evening from the window of a building in Paisley Road, Glasgow, in which they were concealed. After watching the accused board two tramway cars and come off shortly after boarding without taking their places as passengers, the accused disappeared from the view of the police officers, and none of the accused were apprehended until half-an-hour afterwards, at a point at least half-a-mile from where they had boarded the cars. . . . None of the accused were 'found' in the places libelled in the complaint."

Argued for complainers—(1) The complaint was irrelevant. The *locus* libelled, viz., a tramway car, was not a street in the sense of the Act. Nor were the accused in a place adjacent to a street, for that meant a place of the same character—*Young* v. *Neilson*, May 22, 1893, 3 White 487, 20 R.(J.) 62, 30 S.L.R. 640; *Wright* v. *Smith*, December 19, 1903, 4 Adam 316, 6 F.(J.) 18, 41 S.L.R. 198. (2) *Esto* that the *locus* libelled was a street within the meaning of the Act, the accused were not "found" therein, for they were arrested elsewhere. It was not sufficient that they should have been "seen" there.

Argued for the respondent—(1) The car in question was in the street libelled, and therefore also the passengers. Alternatively, it fell within the definition of an enclosed space or place adjacent to a street. (2) On a fair construction of the section the word "found" could not be taken as equivalent to "apprehended." It was quite sufficient that the accused were discovered in the *locus* libelled, although not arrested there.

LORD LOW—The charge against the suspenders in this case was that they were "found in Paisley Road (West), near Great Wellington Street, both in Glasgow, and in or upon two Glasgow Corporation tramway cars in Paisley Road (West) as aforesaid, with intent to commit the crime of theft by pocket picking." The complaint was brought under the Glasgow Police (Further Powers) Act 1892, by the 25th section of which it is provided that "every known or reputed thief, or associate of known or reputed thieves, who is found in or on any house or building, or part of a house or building, or enclosed space, or in any street or place adjacent, with intent to commit any crime," may be apprehended and on conviction imprisoned.

The suspenders argued that an offence under that section was not relevantly libelled in the complaint, because a tramway car did not fall within the description of the places in which a known or reputed thief must be found in order to constitute an offence under the section. A person in a tramway car, it was argued, was not in a "street" or in a "place adjacent." I do not think that it is necessary to indicate an opinion as to whether a tramway car is a "place adjacent" to a street within the meaning of the enactment, because I am unable to assent to the view that when a person steps from the roadway of a street on to a tramway car he thereby leaves the street altogether. I therefore think that the magistrate was right in repelling the objection to the relevancy of the complaint.

On the other point which was argued I have no doubt. The argument was that the word "found" in the Act is equivalent to the word "apprehended." I am clear that that is not the case. There is perhaps a shade of difference between the word "find" and the word "see." And it was probably intended to make it plain that the mere fact of known thieves being seen in a street was not to lead to the inference that they were there for the purpose of committing a crime—they must be seen or discovered in circumstances which infer that they intended to commit crime. Whether in that sense these men were "found" in the street is a question of fact with which we have nothing to do. I am therefore of opinion that this bill of suspension and liberation should be refused.

LORD ARDWALL—I concur.

LORD DUNDAS—I also concur.

The Court refused the bill.

Counsel for the Complainers—Crabb Watt, K.C.—Spens. Agent—James G. Bryson, Solicitor.

Counsel for the Respondent—Morison, K.C.—Gentles. Agents—Campbell & Smith, S.S.C.

COURT OF SESSION.

Thursday, May 26.

SECOND DIVISION.

[Sheriff Court at Glasgow.

CARROLL *v.* GRAY & SONS.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Second Schedule, sec.* 15—*Review of Weekly Payments—Remit to Medical Referee where no Proof Led—Competency—Statutory Rules and Orders,* 27*th June* 1907, *Rules* 20 *and* 29.

In arbitrations under the Workmen's Compensation Act 1906 it is incompetent for the arbiter to remit to a medical referee unless in the course of the same application proof has been led.

C.'s employers agreed to pay him compensation at the rate of £1 per week. They subsequently presented an application for review of the weekly payments on the ground that he had recovered. The Sheriff after a proof remitted to M., one of the medical referees under the Act, who reported that C. was still incapacitated, but suggested that he should undergo a certain operation. The arbiter accordingly dismissed the application. C. having refused to undergo the operation, his employers presented a new application, whereupon C underwent the operation, which was unsuccessful.

