that is to be affected by judicial precedent, is whether the facts admit of its application to the present case. Was then the pursuer a stranger—that is to say, a person not connected with the work in which the servant through whose fault the accident occurred was employed. The contrary appears to me to be the fact. The two, no doubt, are of different classes; the work which the one did was of a higher sort than that which was done by the other; and more than that, the operations in the mine, so far as the raising of minerals was concerned, might have been carried on even if the work for which the pursuer was engaged had never been undertaken. Nevertheless, taking things as they were under the lease by which this mine was worked, the two were in my opinion members of one organisation. The examination of the workings at stated periods by an expert for the purpose specified was a condition of the lease under which all the operations in the mine were conducted; and it appears to me consequently that those engaged in the fulfilment of this part of the contract were persons by whom along with others the work of the mine as that behoved to be carried on was accomplished. "Fellow-workmen" or "*collaborateurs*" might —nay, would—be, if common use is to be taken as the text, an awkward or inapposite word by which to express such relationship as there was between these members of this organisation; but in the sense in which it has been used in the cases referred to it is applicable here, and may, nay I think must, be accepted as an accurate description. But in the second place, the fundamental question is not whether the pursuer is a servant and the defenders were fellow-labourers or *collaborateurs* or members of the same organisation, but what is the legal import or result of the contract between Messrs M'Creath & Stevenson, the pursuer's masters, and the defenders? Is it to be held that the defenders were to answer to M'Creath & Stevenson not merely for their own personal fault but for the fault of their servants in the mineral field? There is nothing to this effect expressed in the contract. There might have been a provision covering either the one party or the other; and as there is not, the presumption is that they were content to leave this to legal implication. My opinion is that in the circumstances M'Creath & Stevenson must be held to have taken the employment which was the subject of their contract with the defenders with all risks attending its execution. Those in fault upon this view of the matter must answer for their fault; but there is no warrant for a vicarious responsibility. An explosion through fault of a worker in the mine is one, and indeed one of the most obvious, of these risks, and as they did not stipulate that the defenders should answer to them for the consequences as if the fault had been their own, the legal and reasonable conclusion is that this is not a responsibility under which, according to the true understanding of the parties, the defenders were to be laid by the contract. The matter appears to me to be one depending upon contract, and as it has not been provided that they should be answerable for their servant's fault, there is nothing upon which the defenders' liability can be sustained.

LORD RUTHERFURD CLARK—I am of the same opinion.

LORD JUSTICE-CLERK—I cannot resist the conclusion at which Lord Young has arrived. It is rather too late now to go back on the principle on which the previous decisions were pronounced. The idea of a contract by a workman to take all the risks of his master's business has recently received a severe shock from the Employers Liability Act; but this case does not fall within the Act, and consequently the question here comes to be whether it is covered by the opinions in the case of *Woodhead*. I confess I cannot distinguish this case from that one, and therefore the decision in *Woodhead* leads to the liberation of the master in this case, which must be ruled by it.

The Court pronounced this interlocutor:—

"The Lords . . . Find that the injury sustained by the pursuer was caused by an explosion of fire-damp occasioned by the fault of the oversman or fireman in the employment of the defenders, who were competent and sufficiently equipped for the proper and efficient discharge of their duties: Find that the pursuer suffered damage to the amount of sixty pounds sterling: Find in law that the defenders are not responsible for said damage: Therefore sustain the appeal: Recal the interlocutor of the Sheriff . . . Affirm the interlocutor of the Sheriff-Substitute of 4th January last: Of new assoilzie the defenders from the conclusions of the action," &c.

Counsel for Pursuer (Respondent)—Mackintosh — Morison. Agent—Alexander Morison, S.S.C.

Counsel for Defenders (Appellants)—Hon. H. J. Moncreiff—Ure. Agents—Mackenzie, Innes, & Logan, W.S.

Wednesday, November 12.

FIRST DIVISION.

[Bill Chamber.

DUMBARTON WATERWORKS COMMISSIONERS *v.* LORD BLANTYRE.

