The absence of such averments is, in truth, accounted for by the fact that the theory of the pursuers' case is entirely different. They begin by saying that when Darley & Butler contracted with the defenders they were acting, and were known by the defenders to be acting, as agents for the Tinnevelly Company. This is the basis of the pursuers' case. It is in law an untenable position, for Darley & Butler could not be the agents of a non-existent company. I should infer from the record that the persons acting for the company had not realised this. Accordingly it is quite consistent with the record to suppose that the persons acting for the company were unaware that if the company was to take the place of Darley & Butler, it required—that is to say the shareholders or their executive required—consciously to do so. In place of any such overt action on the part of the company things were allowed to rest on the original contract between Darley & Butler and the defenders, which was erroneously believed to bind the company. I do not pronounce this to bave been the true state of the facts, having no occasion to do so; all I say is that the pursuers' record says nothing to the contrary and much to this effect.

Well, now, the law applicable to such a case seems to be tolerably clear. First of all, where there is no principal, there can be no agent; there having been no Tinnevelly Company at the date of this contract, Darley & Butler were not agents of that company in entering into the contract. The next point is, that in order to bind the company to a contract not incumbent on it, it is necessary that the company should voluntarily so contract; and it is not equivalent to this if the company merely acts as if, contrary to the fact, the contract had from the beginning been obligatory on it.

I have considered, up to this point, solely the position of the company, and have not taken into account the question how far the consent of the defenders would have been necessary to the substitution of the company for Darley & Butler as parties to the contract, I do not find it necessary to enter upon this question, inasmuch as, in my opinion the case of the pursuers is irrelevant, even if regard be had to the consent of the company alone.

I am for finding that the pursuers have not set forth on record any title in the Tinnevelly Sugar Refining Company, Limited, to sue, that there are no relevant averments to support the conclusions in so far as insisted in by Darley & Butler, and dismissing the action.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court recalled the Lord Ordinary's interlocutor and dismissed the action.

Counsel for Pursuers and Respondents—Jameson—Cooper. Agents—Millar, Robson, & M'Lean, W.S.

Counsel for Defenders and Reclaimers—Ure—Younger. Agents—J. & J. Ross, W.S.

Tuesday, July 17.

FIRST DIVISION.

[Lord Low, Ordinary.

LANARKSHIRE AND DUMBARTONSHIRE RAILWAY COMPANY AND ANOTHER *v.* MAIN.

Railway—Accommodation Works—Conflicting Interests of Owner and Occupier of Lands Taken—All Parties not Heard—Reduction of Sheriff's Award—Railway Clauses Act 1845 (8 *and* 9 *Vict. cap.* 33), *secs.* 60, 61—*Relevancy.*

The Railway Clauses Act 1845, by sec. 60, provides that the company shall make works for the accommodation of the owners and occupiers of lands adjoining the railway; and sec. 61 provides that if any difference arise respecting the kind of accommodation works the same shall be determined by the sheriff.

Held that the difference contemplated might be a difference between owner and occupier, and that averments by an owner to the effect that the Sheriff had considered the claims of the occupier, had along with a civil engineer inspected the ground, where he had heard parties' explanations, without ordering intimation to him and outwith his presence, and had thereafter, although sisting him as a party to the process, refused to allow him to lodge answers or even to give him time to consider his position, were relevant to support an action of reduction of the Sheriff's award.

The Railway Clauses Act 1845 (8 and 9 Vict. cap. 33), by sec. 60, provides—"The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway," . . . and by sec. 61 it provides that "If any difference arise respecting the kind or number of any such accommodation works, or the dimensions or sufficiency thereof, or respecting the maintaining thereof, the same shall be determined by the sheriff or two justices."

In April 1893 Mr George James Fergusson Buchanan of Auchentorlie, Dumbartonshire, arranged with the Lanarkshire and Dumbartonshire Railway Company for payment of compensation for the construction of certain accommodation works rendered necessary by the railway company having taken a portion of his lands under their compulsory powers. Thereafter, Thomas Main, a market gardener at Milton, near Bowling, who held a nineteen years' lease from Whitsunday 1888 of a piece of ground belonging to Mr Buchanan through which the railway passed, claimed certain accommodation works, including an overhead bridge connecting the portions of the garden which were separated by the railway. The company in reply stated objections to supplying the works de-

manded, and averred that the owner would be averse to such being constructed. Mr Main accordingly applied to the Sheriff to determine the question.

