to the pursuer: Find the pursuer entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for Pursuer — Salvesen. Agents — Gill & Pringle, W.S.

Counsel for Defender—Darling—Guy. Agents —Carment, Wedderburn, & Watson, W.S.

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*Friday, January* 21.

## FIRST DIVISION.

[Lord M'Laren, Ordinary.

## MAGISTRATES OF GLASGOW (AS WATER COMMISSIONERS) *v.* FARIE.

*Property—Reservation of Minerals in Disposition to Public Body acquiring Land under Statutory Powers—Minerals—Seam of Clay—Waterworks Clauses Act* 1847 (10 *and* 11 *Vict. c.* 17), *sec.* 22, *et seq.*

*Held* (Lord Mure *diss.*) that a seam of clay of merchantable quality was a "mineral" within the meaning of the Waterworks Clauses Act 1847.

Water Commissioners acquired from the proprietor of lands a part thereof for the purpose of their undertaking, "reserving" to the proprietor "the whole coal and other minerals in said lands," in terms of the Waterworks Act 1847. They formed reservoirs and other works on the ground. *Held* (Lord Mure *diss.*) that the proprietor was entitled, in virtue of the reservation, to work in the ordinary manner a seam of clay in the lands so acquired, whether such working should be injurious to the works of the Commissioners or not, and just as if they had not acquired the surface from him, unless they were willing to make compensation to him for its value in terms of the Waterworks Clauses Act 1847.

In 1871 the Magistrates of Glasgow, as Commissioners under the Glasgow Corporation Waterworks Act 1855, after serving notices for the compulsory taking of lands from Mr Farie, proprietor of Farme and Westthorn, Lanarkshire, and entering into an arbitration with him as to the price, came to an agreement with him as to the price without the necessity of proceeding with the arbitration, and acquired for £11,000, pursuant to their Amendment Act 1866, certain portions of lands amounting in all to 20 acres 3 roods and 29 poles, part of Westthorn. The disposition by Mr Farie contained a clause—"Excepting always and reserving to me and my foresaids the whole coal and other minerals in said lands in terms of the clauses relating to mines in the Waterworks Clauses Act 1847." The Commissioners were duly infeft.

The land was required for reservoirs, and two were constructed, partly by excavation into the clay of which the sub-soil consisted. Other works were also formed, and about 6 acres remained in grass to be used for supplementary reservoirs when required.

Mr Farie of Farme and Westthorn, the defender of this action, was the successor of the disponer of the lands. He began to work the clay in the remaining lands belonging to him for brickmaking. In so doing he worked by "open cast," *i.e.*, by open quarry into the seam, and not by mining, and brought his workings to about 30 feet from the lands acquired by the Water Commissioners. In March 1885, through his law-agents, he intimated to the Commissioners that he had for some time been working a seam of clay in a part of his lands of Westthorn immediately adjoining the ground sold by his predecessor to them, and that in virtue of the reservation before referred to he was desirous of working the seam of clay under the ground so acquired by them, and called upon them to state whether they would avail themselves of their right to prevent his working the said seam by making compensation to him therefor in terms of the Waterworks Clauses Act 1847, 10 and 11 Victoria, chapter 17, particularly section 22 thereof.

The Commissioners maintained that he had no right to work the clay beneath the surface of their lands, or to compensation for refraining from doing so, contending that clay was not within the reservation; that the clay was essential to the purpose for which they had acquired the lands, as the pursuers' predecessor knew. They raised this action to have it declared that they were the "proprietors of the seam of clay lying in or upon the said pieces of ground, and that the said seam of clay is not comprehended or included in the clause of reservation contained in the said disposition of the whole coal and other minerals in said lands in terms of the clauses relating to mines in the Waterworks Clauses Act 1847, nor comprehended under or included in any other words or clause of reservation in the said disposition, but is the absolute property of the pursuers, and it ought and should be found and declared by decree foresaid that the defender is not entitled to work or win the said clay contained within the boundaries of the pieces of ground disponed to the pursuers as aforesaid either by mines or quarries, open cast or otherwise, or by any means whatever; and the defender ought and should be interdicted, prohibited, and discharged accordingly from entering upon or within the said lands acquired from him by the pursuers for the purpose of working or winning the clay therein, and from opening up the surface of the pursuers' said lands and digging quarries thereon, and from making or using any mines, quarries, or other works either above or below the surface of the ground thereof for the purpose of working or winning the said clay."

They pleaded—"(1) The pursuers being proprietors of the lands disponed to them by the foresaid disposition, and the said seam of clay not being within the clause of reservation therein contained, are entitled to decree of declarator and interdict, with expenses as concluded for." They also pleaded in the record, as amended in the Inner House, as mentioned *infra*—"(2) It having been well-known to the defender's author that the undisturbed possession of the clay in the land acquired by the pursuers from him was essential to the purpose for which the purchase was made, and the clay having been included in the subjects sold by him, the defender is not entitled to adopt the proceedings now complained of. (3) *Separatim*, the exercising of the claim made by the defender to work the

clay in the pursuers' lands being incompatible with the safety of the pursuers' works, or with further construction necessary in connection therewith, the pursuers are entitled to decree as concluded for."

The defender stated in his defences as amended—"The clay falls within the reservation in the disposition and statute. The said clay is a mineral in the sense of the Waterworks Clauses Act 1847, and the said disposition. It is used for the manufacture of bricks, and is of very great value. It is estimated that the clay in the lands in question, which the defender would be prevented from working if the pursuers were to obtain the decree and interdict they ask is worth not less than £10,000. The said seam of clay, so far as already wrought in the ground adjoining that in question, has been wrought open cast, but previous tirring of the surface is not necessary. The greatest depth of the workings in the said adjoining ground has been from 20 to 30 feet."

He pleaded—"(4) The defender being proprietor of the said seam of clay, *et separatim*, being entitled to work and win the same (subject to any right the pursuers may have to have the same left unworked on paying compensation therefor) should be assoilzied. (5) *Esto* that the working of the clay in question by the defender would be injurious to the pursuers' property, they are not entitled to prevent the same except on condition of their paying compensation to the defender in terms of the statute."

The sections of the Waterworks Clauses Act 1847 which were important to the question between the parties are fully quoted *infra* in the opinions of the Lord President.

The Lord Ordinary decerned in terms of the second declaratory conclusion (as above quoted), and also in terms of the conclusion for interdict.

"*Opinion.*—The pursuers purchased the subjects condescended on for the purposes of their undertaking. The subjects are, in part at least, not in actual use, but are said to be adjacent to one of the reservoirs of the Commissioners, and to be required for the extension of their works. The conveyance reserves to the seller the property of the coal and other minerals in terms of the Waterworks Clauses Act, an Act which, in the clause referred to, provides for the future compulsory acquisition of the minerals by the undertakers in case the owner of the reserved estate shall signify his intention of working the minerals.

"In the present case the owner is desirous of excavating a bed of clay forming the subsoil of the portion of land referred to, and the question is, whether he can work the bed of clay or compel the Corporation to pay for it? in other words, whether the bed of clay is part of his reserved mineral estate?

"It is agreed on all hands that in the application of such statutory provisions the parties are entirely outside the common law rights and obligations which in the absence of contract regulate the use of the reserved mineral estate.

"The statute has taken away the common law right of support by substituting for it a right of compulsory purchase.

"I am not sure that it is possible to give a universally applicable definition of what is included in a reservation of mines and minerals. For the defender it is contended that the word 'minerals' is to be understood in its widest sense as including everything contained in the substance of the earth, and capable of being worked to profit. I think that this definition is too wide, and that the expression must be interpreted with reference to the ordinary use of language in private agreements, and not in its geological or natural history meaning. A nearer approach to a definition would be, everything that is usually wrought under the denomination of mineral, and capable in the particular case of being profitably worked.

"For example, a grant of minerals, or a reserved right of working minerals in this country, would not in my opinion carry with it the right of digging sand or gravel out of the surface of the ground, and thereby destroying the estate in the surface. But a grant of minerals in California or Australia might reasonably and probably be understood to confer the right of digging and turning over the auriferous sands which are the objects of mining enterprise in these parts of the world.

"In our country the fire-clay which is associated with coal in the coal-measures is commonly wrought along with the coal and ironstone where it is of good quality. I have no doubt that the right of working it would pass under a grant in the terms of the conveyance in question, and this not because it is mineralogically different from ordinary clay, but because it is one of the things ordinarily wrought as a mineral, and is thus within the fair meaning of the term as used in a deed or contract. The right of mining would of course include the right of removing what crops out at the surface. So also a grant of minerals in a private deed has been held to include the valuable china clay of Cornwall, which is produced by the decomposition of the granite rocks, and is peculiar to that district.

