seam of the Skellyton Colliery, Larkhall, occupied by the respondents, and as such was a 'workman' within the meaning of the Workmen's Compensation Act 1897; (2) that on said date the deceased drove a loaded hutch to the gate which fences off said seam from the shaft, and having unyoked the pony which drew the hutch, opened the gate without signalling for the cage to be brought to the gate; (3) that the cage at the time was not opposite the gate, but was down the shaft at the Kiltongue seam, twenty fathoms below the Virtuewell seam; (4) that the deceased, presumably through absent-mindedness, failed to notice (although there was sufficient light to enable him to do so) that the cage was not at the gate, and proceeded to push the hutch from behind till it fell down the shaft; (5) that the deceased was drawn after it, and was fatally injured by the fall; (6) that the respondent is the father of the deceased, and was partially dependent upon him, receiving from 7s. 6d. to 10s. per week out of the deceased's wages, which were at the rate of £1, 9s. 4d. per week. In these circumstances I found that the deceased had contravened rule No. 3 of the Additional Special Rules adopted in the colliery under the provisions of the Coal Mines Regulation Act 1887, but was not guilty of serious and wilful misconduct; that the accident arose out of and in the course of deceased's employment, and I awarded respondent £60 as compensation."

The following questions of law were stated—"(1) Do the circumstances above set forth amount to serious and wilful misconduct within the meaning of said Act? (2) Deceased having contravened said rule, does the assumption that said contravention was due to absent-mindedness on his part negative the respondent's plea of serious and wilful misconduct? (3) Said rule having been contravened by deceased, does this fact amount to serious and wilful misconduct in the absence of any proved excuse for said contravention? (4) Would absence of mind alone constitute a valid excuse for the breach of said rule?"

The Workmen's Compensation Act 1897 enacts, 2 (*c*)—"If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed."

The Coal Mines Regulation Act 1887 provides (section 51) for the establishment of special rules in every mine, and enacts, section 51 (3)—"If any person who is bound to observe the special rules established for any mine acts in contravention or fails to comply with any of them he shall be guilty of an offence against this Act."

Section 52 provides for the approval of such special rules by a Secretary of State.

By Rule 3 of the Additional Special Rules adopted by the United Mining Association of Scotland, approved under the provisions of section 52, and adopted in the Skellyton Colliery, it is provided—"The bottomer at a mid-working in a vertical shaft not provided with an appliance which constantly fences the shaft, being a mid-working in use for the regular passage of workers or the drawing of minerals from the mine, shall not open the gate fencing the shaft until the cage is stopped at such mid-working, and he shall not signal the cage away until he has closed the gate, and shall not permit any other person to open the gate while he is on duty."

In argument the following cases were cited:—For the Appellants—*Callaghan* v. *Maxwell*, January 23, 1900, 2 F. 420, 37 S.L.R. 313; *Daily* v. *Watson Limited*, June 19, 1900, 2 F. 1044, 37 S.L.R. 782; *O'Hara* v. *Cadzow Colliery Company*, February 6, 1903, 5 F. 439, 40 S.L.R. 355; *Condron* v. *Gavin Paul & Sons*, November 4, 1903, 6 F. 29, 41 S.L.R. 33. For the Respondents—*MacNicol* v. *Speirs, Gibb &. Company*, February 24, 1899, 1 F. 604, 36 S.L.R. 428; *Lynch* v. *Baird & Company*, January 16, 1904, 41 S.L.R. 214.

This interlocutor was pronounced:—"The Lords sustain the appeal: Answer the first question of law therein stated in the affirmative: Find it unnecessary to answer the other questions: Therefore recal the award of the arbitrator and remit to him to dismiss the claim and decern."

Counsel for the Appellants—Salvesen, K.C.—R. S. Horne. Agents W. & J. Burness, W.S.

Counsel for the Respondent—G. Watt, K.C. — Moncrieff. Agents — Simpson & Marwick, W.S.

Saturday, July 2.

FIRST DIVISION.

[Lord Pearson. Ordinary.

NORTH BRITISH RAILWAY COMPANY *v.* TURNERS LIMITED.

Railway— Property — Sale for Specified Purpose—Right to Adjacent Support.

Held that a grant of lands for a specified purpose, such as the construction of a canal or railway, whether voluntary or by force of statute, in the absence of evidence of contrary intention appearing *ex facie* of it, carries by implication the right to reasonable and necessary support for the undertaking contemplated from the adjacent lands of the granter, and that the obligation to support once established affects the lands and renders liable in damages a subsequent owner thereof whose operations have withdrawn the support; and consequently that a railway company was entitled to decree in an action concluding for interdict and damages against the owner of an adjoining claypit whose workings had caused a subsidence of the line.

Railway — Minerals — Clay — Railways Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict.* c. 33), *secs.* 70 *and* 71.

Held that common clay forming the sub-soil of a district was not a mine

or mineral within the meaning of the Railways Clauses Consolidation (Scotland) Act 1845.

The following narrative of the facts in this case is taken from the opinion of the Lord Ordinary (PEARSON):—"This is an action of declarator, interdict, and damages at the instance of the North British Railway Company against Turners Limited, who are the proprietors of the Abercorn Brick Works, Portobello. The defenders have for a number of years been working clay in their land lying immediately to the south of the pursuers' main line of railway. The railway at that part runs on an embankment, the rails being from 20 to 27 feet above the natural level. The embankment has subsided, and the pursuers have been put to considerable expense in maintaining the level of the rails. They say that the subsidence has been caused by the defenders' workings, and they now ask for declarator that the defenders are not entitled to work or remove the clay and surface soil from the lands belonging to them, situated immediately to the south of the railway, 'so as to injure the lands, railways, and works belonging to the pursuers, or interrupt or interfere with the working of traffic thereon.' Interdict is asked in similar terms, and there is a conclusion for damages in respect of the expense to which the pursuers have been put in repairing the injury caused by the defenders' operations. The parties have agreed that, if the defenders are found liable in damages, the amount shall be held as fixed at £800.