Arbiter—Statutory Arbitration—Interdict—Ultra Vires—*Competency—Lands Clauses Consolidation (Scotland) Act* 1845 (8 *Vict. c.* 19).

Statutory commissioners authorised to take certain land for the purposes of their works, served a notice on the proprietor that they intended to take certain portions of land belonging to him, and required particulars of his interest. He having served a claim, arbiters were appointed by both parties; but thereafter, on the ground that the claim made by the proprietor appeared to include claims for compensation which were excluded under their private Act, the commissioners sought interdict against the arbitration being proceeded with. The Court *refused interdict* on the ground that it was not desirable to interfere unless it was perfectly clear that under the Act the claims in question were excluded.

In 1883 a bill was promoted in Parliament called the "Dumbarton Waterworks, Streets, and Buildings Bill," one of the purposes of which was to draw water from Loch Humphrey and Loch Fyn, and to increase thereby the water supply of the Burgh of Dumbarton. The bill passed, and the Act received the royal assent in August 1883. A portion of Loch Humphrey and of Loch Fyn belonged to Lord Blantyre, who had opposed the bill, and in consequence of whose opposition the amount of compensation water to be provided by the Commissioners had been largely increased.

Sections 9 and 10 of the Act provided (section 9) that the "Water Commissioners shall, as soon as the waterworks authorised by this Act are completed so far as to be able to afford the supply of compensation water hereinafter mentioned, cause to be discharged from the reservoir by this Act authorised down the stream called Loch Humphrey Burn, a regular and continuous flow of not less than 320,000 gallons in every day (Sundays excepted) of twenty-four hours; and if the Water Commissioners shall commence and continue to discharge from and out of the said reservoir the due quantity of water in manner aforesaid the same shall be deemed to be compensation to millowners and other persons interested in the waters flowing down the said stream called Loch Humphrey Burn, and the stream called Duntocher Burn, for the water intercepted and appropriated for the purposes of this Act." (Section 10) "Nothing in this Act contained shall be held to prejudice or affect the rights (if any) of the Right Honourable Charles Stuart Lord Blantyre in the loch known as Loch Humphrey, or to prevent him from claiming from the Water Commissioners compensation for any such rights which shall be injuriously affected by anything done by the Water Commissioners under or for the purposes of this Act."

The Commissioners under the Act in June 1884 served a notice in pursuance of the provisions of their Act, and of the Lands Clauses Consolidation (Scotland Act) 1845, and the Lands Clauses Consolidation (Scotland) Acts Amendment Act 1860, upon Lord Blantyre, intimating that they were, by the first mentioned Act, authorised to purchase and take certain land or property belonging to him lying in the parish of Old or West Kilpatrick, in the county of Dumbarton, and requiring from him the particulars of his interest in the said land, and a statement of his claim for compensation therefor.

Lord Blantyre upon 3d July 1884 served upon the said Commissioners a statement and claim, in which, in addition to a reservation of various powers and privileges, he claimed a money compensation of £7000.

The Commissioners by notice of 24th July 1884 intimated to Lord Blantyre that they did not admit his claim, and that thus a question of disputed compensation arose between them, and under reservation of all their legal rights and remedies they appointed James Barr as their arbiter to determine the question of disputed compensation, and they called upon Lord Blantyre either to accept the said James Barr as sole arbiter or to appoint some other person to act for him. Lord Blantyre appointed Thomas Buchan, land valuator, Dundee, as arbiter for him in the premises.

The arbiters thus named appointed Sheriff Crichton as oversman.

The arbiters upon 22d August 1884 appointed Lord Blantyre to lodge a statement of his claim within eight days, and the Commissioners within eight days thereafter to answer the same.

While matters were in this position the Commissioners upon 25th August 1884 presented a note of suspension and interdict praying that Lord Blantyre might be interdicted from prosecuting his statement and claim of 3d July, above referred to, and further, that Messrs Barr and Buchan, the arbiters, should be interdicted from acting as arbiters and from issuing any interlocutor or award in the arbitration.

