their claim, if that claim should be held to be in itself a claim which is competently before us.

I do not think it necessary to consider the second question at all. It seems to me that the first ground, viz., the alleged incompetency of the procedure taken before the arbiter is sufficient for the disposal of this case. It was admitted at the bar that this question had been decided in the Court of Session by the case of *Barr* v. *The Caledonian Railway Company*, and the respondents in the suspension endeavour to get over that case by quoting to us several English cases which do not turn upon the same Acts of Parliament, nor upon the same words as the present case. Still it is argued that these English cases are so exactly analogous that we should disregard the case of *Barr* and give effect to these cases by holding that, inasmuch as it has been decided in England that such a case as this can be competently brought before two justices, it must be brought before an arbiter in Scotland, that being the corresponding tribunal under the arbitration section of the Act, and that we should, following these cases and disregarding the case of *Barr*, hold that the present application for arbitration is competent.

I am not prepared to disregard the case of *Barr*. Whether that case can be differentiated from those cases in England I do not say. There may be considerable ground for saying that it might; but then there is a distinct and clear decision in this Court, and having considered it, the decision in my opinion is binding upon us, and we are not entitled to set aside by our judgment a case that has been deliberately decided in this Court. Therefore I am of opinion that, without giving effect to the whole of the Lord Ordinary's interlocutor, we should recal it and sustain the fourth plea-in-law for the complainers.

LORD ADAM—This case arises out of a claim for compensation made by the respondents here, who are yearly tenants of certain premises in Milton Street; and the claim is said to arise in respect of certain operations by the City of Glasgow Subway Company, by which damage has been suffered by them, and for which they say they are entitled to compensation. It is not disputed that if the case of *Barr* v. *The Caledonian Railway Company* has been properly decided, procedure to have this claim of alleged damage submitted to arbitration is incompetent.

I am of opinion that we must follow this case of *Barr* v. *The Caledonian Railway Company*. I am not disposed to express any opinion as to the soundness of that decision. I agree with your Lordship that the Lord Ordinary's interlocutor should be recalled, and that the fourth plea-in-law for the complainers should be sustained.

LORD TRAYNER — I am of the same opinion. The respondents in the suspension are admittedly yearly tenants of the premises in question, and their claim, so far as it is before us, is a claim for injury to their business premises, and to their stock and effects therein.

Now, in these circumstances the first question that arises is—Is a yearly tenant making such a claim entitled to have that claim submitted to arbitration; or must he submit it, in terms of the 114th section, to the Sheriff? I think that question is not open. I think it is concluded, so far as we are concerned, by the decision in *The Caledonian Railway Company* v. *Barr*. I express no opinion as to the soundness of that decision, but as it is a decision pronounced many years ago, and has no doubt been acted upon in Scotland since, I think we are bound to follow it. I agree with your Lordships that the course to be followed is to recal the Lord Ordinary's interlocutor and sustain the fourth plea-in-law for the complainers.

LORD YOUNG and LORD RUTHERFURD CLARK were absent.

The Court recalled the Lord Ordinary's interlocutor, sustained the fourth plea-in-law for the complainers, and interdicted, prohibited, and discharged in terms of the prayer of the note.

Counsel for the Complainers—Dundas—W. Thomson. Agents—W. & J. Burness, W.S.

Counsel for the Respondents—Salvesen—Anderson. Agent—John Veitch, Solicitor.

Thursday, November 7.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

NORTH BRITISH RAILWAY COMPANY *v.* LANARKSHIRE AND DUMBARTONSHIRE RAILWAY COMPANY.

Arbitration — Railway — Reference of All Differences with respect to Execution of Works—Jurisdiction — Lanarkshire and Dumbartonshire Railway Act 1891 (54 *and* 55 *Vict. c.* 201), *sec.* 6, *sub-secs.* 4, 7, 10.

The Lanarkshire and Dumbartonshire Railway Company were authorised by Act of Parliament to construct a line of railway including a tunnel passing underneath an area of ground owned by the North British Railway Company.

By sec. 6, sub-sec. 4, of the Act the promoters were restricted from interfering with the surface without the consent of the North British Company, and by sub-sec. 7 they were prohibited from proceeding with the construction of the tunnel until the plans had been approved of by that company's engineer.

