They accordingly craved his Lordship "to move the Court to insert in the interlocutor words restricting the judgment to the case of such of the pursuers as are of English or Irish domicile, or otherwise to define the pursuers to whom the judgment applies."

LORD PRESIDENT—It is to be regretted that this distinction as to the domicile of some of the pursuers was not pointed out to us when judgment was given, but the circumstances to which our attention has now been drawn do not, in my opinion, affect the result. I may say at once that, as your Lordships know, I had considered the question which we have now to deal with, the question, namely, of the liability of the party doing the injury where damage results from a collision on the high seas, and there is a difference between the law of the country of the party doing the injury and the law of the country of the party injured as to the liability arising from the injury. That question, as I have said, was considered by the Court, and if in the opinion I formerly delivered I did not discuss it, it was not from any doubt on the point, but because, misled by the record, I thought the question did not arise in the circumstances of this case. I may now say that I think the true view of the law, where a conflict arises in such a case between the law of the country of the person injured, and of the person doing the injury, is that which is stated in one of the articles of the Antwerp Congress of 1885, and the rule is that to found a claim there must be a concurrence between the law of the country of the injurer and the injured—that the person convened as defender cannot be made liable unless these two factors concur: first, that he is liable to the claim made against him by the laws of his own country, and in the second place, that the injured would be entitled by the laws of his country to what he claims. Now, in the present case we have only the latter of these elements, for, on the other hand, we have an English defender, and the foundation of our judgment is that an English defender cannot be found liable for *solatium* for injury done on the high seas unless by the law of England he is so liable.

LORD M'LAREN—I agree with your Lordships, and I may say indeed that it was in consequence of your Lordship having called our attention to this point at consultation that I thought it right to refer to it in my opinion, because although in the circumstances of the actual case it might not be strictly necessary to decide whether the right to recover damages depends on the concurrence of the laws of the pursuers' and the defenders' domiciles, the question appeared to me to lie at the foundation of the principle on which our judgment was based, and therefore to be a proper subject for discussion.

LORD KINNEAR was absent.

The Court sustained the second plea-in-law for the defenders, and remitted to the Lord Ordinary to proceed.

Counsel for the Pursuers — Sol.-Gen. Dickson, Q.C.—Younger. Agents—J. & J. Ross, W.S.

Counsel for the Defenders—Ure, Q.C.—Aitken. Agents—Webster, Will, & Ritchie, S.S.C.

Wednesday, November 17.

FIRST DIVISION.

[Lord Low, Ordinary.

CALEDONIAN RAILWAY COMPANY *v.* CORPORATION OF GLASGOW.

Arbitration—Arbitrator—Disqualification—Premature Application for Interdict.

C was appointed standing arbitrator by a railway company and the corporation of a town, in terms of the company's private Act of Parliament, to determine any differences that might arise between them on the subject, *inter alia*, of "any alterations, developments, or extensions of the existing or contemplated works in connection with any department administered by" the corporation.

The corporation subsequently obtained an Act of Parliament to authorise the construction by them of certain sewers and other works near the railway. C having acted as adviser to the corporation in the promotion of this Sewage Act, the company sought to interdict him from acting as arbitrator under their Act, on the ground that he was necessarily disqualified by his relations with the corporation from determining any question that might arise thereunder in connection with the works proposed, though not yet begun, under the Sewage Act.

Interdict *refused*, on the ground that the application was premature, and that though the arbitrator would be disqualified from acting in any question under the company's Act which involved the new sewage works, it was not certain that any such question would ever arise.

Statute — Construction — Glasgow Central Railway Act 1888 (51 *and* 52 *Vict. cap. cxciv*), *sec.* 41 (*P*)—*Glasgow Corporation Sewage Act* 1896 (59 *and* 60 *Vict. cap. ccxxxiv*), *sec.* 11 (6) *and* (7).

Held that the jurisdiction conferred on a standing arbitrator by section 41 (P) of the Glasgow Central Railway Act 1888 is not excluded by section 11 (7) of the Glasgow Corporation Sewage Act 1896

This was a note of suspension and interdict presented by the Caledonian Railway Company against the Corporation of Glasgow and William Robertson Copland, civil engineer, to have Mr Copland interdicted from acting as arbitrator between the complainers and the Corporation under the Glasgow Central Railway Act 1888 (51 and 52 Vict. cap. cxciv).

