for me to say that I should myself have decided the case the other way on the reason and consistency of the thing.

LORD CRAIGHILL—I agree with your Lordship and with Lord Young. I think the birth parish should be found liable. Of course that cannot be accomplished, because the opinion of the majority is the opposite way. I have considered all that they have said with the greatest consideration and respect, and it rather appears to me that not only the logic but the law of the case are against the view they support, and in favour of that which your Lordship has presented. If I were to say more I would only be repeating what your Lordship and Lord Young have already said, and especially that which has been set forth in what I regard as the very reasonable and satisfactory opinion of Lord Fraser.

LORD RUTHERFURD CLARK—I think in a question of this kind it is of great importance to adhere to anything that has been fixed by law, and for that reason I agree with the opinion of the majority of the Court.

LORD JUSTICE-CLERK—I wish to make only one addition to the remarks already made. I agree with Lord Young that there is no great interest on the part of the ratepayers how the question may be decided, and no interest on the part of the pauper; but there is a great interest on the part of the ratepayers to see all these matters put on a proper footing. For I suppose both sides here have spent a good deal more than the whole aliment of this pupil, at least if he is to come on the parish of birth when he arrives at minority, and it would be desirable if some less cumbrous mode of dealing with such questions could be devised, for these questions only require to be settled to determine on which side liability goes.

The Court, in respect of the opinions of the majority of the consulted Judges, dismissed the appeal and affirmed the judgment of the Sheriff-Substitute.

Counsel for Pursuer (Appellant)—Trayner—Ure. Agents—Ker & Smith, W.S.
Counsel for Defender (Respondent)—Mackintosh—Lang. Agents— W. & J. Burness, W.S.

Friday, July 20.

FIRST DIVISION.

THE GLASGOW COAL EXCHANGE COMPANY (LIMITED) *v.* THE GLASGOW CITY AND DISTRICT RAILWAY COMPANY.

Railway—Entry on Lands—Interdict—Compensation—Appropriation for Purposes of Underground Railway of Part of Subsoil of Public Street included in Titles of Private Property—Glasgow City and District Railway Act 1882.

A railway company obtained by their Special Act, for the purposes of forming their line, which was intended to run in tunnel beneath various public streets in a town, power to enter upon, take, and use the lands referred to in the books of reference. The Special Act further provided that the company might, for the purposes of the Act, "appropriate and use the subsoil of the streets, roads, roadways, lanes, footpaths, and places" shown on the plans, and also that they should not be obliged wholly to take these lands, or any part of the surface thereof, or any cellar, vault, or other construction therein or thereunder, held or connected with any house or abutting on such street, road, or lane, "but the company may appropriate and use the subsoil and under-surface of the roadway or footpath of any such street, road, or lane, and if need be they may purchase, take, and use, and the owners thereof, or other persons interested in such cellar, vault, or other construction, shall sell the same for the purposes of the railway; and no such subsoil or under-surface, cellar, vault, or other construction to be appropriated and used or purchased as aforesaid shall be deemed part of a house or other building or manufactory within the meaning of sec. 90 of the Lands Clauses (Scotland) Act 1845." Provision was also made for compensation to be payable in respect of easements acquired under streets, and for the purchase of cellars, &c.

The company in the course of making their line entered on and opened up a part of a public street, which was included within the titles of a private proprietor, though under the jurisdiction of the burgh for police purposes. Prior to doing so they had not given notice to the proprietor, nor paid any compensation for the taking of the subsoil of the street. In a petition by him for interdict against their interfering with the part of the street which fell within his titles until his interest therein had been paid —*held* that the company were under their Act entitled to "appropriate and use" the subsoil of the street, as distinguished from the cellars or other portions of the houses abutting on it, without first paying to the proprietors their interest therein, and that the petition for interdict therefore must be *refused.*

Opinions that the proprietor had a claim for compensation under the company's Special Act.

The Glasgow Coal Exchange Company were proprietors of a block of property bounded on the north by the centre of West Regent Street, Glasgow. The southern half of West Regent Street thus fell within their titles. West Regent Street is a public street. By sec. 28 of the Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii.) "Every public street, for the objects and purposes thereof and of this Act, and the public sewers for the drainage thereof, shall vest in the [police] board, but it shall be lawful for the proprietors of lands and heritages adjoining any such street to construct cellars or vaults under the footpavement opposite to such lands and heritages where by their titles they have a right so to do." The company had such a right.

The Glasgow City and District Railway Company were incorporated under their private Act (45 and 46 Vict. cap. ccxvi.) in 1882, and had power thereunder to form a railway westward from Queen Street Station passing under West Regent

Street (referred to in their Act as railway No. 1.)