"The railway between Edinburgh and Berwick was authorised by an Act passed in 1844, and at the part now in question it passed through land belonging to the Duke of Abercorn. It was afterwards found expedient to deviate from the line originally laid down, and the deviation was authorised by an Act passed in 1845, which incorporated the Lands Clauses and Railways Clauses Consolidation Acts of that year. The portion of railway with which this action is concerned lies wholly within that deviation. The land for it was acquired under the Lands Clauses Act, and in determining the rights of parties regard must be had to the provisions of the Railways Clauses Act so far as these are applicable.

"The pursuers seem to have obtained possession of the land at once, for the line was opened for traffic on 18th June 1846. They do not appear, however, to have obtained any title until 1882, the disposition in their favour by the Duke being dated 11th April, and recorded 2nd June of that year. The disposition narrates that under and by virtue of certain Acts of Parliament, including the two Railway Acts above mentioned, the Railway Company had entered upon possession of certain portions of his land at certain specified dates, ranging from 1844 to 1865, and had, at certain dates mentioned, paid to him sums amounting in all to £20,514, 1s. 5d. in full of the compensation or consideration money due to him for the said lands. In consideration thereof, 'and in pursuance of the several Acts of Parliament relating to the said North British Railway Company, and of the Lands Clauses Consolidation (Scotland) Act 1845, and the Lands Clauses 'Consolidation Act Amendment Act 1860,' the Duke sold and disponed to the Railway Company, 'according to the true intent and meaning of the said Acts of Parliament, and of the Lands Clauses Consolidation (Scotland) Act 1845 and other general Railway Acts,' the various parcels of land, and all such right, title and interest in and to the same as I and my foresaids are or shall become possessed of, or by these said Acts are empowered to convey, reserving always to me and my heirs and successors, or others deriving right from me, all mines, metals, and minerals in and under the said lands hereby disponed.' The lands were disponed, with entry to the several portions 'at all the respective dates on which possession was taken, as before specified.'

"The clay workings, which adjoin the railway embankment both to north and south, appear to have been in the hands of tenants of the Duke of Abercorn before the railway was formed, and so continued until 1875, when they were purchased from the Duke by the Benhar Company. That company sold them to Messrs Thornton in 1880, and in 1893 they were acquired by Mr Turner, and in 1895 he disponed them to the defenders. In the same year (1895) the defenders became tenants under the Duke for thirty-one years of a new clay field, which lay to the south-eastward, and was separated from the old clay pit by the Figgate Burn, the subject let being described as 'that piece of ground with the common clay to be found therein, part of the farm of Southfield,' &c. The extent of the old clay-pit was about 22 acres, and in 1900, in consequence (as appears from the evidence) of the ground slipping in owing to the workings, the defenders acquired from the Duke an additional strip towards the west extending to about 6 acres.'

The pursuers pleaded, *inter alia*—"(2) The defenders having wrongfully and in violation of the pursuers' rights removed surface soil and clay from their lands described in the condescendence, and having thereby affected and injured the pursuers lands, railways, and works, and caused the same to subside, the pursuers are entitled to declarator and interdict as concluded for. (3) The pursuers' said lands having been sold to them for the purpose of enabling them to construct thereon their authorised railway and works, the pursuers are entitled to support therefor from the adjoining lands which belonged to the seller and now belong to the defenders. (4) In any event, the surface soil and clay which are being worked by the defenders, not being minerals within the meaning of the Acts of Parliament referred to and the Acts incorporated therewith, the defenders are not entitled to work them so as to injure or affect the pursuers' said lands, railway, and works."

The defenders pleaded, *inter alia*—"(2) No relevant case. (4) The operations complained of being confined to the ground of the defenders, and the pursuers having no right to interfere with said operations, the defenders ought to be assoilzied. (5) *Separatim*, the clay quarried and worked by the defenders being a mineral, and being quarried and worked in a manner proper and necessary for the beneficial use thereof, the defenders ought to be assoilzied."

Proof was allowed and led.

It was proved that the subsidence of the pursuers' line was due to the working of the defenders' clay-pit. The evidence as to the nature of the clay is summarised in the following excerpt from the opinion of the Lord Ordinary:—"The clay now in question immediately underlies the surface-soil, and extends downwards to a depth of about 100 feet. A few feet of it near the surface shows thin layers or patches of sand among the clay which render it the more suitable for making bricks. At greater depths it is more pure and plastic, and fit for pottery ware, but is also adapted for brickmaking when mixed with sand or ashes. It may accurately be described as forming the sub-soil of the district, though in a narrower sense an agriculturist may define the term 'sub-soil' as extending only so far as the roots of vegetation may go. So chemists may say that kaolin or white china clay is a mineral, as being homogeneous and of definite chemical composition, and that this clay is just very impure kaolin. But admittedly it could not be put on the market as kaolin, and it will not produce white china ware. I think that the sharp conflict of skilled opinion among the experts examined is more apparent than real, and would be avoided by a more careful definition of the terms used. They are practically at one on the facts, for the rest it is a matter of classification."

The Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. c. 33), sec. 70, enacts—"The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands unless they shall have been expressly named therein and conveyed thereby."

Section 71—"If the owner, lessee, or occupier of any mines or minerals lying under the railway or any of the works connected therewith, or within the prescribed distance, or where no distance shall be prescribed 40 yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give to the company notice in writing of his intention so to do thirty days before the commencement of working, and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose, and if it appears to the company that the working of such mines either wholly or partially is likely to damage the works of the railway, and if the company be desirous that such mines or any part thereof should be left unworked, and if they be willing to make compensation for such mines or minerals, or such parts thereof as they desire to be left unworked, they shall give notice to such owner, lessee, or occupier of such their desire, and shall in such notice specify the parts of the mines under the railway or works, or within the distance aforesaid, which they shall desire to be left unworked, and for which they shall be willing to make compensation; and in such case such owner, lessee, or occupier shall not work or get the mines or minerals comprised in such notice; and the company shall make compensation for the same, and for all loss or damage occasioned by the non-working thereof to the owner, lessee, or occupier thereof respectively; and if the company and such owner, lessee, or occupier do not agree as to the amount of such compensation the same shall be settled as in other cases of disputed compensation."

