pursuance of a contract made with their customer, are asked to pay the money over again. In my opinion the demand is extravagant. I think it is quite clear that there were no dealings between the bank and the registered company at all. I think the pursuers' case must fail, and that because the statement made by them in condescendence 3 is not true, while the facts stated in the answer are true.

Lord Craighill—I have come to the same conclusion without difficulty. I agree with your Lordship in the chair and with Lord Young that the contract alleged by the bank in their defences is proved by the communications when the account was opened, and by subsequent operations by the parties upon the account. Now, it is said that even if this defence were good down to the time of the registration of the company, it will not hold good after registration had taken place. But the contract between the bank and the parties who lodged the money, was not paralysed nor nullified by registration. The contract was not nullified until it was brought to a close by an agreement between the persons who were parties to it, and in fact it continued till the liquidation of the company. What was paid was paid to the parties who were entitled to operate upon the account under the contract. The question is one of contract between the bank and those who opened the account, and it having been an integral part of the contract that the money should be paid out upon the cheques of Struthers and Gardner, although the name of a limited company was in the heading of the account, that condition remained operative to the end. I therefore agree with your Lordships that the bank is entitled to our judgment.

Lord Rutherfurd Clark—The money which is sued for in this cause was lodged in the Clydesdale Bank, and the first, indeed the only question is, on what contract was the money lodged there. For of course there must have been a contract. I think it has been proved that each sum was paid in upon a contract that it should be paid out upon cheques signed by Struthers and Gardner. That being so, there is an end to the difficulty, because the money was paid out in terms of the contract under which it was deposited, and such a payment is necessarily a discharge to the bank.

The Court issued the following judgment:—

"Recal the interlocutor appealed against: Find in fact, first, that the company in the record referred to as the pursuer's company, and which was incorporated on 4th December 1883, did not keep an account with the defenders, and that the sums paid into the credit of the account to which the pass-book refers, amounting *in cumulo* to the sum of £1153, 13s. 9d. as per said pass-book, were not paid to the credit of the pursuer's company, or so received by the defenders; second, that the account to which the said pass-book refers was in October 1883 opened with the defenders by A. J. Struthers in name of the 'Struthers Patent Diamond Rock Pulverising Company, Limited,' being the name which he proposed giving to a projected company which he was then promoting, and that the object and purpose of the account was, that it should be immediately operative as a current account in the manner contracted and agreed between the said A. J. Struthers and the defenders; third, that it was contracted and agreed between them that the said account should be operated on by cheques signed by A. J. Struthers and W. L. Gardner, and that it was operated on accordingly in pursuance of the said contract and agreement upon which it was opened and kept until the whole of the sums paid in to the credit thereof were exhausted, with the exception of a balance of £1, 19s. 3d.; fourth, that the defenders had no contract or dealing with the pursuers' company, and had no notice of the incorporation, or of the existence thereof, until the foresaid account with the exception of the said balance was exhausted: Find in law that the contract and agreement on which the said account was opened, kept, and operated on as aforesaid was legal, and that the pursuers have no claim against the defenders in respect of all or any of the sums paid in to the credit thereof and drawn out again: Therefore sustain the defences, and assoilzie the defenders with expenses in both Courts."

Counsel for Pursuers (Appellants)—D.-F. Balfour, Q.C.—Graham Murray. Agents—Gill & Pringle, W.S.

Counsel for Defenders (Respondents)—Moncreiff—Readman. Agents—Morton, Neilson, & Smart, W.S.

Friday, January 15.

FIRST DIVISION.

[Lord Fraser, Ordinary.

NISBET HAMILTON *v.* NORTH BRITISH RAILWAY COMPANY.

Railway — Mines and Minerals — Stone — Construction of Line—Railway Clauses Act 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 70.

