Accordingly the only condition here upon which we can exercise our authority is if the conditions have not been fully performed—fully performed, that is, by the railway company. Now, have the railway company failed to fulfil the conditions of the bond "for payment of all such purchase-money or compensation as may in manner hereinbefore provided be determined to be payable by the promoters of the undertaking?" The facts are these—the arbiter pronounced his award, and, as I understand, fixed two sums, which were to be paid absolutely, and then named various other sums which were to be paid in certain contingencies. That was the position of matters, but the actual existing state of the facts is this, that an action of reduction of that award has been brought by the railway company, so that its validity or invalidity is at present *sub judice*. A reclaiming-note in this action is pending before us and yet we are now asked to say, while that award is still *sub judice*, whether or not the railway company are bound to pay the sums named in that award. If they are not bound to pay, then they are not in default and their default can only be established when their liability to pay has been finally determined.

These are the facts of the case, and on these facts I have come to the conclusion with your Lordship that we have no authority to grant the prayer of this petition, and indeed that the pursuers had no authority to present this petition.

In the case of *Fortune* referred to, an action of reduction of the award had only been threatened. There no question of liability to pay was actually *sub judice*, and therefore that case is not applicable here.

LORD M'LAREN — The only ground on which the petitioner can get up this deposit is, that the railway company is in default in not paying the compensation money awarded. But whether the company is or is not in default is a question of fact, not to be settled by the one fact that the company has not yet paid the money, but depending on all the circumstances of the case. The complaint of the petitioner is, that when he asked for his money he received instead a summons of reduction of the arbiter's award. Now, there is no appeal provided under the Lands Clauses Act from the arbiter's award, and I should hesitate to say that a party who has an award in his favour is to be kept out of his money pending inquiries into the conduct of the arbiter. But it has been explained to us that an action of reduction of the arbiter's award is depending, and that the grounds of that reduction are that the arbiter has gone beyond the terms of the reference, having included in his estimate of compensation certain hypothetical profits proposed to be derived from turning the ground into a vineyard or a horticultural establishment covered with glass. If the arbiter has exceeded his powers there can be no doubt as to the jurisdiction of the Court to set aside the award as being *ultra fines compromissi*, a jurisdiction which is in no way affected by the Act of regulations. In these circumstances I think there has not been a final determination of the amount due to the petitioner so as to put the company in default if they do not instantly pay the sum awarded. The Lord Ordinary at the end of his note says, that as the railway company had refused to pay anything meantime, and as his Lordship had disposed of the action of reduction of the award he must grant warrant to uplift the consigned money. That view would be quite sound if the Lord Ordinary's judgment in the action of reduction were final, but as the reclaiming-note against it has been presented this ground of decision fails. We have not yet applied our minds to the question raised in the reduction, and pending this reclaiming-note I think we cannot hold that the railway company is in default.

LORD KINNEAR—I am of the same opinion, and for the reasons which your Lordships have already expressed.

The Court recalled the interlocutor of the Lord Ordinary, and dismissed the petition.

Counsel for the Petitioner—R. V. Campbell — W. Thomson. Agents — W. & J. Burness, W.S.

Counsel for the Respondent — C. S. Dickson — James Reid. Agents—Clark & Macdonald, S.S.C.

Saturday, March 16.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

THE GLASGOW DISTRICT SUBWAY COMPANY *v.* ESSLEMONT.

Arbitration—Statutory Reference to Sheriff—Award—Suspension—Review—Proof to Show Grounds of Award—Glasgow District Subway Act, 1890 (53 *and* 54 *Vict. c.* 162), *sec.* 73—*Lands Clauses Consolidation (Scotland) Act*, 1845 (8 *Vict. c.* 19), *secs.* 21 *and* 22.

