strue a patent in what may be called a wider or narrower sense, according to what you may find in prior specifications, or in books, or in view of things that have been formerly used or sold. I do not think that that is truly a rule of construction, but that it represents the exigencies of counsel in a case where a patent is being tested. I hold that though the construction is open, the Lord Ordinary and counsel must make the best of it on the documents as they are. I am quite aware this will entail entering into a difficult subject of inquiry. But there are many difficulties in the case arising out of questions of a problematical character—for instance, whether there was a good chance of the invention being superseded by something else. All that is relevant, and I am only pointing out that an inquiry must always be difficult when its domain is in the region, not of what is or what was, but of what might have been. But this is the defenders' fault. If they had performed their duty and had kept the patent alive, we should have had none of these troublesome inquiries to make.

I think the determination of the case should be that we should adhere to the Lord Ordinary's interlocutor, and it would be quite improper in an interlocutor to say anything else. But I think he will consider these further remarks if they seem just to him; and although on this question of construction he will at the proof be entire master of the case, he will give effect to them when the inquiry is taken.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Reclaimers and Defenders—Clyde, K.C.—Sandeman. Agents—Martin & M'Glashan, S.S.C.

Counsel for the Respondents and Pursuers—M'Lennan, K.C.—Macmillan. Agents—R. H. Miller & Company, S.S.C.

Tuesday, June 27.

FIRST DIVISION.

DUKE OF HAMILTON'S TRUSTEES *v.* CALEDONIAN RAILWAY COMPANY.

Railway—Minerals—Minerals Required to be Left Unworked—Property in Minerals Left Unworked—Right of Railway Company to Demand Conveyance—Railways Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33), *secs.* 70, 71.

A railway company in virtue of the provisions of the Railways Clauses Consolidation (Scotland) Act 1845, gave notice to certain trustees requiring them to leave unworked certain minerals lying under or near the railway which the trustees had given notice of an intention to work. The compensation to be paid therefor was settled by the parties. The railway company having maintained that the property in the minerals passed to them, and that they were therefore entitled to a conveyance, *held*, in a special case, that the railway company was not entitled to a conveyance of the minerals.

The Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33) enacts:—"(Working of Mines)—And with respect to mines lying under or near the railway, be it enacted:—

Section 70. "*Promoters of the Undertaking not to be Entitled to Minerals.*—The company shall not be entitled to any mines of coal . . . 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. "*Mines Lying Near the Railway not to be Worked if the Company Willing to Purchase them.*—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, forty yards therefrom, be desirous of working the same, such owner . . . 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 appear 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 parts 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 . . . 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 . . . 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 . . . thereof respectively; and if the company and such owner . . . do not agree as to the amount of such compensation the same shall be settled as in other cases of disputed compensation."

Section 72. "*If Company Unwilling to Purchase, Owner may Work the Mines.*—If before the expiration of such thirty days the company do not give notice of their desire to have such mines left unworked,

and of their willingness to make such compensation as aforesaid, it shall be lawful for such owner . . . to work the said mines, or such parts thereof for which the company shall not have agreed to pay compensation, up to the limits of the mines or minerals for which they shall have agreed to make compensation in such manner as such owner . . . shall think fit, for the purpose of getting the minerals contained therein; and if any damage or obstruction be occasioned to the railway or works by the working or getting of any such minerals which the company shall so have required to be left unworked, and for which they shall so have agreed to make compensation, the same shall be forthwith repaired or removed, as the case may require, and such damage made good by the owner . . . of such mines or minerals, and at his own expense. . . . . ."

Section 74. "*Company to Make Compensation for Injury Done to Mines.*—The company shall from time to time pay to the owner . . . of any such mines extending so as to be on both sides of the railway all such additional expenses and losses as shall be incurred by such owner—by reason of the severance of the lands lying over such mines by the railway, or of the continuous working of such mines being interrupted as aforesaid, or by reason of the same being worked in such manner and under such restrictions as not to prejudice or injure the railway, and for any minerals not purchased by the company which cannot be obtained by reason of making and maintaining the railway. . . ."

This was a special case for (1) the Duke of Devonshire and others, the trustees of the late Duke of Hamilton, acting under his trust-disposition and settlement dated 19th January 1893, and along with certain relative codicils registered in the Books of Council and Session on 26th July 1895—the First Parties; and (2) the Caledonian Railway Company, incorporated by Act of Parliament—Second Parties.