In 1846 a railway company constructed a line on lands which they had acquired under compulsory powers. Part of the line ran through a cutting in the rock. In 1870 the company commenced to remove the stone which had been left on the side of the line within the limits of the lands taken, because, as they alleged, it was liable to come down, and so rendered the line unsafe. The proprietrix of the adjoining lands, from whose predecessors in title the railway company had taken the lands on which the railway was formed, claimed the value of the stone so taken away, on the ground that under section 70 of the Railway Clauses Act, "mines and minerals" unless expressly conveyed, were excepted from the conveyance to the railway company, and that the stone in question came under the description "mines and minerals," and had not been expressly

conveyed. The defence was (1) that section 70 only applied to "mines and minerals" *under* the railway, and that the company had a right to all "mines and minerals" in the lands taken down to formation level; (2) that the stone in question was not merchantable, and therefore did not fall under the term "mines and minerals;" and (3) that the stone was "used in the construction" of the line. The Court, upon a proof, sustained these three grounds of defence, and *assoilzied* the defenders.

In this action Miss G. C. C. Nisbet Hamilton, heiress of entail in possession of the entailed estate of Dirleton, sued the North British Railway Company for £350, the value of certain stone worked out by them which the pursuer alleged was her property.

In 1846 the defenders, in virtue of compulsory powers conferred on them by an Act passed in that year, acquired from the pursuer's predecessors in title such portions of the estate of Dirleton as were necessary for the construction of a branch railway running from the main line at a point near Drem to North Berwick.

The line was laid down, and in the course of its construction considerable cuttings were made in the lands acquired from the pursuer's estate, in some of which there was a quantity of stone. This stone was cut and removed down to the level of the permanent way, but when the cuttings had been made and the line was completed a large amount of stone was left unworked on either side of the railway above the level of the permanent way within the limits of the land acquired by the railway.

The pursuer averred that the stone remaining after the construction of the line was her property, and was of a valuable character.

The defenders answered that the stone in these cuttings was of but trifling value, and explained that they had "never disputed the right of the pursuer to the stone adjoining their line, except only such parts as they acquired by virtue of their title from the pursuer's predecessors and under statute."

The defenders further averred that the pursuer for some years past, after the construction of the railway, had been working out the stone so left, and had been applying it to their own uses. She estimated the value of the stone so worked to be £350, being the sum sued for.

The pursuer pleaded—"The stone remaining in the said lands after the construction of the railway was completed being the pursuer's property, the defenders had no right to work out or use the same, and the pursuer is entitled to payment in respect of the same, as concluded for."

The defenders pleaded—"(1) The defenders never having worked out or used stone which was the property of the pursuer, the action is groundless, and the defenders are entitled to absolvitor."

A proof was allowed. In the course of the proof for the pursuer the defenders obtained leave to add the following statement to their defences—"Explained further that the stone in said cutting is liable to be affected by the weather, and the defenders have found it necessary from time to time to remove portions of stone so affected, for the protection of the line. No stone has been removed by the defenders except such as was necessary for safety."

They also added this plea—"(3) The defenders are entitled to absolvitor, in respect no stone has been removed except what was necessary for the construction, maintenance, and protection of the line."

The pursuer led evidence in support of her contention that the stone was valuable.

For the defenders James Gowans, Dean of Guild in Edinburgh, deponed — "I made the North Berwick branch of the North British Railway in the years 1847 and 1848. I know the rock cutting in question very well. The extent of the cutting originally was 61,000 cubic yards. At the south end the bulk of the stone is of a dark red colour, and very brittle, so that when you strike it it breaks in pieces; it is not a stone you could square up and dress like sandstone. The stone is of no use for building purposes. There is a small vein in the centre of the cutting where the stone is better than elsewhere. . . . I got no stone from any part of the cutting except for rubble, and that only from the vein I have mentioned. The rest of the stone was not fit even for rubble. I inspected the cutting recently and found that the sides at some places were falling. The rock, although not stratified, is very much twisted; it is full of backs and joints which run in, and if you begin to touch it you have to follow these backs and joints to make it safe for the passage of a train. . . I don't believe the stone in the cutting in question would be worth anyone's while to work as a sale quarry; it might be worth for the uses of the property, such as for steadings and things of that sort, but as a mercantile thing it is not worth anything in my opinion. . . I only got about 800 cubic yards of good stone out of the 61,000 cubic yards that we removed from the cutting. . . . If anyone says that this stone is worth 9d. to 1s. 6d. per cubic yard to the proprietor, my observation upon it would be that it is perfect nonsense."