The complainers averred that in March 1892 Mr Copland had been appointed by them and by the Corporation arbitrator under section 41 (p) of that Act. which is in the following terms:—"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."

They further averred that certain railways authorised by that Act and by subsequent Acts (which contained a similar clause as to arbitration, and under which Mr Copland acted as arbitrator) had been constructed, and proceeded:—"The railways so far as they pass through the city, are for the greater part constructed in tunnel at a greater or lesser depth below the surface of the streets, and it has accordingly been necessary, in connection with the construction of the railways, to remove the sewers and drains and gas and water pipes belonging to the Corporation so far as these were in the intended line of the railway, and large sums of money have been expended by the complainers in this work."

They then recited the following sub-sections of section 41 of the Act of 1888:—"(K) Nothing in this Act contained shall prevent the Corporation at any future time from carrying out any public improvement, or any alterations, developments, or extensions of the existing or contemplated works in connection with any department administered by them, either above or below the level of the railway, and wherever the same are, or but for the construction of the railway might have been, carried across the railway, the company shall pay to the Corporation any additional expense the Corporation may reasonably incur or be put to in the carrying out of the same by reason of the making or maintaining of the railways and works, or by any of the operations of the company, nor shall anything in this Act entitle the company to any compensation for any damage occasioned by such operations of the Corporation, unless such damage shall have been occasioned by the default or neglect of the Corporation. (L) Where any of the works to be done under or by virtue of this Act shall or may pass over, or under, or by the side of, or so as to interfere with any sewer, drain, water-course, defence, or work under the jurisdiction or control of the Corporation, or shall in any way affect the sewage or drainage of the district under their control, the company shall make good any damage which may be done by their operations to any of the sewers, and shall clean out the same should they get silted up in consequence of any of the operations of the company during or after the construction of the company's works, and shall provide by new, altered, or substituted works, including outfall sewers, in such a manner as the Corporation may deem necessary (and for the construction of which they shall be bound to afford all reasonable facilities and communicate their powers so far as necessary) for the proper protection of and for preventing injury or impediment to the sewers and the works hereinbefore referred to, by or by reason of the said intended works, or any part thereof, and shall save harmless the Corporation against all and every expense to be occasioned thereby; and all such works may be done by or under the direction, superintendence, and control of the Corporation, at the costs, charges, and expenses in all respects of the company; and all reasonable costs, charges, and expenses thereby occasioned shall be paid by the company on demand; and if any dispute shall arise as to the amount of such costs, charges, and expenses, the same shall be settled as hereinafter provided; and when any new, altered, or substituted works as aforesaid, or any works or defences connected therewith, shall be completed by or at the costs, charges, and expenses of the company under the provisions of this Act, the same shall thereafter be as fully and completely under the direction, jurisdiction, and control of the Corporation as any sewers or works now or hereafter may be; and nothing in this Act shall, except as hereinbefore provided, extend to prejudice, diminish, alter, or take away any of the rights, powers, or authorities vested or to be vested in the Corporation, but all such rights, powers, or authorities shall be as valid and effectual as if this Act had been passed."

The complainers further averred that by the Glasgow Corporation Sewage Act 1896 (59 and 60 Vict. cap. ccxxxiv.) the Corporation had been authorised to construct certain sewers near to the railways and the new, altered, or substituted sewers constructed by the complainers under the Act of 1888 and subsequent Acts. They continued—"The respondents the Corporation of Glasgow have appointed Mr Copland to be their consulting engineer in connection with the said sewage scheme authorised by the Act of 1896, and he has for some time past held and is now holding that appointment, and has been discharging the duties of the said appointment. The position of statutory arbitrator under the said Acts of 1888 and 1890, and the position of consulting engineer to the Corporation of Glasgow in

connection with the said sewage scheme, both of which Mr Copland has now come to hold are quite incompatible with each other. The works under the Acts of the complainers and the Glasgow Corporation (Sewage) Act 1896 are so related that questions as to the construction of such works, and the rights and obligations of the complainers and the Corparation in relation thereto, under the Glasgow Central Railway Act 1888 and the Caledonian Railway (Additional Powers) Act 1890, in which the interests of the Corporation and the complainers mutually conflict, must arise from time to time in the ordinary course of execution of the respective undertakings. In these circumstances Mr Copland has become incapacitated from discharging the duties of statutory arbitrator between the complainers and the Corporation."

