trustees, as well as the beneficiaries, however, are satisfied that it is not in the interest of those concerned, but would be pernicious to the interests of those concerned, to carry on those farms, there must be some way of obtaining authority for discontinuing that losing business with safety to those who are primarily responsible.

Lord Rutherfurd Clark—I am of the same opinion. This application is made under the 27th section of the Entail Amendment Act of 1848, for the purpose of getting authority for the purchase of estates to be entailed on a series of heirs. Now, looking at the trust-deed, I do not doubt that the time for purchasing lands and entailing them upon a series of heirs has not yet arrived. Therefore I think it plain that the petitioner is not entitled to present a petition under the section of the Act to which I have referred.

The Act is an Act which is intended to enable heirs in possession of entailed estates to disentail. The only persons under the leading sections of the Act who are entitled to get powers for the purpose of disentailing are heirs in possession. But in certain cases there is money directed to be paid, and the 27th section gives certain powers by which money may be obtained, but as I read the clauses which are here applicable, the person who applies to disentail money must be with respect to that money in the position of an heir of entail in possession. Now, the petitioner cannot possibly be in that position by reason of the simple circumstance that the entail cannot be executed at this time. Therefore she cannot be in any sense in possession of the entailed estate. It is for that reason I think the petition must be dismissed.

Something was said with respect to the date, and the bearing upon that matter of the 28th section of the Act of 1848. I think it is plain enough from the decision in the case of *Black* [*sup. cit.*] that the meaning of that section was to fix the date of the entail for the purpose of ascertaining the powers of heirs in possession to disentail, for these depend on the date of the entail, whether before or after 1848. That is the only purpose which that artificial date produced by the 28th section was intended to serve.

We have had a good deal said in regard to the question of vesting under this trust-deed. From what I have said it is obvious enough that that question of vesting, if it exists at all, is quite subsidiary.

Lord Craighill was absent.

The Court adhered.

Counsel for Petitioner — Pearson — Guthrie. Agents—Smith & Mason, S.S.C.

Counsel for Trustees—Goudy. Agent—John Macmillan, S.S.C.

Thursday, February 25.

FIRST DIVISION.

[Lord Fraser, Ordinary.

THE GLASGOW CITY AND DISTRICT RAILWAY COMPANY *v.* MACGEORGE, COWAN, & GALLOWAY.

Arbiter — Ultra fines compromissi — *Railway — Compensation—Structural Damage, Mode of Estimating—Glasgow City and District Railway Act* (45 *and* 46 *Vict. cap. ccxvi.*)

A railway company was taken bound by its Act as follows—"If by reason of the construction of the said . . . tunnel any structural damage shall be caused to any buildings, . . . the company shall make compensation therefor to the owners." The award of an arbiter in a reference under this Act was impeached on the ground that he had incompetently and illegally taken into account in estimating the damage what was not structural damage at all. *Held*, after a proof by the examination of the arbiter, at which he deponed that he had allowed only for structural damage, and that he had estimated it in a particular manner, and in which it was not shown that he really misunderstood the meaning of the expression, that there was no ground for setting aside the award.

This was an action of reduction of a decree-arbitral pronounced by Mr William M'Jannet, writer, Glasgow, as oversman in a reference under the Lands Clauses Act entered into between the Glasgow City and District Railway Company and Messrs MacGeorge, Cowan, & Galloway, writers, Glasgow.

MacGeorge, Cowan, & Galloway, the defenders, were owners of a dwelling-house in West Regent Street, Glasgow, with a bleaching-ground behind the same, used by them as their writing chambers, and the title to which was in the names of the individual partners as trustees for their firm. The house fronted West Regent Street.

The pursuers the Glasgow City and District Railway Company were empowered by their private Act (Glasgow City and District Railway Act, 45 and 46 Vict. cap. ccxvi.), *inter alia*, to construct a tunnel underneath certain streets in Glasgow, including West Regent Street. Section 48 of that Act provided that "if by reason of the construction of the said covered way or tunnel any structural damage shall be caused to any buildings, present or future, fronting or abutting on the streets or roads in or under which Railway No. 1 is constructed, or any buildings erected or which may hereafter be lawfully erected upon the land over or by the side of the tunnel, or to the foundations of any such buildings, the company shall make compensation therefor." The defenders gave notice to the railway company that they claimed in respect of structural damage to their property, including depreciation in marketable value caused by pursuers' operations, the sum of £1400, and £100 for damage which they sustained as occupiers.

