Wednesday, November 6.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

GLASGOW DISTRICT SUBWAY COMPANY *v.* T. ALBIN & SON.

Railway—Railway Operations—Compensation to Yearly Tenants—Railway Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. c.* 33), *sec.* 6—*Lands Clauses Consolidation (Scotland) Act* 1845 (8 *and* 9 *Vict. c.* 19), *sec.* 114.

Where a tenant from year to year claims, under sec. 6 of the Railway Clauses Act 1845, that the premises occupied by him as tenant have been injuriously affected by railway operations, his claim for compensation falls to be determined, not by statutory arbitration, but by application to the Sheriff under sec. 114 of the Lands Clauses Act 1845.

Caledonian Railway Company v. *Barr*, 17 D. 312, *followed.*

The Glasgow District Subway Act 1890 (53 and 54 Vict. c. 162), which empowered the Company thereby incorporated to construct a subway below certain streets in Glasgow, incorporated the Lands Clauses Acts, and, *inter alia*, sec. 6 of the Railway Clauses Act 1845—(*Glasgow Subway Company* v. *Crabbie*, August 7, 1895, 32 S.L.R. 572). Section 6 of the latter Act is as follows:—"In exercising the power given to the company by the special Act to construct the railway, and to take lands for that purpose, the company shall be subject to the provisions and restrictions contained in this Act, and in the said Lands Clauses Consolidation (Scotland) Act, and the company shall make to the owners and occupiers of, and all other parties interested in, any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties by reason of the exercise, as regards such lands, of the powers by this or the special Act, or any Act incorporated therewith, vested in the company, and except where otherwise provided by this or the special Act, the amount of such compensation shall be ascertained and determined in the manner provided by the said Lands Clauses Consolidation Act for determining questions of compensation with regard to lands purchased or taken under the provisions thereof; and all the provisions of the said last-mentioned Act shall be applicable to determine the amount of any such compensation, and to enforcing the payment or other satisfaction thereof."

By section 114 of the Lands Clauses Consolidation (Scotland) Act 1845, it is enacted, with respect to lands subject to leases, that "if any such lands shall be in possession of any person having no greater interest therein than as tenants for a year or rom year to year, and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands, and for any just allowance which ought to be made to him by any incoming tenant, and for any loss or injury he may sustain, or if part only of such lands be required, compensation for the damage done to him in his tenancy by the severing of the lands held by him, or otherwise injuriously affecting the same; and the amount of such compensation shall be determined by the sheriff in case the parties differ about the same; and upon payment or tender of the amount of such compensation, all such persons shall respectively deliver up to the promoters of the undertaking, or to the person appointed by them to take possession thereof, any such lands in their possession required for the purposes of the special Act."

During the construction of the subway T. Albin & Son, hairdressers and perfumers, No. 1½ West Milton Street, a street leading off Cowcaddens Street, and Thomas Albin, the sole partner of the firm, made claims for compensation against the company. West Milton Street was not one of the streets under which the subway was constructed, but it was taken possession of by the company for purposes connected with their operations. On 30th January 1895 T. Albin & Son, by deed of nomination served upon the company, nominated Charles Yule, accountant, Glasgow, as their arbiter, in terms of the Lands Clauses Consolidation (Scotland) Act 1845, for the purpose of determining and ascertaining their alleged claim against the company. This nomination proceeded on the narrative that the company had entered into possession of a portion of the street known as West Milton Street, and had erected a barricade for purposes connected with the construction of the subway; that the claimants' shop fronted and abutted on the street and the barricade. It also set forth that the claimants had from time to time given the company notice of claims "for loss and damage to our stock and effects, business premises, and loss of and interference with the access to the said premises caused through the construction of the subway and the operations of the company;" that the company had repudiated liability for the loss and damage thus caused, and that a case of disputed compensation had thus arisen, which, in accordance with the provisions of the Glasgow District Subway Act, fell to be ascertained in the manner prescribed by the Lands Clauses Consolidation (Scotland) Act 1845. They also required the company to concur with the claimants in the nomination of Charles Yule as sole arbiter, or to name another person to act as arbiter on behalf of the company along with Mr Yule; and they gave notice that in the event of the company failing to nominate for the space of fourteen days after receipt of the claimants' nomination, the latter would themselves nominate and appoint Charles Yule to act as arbiter for both parties.

In order to prevent Charles Yule from acting as sole arbiter, the company, on 4th February 1895, nominated John Watson Ormiston, mining engineer in Glasgow, as their arbiter under protest and under denial of the validity of the alleged claim.