"Here, however, the thing which the defender claims to work is the common clay which constitutes the subsoil of the greater part of the land of this country, which never can in any locality be wrought by underground working, but under all circumstances is only to be won by tearing up and destroying the surface over the entire extent of the working. When such a right is claimed against the owner of the surface, I ask myself, Did anyone who wanted to purchase or acquire a clay-field, whether by disposition or reservation, ever bargain for it under the name of a right of working minerals? In the case of a voluntary sale of land with reservation of minerals I am satisfied that we should not permit the seller to work the clay to the destruction or injury of the purchaser's estate, because we should hold that the conversion of the estate into a clay-field was not within the fair meaning of the reservation. That being so, I see no reason for concluding that the statutory reservation of minerals means anything different from a reservation of minerals in a private deed. The consequences of the reservation are different, but the thing to be reserved is to my mind essentially the same, being neither more nor less than the right to work such substances and strata as are ordinarily known by the denomination of minerals in contracts between sellers and purchasers or superiors and feuars.

"I was referred to a reported case, in which Mr Justice Kay held that clay was included in

the term 'minerals' as used in the Railway Clauses Acts. I have the greatest respect for the opinion of that learned Judge, but the decision of a single Judge in a co-ordinate Court does not relieve me from the necessity of acting on my own opinion clearly entertained. I was also referred to the decisions of the Judges of this Court to the effect that in the particular cases freestone wrought for purposes of building and limestone for calcination were minerals within the meaning of the statute. I do not mean to express any doubt as to the soundness of these decisions, because my opinion in this case is rested entirely on the essentially superficial character of the stratum proposed to be wrought, and the known use of the terms 'mining' and 'minerals' in this country—terms which are confined as I think to strata ordinarily wrought by underground workings, and only by removal of the surface in these exceptional cases where the lie of the strata makes this the more economical mode, or it may be the only mode of working them.

"I may add that I have not thought it necessary to investigate this case by a proof, (1) because there is no dispute as to the subject being the ordinary subsoil clay (I assume of a superior quality and workable to profit), and (2) because the question of the meaning of the statute is one as to which proof appears to me to be unnecessary or inadmissible."

The defender reclaimed.

On 29th June 1886 the Court allowed the record to be opened up and amended by the addition of certain statements made by both parties. The pursuers added averments to the effect that before they occupied the lands they had been bored with a view to ascertaining the nature of the subsoil by arrangement with the defender's predecessor, and that it had been found to consist of the ordinary clay of the district most suited to their works, and that the works had been made thereon at great expense, and that it had been understood by them and the defender's predecessor, who well knew the purpose for which they were acquired, that clay was not included in the reservation. They added the second and third pleas as above quoted.

The defender made the averment as to the value of the clay being £10,000 as above quoted, and added the fifth plea for the defence also above quoted.

Argued for the defender—The clay in question was included in the reservation of minerals; clay was a mineral in the sense of the Waterworks Act, and remained to the proprietor of the lands. What the pursuers obtained in return for the £11,000 was a right to use the surface of the land, but not to mine or carry away minerals and clay by open cuttings. What the pursuers proposed to do was to interdict the defender from working the clay under a portion of the land of which the right to use the surface only had been sold. The difference between such a reservation as that in question and a reservation of the same class in an ordinary conveyance lay in this, that the pursuers could not claim the right of support, but only a right to the surface and to prevent the defender from causing wilful damage in working his reserved minerals, while in an ordinary conveyance the right of support was included. As to the clay itself, it had considerable commercial value, and if the pursuers desired to prevent the defender from working it they were bound to pay him compensation.

Authorities—*Great Western Railway Company* v. *Bennet*, 2 Eng. & Ir. App. 27; *Midland Railway Company* v. *Haunchwood Brick and Tile Company* (a bed of clay), L.R., 20 Ch. Div. 552; *Loosemore* v. *Tiverton Railway Company*, L.R., 22 Ch. Div. 25; *Hext* v. *Gill* (china clay), L.R., 7 Ch. App. 699; *Myles* v. *Midland Railway Company*, L.R., 30 Ch. Div. 634; *Dudley Canal Company*, 1 Bar. & Ad. 59; *Midland Railway Company* v. *Checkly*, L.R., 4 Eq. 25.

Replied for pursuers—Ordinary clay such as was used for making bricks was not a mineral, and that was the purpose to which this clay was put. The meaning of the word "mineral" ought not to be so extended in the present case as to destroy the subject acquired, and this would be the effect of holding a clay-bed like the one in dispute to be included in a reservation of minerals. Here the clay was bargained for as the substance of the soil, and in determining what was a mineral the terms of the bargain must be kept in mind. In determining the rights of parties the circumstance that the pursuers' powers to execute the works had expired did not enter into the question. This clay was on the surface, and was surface worked. This being so, the case of *Nisbet Hamilton* v. *North British Railway Company*, January 15, 1886, 13 R. 454, applied, in which case the word "construction" became equivalent to "maintenance." On the authority of this case the pursuers were entitled to as much clay as would "maintain" their works and give them support, and if effect was given to this contention the defenders' proposed works would be interdicted. There was nothing in the Waterworks Statutes which contemplated making clay like this a mineral. What was really reserved were the products of mining.

Authorities—Those cited by the reclaimer, and *The Attorney-General of the Isle of Man* v. *Mylechreest*, L.R., 4 App. Cas. 294; *Jamieson* v. *North British Railway Company*, December 18, 1868, 6 S.L.R. 188; *Nisbet Hamilton* v. *North British Railway Company*, January 15, 1885, 13 R. 454.

At advising—

Lord President—The Commissioners of Waterworks of Glasgow have raised this action of declarator for the purpose of obtaining a judgment that Mr Farie, the defender, being the proprietor of the lands of which they took a portion for the purposes of their works, is not entitled to a seam of clay which lies within a portion of the lands that they took for the purposes of their works, and the conclusion is that that seam of clay "is not comprehended or included in the clause of reservation contained in the disposition of the whole coal and other minerals in said lands in terms of the clauses relating to mines in the Waterworks Clauses Act, nor comprehended under or included in any other words or clause of reservation in the said disposition, but is the absolute property of the pursuers." And further, they ask to have it found and declared "that the defender is not entitled to work or win the said clay contained within the boundaries of the pieces of ground disponed to the pursuers as aforesaid, either by mines or quarries, open cast or otherwise, or by any means whatever." The remaining conclusions of the summons are ancillary to the conclusions of declarator.

Now, the circumstances of the case are very simple—the land was taken by the pursuers, the Water Commissioners, by notice under the Lands Clauses Act, and the matter of compensation was referred to arbitration, but the parties settled the compensation without going to the arbiters. Upon that a disposition was granted by Mr Farie to the Water Commissioners conveying to them the piece of land which they had given the requisite notice to take, and containing this reservation—"Excepting always and reserving to me and my foresaids the whole coal and other minerals in terms of the clauses relating to mines in the Waterworks Clauses Act 1847."

It is therefore necessary to resort to these clauses of the Waterworks Act, because upon the construction of these the whole question between the parties turns. The Waterworks Clauses Act 1847 is the one that contains these clauses, and the first clause with which we have to deal here is the 18th. The 18th section provides that "the undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them except only such part thereof as shall be necessary to be dug or carried away or used in the construction of the waterworks, 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." Then the 22d section provides—Except where otherwise provided for by agreement between the undertakers and other parties, if the owner, lessee, or occupier of any mines or minerals lying under the reservoirs or buildings belonging to the undertakers, or under any of their pipes or works which shall be underground . . . or within the prescribed distance, if any, and if no distance be prescribed, within 40 yards therefrom, be desirous of working the same, such owner . . . shall give the undertakers notice in writing of his intention so to do thirty days before the commencement of working, and upon receipt of such notice it shall be lawful for the undertakers to cause such mines to be inspected by any person appointed by them for the purpose, and if it appear to the undertakers that the working of such mines or minerals is likely to damage the said works, and if they be willing to make compensation for such mines to such owner, lessee, or occupier thereof, then he shall not work the same; and if the undertakers and such owners do not agree as to the amount of such compensation the same shall be settled as in other cases of disputed compensation." The 23d section is the only other one which it is necessary specially to refer to. It provides—"If before the expiration of such thirty days the undertakers do not state their willingness to treat with such owner, lessee, or occupier for the payment of such compensation, it shall be lawful for him to work the said mines, and to drain the same by means of engines or otherwise, as if this Act and the special Act had not been passed, so that no wilful damage be done to the said work, and so that the said mines be not worked in an unusual manner." . . .