Section 73 of the Glasgow District Subway Act, which authorised the construction of a subway in Glasgow, provided that, if the construction of the subway should cause any "structural damage" to any buildings in the streets under which it was constructed, the company should make compensation to the owners or occupiers, and that such compensation should be ascertained in the manner provided by the Lands Clauses Consolidation (Scotland) Act. By section 21 of the Lands Clauses Act it is provided that, if the compensation claimed does not exceed £50, the amount due shall be settled by the Sheriff, and section 22 provides that the decision of the Sheriff shall be final and not subject to review.

The tenant and occupier of a dwelling-house applied to the Sheriff to fix the

amount of compensation due to her in respect of damage caused by the company's operations. She averred that she earned her living by taking in lodgers, and that she had been unable to obtain lodgers "on account of the noise, shaking, and wholesale inconvenience occasioned to dwellers in the house by the operations" of the company; and further that "in consequence of said operations nearly all the windows in the house had been put in such a state through cracking and settling of the walls as to be unable to shut," and lodgers had left her for this reason. She estimated her loss at £50. The Sheriff ordained the company to pay her £30.

The company presented a note for suspension of the decree of the Sheriff and the charge following thereon, averring that the Sheriff in making his award had taken into consideration other than structural damage, and that notice of the damage had not been given to the company by the occupier within the time required by the statute.

The Court (*diss.* Lord Young, *aff.* the judgment of Lord Kyllachy) allowed a proof.

Section 73 of the Glasgow District Subway Act, 1890 (53 and 54 Vict. c. 162)—a statute which authorised the Glasgow Subway District Railway Company to construct certain railway works in Glasgow—enacted as follows:—"If by reason of the construction of the subway any structural damage shall be caused to any buildings, present or future, fronting or abutting on the streets or roads in or under which the subway is constructed, or any buildings erected or which may hereafter be lawfully erected upon the land by the side of the subway, or to the foundations of any such buildings, or if by reason of such construction any damage shall be done to any stock or effects in any such buildings, the company shall make compensation therefor to the owners, lessees, or occupiers of such buildings, and such compensation shall be ascertained in the manner provided in the Lands Clauses Consolidation (Scotland) Act, 1845, in cases of disputed compensation: Provided that compensation for injuries recoverable under this section shall be recoverable from time to time as such injuries may accrue or be discovered; but no claim for such compensation shall be made or allowed unless the occurrence of the damage in respect of which it is intended to claim, if known to the claimant, shall be notified in writing to the company without unreasonable delay by the person intending to claim, nor shall any such claim be recoverable unless it shall be presented to the company by such person within six months from the discovery of the damage complained of."

By section 21 of the Lands Clauses Consolidation (Scotland) Act, 1845 (8 Vict. cap. 19) it is enacted—"If the compensation claimed and disputed shall not exceed £50, unless both parties agree to refer such compensation to arbitration, the same shall be settled by the Sheriff."

Section 22 of the same Act provides—"It shall be lawful for the Sheriff, upon the application of either party with respect to any such question of disputed compensation, to issue an order for the other party to appear before such Sheriff at a time and place to be named in the order; and upon the appearance of such parties . . . it shall be lawful for such Sheriff to hear and determine such question, and for that purpose to examine such parties or any of them and their witnesses upon oath without written pleadings or reducing them to writing . . . and the determination of the Sheriff upon such questions shall be final and conclusive and not subject to review or appeal in any form or court."

In March 1894 Mrs Mary Smith or Esslemont, residing at 102 New City Road, Glasgow, presented an application against the Glasgow District Subway Company in the Sheriff Court at Glasgow, in which she prayed the Court "to ordain the defenders to appear before the Court at such diet as may be appointed, and at said diet to determine the amount of compensation to be paid by the defenders to the pursuer in respect of the loss and damage she has sustained through the execution of their undertaking, as being the tenant and occupier of the dwelling-house after mentioned."