Section 34 of the statute provides—"Subject to the provisions of this Act the company may, for the purpose of constructing railway No. 1, appropriate and use the subsoil of the streets, roads, roadways, lanes, footpaths, and places shown on the deposited plans, and described in the deposited books of reference, and may break up, remove, alter or interfere with all drains or sewers, and all water, gas, and other pipes therein or thereunder, and the company may during the construction of the railways cross, alter, stop up, or divert the said streets, roads, roadways, lanes, footpaths, and places, or any of them, and use and appropriate any of them so stopped up." . . .

Section 55 provides—"With respect to any lands which the company are by this Act authorised to enter upon, take, and use for the purposes of the railways, and which are in or under the roadway or footpath of any street, road, or lane shown on the deposited plans, and described in the deposited books of reference, the company shall not be required wholly to take the lands or any part of the surface thereof, or any cellar, vault, or other construction therein or thereunder held or connected with any house fronting or abutting on any such street, road, or lane, but the company may appropriate and use the subsoil and under-surface of the roadway or footpath of any such street, road, or lane, and if need be they may purchase, take, and use, and the owners of, or other persons interested in such cellar, vault, or other construction shall sell the same for the purposes of the railway, and no such subsoil or under-surface, cellar, vault, or other construction to be appropriated and used or purchased as aforesaid shall be deemed part of a house or other building or manufactory within the meaning of sec. 90 of the Lands Clauses (Scotland) Act 1845."

Section 56—"Nothing contained in the sections of this Act of which the marginal notes are 'interference with streets' . . . 'company may acquire easements only under streets or roads, and may purchase cellars, &c.,' nor any dealing with lands in pursuance of those sections or any of them, shall relieve the company from the liability to compensation under any Act incorporated with this Act, and every case of compensation to be ascertained under this Act shall be ascertained according to the provision contained in the Lands Clauses Consolidation (Scotland) Act 1845."

This Act incorporated with it the Lands Clauses Consolidation Act 1845, the Lands Clauses Consolidation Amendment Act 1860, and the Railways Clauses Consolidation Act 1845, except where expressly varied by or inconsistent with the private Act. By section 6 of the last mentioned of these Acts it is provided—"That in exercising the powers given to the company by the special Act to construct the railway, and to take the lands for that purpose, the company shall be subject to the provisions and restrictions of this Act, and in the said Lands Clauses Consolidation (Scotland) Act, and the company shall make to 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."

By the Lands Clauses Consolidation (Scotland) Act 1845, sec. 83, it is provided as follows—"That the promoters of the undertaking shall not, except by consent of the owners and occupants, enter upon any lands which shall be required to be purchased or permanently used for the purposes and under the powers of this or the Special Act, until they shall either have paid to every party having any interest in such lands, or deposited in the bank in the manner herein mentioned, the purchase money or compensation agreed or awarded to be paid to such parties respectively for their respective interests therein; provided always that for the purpose merely of surveying and taking levels of such lands, and of probing or boring to ascertain the nature of the soil, and of setting out the line of the works, it shall be lawful for the promoters of the undertaking, after giving not less than three or more than fourteen days' notice to the owners or occupiers thereof, to enter upon such lands without previous consent, making compensation for any damage thereby occasioned to the owners or occupiers thereof."

In the course of forming the railway No. 1, which from the nature of its course required to be nearly all in tunnel, the company opened up part of West Regent Street, including the part of it belonging to the Coal Exchange, and made a considerable excavation therein for the purpose of their works, with the object of driving the tunnel through the subsoil and under-surface of the street. Before doing so the company gave notice to the Corporation of Glasgow, in terms of an obligation imposed on them by the Special Act to give notice at least twenty-one days before commencing any works the execution of which would in any way interfere with or affect any of the roads or streets in the city and royal burgh, or the sewers or drains belonging to the corporation. No notice to treat for the lands upon which operations were thus begun was given to the Coal Exchange Company.

The Coal Exchange Company brought this petition in the Sheriff Court, craving the Court "to interdict the defenders from entering upon the property of the pursuers in West Regent Street of Glasgow, including therein the whole of the southern half of West Regent Street from the middle line thereof southwards between the central line of West Nile Street upon the east, and Renfield Street upon the west, and from digging and making excavations therein, or for removing any part thereof, or from otherwise interfering with the same in any manner of way, and to grant interim interdict, and find the pursuers entitled to expenses in the event of the defenders opposing the prayer of this petition, and decern therefor, reserving to the pursuers their claim for penalties."

They averred that the company would require in constructing the railway, to acquire from them, and permanently to use, a stratum or portion of their lands, being part of the block of property above mentioned, and that the construction of the works would also, apart from structural damage, injuriously affect the remainder of the pro-

perty by interfering with the streets forming part of it, and that the operations of the company were for forming a tunnel in and under the part of West Regent Street belonging to them.

They reserved all claim for penalties under the Lands Clauses Consolidation Act, and for compensation and damages.

They pleaded—"The defenders having entered upon the property of the pursuers, being lands required to be purchased or permanently used for the purposes of their Special Act, without having paid to the pursuers their interest therein, the pursuers are entitled to interdict, as craved."