The complainers pleaded, *inter alia*, that as their operations did not affect Loch Humphrey, Lord Blantyre was not entitled to claim compensation in respect thereof. They also pleaded that Lord Blantyre's rights as riparian proprietor on Loch Humphrey Burn having been compensated by the private Act he was not entitled to compensation therefor; and (4) "the statement and claim of the said respondent including matters in respect of which he has no right of compensation, and being irrelevant and wanting in specification, and therefore invalid, the complainers are entitled to interdict."

The respondent pleaded (1) that the complainers having by their notice initiated the proceedings complained of, and by their subsequent nomination of an arbiter acquiesced in them, were thus barred from insisting in this application; and (2) that as the question of compensation had been properly referred to arbiters and an oversman, and the arbitration being then in dependence, the application for interdict was incompetent.

The Lord Ordinary on the Bills (Lord Kinnear) refused the note.

"*Note.*—The complainers themselves have instituted the proceedings which they now seek to interdict. They had served a notice upon the respondent, under the Lands Clauses Act, that they were to take certain lands belonging to him, or in which he was interested, and required him to state the particulars of his interest and claims; and he having accordingly served upon them a statement and claim, they gave notice, in terms of the statute, that his claim was not admitted, that a question of disputed compensation had thus arisen, that they had nominated an arbiter, and called upon him either to concur in the nomination or to appoint some other person to act as arbiter along with their nominee.

"The respondent has named an arbiter, and the arbiters so nominated have appointed him to lodge a statement of his claim, and the complainers to answer it. The complaint is that the original claim, which is said to be too vague to be submitted to arbitration, appears to include claims which under the statute Lord Blantyre is not entitled to make. But it was explained at the discussion in the Bill Chamber that the object of the application was to obtain the judgment of the Court upon the construction of the ninth and tenth clauses of the complainers' Act, by which they maintain that any claim by Lord Blantyre for compensation in money for injury to his rights as a riparian proprietor in certain streams has been excluded. It may be that this is a question as to which the decision

of the arbiters, if they find it necessary to decide it, will not be final. But the possibility that such a question may be raised appears to me to be no reason for stopping proceedings which have been duly instituted at the instance of the complainers themselves, or for withdrawing from the arbiters the consideration of questions which are competently before them."

The complainers reclaimed; argued for them that the case was one for the interdict craved. The authority of the case of *The Glasgow and South-Western Railway Company* v. *Caledonian Railway Company*, Nov. 3, 1871, 44 Scot. Jurist, 29, was entirely in point. The arbiters could not be compelled to split up their award into items; they would probably return their award of damages in the slump, and thus all objections to particular items would be precluded.

Argued for the respondent—This objection came too late; the proceedings now complained of were instituted by the Commissioners themselves, and they could not now be heard to object to them. The real object of this proceeding was to get a direction from the Court for the benefit of the oversman as to certain sections of the Commissioners' Act of 1883. Where a claim contained certain items untenable in law the Court would interdict the arbiter from considering them, but that must be quite clear before any interference by the Court would be made. While this Act certainly contemplated compensation in water, circumstances might arise in which a money compensation might also be demanded, such as (1) before the reservoirs were constructed, (2) if from any cause the water was cut off after the works had been completed.

Authorities—*Caledonian Railway* v. *Walker's Trustees*, December 2, 1879, 17 Scot. Law Rep. 192; *Lord Blantyre* v. *The Clyde Trustees*, June 6, 1883, 10 R. 910.

The complainers in the Inner House restricted the prayer of the note, and craved that the respondent be interdicted from prosecuting his claim only in so far as it imported a claim for money compensation.