The tunnel, as ultimately constructed, had a ventilating shaft opening on the area in question, and the North British Company thereafter raised an action

against the promoters to have them ordained to remove the shaft, on the ground that their consent to its construction had never been obtained as required by sub-sec. 4. It was admitted that the plans for the tunnel had been approved by the pursuers' engineer, and the questions raised in the case were whether the plans, as submitted, disclosed that a ventilating shaft was contemplated, and whether, if this were so, the approval of the plans by the pursuers' engineer, under sub-sec. 7, could be held, under sub-sec. 4, to amount to an assent by the pursuers to the construction of the shaft.

Held that the matter in dispute, although involving questions of law as well as questions of fact and of engineering skill, fell within a clause of reference in sec. 6, which provided that if any difference should arise between the companies "with respect to any of the matters above referred to in this section," such difference should be determined by an engineer to be appointed by the Board of Trade, and that consequently the action was incompetent.

The Lanarkshire and Dumbartonshire Railway Company by Act of Parliament (54 and 55 Vict. c. 201) were authorised in 1891 to construct a line of railway starting from the Caledonian Railway at a point close to the Queen's Dock, Glasgow, and extending to Dumbarton. By sec. 6 of the said Act (which is entitled "for the protection of the North British Railway Company") it is provided, sub-sec. 4—"Railway No. 1 shall be carried under the North British Company's Glasgow City and District Railway, and under the joint sidings and works of that company and the Caledonian Company at Stobcross in tunnel, and the company shall not, without the previous consent of the companies owning the same, in the construction of such tunnel, break open the surface of the ground, or in any way raise or interfere with the rails of the North British Company, or of the joint property of that company and the Caledonian Company, but the company may open the surface where necessary for the purpose of temporarily supporting or protecting the railways or sidings of those companies from injury during the construction of the railway."

By the same section, sub-sec. 7, it is provided that "All bridges and works which may be constructed by the company, so far as passing over or under, or in any manner interfering with any lines, works, or lands belonging to the North British Company, shall be of such design and materials as shall be approved of by the engineer for the time being of that company, and shall be constructed and completed under the superintendence, and to the reasonable satisfaction in all respects, of such engineer, and according to working plans, sections, and specifications to be submitted to and approved of by him previously to the commencement of the works affecting the property of the said company, and all costs, charges, and expenses incurred by such engineer in relation to the matters aforesaid shall be paid by the company."

By the same section, sub-sec. 10, it is provided—"If any difference shall at any time arise between the company and the North British Company, or their respective engineers, with respect to any of the matters above referred to in this section, such difference shall be determined by an engineer, to be appointed by the Board of Trade, on the application of either of the said companies, at the cost of the company, and the decision of such engineer shall be final and conclusive."

In 1892 the Lanarkshire and Dumbartonshire Railway Company intimated to the North British Company that they proposed to construct the tunnel, referred to in subsection 4, and they submitted plans to the North British Railway Company's engineer for his approval, in terms of sub-section 7. On the plans being approved the Lanarkshire and Dumbartonshire Railway Company proceeded to construct the tunnel, and in order to provide for ventilation carried a shaft from the roof of the tunnel to the surface, opening upon the area of ground occupied by the Stobcross depot. On 6th March 1895 the North British Railway Company raised an action against the Lanarkshire and Dumbartonshire Railway Company, craving the Court to ordain the defenders to remove the shaft and restore the surface to its original condition. The pursuers averred that the shaft had been made without their knowledge, and that on receiving information as to it in November 1894, they had remonstrated with the defenders, who had stopped work for a short time, but had recommenced and concluded it in January, 1895. They further averred that the defenders had been allowed access to the ground only for the purpose of making the tunnel, and also that the plans submitted to their engineer did not disclose that a ventilating shaft was contemplated. They further maintained that even if this were the case the engineer had no authority to consent to the construction of the tunnel, his authority being limited to the approval or disapproval of the plans.

They pleaded—"(2) The defenders not having obtained the consent of the pursuers, in terms of section 6, sub-section 4, of the defenders' Act of Parliament, the works complained of are illegal, and the defenders should be ordained to remove them, and to restore the ground in terms of the conclusions of the summons."

The defenders averred that the shaft had been constructed in the knowledge and with the consent of the pursuers' engineer, who had approved of the plan showing the proposed shaft. They also averred that the work was completed under the supervision of the pursuers' inspectors, and that no objection had been taken to the shaft till it was nearly completed. They maintained that these facts constituted consent to the construction of the shaft on the part of the pursuers, and further, that the action was excluded by the above clause of reference.