C. having declined to undergo a further operation, and his employers having thereupon craved the Court to end the compensation, C. lodged in process a medical certificate stating that he was not in a fit state to undergo the operation. In these circumstances the Sheriff remitted to M. to report, *inter alia*, as to C.'s fitness to undergo it.

Held that, as no proof had been led in the application, the remit was incompetent.

The Workmen's Compensation Act (6 Edw. VII, cap. 58), Second Schedule, section 15, enacts—"(15) Any committee, arbitrator, or judge, may, subject to regulations made by the Secretary of State and the Treasury, submit to a medical referee for report any matter which seems material to any question arising in the arbitration."

The Statutory Rules and Orders, 27th June 1907, made by the Secretary of State and the Treasury under the provisions of the First and Second Schedules to the Workmen's Compensation Act 1906 provide—Rule 20—"Before making any reference the committee, arbitrator, or sheriff, shall be satisfied, after hearing all medical evidence tendered by either side, that such evidence is either conflicting or insufficient on some matter which seems material to a question arising in the arbitration, and that it is desirable to obtain a report from a medical referee on such matter." Rule 29—"The committee, arbitrator, or sheriff, may . . . remit the report to the medical referee for a further statement on any matter not covered by the original reference."

In an arbitration under the Workmen's Compensation Act 1906 between Owen Carroll, plasterer, 201 Thistle Street, Glasgow, and James Gray & Sons, plasterers, Herriet Street, Pollokshaws, the Sheriff-Substitute at Glasgow (FYFE) made a remit to one of the medical referees under the Act to report, *inter alia*, as to Carroll's fitness to undergo an operation, and at Carroll's request stated a case for appeal.

The Case stated—"This is an arbitration brought in the Sheriff Court of Lanarkshire at Glasgow at the instance of the respondents, in which the crave of the petition is as follows:—The claim of the pursuer is—For 'the ending or diminishing of the weekly payments of compensation under the Workmen's Compensation Act 1897, which are presently being made by them to the defender in terms of a memorandum of agreement between the parties recorded in the Sheriff Court Books of Lanarkshire at Glasgow on 28th day of March 1906, in respect that the defender has refused, and still refuses, to undergo a surgical operation recommended in a report by Dr D. C. M'Vail, one of the medical referees appointed under said Act, dated 22nd August 1907, under a remit to him by the Court, dated 1st August 1907, by which operation the defender's normal capacity for work would in all probability be restored.'

"On 23rd October 1905 the appellant, while in the employment of the respondents as a plasterer, sustained certain injuries, as a result of which he was incapacitated from following his employment.

"After the accident an agreement was come to between the parties by which the respondents undertook to pay compensation to the appellant under said Act at the rate of £1 per week from and after the first fortnight after the date of the accident until the same should be ended, diminished, or suspended, in accordance with the provisions of said Act. A memorandum of said agreement was recorded in the Sheriff Court Books of Lanarkshire at Glasgow on 28th March 1906.

"On 8th June 1907 the respondents presented an application for review of said weekly payment on the ground that the appellant had at that time regained his capacity for work, and after having heard proof, I, on 1st August 1907, remitted to Dr D. C. M'Vail, Glasgow, one of the medical referees appointed under said Act, to examine the appellant and report. On 22nd August 1907 Dr M'Vail reported that the appellant was then still suffering from severe sciatica due to the injury to the right sciatic nerve from his fall on 23rd October 1905, and that he was entirely incapacitated at that time for working at his trade as a plasterer, and further, that he was of opinion that the appellant at his time of life should under suitable treatment entirely recover within a year from that date the power of working at his trade, and suggested that he should undergo the operation of nerve stretching.

"On consideration of the evidence, led and the report by the medical referee, I dismissed said application of the respondents, and found the appellant entitled to expenses.

"On 19th December 1909 the respondents presented the present application. The application was called in Court and was continued until 23rd December, when it was explained at the bar that the appellant had at that time indicated his willingness to undergo the operation referred to in Dr M'Vail's report above referred to, and I therefore continued the application in order that the result might be seen. Thereafter the appellant underwent an operation for nerve stretching in the Royal Infirmary, Glasgow, under chloroform, being detained in said institution for three days. Said operation was not successful, and the surgeon who operated recommended a further operation which would detain appellant in said infirmary for several weeks. The appellant declined to undergo said further operation, and in respect of said refusal the respondents, on 24th January 1910, lodged a motion in the following terms:—'The pursuers respectfully move the Court to resume consideration of their application, and to terminate or suspend the weekly payments of compensation to the defender in respect that, after having undertaken to undergo the operation recommended by Dr M'Vail, he now refuses to do so.' The appellant thereupon lodged in process the following medical certificate, viz.:—

"'654 *Rutherglen Road, Oatlands*, 26/1/1910.