The claim bore to be exclusive of all other claims competent to the claimants in virtue of the company's private Act or at common law. It reserved their right to amend or augment it in respect of all matters which should come to their knowledge after the date of intimation (10th April 1884), and for all structural and other or further damage which should accrue. As the pursuers refused to admit this claim an arbitration under the Lands Clauses Act was entered into. The arbiters nominated Mr William M'Jannet, writer, Glasgow, as oversman, and eventually after proof had been led, at which the oversman was present by arrangement of parties, the arbiters on 10th October 1884 devolved the reference on him.

On 28th October Mr M'Jannet issued a note of his proposed findings as follows:—I. "That by reason of the construction of the covered way or tunnel made by the respondents in West Regent Street, Glasgow, the claimants' property, situated at and forming No. 91 of that street, has prior to 1*st October* 1884 sustained structural damage to the buildings erected on and forming part of said property, and to the foundations of such buildings, and that the claimants are entitled to be paid by the respondents, as compensation in respect thereof, as follows, viz.—(1) As owners the sum of £950 sterling; and (2) as occupiers the sum of £50 sterling." II. "That the claimants are further entitled to be paid by the respondents the expenses incurred by them in and incident to the arbitration, and that the respondents are also liable for the expenses (including outlays) incurred to the clerk and legal assessor."

After a representation against these findings, and answers thereto, the oversman issued a deliverance, in which he adhered to the proposed findings, as well in respect of amount as in form, and he on 17th December 1884 pronounced the decree-arbitral which it was sought by this action to reduce—"Find that by reason of the construction of the covered way or tunnel made, or in course of being made, by the respondents in West Regent Street, Glasgow, the claimants' property situated at and forming No. 91 of that street had, at the date of their notice to and claim against the respondents, dated 10*th April* 1884, sustained structural damage to the buildings erected on and forming part of said property, and to the foundations of such buildings, and that the claimants are entitled to be paid by the respondents, as compensation in respect thereof, as follows—*videlicet*, first, the said Andrew MacGeorge, William Cowan, and Hugh Henry Galloway as trustees foresaid, as owners of the said property, the sum of £950 sterling; and second, the said MacGeorge, Cowan, & Galloway, as occupiers thereof, the sum of £50 sterling."

The pursuers objected to the decree-arbitral as being incongruous, inconsistent and inextricable, inasmuch as it bore to be an adherence to proposed findings which fixed the date up to which structural damage had been sustained, and compensation in respect thereof due, at 1st October 1884, and at the same time in its latter part fixed the date at 10th April 1884; further, that the defenders craved £1400 in their notice and claim, and when ordered to lodge a claim on the arbitration increased it so as to claim as at 5th August 1884 £2500, and the evidence at the proof was directed to proving that claim, and indeed was brought down to 1st October 1884. They averred that in these circumstances the oversman acted wrongfully, illegally, and corruptly in fixing the date up to which he gave damages at 10th April 1884.

The defenders averred that the decree-arbitral did not exhaust the submission, because it fixed the date at 10th April 1884, while the claim and the decree applied to compensation up to 5th August 1884, and evidence was led as to the condition of the buildings down to 1st October 1884, or at all events 5th August 1884. They also stated that the arbiters took into account deterioration in marketable value and other items other than structural damage, for which there was no legal claim. They pleaded that the pursuers' averments were irrelevant.

The Lord Ordinary on 3d June 1885 found the pursuers' statements irrelevant and dismissed the action.