The defenders denied that Mr Copland was their consulting engineer in connection with the sewage scheme, and explained that they had only used Mr Copland's advice in promoting their Sewage Act in Parliament. They further denied that he was incapacitated from acting as statutory arbitrator; and averred that the complainers' railways had all been completed.

The pursuers pleaded—"The respondent Mr Copland having become disqualified and incapacitated from acting as statutory arbitrator between the complainers and the respondents the Corporation of Glasgow, the complainers are entitled to interdict as craved."

The defenders pleaded—"The respondent Mr Copland being the statutory arbitrator between the complainers and these respondents, duly appointed, and not having become disqualified and incapacitated from acting, the note should be refused with expenses."

In the Inner House the following plea was added by the defenders—"In respect that any differences that may arise between the parties in connection with the execution of the sewage scheme authorised by the Glasgow Corporation Sewage Act 1896 will fall to be dealt with by the arbiter to be appointed under said Act, and not by the arbiter appointed under the Glasgow Central Railway Act 1888, and the Caledonian Railway Acts 1890 and 1894, the present application is uncalled for and ought to be dismissed."

The Glasgow Sewage Act 1896, sec. 11, contains certain provisions for the protection of the Caledonian Railway Company with regard to the sewers and works authorised by that Act. It provides, *inter alia*—(6) "Nothing in this section shall prejudice or affect the rights, powers, and immunities reserved to and conferred on the Corporation and the Caledonian Company by sec. 41 of the Glasgow Central Railway 1888, and any Acts public or private, or any agreements with or relating to the Caledonian Company conferring rights, powers, and immunities, and imposing liabilities, duties, and obligations upon the Corporation and the Caledonian Company with reference to any sewers, property, and works of the Corporation, and to any railways and works of the Company." (7) "If any difference shall at any time arise between the Corporation and the Caledonian Company or their engineers with respect to any of the matters referred to in this section, such difference shall be referred to and determined by an arbiter to be agreed on."

After a proof, from which it appeared that there was a possibility of the Corporation sewage works coming in contact with the drains constructed by the Company at more than one point, and the import of which otherwise is sufficiently indicated in the Lord Ordinary's opinion, the Lord Ordinary (Low) on 16th March 1897 dismissed the note.

Note.—"Mr Copland is standing arbiter in certain classes of questions between the complainers and the respondents under the Glasgow Central Railway Act 1888 and the Caledonian (Additional Powers) Act 1891.

"In 1896 the respondents obtained an Act of Parliament authorising them to construct a new system of sewers for part of Glasgow. The new sewers at one or two points come in contact with the complainers' railway, or with drainage works which they constructed when they made the railway, and it is extremely probable that, if and when the new sewage scheme is gone on with, questions will arise between the complainers and the respondents. If such questions arise, it is said that under the Act of 1896 they will fall to be determined by the standing arbiter under the earlier Acts.

"The complainers' case is that Mr Copland is disqualified from acting any longer as arbiter. They aver that the respondents have appointed him 'to be their consulting engineer in connection with the said sewage scheme of 1896, and he has for some time past held, and is now holding, that appointment, and has been discharging the duties of that appointment.'

"The complainers have not proved that averment. Mr Copland has not been appointed consulting engineer in connection with the sewage works. He was, however, connected with the promotion of the bill in Parliament, and the complainers contend that that is sufficient to disqualify him.

"What happened was this: The respondents authorised their engineer, when preparing plans in view of the bill, to consult Mr Copland, and accordingly the latter revised the plans and other details. His name appeared also upon the plans which were laid before Parliament as 'consulting engineer,' and he gave evidence in favour of the scheme.

"Now, if the sewage works had been commenced and a question had arisen between the complainers and the respondents in regard to them, I think that it would have been very difficult to say that Mr Copland was not disqualified from acting as arbiter.

"But although I suppose there is no doubt that the sewage scheme will be carried into effect, it has not as yet been begun; and it is possible, although not

probable, that no question may ever arise under it.

"The complainers do not contend that Mr Copland so identified himself with the respondents when the Sewage Bill was before Parliament that he is disqualified from acting as arbiter between them upon questions not connected with the new sewage scheme. Their argument is that he must either be qualified to deal with all the questions which may come before him as standing arbiter, or disqualified to deal with any of them. As he is disqualified to deal with questions under the new sewage scheme, he can no longer act as standing arbiter.