The Sheriff-Substitute (GEBBIE) appointed Mr William Robertson, C.E., to advise him, and along with him and the representatives of the company and of the occupier of the land visited the ground, and there heard explanations. Upon 7th August 1893, when parties were appointed to address the Sheriff, Mr Fergusson Buchanan craved to be sisted as a party, and to be allowed to lodge written answers, or at least to have time given him to consider his position. The Sheriff-Substitute sisted him, but found it unnecessary that he should lodge answers, refused the delay asked and directed his agent to make any explanations he wished then and there. Thereupon the Sheriff-Substitute took the case to avizandum, and on 9th August pronounced a deliverance ordaining the railway company to construct an under-bridge with the necessary approaches, all as specified.

In September 1893 the Lanarkshire and Dumbartonshire Railway Company and Mr Fergusson Buchanan brought an action against Mr Main for the purpose of having the deliverance of the Sheriff-Substitute reduced.

It was averred — "The pursuer Mr Fergusson Buchanan was not called as a party to the application by the defender, and it was only at the final stage after he had become aware of the nature of the proceedings that he sisted himself as a party, and asked the Sheriff to be allowed to lodge written answers to the petition, or at least to have time given to him to consider his position. This was however refused, and he protested against this refusal, and has had no opportunity given to him of stating his objections. . . . Explained further that Mr Fergusson Buchanan's procurator was unable to state his case properly owing to the manner in which the procedure was conducted. . . . The said finding and determination is incompetent and irregular and ought to be set aside. . . . In pronouncing the said finding the Sheriff-Substitute altogether ignored these facts (1) that the proprietor of the land had already arranged with the Railway Company for all the accommodation works rendered necessary on his lands by the construction of the railway; (2) that the proprietor was very strenuously opposed to the accommodation works sought in the application, as well as to those determined by the Sheriff-Substitute; (3) that he was refused an opportunity of lodging written answers to the defender's petition, although written statements had already been lodged for the defender and the railway company; (4) that no time was allowed to the proprietor to consider the works proposed so as to adequately discuss the objections to same; (5) that the accommodation works appointed to be executed by said finding were totally unsuited for the ground, and would cost at least £1500, a sum enormously out of all proportion to the magnitude of the tenant's interest in the land; and (6) that in order to execute the said works the Railway Company would require to deal with the land in a way to which the pursuer Mr Fergusson Buchanan was seriously averse, and in which the defender was not, by virtue of any of the powers contained in his lease, entitled to deal with the land."

They pleaded, *inter alia*—"The said finding and determination is incompetent and irregular, and ought to be reduced. . . . (2) because the pursuers the said Railway Company had already arranged with the proprietor of the said land the accommodation works rendered necessary by the construction of the railway; (3) because the pursuer Mr Fergusson Buchanan, after being sisted as a party to the application, was not allowed to lodge a written statement in answer to the application, or allowed time to consider the same so as adequately to state his objections; (4) because the works ordered to be executed are opposed to the wishes and inimical to the interests of the pursuer Mr Buchanan; and (5) because the works ordered are quite unsuited for the ground, and the cost of them excessive."

The defender pleaded, *inter alia*—"(3) The fixing of accommodation works under the Railways Clauses (Scotland) Act 1845, being an administrative Act entirely in the discretion of the Sheriff, his determination is not subject to any review. (5) The pursuers' averments being irrelevant and insufficient to support the conclusions of the summons, the present action should be dismissed, with expenses. (10) The pursuer Mr Fergusson Buchanan having had ample time to consider his position, and his procurator having been fully heard on his behalf, and his case considered, *et separatim*, he *qua* proprietor having no interest to interfere with the accommodation works for the defender, the action so far as he is concerned should be dismissed."

Upon 27th April 1894 the Lord Ordinary (LOW) sustained the defender's fifth plea-in-law, and dismissed the action.

"*Opinion.*—The finding of the Sheriff-Substitute is sought to be reduced upon five grounds, which are stated in the pursuers' pleas-in-law. . . .

"It is said in the second place that the Railway Company had already arranged with the proprietor of the land the accommodation works rendered necessary by the construction of the railway.

"It is admitted that the Railway Company and the proprietor arranged that the several portions of the land should be connected by a level-crossing, but it is also admitted that the defender was no party to the arrangement. The question therefore is, whether the fact that the owner of the land has agreed to accept certain accommodation works as sufficient, precludes the occupier from demanding that additional works shall be executed?