In her condescendence Mrs Esslemont stated—"(2) The pursuer has been tenant and occupier of her said dwelling-house upon yearly let for four years past at the annual rent of £19, 15s. The said dwelling-house consists of three rooms and kitchen, and the pursuer is dependent for her living upon letting her rooms to lodgers, and waiting and attending on them. Since 2nd February 1893, in consequence of defenders' operations, she has been unable to retain her then lodgers in their tenancies, and has also been unable to procure new lodgers, except with much difficulty, on account of the noise, shaking, and wholesale inconvenience occasioned to dwellers in the house by operations of defenders. (3) Further, in consequence of said operations, nearly all the windows in the house have been put in such a state through cracking and setting of the walls, as to be unable to shut, and on this account, during the recent abnormally stormy winter, the house has been barely habitable, and lodgers have left for this reason. (4) The tenement has sustained structural damage by or through the said operations, for which the proprietor has been awarded the sum of £1200, and the expenses of an arbitration in connection therewith. The tenant of the shop in the ground floor likewise obtained under similar proceedings a sum of £400 and expenses for his loss and damage. (5) The said loss and damage sustained by the pursuer is moderately stated at the sum of £50, conform to the accounts herewith produced, and the defenders are bound to compensate her therefor in terms of law. In addition to the said statement of claim, the said pursuer has since the date thereof, 17th February 1894, sustained further loss, injury, and damage, for which meantime her claim is reserved."

On 20th April 1894, after hearing proof, the Sheriff-Substitute (BIRNIE) pronounced the following interlocutor — "Finds the defenders liable to the pursuer in the sum of £30 sterling of principal, with £8, 8s. of costs, and decerns against the defenders therefor."

This decree was extracted, and the company were charged to pay the amount decerned for, whereupon they presented a note of suspension against Mrs Esslemont in which they prayed the Court to suspend the Sheriff's decree and charge.

They averred—(Stat. 3) . . . Under none of the provisions of the Railway Acts was the Sheriff entitled to give compensation for the 'noise, shaking, and wholesale inconvenience,' but this was what he practically awarded the whole damages for. (Stat. 6) The averments of the respondent in the said petition, and any proof offered by her, showed that the damage, if any, arose at 2nd February 1893. In point of fact the complainers' works were pushed entirely past the respondent's property before the end of the year 1892. Their works were carried on from east to west. The excavation of the south tunnel was made up to the respondent's east boundary by 14th November, and up to and beyond the west boundary by 5th December 1892. The second tunnel passed the respondent's east boundary on 30th November, and her west boundary on 18th December 1892. Any damage done must have been done at this last date. No notice of any kind of the damage alleged by the respondent was given to the company (complainers) prior to 5th February 1894."

They pleaded *inter alia*—"(1) The Sheriff-Substitute having given decree for a claim which, under the Subway Act, the respondent was barred from making, and having thus acted *ultra vires* and beyond his powers, suspension should be granted as craved. (2) The Sheriff-Substitute having awarded damages for claims for which the respondent had no claim under any of the Railway Acts, the complainers are entitled to suspension."

Mrs Esslemont lodged answers averring, *inter alia*—"Sections 21 and 22 of the Lands Clauses Act (8 Vict.), c. 19, under which the claim was made, are referred to, by the latter of which it is provided that the determination of the Sheriff 'shall be final and not subject to review or appeal to any form of Court whatever.' The Sheriff under the statutes has power to hear parties without written pleadings and without reducing the evidence to writing. The statement of claim does not preclude a claimant from alleging additional grounds of damage to those made in the statement of claim. In the present case structural damage to the premises, and consequent loss to the respondent to the full extent of the sum awarded, were caused by the complainers' operations, and this was alleged and proved before the Sheriff. The proprietors of the said premises and the tenant of the spirit shop on ground flat respectively obtained awards of £1200 and £400 in a reference under the Lands Clauses Act, in respect of structural damage caused to the premises by the complainers' said operations. The respondent had a good and valid claim against the defenders under and in virtue of sections 73 and 74 of the Glasgow District Subway Act 1890, and the said claim was validly stated by her and was validly decided by the Sheriff-Substitute in the deliverance complained of."

On 1st December 1894 the Lord Ordinary (KYLLACHY) before answer allowed the parties a proof of their averments.