"*Opinion.*—Three objections have been stated to the award by the oversman in this case, but only two of them were insisted on by the pursuers. The first objection was that the award by the oversman does not exhaust the submission. The award gives damages down to the 10th of April 1884, which was the date of the notice and claim made by the pursuers. It was, however, only on the 5th of August 1884 that the defenders lodged their claim in the arbitration, and the complaint against the award is that the oversman took the date of the notice and claim, and not the date when the actual paper or claim was lodged. The oversman on the 28th of October 1884 issued a note of proposed findings in which he stated that he was prepared to find that the claimants had prior to 1st October 1884 sustained structural damage to the buildings erected on and forming part of the said property—to a certain extent. According to the plain reading of this, it meant that the oversman had estimated the damage down to 1st October, but against his proposed findings there were representations given in by the parties, and the oversman altered, as he was entitled to do, his proposed findings, and gave damages, not as at 1st October 1884, but as at the date of the notice and claim on 10th April 1884. The pursuers of this action of reduction say that the damages ought to have been brought down to 5th August 1884, when the claim was actually lodged, and that they may be harassed by an additional claim at the instance of the defenders. The Lord Ordinary is of opinion that their pleas are groundless, 1st, because the proper period for claiming damage was the date of the notice of claim on 10th April 1884, and 2dly, because the 48th section of the Act, incorporating the pursuers' company, expressly provides that no claim for compensation shall be made after six months from the discovery of any structural injury to the buildings of the owner, and such six months have long expired.

"The second objection, which was not pressed, and which is set forth in the 16th article of the condescendence [*i.e.*, that evidence had been led applying to the period down to 1st October 1884, as above stated] need not be adverted to; but the third objection is, that whereas the pursuers' Act of Parliament allows compensation to be made for structural damage—that is, damage to a house

or building of the defenders—the oversman in awarding compensation wilfully took into account deterioration in the marketable value of the property and other items of damage other than structural damage, for all which the defenders under the recited Act have no legal claim.

"Now, the award itself expressly bears that the defenders 'sustained structural damage to the buildings erected on and forming part of said property, and to the foundations of such buildings, and that the claimants are entitled to be paid by the respondents as compensation in respect thereof,' &c. It is now sought to contradict this statement of the oversman by evidence. The only evidence as to what passed in his mind that can be adduced is the parole evidence of the oversman himself, and such evidence is in the opinion of the Lord Ordinary wholly incompetent, as was decided by the House of Lords in the case of *The Duke of Buccleuch* v. *Metropolitan Board of Works*, 29th June 1872, L.R. 5 Eng. and Ir. Ap. 418. 'The award,' said Lord Cairns, 'is a document which must speak for itself, and the evidence of the umpire is not admissible to explain or to aid, much less to attempt to contradict (if any such attempt should be made), what is to be found upon the face of that written instrument.' And this view was given effect to in a case in the Court of Session—*Rogerson and Others* v. *Rogerson*, 31st January 1885, 12 R. 583.

"The result is that the averments being irrelevant, the action must be dismissed."

The pursuers reclaimed.

By interlocutor of 13th November 1885 the Court after argument allowed the pursuers to lodge a minute of amendment. They did so by adding a statement to Cond. 16, above referred to, setting forth that the defenders in their notice and claim of 14th April 1884 only claimed £1400, but when ordered to lodge a claim in the reference increased it by £1100, making it £2500 as at 5th August 1884, "and as the decree-arbitral now stands the defenders may make a new claim for the said £1100 or whatever damage they may allege has become apparent from and after 10th April 1884, and the evidence at the proof was directed to proving this latter claim, and indeed was brought down to 1st October 1884. In the circumstances the said oversman acted wrongfully, illegally, and corruptly in fixing the date up to which he gave damages as 10th April 1884."