On 8th September 1903 the Lord Ordinary (PEARSON) pronounced the following interlocutor:—"Finds and declares in terms of the declaratory conclusion of the summons: Interdicts, prohibits, and discharges in terms of the conclusion to that effect, and decerns: Further decerns and ordains the defenders to make payment to the pursuers of the sum of Eight hundred pounds (£800) sterling: Finds the pursuers entitled to expenses," &c.

Opinion.—[*After stating the facts, ut supra, and the result of the proof as to the nature and cause of the subsidence*]—"The main ground on which the pursuers maintain the liability of the defenders is that by their purchase of the land for the purposes of a railway to be built according to the Parliamentary plans they acquired a legal right against the granter to all necessary support, including lateral support from his adjoining lands, for the embankment as built and as used for the purposes of the railway. In support of this proposition the pursuers referred to the cases of *Sprot* v. *Caledonian Railway Co.*, 1856, 2 Macq. 449; *Elliott* v. *North-Eastern Railway Co.*, 1863, 10 Clark (H.L.) 333; *Ruabon Brick Co.* v. *Great Western Railway Co.*, 1893, 1 Ch. 427; *London and North-Western Railway Co.* v. *Evans*, 1893, 1 Ch. 16; *Great Western Railway Co.* v. *Cefn Brick Co.*, 1894, 2 Ch. 157. In the case of *Sprot* the conveyance had been expressly made for the purpose of the land conveyed being used as a railway, but there was a reservation of all mines with liberty to win and work the minerals. It was held that by the effect of the conveyance the Railway Company acquired a right to the surface of the ground traversed by the railway, together with a right as against the granter to such subjacent and adjacent support as was necessary for enabling them to maintain and work the railway. And on an examination of the statutes to ascertain whether that right

had been qualified it was found that it had not. So in the case of *Evans*, where statutory authority had been obtained to convert a brook into a navigable canal, and to maintain it as such, and where the owner of the coal underneath had worked it so as to cause a subsidence, the Court of Appeal held that where a grant of lands is made for a specific purpose, such as the construction of a canal or railway, 'the grant, in the absence of a contrary intention appearing on its face, carries with it by implication the right of reasonable and necessary support for the works so to be erected from the subjacent or adjacent lands of the granter.' (Bowen, L.J.)

"The defenders reply that, although the Railway Company may have had this right originally as against the Duke of Abercorn, the liability did not transmit against the defenders' authors (the Benhar Company) on their acquiring the adjoining lands from the Duke in 1875 so as to be now binding on the defenders, particularly having regard to the absence of any formal disposition in favour of the pursuers until long after 1875. Full as the argument before me was, this point was not fully argued. In my opinion the obligation of support of land to land, once it exists, cannot be thus extinguished by change of ownership. The railway having been built, and being in full working in 1875, it was not in the power of the Duke to convey his land free from the obligation, and his disponee knowing of the railway must be held to have bought the land subject to all such incident obligations of support.

"Further, it is said that when the Railway company did get their title in 1882 it contained the express reservation (already quoted) of all mines, metals, and minerals in and under the lands, and that this must be taken as interpreting the effect of the statutory taking in 1845. The effect of the statutory provisions will be considered presently. But I think it would be more accurate to say that the words in the conveyance ought, if possible, to be construed as not abridging the rights of the railway company as statutory purchasers. If the matter is to be decided upon the conveyance, then the case of *Sprot* undoubtedly applies, and Lord Cranworth there lays down the rule that 'in reserving mines the granter must be understood to have reserved them so far only as he could work them consistently with the grant he had made to the company.'

"It is true that there is an appearance of inconsistency in the decisions in applying the distinction between voluntary and statutory conveyances to questions regarding the right of support. Sometimes the case of *Sprot* and the doctrines there expounded are set on one side as having turned entirely on the interpretation and incidents of a private conveyance, and as having no bearing on a case arising under the statutes. This is specially so in the very authoritative case of the *Great Western Railway Company* v. *Bennett*, 1867, 2 Eng. and Ir. App. 27, where it was held that if a railway company, after notice from the mineral owner of his intention to work, declines to pay compensation, the owner, working in a usual and proper manner, may work them out, and the company cannot claim any right of subjacent or adjacent support. The ground of judgment was, that in the 'mineral' provisions of the Railways Clauses Act it was the intention of the Legislature (as Lord Cranworth puts it) 'to create a new code as to the relation between mine owners and railway companies where 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.' Lord Chelmsford expressed the same view. On the other hand, in the equally authoritative case of *Elliot*, decided four years previously, it was held by Lord Chelmsford and Lord Kingsdown, in a question of subjacent and adjacent support to a railway, that a conveyance granting land for a special purpose must be construed as conveying all the rights necessarily incident to the due execution of that purpose, and that this is so whether the conveyance is a voluntary bargain between the parties or is made because the Act gives the company the power of compelling a grant. The same rule is concisely stated by Lord Justice Bowen in the case of *Evans*. After stating that an ordinary grant of land made for a specific purpose carries with it the right of reasonable and necessary support for the works to be erected from the subjacent or adjacent lands of the grantor, he adds, 'This maxim of law and of good sense applies whether the grant is voluntary or under the compulsory powers of a statute (see *Elliot* and *Sprot*). When we pass from private grants between individuals to titles and rights created by an Act of Parliament, the exact subject-matter is altered, but similar rules of good sense and law obtain when we have to interpret sections which do not expressly decide the matter.' I take it, there is no real discrepancy between these opinions. The 'mineral' clauses of the statute introduced what Lord Cranworth called a new code, with the object of 'getting rid of all the ordinary law on the subject.' But the ordinary law is got rid of only so far as the code extends—only so far as it substitutes a different set of rights and obligations to take the place of the common law. Thus (as was decided in *Bennett*) a company which has the statutory right to inhibit working upon paying compensation is not entitled to fall back on the the common law rights of support which but for the statute would have been open to them. On the other hand, the protected area to which this right extends only to the minerals under the railway and to a strip 40 yards wide on either side of it. If workings outside this 40 yards strip should, by their abnormal depth or by

the nature of the intervening strata be threatening imminent danger to the railway line, it might well be that the common law rights of support would be available, as the statutory provisions would not apply.