The defenders pleaded, *inter alia*, that the pursuers' averments were irrelevant and insufficient.

The Sheriff-Substitute (ERSKINE MURRAY) granted *interim* interdict till further orders of Court.

"*Note.*—The pursuers, the Coal Exchange Company, are proprietors of a block of property facing West Regent Street on the north. By their titles they have right to the *solum* of half that street, their north boundary being the centre of the street. By the Glasgow Police Act of 1866, 'Every public street, for the objects and purposes thereof and of this Act, and the public sewers for the drainage thereof, shall vest in the board.' The defenders, the Glasgow City and District Railway Company, by their Act of Parliament, section 34, have power, subject to the provisions of the Act, to appropriate and use the subsoil of the streets, &c. By section 55 (rubric) they 'may acquire easements only under streets or roads, and may purchase cellars,' &c., without being bound to take the whole of the lands. This section 55 lays down that the company 'shall not be required wholly to take those lands, or any part of the surface thereof, or any cellar, vault, or other construction therein or thereunder, held or connected with any house fronting or abutting on any such street, road, or lane, but the company may appropriate and use the subsoil or under-surface of the roadway or footpath of any such street, road, or lane, and if need be they may purchase, take, and use, and the owners of and other persons interested in any such cellar, vault, or other construction shall sell, the same for the purposes of the railways; and no such subsoil, cellar, vault, or other construction to be appropriated and used or purchased as aforesaid shall be deemed part of a house or other building or manufactory within the meaning of section 90 of the Lands Clauses Act.'

"Section 56 lays down that nothing contained in the above-quoted sections shall relieve the company from the liability for compensation under any Act incorporated with this Act; the Lands Clauses Acts and Railways Clauses Acts, *inter alia*, are incorporated with the present Act.

"The defenders are in course of making excavations in the causeway of West Regent Street, in the portion falling within pursuers' titles, for the purposes of their railway, which is intended to run in a tunnel carried westward below the causeway of West Regent Street. The pursuers have brought the present petition to have them interdicted from doing so. It seems that by the Lands Clauses Act, section 83, the promotors of an undertaking shall not, except by consent of the owners and occupiers, enter upon any lands which shall require to be purchased or permanently used for the purposes of the Act, until they shall have paid or deposited in bank the purchase-money or compensation in respect thereof. This they have not done in the present case, and hence the petition.

"The defenders contend, in the first place, that the pursuers have no title, the Police Board being vested in the street; and (2) that even if this is not correct, the case is one not of a company entering upon lands, but only of a claim for compensation in respect of damage, and that therefore interdict is not the proper remedy, but that the pursuers should simply state and carry out their claim for compensation in the usual way.

"As regards the first question raised by the defenders, it is clear, and is indeed practically admitted, that the Police Act only vests in the board the street in so far as required for the purposes of the Police Act. Otherwise the property of the street remains as it is. The pursuers therefore are clearly still proprietors of the *solum* of their half of West Regent Street, and all that is below it, including the site of the proposed tunnel. The objection of want of title is thus a mistake.

"But is the formation of the tunnel an entering on lands necessitating payment on deposit under section 83 of the Lands Clauses Act, or is it simply damage giving rise to a claim for compensation? This is a more difficult question. The Lands Clauses Act apparently had only two things clearly in view, the actual taking of lands, or damage done to lands or properties. The idea of an 'easement' under a street or road—in other words, the right of making a tunnel without taking the surface—was a later idea still; it seems in principle to fall under the former rather than the latter alternative. For it is not damage done to a parties' property, but the actual taking possession of it to a certain extent. Some of the land is taken, though not the surface of it. The definition of 'lands' in the Lands Clauses Act includes 'houses, lands, tenements, and heritages of any description or tenure.' The earth below the surface is certainly part of a heritage. And this view has been already adopted by the English Courts in the case of *Hill* v. *The Midland Railway Company*, L.R., 21 Chancery, 143 (1882), where it was held that an easement of the kind in question was in the English phrase a hereditament, and the railway company were entitled to enter upon the space to be occupied by their tunnel on depositing the assessed value of the easement. This is directly in point. As the railway company in the present case have made no such deposit, the pursuers are entitled to their interdict."

The defenders appealed to the Sheriff (CLARK), who pronounced this interlocutor:—"For the reasons assigned in the subjoined note, Finds that the petitioners have failed to set forth a case sufficient to warrant the Court to interfere by way of interdict; therefore recals the interlocutor appealed against, and dismisses the petition: Finds the petitioners liable in expenses; allows an account, &c.