Thereafter the company raised an action of suspension and interdict against Messrs T. Albin & Sons, Thomas Albin, the sole partner of that firm, Charles Yule & John Watson Ormiston, in which they prayed the Court to suspend the procedure in the reference, and to interdict the respondents Messrs Yule & Ormiston from acting as arbiters.

In their condescendence the complainers denied that the claims were proper subjects for compensation either under the special Act or under the general law, and averred—"The said T. Albin & Son have no greater interest in their said shop than as tenants from year to year, and as such would in no view be entitled to resort to any other or more formal procedure than that provided by the 114th section of the Lands Clauses Consolidation (Scotland) Act 1845."

They pleaded, *inter alia*—"(4) If any ground of compensation exists, the procedure adopted by the respondents is inappropriate and incompetent as a method for ascertaining the same."

The respondents T. Albin & Son, and Thomas Albin, lodged answers and pleaded, *inter alia*—"(4) The nominations of arbiters having been regularly proceeded with, and being in accordance with the provisions of the said Glasgow District Subway Act and the Lands Clauses Consolidation (Scotland) Act 1845, the note of suspension and interdict should be refused, with expenses."

On 9th August 1895 the Lord Ordinary sustained the pleas-in-law for the complainers, and interdicted, prohibited, and discharged the respondents in terms of the prayer of the note of suspension.

In his note the Lord Ordinary held (1) that the claim for compensation made by the respondents did not fall within any of the sections of the complainer's special Act, these sections dealing exclusively with buildings and lands in streets under which the subway was constructed; (2) that the claim did not fall within section 6 of the Railway Clauses Act 1845, in respect that the claim was substantially one for loss to trade and not for injury to buildings; but (3) that even assuming that the claim was competently made under that section, it fell to be determined not by arbitration but by application to the Sheriff under section 114 of the Lands Clauses Act 1845.

The part of the Lord Ordinary's note dealing with the last point was as follows:—"The complainers further maintained that, even if it were held that the respondents had right to compensation, they could, as yearly tenants, only proceed before the Sheriff under the 114th section of the Lands Clauses Act. I am of opinion that I am bound to sustain that argument. The precise point was decided in the case of *The Caledonian Railway Company* v. *Barr*, January 27, 1855, 17 D. 312. No Scottish case was quoted on the other side. It appears, however, that the decisions in England have been different. The difference is noticed in Deas on railways, p. 161, *et seq.* In the cases referred to by him it was held that the 121st section of the English Act, which corresponds to the 114th section of the Scottish Act, applied only when land was taken. I consider, however, that I am bound to follow the decision in our own Courts. It may be that in the Inner House the decision in *The Caledonian Railway Company* v. *Barr* might be reconsidered with reference to the English cases. But it must, in the meantime, be followed in the Outer-House."

The respondents reclaimed, and argued,—Section 114 of the Lands Clauses Act 1845 only applied where possession of the lands required to be wholly or partly given up by the tenant before the expiration of his term or interest therein. No doubt the case of *Caledonian Railway Company* v. *Barr* seemed to point to a different construction of the Act, but the construction of the section which was maintained by the respondents had been upheld by English decisions pronounced after the date of *Barr's* case—*Queen* v. *Sheriff of Middlesex*, 1862, 3 L.J., Q.B. 261; *Queen* v. *Stone*, 1866, L.R., 1 Q.B. 529; *Hammersmith, &c. Railway Company* v. *Brand*, 1869, L.R. 4 Eng. and Ir. App. 171, opinion of Lord Colonsay, 209. The terms of section 121 of the English Act (8 and 9 Vict. c. 18) were the same as those of the Scottish Act, and it was important that in questions of this kind the law in England and Scotland should be the same. The case of *The Caledonian Railway Company* v. *Barr* must therefore be held to have been overruled.

Argued for complainers — *Caledonian Railway Company* v. *Barr* ruled the present case. It was a decision of five Judges, and must be held to have laid down the law on the subject as far as the Court of Session was concerned. The decision was also right in principle. The 114th section of the Lands Clauses Act 1845 provided that the amount of compensation for all injuries to yearly tenants, where possession of the lands was wholly or partly given up, was to be ascertained before the Sheriff, and section 6 of the Railway Clauses Act 1845 provided that compensation where land was not taken was to be ascertained in the same way. The English cases were not in point, because the Judges in these cases had only one Act to deal with—section 68 of the English Lands Clauses Act (8 and 9 Vict. c. 18) applying where land was not taken either wholly or partly; and sec. 121 applying where land was taken.