"It therefore becomes necessary to consider the legal relations of the parties as these exist under the statutes, and particularly under the Railways Clauses Act, in order to ascertain whether and to what extent the right of support (which I hold the pursuers otherwise to have) is excluded by the statutory provisions.

"On this head the first question which bulks largely in the proof is whether this Portobello clay is a mineral within the meaning of the group of clauses beginning with section 70 of the Railways Clauses Act. The pursuers say that it is not, and therefore that these clauses need not be further considered as affecting their right of support, and in this, I think, they are clearly right. It appears to me that the question is concluded by the cases of *Farie* v. *Magistrates of Glasgow*, 1888, 13 Ap. Cas. 657, 15 R. (H.L.) 94, 26 S.L.R. 229, and *Todd, Birleston, & Company* v. *North-Eastern Railway Company*, [1903], 1 K.B. 603, to which may be added the case of *Great Western Railway Company* v. *Blades*, 1901, 2 Ch. 624. It is true that *Farie's* case turned on the Waterworks Clauses Act, and the case of *Todd & Company* on the English Railways Clauses Consolidation Act, but I can find no difference between these and the Act now referred to in any particular which affects this case. It is also true that the application of these authorities involves to a certain extent a finding in fact, viz., that the Portobello clay is practically indistinguishable from the clay in *Farie* and in *Todd & Company*, in all the particulars which were held relevant to the issue in those cases. I have carefully considered the evidence of the geologists, the chemists, the mining engineers, and the practical clay workers in this case, and I am unable to find any distinction which would lead to a different result here." . . .

[*His Lordship then stated the import of the evidence as to the nature of the clay*].

"It is true that the opinions of the majority in the case of *Farie* proceeded on diverse lines. But from these different points of view it was laid down that the clay was not a mineral within the meaning of the statute, either because it was not so according to the ordinary use of the word in dealing with proprietary rights in Scotland, or because the 'land purchased' included not only the surface soil but the sub-soil clay, even if it were of exceptional depth, or because the exception of mines was limited to underground workings. The case of *Todd & Co.* illustrates simply and forcibly the view of the decision in *Farie's* case contended for by the pursuers. The railway company, in order to widen their line, had served a notice to treat for the purchase of a strip of land, together with the mines and minerals under the same, except coal, ironstone, and fire-clay. The strip immediately adjoined a clay pit. The arbiter stated an alternative award in the form of a special case for the opinion of the Court, the question being whether 'the clay described in paragraph 4 of the case' was a mineral within the meaning of section 77 of the English Railways Clauses Act which is identical with our section 70) Paragraph 4 of the case (which seems to me to describe accurately the clay now in question) was this—'(4) All the land the subject of the arbitration contains immediately under the surface of vegetable soil an extensive bed of clay or common brick earth. This extends to a considerable depth. It has been proved by borings to extend to a depth of 100 feet. Clay of the same character exists immediately under the surface over a large area of land in the district. The clay is worked by open work and not by mining.' The Court held that the question was concluded by authority, the Lord Chancellor putting it thus—'I do not think there is the smallest ground for saying that this case is distinguishable from *Lord Provost of Glasgow* v. *Farie* in the House of Lords, and that decision must be binding on all Courts.' There were difficult questions behind, and the Lord Chief Justice refers to these in his opinion, and expressly reserves them. It is impossible from the report to discover what those questions were, but from a copy of the special case, which was referred to in the discussion before me, it would appear that the arbiter assumed that the amount to be awarded was in some way dependent upon whether the railway company were entitled to lateral support from the adjacent land. But the Court answered the question put to them and no other; and their answer appears to me conclusive as to the application of the case of *Farie*.

"I may observe that even if the opposite view were taken, and the clay were held to be a mineral within the meaning of the statute, it would not, in my view, be of much benefit to the defenders so far as the present action is concerned. The situation would be this—The surface of the railway company's land would belong to the railway company, the clay beneath to the Duke of Abercorn, and the clay in the adjoining land to the defenders. That would be an unusual situation, but I suppose that the clay, being a mineral, section 71 would apply to enable the railway company to inhibit working within the protected area of forty yards upon paying compensation. But that right arises only upon written notice being given of the intention to work the minerals, and if no such notice is given the working within the forty yards is illegal and may be stopped. True, the notice may be given at any time, and if this clay be a mineral it may be open to the defenders to legalise their position by giving notice now. But I have not been referred to anything which, in my opinion, amounts to such written notice, and it lies on the defenders to aver and prove that it was given. A further question might possibly arise on the facts if it were held that the subsidence of the

embankment was caused by workings not within the forty yards area but outside of it. It is quite possible that the draw or sit had begun to affect the embankment before the actual workings had reached that area of forty yards. To such a state of matters the 71st section would not apply. There would be no duty to give notice of working and no correlative statutory right on the part of the Railway Company to stop the workings at that stage upon paying compensation. The situation would be outside the statutory code, and it might be that the common law right of adjacent support would receive effect because the statutory code had no application to the circumstances. These questions do not, in my view, arise here for decision, and I have only adverted to them because they may be thought to have some bearing on the case made for the defenders.