The 17th article of the condescendence as amended was as follows—"Throughout the whole proceedings preliminary to and in course of the reference the question as to what kind of damage the claimants were entitled to compensation for, and what subject or elements of damage the arbiters and oversman were entitled to consider, was distinctly raised by both parties. In their original claim of 10th April 1884 the defenders claimed damages in respect of the structural damage already sustained, 'including depreciation in the marketable value of said property,' while in the counter notice by the pursuers, dated 2d July 1884, the pursuers 'protest that in so far as it (the said notice and claim) demands compensation for damage, other than the structural damage provided for by the said 48th section of the said Act, it is incompetent, and we do not admit the right of you to prefer such claims, and we are not willing to pay the amount of compensation claimed by you, and will not enter into an agreement for that purpose;' and the same protest was repeated in the pursuers' nomination of an arbiter dated 18th July 1884. Further, the defenders, in article 4 of their claim lodged in the reference on 5th August 1884, founded on and claimed damages under not only section 48 of the said special Act, but under section 6 of the Railways Clauses Consolidation (Scotland) Act 1845, which latter section the pursuers have all along maintained is excluded, except as regards the structural damage provided for by said section 48 of the special Act. The defenders in the said claim further claim damages at common law, while in their answers to the said claim pursuers plead that, so far as the defenders' claims extend beyond structural damage, they are incompetent and invalid. And in the proof taken before the said arbiters and oversman evidence was led by the defenders (the claimants) with regard to alleged damage sustained by them in connection with the property in question other than structural damage. In particular, they led evidence to show that the subjects in question would be permanently depreciated in value in ways quite unconnected with structural damage to the existing buildings, and that, *inter alia*, in the following ways—*First*, that a prospective and hypothetical purchaser would not give so good a price for the site, including therein both ground built upon and ground unbuilt on, because it had lost its good reputation, or, as stated by the witnesses and counsel for the defenders, that there was a '*fama*' against it. *Second*, that such prospective and hypothetical purchaser would not give so good a price for the subjects in question with the view of developing the property by heightening the walls of the existing buildings, and otherwise adding to them; and *third*, the defenders, on their evidence and by their counsel, suggested other speculative grounds of damage, such as the inconvenience of having a railway under the street in front of the house. It was maintained, on the contrary, for the pursuers that all that the defenders were entitled to get was damage for injury to the structure of buildings in question as they then stood, and it was proposed to the oversman by Mr James Graham, arbiter for the defenders, that the arbiters or the oversman (in case of devolution taking place) should make two sets of findings in order that the parties might get the opinion of the Court on the point of law raised upon the statute. This was done in presence of the counsel for both parties, and both the oversman and the counsel for the defenders apparently acquiesced in the proposal. Further, in the representation made by them when the oversman had issued his proposed findings the pursuers requested the oversman to separate in his award, the different items of damage, in these terms—'The respondents do not conceal from the oversman that in their view he, in giving effect to some extent to the opinions of these witnesses in support of that claim, has taken into consideration an element not embraced in the submission, and to give effect to which is in their judgment *ultra vires*, and with the view of enabling them to properly raise that question, and obtain a judicial determination upon it, they respectfully ask the oversman, should he on reconsideration adhere to the award proposed, or propose to award any sum exceeding £300, to state

the sum to which the claimants are in his judgment entitled on the evidence for the reparation of the structural damages hitherto done, and separately the amount to which he conceives they are entitled in respect of "depreciation in market value," or apprehension of future injuries.' The said oversman, however, wrongfully, illegally, and corruptly refused, or at least failed, to comply with the pursuers' request, and the pursuers believe and aver that in awarding the said sum of £950 sterling he took into account and gave damages for speculative deterioration in the future marketable value of the property in question, and of the site or *solum* of the said property, with reference to future and speculative operations thereon apart from the presently existing buildings, and in the site so deteriorated the said oversman computed not only the ground on which the buildings stood but a considerable extent of unbuilt-on ground behind the said buildings. The pursuers believe and aver that he also took into account the deterioration that might in his view accrue to the property from there being a railway under the street in front of it, and other items of speculative damage and amenity damage, for all which the defenders, under the terms of the recited Act, have no legal claim. The pursuers believe and aver that the greater part of the said sum of £950 was really awarded in respect of claims which it was incompetent and illegal for the oversman to take into consideration under the said special Act, but notwithstanding that the said sum was awarded in respect of such claims the said oversman falsely, corruptly, and illegally set forth in the said decreet-arbitral that it was awarded in respect of 'structural damage to the buildings erected on and forming part of said property, and to the foundation of such buildings.' In proceeding as aforesaid the said oversman acted illegally and corruptly in the sense of the Act of Regulations 1695. In the circumstances above stated the present action of reduction is necessary."

The defenders' 2d, 3d, and 5th pleas on the record as amended were—"(2) The pursuers statements so far as material being unfounded in fact, the defenders should be assoilzied. (3) The objections to the decree-arbitral being unfounded, and the said decree-arbitral being in every respect valid and final between the parties, the defenders should be assoilzied. (5) The arbiter not having been guilty of legal corruption, and the decree-arbitral not being *ultra vires* of the arbiter or *ultra fines compromissi*, the defenders should be assoilzied.

On 4th December 1885 the Court allowed the pursuers a proof of their averments in article 17 as amended. Under this allowance of proof Mr M'Jannet, the oversman, was examined as a witness before Lord Shand. The material evidence given by him is quoted in the opinion of the Lord President.