The case set forth that the first parties, as trustees foresaid, were proprietors of the Dukedom of Hamilton, which included various lands and estates in the county of Lanark.

Under and in virtue of the Railways Clauses Consolidation (Scotland) Act 1845, and particularly section 71 thereof, the Caledonian Railway Company on certain dates specified gave notice to the trustees requiring them to leave unworked certain portions of freestone, clay, and blaes at Bothwell Park Quarry, in the parish of Bothwell, near the company's line of railway viz.—

Freestone Rock.

Dates.	Extents of the Areas	Compensation Agreed upon.
(1) 4th June 1897 .	113 poles	£1977 10 0
(2) 3rd August 1898	24 poles	420 0 0
(3) 3rd August 1898.	37 poles	259 0 0
(4) 5th October 1900	62 poles	1085 0 0

"*Freestone Rock, Clay, and Blaes.*

(5) 5th October 1900	166⅔ square yards	77 4 4

Clay and Blaes.

(6) Clay and Blaes in 87 poles of the areas (1), (2), (3) and (4) [the trustees' claim for clay and blaes in the remaining 149 poles having been reserved] . .	£609 0 0	
And in 21½ poles	150 10 0	
		759 10 0
		£4578 4 4"

The case further stated—"The trustees and the Caledonian Railway Company have agreed that the sums above stated, set opposite to the respective items, and amounting in all to £4578, 4s. 4d., shall be the amount of compensation to be paid to the trustees for leaving unworked the freestone, clay, and blaes in the several areas above mentioned, excepting the clay and blaes in 149 poles reserved as above stated. It has been further agreed that interest at 5 per centum per annum is to be paid from the dates stated in the case of the first five items, and from 1st January 1898 in respect of the sixth item. The Caledonian Railway Company further in virtue of said statute intimated to the trustees in May and September 1901 that they desire the following blocks of coal belonging to the trustees to be left unworked for the support of certain culverts over the stream called the Rotten Calder on the railway line between Newton and Hamilton in the parish of Cambuslang, viz., (1) a block of ell coal in an area extending to 1·582 acres. (2) A block of the main coal in an area extending to 0·623 acres. (3) A block of the splint coal in an area extending to 1·176 acres. The trustees and the Caledonian Railway Company have agreed that the compensation payable to the former for leaving unworked the said blocks of coal shall be £444, 0s. 7d., to bear interest at 5 per cent. per annum from 2nd December 1901."

A question having arisen between the first and second parties as to the nature and extent of their respective rights and interests in the said minerals falling to be left unworked in compliance with the notices above mentioned the present special case was presented.

The first parties maintained that they were not divested of their right of property in the said minerals by the notices or payment of compensation under and in terms of section 71 of the Railways Clauses Consolidation (Scotland) Act 1845, and that the second parties, on payment of the compensation, were not entitled to a conveyance of the said minerals.

The second parties maintained that under the said sections 70 and 71 of the said Railways Clauses Consolidation (Scotland) Act 1845, and in accordance with the general practice in Scotland since the passing of the said Act, they were in respect of the compensation agreed to be paid entitled to have the first party divested of the property in the said minerals by a conveyance thereof to be granted by the first party to the second party.

The question of law was — "Are the second parties entitled to demand from the first parties a conveyance of the minerals above mentioned on payment of the compensation due therefor under section 71 of the Railways Clauses Consolidation (Scotland) Act 1845?"

Argued for the first parties—Sections 70-74 of the Railways Clauses Consolidation (Scotland) Act 1845, which corresponded to sections 77-81 of the English Act (8 and 9 Vict. c. 20), did not divest an owner of minerals of his right of property therein, but merely laid an embargo on his working them. What the owner received was "compensation," not "price." This was the result of the English decisions, and as the sections relating to compensation in the Scottish Act were similar in their terms to the corresponding sections of the English Act the effect should be the same — *Smith* v. *Great Western Railway Co.*, L.R., 1877, 3 A.C. 165, at p. 189; *Errington* v. *Metropolitan District Railway Co.*, 1881, L.R., 19 C.D. 559; *Great Northern Railway* v. *Inland Revenue Commissioners*, [1901] 1 K.B. 416, at p. 425; *Edinburgh and District Water Trustees* v. *Clippens Oil Co., Limited*, August 5, 1902, 4 F. (H.L.) 40, 39 S.L.R. 860.