James Bell, civil engineer, and principal assistant to the chief engineer for the defender's company, defenders' witness, deponed—"I know the cutting at Dirleton very well. It is a very dangerous cutting. The rock is loose, rotten, and friable, and easily brought down by the action of the weather. That has been the experience of all those in charge of the line during the fifteen years that I have known it. It is full of what are called backs and faults. The result is that water gets in behind the backs, and when there is frost the water swells and brings down the rock. As long as I have been performing engineering duty on the line that rock cutting has been a source of very great anxiety, particularly during frosty and wet weather. . . I cannot say what quantity of rock was taken away. The object of taking it down was for the safety of the line, and for that purpose only. . . The bulk of the stone was taken to South Leith and discharged over the sea-wall into the slopes. . . The stone was taken to Leith simply because we had no other place to put it, and we had to get rid of it somehow. We did not quarry it for the purpose of using it at Leith or anywhere else, it was taken out solely for safety of the line. . . We never removed it for the value of the rock, or with the view of obtaining material for railway works elsewhere. I may mention that I have

renewed all the bridges on the East Coast line from Portobello to Berwick with malleable iron and stone abutments, raised and extended all the platforms in the neighbourhood of that station, and also put up an engine-shed at North Berwick, and I have never used a pound of that stone. . . The stone was brought down with the pinch. We had no difficulty in getting it down in that way. . . In my judgment the stone that was removed had no commercial value as building stone or for any other purpose."

George Easton, builder and joiner in North Berwick, pursuer's witness, deponed—"If there was stone lying in such a form that you could take it down with pinches alone, I would not consider that it was worth very much."

The Lord Ordinary (FRASER) on 12th June 1885 pronounced this interlocutor:—"Finds that the defenders have worked out stone near Dirleton, at the side of their line of railway, on various occasions during several years, and have carried away and used such stone for their own purposes: Finds that the stone so cut and carried away by the defenders was within the limits of the ground purchased by them from the owner of the land through which the line was run, who was the predecessor of the pursuer: Finds that it was necessary to cut and carry away such stone in order to prevent blocks thereof from falling upon the line, and thereby injuring it and endangering the public safety: Finds, in these circumstances, that the defenders acted within their legal powers in so doing, and that the pursuer is not entitled to claim the value of the stone so removed, under the reservation in the 70th section of the Railway Clauses Consolidation (Scotland) Act 1845: Therefore assoilzies the defenders from the conclusions of the action, and decerns, &c.

"*Opinion.*—The 70th section of the Railway Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33) is in the following terms:—'The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug, or carried away, or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby.' Although the mines and minerals are thus reserved to the proprietor, he is not entitled to work them until he has given a month's notice to the railway company so as to enable them to purchase, if they will not run the risk of injury to their line (sect. 71). In the construction of the word 'mine' it has been held that freestone worked by means of an open quarry was within the reservation—*Jamieson* (*Dundas' Trustee*) v. *North British Railway Company*, 18th December 1868, 6 S.L.R. 188—and in an English case it was found that it includes minerals whether got by underground or by open workings, and therefore a bed of clay got entirely by open working was included (*Midland Railway Company* v. *Haunchwood Brick and Tile Company*, 22nd March 1882, L.R., 20 Chan. Div. 552).