At advising—

Lord President—In an application of this kind the Court is called upon to exercise its discretion, and often a very delicate discretion. The first impression which an application of this kind makes upon one is, that it is not at all desirable to interfere in any way with the progress of a statutory arbitration, and although cases might arise in which I should be quite prepared to interfere, such a course should be followed only upon very special and clear grounds. I adopt the views expressed by Lord Neaves in that part of his opinion in the case of *The Glasgow and South-Western Railway Company* v. *The Caledonian Railway Company*, in which he says—"It is very often inexpedient to interdict an arbiter before he acts. But it is a perfectly competent form of procedure, and one which the Court will adopt to save parties unnecessary expense and litigation whenever, as in the present case, it appears plain on the face of the matter that the arbiter has no such power as that which he is called on to exercise."

Now, if it could be made plain here that the arbiter is called upon to exercise a power which he does not possess, then this remedy of interdict would be competent and expedient, but it must always depend on the nature of the case and upon whether the anticipated excess of power is made clear to the Court either upon the face of the statute or whatever it may depend on. The excess of power must, however, be clear, and the question comes to be whether that is the case here. Now, I confess I do not see that this is by any means so clear a point as has been represented to us on the part of the reclaimer; on the contrary, questions may arise under sections 9 and 10 which may depend for their solution not upon the words of the statute but upon surrounding circumstances. I do not see therefore that we can interfere with the action of the arbiter to prevent him entertaining a claim which we are not now in a position to determine. It is quite obvious that this is just one of those cases in which an arbiter of experience will make his findings of damages not in the slump but by items, and the party now seeking to restrain the arbiter will have an opportunity hereafter if he desires it of challenging the competency of these findings under the separate heads. I do not see therefore that any sufficient ground has been stated to warrant us in interrupting the proceedings in this arbitration.

Lord Mure—I am of the same opinion, and think that the Lord Ordinary has placed his judgment upon broad and distinct grounds. Where a company has, as here, given the ordinary statutory notice, and the parties have gone the length of appointing arbiters to consider the claims raised under that notice, it would be very inexpedient for the Court to interfere with the statutory tribunal unless a clear case of excess of power was alleged to have been exercised by the arbiters, and certainly no such allegation is made here. I therefore agree with your Lordship in thinking that no sufficient ground has been stated to warrant us in interfering with the statutory tribunal.

Lord Shand—I am of the same opinion. It is only in very exceptional circumstances that the Court will interfere so as to interrupt an arbitration under the Lands Clauses Act or under any of the similar Acts with which we are familiar. I agree with your Lordships in thinking that this case is not by any means so clear as to warrant us in granting the interdict even to the modified extent now asked. If it had appeared from the claim given in to the arbiters that in one of its branches, quite separable, a claim was made on grounds untenable in law either on account of some provision of statute or of common law, and the claimant insisted upon going on to have that claim dealt with, and was thereby causing expense in the arbitration, the Court would in these circumstances grant the remedy craved. This, however, is not a case of that class at all. It is obvious that section 9 of the Commissioners' statute provides for any injury that may be done by the abstracting of water from the burn, and that a provision is made for water compensation, but whether that would be held as a complete bar to any pecuniary claims which might be made is doubtful. I think, however, it is enough at present to say that various questions may arise about abstracted water taken out of the burn, and when so raised Lord Blantyre will be entitled to have that head of his claim brought under the careful

consideration of the arbiters. In that view of the case, and considering that very strong circumstances would be required to interrupt an arbitration of this kind, I agree with your Lordships that the interlocutor of the Lord Ordinary should be adhered to.

The Court adhered.

Counsel for Complainers—J. P. B. Robertson—W. C. Smith. Agents—Murray, Beith, & Murray, W.S.

Counsel for Respondents—Mackintosh—Dundas. Agents—Dundas & Wilson, C.S.

Wednesday, November 12.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

M'FARLANE & GIBB *v.* STRACHAN.

Process—Remit to Reporter to Hear Parties—Duty of Reporter—Reference—Debts Recovery Act 1867 (30 *and* 31 *Vict. cap.* 96).

In an action under the Debts Recovery Act the Sheriff remitted the account in dispute to a man of skill with instructions to hear parties, examine the disputed account, and report. The reporter after conferring with the parties separately, issued his report. *Held* that he was bound to hear the parties in each other's presence, and that a decree founded on the report could not stand.