"I think that that view is sound to this extent, that if and when questions arise of a kind with which Mr Copland cannot deal, the complainers will be entitled to demand that a new standing arbiter shall be appointed. But the sewage works, in regard to which alone such a question can arise, not having been commenced, and it being possible that such a question may never arise, I do not see why Mr Copland should be interdicted from disposing of questions which have been submitted to him and in regard to which no disqualification is alleged.

"Accordingly I am of opinion that the application is premature, and should be dismissed."

The complainers reclaimed, and argued—The Lord Ordinary was wrong. The complainers did not contend that Mr Copland was primarily disqualified from acting as arbiter on every point that might arise under the Act of 1888. Their contention was that he would be disqualified from adjudging on questions arising under that Act in consequence of operations authorised by the Sewage Act of 1896, and that, being so disqualified, he could not act as arbiter on any question under the Act of 1888, the policy of which, as regards arbitration, was to secure continuity of judgment. The general principle as to arbiters was that they should not "mix themselves up" in the matter—*Mackenzie* v. *Clark*, December 19, 1828, 7 S. 215, *per* L. J.-C. Boyle. Mr Copland's relations to the Corporation and their Act of 1896 put him in an inconsistent position when called upon to decide points that arose in connection with the new sewage works. It was erroneous to hold that the Acts of 1888 and 1896 were absolutely exclusive of one another, and that no questions could arise under the former now that the railway was completed. It would be much more correct to say that they were complementary of one another, the one safeguarding the rights of the Corporation, the other those of the company. The policy of the 1896 Act as shown in sec. 11 was to reserve the Act of 1888, and *quoad ultra* to make a similar provision for settling disputes. The Sewage Act of 1896 was certain to bring about the very state of matters contemplated by section 41, subsection (K), of the Act of 1888.

Argued for the respondents—The complainers had failed to show that Mr Copland was disqualified from acting under the Act of 1888. He might, indeed, be disqualified from acting as arbiter under the Act of 1896, but that was a very different matter. The two Acts were mutually exclusive, and no question could arise under the one which was affected by the other. All questions connected with the sewage scheme would be determined under the Act of 1896, and that being so there was nothing to constitute disqualification on Mr Copland's part from exercising the totally distinct jurisdiction conferred by the Act of 1888—*Addie & Sons* v. *Henderson & Dimmack*, October 24, 1879, 7 R. 79, and *Trowsdale & Son* v. *North British Railway Company*, July 12, 1864, 2 Macph. 1334, referred to.

At advising—

LORD PRESIDENT—It is quite clear that the Act of 1888 contemplates and prescribes that all questions falling under section 41 shall be determined by one and the same arbitrator, and shall not be decided piecemeal, some by one arbitrator and some by another. Accordingly, I think that if the reclaimers, who have a clear interest to insist that there shall be continuity of decision, were able to show that questions had arisen which must be decided under that section, but which Mr Copland has disabled himself from adjudging, then they would be entitled to have him interdicted from proceeding in those cases also to which his disability did not relate.

Now, I do not see that the arbitration clause of the Sewage Act of 1896 has rendered it impossible that questions may arise touching the sewage works which would fall under the arbitration section of 1888. The later arbitration section does not square with the subject-matter of the earlier section so as to supersede that section. So far I am with the reclaimers.

I hold also that by his actings subsequent to his being chosen as arbitrator under the Act of 1888, Mr Copland has become disqualified from acting as arbitrator in matters relating to the sewage works. He has so identified himself with the sewage scheme of works that he could not act as arbitrator in questions in which they, or their promoters, came in conflict with the rights of other parties who chose him before those relations arose. On this point again I am with the reclaimers.

Where I think their case fails is, not in the possibility of such cases arising in which Mr Copland is disqualified, but in the entire uncertainty that any question relating to the sewage works, and falling under the reference clause of 1888, ever will arise. The probability, it may be granted, is that there will be such cases. But, on the other hand, in the event it might turn out that no such questions would ever require the application of the arbitration clause.