On 11th July 1895 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—"Finds that the question between the parties falls to be determined by an arbiter appointed by the Board of Trade, in terms of section 6, sub-section 10, of the defenders' Act: Therefore sists process to enable either of the parties to make application to the Board of Trade for the appointment of an arbiter, with a view to the cause being remitted to such arbiter upon his appointment, &c.

Note.—"The question in this case is whether a certain ventilating shaft, constructed by the defenders in the roof of a tunnel on their railway where it passes under certain property of the pursuers, was constructed with the consent of the pursuers. If there was no consent, it seems to be conceded that the structure was illegal and must be removed. But the defenders maintain that the pursuers did consent to the work, and their consent is said to have been obtained in this way: That the plans of the tunnel, which required under the statute to be submitted to the pursuers' engineer, showed the ventilating shaft in question as part of the proposed works, and that the engineer approved of this plan, including the proposed shaft. The pursuers, on their part, deny that the plan showed a ventilating shaft or any work of that description, and they further maintain that the engineer of their company had no authority to consent to the construction of the shaft, his authority being, as they say, limited to the approval or disapproval of the plan of the tunnel.

"In these circumstances there is plainly an issue of fact which has arisen between the parties—an issue, at all events, involving the construction of the plans of the tunnel which were submitted to the pursuers' engineer; and what I have to determine is, whether the issue thus arising is one which falls to be remitted to an arbiter in terms of sub-section 10 of section 6 of the defenders' Act. The defenders contend that that arbitration clause applies, and that the action should be sisted to enable an application to be made to the Board of Trade, and should then be remitted to the arbiter to be appointed by that Board.

"I have come to the conclusion that there is no sufficient reason for denying to the language of the arbitration clause its *prima facie* and natural latitude. I think that the language of the clause is wide enough to cover any dispute which may arise under the section in question—that is to say, any dispute with regard to the execution of the works in question which may arise between the parties. But even if it were to be held implied—as the pursuers maintain—that the matters to be referred to the engineer appointed by the Board of Trade were only matters of engineering, I am not prepared to say that that construction would exclude the remit which is asked in this case, because, as I have said, the one question—perhaps the main question—between the parties is as to the true reading of certain plans submitted by one engineer to another; and that seems a matter peculiarly appropriate for the determination of an engineer. I propose therefore not to dismiss the action, because a clause of that kind does not oust the jurisdiction of the Court, but to find that the question between the parties falls to be determined by the arbiter appointed by the Board of Trade, in terms of section 6, sub-section 10 of the defenders' Act, and therefore to sist process to enable either of the parties to make application to the Board of Trade for the appointment of such arbiter, with a view to the case being remitted to such arbiter upon his appointment."

The pursuers reclaimed, and argued—The question involved in the case was not a question of engineering skill, but a question of law raised by the pursuer's plea that the defenders had made an illegal use of their lands. The defenders had acted outwith the statute altogether, not having obtained the pursuer's consent under sub-sec. 4 of sec. 6. It was outwith the scope of the engineer's authority to sanction the construction of the shaft, even if he actually did so. Whether he did so was a question of fact and not a question of engineering skill, and was not therefore appropriate for reference to an engineer. Sub-section 10 however widely construed did not cover such questions as these. Indeed, sub-section 4 did not really apply to works of a permanent character, but to the operations during the course of construction, and accordingly, even if questions raised under it were to fall within the arbitration clause, the present question would not be included.

Argued for defenders—The question in dispute was covered by the arbitration clause in the statute. The same point had been settled in the case of *Magistrates of Glasgow* v. *Caledonian Railway Company*, 1892, 19 R. 874, where the arbitration clause was very similar in its terms. The question whether the plans submitted to the pursuers' engineer had disclosed the contemplated shaft, was certainly a difference covered by the words of the arbitration clause, which were imperative. It was a fit subject for the arbiter appointed to determine—*Great North of Scotland Railway Company* v. *Highland Railway Company*, 1871, 9 S.L.R. 92; *Caledonian Railway Company* v. *Greenock and Wemyss Bay Railway Company*, 1874, 1 R. (H.L.) p. 8. The case of *Hodgson* v. *Railway Passengers Assurance Company*, 1882, 9 Q.B.D. 188, showed that it lay upon the pursuers to show that a good reason existed to prevent the arbitration clause applying, and this they had failed to do.