"The pursuer of this action was the owner of land near Dirleton, over which the defenders' railway had to be carried. Part of the line ran through a rock cutting of igneous formation, and the railway company cut as much of the rock at the formation of the line as they thought was necessary. The character of the stone however was such that it was easily acted upon by frost and rain and wind, and portions of it have been removed from time to time at the sides of the cutting, but always within the limits of the ground purchased by the railway company from the pursuer or her predecessor. The railway has been thirty-eight years in existence, and these operations upon the sides of the line have been carried on in different years, and for longer or shorter periods of time. This is not the kind of case contemplated by the Act of Parliament of the owner of a mine proposing to work it, and giving the railway company the option to make compensation for it if they objected to the working. The company here have worked this rock and carried away the stone, and the owner of the land from whom it was got now demands that the company should pay the value of the stone so removed. The railway company resist this, upon the ground that 'the stone in said cutting is liable to be affected by the weather, and the defenders have found it necessary from time to time to remove portions of stone so affected for the protection of the line. No stone has been removed by the defenders except such as was necessary for safety.' The Lord Ordinary is of opinion that this statement is supported by the proof. They have not removed the stone as quarrymen merely for the purpose of sale. Their object in effecting the removal was that stated in defence. It is said however by the pursuer that the company utilised the material which they obtained from the cutting by forming a sea-wall with it at South Leith; by using it as a support to the props of the bridge at Gala Water; other stones were used for the protection of the bridge over the Tyne at East Linton, others at Musselburgh, others on the Hawick Road at Bowland, to keep the water from breaking in on the sides of the line; but upon the whole the chief part of the material was taken to South Leith and discharged over the sea wall into the slopes.

"Now, it is noways inconsistent with the defence set up (that the company only took away stone which was threatening injury to their line, and was dangerous to the public) that they apply it in a useful way instead of putting it on shipboard and throwing it into the sea, or by turning useful land which they possess into a spoil bank. It is proved in every one of the cases where the company used up the stones and débris which they removed that they could have got similar or better material nearer the spot at half the price.

"Such being the case upon the proof, the next question is, whether it is relevant as an answer to the pursuer's demand? and this requires an interpretation to be put upon the words of the 70th section of the statute. It is said that when the line was formed in 1847, with the cutting then thought sufficient, the powers of the company of taking minerals for the construction of their line was at an end, although the minerals were within the ground bought from the landowner. No further process of cutting, or of diminishing the rock on the side of the line, could, it is contended, be made by the company, however patent was the impending danger, without the consent of the owner, or the obtaining

further powers from Parliament. Now, this is an interpretation of the 70th section that is unreasonable. The company can take and carry away all that is necessary for the safe construction of the works; and what is necessary for safety can only, in a case like the present, be ascertained from time and experience. The work was faulty at first, as time has shewn, in not cutting away a sufficient quantity of the rock. The engineers did not give due consideration to the decomposing and disintegrating operations of the weather. A line cannot be said to be constructed until it is constructed in such a way as to be safe.

"The 15th section of the Regulation of Railways Act 1842 (5 and 6 Vict. cap. 55) contains a provision which has a considerable bearing upon the present case. The Board of Trade are by that section authorised to extend the prescribed time for the taking of lands, where such appears to be necessary, with a view to public safety, for the purpose of giving increased width to the embankments and inclination to the slopes of railways, or for other works for the repair or prevention of accidents. This has reference to taking additional land to that originally purchased. But in the present case there is no necessity for asking the Board of Trade for their certificate, seeing that the rock here is within the ground purchased by the railway company. The inference is plain, that when the public safety demands it the company may slice away additional rock, if such be necessary for the public safety, always keeping within the ground they purchased.

"The Lord Ordinary has found the defenders liable in expenses down to the date of closing the record, in respect that the defence which has now been sustained was only put upon the record on the day when the proof was about to commence."