"*Opinion.*— . . . On the merits the first point is that according to the complainers' averments the Sheriff exceeded his jurisdiction in considering the respondent's claim at all. The Special Act, it appears, contains the following clause of prescription or limitation, 'provided that compensation for injuries recoverable under this section shall be recoverable from time to time, as such injuries may accrue or be discovered; but no claim for such compensation shall be made or allowed unless the occurrence of the damage in respect of which it is intended to claim, if known to the claimant, shall be notified in writing to the company, without unreasonable delay, by the person intending to claim, nor shall any such claim be recoverable unless it shall be presented to the company by such person within six months from the discovery of the damage complained of.' The complainers aver and offer to prove that the damage here arose before the end of the year 1892, and that no notice of it was given to the company until 5th February 1894. They also make averments (I mean by way of narrative of the claimant's first claim), which may perhaps be taken to imply that the claimant (the present respondent) discovered the damage claimed for not later than February 1893. This, they say, if proved, is conclusive, because it ousts the Sheriff's jurisdiction, taking the case altogether outside the Act.

"The claimant's reply is that the Sheriff considered this question of prescription or limitation, which, of course was a question of fact, and that he confined his award 'to damage suffered by the claimant, her claim to which had not prescribed under the statute.' They also point out, although in this I think they are too critical—that the complainers nowhere aver in words that the damage came to the claimant's knowledge more than six months before her notice to the company.

"I think on this matter I must allow a proof. The parties are at issue as to what the Sheriff did; but, apart from that, I do not at present see how if the facts were as the complainers allege, the Sheriff's judgment could be final, or could even be looked at. His jurisdiction is entirely statutory, and if the claim in question is excluded by the statute, he (the Sheriff) could not, by his judgment, bring it within the statute, because that would be extending his own jurisdiction. The facts, therefore, must be ascertained by proof.

"The complainers' other point on the merits is of this nature. The Special Act, it is said, allows compensation only for structural damage, but the claimant has

included in her claim laid before the Sheriff not only structural damage but damage from noise, shaking, and wholesale inconvenience—and the Sheriff, it is averred, has entertained this part of the claim and allowed, as the appellant puts it, 'practically the whole sum he did award for noise, shaking, and wholesale inconvenience.'

"The respondent of course denies that the Sheriff did anything of the kind. She says—as I understand her—that the whole sum awarded by the Sheriff (£30) was for structural damage, that is to say, for structural injury to her house, and damage of different kinds thence resulting. But the respondent also contends that the issue of fact which is thus raised is one which does not fall to be determined by evidence. The Sheriff, she says, must be presumed to have disregarded such part of the claim as was outside the statute—at least that this must be presumed, unless the contrary appears from his judgment. With respect moreover to what claims fall within the statute, the respondent does not admit that compensation may not be due for noise, shaking, and the like, when the same are due to the construction of the railway, as distinguished from its use, and when they are of such degree as to affect the uses of the premises, and to have been actionable, but for the statute, at common law. She therefore contends, separately, that the complainers' statement is irrelevant in so far as it merely sets out that the Sheriff's award included damage under the heads referred to.

"Now, I do not consider that I am bound to presume that the Sheriff gave effect to every item of the claim which was put before him. That would, I think, be a somewhat extreme presumption. But, on the other hand, I do not feel at liberty to presume—in the face of averments to the contrary—that the Sheriff confined himself to the structural damage which both parties agree to be a legitimate subject for compensation. I recognise the awkwardness of putting the Sheriff in the position of being examined as a witness with respect to the basis of his award. But he is in this matter really an arbiter, exercising a special statutory jurisdiction, and I do not see how such an inquiry can be avoided. I therefore propose to allow before answer a proof to both parties of their averments, and under that proof it will be open to ascertain from the Sheriff whether he allowed for anything but structural damage, that is to say, for anything but structural damage, or the direct result of structural damage; and next, whether if he did so he distinguished between damage resulting from the use of the railway and damage resulting from the construction of the railway, and between damage which would have and damage which would not have involved a nuisance at common law. In short, I do not doubt that the proof will put me in a position to decide the whole questions between the parties."