Argued for the pursuers—The award of the oversman was wrong; he had acted *ultra vires*, and *ultra fines compromissi*. He had awarded compensation for other than structural damage, and he had never applied his mind to structural damage in the sense of the Act. His mode of calculation was to take one-fifth of the value of the subjects, including the back ground, and call that structural damage; this was clearly an erroneous method of estimating structural damage. The oversman had clearly taken a wrong view of the statute; he had felt a difficulty, and got over it by using a statutory phrase and calling the sum which he had allowed an award for structural damage.

Replied for defenders—There were two points which had to be distinguished and kept separate. (1) The kind of damage. (2) The mode of estimating the pecuniary loss to the claimant. If the arbiter had only dealt with structural damage, he could not competently be examined as to the grounds of his decision. He stated in his award (which was the proper evidence) that he only dealt with structural damage, and there was no evidence that he had acted *ultra vires*.

At advising—

Lord President—This arbitration was entered into under the authority of the 48th section of the pursuers' Act of Parliament, and the provision of that section is very special and peculiar. It provides that "if by reason of the construction of the said covered way or tunnel any structural damage shall be caused to any buildings, present or future, fronting or abutting on the streets or roads in or under which Railway No. 1 is constructed, or any buildings erected or which may hereafter be lawfully erected upon the land over or by the side of the tunnel, or to the foundations of any such buildings, the company shall make compensation therefor."

Now, there is one thing quite clear upon the reading of that section, that no compensation is provided to be awarded except for any structural damage, whether that damage be caused to the building itself or to the foundation of it. It must be structural damage in both cases.

Then, again, there is a proviso in the same section, that compensation for injuries recoverable under this section shall be recoverable from time to time as such injuries may accrue or be discovered, but the claim must be made within six months of the discovery. This again shows that the structural damage for which compensation is to be made may not all be discoverable at one time, even as regards the building which is in existence at the time the first claim is made, or it may apply to a new building to be hereafter erected upon the ground. In short, the railway company were taken bound to pay for the damage caused to a building or its foundation upon that ground, whether a present building or a future building, or whether the damage to the present building be already discoverable or shall only be discoverable hereafter. That, I think, is the meaning of the section, and it is unnecessary for the purposes of this present case, to enter into more minute consideration of possible cases that may arise under the section.

Now, the allegation of the pursuers upon which they were allowed to go to proof is contained in the 17th statement of their condescendence, and amounts to this, that the oversman in awarding the damages which he has given to the defenders has taken into account, not merely the damage arising from structural injury to the building or its foundation, but has also taken into account the way in which the marketable value of the subjects may be affected, not by structural damage, but by other incidents connected with the foundation or existence of the underground railway. That, I think, is the substance of the railway company's allegation. And of course that allegation

can only be proved by the testimony of the oversman, because nobody can tell except the oversman himself what entered into his mind in arriving at this conclusion, unless he had expressed upon the face of his award that he did give damages not for structural injury only but for injury of a different description, and particularly that he gave damages for what may be called prospective damage, which is not within the 48th section of the statute. Now, how stands the matter of fact as we have it ascertained. In the first place, Mr M'Jannet, the oversman, says very distinctly, when he is asked whether he took into consideration any claim that might be made under the 6th section of the Railway Clauses Act, in addition to the claim that might be made under the 48th section—"I did not consider that point very carefully. I became satisfied that I could decide fairly between the parties under the 48th section of the special Act, and disregarded the 6th section of the Railway Clauses Act. I allowed for no damage that was not structural damage done to the buildings and to the foundations of the buildings. In that damage I included £150, which I estimated as the cost of repairing the existing cracks and repainting and repapering." Now, if the matter had stood there, upon that statement alone, I do not think it would be possible for the pursuers to say that by the evidence of Mr M'Jannet they had made out their allegation contained in their 17th statement, and I think if they were to assail that very distinct statement of Mr M'Jannet they should have proceeded to ask him what he understood to be the meaning of the term "structural damage," and I do not find that they have put that question throughout the whole examination. If they could have shown by asking that question and getting an answer from Mr M'Jannet, that he attached a meaning to structural damage that was inconsistent with the meaning of the 48th section of the statute, they would have taken a great step towards winning their case, but that they have not done. The way in which they assail his position is this—they say, "In estimating the structural damage, or, in other words, in ascertaining the *quantum* of structural damage, Mr M'Jannet proceeded upon an unsound process of reasoning. He took the value of the entire subject belonging to the defenders, which consists of a house in West Regent Street with a back green, and he did not exclude the back green in taking that value." Having ascertained the value of the entire subjects, and neither of the parties having given him the possibility of ascertaining the value of the house without the back green, which he also very distinctly states, he felt himself compelled to take the value of the entire subject, and then he considered what proportion of the value would represent what he conceived to be the extent of the loss sustained by the defenders arising from structural damage. I think I am fairly representing the rest of the evidence in saying that that is the substance of it. Now, that may or may not be a judicious mode of ascertaining the *quantum* of structural damage, and upon that I give no opinion, but it is certainly not embracing within his award damage that is not structural. He distinctly says, "I gave nothing that was not for structural damage;" and in the absence of any question asking him what he understood to be the meaning of structural damage, I must take it that he and the Act of Parliament mean one and the same thing by structural damage.