The pursuer reclaimed, and argued—There was no express conveyance to the railway company of "mines and minerals" in the lands acquired by them. Therefore under section 70 of the Railways Clauses Act they must be deemed to have been excepted out of the conveyance, and remained the property of the pursuer. In this view the sum sued for was not so much compensation in respect of the consequences of a legal act as damages for the consequences of an illegal act—*Great Western Railway Company* v. *Bennett*, L.R. (2 H. of L.) 27; *Caledonian and Glasgow and South-Western Railway Company* v. *Dixon*, November 13, 1879, 7 R. 216, *aff.* 7 R. (H. of L.) 116. On the evidence the defenders had failed to show that the stone in question did not fall under the term "mines and minerals" on account of being not merchantable. Stone fell under the description "mines and minerals"—*Jamieson* (*Dundas' Trustee*) v. *North British Railway Company*, December 18, 1868, 6 S.L.R. 188. Nor had they proved that the stone was removed either in the course of construction or for the safety of the line. This defence was an afterthought. But even supposing the stone was removed for the safety of the line, that was not a relevant defence to the present action, because they would still be under obligation to pay for the stone they had worked and carried away.

The defenders replied—The 70th section of the Railways Clauses Act did not apply, because the stone in question did not lie under the railway; the mines and minerals in the lands acquired had, down to the formation level, been purchased by the railway company. Further, the stone in question did not fall under the term "mines and minerals," because it was of no commercial value; it was not merchantable. In any view, the defenders were entitled to remove the stone without payment wherever that was necessary for the safety of the line—*Tiverton and North Devon Railway* v. *Loosemore*, L.R., 9 App. Cas. 480, at p. 509; Woolf & Middleton on Compensation, 316; *Errington* v. *Metropolitan District Railway Company*, 19 Ch. D. 559. The claim was barred by acquiescence, because the work had gone on since 1870 in the knowledge of the pursuer.

At advising—

Lord Adam—This is an action brought by Miss Nisbet Hamilton against the North British Railway Company for payment of the sum of £350 as the value of certain stone alleged to be her property, and to have been illegally carried away by them.

The stone was taken from a cutting on the defenders' line of railway, where it passes through the pursuer's lands of Dirleton, and within the limits of the lands purchased from the predecessor of the pursuer for the purposes of the railway.

When the line was constructed, nearly forty years ago, part of the stone within the land so purchased was cut away and removed down to the level of the permanent way, so as to form a cutting, leaving a quantity of stone on each side of the cutting. The defenders do not dispute that they have on several occasions since the original construction of the line removed and carried away from the sides of the cutting a quantity of the stone thus left. It is the stone so removed by them which forms the subject-matter of this action.

The conveyance of the lands by the pursuer's predecessor to the defenders contains no express conveyance of the "mines and minerals" in these lands, and the pursuer, founding on the terms of the 70th section of the Railways Clauses Consolidation Act, pleads that the stone in question, being a mineral, and not having been expressly conveyed to the defenders, must be deemed to have been excepted out of the conveyance, and therefore that it was her property. To this the defenders reply (first) that the 70th section does not apply to the stone in question in respect that it did not lie under the railway; secondly, that it was not a "mineral" in the sense of that section, because it was of no commercial or mercantile value; and thirdly, that it was necessary for the safety of the railway and the public that the stone should be removed, and therefore that they were entitled and bound to do so. The Lord Ordinary has given effect to this last plea, and has assoilzied the defenders, but he has not expressed any opinion upon the other pleas maintained by them. I think, however, that it is desirable that these pleas should also be disposed of.

"Mines and minerals" are the subject of certain special provisions contained in the Railway Clauses Act. The 70th and subsequent sections which contain these provisions are introduced under a general heading in these terms—"And

with respect to mines lying under or near the railway, be it enacted as follows"—implying that these sections are intended to deal only with mines in one or other of these positions—that is, either under or near the railway. It is not difficult to see why mines or minerals in these positions should have been the subject of special enactments.

It is clear that a conveyance of lands to a railway company, without any special mention of mines or minerals, would have vested in them the whole mines and minerals in the lands, and of course in that case they would have had to pay for them before entering on possession. But mines and minerals below or adjoining a railway are of no use to the railway company in the construction of their line, and there was no necessity that they should be required to purchase them so long as they should remain undisturbed. It is only when the owner proposes to work them, and possibly to injure the stability of the railway, that the interest of the railway company emerges, and it is then only that they require to purchase them if they should think it necessary or desirable so to do.