Now, I confess I do not see much difficulty in construing those clauses and applying them to the present case. It seems to me that everything that can be called a mineral is reserved in this statutory transfer of the ground from the original owners to the undertakers. It is absolutely reserved, and so completely is it reserved that the owner's right to work these minerals comes into operation even to the effect of displacing altogether the works which have been constructed by the undertakers, unless the undertakers intervene in terms of the 22d and 23d sections, and intimate that they desire to have a portion of the minerals under the undertaking, or adjacent to the undertaking, left unworked, and offer compensation therefor. The only restrictions upon the owner's right introduced by the 23d section are, in the first place, that in taking out his minerals, if the undertakers do not choose to buy them, he shall not do any wilful damage—that is to say, no damage not necessary for the legitimate working out of his minerals, and that he shall not work the minerals in an unusual manner, but with these two exceptions his right to work is absolute unless the undertakers choose to buy the minerals from him. The mode of working will of course depend entirely upon the nature and situation of the minerals in question. Some minerals are worked only by deep mining, other minerals can be worked only from the surface, and in the latter case it is quite plain that if the minerals lie under the rails the effect of working by open cast, which in many cases is the only possible way of working, will be to destroy the rails altogether, or, in the case of water-works, to destroy the reservoirs under which the minerals lie. This is, I think, the fair and true construction of these clauses upon the face of them. But there is a very authoritative judgment of the House of Lords upon the subject, which puts the construction of such clauses beyond all doubt, the case of the *Great-Western Railway* v. *Bennet*. No doubt that was the case of a railway, but the clauses regarding mines in the Railways Clauses Act, and the clauses in the Waterworks Act are in substance and in effect precisely the same; there really is no substantial distinction at all between the one and the other. Now, in that case of the *Great-Western Railway* there was a judgment given by three very eminent lawyers—Lord Chancellor Chelmsford, Lord Cranworth, and Lord Westbury—and it is only necessary to read a single sentence from each of them in order to show what their view of the construction of such clauses was. The Lord Chancellor said—"This section (meaning the 78th) appears to me to leave the mine-owner to work his mines exactly as he would if the surface belonged to him, unless the railway company chooses to prevent him by expressing willingness to make him compensation. If the company should not within thirty days state their willingness to treat with the mine-owner for the payment of compensation, he is by the 79th section left at liberty to work the mines, so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district." Lord Cranworth said—"Independently of the statute, I think the contention of the company would have been unanswerable. I should be certainly sorry if this case should at all bring into doubt the doctrine which was enunciated and acted upon by this House in the case of the *Caledonian Railway Company* v. *Sprot*, which doctrine is this, that if I sell my lands for the purpose of a railway being made upon it, I

impliedly sell all necessary support both subjacent and adjacent that is required for the purpose of supporting that railway. In the case of *The Caledonian Railway* v. *Sprot* the conclusion at which this House arrived was that although the sale of the land was one which might have been compelled, probably, under the statutes then in force (not the present statute, because it was before the passing of the statute now in force), yet in truth it was a mere contract between Mr Sprot and the company, and must be dealt with just as if no statute existed. But the difficulties which had arisen upon this subject were, I presume, what gave rise to these provisions of the Railways Clauses Acts which are now under discussion. It was obviously the intention of the Legislature in making these provisions to create a new code as to the relation between mine-owners and railway companies when lands were compulsorily taken for the purpose of making a railway. The object of the statute evidently was to get rid of all the ordinary law on the subject, and to compel the owner to sell the surface, and if any mines were so near the surface, that they must be taken for the purposes of the railway, to compel him to sell them, but not to compel him to sell anything more. The land was to be dealt with just as if there were no mines to be considered, nothing but the surface. That being so, justice obviously requires that when the mine-owner thinks it beneficial to him to work his mines, and proceeds to do so, he should be just in the same position as if he had never sold any part of the surface at all." And Lord Westbury's opinion is expressed in substantially the same terms.

Now, the effect of that appears to be to put the construction of these clauses, both in the Railways Clauses Act and in the Waterworks Clauses Act, beyond all doubt—the mine-owner is go on when he finds it convenient to work out the mine adjacent to or subjacent to the waterworks or the railway just as if he had not sold even the surface to the undertakers. In that case, if the mines can be reached only by open-cast workings, then it will be in the power of the mine-owner to put down his workings and make his open cast even on the very bed of the waterworks' reservoir, or the line of the railway, as the case may be. That looks at first sight a very hard position in which to place the railway company or the undertakers, but in truth there is no hardship about it at all; on the contrary, the arrangement of these clauses is very beneficial to the undertakers of such enterprises. It does not put them under the necessity of buying, in the first instance, anything more than the mere right to use the surface, or to dig down so far as is necessary to reach what is called the formation level of the railway, or to the bottom of the reservoir in the case of such a subject as we have here. They are not required, in the first instance, to pay for any support either subjacent or adjacent, and therefore they escape from paying a great deal more money than they would otherwise have to pay if they required to get such support. It is only when the progress of the mining operations makes it necessary for the mine-owner to approach the railway and to invade the ground which he has sold to the company or to the undertakers for the purpose of working his minerals, that it then becomes necessary, if it be necessary, for the safety of the concern that the undertakers come forward and pay for so much of the minerals as is necessary to give them the requisite support.

Now, the case of *The Great Western Railway Company* v. *Bennet* was the case of a coal mine, but the coal mine was wrought in such a way that the surface could not be preserved, and the only question that remains in the present case is, I think, whether the clay which the defender is proposing to work is a mineral within the sense of these clauses of the Waterworks Act. And upon that subject I confess I entertain no doubts. The minerals contemplated in the clauses to which I have been referring, whether in the one statute or the other, are certainly not confined—the term "mineral" is not confined—to any one species of substances which constitute the crust of the earth. There is no doubt that it embraces freestone—that was decided by Lord Kinloch—and it includes also limestone, as was decided by Lord Adam in the case of *Dixon* v. *The Caledonian Railway Company* [*infra cit.*]; and in like manner in the case of *The Midland Railway Company* [*sup. cit.*] it was decided that it also comprehended clay, which is the subject we are here dealing with. In short, it appears to me that the term "minerals" in these clauses must comprehend everything under the surface, however deep or however shallow may be its situation, that can be profitably worked and taken away, or, in other words, everything that is of commercial value. The case of *Dixon* v. *The Caledonian Railway Company*, November 13, 1879, 7 R. 216, is one, I think, of considerable importance, because although the point was not carried to the Inner House it was very clearly and distinctly raised. I see it stated in the report that there had been negotiations between the parties with regard to the working of the limestone which was to be worked, and could only be worked, from the surface. There was a negotiation which ended in this, that the limestone should be worked out up to within 10 feet of the centre of the line of rails. This agreement was acted upon, and in June 1878 the mineral tenants had reached this limit. The railway company, in order to try the question as to whether the mineral tenants were entitled to work out the rest of the limestone by open-cast workings, raised a suspension and interdict in the Court of Session on 21st June 1878. This process remained in dependence until February 1879, when the point was decided against the company. Lord Adam in his note to that case gives this account of these previous proceedings. He says—"In the month of June 1878 the respondents' workings had been carried within 10 feet of the centre of the railway. Thereupon the complainers on 21st June 1878 presented a note of suspension and interdict, in which they sought to have the respondents interdicted from quarrying or working the limestone lying under the railway by means of open-cast working or otherwise, so as to destroy the railway. They did not dispute the respondents' right to work otherwise than by open-cast workings. On 16th July 1878 the Lord Ordinary on the Bills passed the note, and interdicted the respondents from quarrying. This interlocutor was adhered to by the Second Division of the Court on 26th October 1878." But then that was merely a judgment passing the note for the purpose of trying the question

and keeping matters in the meantime by granting an interim interdict. But "the case came thereafter to depend in the Court of Session, and was finally disposed of by an interlocutor of the Lord Ordinary, of date 11th February 1879, deciding the case against the complainers and refusing the interdict." Now, as Lord Adam, the Lord Ordinary in this case of *Dixon*, was Lord Ordinary in that previous case, we may, I think, take his account of it as being perfectly authentic, and there is a judgment by him which appears to me to apply directly to such a case as the present. It is the case of a limestone working which could only be wrought by open cast, and where therefore the subject of the railway company's property required to be absolutely taken possession of and their works destroyed for the purpose of getting out that mineral. And the cases of *Jamieson* and that of *The Midland Railway Company* are decided on exactly the same principle.