"It seems to me that that question must be answered in the negative. The accommodation works which a railway company is taken bound by the Railway Clauses Act to execute are such as are necessary for the

protection of both owner and occupier, and I am of opinion that the owner cannot without the knowledge or consent of his tenant discharge the company of their statutory obligation to make such accommodation works as are necessary for the protection of the occupier, or deprive the occupier of his right to demand that such works shall be executed. That is the view of the statute which appears to have been taken by the Court of Appeal in England in the case of *Corry* v. *Great Western Railway Company*, 7 Q.B. Div. 323.

"The third ground of reduction is that the pursuer Mr Fergusson Buchanan, the owner of the lands, was not allowed to lodge written answers to the defender's application to the Sheriff, or allowed time to consider the application so as adequately to state his objections

"It was argued for the defender that the pursuer had no title to appear in the proceedings before the Sheriff. I should hesitate to affirm that proposition, because the owner of lands has a clear interest in regard to the nature of proposed accommodation works. I do not however require to express an opinion upon the point, as upon other grounds I am against the pursuers.

"Mr Fergusson Buchanan appeared and asked to be sisted as a party to the process apparently after the Sheriff-Substitute had inspected the ground. The Sheriff-Substitute sisted Mr Buchanan as a party, but found that it was not necessary for him to lodge answers to the petition, and also, Mr Buchanan avers (and, I assume truly), refused to allow him time to consider his position. It is not disputed that the Sheriff-Substitute heard Mr Buchanan's agent, and therefore the ground of reduction which I am now considering is reduced to this, that the Sheriff-Substitute found that it was not necessary for Mr Buchanan to lodge answers and refused to grant delay. These were both matters in my opinion which were within the discretion of the Sheriff-Substitute. If he had refused to sist Mr Buchanan, or to hear him after he had been sisted, the question would have been very different. But having heard Mr Buchanan, I think that it was competent for the Sheriff to determine whether there was any necessity for written pleadings being lodged or for further delay.

"The pursuers plead in the fourth place that the deliverance should be reduced, because the works ordered to be executed are opposed to the wishes and inimical to the interests of Mr Buchanan.

"In what respect the works would be inimical to the interests of Mr Buchanan is not stated on record, but I understand that he considers that an under-bridge with roads sloping down to it for a considerable distance on either side would be prejudicial to the use which he will probably make of the ground after the termination of the defender's lease.

"In considering this ground of reduction I would point out that this Court has nothing to do with the merits of the Sheriff-Substitute's deliverance. If the matter was properly before the Sheriff-Substitute, his judgment as to the character of the accommodation works is final.

"If, therefore, I am right in thinking that the defender was entitled to demand that the company should make such works as were necessary for his accommodation, although they had already made an agreement with Mr Buchanan, the Sheriff's deliverance cannot be reduced simply because the landlord does not approve of the works ordered, or because it would be better for the landlord's interests in the future that the works necessary for the tenant's protection during the currency of the lease should not be executed. The Sheriff had to consider the existing and not any future use of the lands, and the only question which he had to determine was what works the company were bound to make, and the defender entitled to demand, for the purpose of making good the interruption caused by the railway to the use of the lands as at present occupied.

"Further, it seems to me that Mr Buchanan can no more object to the necessary accommodation works being made, on the ground that they are inimical to his interests, than he could object upon that ground to the railway being formed. Because making of accommodation works which the company may be compelled to make is one of the purposes of their Act for which compulsory powers may be exercised—*Beauchamp* v. *Great Western Railway Company*, 3 Ch. 745; *Wilkinson* v. *Hull Railway Company*, 20 Ch. Div. 323.

"The last ground of reduction is that the works ordered are quite unsuited for the ground, and the cost of them excessive. It is sufficient to say that that raises a question upon the merits of the Sheriff's deliverance which is not subject to review.

"Upon the whole matter I am of opinion that the pursuers have not stated relevant grounds of reduction, and that the defender is entitled to have the action dismissed."

The pursuers reclaimed, and argued—The case of *Corry* decided that an occupier had rights as well as an owner, but did not decide that he could have works executed against the wishes of the landlord, and which were plainly detrimental to his interests. A tenant because a couple of acres were taken from him under compulsory powers, could not have permanent works erected which he had no right to under his lease. The suggestion of a permanent under-bridge was extravagant, and yet the Sheriff had declined to hear Mr Buchanan altogether. It was clearly incompetent for the Sheriff to force these works upon the owner of the land without hearing him, and as he had done so his finding fell to be reduced. It was said opportunity had been given to Mr Buchanan's agent to explain his objections, but he could not do so when he knew nothing in detail of what had already passed.