Now, the 70th section enacts that "the company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands unless they shall have been expressly named therein and conveyed thereby." It is clear, accordingly, that all mines and minerals in lands acquired by a railway company which they require to dig, carry away, or use in the construction of the works, vest in them without any special conveyance, while the remainder do not.

Now, although the language here used does not in terms express the distinction between mines and minerals above and mines and minerals below the railway indicated in the general heading I have quoted above, I think that practically it will be found to amount to the same thing.

There is no doubt that a railway company before entering upon lands and proceeding to execute their works must pay the purchase price of the lands, and for all damage that may be done by reason of the execution of the works, and that once for all.

It is equally clear that the company after getting a conveyance to the lands would have power, if necessary, to dig, carry away, and use the whole minerals within the limits of the land required by them down to the level of the railway.

But it is obviously impossible to know before the execution of the works how much of the stone the company might require to carry away or use. They might require the half, or it might be the whole. In such circumstances it appears to me that the owner must be presumed to have claimed and to have been settled with on the footing that the company will execute their powers to the full extent to which they are entitled to exercise them, that is, that the whole stone will be carried away or used in the construction of the railway. The owner does not claim on the footing that a quantity of mineral necessarily undetermined will be carried away or used. On the other hand the railway company must pay for all the rights which they acquire by the conveyance in their favour, and one of their rights is to carry away and use the whole minerals down to the level of the railway.

But I am further disposed to think that that part of the stone which is not actually carried away is in the sense of the statute used in the construction of the works just as much as the stone which is carried away. It is used to form a slope or embankment necessary for the railway. It was and is used as a retaining wall to prevent the adjoining ground from coming down upon the railway. If it were to be removed a retaining wall would have to be built, and, indeed, at one part of the cutting where it has been removed that is proposed to be done.

Now, if this construction of the 70th section of the statute be right, the mines and minerals in the land purchased by the railway company, down to the level of the railway, have been conveyed to them, although not expressly mentioned in the conveyance, and are not to be deemed to have been exempted from the conveyance.

This construction of the statute is in entire harmony with the other sections of the statute having reference to mines and minerals. These sections the statute declares are enacted with respect to mines lying under or near (that, is adjoining) the railway, and presumably therefore they are not enacted in respect of mines in any other position. But to hold that they apply to the stone in question would be to hold that they apply to mines not under but above the railway.

The 71st and subsequent sections of the statute accordingly deal only with mines and minerals under or near, that is adjoining, the railway, and no others.

Thus the 71th section provides that if the owner of any mines or minerals under the railway, or within the prescribed distance, that is, 40 yards, be desirous of working the same, he shall give to the company notice of his intention to do so thirty days before the commencement of working, in which case the company are to have the option of purchasing; but it makes no provision for notice in the case of minerals in the situation of those in question, although, unless they be the property of the company, notice would seem to be as necessary in the one case as the other.

On the whole, it appears to me that mines and minerals above the level of the railway were left to be purchased and paid for before the company entered on possession of the lands which contained them, and I am therefore of opinion that the stone in question, assuming it to be a mineral in the sense of the Act, was conveyed to the defenders, and was their property, and therefore that they were entitled to remove and use it as they did.

But the question next arises whether the stone in question falls within the description of "mines and minerals" in the sense in which these words are used in the Act.

The word "minerals," as there used, is necessarily subject to construction. Common earth and sand are minerals, but nobody will contend that they are intended to fall within the descrip-

tion of minerals in that 70th section. Stone may or may not fall within it according to its quality and value. Where it is valuable, it certainly does, as was decided in the case of *Jamieson* v. *The North British Railway Company* (6 S.L.R. 188). But where the stone is of such a quality or description as to be of no merchantable value, I am of opinion that it does not.