Now, the subject in this case is a species of clay, of which there is a very large bed apparently upon Mr Farie's estate, which has been wrought for a very long time, and has been continuously wrought without interruption down to the present time. The working has now reached the neighbourhood of these waterworks, and Mr Farie proposes to work on under the works of the Commissioners unless they choose under the statute to purchase that portion of the clay from him, and the Commissioners say, in the first place, that it is their property, and in the second place, that even if it were not their property he is not entitled to work it. Now, if the construction of the clauses of the Waterworks Act is fixed in the way I have explained, and if this clay is protected as a mineral, I do not see very well how either of these two propositions can possibly be maintained. I may mention that in the case of *Nisbet Hamilton*, Jan. 15, 1885, 13 R. 454, the judgment of the Court contains a passage which has a pretty distinct bearing upon this question also. The judgment of the Court in that case was delivered by Lord Adam. We all concurred in it. He makes use of this expression—he says, "The word minerals as there used"—that is to say, in the Railways Clauses Act—"is necessarily subject to construction. Common earth and sand are minerals, but nobody would contend that they are intended to fall within the description of minerals in the 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. *North British Railway Company*, but where the stone is of such a quality or description as to be of no merchantable value, I think it does not." Now, I think that is just the distinction upon which we must proceed here. The question is, whether this is of merchantable value. The parties differ upon record very much as to what this clay is worth, but it is not disputed upon the part of the pursuers that it is of merchantable value. Mr Farie says that the clay which he would be prevented from winning if the contention of the pursuers was maintained is worth £10,000, but supposing that to be an entire exaggeration, it is at all events quite certain, because it is not disputed, that it is of merchantable value. Money can be made of it in the market, and therefore in my humble opinion, upon the authority of the various cases I have referred to, this is certainly a mineral within the meaning of the clauses of the Waterworks Act. I am therefore for assoilzieing the defender.

Lord Mure—I have found the question here raised, as to whether the bed of clay in dispute is part of the defender's reserved mineral estate, to be attended with a good deal of difficulty; but after considering it in all its bearings I have not been able to see my way to any other conclusion than that at which the Lord Ordinary has arrived.

The main leading facts on which the question depends are as follows:—The twenty acres of ground on which the pursuers' reservoirs and works are formed were acquired by them from the predecessor of the defender in 1871 under a disposition in which there is reserved to the defender "the whole coal and other minerals in the lands, in terms of the clauses relating to mines in the Waterworks Clauses Act 1847." The subsoil of the ground so acquired consisted mainly of a bed of ordinary clay, beginning at about two feet below the surface and extending to a considerable depth.

It appears from the statements in the record as now amended that the pursuers and the late Mr Farie were both aware of the existence of this bed of clay; and it further appears that before the transaction was concluded the pursuers, who considered such a subsoil very suitable for the construction of their reservoirs, obtained permission from Mr Farie to make borings on the ground for the purpose of ascertaining the nature of the strata underneath. This they accordingly did, when they ascertained that the depth of the clay at the place where they proposed to construct their reservoirs was about six fathoms; and they were informed at a meeting which took place between Mr Farie and their engineer that the seam of coal lying nearest the surface had all been worked out, but that the lower seams of coal remained unwrought. It is further stated that when this permission was granted Mr Farie stipulated that the rock underneath the clay should not be pierced, in order to prevent the risk of any surface water getting down to the coal workings below. These allegations are denied by the defender, but I understood that the pursuers were ready to instruct them.

Having thus ascertained the general character of the ground, and that it was suitable for the purposes of the reservoir and works which they had in view, the pursuers took the necessary steps for concluding a purchase, and obtained a conveyance of the ground from Mr Farie for the sum of £11,000—being at the rate of between £500 and £600 an acre. Matters having been so arranged the pursuers proceeded to construct their works in the manner set out in the third article of the amended record; and it is pretty plain, from the description there given of the way in which the reservoirs were constructed, that the body of water was made to rest upon the clay formation which had been dug into and used as the most suitable *solum* for the reservoir.

So standing the facts as to the acquisition of the ground, the construction of the reservoirs, and the object for which they were constructed, intimation was given to the pursuers on the part of the defender in the year 1885, that he was desirous of working out the bed of clay under the ground acquired by the pursuers, and requiring

them to state whether they would avail themselves of their right to prevent him from working out the clay by making compensation in terms of the statute. This the pursuers have declined, as a thing which they are not, in their view, bound in law to do; and the practical result appears to be this, that unless the pursuers are prepared to pay to the defender £10,000, or such other sum as the value of the clay underneath the twenty acres may amount to, the defender proposes to proceed to carry his clay workings into the pursuers' lands, and so to endanger, if not to destroy, the whole of the pursuers' reservoirs and works.

It is not denied that the clay in question can only be worked by open cast; so that it is plain that, if the defender's clay workings are carried on in the way they have hitherto been, and which it is intended to continue, the removal of the clay to the extent of from twenty to thirty feet below the land purchased will involve the destruction of the pursuers' reservoirs and works, and even the agricultural value of the ground. And the question raised for consideration under this reclaiming-note is, whether that is a proceeding which the defender is in law entitled to have recourse to?

I am humbly of opinion that he was not, because I do not think that the terms of the clause of reservation are sufficient in the circumstances of this case to include seams of clay of the nature here in question. Dealing with the case as one falling to be disposed of by the rules of common law, and without reference to the provisions of the Waterworks Clauses Act, to which I will immediately advert, I hold it to be settled by the decisions to which we have been referred, that a mere general reservation of "mines and minerals" in a disposition does not necessarily include substances such as stone, clay, or sand, although these substances may, in a geological and scientific sense, sometimes be described as minerals. Such a reservation must, I apprehend, be held to be restricted to those substances which in common parlance are understood to be "minerals," viz., substances usually got by mining, as distinguished from quarrying or open working. If the intention be to reserve every kind of substance that can be said to come, in any view, under the description of a mineral, the granter of the disposition ought I conceive to make those substances matter of special reservation. That I think is the fair import of the decisions I have mentioned.

The first is that of *Menzies* v. *Breadalbane*, reported in the Faculty Collections, June 10, 1818, and in the House of Lords, July 17, 1822, 1 Sh. App. 225. The clause of reservation in that case was very comprehensive, and bore that "the haill mines and minerals which may be found within the bounds of the said lands, of whatever nature and quality, with the liberty of digging, winning, and away leading the same," were excepted. But it was held that these words did not include what was described as "a vein of stone of a rare species, peculiarly fitted for architectural purposes." The report shows that the case was very deliberately and anxiously considered, and the usual arguments for maintaining that such a stone was a mineral appear to have been used, and, in particular, the argument that "all substances under the soil from which rent and profit may be derived fall under the legal description of minerals." That argument was however rejected, and the Court, altering the judgment of the Lord Ordinary, held—one Judge dissenting—that the stone was not such a substance as fell within the reservation. The report further bears that on a reclaiming petition against that judgment four of the Judges thought the interlocutor right, while the remaining Judge still doubted, and the interlocutor altering that of the Lord Ordinary was adhered to.

On appeal this last interlocutor was affirmed, and the Lord Chancellor (Eldon), on giving judgment, and after shortly explaining the difference as to the principles that are to be applied to the construction of a feu and a lease in such a matter, thus expresses himself—"On the other hand, in the case of a feu everything is given that is not specially reserved. It does appear to me to be the better opinion that mines and minerals in this feu did not mean stone quarries, and that the opinion of the majority of the Judges is therefore right."

In the other case, viz., that of the *Duke of Hamilton* v. *Bentley*, June 29, 1841 (3 D. p. 1121), the same question was raised, and the same decision pronounced, relative to a clause which reserved to the Duke "the liberty of working coal and other fossils and minerals," and under which it was held, on the authority of the case of *Menzies*, that freestone was not comprehended in the reservation.

It appears to me that pretty much the same arguments were maintained on the respective sides as those used in the case of *Menzies*, and it was in addition contended, on the part of the Duke, that the case was distinguishable from that of *Menzies*, inasmuch that there could be no doubt that freestone was a "fossil," which was a word not used in the reservation in the case of *Menzies*. It was, however, on the other hand, contended, on the part of the defender, that a reservation of "fossils, mines, and minerals in a Scotch deed of conveyance did not comprehend freestone quarries, the term 'mineral' in particular being one to be used in a popular, and not in a strictly scientific sense." It was further contended that where it was intended to reserve freestone quarries it was the practice to reserve this expressly, and the reference given to the juridical styles of the period showed that to be the case.

On considering these arguments the Lord Ordinary gave effect to those of the defender, and the Court, on the case coming before them on a reclaiming-note, unanimously adhered, and as the opinions of the Judges seem to me to be very important I must ask your Lordships' attention to them somewhat in detail. The Lord-Justice-Clerk Boyle says—"Though I doubted in the case of *Menzies* v. *Lord Breadalbane* my opinion was overruled, and that case was affirmed in the House of Lords, and it seems to me to establish a principle affirmative of the Lord Ordinary's interlocutor. I think that under a fair construction of the clause of reservation the defender is entitled to work a freestone quarry, and that a principle was meant to be established in *Lord Breadalbane's* case, which decides this case." Lord Meadowbank was "of the same opinion. Whether right or wrong, the House of Lords having given a certain meaning to the exceptions in

question, you are bound to adopt the same meaning. But if you go to common parlance, I do not think that freestone quarries are to be comprehended under mines and minerals." Lord Medwyn agreed, and said—"I consider this a stronger case than the one referred to. If you were to ask anyone whether a common freestone quarry comes under a reservation of mines and minerals they would answer that it did not." And Lord Moncreiff added—"I am of the same opinion. I do not see that it is possible to distinguish the case of *Lord Breadalbane* from the present."