"'I hereby certify that I have this day examined Owen Carroll, residing at 183 Cumberland Street, S.S., and that in my opinion he is not in fit state physically to undergo an operation for nerve stretching. It is further my opinion that such an operation for nerve stretching would, on account of the length of time he has been affected with his injury, and also on account of the fact that such nerve sheath adhesions were produced by direct injury due to a fall, be of no avail in his case, and that any stretching of the affected nerve might only leave the man in a more useless condition physically.

"'Personally I believe he is permanently injured.'

"(Signed) 'ALEX. JAMIESON, M.B., Ch.B.'

"On 1st February 1910 I pronounced the following interlocutor:—'Having heard parties' procurators, before further answer, and under reservation of all pleas of parties, remits to Dr D. C. M'Vail, medical referee, to report what is the present state of health of Owen Carroll, and in particular what is the nature of the operation, if any, which is recommended by the medical referee, and whether Owen Carroll is in a fit state of health to undergo the operation.'"

The *questions of law* included the following:—"Whether in the whole circumstances, and in view of the medical certificate by Dr Jamieson, dated 26th January 1910, lodged in process, the arbiter was entitled to make the said remit to the medical referee."

Argued for the appellant—The Sheriff had no power to make a remit at this stage. A remit to a medical referee could only be made subject to the regulations made by the Secretary of State and the Treasury—Workmen's Compensation Act 1906 (6 Edw. VII, c. 58), Second Schedule, sec. 15. Under the regulations the Sheriff before making a remit must be satisfied, after hearing all the medical evidence tendered, that it is conflicting or is insufficient on some material point—Statutory Rules and Orders, 27th June 1907, rule 20 (*vide* Umpherston's Workmen's Compensation Act 1906, at p. 318). A remit could not be used as a substitute for proof. The course followed by the Sheriff was therefore incompetent, no proof having been led in the present application. The appellant was not unreasonable in refusing to undergo the second operation, for he was acting on the advice of his own doctor—*Donnelly* v. *Baird & Company, Limited*, 1908 S.C. 536, 45 S.L.R. 394; *Dowds* v. *Bennie & Son*, December 19, 1902, 5 F. 268, 40 S.L.R. 239; *Sweeney* v. *Pumpherston Oil Company*, June 23, 1903, 5 F. 972, 40 S.L.R. 721.

Argued for the respondents—The remit was competent. All applications relative to one accident formed one process—Act of Sederunt, 26th June 1907, sec. 9. *Esto*, that the previous application had been dismissed, it had not gone out of Court, for all were part of the same arbitration. The Sheriff was not satisfied that what the referee in the prior application had recommended had been done. He was therefore entitled to remit to the referee to report. —Statutory Rules and Orders (*cit. sup.*), rule 29. Further, the remit was competent at common law, and under rule 60 of the First Schedule of the Sheriff Courts Act 1907 (7 Edw. VII, cap. 51), the Sheriff was entitled to make a remit on any matter of fact. This provision was not inconsistent with the provisions of the Workmen's Compensation Act and therefore should receive effect here.

At advising—

LORD ARDWALL—The first question submitted for the opinion of the Court in this stated case is whether the arbiter was entitled to make the remit to a medical referee contained in the interlocutor of 1st February 1910. The remit was stated to have been made in terms of the provisions of the 15th section of the second schedule annexed to the Workmen's Compensation Act 1906. Under this section the remit to a medical referee is to be made subject to the regulations made by the Secretary of State and the Treasury. The regulations issued by the Secretary of State in terms of this Act are dated 27th June 1907, and part 5, section 20, is the regulation applicable to the exercise of the powers under said section 15 of the second schedule. It is in the following terms:—[*His Lordship read the rule, ut supra*].

I think it appears from this and subsequent provisions in the regulations that a remit under said section can only be made where there has been a proof regarding the question to be submitted, and that the purpose of the remit is to enable the arbiter to obtain the services of a referee, who practically may act as a medical assessor, and may as an expert in medical matters weigh and decide upon the effect of the evidence of fact and of opinion which has been led in the arbitration and give his impartial opinion thereon; in short, the remit contemplated by the section and the regulations is not one for the purpose of obviating proof by being substituted for it, but for the purpose of assisting the arbiter to arrive at a just decision on evidence that has been taken. As no evidence had been taken upon the application presented on 19th December 1909, I am of opinion that it was incompetent for the arbiter to make the remit he did.