"*Note.*—After a careful and repeated consideration of the authorities, both English and Scotch, cited at the debate, I have, contrary to the opinion I at first entertained, arrived at the conclusion expressed in the above interlocutor—

that the case as stated by the petitioners contains no sufficient grounds to warrant the Court in interfering by way of interdict to prevent the respondents from carrying out the operations contemplated by their Special Act. If the petitioners can ultimately establish that they have suffered injury from the operations of the respondents, they will not be without the appropriate remedy. But at present what the Court has to deal with is—not whether the petitioners may ultimately be found entitled to compensation, but whether at present a case has been made out for interference by interdict.

"It is important to notice what forms the prayer of the petition. It craves interdict against the respondents entering on, digging, excavating, or removing any part of, or interfering in any way with, what is alleged to be the property of the petitioners. Now, this alleged property forms, in point of fact, part of streets within the city of Glasgow. But by the Police Act of 1866, section 289, these streets are vested in the Police Board in so far as required for the purposes of traffic, drainage, and the requirements of the public generally, the only rights remaining in the adjacent proprietors being that of constructing cellars or vaults under the foot-pavement, and the ownership of the minerals or strata lying underneath the subsoil required for the purposes of the Police Board. If this view be correct, then the respondents, in carrying out the provisions of their Special Act, are answerable only at the suit of the Police Board, except as regards cellars or vaults, and any interference with the subsoil at a greater depth than that required for police purposes. These considerations must be kept in view in order to arrive at a reasonable interpretation of section 55 of the respondents' Special Act. By that section, as well as others, a plain distinction is drawn between what the respondents may appropriate and use without purchase, and what they can only take and use on condition of purchase. As regards the former, they may appropriate and use, for the purposes of their undertaking, the surface and under-surface of the street without any purchase or leave from the adjacent proprietors, because it is already dedicated to the public service as being vested in the Police Board. As regards the latter, the respondents can only take and use, for the purposes of their undertaking, vaults, cellars, &c., not held by the Police Board, but by the adjacent proprietors, on obtaining right to do so by purchase or otherwise from the said proprietors. That appears to me to be the proper meaning of section 55, as read with the previous section 34, and to be based upon the distinction between ground already appropriated to the public service and ground still remaining under the *plenum dominium* of private persons. Now, as regards the subjects in relation to which the present interdict is asked, it seems to me that the petitioners have stated no case to obtain interdict, either as regards the surface of the streets, the subsoil immediately thereunder, or the ground at a still greater depth. If the operations complained of affect the surface of the streets or the subsoil thereunder, these are matters for which the respondents are answerable not to the petitioners, but to the Board of Police, who are not moving in the matter. If, again, the said operations are sought to be interdicted in respect of any injury to the vaults or cellars which would thereby accrue, no relevant allegations are made to that effect. Lastly, if the interdict is sought on the ground that the respondents' operations will cause loss and damage to the petitioners from injurious interference with materials or minerals at a greater depth than that to which the rights of the Police Board extend, then in this case also no allegations sufficiently relevant for this purpose have been made. Upon the whole, therefore, I am of opinion, that whatever remedy may be competent to the petitioners in the event of injury or damage arising to them by reason of the defenders' operations, they have stated no sufficient case to justify the serious intervention of interdict. The allegations of the petitioners, while disclosing no proper title, are at best mere suggestions of contingencies which may never arise, and which, if they do, can always be compensated by damages as they accrue. To stop an important and useful public undertaking sanctioned by the Legislature, on mere suggestions of this kind, seems to me a course which the Court would not be warranted in taking.

"It will be observed that I have not only recalled the *interim* interdict, but dismissed the petition. I have done this because in dealing with the case I have assumed the accuracy of the petitioners' averments as regards matters of fact, and have deemed it necessary to consider only their relevancy. That being so, to make up a record could serve no purpose but to create additional expense; for unless the petition were so amended as virtually to introduce new grounds of action, I could not—in view of the reasons above stated—come to any other conclusion than that embodied in the interlocutor."

The pursuers appealed to the Court of Session, and argued—That the real question between the parties was whether or not the pursuers were to receive any compensation for the damage the defenders were doing to their lands. The law as to that was illustrated in *Coverdale* v. *Chalton*, L.R., 4 Q.B. Div. 104. The company might be entitled to take the subsoil under roads and street, but they could only do so under the provisions of their Acts, and the sections of the Lands Clauses Act (which was incorporated with their private Act) giving this power were the 17th, 83d, and 84th — *Ramsden* v. *Manchester Railway Company*, 1 Well., Hud. & Gordon, Ex. 723; and *Hill* v. *Midland Railway Company*, May 4, 1882, L.R., 21 Ch. Div. 143. The action of the railway company was illegal, as no notice such as was required by section 17 of the Lands Clauses Act had in the present case been served upon the pursuers, who craved interdict until the company consigned or found caution for damage done. The words made use of in the different sections of the Act were of importance. In section 34 the word was "appropriate," whereas in section 55 it is "enter upon, take, and use," and elsewhere "purchase."