All that is left for us to consider is, whether this was a reasonable mode of ascertaining the *quantum* of that structural damage? It is not a matter of much consequence whether it is a judicious mode or not? It may be an erroneous mode, but that is not the ground upon which it is sought to set aside this award. That is not *ultra fines compromissi*. It is a matter left entirely to the arbiter to take his own mode of ascertaining the *quantum* of the damage, and if we were to reduce the award upon the ground that the arbiter or oversman had taken an improper or unjust way of ascertaining the *quantum* of damage, that should be simply reducing the award on the ground of iniquity against the express provisions of the Act of Regulations.

For these reasons, and without going more fully into the matter, I am of opinion that the pursuers have failed to make out their case, and that the defenders are entitled to be assoilzied.

Lord Shand—I am of the same opinion. When this case was originally presented to us there were a number of objections stated to this award, but none of these have been pressed, and the discussion which has now taken place has been confined to this, that the oversman acted *ultra vires* in giving this award, and the grounds upon which that argument have been maintained are two—in the *first* place, that Mr M'Jannet, the oversman, has given damages in respect of permanent depreciation of the site upon which the building in question stands—the ground or area upon which its foundations are laid—and, in the *second* place, that he has given damages, not merely for injury to the building and the foundations of the building, but he has given compensation in respect of ground behind this building which has not been injured by operations of the railway company.

I think the proof fails to substantiate either of these grounds.

It has been maintained that the word "foundations" in the 48th section of the statute necessarily means only the stone and lime work forming part of the building, and that however seriously, and even permanently, the site upon which that stone-work is laid may be destroyed for future building, this section of the statute would give no compensation for it. I desire to reserve my opinion upon that point, and I shall say no more about it, for I do not think it is raised by the facts that we have before us in this case.

I think there is no evidence that this site was permanently damaged in the way I have supposed, or that the arbiter has taken any such damage into view. We have, in the passage in his evidence to which your Lordship has referred, a distinct statement by him that he has allowed for no damage that was not structural damage to the building and the foundations of the building; that, of course, taking it in the ordinary meaning to be applied to the language used, excludes everything of the nature of permanent injury to the site on which the buildings rest, and it equally excludes damage in respect of injury to the ground behind the buildings, and accordingly I think there is really no answer to that unless it is controverted by other portions of Mr M'Jannet's

evidence. But it is said that the evidence otherwise shows that that was not so. I cannot reach that conclusion. The arbiter, in dealing with this question, having made up his mind upon the construction of the statute which he adopted, viz., that he was to allow only for structural damage done to the building and to the foundations of the building, might estimate the amount of that damage in either of two ways —First, he might have taken the view, "I shall allow for the rebuilding of these premises altogether, which seem to have been very seriously injured, and ought to be taken down and rebuilt," and in that case he would have had no difficulty in reaching the figures, if there was evidence before him on which he could rely, of the cost of rebuilding and the value of the materials of the old buildings. But he tells us that he did not get materials on that subject satisfactory to his mind, and that he did not proceed upon that view or upon evidence which was satisfactory to him which would enable him to come to a sound conclusion upon it. That being so, he resorted to another mode of fixing the amount of this compensation, and apparently what he seems to have done is this— "I shall take the value of the subjects as a whole, and I estimate it at £4000." He does not say he had satisfactory material for that either, but relying on his professional knowledge and the general evidence led—and he had nothing beyond these—he said, "I shall take this property as worth £4000, and I shall estimate the structural damage to the building and its foundations at one-fifth of that value." And accordingly that was his way of reaching the injury to the site upon which this building and its foundations were placed, but not to the green behind this building. That was his mode of reaching the amount of damage which he thought the building in its foundations and in its structure had suffered. I suppose nothing is more settled than this, that an arbiter or oversman charged with the duty of fixing compensation to be given for an injury is entitled to take his own way in reaching the amount, and that we cannot interfere with him upon that.