It was argued in support of the interlocutor that evidence had been already taken in the arbitration under the application made upon 8th June 1907, and that although that application had been dismissed yet the fact of evidence having been taken in it made it competent for the arbiter to make a remit in any subsequent application in the same arbitration process. I think this view is extravagant. The application on 8th June 1907 was finally disposed of when it was dismissed, and although the present application is made in the same arbitration process, it is a new proceeding, and any remit to a medi-

cal referee in it can only be made after evidence has been led relating to it, and the making of a remit cannot be supported by referring to evidence which was taken in another and defunct proceeding. It was suggested that the remit in question was competent under rule 29 of part v, but the remits referred to in that rule are remits to explain a report already competently obtained in an arbitration proceeding, and we have no such report in the present proceeding.

It was further maintained, however, that it was competent for the Sheriff to pronounce the interlocutor he did under the provisions of the Sheriff Court Acts and at common law. This argument I consider to be also unfounded. Where the Legislature has in an Act of Parliament laid down a complete code of procedure for the purposes of such Act, that procedure is the only competent procedure under the Act, and impliedly excludes all other procedure, whether statutory or at common law. This, I think, is too plain to require further argument.

I accordingly arrive at the conclusion that the first question must be answered in the negative, and if this is so the second question is superseded, but I may add that in any view there is no material in the case to enable it to be satisfactorily dealt with.

The question next arises as to what further order, if any, we should make in the case. The respondents moved that in the event of the question being answered unfavourably to their contentions the case should be remitted back to the Sheriff-Substitute with a direction to allow a proof in the application of 19th December 1909. The appellant on the other hand moved that the Court should direct the application to be dismissed. In my opinion the application ought to be dismissed. The ground on which the application proceeded is thus stated—"In respect that the defender has refused and still refuses to undergo a surgical operation recommended in a report by Dr D. C. M'Vail, one of the medical referees appointed under the said Act, dated 22nd August 1907, under a remit to him by the Court dated 1st August 1907, by which operation the defender's former capacity for work would in all probability be restored."

I have first to observe upon this statement of the ground of the application that it is not altogether correct, looking to the actual terms of Dr M'Vail's report, but passing over that it appears from the statements in the case that the appellant had on 23rd December indicated his willingness to undergo the operation referred to in Dr M'Vail's report; and the case also states as follows—"Thereafter the appellant underwent an operation for nerve-stretching in the Royal Infirmary, Glasgow, under chloroform, being detained in said institution for three days. Said operation was not successful, and the surgeon who operated recommended a further operation which would detain the appellant in the said infirmary for several weeks."

Now the operation which was suggested by Dr M'Vail was "the operation of nerve-stretching." I accordingly can come to no other conclusion on the case as stated than that the appellant underwent an operation for nerve-stretching which was the operation recommended in Dr M'Vail's report. It seems to me accordingly that the ground of the application entirely fails, and further, that the motion on which the arbiter's interlocutor of 1st February 1910 proceeded contained statements which were incorrect in fact. That motion was in these terms—"The pursuers respectfully moved the Court to resume consideration of their application, and to terminate or suspend the weekly payments of compensation to the defender in respect that after having undertaken to undergo an operation recommended by Dr M'Vail he now refuses to do so." This is not correct in point of fact. According to the statement in the case, the operation which the defender (appellant) refused to undergo was a further operation recommended by the surgeon who performed the operation of nerve-stretching on the appellant.

The respondents seem to have persuaded the arbiter that Dr M'Vail recommended in 1907, not the operation of nerve-stretching which had been performed, but something of a much more serious nature, but there is no support for this view in the stated facts in the case, and that being so, I think it clear that what ought now to be done is to dismiss the application of 19th December 1909.

I may add that if, as was alleged at the bar for the respondents, a safe and simple operation would have the effect of bringing about the appellant's restoration to health and his capacity for work, it is much better that that issue should be raised and tried in a new application altogether, for any proof in the present application would be both limited and complicated by the question as to what Dr M'Vail meant by his first report, and whether the appellant has not behaved reasonably and done all that is required of him in submitting to the somewhat severe operation that he has already undergone; whereas in a fresh application the simple question would be raised whether in the present circumstances the appellant ought to submit to a further operation, and failing his doing so whether his compensation should be ended or diminished. Such questions are by no means easy to determine, and I therefore think it very desirable that they should be presented in as simple a form as possible and not complicated by any other questions.