Argued for the respondent — The statutory formalities had been complied with, as the notice was served upon the corporation in whom was vested the *solum* of the street for public purposes. In any event, the railway company was not bound to "purchase" the subsoil. Under the Lands Clauses Acts there were two kinds of claims—one for payment before entry on the

lands, and another for compensation for damage done. The present question turned upon the construction of sections 34 and 55 of the Company's Special Act, for by the provisions of sections 36 and 37, which did not apply to this case, the company could appropriate and use the subsoil of the street by giving notice to the magistrates. The works could not competently be stopped by interdict.—*Souch* v. *E. L. Railway Company*, April 26, 1873, L.R., 16 Eq. 108; *Magistrates of Leith*, 15th November 1878, 6 R. 185.

At advising—

LORD PRESIDENT—This is an application for interdict against the Glasgow City and District Railway Company entering upon the property of the pursuers in West Regent Street of Glasgow, including therein the whole of the southern half of West Regent Street, from the middle line thereof southwards between the central line of West Nile Street upon the east and Renfield Street upon the west, and from digging and making excavations therein, or from removing any part thereof, or from otherwise interfering with the same in any manner of way. Now, although the prayer for interdict asks for interdict against the defenders entering upon the property of the pursuers, that really means their property under the street called West Regent Street, the whole contention being about that part of their property. And the ground upon which the application is based is very well expressed in the plea-in-law—"The defenders having entered upon the property of the pursuers, being lands required to be purchased or permanently used for the purposes of their Special Act, without having paid to the pursuers their interest therein, the pursuers are entitled to interdict as craved." Now, the answer which the railway company make to this application is in substance this, that this is not a property which they are required to purchase and take under the provisions of their Act, but is a property which they are entitled to appropriate and use for the purposes of their Act without purchasing it, and they seem to indicate a doubt whether they are required to make compensation to the owners of that property; but of that I shall speak hereafter. But their main defence certainly is that this is a property which they are entitled to appropriate and use without paying a price for it as the condition of their entry. Now, this railway is one which from the peculiar area which it traverses is necessarily a good deal under ground, and a great deal of it is formed in the way of tunnel, and therefore it is not at all unnatural to expect that there will be special provisions in the Act as to the ground under which the tunnel is to be made. There can be no doubt in the world that in the absence of any special provision as to property of the ordinary description, when a company proceeds to make a railway by a tunnel they must purchase the property, just as they must do in the ordinary case. But there are special provisions in this statute to prevent the application of the ordinary rule, and I think the rule to be determined depends entirely upon the language of these sections.

The 5th section of the statute is the one which gives power to make the railway in the line and according to the levels shown upon the plans and sections, and it also contains power in the usual way to "enter upon, take, and use such of the lands delineated on the said plans, and described in the deposited books of reference, as may be required for that purpose." Now, that is the ordinary language of such a clause in almost every Special Act authorising the construction of a railway—power to "enter, take, and use"—and these words, according to the ordinary language of railway law, undoubtedly mean that they are to purchase the ground which they so appropriate. But there is one section in this statute which is directed specially to the matter of interference with streets, and that comes to be of course a very important thing for a railway which is to traverse a great portion of the area of the city of Glasgow, and there the language is by no means the ordinary language of railway Acts. It provides (sec. 34) that "Subject to the provisions of this Act, the company may, for the purpose of constructing railway No. 1, appropriate and use the subsoil of the streets, roads, roadways, lanes, footpaths, and places shown on the deposited plans, and described in the deposited books of reference, and may break up, remove, alter, or interfere with all drains or sewers, and all water, gas, and other pipes therein or thereunder." Now, there are two or three things to be observed in the language of this section. In the first place, this section does not, like the 5th, use the ordinary term "enter upon, take, and use," but employs another phrase which is not at all known in such statutes, "appropriate and use." In the second place, it is to be observed that it is directed to the interference of the railway company with streets, and more particularly with the subsoil under streets. And thirdly, it appears to me to be very important to observe that while it gives power to the company not only to appropriate and use the subsoil, but to break up, remove, alter, and interfere with sewers and pipes of all descriptions, it does not authorise them to interfere with cellars under the streets, and therefore while under this section 34 they have authority to do a great many things with regard to what is under the public streets of the city, they certainly have not obtained by it any authority to appropriate cellars belonging to private proprietors otherwise than by the ordinary mode of purchase. Now, keeping these things in view, we approach next to the consideration of the 55th section, upon which the whole thing seems to me to depend. It is expressed thus—"With respect to any lands which the company are by this Act authorised to enter upon, take, and use for the purposes of the railways" (that is, the lands which are on the plans and in the book of reference), "and which are in or under the roadway or footpath of any street, road, or lane shown on the deposited plans, and described in the deposited books of reference, the company shall not be required wholly to take these lands, or any part of the surface thereof, or any cellar, vault, or other construction therein or thereunder, held or connected with any house, or abutting on any such street, road, or lane." Now, if this section had stopped there it would have been very difficult to know what it meant, because the provision up to that point is merely that the company are not to be required wholly to take the lands in that position. What, then, are they to do if they are not