The decisions in these two cases appear to me to settle in the most authoritative manner that by the law of Scotland, as adjudicated in the Court of last resort, a reservation of "mines and minerals" in a disposition of property does not comprehend a reservation of freestone, or of a right to work freestone within that property. That being so, the question at once arises, whether if the proposal here made had been to work a quarry of freestone instead of a bed of clay under the land in question in respect of this general reservation of "minerals," I could consistently with the law laid down in these cases give effect to that proposal. I am of opinion that I could not, and that I should in respect of those decisions have been bound to reject it.

And if I am right in this, the next question which arises is, whether on principle any different rule can be laid down and applied in the case of clay. I am of opinion that it cannot. In a popular sense, or to use the expression of Lord Meadowbank and Lord Medwyn in the case of the *Duke of Hamilton*, in "common parlance," I do not think that common clay is ever classed under the words "mines and minerals" any more than common or uncommon freestone, as the freestone in the case of *Menzies* is said to have been, and if in selling a property the seller intends to reserve a right to prevent the purchaser from making use of portions of that property, which both the clay and the freestone are, and which are not generally understood to be minerals, he is, I think, bound to make this a matter of express and special reservation.

In the opinion which I have just read of Lord Justice-Clerk Boyle in the case of the *Duke of Hamilton*, he speaks of the principle laid down in the case of *Menzies*, which he considered himself bound to adopt and give effect to. Now, as I read the case of *Menzies*, as decided in the House of Lords, the main principle given effect to there is that of requiring a clause of "special reservation" of the particular substance intended to be reserved wherever that substance is not generally and popularly understood to be a mineral. Lord Eldon's words are, "In a feu everything is given which is not specially reserved;" and he adds—"It does appear to me that mines and minerals do not include stone quarries." In the present case, however, there was an omission on the part of the defender's predecessor to give effect to this broad principle of "special reservation." Instead of doing so he has used the general words the "whole coal and other minerals," and in respect of this omission the defender is, I think, now precluded from insisting on the claim he is making to work out the clay under the pursuers' property. I think that clay was disponed to the pursuers absolutely, and that no reservation of it was made to the defender.

Such being the conclusion I have come to in dealing with the case as one of Scotch conveyancing, I do not consider it necessary to go into any detailed examination of the English decisions mainly relied on by the defender.

Your Lordship has referred to the opinion of Lord Kinloch in the case of *Jameson* v. *North British Railway Company*. I have great respect for any opinion of Lord Kinloch, but I consider myself bound by the higher authority of the cases to which I have referred, and which have remained unchallenged since 1841. I am quite unable to look upon the opinion of a Judge sitting as Lord Ordinary in the Outer House as sufficient to supersede deliberate decisions of this Court and of the House of Lords, which do not seem to have been brought under his consideration. The same observation applies to the opinion of Lord Adam in the case of *Dixon* v. *Caledonian Railway Company*. It is said that I concurred in the result of the judgment of this Division in the case of *Nisbet Hamilton*. But I am not aware that by doing so I am to be held responsible for all the observations which may have been made argumentatively in delivering judgment in that case. In my view of the case it was not necessary to decide whether freestone was a mineral or not, and as I read the case the point was not actually decided. It appears to me, therefore, notwithstanding these recent decisions, that upon the authority of the cases of *Menzies* and of *Hamilton* a reservation of "mines and minerals" in a disposition of heritable property in Scotland cannot, on sound construction, be held to apply either to freestone or to clay, and that the defender has no right to take up the position he has here done.

But your Lordship has, as I understand, indicated an opinion that the words of the Railway and Waterworks Clauses Acts must be interpreted as extending the common law rules, and as meaning mines and minerals of every description, and under any scientific denomination. I am obliged to differ from your Lordship in that respect. For as I read the words of reservation in those Acts, which are "coal, ironstone, slate, or other minerals," they are in no respect more comprehensive than the words "mines and minerals." They are not so comprehensive as those used in the case of *Menzies*, and I am not aware that it has ever as yet been decided that a wider construction must be given to such words when used in a disposition of property under either of those Acts than when they are used in a disposition of property at common law.

There are no doubt most material provisions in the Waterworks Clauses Act, following the Railways Clauses Act, as to the way in which, under a reservation of mines and minerals, the minerals are to be worked. That is where these Acts alter the common law, but they do not, as I apprehend, alter the common law in any other respect, and I am unable to find any expressions in the opinions of the Judges in the case of *Bennet* (2 Eng. & Ir. App.) which are calculated to show that they held the reservation under the Railways Clauses Act to include minerals which were not covered by a reservation of "mines and minerals" at common law. I am myself very clearly of opinion that it does not, and I cannot assume, in the absence of any express provision

to that effect, that it was the intention of the Legislature in providing for the mode in which minerals were to be worked under or near a railway, to alter the common law rules as to what a reservation of minerals was intended to cover, and so to supersede decisions that had been deliberately pronounced as to what substances a reservation of "mines and minerals" could be held to include. The judgment in the case of *Bennet* was pronounced to regulate the mode of working of coal under the Railways Clauses Act. There was no question there raised as to what was covered by the word "mineral." The only question was as to how the coal was to be worked, and I think the observation of the Lord Ordinary in this respect is quite correct when he says that the "statute has taken away or displaced the common law right of support by substituting for it a right of compulsory purchase." In all other respects it appears to me that the statute has left the common law as to mines and minerals where it was.

Reference has been made to the case of *Hext* v. *Gill* (7 L.R., Ch. App. 699), where a peculiar kind of clay, called china clay, was held to be a mineral. But that was done after an investigation into the character of the substance there in question, and after a careful investigation the Court came to the conclusion that that particular kind of clay was a mineral. But while they came to be of opinion that it was a mineral, they took very good care to prevent the owner of the reserved right from doing any injury to the property in which it was found, and they granted an injunction against working the mineral, because it could not be worked without destroying the substance of the property from which they proposed to take it. So that practically the decision was in favour of the owner of the ground. In examining that decision it appears to me to have been pronounced mainly in respect of the previous case of *Bell* v. *Wilson* (1 L.R. 303), where the Lord Justices, altering Vice-Chancellor Kindersley, held freestone to be a mineral. In giving judgment in the case of *Hext* Lord Justice Mellish refers to *Bell* v. *Wilson* as a leading authority on the subject, and seems to have considered himself bound by that decision, and applying the rule there laid down as to freestone to the case of china clay, held upon the evidence that the clay was a mineral. It is clear, therefore, that in deciding the case of *Hext* the Lord Justices started with quite a different rule from that laid down in the judgment of the House of Lords in the case of *Menzies*, and of this Court in the case of the *Duke of Hamilton*. I am of opinion therefore that a decision such as that of *Hext*, proceeding as it does upon the decision of *Bell* v. *Wilson*, which is directly at variance with what I conceive to be the rules of the law of Scotland in such matters, cannot be regarded as an authority in Scotland in dealing with a question of this description.

In the case of *Hext* Lord Justice James, in concurring with the judgment, though not I think very cordially, says—"But for these authorities," *i.e.*, *Bell* v. *Wilson* and others, "I should have thought that what was meant by 'mines and minerals' in such a grant was a question of fact, what these words meant in the vernacular of the mining world and commercial world and landowners at the end of the last century, upon which I am satisfied that no one at that time would have thought of classing clay of any kind as a mineral." In these observations I entirely concur, but I think that his Lordship should not have stopped at the end of the last century, for I believe the impression to which he has referred prevailed to a much later date, and that if even at the present time the question were put to any of the same class of persons, whether clay was considered to be a mineral, the answer of the great majority would be that it was not. But even if I am wrong in that, it ought, I think, to have been proved that the clay here in question was a mineral. In the English cases to which we have been referred there was inquiry, and particular ingredients appear to have been found in the clay which led to its being held to be a mineral. Here, however, there has been no such inquiry; the substance in question is just ordinary clay, and there is no evidence to show that ordinary clay is a mineral.

