to dissent from the judgment, though I think I must state shortly the grounds of my difficulty. I

agree entirely in the observations made by Lord Young upon the very great importance in such a case as this of having a convenient court for the purpose of dealing with difficulties which may arise as between such a Corporation as that of Glasgow concerning the streets, and such a company as the Caledonian Railway Company, which is engaged, under the authority of Parliament, in making great works which necessarily interfere with the use of those streets. And I also have no hesitation in agreeing with the view your Lordships take, that the terms of the clause, under which these matters are referred in this particular case to the arbiter, are terms of the very broadest. But the difficulty that I have is this, that the mere fact that the terms are broad cannot cause them to cover anything and everything that the railway company might propose to do under pretence of the authority of the Act of Parliament. I think the intention of the clause, broad as it is, is to deal only with such matters as can reasonably be maintained to be within the clauses of the Act of Parliament, the interpretation of which is referred to the arbiter.

Now, as regards the facts of this case, my doubt arises upon this. In this Act of Parliament authority was given to the railway company to enclose certain spaces in Argyle Street at intervals of not less than 200 yards, unless they get the consent of the Corporation. They did, as I understand, get the consent of the Corporation, upon a representation that their works could not be carried on satisfactorily unless that interval was reduced, and if I am not mistaken, they are now, by the leave of the Corporation, using enclosures which are only 100 yards apart. Now, the obstruction to the inhabitants of Glasgow who use Argyle Street, or who have business premises in Argyle Street, does not in the least depend on whether the space that is occupied by the railway company is enclosed or not—the obstruction is the same if the roadway cannot be used by the citizens; and the Corporation call attention to this fact, that according to the ordinary law of Glasgow, no occupation of the streets can be made by anyone, even with permission of the Corporation, except upon the footing that the space so occupied is enclosed. Now, I take that to be the law of Glasgow, and I find nothing in this Act of Parliament to indicate in the very slightest degree that as regards any space to be occupied in Argyle Street by the railway company, that law is in any way altered. Now, if obeying that law, the railway company was to proceed to enclose a longer space than 50 feet by 17 feet in Argyle Street, it would at once, and palpably on the face of it, be against the Act of Parliament which they themselves have obtained; and they propose to avoid that by saying—"We are not going to enclose, we are only going to occupy." But as I have pointed out, the damage to the citizens of Glasgow from the occupation of Argyle Street does not turn at all upon the question of enclosure but upon the question of the street being so occupied that the inhabitants cannot use it. And when I find in the Act of Parliament which the company have got, that they are to be allowed to enclose not more than 50 feet long by 17 feet wide at certain intervals, I should be inclined to think, in view of what the law of Glasgow is, and which is not touched by this Act of Parliament, that they are not to occupy the street at all, except in the ordinary way, by enclosures, and that these enclosures are to be a certain distance apart, and only a certain size, that it is almost a mockery to turn round and say, "We shall enclose 50 feet by 17 feet, but you cannot prevent us occupying a large portion more of the street which we shall not enclose." I do not see what defence the railway company could have if they were challenged under the Glasgow Act of Parliament for not enclosing any ground they occupy. There is nothing in this Act of Parliament, so far as I can see, to entitle them to occupy without enclosing, which is the law of the Glasgow streets unaltered by this Act. And therefore my view upon that matter—the view I incline to—is this, that this proposal to occupy the street between the enclosures of 50 feet long by 17 feet wide is so palpably inside of their own Act of Parliament that it is not a question which can be referred to arbitration at all, as not being in the Act in any sense.

No doubt, as Lord Young has pointed out, in a matter of this kind where there is considerable breaking up of the streets of the city, it is in the public interest that there should be a rapid and practical mode of getting rid of difficulties. But that has another side. If this is a thing which is really outside of the Act of Parliament, and we send it to an arbiter for decision, and he decides that it is within it, and that the railway company can make the occupation of the streets which they propose, then the Corporation and citizens of Glasgow have no redress whatever. And therefore, while I hold without hesitation with your Lordships that the terms of the Act of Parliament are broad and ought to be liberally interpreted, the doubt I have is whether this particular matter which is before us is not plainly upon the face of it outside the Act of Parliament altogether. I can suppose very well that if the Corporation had known that after their concession, by which they reduced the space for the citizens to 100 yards between these enclosures, the space was to be again reduced by putting down material, and so preventing the road being used at all whether there was an enclosure or not, they never would have got that concession; and it may be a question whether the concession cannot be taken away, and that might make a considerable difficulty in the way of the railway company carrying out what they are now proposing.