wholly to take?—that is, to take them within the meaning of the 5th section of the statute. It must be intended that they shall do something else, and the clause accordingly does go on to specify what is intended by these words; they are not to be obliged "wholly to take" such lands, "but the company may appropriate and use the subsoil and under-surface of the roadway or footpath of any such street, road, or lane, and if need be they may purchase, take, and, use" any cellar under the same. Now, there are repeated the words which we find in the 34th section, "appropriate and use," and there are also used words which very clearly are intended to mean something that is contrasted with the appropriating and using, viz., purchasing, taking, and using. Under the 34th section the company are entitled to appropriate and use everything under the streets except cellars. Cellars are not dealt with in the 34th section. Therefore when you get here in the 55th the words appropriate and use, and also find that the thing which they are to "take" is the very something that is not dealt with in the 34th section, you see clearly that the Legislature has intended something quite different from the ordinary taking of lands. And accordingly it becomes necessary in defining the powers of the railway company under this 55th section to observe the language used. When they deal with a kind of property which is not within section 34, and which may not be appropriated and used within the meaning of that section, and when they deal with that, viz., cellars below the street, they use very emphatic language—much more definite language than that in section 34—because introduced for the purpose of making it clear that as regards cellars the company are to take them as purchasers, thus showing very clearly that when they are not taking cellars under the street, or anything under the street, they do not require to purchase, but on the contrary are entitled to appropriate and use, whatever that may mean less than is meant by the word purchase. Now, it appears to me that that portion of the statute is very clearly expressed, and that it is quite impossible to hold that the company are to buy the soil under the street, and that their powers are to be exactly the same as regards both subjects, those that they may appropriate and use under section 55, and those that they may not appropriate and use under section 54. One of the most apparent objects of these sections is to distinguish between those things which they may appropriate and use under section 34, and those that they may not, viz., cellars. If they must purchase cellars notwithstanding section 34, it is quite clear that the power which they acquire under section 34 and section 55 together, in regard to all other things under the ground of the streets, is not the usual power to take but something different. I think this is conclusive of the whole case. I think it proves as distinctly and in as plain language as can very well be used in such a statute, that the company are entitled to take all the subsoil under the street as a thing for which they may be required to pay, no doubt, but not to pay in the way of a purchase price, but, on the contrary, to pay afterwards when the amount of the injury to the owner of that subsoil comes to be ascertained.

It was maintained on the part of the railway company that the owners of the houses in question here were not in point of fact owners of this subsoil at all, but I give no effect to that argument. I think the magistrates under the Police Act have right to the surface for all the purposes of the statute, and that they have also right to the subsoil immediately below the surface to such a depth as is necessary for the purpose of constructing sewers, and laying gas and water pipes, and that everything beyond that remains the property of the owners under their infeftments, and therefore it is not because I entertain the slightest doubt that the complainers here are the owners of the subsoil which they complain the defenders are removing—it is not from any doubt about that at all—that I decide this case against them, but simply from the words of the statute, which give the railway company the power of dealing with this part of their property, not by way of purchase, but in a different way altogether.

I think it not unfair to add also—it may perhaps save some dispute afterwards—that I do not entertain the smallest doubt of the complainers' right to compensation for what is being done to their property. I do not mean that they are to get the price of so much material, but that they are to be really compensated for any injury done to them. That I think is made perfectly plain by the 56th section of the statute, which provides that in dealing with cases of this kind, particularly with those under this 55th section, dealing with lands in pursuance of that clause, they are not to be relieved from liability for compensation under any Act incorporated with this Act, that is, either under the Lands Clauses Act or the Railway Clauses Act, and therefore I think that the compensation which is due to the owners for any damage sustained by them by the tunnel passing through their ground, or by any operation of that kind, is quite retained to them.

I agree with the Sheriff in the conclusion at which he has arrived, but I think he is mistaken in his view with regard to the Magistrates as Police Commissioners, and the pursuers' rights as proprietors of the subsoil, but upon the main argument I think he is quite right, and that this prayer for interdict should be refused.

Lord Deas concurred.

Lord Mure—This is a case of some difficulty and nicety, and I am not surprised that the Sheriff-Substitute and Sheriff should have come to different conclusions about it; but after having given the matter the best consideration in my power, I have come to the same result as your Lordship, that the Sheriff has taken the right view of it.