In the case of the *Duke of Hamilton* Lord Moncreiff refers in his opinion to various authorities as to the meaning of the word "fossil." That suggested to me to look into the usual sources of information as to the meaning of the word "clay," and I thought I could not do better than endeavour to ascertain what Dr Johnson said in his Dictionary as to the ordinary understanding of mankind as to the meaning of the word. In the larger edition of his Dictionary I find clay divided under three heads, and defined (1) "unctuous and tenacious earth, such as will mould into a certain form; (2) earth in general; (3) dirt or moistened earth;" and in the smaller edition it is defined as a "common sort of earth." In the Imperial Dictionary the definition is "a species of earth which is firmly coherent and compact." So that these compilers describe clay as being earth or a species of earth, and if clay is in these circumstances to be dealt with as a mineral, in the sense in which the words "mines and minerals" are used in a reservation in a deed of conveyance, it appears to me that sand, gravel, and even some kinds of subsoil, must also be held to be reserved. That is a very startling result for all railway and water companies, and for all owners of property in the disposition of which mines and minerals are reserved. For it will necessarily expose them to the risk of being obliged to give up considerable parts of their property, or to pay large sums in compensation, wherever the holder of the reserved right can show that he can make a profit by working and disposing of substances which have in my opinion never before been held in Scotland to be covered by such a reservation.

This is a risk against which such proprietors are, I think, entitled to be protected upon the authority of the two leading decisions I have referred to, and I am therefore for adhering to the interlocutor of the Lord Ordinary.

Lord Shand—I concur not only in the judgment which your Lordship proposes should be given in this case, but also in the reason contained in your Lordship's opinion.

The property with which we have to deal in this case consisted, as it was conveyed to the Lord Provost, Magistrates, and Town Council of Glasgow, as Commissioners under the Glasgow Corporation Waterworks Act, of an area of about 21 acres, and it appears from the statements of

the parties—indeed from the statement of the Water Commissioners themselves—that of these 21 acres they have occupied for the purposes of their statute about 15 acres, so that there remains six acres of this property so conveyed unoccupied by works of any kind, while the powers of the company to make any extension of their works under their statutes have expired, And as we are told by the pursuers in article 3 of the condescendence, the northern portion—that is, the six acres which are referred to in the same article, which have not been used—not being at present required for the pursuers' works is let by them for grazing purposes. The parties are agreed that the ground does contain clay—the defender alleges clay of a valuable character, for his statement is that it is estimated, upon his view of the case, that the clay in the lands in question, which the defender would be prevented from working if the pursuers were to obtain the decree they ask is worth not less than £10,000. That is not admitted by the pursuers of the action, but the argument was taken on the concession, which could not be withheld, that this clay was of commercial value—a circumstance which is put beyond question by the fact that Mr Farie, the defender, has been working the very same seam, and is working it now to profit on the lands immediately adjoining, the workings being in such a position that they are now approaching close to the line of the property held by the Commissioners.

Now, that being the state of the property and the character of the substance contained in it, the conclusion of this action is for declarator that the Water Commissioners are proprietors of the whole of the land, and for a declarator further that the defender is not entitled to work or win any part of the clay which it contains, and for an interdict in these broad terms. I am clearly of opinion with your Lordship that no such declarator or interdict can be granted. If, as following upon the result of this decision, the defender should in the course of working the clay—taking out the substance in question—infringe any particular right which the pursuers may have, by his mode of working, or by the way in which an approach is made, and should thus exceed the rights reserved, a right to interdict will still remain with the Waterworks Commissioners, but that must be maintained in a different action from this, not in an action for interdict against the defender working any part of the clay, but where a special question is raised, founded upon particular circumstances which it could be shown would be a violation of any rights which the pursuers may have.

That being so, the question raised by the action is, whether this clay throughout the great extent of ground is the property of the Magistrates, and has been conveyed to them by the conveyance quoted in the summons? The conveyance expressly bears to be granted with this exception:—"Excepting always and reserving to me and my foresaids the whole coal and other minerals in said lands, in terms of the clauses relating to mines in the Waterworks Clauses Act 1847." Now, the argument presented on the reclaiming-note (and I rather fancy for the first time), and which has moved, if I am not mistaken, my brother Lord Mure to differ from the opinion which your Lordship has expressed was rested upon certain old cases which occurred in this country having reference to the interpretation of private grants, as between superior and vassal, of property containing a reservation of mines and minerals. Upon these cases I have simply to say that I hold that they are entirely away from any question as to the meaning of the terms "mines and minerals" contained in a conveyance to a railway company under the Railway Clauses Act, or to a water company under the Waterworks Clauses Act. It appears to me that an entirely different question will arise as to the interpretation of the terms "mines and minerals" in an ordinary conveyance (not to a public company under the Clauses Acts), or in a lease, it may be, by a landlord, and that other considerations, which do not arise in such a question as we have here, must enter into the decision of cases which arise upon such conveyances or leases. There is certainly at the outset this broad distinction between the two classes, settled by the authorities, that in the ordinary case, notwithstanding the reservation of mines and minerals, there is an obligation of support, and nothing is more clearly settled than this, that there is no such obligation in the case of a conveyance to a railway company, or to a water company under the statutes. The circumstance that the reservation is given in the terms of the statutes, and in reference to the provisions therein contained, has been distinctly held to result in this—that there is no such right of support given, but that, on the contrary, if the right of a support is desired in a case in which minerals are in the ground, that must be bought and paid for in a subsequent transaction. There, to begin with, there is a vital difference between all such cases of private transaction and the case of a conveyance under these statutes. But this matter is put beyond all question, as it humbly appears to me, by what their Lordships in the House of Lords have laid down in the leading case of *Bennett*, which has ruled a great many cases since its date. It that case, as your Lordship has already pointed out, there had been an argument founded upon the House of Lords' decision previously given in the case of *The Caledonian Railway Company* v. *Sprott*, and Lord Cranworth takes care to say—"Independently of the statute I think the contention of the company would have been," &c.—[*His Lordship read the passage quoted supra by the Lord President*]; and he goes on to say—"The difficulties which have arisen upon this subject were, I presume, what gave rise to these provisions of the Railway Clauses Act which are now under discussion." So that the statute was intended for the very purpose of obviating any questions which could have been raised upon such decisions as were founded upon in the argument for the pursuers upon this branch of the case. "It was obviously," his Lordship adds, "the intention of the Legislature," &c.—[*His Lordship read the passage quoted supra by the Lord President*]; and the opening passage of Lord Chelmsford's opinion is worthy of notice, where he says—"The question depends entirely upon the clauses contained in the Railway Clauses Consolidation Act 1845, under the heading 'with respect to mines lying under or over the railway,' beginning with section 77. This will at once render inapplicable the two cases of *The Caledonian Railway* v. *Sprot*, 2 Macq. 449, and *Elliot* v. *North-Eastern Railway*

*Company*, 10 H. of L. Cas. 333, decided in this House, neither of which decisions turned on the sections in question." But it appears to me that there is a further argument upon this branch of the case to be derived from the decision in the case of *Nisbet Hamilton* v. *The North British Railway Company*. It was pleaded before us that a reservation of mines and minerals such as we have here—a reservation in these terms—did not include freestone, but that the freestone had been conveyed to the company, and the question between the parties was whether it did so. Miss Nisbet Hamilton in raising that action contended that the stone which formed part of the embankment of the line was reserved. The company on the other hand raised the opposite argument. And what was the view which was there stated by the Court in the opinion as delivered by Lord Adam? It was in these words—"The word 'minerals,' that is, the word 'minerals' as used in the Railway Clauses Act, is necessarily subject to construction. Stone may or may not fall within it according to its value. Where it is valuable it certainly does, as was decided in the case of *Jamieson* v. *The North British Railway Company;* but where the stone is of such a quality and description as to be of no merchantable value, I am of opinion it does not." Now, if it could have been successfully contended upon the authority of cases applicable to the common law that freestone did not fall within the exception, there was no occasion for the proof or a great part of the argument which took place in that case. The real argument proceeded upon the assumption that freestone would fall under the reservation; it certainly does, as I humbly think, if it be of a valuable nature, and upon that view the decision of the Court proceeded. That was an unanimous decision, and it appears to me a direct authority by this Division of the Court, that the contention which was maintained in these older cases, that freestone is not within the meaning of the Railways Clauses Act a mineral, cannot succeed.

But I may further notice that the Lord Ordinary in the judgment he has given does not seem to have given any countenance to the argument which was presented on the reclaiming-note, for I observe that with reference to this matter of freestone he does not take the view or indicate the view that "minerals" in the sense in which it is used here is to be confined to metalliferous substances. What his Lordship says is this—"I was referred to the decisions of Judges of this Court to the effect that in the particular cases freestone wrought for the purposes of building, and limestone for calcination, were minerals within the meaning of the statute. I do not mean to express any doubt as to the soundness of these decisions, because my opinion in this case is rested entirely on the essentially superficial character of the stratum proposed to be wrought" (so that his Lordship does concur in thinking that freestone is a mineral within the meaning of the clauses, but adds) "and the known use of the terms 'mining' and 'minerals' in this country, terms which are confined, as I think, to the strata ordinarily wrought by underground workings, and only by removal of the surface in these exceptional cases where the lie of the strata makes this the more economical mode, or it may be the only mode, of working them." The ground of judgment of the Lord Ordinary, therefore, is that, according to his view, the exception includes only substances which are to be removed by mining, and will not cover subjects wrought from the surface. There is no indication of opinion that freestone is not included in the term minerals; on the contrary, his Lordship is of opinion that it is.