This being so, I have come to the opinion that the Lord Ordinary is right. I do not know that the Court has ever gone so far as it would do if it granted this interdict. For aught that appears, all the questions that ever will arise under section 41 may be

disposed of without the sewage question being touched. If this were so, and we had interdicted Mr Copland, his disqualification would be that if certain cases had arisen which did not arise he could not have tried them. I think this too remote.

LORD ADAM—In the first place, I am of opinion that the additional plea that was added to the record by the defenders, to the effect that, in respect that any differences that may arise between the parties in connection with the execution of the Glasgow Corporation Sewage Act 1896 will fall to be dealt with by the arbiters appointed under the said Act, and not under the Railway Clauses Act, this application should be dismissed, is unsound. The clause referred to in the Sewage Act is the 7th sub-section of the 11th clause of the Act, and that clause of reference, it is clear upon the face of it, says that if any difference shall arise between the Corporation and the company "with respect to any of the matters referred to in this section, they shall be referred to and determined by an arbiter to be agreed on," and so on. Now, it is clear without going over them that the matters referred to in that section relate to the works to be constructed by the Corporation under or across or near to the railway; and that is the class of matters that are embraced in this clause of reference. But the 6th sub-section of the same section of that Act says this—"Nothing in this section shall prejudice or affect the rights, powers, and immunities reserved to and conferred on the Corporation and the Caledonian Company by section 31 of the Glasgow Central Railway Act 1888, and any Acts, public or private, or any agreements with or relating to the Caledonian Railway Company." Now, one class of matters so reserved by the Sewage Act as still in existence is the matters referred to in sub-section K of section 41 of the Railway Act, and it is this—that in carrying out any public improvement or works either above or below the level of the railway, and wherever the same are, or but for the construction of the railway might have been carried across the railway, the company shall pay to the Corporation any additional expense the Corporation may reasonably incur or be put to in the carrying out of the same by reason of the making and maintaining of the railways and works. Now, the very bulk of the pursuer's argument in this case is that it was inevitable that such questions would arise for the appliance of the section, because the sewers, instead of being carried along the railway in a straight line as otherwise they would have been, were taken round the end of one of the railway lines and up the side of it, and the Railway Company anticipated that when the sewage works began claims of additional expense would certainly arise. But if such claims should arise, they are clearly not covered by the clause of reference in the Sewage Act. Therefore it humbly appears to me that the plea founded on that reference to the Sewage Act is not well founded.

In the next place, I agree with the Lord Ordinary and your Lordship that Mr Copland is not as yet disqualified by anything he has done in the past from still acting as arbiter under the Railway Clauses Act. The Lord Ordinary states the facts I think quite correctly. He says—"Mr Copland was connected with the promotion of the bill (the Sewage Bill) in Parliament, and the complainers contend that there is sufficient to disqualify him;" and then he says—"What happened was this — the respondents authorised their engineer, when preparing plans in view of the bill, to consult Mr Copland, and accordingly the latter revised the plans and other details. His name appeared also upon the plans which were laid before Parliament as consulting engineer, and he gave evidence in favour of the scheme." That sets forth, I think, quite correctly his connection with the Sewage Act, and I agree with the Lord Ordinary that such acting does not disqualify Mr Copland from acting as arbiter in any matter which is not connected with the sewage works. And I observe from the correspondence that the Corporation did not pretend that he ought to act as arbiter in any works which are connected with any question relative to sewage works, but what they contended was that he should only be disqualified in that particular case when such a question arises, but that he is still entitled to act in other cases not connected with the sewage works when they arise. I agree with your Lordship that what the statute contemplated was a standing arbiter to decide any questions under the Act. I think that is clear, for the Act says that the appointment of the arbiter shall be made before the railway works are commenced, which clearly points out that it is not an appointment of an arbiter for any particular case which may arise, but for all cases that may arise. That being Mr Copland's position, I think the result is this, that if any case shall arise out of the Railway Act which it is shown is connected with sewage works, then I think Mr Copland would be disqualified from sitting as arbiter in such a case, and I think the natural consequence of that is that if he is disqualified in one case, he must cease to be standing arbiter in all the other future cases that may arise. I therefore concur with the Lord Ordinary.

The LORD PRESIDENT stated that LORD KINNEAR, who was absent, concurred.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Complainers—Balfour, Q.C.—John Wilson. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Respondents — Lees — Deas. Agents—Campbell & Smith, S.S.C.