"The defenders, however, say that while they have met the pursuers both in proof and in argument upon the case made for the pursuers, their own case is really a different one, and does not depend on whether the clay is or is not a reserved mineral under section 70. They say that there is no question here as to that, and that, as they make no claim to the clay underneath the railway property, it is immaterial to them whether that clay belongs to the Railway Company or is reserved to the Duke of Abercorn. The question (it is said) is entirely one of the right to support from the adjoining land, while the cases referred to, which were decided under the statute, were all cases as to minerals under the land taken, and therefore do not apply here. In other words, they were cases under section 70 (or the corresponding section of the English Act), while this is a case under section 71. This might not be material if the language and scope of the two sections were the same; but in the first place the words are different, those of section 70 being 'any mines, or coal, ironstone, slate, or other minerals, and of section 71, 'any mines or minerals.' The scope of section 71 is also quite different, and much wider than that of section 70, which deals only with the minerals under the land purchased. The Railway Company (it is said) may purchase everything under the land taken, and if they do they simply become conterminous proprietors with the owners of the adjacent lands, who are owners of the mines and minerals up to the railway boundary. Apart from the question of derogating from the grant, the adjoining owner may therefore work up to that boundary, and he may do so whatever the mine or mineral may be, subject only to the provisions of section 71 as to giving notice. The defenders contend that, having thus displaced the authorities on the construction of section 70, they are entitled to resort to what they maintain to be the common law of Scotland, that the term 'mineral' includes clay. This, they say, was laid down by the Lord President in the case of *Farie* (14 R. 346, 24 S.L.R. 253). I do not so read his Lordship's opinion, which, I think, was confined to stating his view of the law and the decisions upon the construction of the Waterworks Clauses and Railways Clauses Acts, and I rather think the common law of Scotland on the subject is as stated in the opinions of Lord M'Laren and Lord Mure to the contrary effect. For my own part, I should, in any view, find it difficult to hold that the difference of expression in sections 70 and 71 imports a distinction in the minerals referred to, except, perhaps, in the view supported by Load Macnaghten in *Farie*, that the expression 'mines or minerals' in the earlier section excludes any substance worked by open cast. It is true that section 70 enumerates mines of coal, ironstone, and slate, and then adds the general expression, and it may be that this would be held as restricting it to mines *ejusdem generis*. But it does not follow that the later section includes more, and as regards the matter now in hand, viz., the inclusion of clay, I note that in the case of *Todd & Co.* the appellants argued that the clay was a mineral under section 77, and at any rate under section 78 (which corresponds to our section 71), and that the Lord Chief Justice says—'I think that in this case no distinction can be pointed out between sections 77, 78, and 79.' But even admitting the defenders' contention on this head, it would only bring in the provisions of section 71, including the provision as to notice in writing, and (as I have said) I do not find that any such notice was given so as to legalise the defenders' position.

"Accordingly, I hold the pursuers to be entitled to decree of declarator and interdict as concluded for, and I think that decree for the £800 of damages must follow. The defenders state a plea of bar; and they contend that the Railway Company, in the knowledge of the workings and of the risk to the embankment, have lain by, and are not entitled to damages for the past. There is certainly an absence of complaint or protest on the part of the pursuers until the more serious subsidence took place; and the Railway Company have hitherto been content to do their best with the situation by making up their own embankment. But this does not appear to me to fall within the rule applied in some cases, that where operations leading to damage have been acquiesced in, only future damages will be allowed, on the ground that the past damage was permitted or was the necessary result of permitted acts. I cannot hold that the Railway Company acquiesced (in the legal sense of the term) in anything that was done by the defenders, nor in the bringing down of their own embankment as the result of it. In the circumstances I think they were entitled, without losing any of their rights, to make the best of the situation until the risk became imminent and serious."

The defenders reclaimed, and argued—There was no difference between a voluntary and a compulsory purchase of lands in this matter—*London and North-Western Railway Co.* v. *Evans* [1893], 1 Ch. 16, *per* Bowen, L.J., at p. 27. The conveyance

must be read in the light of the circumstances under which it was granted—*Bank of Scotland* v. *Stewart*, June 19, 1891, 18 R. 957, 28 S.L.R. 735; *Anderson* v. *M'Cracken Brothers*, March 16, 1900, 2 F. 780, 37 S.L.R. 587; *Great North of Scotland Railway Co.* v. *Duke of Fife*, March 20, 1901, 3 F. (H.L.) 2, 37 S.L.R. 630. In a compulsory purchase the controlling circumstance was the statute under which the purchase was made. Here the statute was the Railways Clauses Consolidation (Scotland) Act 1845, and that statute set up in place of the common law a code as between railway company and mine-owner—*Great Western Railway Co.* v. *Bennett*, 1867, L.R., 2 Eng. and Ir. App. 27. The portion of the statute dealing with this matter was headed "With respect to mines lying under or near the railway," showing that it dealt with the whole question, and while in the absence of special provision restriction on the working of mines was limited to 40 yards from the centre of the railway, it was in the power of the Railway Company to extend that limit. Outside the limit the mine-owner must be able to do what he liked whatever the consequences, otherwise he might be deprived of his minerals without being able to get compensation. The question therefore came to be whether this substance was one which the proprietor was entitled to work under section 71? Was it a mine or mineral in the meaning of that section? The cases cited by the pursuers and relied on by the Lord Ordinary all dealt with section 70 or the corresponding section in the English Act. Section 71 was quite different. It dealt with a different subject, was different entirely in its terms, and was much broader. These cases therefore did not rule, and the grounds of decision when examined were quite inapplicable. None of them decided that clay was not a mineral, and there were cases which treated it as such—*Hext* v. *Gill*, 1872, L.R., 7 Ch. App. 699; *Earl of Jersey* v. *Guardians of Neath*, 1889, 22 Q.B.D. 555; *Midland Railway Co.* v. *Haunchwood Brick and Tile Co.*, 1882, 20 Q.B.D. 552; *Ruabon Brick Co.* v. *Great Western Railway Co.*, [1893], 1 Ch. 427. There was really no hard-and-fast definition of a mine or a mineral—*Midland Railway Co.* v. *Robinson*, 1889, 15 App. Cas. 19; *Menzies* v. *Earl of Breadalbane*, June 10, 1818, F.C., *affd.* 1 Sh. App. 225; *Duke of Hamilton* v. *Bentley*, June 28, 1841, 3 D. 1121; *Blair* v. *Ramsay*, October 22, 1875, 3 R. 25, 13 S.L.R. 10—and if an artificial one was to be taken then the context must govern, and the test here must be whether the substance could be worked commercially—*Nisbet-Hamilton* v. *North British Railway Co.*, June 15, 1886, 13 R. 454, 23 S.L.R. 296. It might be that the Railway Company would have been entitled to interdict, &c., as against the Duke of Abercorn or his representative on the contract, but there was no contractual relation between the defenders and the pursuers.