Now, having said so much upon the leading argument which was presented on the part of the Commissioners, I shall only add a few words as to the view I take of the law as applicable to this case. It appears to me to be the result of *Bennet's* case with reference to the particular code which the Railway Clauses Act and the Waterworks Clauses Act lay down for the decision of questions of this kind, that where lands contain any substance below the surface which can be got and removed so as to produce profit, that (first) there is given a right to the surface only, including such parts of any mines, or coal, freestone, slate, or other minerals under the surface, as shall be necessary to be dug or carried away or used in the construction of the works; and (second) that there is no right to support given, that is, no right which can prejudice or affect the right of the proprietor granting the conveyance to get and remove any substance underneath the surface which can be got and removed so as to produce profit. It appears to me that the authorities upon that subject in the law are clear, following upon the case of *Bennet*, which no doubt dealt with coal only, but which still is a clear authority for the determination of any question of this kind. We have in this Court the case of *Jamieson*, to which your Lordship referred, and which was approved by the unanimous judgment of the Court in the recent case of *Nisbet Hamilton*, and in addition to that we have the case which your Lordship mentioned, decided by Lord Adam, applying to limestone, and putting that in the same position as a mineral which was excepted from the conveyance. Then again in England we have a stream of cases. One of the leading authorities is the case of *Hext*, which was cited in the argument, in which there is a very clear description by Lord Justice Mellish of what is to be held as comprehended under the term minerals. There is the case of the *Attorney-General* v. *Mylechreest*, L. R., 4 App. Cas. 294, in which four or five Judges of great eminence gave the same extensive meaning to the word "minerals;" and finally there is the valuable and clear judgment by Lord Justice Kay (in which I beg to express my entire concurrence) in which it seems to me he dealt with the very point the Court is now deciding, and decided it in accordance with the opinion your Lordship has expressed. It is quite true, as has been observed, that although the china clay in the ground in the case of *Hext* had been reserved, the proprietor was not held entitled to work the clay, but the reason of that, as stated by the learned Judges, was, that taking the grant as a whole they were of opinion that it was so expressed that the only right of working given to the landowner was here and there to open places by which he could get the materials so as to work underneath and take it away, whereas the right if exercised in the way the proprietor contended for would have removed the substance altogether, and taken away the whole ground, including the whole sur-

face, and the Court while holding that the china clay was embraced in the term "minerals" refused to allow the whole of the subject to be removed as was proposed, because there was a defect in the expression of the title, from which it was clear that the proprietor was not to be entitled to take away the very substance he had sold. In regard to the case of *The Midland Railway Company* v. *The Haunchwood Brick and Tile Company*, it is true that while that was a case in which the clay in question was simply used for making bricks, it appears that the bricks were of more value than usual, because there was a certain strain of iron to be found in the clay. But it is quite clear upon reading the report that the judgment did not rest upon any special view of that kind, but that Mr Justice Kay's judgment would equally apply to the case of any clay which was of commercial value for the purpose of making bricks, such as the clay in question in this case undoubtedly is.

The judgment which your Lordship proposes is, I think, very much supported by the consideration of what occurs when questions of compensation are raised by proprietors who demand compensation from a water company or a railway company taking their land. If the railway, to take that case in the first instance, is to carry its works entirely upon the surface, and it is quite clear that it is a level surface, and there is to be no cutting, what does the company pay for? The railway company takes and pays for the surface and the surface only. There is nothing in the statute entitling them or at least requiring them to take more, for the statute expressly bears that the undertakers shall not be entitled to any mines and minerals, except only such parts as are necessary to be dug, carried away, or used in the construction of the works. If, again, the company have to make excavations or deep cuttings, then what do the company pay for? I take it to be simply for the surface to be occupied by them down to the formation level as was explained by Lord Adam in the case of *Nisbet Hamilton*, and nothing more; and in that case they take, and are entitled to take, away what is used in the construction of the works—what is dug and used in the construction of the works. If companies had at once to take and pay for clay, sand, or gravel, or other minerals to a great depth, claims of compensation would be made on quite a different principle, and the hardship to public companies would be very great. I have only further to add that it is, I think, impossible to read the words of section 18 of the Waterworks Clauses Act, the corresponding section to the Railway Clauses Act, as limited to mines in the sense which the Lord Ordinary seems to adopt, that they must refer only to underground workings—working by shafts and underground mines. The statute reserves the right to two separate things in the expression used. It says [sec. 18] that "the undertakers shall not be entitled to any mines of coal, ironstone, slate," and adds "or other minerals," and the words "or other minerals" in that sense surely must mean something more than metals such as ironstone, or minerals limited to such substances as coal. And that it certainly does mean more is, I think, very clear when you look at what follows. They are not to 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 waterworks." Now, can it be suggested that the company would ever use coal, ironstone, or slate in the construction of their works, or that a railway company in making its railway has to use coal, ironstone, slate, or other minerals? It seems to me very plain that what the Legislature must have had in view is other minerals or substances than coal, ironstone, and slate, because neither of these can be used in the construction of the works; and the very first substance that occurs to one in reference to a clause of this kind as embraced under the word "minerals" which the company would be most likely to use is freestone or other stone, and if stone, then clay and gravel and sand, all of them substances of value which may be dug up and taken away and used by the undertakers in the construction of their works. Accordingly, I hold with your Lordship that the word "minerals" in this case is not to be taken in any narrow sense which would exclude freestone, the very substance of all others which the company might find useful in making embankments and bridges, but must include that, and on the same principle everything which is of value, if we be right in holding that the company really paid for the surface only, and did not pay for support. If it happen that the property does not contain any valuable substance below the surface, the company no doubt will get support, but in that case they do not get support because they have bought and paid for it, but from the circumstance that it is not worth the proprietor's while to proceed to take away what lies under the surface. Accordingly, I entirely concur with the observation made by Mr Justice Kay in the case of the *Midland Railway Company*, that the whole question as to the right of working the substance on the part of the owner who has reserved it depends upon his being able to show that it is of commercial value. If it be not of commercial value, then it would not be a *bona fide* proceeding on his part to give notice that he was to take away the substance lying under the surface—if his purpose was to harass the railway company, and not to use anything valuable to himself, and I cannot doubt that in that case the owner who had reserved his minerals would not be entitled to execute any working which would affect or take away the surface. But if an owner who has reserved his minerals, and has not given any obligation of support, under these statutes desires to remove the freestone, coal, ironstone, sand, clay, or gravel, which may be worked to profit, it appears to me that each of these substances are in the same position—that they are reserved to the owner; and accordingly I concur with your Lordship in holding that we should give judgment to the effect which your Lordship proposes.

Lord Adam—As I was the Lord Ordinary who decided the case of *Dixon* v. *The Caledonian Railway Company* in the Outer House, and as I am chiefly responsible for the opinion of the Court in the case of *Nisbet Hamilton*, my opinion of this case cannot be doubted.

The lands here were disponed under reservation of "the whole coal and other minerals in the said lands in terms of the clauses relating to mines

in the Waterworks Clauses Act 1847." Now, these clauses in the Waterworks Clauses Act are admittedly identical in substance with the corresponding clauses as to mines and minerals in the Railway Clauses Act, and it follows from that that all the decisions which have been pronounced under the Railway Clauses Act apply to the cases arising under the Waterworks Clauses Act, and I think no distinction can be made.

Now, the Lord Ordinary has disposed of this case, and Lord Mure is of the same opinion, by holding that it is to be disposed of just in the same way as if it had been a voluntary disposition with a reservation of mines and minerals, and that the fact that it is not a voluntary sale but a statutory sale and a statutory reservation of mines and minerals makes no difference. That is the view expressed by the Lord Ordinary at the foot of page 2 as the ground of his judgment. After putting the case of a voluntary sale, he says—"That being so, I see no reason for concluding that the statutory reservation of minerals means anything different from a reservation of minerals in a private deed." Now, in my humble opinion, that is where the Lord Ordinary has gone wrong. If this had been a voluntary sale with a reservation of minerals and nothing else, I should probably have come to the same opinion as the Lord Ordinary, and should have concurred with Lord Mure in the view he takes, but I think a statutory sale, with a statutory reservation of mines and minerals, is quite different.