The respondents' counsel stated that if this course were followed he might be prejudiced in any future application, but it seems to me that a simple reservation would obviate the respondents' apprehension on this matter.

I would accordingly propose that we should answer the first question in the negative, find it unnecessary to deal with the second question, and should remit to the arbiter to dismiss the application of

19th December 1909 without prejudice to the question whether or not the appellant ought to submit to any further operation as a condition of his continuing to receive compensation under the memorandum of agreement recorded on 28th March 1906, if such question should be competently raised in any future application to the arbiter.

LORD LOW and LORD DUNDAS concurred.

The LORD JUSTICE-CLERK was absent.

The Court answered the question of law in the negative.

Counsel for Appellant — Crabb Watt, K.C.—Jameson. Agents—Marr & Sutherland, S.S.C.

Counsel for Respondents—D. P. Fleming. Agents—Mitchell & Baxter, W.S.

Thursday, June 2.

FIRST DIVISION.

[Sheriff Court at Glasgow.

MECHAN & SONS, LIMITED *v.* BOW, M'LACHLAN, & COMPANY, LIMITED.

Sale—Disconformity to Contract—Right of Rejection—Bar—Act Inconsistent with Ownership of Seller—Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *sec.* 35.

A firm of engineers contracted to supply two feed tanks to a firm of shipbuilders for a tug which the latter were building for the Admiralty. It was a condition of the contract that the tanks were to be made "to British Admiralty latest tests and requirements." Owing to some misunderstanding between the parties the tanks were delivered to the shipbuilders without having been tested by the Admiralty inspector. The shipbuilders assuming that this had been done, built them into the vessel without further inquiry, and closed up the engines. A week later the tanks were inspected by the Admiralty officer, and rejected.

Held that as the shipbuilders had built the tanks into the vessel without ascertaining as they might have done whether the contract condition had been complied with, they were barred from rejecting them, and that accordingly they were liable for the price.

Contract—Construction—"All to British Admiralty Latest Tests and Requirements."

A contract for tanks contained a condition that they were to be made "to British Admiralty latest tests and requirements." The tanks failed to satisfy the Admiralty inspector.

Held that the tanks were disconform to contract.

The Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), section 35, enacts—"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them."

On 29th April 1908 Mechan & Sons, Limited, engineers and contractors, Glasgow, brought an action against Bow, M'Lachlan, & Company, Limited, engineers and shipbuilders, Paisley, in which they sought payment of £89, 10s., being the price of two galvanised feed tanks which they had supplied to the defenders for H.M. tug "Robust," which they (the defenders) were building, but which had been rejected by the Admiralty inspector after they had been built into the vessel. The defenders lodged a counter claim for £64, being (1) the expense of removing the tanks from the vessel, and (2) the cost of replacing them with others.

The following narrative is taken from the opinion (*infra*) of Lord Salvesen:—"This action is brought to recover, *inter alia*, the price of two galvanised steel feed tanks which the pursuers contracted to supply to the defenders on 30th August 1907. It was a condition of the contract that the tanks were to be made "to British Admiralty latest tests and requirements." In the ordinary case it appears that the Admiralty insist that the material of which tanks are made should be tested by bending and tensile tests before the construction is commenced, and that only such material should be used as has passed these tests. The pursuers originally contemplated that the steel plates required for the tanks should be specially rolled at the works of Messrs Beardmore; and it is common ground that it was their duty to instruct the Admiralty inspector to attend at Messrs Beardmore's works and test the plates there; and in their letter of 30th August in which they accepted the defenders' order they asked the name of the Admiralty inspector who would in ordinary course attend to this matter. Some delay occurred in getting the plates rolled, but on 11th September they intimated to the defenders that Messrs Beardmore intended to roll the plates that night, and that if they were not ready for the Admiralty inspector next day, they certainly would be by Friday. A telephone conversation took place on 12th September, in the course of which the pursuers were instructed, as the tanks were urgently required, to take the material from stock, and they maintain that at the same time the defenders released them from their obligation to have the material tested. The defenders deny this, and I agree with the Sheriff-Substitute that it cannot be held proved that there was any such change on the contract, if, indeed, that could be competently established by parole evidence, which I greatly doubt. On the other hand, I think that the pursuers *bona*