It must be kept in view in dealing with a case of this kind that a portion of the property of these appellants has by the 298th section of the Police Act been to a certain extent taken out of the administration of the proprietors and vested in a public body for the purposes of that Act. Now, the object and purpose of the Act are police purposes apparently, for the streets are to be under the charge and administration of the magistrates for the purpose of placing sewers and pipes and things of that sort under them; and therefore it is necessary to have them to a certain extent taken out of the administration of the proprietors. Now, such being the position of

the streets under which this railway is to go to a very considerable extent, crossing and re-crossing these streets, and the houses of the propriteors being to a certain extent interfered with in that way, the question comes to be, whether under this Act of Parliament, by which the company were allowed to go under these streets, it was not to be expected that they would not make some provisions by which they would carry through their works without being interfered with by the proprietors when they came to pass under the streets; and therefore it was that to a considerable extent these streets were taken out of the administration of the proprietors of them, and that the Act of Parliament provided that the railway company in going through these streets should adopt a somewhat different mode of dealing with these proprietors than they would have been obliged to do if they had been taking possession of any property in the manner usually observed by railway companies; and therefore we find in those sections of the Act with which we have here to do, referred to by your Lordships—viz., the 34th and 55th sections—special regulations for dealing with the owners of properties through which the railway is going to pass, and I agree with your Lordships in the interpretation of these clauses. I think that these two clauses point to different modes of dealing with the owners; and, in the first instance, I think that for the subsoil which the company are authorised under section 34 to appropriate and use they are not bound to go through the form of giving notice to the parties; and, in the next place, that as regards cellars—which under section 55 they are authorised to purchase and take—they must give notice to the owners that they are to purchase these in the usual way. That, I think, is reserved to the owners by the Act; and that being so, I think that all that the present appellants can demand from the company is that they shall make compensation under the 56th section of the Act. I am therefore of opinion that the appellants are not entitled to the remedy of interdict craved.

Lord Shand—I am of the opinion expressed by your Lordship, that the whole question that is involved in this case is the right to enter on, appropriate, and use the subsoil of this street, without previously making compensation or making a deposit by way of security; and in the decision to be now given I understand that question of compensation is to be left unaffected. The railway company indicate very limited views of compensation—much more limited than are sound; but whatever may be held as to the rights of the complainers, the sole question now is, whether, even assuming that their rights to compensation do subsist, the railway company are not entitled to enter upon the lands before making payment or consigning money in respect of any compensation to be paid to them? Now, on that question I have come to the conclusion with your Lordships that the statute authorised entry, but that notwithstanding that entry, use, and appropriation the railway company will be liable in compensation. The subjects to be taken and used are, as Lord Mure has explained, of a very peculiar and special kind. It is not the surface—it is not even the immediate subsoil or under-surface — but it is the subsoil or subsurface which is at a greater depth than is required for police purposes under the statute, and I include in police purposes the use of the ground for water and gas pipes, sewers, and the like. I do not understand the complainers here to seek to interfere with the operations so far as regards that part of the ground which may be called the surface and immediate surface, because it is conceded that that particular interest is substantially in the magistrates. On the other hand, the complainers have the right to the property of the ground below; and I do not understand it to be disputed by the railway company that the magistrates' rights, whatever they may be, amount to a right to use the under-surface of the ground for sewers and other necessary public purposes. And taking that to be the state of matters, it is not surprising that the Legislature should allow entry without notice and without any arrangement to purchase. It is a very peculiar subject. It is certainly not in any proper sense in the occupation of the proprietor, nor is he having any beneficial use or enjoyment of it at this moment. The subject is not like that of a garden or manufactory placed or situated on the surface of the ground, nor like any other use of the surface; and therefore it is not surprising to find that the Legislature in this particular class of subject authorised entry subject to compensation, but without imposing upon the persons taking their ground the necessity of purchase before entry, but subject, as I have said, to compensation; and accordingly I think that that is what in substance the statute has done. For, in the first place, section 34, as your Lordship has pointed out, provides that the company may, for the purpose of constructing their railway, appropriate and use the subsoil of the streets, roads, roadways, lanes, footpaths, and so on; but I am not prepared to say that, even assuming or supposing that section 55 had not been part of this statute, and that section 34 had stood alone with section 56, reserving right to compensation, it might not have been sufficient to entitle the railway company to succeed in their demand for right to enter without payment or finding security; and I rather agree with Mr Trayner's observations that the primary purpose of section 55 is rather this, to make it clear that in taking subsoil there is to be no obligation thereby necessarily imposed or implied to take the surface, and also at the same time to make it clear with regard to a mere cellar that abuts on that subsoil there is no obligation to take the upper surface; that may be called the primary purpose of section 55, and I think it throws a great deal of light on the question we are now dealing with. And so, without following your Lordship through the statute, which your Lordship has already and much better done than I could, I have only to say that the clauses to which your Lordship referred make a clear distinction between subsoil and anything of the nature of a cellar or the like—that in the one case, reverting to the language of section 34, subsoil may be appropriated and used, whereas the other is to be purchased, taken, and used. The form of this expression seems to me to give right to the company without notice to appropriate the subsoil, whereas the latter seems to indicate that before doing so there must be purchase. And accordingly it appears to me that sections 83 and 84 of the

Lands Clauses Act which have been founded on do not apply. These sections are introduced by the words "And with respect to the entry upon lands by the promoters of the undertaking, be it enacted as follows;" and then follow, in the first place, a direct enactment that the promoters shall not enter upon lands acquired until they shall have paid compensation, and further, a provision that they may deposit the amount. And it appears to me that this statute in itself deals with the entry upon the lands which are here in question, for I think that under the phrase "appropriate and use" the subsoil the entry is thereby made legal and provided for, and that therefore indirectly the words of sections 83 and 84 have no application to this case.