M'Farlane & Gibb, upholsterers, Edinburgh, sued Miss Strachan, Edinburgh, in the Sheriff Court of Midlothian under the Debts Recovery Act 1867, for the sum of £47, 17s. 11d., as per account ending 20th June 1883.

The defender pleaded that the account was overcharged. She tendered £31, 10s. for a discharge in full, and she made a counter claim for £5. The Sheriff-Substitute by interlocutor of 31st March 1884 remitted to Mr Veitch, cabinet-maker, Shandwick Place, Edinburgh, "to hear parties, examine the said accounts, and if necessary the work executed, and report."

Veitch reported—"I have examined the account sued for. I have also examined, as far as that could be done, the work charged for in the account. I have also considered Miss Strachan's statement on the subject, with three letters from her. I have also examined Messrs M'Farlane & Gibb's business books, and I have considered their statements on the matter in dispute." The result of the report was that the pursuers' account was overcharged by £3, 3s. 6d., and that 15s. should be allowed for the defender's counter claim.

Objections to this report were lodged by the defender, who complained, *inter alia*, that the reporter "did not hear parties, that he had received documentary evidence adduced by the pursuers, and heard their statements and arguments outwith the defender's presence."

Upon 11th July the Sheriff-Substitute remitted the matter to the reporter, with instructions to him to specify the items which he considered to be overcharged, and the precise grounds on which he allowed the counter claim. Veitch then lodged a supplementary report bringing out the details desired by the Sheriff-Substitute.

Upon 23d July the Sheriff-Substitute gave effect to Veitch's two reports, and ordained the defender to pay the pursuer the sum of £43 19s. 5d., the balance of the account sued for after deducting £3, 3s. 6d. and 15s.

The defender appealed to the Sheriff, who upon 1st August affirmed the judgment of the Sheriff-Substitute and dismissed the appeal.

The defender appealed to the Court of Session, and argued that the account in question was grossly overcharged; various items were entered in the account which she had never purchased, and no opportunity was offered to her of making, explanations in the presence of the pursuers; upon that ground the award ought to be set aside.

Argued for the respondents—The referee had taken a fair and reasonable view of the dispute between the parties, and his award ought to be sustained. The words "in each other's presence" usually inserted after the order "to hear parties," in this case were omitted, and the reporter was not bound to hear parties in each other's presence.

Authorities—*M'Gregor* v. *Stevenson*, 20th May 1847, 9 D. 1056; *M'Nair* v. *Faulds*, Feb. 16, 1855, 17 D. 445.

At advising—

Lord President—It is very unfortunate that a miscarriage of justice of this kind has occurred under a statute which was intended to be expeditious in its operation and to save expense. But from what has occurred it is clear that justice has not been done to the defender, and therefore matters cannot stand in their present position. The defender may not be successful in getting the accounts in question materially reduced in amount, but she is at any rate entitled to be heard as to any objections she has to the various items of the account. The parties should have been heard by the referee in each other's presence, and an opportunity given to each to make all necessary explanations. No doubt, Mr Veitch was a very suitable man to whom this matter might be referred, but in the present case he has made a mistake by not hearing what the parties had to say in each other's presence. The words "to hear parties" in the Sheriff's interlocutor of 31st March 1884 form an expression which means that the parties are to be heard in each other's presence.

Upon that ground, and upon that alone, I think that this award must be set aside, and that we should remit to the Sheriff to remit to Mr Dowell to examine the account and hear the parties' explanations.

The remit will be very much in the terms of the previous remit.

Lord Mure and Lord Shand concurred.

Lord Deas was absent.

The Court remitted the case to the Sheriff, with instructions to remit the account in dispute to Mr Alexander Dowell to examine it, hear parties' explanations, and report.

Counsel for Appellant—Campbell Smith. Agent—John Macmillan, S.S.C.

Counsel for Respondent—R. Johnstone—Shaw. Agent—P. Morison, S.S.C.