Argued for the respondents—The Railway Company acquired the whole lands, not the surface only, save as excepted by the statute—*Ruabon Brick Co.* v. *Great Western Railway Co.*, *cit. sup.*, at p. 457—and the statute only excepted mines and minerals. But this clay was not a mine or mineral—*Magistrates of Glasgow* v. *Farie*, August 10, 1888, 15 R. (H.L.) 94, 26 S.L.R. 229; *Great Western Railway Co.* v. *Blades*, L.R. [1901], 2 Ch. 624; *Todd, Birleston, & Co.* v. *North-Eastern Railway Co.* [1903], 1 K.B. 603. It was unlikely that a different meaning was to be given to the terms "mine" and "mineral" in the different sections, for they were bound together by a common heading, and such an interpretation would result in practical difficulties. But *Todd, Birleston, & Co* v. *North-Eastern Railway Co.* was decided upon the corresponding section to 71 in the English statute. If the clay were not a mineral, then the Railway Company was by common law entitled to support—*Sprot* v. *Caledonian Railway Co.*, 1856, 2 Macq. 449, 19 D. 3; *Elliott* v. *North-Eastern Railway Co.*, 1863, 10 Clark (H.L.) 333; *London and North-Western Railway Co.* v. *Evans*, [1893], 1 Ch. 16; *Clippens Oil Co.* v. *Edinburgh Water Trustees* L.R. [1904], App. Cas. 64, 41 S.L.R. 124. If the clay, however, were held to be a mineral, still that would only protect the operations within the 40 yards, and as the operations outside that limit affected the railway by sucking out the clay, interdict would lie for outside the limit, and the Railway Company was entitled to common law support. Further, interdict would lie to prevent the clay itself, which was under the embankment and did not belong to the defenders, being sucked out — *Trinidad Asphalt Co.* v. *Ambard and Another* [1899], App. Cas. 594. If interdict were given the right to damages followed. *Glasgow and South-Western Railway Co.* v. *Bain*, November 15, 1893, 21 R. 134, 31 S.L.R. 98; and *Caledonian Railway Co.* v. *Davidson's Trustees*, October 15, 1895, 23 R. 45, 33 S.L.R. 25, were also referred to.

At advising—

LORD PRESIDENT—The questions in this case are (1) whether the pursuers are entitled to have the defenders restrained from so working the clay in certain lands near Portobello of which they are proprietors, adjoining the railway belonging to the pursuers, as to injure that railway and relative works, and to interfere with and endanger the traffic upon it, and (2) whether the pursuers are entitled to recover damages from the defenders in respect of injury caused to their railway and relative works by the clay workings of the defenders at the place mentioned.

The pursuers' railway at the place in question was authorised by Acts of Parliament passed in the years 1844 and 1845. Their Act of the latter year incorporated the Lands Clauses Consolidation (Scotland) Act and the Railways Clauses Consolidation (Scotland) Act, of the same year. The pursuers obtained immediate possession of the land required for their railway and relative works, and their line at the place in question was opened

for traffic in June 1846. They did not, however, get a formal title to the land until the year 1882, when they obtained from the Duke of Abercorn, to whom the land belonged, a disposition of it, dated 11th April and registered in the Register of Sasines 2nd June 1882.

The disposition contained a reservation by the Duke of Abercorn in the following terms:—"Reserving always to me and my heirs and successors, or others deriving right from me, all mines, metals, and minerals in and under the said lands hereby disponed."

The right to work clay in the land adjoining the railway embankment at the place in question seems to have been let by the Duke of Abercorn to tenants prior to the formation of the pursuers' railway, and to have continued in the hands of such tenants until 1875, when the Benhar Coal Company Limited purchased the land from him. After various transmissions the right to the clay was acquired by the defenders in 1885, and it has since been, and still is, worked by them. The Duke of Abercorn did not sell and convey the clay under the railway either to the Benhar Coal Company or to the defenders, and they have no right or title to it.

The pursuers allege that at the place in question the character of the ground is as follows:—There is on the top a layer not more than eighteen inches deep of ordinary surface soil, consisting of vegetable or wind-blown deposit, made up of decomposed vegetable matter, and directly below this surface soil a layer of common or subsoil clay, the uppermost part of which has become decomposed by exposure to weather, by percolation of water and otherwise, and below this weathered clay there extends for an unknown depth an unweathered common clay. This description of the ground seems to me to be substantially correct. Some strata or layers of the clay are so soft that they are squeezed out by the superincumbent weight of the strata at any place which has been opened by the working of the clay. The pursuers deny that any of this clay is a mineral in the sense of the statutes and decisions, while the defenders maintain that it is a very valuable mineral in that sense. The defenders make some pottery of the coarser sorts from the clay, but it appears to me to be essentially different from the substance known as China clay or kaolin.