At advising—

LORD PRESIDENT—The question in dispute, as the Lord Ordinary says in the first sentence of his opinion, is whether this ventilating shaft was constructed with the consent of the pursuers. Although, however, this is the ultimate question, the dispute, as it was explained to us, involves more than a question of fact or of engineering, and indeed depends largely on the construction and relation of the 4th and 7th

sub-sections of the 6th section of the defenders' statute.

On the one hand, it is said for the defenders that they having presented to the pursuers' engineer plans showing a ventilating shaft, he approved of it, and that this having been done under sub-section 7, the pursuers cannot challenge the shaft. The defenders say also that the engineer's approval may also be held to be the consent of the company under sub-section 4, and thus to legalise the shaft.

On the other hand, the pursuers say that even assuming (which they did not unreservedly do) that a ventilating shaft may be treated as a work incidental to the railway, yet that inasmuch as it necessarily involves breaking upon the surface of the ground, the previous consent of the company was necessary under sub-section 4 to its construction at this place; that the engineer had no authority, express or implied, to grant such consent; and that his approval of the plans cannot supply the want of the company's antecedent consent. The question is also complicated by the defenders not having served notices to take the land on which the shaft is constructed.

This, or something like this, is the controversy; and if it contains the elements of fact and engineering skill, it is, or may prove ultimately to be, mainly a question of law.

Not the less, however, do I hold that the dispute is a difference or differences with respect to some of the matters referred to in section 6, and therefore must be determined in manner provided in sub-section 10. I see no warrant for limiting the very wide terms of the clause to matters in which an engineer is a peculiarly well qualified arbiter by reason of his professional skill. The statute has drawn no such distinction.

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

The Court adhered.

Counsel for the Pursuers and Reclaimers—Balfour, Q.C.—Cooper. Agent—James Watson, S.S.C.

Counsel for the Defenders and Respondents—Ure—Dickson—Malcolm. Agents—Clark & Macdonald, S.S.C.

Thursday, November 7.

FIRST DIVISION.

[Sheriff of Aberdeen.

GARDEN CAMPBELL *v.* BARBER AND ANOTHER.

Executor — Confirmation — Allegations of Conduct Disqualifying—Danger to Estate —Judicial Factor.

A petition for confirmation as executrix presented in the Sheriff Court by the wife of the deceased was opposed by a beneficiary under a former will on the grounds (1) that an action to reduce the will and other testamentary provisions executed by the deceased in favour of the petitioner was being raised in the Court of Session; and (2) that the whole of the estate had not been included in the inventory lodged, and that the petitioner had removed jewellery and other articles of value belonging to the estate outwith the jurisdiction of the Court. The objector accordingly asked that a judicial factor should be appointed.

The petitioner met these averments by a general denial and by an explanation that any jewellery possessed by the deceased had been given before his death as presents to the petitioner and to other friends.

Held that the pleadings showed a *prima facie* case of danger to the estate, and that the proper course was to appoint a judicial factor.

Colonel Garden Campbell, heir of entail in possession of the estate of Troup in Banffshire, died on 16th May 1895. He was twice married, his first wife having died without issue in August 1893, and was survived by his second wife whom he married on 23rd July 1894. On that day he executed a general disposition and settlement, by which he conveyed to his second wife Mrs Thorne or Garden Campbell his whole means and estate, and appointed her his sole executrix.

Mrs Garden Campbell presented a petition for confirmation as executrix-nominate in the Sheriff Court of Aberdeen. Thereafter a *caveat* was lodged by Mrs Laura Johnstone or Barber, with the consent and concurrence of her husband. She stated in her objections that she was the adopted daughter of the deceased and the sole beneficiary under a former will which he had executed shortly after his first wife's death. The objector further averred that the petitioner had been previously to her marriage a woman of immoral character, and that the deceased was of intemperate habits, which had reduced him to a state of such mental weakness that he had fallen entirely under the influence of the petitioner, who had induced him to sign the deeds leaving everything to her and revoking his former will. These statements were denied by the petitioner.

The objectors further averred—"(Obj. 14) The inventory of the real and personal estate does not include the whole of the estate of the said deceased liable to duty."

The petitioner answered — "(Ans. 14) Denied. The objector is well aware that the liabilities considerably exceed the assets, and that even if the general disposition and settlement was reduced and the will in her favour, of 8th August 1893, set up, she would get nothing from the estate."

The objector also stated that an action was being raised in the Court of Session for reduction of the deeds of settlement and other deeds executed in favour of the petitioner, and craved the Court to sist proceedings till the determination of that action.