The stone in this cutting is not all of the same quality or description. There is a small quantity of it, similar to the stone in the neighbouring quarry of Rattlebags, of better quality than the rest and which possibly may be of some small commercial value. It would appear, however, that no part of this stone has been removed. As regards the quality and value of the stone, evidence of opinion has been adduced on both sides. Engineers and builders have been examined on the part of the pursuer, who describe the stone as good building rock, and worth from 1s. to 1s. 6d. per cubic yard, while the engineers and builders examined for the defenders describe it as hard and brittle, full of joints and backs, and of no merchantable value at all. Had there been no other evidence in the case than that of opinion I should have been disposed to give most weight to that adduced by the defenders, but it appears to me that the facts proved as to the uses and purposes to which alone the stone has ever been applied show conclusively that it is of no commercial value. Mr Gowans, the contractor who made this branch line, says that he excavated 61,000 cubic yards of stone out of this cutting, that of this quantity he found only 800 cubic yards that could be used for building purposes, and that came from that part of the cutting where the stone was similar to the Rattlebags quarry stone, and that all the rest of the stone was used in forming the railway embankments. He says the stone is of no value for building purposes, and he mentions the fact that he had to bring stone from a distance to build a bridge immediately at the end of this very cutting. No doubt he found and used some stone fit for building purposes. But it is impossible to say that any stone could be worked to profit where only so small a proportion of it as he found could be so used. Mr Gowans had certainly the best means of knowing the quality and value of the stone, and if his evidence is to be relied on—and I do not see why it should not be—the description he gives of it clearly shows that it is of no merchantable value. It is also proved that no part of the stone removed by the defenders has been used for building purposes. The most part of it was carried to Leith, where it was discharged over a sea wall there, and into a breach which had been made in the bulwarks by a gale. It was also used in repairing breaches in the river banks near Hawick, and for similar purposes elsewhere. It was not in any case built in, but as Mr Bell, the engineer of the company, says, thrown in promiscuously. Mr Bell also states that during the time the stone was being removed from the cutting he renewed all the bridges between Portobello and Berwick, and enlarged the platforms at the stations, but that in no case did he use this stone—having brought stone from Polmont for the purpose. It may be fairly inferred that he would have used it had it been suitable for building purposes.

The evidence also shows that the stone is not quarried in the usual way by blasting or by using wedges and punches, but is simply brought down by pinches, and when that is the case Mr Easton, one of the pursuer's witnesses, says he would not consider it worth much.

On the whole matter, I am of opinion that while the stone was of some value to the defenders for making or repairing embankments, and for the similar uses to which they applied it, it was of no merchantable value whatever. I therefore think that the stone did not fall within the description of "mines and minerals" in the sense of the Act; that therefore it was not excepted from the conveyance of the lands to the defenders, and was their property, which they might use as they pleased.

The defenders further say that even if the stone was to be considered as a mineral, and so falling under the 70th section of the Act, yet that the stone was removed solely with a view to the safety of the railway and the public, and therefore that they acted within their powers in so removing it.

The Lord Ordinary has given effect to this plea, and I agree with him, although with some difficulty. If it be true, in point of fact, that the company did remove the stone with a view to the safety of the railway and the public, I do not doubt, for the reasons assigned by the Lord Ordinary, that they were quite entitled to do so; but my difficulty arises from a doubt whether it is proved that that was truly the reason why the stone was removed. The fact that this plea was not put upon record until after the proof had actually commenced, suggests a doubt whether it was not altogether an afterthought. But it may be that the defenders were relying on their other pleas and did not realise the importance of this one. I concur however with the Lord Ordinary in thinking that it is sufficiently proved, that in each case where the company used up the stones and débris, they could have brought similar material to the spot at a cheaper rate. If this be so, it is difficult to believe that they were doing anything else than getting rid of the stuff. Entertaining however the opinion which I have expressed as to the defenders' other pleas, I do not think it necessary to say more on this point, and on the whole matter I am of opinion that the defenders are entitled to be assoilzied.

The Lord President, Lord Mure, and Lord Shand concurred.

The Court adhered.

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