I express no opinion upon whether that was a reasonable way of reaching the amount of compensation or not, but that that was the mode is beyond all question, and that being so, I think it becomes clear that the arbiter did not take a wrong view of the statute. Whether he took a right or a wrong view of the matter of estimating the damage is another matter. I am not prepared to say that he has done anything wrong in doing what he did. On that I express no opinion whatever. I shall only say in conclusion that I think the evidence of the oversman on this subject is corroborated in a most material degree by a note which we have in his own handwriting, because in stating what he finds under the head of structural damage, including damage to foundations, he goes on to give damages for patching up rents and for painting, all of which he estimates at £950, thus showing clearly that he only gave damages for injury to the house or building and its foundations, and also, although he did not give effect to the view, that the cost of rebuilding the house would in his view amount to the same sum of £950. It seems to me, therefore, that the oversman has given damages for structural injury only, and has confined the damages to injury to the building and its foundations, and to nothing else. The pursuers here are not entitled to prevail, and I therefore agree with your Lordship in thinking the defenders are entitled to absolvitor.

Lord Mure was absent.

Lord Adam—I think, in the first place, that upon the construction of the 48th section of this private Act the only question before the oversman was the question of present compensation for present damage only, without going into any question in regard to prospective compensation at all. Compensation was to be given for structural damage to buildings and to the foundations of buildings, and for nothing more nor less.

Now, for myself, I also reserve my opinion in regard to future compensation in a future possible case, because I fail to see how there can be damage done to the *solum* (of the ground) upon which a future building shall be rested.

Now, I agree with your Lordship as to what it is that the oversman has dealt with, for he has told us in the plainest terms what he has allowed for. He says—"I allowed for no damage that was not structural damage done to the buildings and to the foundations of the buildings." Nothing can be more clear and distinct than this. He allowed compensation for nothing unless for what under the express words of the statute he was entitled to give compensation. And I also agree with your Lordship in thinking that if the parties had asked this oversman, "What do you mean by structural damage to buildings or foundations?" they would have brought out the answer, that in his view it was damage to the house or building and the foundations of it, and that he excluded from that, for example, prospective damage to the area of ground behind, or prospective damage to the area as a place where possibly a building might hereafter be placed. If he had told us that he had in awarding compensation for structural damage he allowed anything for future injury to the ground, I should have thought that the railway company were entitled to redress. But we have no evidence before us that that is so at all. There is really nothing before us from which it can even be supposed that the arbiter in giving structural damage for injury to buildings and to the foundations meant to give compensation for anything that he was not entitled to give, and if that be so, we are not entitled to inquire into the way in which he arrived at his conclusion. And in regard to that matter I agree with the view expressed by your Lordship. The oversman's mode of reaching his conclusion was not very satisfactory, but it was the best he had, as the parties had not given him the means of doing so properly. He seems to have taken the value of the property at £4000, and to have taken one-fifth of that value as the amount of damage for structural injury. That was what he did, and I do not think he would have done so if the evidence had been sufficient to enable him to arrive at a conclusion by any other mode, because he deals with the value of the house and what it would cost to rebuild it, and he thought that was the right way, but as the parties had not given him information for that he took another way of reaching the amount of damage. I may or may not agree with the arbiter, but I cannot review

his decree because he took that way, and therefore I agree with your Lordship.

The Court pronounced this interlocutor:—

". . . Sustain the second, third, and fifth pleas for the defenders: Repel the reasons of reduction: Assoilzie the defenders from the conclusions of the action, and decern."

Counsel for Pursuers—R. Johnstone—Jameson. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for Defenders—D.-F. Mackintosh—Dickson. Agents—Ronald & Ritchie, S.S.C.