In considering this case I think we ought to have regard to the object and intention of the Legislature in introducing these mines and mineral clauses into the Railways Clauses Act and the Waterworks Clauses Act. It was to meet this—it was obvious that the only use which a railway company or the undertakers of waterworks could make of the ground was the use of the surface and the necessary support; anything beneath the surface of value was of no use to them at all; in fact it may be doubtful whether a railway company would have power to excavate and sell valuable minerals. But however that may be, the only use a railway company requires is the use of the surface, which is important for their railway, and it would be altogether out of the question to compel them to buy valuable mines and minerals under the railway before such time as the proprietors of these mines and minerals required to work them. That is the reason of those clauses. And it should be observed that while that was a great advantage to a railway company or a waterworks company, it was no disadvantage to the proprietor, because as soon as he would have worked the mine and minerals, supposing no railway had been there, he was perfectly entitled to work them still, the only difference being that he had to give notice of his intention, so that they might be bought then if they were to be bought by the railway company.

Now, that being the object and intention of the Legislature in introducing these clauses, we must have regard to that in considering what they meant by "mines and minerals," and it is obvious to me that they must have meant everything valuable, being a mineral, which this undoubtedly is—everything being mineral which was of no use to the railway company which purchased. So that the Act applies just as much to clay as to ironstone or coal, or other valuable substance or material in or under the ground. The Act, I think, ought to receive a liberal interpretation in this respect. Why should a railway company be compelled, it may be 50 years before the proprietor wants to work it, to buy clay any more than they should be asked to buy ironstone or coal? The reason of the thing applies just as much to the one as to the other. It is a mineral; it is neither an animal or a vegetable, and therefore it is a mineral; and if it is a mineral of value then I say it falls within the purport and intention of the Legislature in introducing these clauses. Accordingly I think we must look at this case where it is a statutory sale and a statutory reservation as being totally different from a case where it is a voluntary sale and a voluntary reservation. I do not think the questions are the same at all. Now, taking it as a statutory sale and a statutory reservation, the question is, whether or not this clay is included in the terms "mines and minerals." There are various cases upon this point. Your Lordship has referred to the case of *The Midland Railway Company*, and I do not propose to refer to it again except to remark that the clay there was very much in the same position as the clay here, because I see from the report that there, just as here, the clay was some three or four feet below the surface, and all that was said about it was that it was a peculiar clay of some value. Then there is the case to which your Lordship did not allude—also a case of clay, and therefore I shall mention it—the case of *Loosemore*, 22 Chan. Div. 25, where there was a proof as to the nature of the clay. Upon considering the proof the Judge (Mr Justice Fry) said—"I have come to the conclusion that this clay, although it does not appear to have been worked in the neighbourhood, was nevertheless clay of commercial value, and was therefore a mineral within the meaning of the 77th section." It is the very point that he puts there that we are putting here. It was a clay which had not been worked, and all he said of it was—"It is of some commercial value, and therefore is a mineral within the meaning of section 77" of the English Railways Act, which corresponds to the clauses we have here. That is a case which brings out the very point which also exists here, of commercial value as being the test. Now, there are two other cases that illustrate the point that "commercial value" is the true test, although not occurring under the general Acts. The first is the case of *The Midland Railway Company* v. *Chickley*, 4 Eq. 19. It was a canal case, and it was an early case. It was under the clauses of a private Act, but the clauses in the private Act were very similar to the clauses in the Consolidation Act, and, as we know, before the passing of the Consolidation Act the same clauses used to be enacted in all private Acts. It was the case of a quarry, and the stone was used for roadmaking and paving. The rubric is—"Held that the reservation of mines and minerals within and under the land included everything below the surface available for agricultural purposes which could be made useful for any purpose, and included the right of quarrying as well as of underground mining." And Lord Romilly, the Master of the Rolls, who decided the case, says—"Stone is in my opinion clearly a mineral, and in fact everything except the mere surface, which is used for agricultural purposes—anything beyond that which is useful for any purpose whatever, whether

gravel, marble, fire-clay, or the like—comes within the word 'mineral' when there is a reservation of mines and minerals from a grant of land." That is what he says in an early case upon that. We have also a case of clay in the case of *Hext* v. *Gill* (7 Ch. 699), which was a case of china clay. But that is a special case, from the fact that it was a voluntary sale, and the proprietor of the minerals was not entitled to work them for the reason that, it being a voluntary sale, the granter was bound to do nothing to derogate from his grant. If we had that principle applied to these railway cases it would probably protect the railway, but that has no application to this case.

There is therefore a great deal of authority for saying that clay if of commercial value is a mineral in the sense of the statutes.

Now, as to the mode or manner in which the proprietor of minerals is entitled to work them, it is superfluous to say anything, because that is determined conclusively by the case of *Bennet* to which your Lordship has referred. The principle there established is simply this, that the proprietor is entitled to work his minerals exactly as if he had never sold the land at all, and the only restriction of that power is the one your Lordship pointed out as contained in the 23d section of the Waterworks Clauses Act, which says—[*reads*]. These are the only two statutory limitations of the absolute right to work in the way best adapted for getting the minerals. Now in this case there can be no question raised upon either of these points. It is a matter of admission that in point of fact the clay here has been worked for a considerable time, and is being worked, and it is because it is being worked close up to the margin of the pursuers' purchase that the question has now arisen. The clay is therefore of commercial value, and there is no allegation that it is not being worked in an ordinary and reasonable mode. Therefore I am of opinion with your Lordships that the clay here being of commercial value comes under the reservation in the disposition.

The Court recalled the Lord Ordinary's interlocutor, and assoilzied the defender from the conclusions of the summons.

Counsel for Pursuers—Sol.-Gen. Robertson, Q.C.—Comrie Thomson—G. W. Burnet. Agents—Campbell & Smith, S.S.C.

Counsel for Defender—D.-F. Mackintosh, Q.C.—Dickson. Agents—Hamilton, Kinnear, & Beatson, W.S.

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*Friday, January* 21.

## FIRST DIVISION.

### MURRAY AND OTHERS (GREGORY'S TRUSTEES) *v.* MRS GREGORY'S TRUSTEES AND OTHERS.

*Succession—Vesting—"Nearest of Kin"—Destination-over—Period of Distribution.*

By postnuptial contract spouses conveyed to each other in liferent, and to the children of the marriage, if any should be born, in fee, the whole estate of each, the fee of both estates to be divisible by the husband among the children of the marriage, such division to take effect after the death of the surviving spouse, and at majority or marriage of the children. Powers of advancing funds for their maintenance and education or setting them up in business were conferred on certain persons named as trustees to carry the contract into execution. In the event of the decease of all the children during the life of the surviving spouse the funds were (failing a disposition by the spouses severally) to suffer division after the decease of the survivor of the spouses, by the funds of the husband falling to his own nearest of kin, and those of the wife falling to her own nearest of kin. The marriage was dissolved by the husband's death, he never having executed any further deed, and the only child of the marriage predeceased the widow, leaving issue, who also predeceased her. *Held* (1) that there was no vesting under the contract till the death of the surviving spouse; (2) that the persons favoured as to the husband's estate were his nearest of kin as a class, to be ascertained as at the period of distribution, and not as at his own death, and therefore that his nearest of kin as at the death of the widow were entitled to his estate. Lord Shand *dissented* on both points.

*Heritable and Moveable—Conversion.*

A husband by postnuptial contract conveyed to his wife in liferent and the children of the marriage in fee, and in the event of their predeceasing the surviving spouse then to other persons, the estate belonging to him at the date of the contract, or which should belong to him at his death. During the marriage its form was changed from moveable to heritable. *Held* that it was not converted in a question of succession, but that the succession to it continued to be regulated by the contract.

By postnuptial contract of marriage entered into between Dr William Gregory, sometime Professor of Medicine in the King's College of Aberdeen, afterwards Professor of Chemistry in the University of Edinburgh, and Mrs Lisette Scott or Makdougall Gregory, his wife, "for their love and affection to each other, and for provisions to the children of their marriage, if any there may be," dated 25th March 1840, and registered in the Books of Council and Session 16th October 1877, Dr and Mrs Gregory gave, granted, assigned, and disponed, each of them to the other in case of his or her survivancy, in liferent during all the days of the lifetime of such survivor, and to the children of their marriage in fee, the whole estate and effects, heritable and moveable, then belonging to either of them, or in which they then had any vested rights or interests, or which might pertain and belong or become due or indebted to either of them during the subsistence of their marriage. In particular, and without prejudice to the generality, each disponed to the other in liferent in case of survivance, and to the children of the marriage in fee, certain specified estate, that of Dr Gregory consisting of his share of certain sums of money in the public funds. It was also provided and declared that the funds settled on the children in fee should be divisible among