But upon the whole matter, as your Lordships are clear that this is within the Act of Parliament and should go to the arbiter, I shall not actively dissent from your Lordship's judgment, but acquiesce.

LORD YOUNG—Perhaps your Lordship would permit me to say—I intended to say it, and I am not sure that I did not—that I desire very emphatically and distinctly to avoid indicating in the least degree an opinion, one way or the other, upon the question of which the arbiter is, in my opinion, the sole judge. If that question were before us we should of course have to consider it, and form an opinion upon it, and give a judgment upon it, but I think it unfit that we, not having jurisdiction, should express even an inclination of opinion upon it. The arbiter may, for anything I know, determine, upon hearing the matter, in accordance with the views which your Lordship has referred to, or against them. He will hear argument, and consider the matter as within his jurisdiction. The question about our interfering with his judgment as extravagant, or pronouncing "yes" to be "no," or "no" to be "yes," is a matter which is not likely ever to arise; but I desire again most emphatically to say that I indicate no opinion, one way or other, as to which is the right view upon the question upon which alone he has, in my opinion, jurisdiction.

LORD JUSTICE-CLERK—May I also add that all I intended to say was to indicate my own doubt or difficulty whether this question, as presented, was not a question outside of the Act of Parliament; and of course I had to go to a certain extent into the facts in order to indicate what was my doubt and difficulty about that. The decision whether it is or is not is of course not before us just now at all.

The Court pronounced the following interlocutor:—

"Sustain the appeal and recal the interlocutors appealed against: Sustain the fourth and fifth pleas-in-law for the appellants (respondents in the Sheriff Court): Dismiss the action, and decern: Find the appellants entitled to expenses in this Court and the Sheriff Court."

Counsel for Pursuers—Lees—Craigie. Agents—Campbell & Smith, S.S.C.

Counsel for Defenders—D.-F. Balfour, Q.C.—Guthrie. Agents—Hope, Mann, & Kirk, W.S.

Friday, June 17.

SECOND DIVISION.

[Sheriff of Renfrew.

SWEENEY *v.* DUNCAN & COMPANY.

Reparation—Workman Injured by Wrong Order of Foreman—Sub-Contractor—Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 1, *sub-sec.* 3.

A firm of shipbuilders apportioned their work among their various workmen, who again employed labourers to assist in the appointed tasks. One of their workmen, the gaffer of a gang of labourers whom he had engaged, gave a wrong order, which resulted in injury to one of the labourers. In an action of damages by the latter against the shipbuilders, under the Employers Liability Act, sec. 1 (3), *held* that the defenders were not liable, as they had not any contract with the pursuer under which he took service with the foreman.

The Employers Liability Act 1880 provides—"(1) Where, after the commencement of this Act, personal injury is caused to a workman . . . (3) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed, the workman shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of or in the service of the employer nor engaged in his work."

In October 1891 Robert Duncan & Company, shipbuilders, Port-Glasgow, instructed certain fitters in their employment, including Bernard Flannigan, to construct the frames of a vessel. Upon 27th October, Flannigan and five fitter's helpers or labourers, whom he had engaged to help him, were engaged in raising a plate to have holes punched therein. A chain sling was round the plate, and Flannigan took a "cut link" and attached the sling to the chain of the crane. When the plate was slung up by the crane the "cut link" broke and the plate fell upon the foot of Patrick Sweeney, fitter's helper, one of the men working with Flannigan, and crushed it severely.

Sweeney raised an action in the Sheriff Court against Duncan & Company, and claimed damages for the injuries sustained by him.

The pursuer pleaded—"(1) The pursuer having suffered loss, injury, and damage, through the fault and negligence of the defenders, or of those for whom they are responsible, is entitled to reparation therefor. (2) The pursuer having been injured when in the employment of the defenders as a workman, through the fault and negligence of the defenders or of those for whom they are responsible, is entitled to reparation under the Employers Liability Act 1880, section 1, sub-sections 1, 2, and 3."

The defenders pleaded—"(1) The relationship of master and servant not having existed between the pursuer and the defenders, the pursuer is not entitled to reparation under the Employers Liability Act 1880. (2) The pursuer not having been injured through the fault or negligence of the defenders, or of any one for whom they are responsible, the defenders should be assoilzied."

A proof was allowed, at which it was established that it was the practice in the defenders' yard for squads of fitters to take contracts for the framing of vessels, and be paid so much per frame. Each man got his