Thursday, February 25.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

BANNATYNE *v.* BANNATYNE.

Husband and Wife—Divorce—Evidence of Adultery — Witness — Criminating Question — Evidence Further Amendment Act 1874 (37 *and* 38 *Vict. cap.* 64), *sec.* 2.

Section 2 of the Evidence Further Amendment Act 1874 enacts that "no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery." . . . *Held* that it is the duty of the Court to remind a witness called to give evidence as to his own alleged adultery, of the protection afforded to him by the statute, and then to allow his examination to proceed or not according only as he expresses willingness or otherwise to submit to examination.

Observations on *Cook* v. *Cook*, Nov. 4, 1876, 4 R. 78, and *Hebblethwaite* v. *Hebblethwaite*, Dec. 18, 1869, L.R. 2 Prob. and Div. 29.

This was an action of divorce raised by a wife against her husband on the ground of his alleged adultery. One of the acts of adultery was stated on record in Cond. 5 as follows—"The defender further committed adultery with Elizabeth Gilbert, formerly a servant in a hotel in Stirling, and now residing in Bridge of Allan, in or about the months of June and July 1884, in his rooms in the Arcade, Stirling, where he had invited Gilbert to meet him."

The action was defended and went to proof before the Lord Ordinary (M'Laren). Elizabeth Gilbert was called as a witness for the pursuer. Her examination was thus reported in the shorthand writer's notes:—"*Examined*—(After being duly cautioned by the Lord Ordinary that she was not bound to answer any question tending to show that she had been guilty of adultery) . . . Defender called to see my master and mistress. He spoke to me. He spoke to me familiarly. He spoke to me again. (Q) Did the defender ever attempt any familiarities with you?—(A) Not at that time, not till he asked me up into his class-room. He attempted familiarities with me in his class-room." (The Lord Ordinary at this stage stopped the examination of the witness).

Section 2 of the Evidence Further Amendment Act 1874 provides—"The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding; provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

The Lord Ordinary on the whole proof found that the pursuer had failed to prove her averments, sustained the defences, and assoilzied the defender from the conclusions of the libel.

"*Note.*— . . Next, as to the charge of adultery committed with Elizabeth Gilbert, a servant in a hotel at Stirling—Gilbert was adduced as a witness for the pursuer's case, and she assented to a question put by pursuer's counsel as to whether on one occasion the defender had attempted familiarity with her in his class-room. I informed the witness that she was not bound to answer any question tending to prove adultery committed with herself, and as she did not offer to make a statement I held her excused from giving further evidence. No corroborative evidence was offered upon this charge, and I do not think that any inference adverse to the defender can legitimately be drawn from the silence of the witness Gilbert.". . .

The pursuer reclaimed, and with regard to this matter she argued—The Lord Ordinary had mistaken the law with reference to the examination of Elizabeth Gilbert. The duty to caution her had been discharged at the beginning of the examination, and on her showing her willingness to answer the questions put to her the Lord Ordinary should have allowed her examination to proceed. Leave should now be given to the defender to ask her if she was willing to dispense with the protection of the statute, and if she should appear to be so willing then the defender should be allowed to ask her the questions he had intended to ask her at the proof. The true interpretation of the 2d section of the Evidence Further Amendment Act 1874 sanctioned this course, which had received the sanction of the English Court in the case of *Hebblethwaite* v. *Hebblethwaite*, Dec. 18, 1869, L.R., 2 Prob. and Div. 29. The leading authority in Scotland was *Cook* v. *Cook*, Nov. 4, 1876, 4 R. 78.

The defender replied—The Lord Ordinary had in the course which he had followed acted according to the sound construction of the statute on the subject. He had indeed only construed the statute strictly. Under it it was clear that the Legislature intended that the witness should not be exposed to say whether she will give evidence or not, and meant to protect the witness from being put in that position by not giving her the option. The witness might volunteer ultroneously to give evidence, but that must be without invitation. The reasonable time to do so was immediately after the witness had been cautioned. That happened in *Hebblethwaite supra.*

At advising—

Lord Young—This is an action by a wife against her husband concluding for divorce on the ground of adultery, and one of the acts of adultery charged is thus stated on record, in the 5th article of the condescendence—"The defender further committed adultery with Elizabeth