The respondent reclaimed—When the case was before the Inner House the complainers amended their record by stating therein that "the complainers specially called the Sheriff-Substitute's attention to this section, and pleaded that the respondent's claim was excluded as not being for structural damage nor having been timeously notified and presented, but the Sheriff-Substitute disregarded the said section and the said pleas," and by adding to their statement that they had received no notice of damage from the respondent prior to 5th February 1894 this addition, "though said damage and the cause thereof were known to her day by day as the said damage accrued."

Argued for the respondent—There was no relevant averment on record that the Sheriff-Substitute had acted *ultra vires* or corruptly, and unless the railway company averred that the arbiter corruptly and illegally allowed a sum for damages which did not fall within the section of the Act the Court would not allow his award to be opened up. It was not competent for the Court to inquire into the mode by which the Sheriff-Substitute had arrived at his decision unless it was stated that he had wilfully and corruptly refused to take into consideration the complainers' arguments and gone beyond his powers—*Rogerson* v. *Rogerson*, January 31, 1835, 12 R. 583; *Glasgow City and District Railway Company* v. *Macgeorge, Cowan & Galloway*, February 25, 1886, 13 R. 609. No questions could be put to the Sheriff-Substitute as to what passed in his own mind when exercising the discretionary powers entrusted to him by the Act—*Duke of Buccleuch* v. *Metropolitan Board of Works*, 1872, L.R., 5 Eng. and Irish App. 418. It must be assumed that the Sheriff had not gone beyond his powers, and that the whole sum awarded by him was for structural damage. It must also be assumed that the Sheriff knew of the limitation clause in the statute and confined his award to damage suffered, her claim to which had not prescribed.

Argued for the complainers—The rule was quite distinct that the Sheriff could not be asked as to what passed in his mind in awarding damages if the claim made was lawful under the statute, but if the claim went beyond the statute and the Sheriff entertained the whole of it, the award must be set aside. In order to find out whether the Sheriff had taken into consideration anything more than structural damage, a proof must be allowed. If in any proceedings before an arbiter he had failed to do substantial justice, that would entitle the Court to allow a proof—*Lanarkshire and Dumbartonshire Railway Company* v. *Main*, July 17, 1894, 21 R. 1018. The damage arose before the end of 1892; no notice was given to the company until 5th February 1894; the claim was not therefore recoverable, as notice had not been given as required by the Act within six months from its discovery. A proof should be allowed.

At advising—

LORD JUSTICE-CLERK—In this case a claim was made against the Glasgow District Subway Company by one who was

not an owner of the ground taken by the company. No doubt under the Act of Parliament if structural damage is caused to any person by reason of the operations of the company that structural damage may be a matter giving rise to a claim for compensation. In the present instance the case went to the Sheriff for the purpose of determining whether such damage had been caused to the petitioner's dwelling-house, and on the face of the proceedings it is not quite clear that the claim was made in respect of structural damage. Certain phrases in the condescendence seem to indicate that something else than structural damage may have formed a ground for part of the damages awarded. The case comes before us on a reclaiming-note from the judgment of the Lord Ordinary, who has found that the company is entitled to a proof of what the damages were given for by the Sheriff.

This case was tried before the Sheriff-Substitute in Glasgow, and if the case had come before him in his ordinary capacity as Sheriff-Substitute I should have been very slow to hold that it was a matter that could be inquired into. But the Sheriff in this case acted as a valuator appointed by Act of Parliament. In these circumstances I am of opinion that we are not entitled to refuse the company the inquiry they ask as to what it was that the valuator gave damages for.

I am for affirming the Lord Ordinary's interlocutor.