Argued for the respondent—This was practically an arbitration—*cf. Main* v. *Lan-*

arkshire & Dumbartonshire Railway Company, December 19, 1893, 21 R. 323—in which the Sheriff's finding was final. No relevant statement had been made which would have led to the reduction of an arbiter's award. There had been no failure to do justice. The Sheriff was cognisant of the owner's position, and had heard his agent. There was nothing to prevent the agent making full explanations without further inquiry. The Sheriff in refusing further delay exercised a discretion with which the Court would not interfere.

At advising—

LORD PRESIDENT—The pursuers of this action impugn the validity of certain proceedings before the Sheriff-Substitute of Dumbartonshire acting under the 61st section of the Railways Clauses (Scotland) Act 1845. It is necessary first to consider what are the rights of landlord and tenant respectively under the 60th as well as the 61st section.

The 60th section obliges railway companies to execute the necessary works, of the kind there specified, "for the accommodation of the owners and occupiers of lands adjoining the railway." Now, I take it that the section treats the owners and occupiers as the persons interested in the land and concerned to get the works necessary for its beneficial use. That is their common interest. In the vast majority of cases their needs will coincide. It is, however, possible that the owner and occupier may differ, and even that their interests may differ, as to what are the proper works to be required of the company. Both are to be accommodated; and the interests of both are to be considered in fixing the accommodation works.

Accordingly it is clear that the owner cannot, by agreement with the railway company, conclude the question what works shall be executed so as to preclude the demand of the tenant for what he deems necessary. If the company choose to treat with the owner alone and to bind themselves to him, they cannot, merely on account of this obligation, refuse to listen to the tenant if he asks for something else. On the other hand, the owner has a clear right to be heard to object to a work which the occupier demands if that work would be injurious to the property.

It is thus manifest that differences may arise about accommodation works not merely between the owner and occupier, as collectively representing the land on the one hand, and the company on the other hand, but also between the owner and occupier themselves. When therefore the 61st section says "if any difference arise respecting the kind or number of such accommodation works the same shall be determined by the Sheriff," the enactment applies to the case where the owner and occupier are at variance and the company sides with one of them. It is also obvious that in order to the determination of any dispute about accommodation works it is necessary that the three parties interested should all be before the Sheriff. The duty of the Sheriff is then to decide how the interests of owner and occupier (the one permanent and the other temporary) may be harmonised in due accordance with the interests of the railway company, which is not to be saddled with duplicate obligations towards what is, for them, one estate.

Well, now, in the present case the owner and the company came to an agreement without cousulting the occupier. He then made his own demands, which were not acceded to; and the occupier and the company having thus differed, went to the Sheriff. Written pleadings were ordered; the occupier stated his demands, which were large; and the company in their answers stated that they had arranged with the owner, and that the owner strongly objected to some of the works demanded by the occupier as being injurious to the property.

There was thus disclosed to the Sheriff a difference between the owner and the occupier, as well as between the occupier and the company; and if the Sheriff had noticed it, I cannot but think he would have seen that the landlord must be brought into the proceedings if they were to be effective. The Sheriff, however, went on without ordering intimation to the owner; he appointed a meeting on the ground for an inspection; he appointed Mr William Robertson, a civil engineer, to accompany him to the inspection; he met parties (to wit, the occupier and the company) on the ground and heard their explanations. Having done so, he appointed them to be heard on the whole cause on a day fixed. On the day thus appointed for debate, the owner for the first time appeared, and he craved to be sisted as a party to the action. His right to be sisted was in my opinion indisputable. The Sheriff however dealt with the application in a rather singular way, for the interlocutor of August 7, 1893 bears—"In respect he" [the owner] "has, in answer to the call made upon him at the bar, produced two agreements between him and the respondents relative to the ground in question, sists the said George James Ferguson Buchanan as craved: Finds it is not necessary for the said George James Ferguson Buchanan to lodge answers to the petition, and having heard parties' procurators on the whole cause, in presence of Mr Johnston, makes avizandum." By a subsequent interlocutor, two days later, the Sheriff fixed the works to be executed. With his decision both the railway company and Mr Buchanan were grievously dissatisfied.