The effect of the defenders' working of the clay in question upon the railway works appears to have been first observed about the year 1880, and the movement of the ground seems thereafter to have been progressive, although no serious injury to the railway works was done until the year 1887, from which time the injury increased until the end of March 1902, when a very serious subsidence took place. Latterly it has been necessary for the pursuers to specially watch and make up with ashes their line at the place in question, especially since March 1902, when serious subsidence of the pursuer's main line occurred there.

There does not seem to me to be any doubt that the subsidence mentioned was caused—chiefly, at all events—by the workings in the defenders' clay pit by which the support, subjacent and lateral, requisite to maintain the statutory works of the defenders *in situ* was in a greater or less degree withdrawn. I do not think it at all clear that subsidence of the ground in question as the result of the operations of the defenders would not have occurred, even if the pursuers' embankment had not been made upon it and used for the purposes of a railway. It appears to me that there would have been more or less subsidence even if the land belonging to the pursuers had remained in its natural state.

The pursuers contend that the defenders are liable, mainly on the ground that by their (the pursuers') acquisition of the land for the purposes of a railway, according to their Parliamentary plans, they obtained as against the Duke of Abercorn, from whom the land was acquired, and anyone deriving title from him, a right to vertical and lateral support for their authorised railway works. They rely upon the case of *Sprot* v. *Caledonian Railway Company*, 2 Macq. 449, and other cases mentioned by the Lord Ordinary, as sustaining this contention. The conveyance to the railway company in the case of *Sprot* expressly bore that the land was bought for the purpose of being used as the site of a railway, and there was a reservation of all mines, with liberty to win and work the minerals. It was held that the railway company, by virtue of their conveyance, acquired right not only to the surface of the land traversed by the railway but also as against the grantor and persons deriving titles from him to such subjacent and adjacent support as was requisite to make the purposes of the grant effectual, *i.e.*, the construction, maintenance, and working of a railway. It appears to me that the result of the decisions is that where a grant of lands is made for a specified purpose such as the construction and use of a railway, it (the grant), in the absence of evidence of contrary intention appearing *ex facie* of it, carries with it by implication a right to reasonable and necessary support for the works to be made upon it by the subjacent or adjacent lands of the grantor, whether the lands continue to belong to him or are by him conveyed, subsequent to the date of the grant, to another person or persons. In the case of *Sprot* Lord Cranworth said that "in reserving mines the grantor must be understood to have reserved them so far only as he could work them consistently with the grant he had made to the company." It does not, in my judgment, make any difference to the right of support for the works to be erected or executed in such a case upon the ground taken, whether the grant or conveyance is voluntary or by force of statute.

The case of the *London and North-Western Railway Co.* v. *Evans* [1893], 1 Ch. 16, is an important authority in the same direction. It was held by the Court of

Appeal in that case that where an express statutory right is given to make and maintain something requiring support, the statute, in the absence of a controlling context, must be taken to mean that the right of support shall accompany the right to make and maintain, that if the Act does not provide any means of obtaining compensation for the loss occasioned to the landowner by his having to leave support, this is a strong argument against the Legislature having intended to give such a right, but that if it contains provisions under which compensation can be obtained, it needs a strong context to show that the right of support is not given; that under the Act in that case compensation could have been successfully claimed for the damage occasioned to the landowners by making their mines unworkable; that the Legislature therefore must be taken to have intended to give a right of support, and that the plaintiffs were entitled to an injunction. This decision was approved of by the House of Lords in the recent case of the *Clippens Oil Co.* v. *The Edinburgh and District Water Trustees* [1904], App. Cas. 64.

The defenders, however, maintain that even if the right of the pursuers to support for their works would have been as now stated, apart from certain statutory provisions on which they rely, that right of support is seriously modified by these provisions; and they found in particular on section 70 of the Railways Clauses Consolidation (Scotland) Act 1845, which provides that the company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been named therein and conveyed thereby. They say that the clay in question falls under the description of "mines of minerals" in section 70, and that consequently it is not conveyed to the pursuers, so that if the pursuers wished to have the support of the clay, they could have purchased and paid for it before the expiry of their compulsory powers — *Errington* v. *Metropolitan District Railway Co.*, 1882, 19 Ch. Div. 559. The validity of this contention depends upon whether the clay in question is a mineral or rather a "mine of a mineral" within the meaning of section 70, and I am of opinion that it is not.

The Lord Ordinary says that it appears to him that the question is concluded by the decisions in the cases of *Farie* v. *Magistrates of Glasgow*, 13 App. Cas. 657; and *Todd, Birleston, & Co.* v. *North-Eastern Railway Co.* [1903], 1 K.B. 603, and other cases. *Farie's* case depended upon the Waterworks Clauses Act, and the case of *Todd, Birleston, & Co.* on the section of the English Railways Clauses Consolidation Act, which corresponds to section 70 of the Scotch Act, but the language on the construction of which the decisions turned was substantially the same in all the cases. So far as appears from the reports, the clay to which the cases of *Farie* and *Todd, Birleston & Company* related was similar to, though not identical with, the clay now in question, but there does not appear to me to be any such difference as to prevent the reasoning in these cases from being applicable to this case. In the case of *Todd, Birleston & Company* the Lord Chancellor said: "I do not think there is the smallest ground for saying that this case is distinguishable from *The Lord Provost of Glasgow* v. *Farie* in the House of Lords, and that decision must be binding on all Courts." In the case of *The Great Western Railway Company* v. *Blades* (1901), 2 Ch. 642, Mr Justice Buckley gave a clear and, as I think, a correct exposition of the effect of the decision in *Farie's* case, which is thus summarised in the head note. "Clay forming the surface or sub-soil, and constituting the land purchased for the purposes of the undertaking, is not a 'mineral' within section 77 (corresponding to section 70 of the Scotch Railways Clauses Consolidation Act, 1845) of the Railways Clauses Consolidation Act, 1845, as interpreted by *Lord Provost of Glasgow* v. *Farie*," and this statement was expressly approved of by Lord Alverstone in *Todd, Birleston & Company* v. *North Eastern Railway*, C.A. 1903, p. 609.