Lord Young—"On the merits," the Lord Ordinary says, "the first point is that according to the complainer's averments the Sheriff exceeded his jurisdiction in considering the respondent's claim at all," and in the view, as I understand his Lordship's note, that if these averments are true the Sheriff had no jurisdiction to consider the claim, his Lordship has allowed a proof of them. The question between the parties thus regards the Sheriff's jurisdiction to consider the respondent's claim against the complainers. That claim was for compensation under section 73 of the complainers' Act. It may have been bad on the facts, or even on the statement of it, but the respondent certainly had no other claim than one under this clause of the Act.

The clause provides that "if by reason of the construction of the subway any structural damage shall be caused to any buildings, . . . or if by reason of such construction any damage shall be done to any stock or effects in any such buildings, the company shall make compensation therefor to the owners, lessees, or occupiers of such buildings."

It is not disputed that during the period between February 1893 and February 1894 the respondent was "lessee or occupier" of a house forming part of a building in the situation to which section 73 of the Act applies, and that during her occupation (the exact date however being disputed) structural damage was caused to the building "by reason of the construction of the subway."

The substance of her claim, as I understand it, is that, as lessee and occupier from 2nd February 1893 to 17th February 1894 of part of the building so structurally damaged, she suffered damage to the amount of £50. The claim generally was intimated to the complainers, the railway company, on 5th February 1894, with the promise that a detailed statement would be submitted shortly. This was done on 7th February 1894. No notice seems to have been taken of it, and on 12th March 1894 the matter was, as a question of disputed compensation, laid before the Sheriff on the "application" of the respondent as the party claiming the compensation. The "application" (I use the statutory name—see Lands Clauses (Scotland) Act 1845, sec. 22), which is in the form of petition, is slovenly no doubt, but fortunately the statute dispenses with all written pleadings when the claim does not exceed £50, and requires the Sheriff "on the application of either party to determine the question of disputed compensation" in the most summary manner possible. If the respondent's petition cannot be regarded as an "application" to the Sheriff under section 22 of the Lands Clauses Act to settle "a question of disputed compensation," we require no evidence, the petition being before us, in order to set aside the Sheriff's orders upon it which were made in the view that it is. It was not of course a case of disputed compensation under the Lands Clauses Act, but under section 73 of the Glasgow District Subway Act, which provides that compensation under it "shall be ascertained in the manner provided in the Lands Clauses Consolidation (Scotland) Act 1845 in cases of disputed compensation." In short, any question of disputed compensation under section 73 of the Subway Act is to be determined in the same manner as a question of disputed compensation under the Lands Clauses Act, that is to say, "if the compensation claimed and disputed shall not exceed £50," by the Sheriff on the application of either party without written pleadings or reducing the evidence to writing, his determination being "final and conclusive and not subject to review or appeal in any form or Court whatever."

No objection was stated to the Sheriff dealing with the application as he did by ordering the parties to appear, hearing them both, and examining their witnesses on oath. The objection now made, if I understand it, is not that the Sheriff had no jurisdiction to consider the application or hear evidence and argument for and against it, but that had he justly appreciated the evidence and argument submitted to him he would have rejected the claim for compensation—sustaining the grounds and upholding the views on which it was disputed—in short, that he ought, in the exercise of his jurisdiction, to have decided otherwise than he did. This objection would seem at first sight, certainly, to be excluded by the consideration that there are no written pleadings or record of evidence, and that the Sheriff's "deter-

mination" is final. I think the effect and manifest purpose of the language of section 22 of the Lands Clauses Act (which admittedly governs the case) is to prevent the Sheriff's determination upon disputed claims not exceeding £50 being impeached in a Superior Court, and I must confess that I am unfavourable to the view that when the Legislature dispensed with any record of pleadings or evidence it was only intended to put the parties to the expense and inconvenience of imperfectly supplying their place by leading evidence in a court of review as to what was pleaded and proved before the Sheriff, or that the declaration of finality is operative only if the Sheriff when examined as a witness shall give an account and explanation of his "determination," which, when taken along with the evidence as to the whole proceedings before him (pleadings and proof), shall satisfy the court of review that he was right.