Now, as I have already said, Mr Buchanan as owner was not only a proper, but in the circumstances of the case a necessary party to the determination of the question what works were to be executed on his own property. He was unfortunately not made a party to the proceedings, and as I think also unfortunately the proceedings were not intimated to him when the Sheriff was apprised of the difference between him and the occupier. As regards the sequel, his case upon record amounts to the following:—The proceedings came to

his knowledge after the Sheriff had examined the ground and heard the explanations of the parties, and the views of the engineer whom the Sheriff had called to his aid. In short, when Mr Buchanan appeared and asked to be sisted, the inquiry had taken place, and all that remained to be done was that the parties' procurators should be heard on the results of the inquiry. Under these circumstances it was manifestly impossible that Mr Buchanan or his agent could to any purpose make a speech about an inquiry of which he knew nothing, and to propose to hear him then and there was practically to refuse to hear him at all. What Mr Buchanan's agent is alleged to have proposed was, I think, very reasonable; he asked to be allowed to lodge written answers, or at least to have time given him to consider his position. These requests the pursuers allege to have been refused, and allege that all that was allowed to Mr Buchanan was that his agent should then address the Sheriff—a permission which, as I have already pointed out, was entirely illusory.

Now, I should be slow to say that an award under this section could be set aside merely because the Sheriff deemed a written statement unnecessary in the case of an owner who came and verbally explained his position, even although the other parties had had the advantage of written pleadings. But in the present case the owner was not merely refused the opportunity of stating his views in writing as the others had done, but (what is much more important) he was refused time to inform himself about what had been done in the proceedings, and was only allowed to be heard if he went on to speak of what he necessarily knew nothing.

Such being the averments, they seem to me to constitute a relevant ground of reduction. The pursuer's case is that he, being a proper party to the proceeding, was practically, although not formally, refused a hearing. I do not think that an arbiter's award could be supported in such circumstances, and the Sheriff's decision under the 61st section is for present purposes in the same position as an arbiter's award.

My opinion is therefore that the pursuer's averments are relevant, that the pursuer is entitled to prove them, and that the interlocutor having been pronounced on a record closed on preliminary defences, the case must go back to the Outer House for the requisite procedure.

LORDS ADAM, M'LAREN, and KINNEAR concurred.

The Court recalled the interlocutor reclaimed against and remitted the cause to the Lord Ordinary.

Counsel for Pursuers and Reclaimers The Lanarkshire and Dumbartonshire Railway Company—Reid. Agents—Clark & Macdonald, W.S.

Counsel for Pursuer and Reclaimer Buchanan—Dundas. Agents—J. & F. Anderson, W.S.

Counsel for Defender and Respondent—H. Johnston—W. Thomson. Agents—W. & J. Burness, W.S.

Wednesday, July 18.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

COMMISSIONERS OF THE CALEDONIAN CANAL *v.* COUNTY COUNCILS OF INVERNESS AND ARGYLL.

Company—Railway and Canal Companies—Whether "Company" includes Commissioners—Valuation of Lands Act 1854 (17 *and* 18 *Vict. c.* 54), *sec.* 21—*Rule of Construction.*

The Valuation of Lands (Scotland) Act 1854, by sec. 21, provides that the Assessor of Railways and Canals under this Act shall fix the value of all lands belonging to each railway and canal company.

Held that "company" as so used was not a technical word, and included a body of statutory commissioners charged with the administration of a canal.

The Assessor for Railways and Canals in Scotland assessed the Caledonian Canal and the Crinan Canal, which are administered by the same commissioners as one undertaking, and valued the combined canals for the year to Whitsunday 1894 at *nil*, the loss on the Caledonian Canal more than extinguishing the profit on the Crinan Canal. Against this valuation the County Council of Argyll appealed to the Sheriff of Argyll, who sustained the appeal, fixing the valuation of the Crinan Canal at £290, 19s. 6d. The Caledonian Canal Commissioners, who had objected to the jurisdiction of the Sheriff on the ground that the canals being one undertaking situated in different counties—Argyll and Inverness—the appeal should have been to the Lord Ordinary on the Bills, brought an action of declarator and reduction against the County Councils of Argyllshire and Inverness-shire to have it found and declared that the two canals formed one undertaking, and to have the deliverance of the Sheriff reduced,

The defenders pleaded, *inter alia*—"(3) The pursuers being neither a canal nor a railway company within the meaning of the 21st section of the Valuation Act 1854, the declaratory conclusions fall to be dismissed."

The Valuation of Lands (Scotland) Act 1854 (17 and 18 Vict. c. 54), by sec. 20, provides that "In order to the making-up of valuations and valuation rolls of lands and heritages in Scotland belonging to or leased by railway or canal companies, and forming part of the undertakings of such companies, it shall be lawful for Her Majesty to appoint, as occasion requires, a fit and proper person to be assessor of railways