It only remains to notice, what I think is very important in considering this question, that there is in this Act an actual saving of the right to compensation notwithstanding this entry. Section 56 enacts that "Nothing contained in the sections of this Act of which the marginal notes are" so and so, being those of 34 and 55, which have been already noticed, and then it goes on further—"nor any dealing with lands in pursuance of those sections, or any of them, shall relieve the company from the liability to compensation under any Act incorporated with this Act." It appears to me that that leaves the right of the proprietor to compensation practically on the same footing as it would be if notice was required so far as liability to compensate is concerned. And I should be disposed to hold that such compensation, particularly having regard to section 6 of the Railways Clauses Act, may fairly involve payment of compensation for the soil or subsoil removed from the property of the person from whom it is taken. That may be of trifling value, but if so, the compensation will be all the less. But in principle, if that subsoil be of value, I cannot see that the claim of the owner whose property has been taken and removed can be excluded. It will include, I think, fairly, (1) injury that may be done by the permanent occupation by the tunnel which interferes with the property if injury can be shown; and (2) injury to the adjoining subjects of the proprietors, and all of these are saved by this 56th section of the Act.

It was argued by Mr Trayner that something more was saved—that there was further saved to the proprietors right to require that there shall be notice served upon the proprietors, and that that was necessary to sanction the use. I do not so read section 55, while section 56 declares that any dealing with lands shall not relieve the company of the liability to compensation. I do not find anything there that leaves the railway company bound to take the procedure required under either of the Acts, for I think there is in the statute no authority to take and enter except under an obligation for compensation.

The Court refused the appeal with expenses.

Counsel for Pursuers (Appellant)—Trayner—Ure. Agents—J. & J. Ross, W.S.

Counsel for Defenders (Respondents)—R. Johnstone—R. V. Campbell. Agents—Millar, Robson, & Innes, S.S.C.

Saturday February 24.

OUTER HOUSE.

[Lord M'Laren.

MILLER (ALLAN & COMPANY'S TRUSTEE) *v.* PHILIP & SON.

Bankruptcy—Illegal Preference—Act 1696, *c.* 5—*Cash Payment.*

A merchant within sixty days of bankruptcy delivered to a creditor a letter addressed to the agent for one of his customers, requesting him to pay a sum to the creditor out of the price in his hands of certain work which he (the merchant) was doing for the customer. The agent had no money due to the merchant in his hands at the time, but on it subsequently coming into his hands he paid it over to the creditor as requested. *Held* that this was not a cash payment by the merchant to the creditor, but constituted an illegal preference reducible under the Act 1696, c. 5.

This was an action of reduction at the instance of the trustee on the sequestrated estate of D. Allan & Co., boat-builders, Granton, of a letter, draft, or order granted by the bankrupts within sixty days of notour bankruptcy, with the result, as the pursuer alleged, of giving an illegal preference to the defenders John Philip & Son, timber merchants, Leith, over the other creditors of the bankrupts. The pursuer also concluded for payment to him as trustee the sum of £150 as the amount of the alleged preference. The facts were as follow—The bankrupts were embarrassed in their affairs in the summer of the year 1881, though not sequestrated till 19th October of that year. The defenders had had frequent dealings with them in the course of business. In the course of the year 1881 the bankrupts were building two vessels for a Spanish customer, the name of one of which vessels was "Marques de Viluma." In the month of August or September 1881 it was agreed between the bankrupts and the Spanish customer for whom the "Marques de Viluma" was being built that money should be placed by the latter in the hands of Mr Ressich (of Ressich, M'Laren, & Co.), the Spanish consul at Leith, in payment of the price to become due to the bankrupts when the "Marques de Viluma" should be completed and delivered to him.

On the 22nd September a bill for £175, 8s. drawn by the defenders upon the bankrupts fell due and was dishonoured by the bankrupts. This bill had been discounted by the Bank of Scotland, and was lying at the Leith branch of that bank.

On the 24th September the bankrupts handed to the defenders the letter under reduction in this action. It was addressed to Ressich, M'Laren, & Co., and ran thus:—"*Leith, 24th September* 1881—Gentlemen, Please to pay to Messrs John Philip & Son, timber merchants, Leith, the sum of One hundred and seventy-five pounds eight shillings stg. for the purpose of lifting bill due at the Bank of Scotland, Leith, out of the balance of the price of the s.s. 'Marques de Viluma,' when the vessel is finished, and oblige yours truly