The Lord Ordinary notices two points on which he desires evidence, viz., (1) whether the respondent presented her claim to the complainers within six months from the discovery of the damage for which the Sheriff has awarded £30; and (2) whether it was proved to the Sheriff that the respondent sustained injury from structural damage to the building, or whether the Sheriff allowed "practically the whole sum he did award for noise, shaking, and wholesale inconvenience"—not being the direct result of structural damage. I am unable to assent to the view that such evidence may be allowed. The parties had their opportunity of leading all competent evidence which was available and they thought material as to the structural damage done and when it showed itself, how it increased (for such damage I suppose never diminishes), and the full extent and consequences of it in the end. I have no reason to doubt that they did so. It is averred by the respondent on this record that the proprietors of the building were awarded £1200 for this structural damage, and the averment when repeated at the bar before us was not denied. The damage was serious, and the fact of its occurrence notified and known to the complainers. The damage of which the respondent complains is the loss to her as a lodging-house keeper from February 1893 to February 1894 in consequence of lodgers leaving and her inability to procure others to the same number and at the same rent owing to the barely habitable condition to which her rooms were reduced by the structural damage and its consequences. Is this damage of a kind for which compensation may be claimed under section 73? I cannot think it doubtful that it is. Compensation therefore would have been recoverable at the common law had the operations which caused it not been authorised by statute, and the reason of the provisions which occur in all statutes authorising works whereby property may be damaged and those interested in it injured (in the familiar sense) is simply to exclude the defence that no one can have compensation for suffering caused by lawful acts. I therefore hold that if the respondent was damaged in her business of a lodging-house keeper in consequence of the structural damage caused by the construction of the subway she was entitled to claim compensation, for I cannot so read section 73 as to exclude such an obviously reasonable and just ground of claim, and if necessary should read the clause liberally in order to include it. She accordingly made the claim, and the complainers disputing it, there was of course jurisdiction somewhere to determine the dispute, and it has not been suggested that it was elsewhere than with the Sheriff of Lanark, or to be exercised by him otherwise than under sections 21 and 22 of the Lands Clauses Act, having regard to the fact that the claim did not exceed £50. I must therefore conclude that the parties were legitimately and in all respects regularly before the Sheriff on a question of disputed compensation which he had jurisdiction to determine finally without appeal.

The complainers allege on this record that they, when before the Sheriff, disputed the claim on two grounds, viz.—1st, That the structural damage to the building occasioned no damage to the respondent, it not being true in fact that her business suffered from lodgers leaving or a difficulty in supplying their places, or that if it did, the fact was not attributable, or at least not exclusively attributable, to structural damage, but to noise, shaking, and inconvenience, which was or might have been otherwise occasioned; and 2nd, That the claim was not presented "within six months from the discovery of the damage complained of." On the first ground I shall only say that it has no relation to any question of jurisdiction or finality, and that I strongly object to the proposal to examine the Sheriff in order to ascertain whether in fixing the compensation at £30 he took account only of such damage to the respondents lodging-rooms (I mean such as rendered them more or less unlettable) which he was certainly assured had been occasioned by structural damage exclusively, and no account whatever of what might possibly have existed and scared away her customers even though the tenement had been strong enough to escape structural damage (which it admittedly did not). The second ground (the delay in making the claim) is also, in my opinion, foreign to any question of jurisdiction or finality. It is no doubt a condition of the validity of the claim that it shall be made within six months from the discovery of the damage. The existence of the damage is equally a condition of the validity of the claim. The condition of timeful notice and demand is familiar in contracts as well as in statutes—most familiar in mercantile contracts and leases, but it is to me a quite novel idea that such a condition affects jurisdiction or a provision of finality, so that it may be for one tribunal (this Court for example) to determine whether the stipulated timeful notice

was given and demand made, and another (the Sheriff) whether the demand was well founded. Is it contended that the Sheriff ought to have declined to consider the objection that the claim was not timeously made, and delayed the case till this objection was decided in an ordinary action, or is the contention this, that it was within his jurisdiction to take evidence upon it and determine it, but that to this extent his determination, whatever it might be, was not final?