At advising—

LORD JUSTICE-CLERK — There are two matters now before us. The first is as to the competency of the procedure taken by the respondents in the suspension, who are the reclaimers in this reclaiming-note. The other question is as to the relevancy of

their claim, if that claim should be held to be in itself a claim which is competently before us.

I do not think it necessary to consider the second question at all. It seems to me that the first ground, viz., the alleged incompetency of the procedure taken before the arbiter is sufficient for the disposal of this case. It was admitted at the bar that this question had been decided in the Court of Session by the case of *Barr* v. *The Caledonian Railway Company*, and the respondents in the suspension endeavour to get over that case by quoting to us several English cases which do not turn upon the same Acts of Parliament, nor upon the same words as the present case. Still it is argued that these English cases are so exactly analogous that we should disregard the case of *Barr* and give effect to these cases by holding that, inasmuch as it has been decided in England that such a case as this can be competently brought before two justices, it must be brought before an arbiter in Scotland, that being the corresponding tribunal under the arbitration section of the Act, and that we should, following these cases and disregarding the case of *Barr*, hold that the present application for arbitration is competent.

I am not prepared to disregard the case of *Barr*. Whether that case can be differentiated from those cases in England I do not say. There may be considerable ground for saying that it might; but then there is a distinct and clear decision in this Court, and having considered it, the decision in my opinion is binding upon us, and we are not entitled to set aside by our judgment a case that has been deliberately decided in this Court. Therefore I am of opinion that, without giving effect to the whole of the Lord Ordinary's interlocutor, we should recal it and sustain the fourth plea-in-law for the complainers.

LORD ADAM—This case arises out of a claim for compensation made by the respondents here, who are yearly tenants of certain premises in Milton Street; and the claim is said to arise in respect of certain operations by the City of Glasgow Subway Company, by which damage has been suffered by them, and for which they say they are entitled to compensation. It is not disputed that if the case of *Barr* v. *The Caledonian Railway Company* has been properly decided, procedure to have this claim of alleged damage submitted to arbitration is incompetent.

I am of opinion that we must follow this case of *Barr* v. *The Caledonian Railway Company*. I am not disposed to express any opinion as to the soundness of that decision. I agree with your Lordship that the Lord Ordinary's interlocutor should be recalled, and that the fourth plea-in-law for the complainers should be sustained.

LORD TRAYNER — I am of the same opinion. The respondents in the suspension are admittedly yearly tenants of the premises in question, and their claim, so far as it is before us, is a claim for injury to their business premises, and to their stock and effects therein.

Now, in these circumstances the first question that arises is—Is a yearly tenant making such a claim entitled to have that claim submitted to arbitration; or must he submit it, in terms of the 114th section, to the Sheriff? I think that question is not open. I think it is concluded, so far as we are concerned, by the decision in *The Caledonian Railway Company* v. *Barr*. I express no opinion as to the soundness of that decision, but as it is a decision pronounced many years ago, and has no doubt been acted upon in Scotland since, I think we are bound to follow it. I agree with your Lordships that the course to be followed is to recal the Lord Ordinary's interlocutor and sustain the fourth plea-in-law for the complainers.

LORD YOUNG and LORD RUTHERFURD CLARK were absent.

The Court recalled the Lord Ordinary's interlocutor, sustained the fourth plea-in-law for the complainers, and interdicted, prohibited, and discharged in terms of the prayer of the note.

Counsel for the Complainers—Dundas—W. Thomson. Agents—W. & J. Burness, W.S.

Counsel for the Respondents—Salvesen—Anderson. Agent—John Veitch, Solicitor.

Thursday, November 7.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

NORTH BRITISH RAILWAY COMPANY *v.* LANARKSHIRE AND DUMBARTONSHIRE RAILWAY COMPANY.

Arbitration — Railway — Reference of All Differences with respect to Execution of Works—Jurisdiction — Lanarkshire and Dumbartonshire Railway Act 1891 (54 *and* 55 *Vict. c.* 201), *sec.* 6, *sub-secs.* 4, 7, 10.

The Lanarkshire and Dumbartonshire Railway Company were authorised by Act of Parliament to construct a line of railway including a tunnel passing underneath an area of ground owned by the North British Railway Company.

By sec. 6, sub-sec. 4, of the Act the promoters were restricted from interfering with the surface without the consent of the North British Company, and by sub-sec. 7 they were prohibited from proceeding with the construction of the tunnel until the plans had been approved of by that company's engineer.

The tunnel, as ultimately constructed, had a ventilating shaft opening on the area in question, and the North British Company thereafter raised an action