For similar reasons I am of opinion that the clay in question is not a mineral within the meaning of the clause of reservation contained in the disposition by the Duke of Abercorn in favour of the pursuers.

The defenders further maintained that even assuming that the pursuers had a right to support in a question with the Duke of Abercorn, that right did not transmit against the defenders, because the right arose *ex contractu* between the Duke and them, and the pursuers have no contract with the defenders. It appears to me, however, that this contention is not well founded, as the titles created not merely a contractual personal relation between the Duke and them, but a relation between the properties acquired by them respectively, immediately or mediately, from him. What they acquired was, as the Lord Ordinary says, a right of support of land to land.

If the views now expressed as to the rights of the pursuers and the liabilities of the defenders are correct, the only remaining question is as to the amount of the damages payable by the defenders to the pursuers, and I understand that the parties agreed that if damages were found to be due the amount should be £800.

For the reasons now given, I am of opinion that the judgment of the Lord Ordinary should be adhered to.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuers and Respondents—The Dean of Faculty (Asher K.C.) —Cooper. Agent—James Watson, S.S.C.

Counsel for the Defenders and Appellants —Clyde, K.C.—Hunter—Mercer. Agents —J. & A. Hastie, Solicitors.

Saturday, July 2.

SECOND DIVISION.

LIQUIDATOR OF THE MELVILLE COAL COMPANY *v.* CLARK

Company — Winding-Up—Scheme of Arrangement—Arrangement Sanctioned by Court—Modification of Arrangement in Case of Individual Shareholder—Joint-Stock Companies Arrangement Act 1870 (33 *and* 34 *Vict. cap.* 104), *sec.* 2—*Companies Act* 1900 (63 *and* 64 *Vict. cap.* 48), *sec.* 24.

An arrangement was made by a company in liquidation for the sale of its business to a new company, each shareholder in the old company being entitled to certain allotments of shares in the new company. The agreement of sale entered into for the completion of the arrangement provided that any shareholder of the old company who failed to apply within a specified period after the arrangement was sanctioned by the Court for shares in the new company should have no interest in the assets of the old company or claim for shares in the new. Circumstances in which the Court *sanctioned* the agreement of sale subject to a modification in the case of an individual shareholder whereby the period during which he should be entitled to apply for shares in the new company was extended.

The Joint Stock Companies Arrangement Act 1870 (33 and 34 Vict. cap. 104) enacts:—Section 2—"Where any compromise or arrangement shall be proposed between a company which is . . . in the course of being wound up, . . . and the creditors of such company, or any class of such creditors, it shall be lawful for the Court, in addition to any other of its powers, on the application in a summary way of any creditor or the liquidator, to order that a meeting of such creditors or class of creditors shall be summoned in such manner as the Court shall direct; and if a majority in number, representing three-fourths in value of such creditors or class of creditors present either in person or by proxy at such meeting, shall agree to any arrangement or compromise, such arrangement or compromise shall if sanctioned by an order of the Court be binding on all such creditors or class of creditors as the case may be, and also on the liquidator and contributories of the said company."

The Companies Act 1900 (63 and 64 Vict. cap. 48) enacts:—Section 24—"The provisions of section 2 of the Joint Stock Companies Arrangement Act 1870 shall apply not only as between the company and the creditors or any class thereof but as between the company and the members or any class thereof."

The liquidator of the Melville Coal Company, Limited, was authorised at an extraordinary general meeting of the company to enter into an arrangement for the sale of its business to a new company.

The arrangement was agreed to at meetings held in obedience to orders of the Court obtained on the liquidator's application in terms of section 2 of the Joint Stock Companies Arrangement Act 1870; and an agreement of sale was adjusted.

To the liquidator's application to have the agreement of sale sanctioned by the Court, answers were lodged by James Clark, Westbourne Villa, Eskbank.

The respondent averred—"The respondent is a shareholder in the said company. His holding consists of—(*a*) 20 preference shares of £10 each, and (*b*) 181 ordinary shares of £10 each, all fully paid up. From the opening of the company's colliery seven years ago till about October 1903 he acted as their managing director. On said latter date he resigned, and shortly thereafter went abroad. He returned to this country on 20th June 1904. . . Prior to his leaving this country he executed a factory and commission in favour of Archibald Menzies, S.S.C., Edinburgh, which is herewith produced. Under said factory and commission the said Archibald Menzies, in addition to the usual powers in general terms, was specially authorised to sell, assign, and transfer the ordinary and preference shares of the said Melville Coal Company, Limited, held by the respondent. The said factory and commission was intimated to the company on 13th January 1904, and was exhibited on 7th June 1904, in order that it might be registered in the company's books. In virtue of said factory and commission, the said Archibald Menzies, as representing the respondent, went to the meetings of the ordinary and preference shareholders appointed by the Court to be held on 8th June 1904, but the petitioner, who was chairman of these meetings, ruled that he was not entitled to attend or vote, 'on the ground that he was not qualified to represent a shareholder, he not being himself a member of the company, and further, that the factory and commission had not been registered in the company's books.' Thereafter, and within seven days of said meeting, in terms of section 161 of the Companies Act 1862, a written note of dissent against the resolution carried at said meetings was lodged with the liquidator on behalf of the respondent. No notice of said dissent has been taken by the liquidator. The respondent objects to the proposed sale to the new company. The second article of the proposed agreement of purchase and sale provides that the purchase price shall be £30,000; further—(*a*) that each preference shareholder of the old company shall be entitled to receive an allotment of ten 6 per cent. cumulative