I can well believe that the Sheriff may in this case have found the question of timeous notice and demand one of difficulty. I do not suppose that the structural damage to a house caused by adjacent underground operations necessarily occurs fully developed with all its evil-producing powers manifested in a moment, or even in a week or a month. I assume the accuracy of the Sheriff's determination that down to 17th February 1894 the respondent sustained damage to the amount of £30 and no more. When did she discover the damage? I cannot adopt the view that the discovery of the damage means the discovery of the structural damage to the building, and think it rather means the discovery of the damage resulting to her therefrom, for on this alone her claim for compensation is founded. I think the manner in which the respondent states her loss is fair and unobjectionable, and the Sheriff must have so regarded it, although he thought the sum claimed excessive. I also think that the Sheriff properly dealt with the case on the footing that the loss or damage for which compensation was claimed terminated in February 1894, when it amounted in his judgment on the facts to £30. There is no reason whatever that I can see for the suggestion that he awarded this £30 for loss and damage which accrued and was discovered six months before the presentment of the claim. Some of it possibly may, but it is according to our common law and familiar practice in dealing with prescriptions to look only to the termination of the account and to date therefrom. In the complainers' last amendment of the record (Stat. 5) they say no notice of damage was given by the respondent till 5th February 1894 — "though said damage and the cause thereof were known to her day by day as the said damage accrued." But according to this view a separate six months' prescription would run on each day's damage —a new term running and counting from every day that a lodger left without a successor coming.

I am of opinion that the Sheriff's determination complained of is within his jurisdiction, is final and conclusive, and that we cannot review it.

LORD RUTHERFURD CLARK—I think the interlocutor of the Lord Ordinary should be affirmed. I regret it, but do not see how any other course can be followed.

LORD TRAYNER—I agree in thinking that the interlocutor of the Lord Ordinary should be affirmed. I abstain from expressing any opinion at present as to the limit of the defenders' liability under the 73rd section of their Act until the inquiry allowed by the Lord Ordinary has been made. It will then appear what is the particular damage or injury for which compensation has been awarded, and therefore whether the compensation has been awarded for which under the complainers' Act the complainers are or are not responsible.

The Court adhered.

Counsel for the Complainers — R. V. Campbell—W. Thomson. Agents—W. & J. Burness, W.S.

Counsel for the Respondents—A. S. D. Thomson — Hunter. Agents — Ronald & Ritchie, S.S.C.

Saturday, March 16.

FIRST DIVISION.

[Lord Low, Ordinary.

ELDER'S TRUSTEES *v.* ELDER, &c.

(*Ante*, vol. 31, p. 594, and 21 R. 704.)

Succession — Settlement — Conditio si sine liberis decesserit—Implied Revocation—Prior Will—Intention of Testator.

A testator executed a general trust-disposition and settlement in 1858 in favour of children born or to be born. In 1886 he executed a trust-deed in which he expressly revoked all prior settlements, and settled his whole means and estate upon his then existing children. The Court having held that this settlement had been revoked in consequence of the subsequent birth of a child, it was attempted to revive the prior deed on the ground that the revocation destroyed the clause cancelling prior settlements.

Held that the prior settlement was not revived.

Opinion per Lord M'Laren that, whenever a last will is cut down by the operation of the *conditio si sine liberis decesserit*, all previous testamentary settlements must fall along with it, except such as are obligatory and matter of contract.

Process—Multiplepoinding—Claims—Competency—Res judicata.

In a multiplepoinding the Court decided that a will had been revoked in virtue of the *conditio si sine liberis*, and ranked and preferred one of the claimants. Thereafter while the fund was still *in manibus curiæ*, certain of the claimants, who had unsuccessfully maintained that the will had not been revoked, lodged new claims pleading that the revocation had the effect of setting up a prior settlement in which they were interested.

Held that these new claims were incompetent, it being *res judicata* that the claimants had no right to the fund.