Argued for the second parties—The practice in Scotland since 1845 had been for the railway company to obtain a conveyance of the minerals where a notice was served by the company. In most of the cases the transaction had been regarded as a purchase and sale—Wood's Conveyancing, p. 112. The dicta relied on by the first parties were *obiter*. Compensation was paid for the minerals, not for the stoppage of working them—*Glasgow, &c. Railway Co.* v. *Nitshill Coal Co.*, December 23, 1848, 11 D. 327, at p. 331; *Caledonian Railway Co.* v. *Henderson and Others*, November 17, 1876, 4 R. 140, pp. 144-146, 14 S.L.R. 92; *Caledonian Raitway Co.* v. *William Dixon, Limited*, November 13, 1879, 7 R. 216, 17 S.L.R. 102, *affd.* July 12, 1880, 7 R. (H.L.) 116, 17 S.L.R. 816; *Nisbet Hamilton* v. *North British Railway Co.*, January 15, 1886, 13 R. 454, pp. 459-60, 23 S.L.R. 295.

At advising—

LORD PRESIDENT—This is a special case in which the point is a very short one. The Caledonian Railway Company with one of their lines go through some of the property belonging to the other parties to the case—the trustees of the late Duke of Hamilton. They intimated to the trustees in May and September 1901 that they desired certain minerals under certain portions of their line to be left unworked; and accordingly that was done and compensation was settled and paid in the ordinary way. The point at issue now between them is whether, that compensation having been admittedly paid, the Railway Company are entitled to obtain from the trustees a conveyance of the minerals. This conveyance the trustees, for reasons which I assume to be quite sufficient, do not wish to grant.

The point therefore rises shortly upon the provisions of the Railways Clauses Consolidation (Scotland) Act 1845. The fasciculus of sections dealing with that matter begins at section 70. Section 70 enacts that the company are not to be entitled to any mines under land purchased by them unless the same shall have been expressly purchased, and that all such mines shall be deemed to be excepted out of the conveyance of said lands; and then section 71 proceeds, that "if the owner, lessee, or occupier . . . 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." . . . And thereupon, if the company thinks the working of the mines is likely to damage the works of the railway "they shall give notice to such owner . . ." that they desire that it be not worked, "and in such case such owner, lessee, or occupier shall not work or get the minerals comprised in such notice, and the company shall make compensation for the same." . . . Section 72 provides that if the railway company is unwilling to pay compensation then the owner may work the mines; and there are certain other sections dealing with matters which have to do with the same things.

Now, it seems to me that the whole scheme of the Act is to exempt minerals from purchase unless they are specially purchased—that is to say, unless an ordinary notice to take is given; and the provision in the 71st section of compensation for leaving unworked materially differs from a purchase scheme, and particularly in these two criteria—first, that the notice to take must be of course within the limits of deviation, whereas the notice under the 71st section may be forty yards beyond the limits of deviation. And then the second point of divergence that I see is this—that notice to take cannot be given after the time when the compulsory powers have expired, whereas the scheme of notice and counter notice under section 71 is applicable until the mineowner commences to work the minerals. Now, I think really that consideration ends the question.

Indeed, the only argument I could find that the Railway Company have was the argument based on some words that are used in the 74th section. Now, section 74 is a general section which provides for the Railway Company making compensation to owners of mines for injury done to them by severance or by the continuous working of the mines being interrupted by the railway, and it is in these terms—"The company shall from time to time pay to the owner, lessee, or occupier of any such mines extending so as to be on both sides of the railway all such additional expenses and losses as shall be incurred by such owner, lessee, or occupier by reason of the severance of the lands lying over such mines by the railway, or of the continuous working of such mines being interrupted as aforesaid, or by reason of the same being worked in such a manner and under such restrictions as not to prejudice or injure the railway, and for any minerals not purchased by the company which cannot be obtained by reason of making and maintaining the

railway." And it is said the use of the word "purchase" introduced here meant the proper transference which ought to be accompanied by a conveyance. The simple answer there is that I think that word "purchase" refers back to the words used in the side-note of sections 71 and 72, where the expression is used that "if the company is willing to purchase the minerals," or "if the company is unwilling to purchase." But that of course is a mere description of the form used in the section, and sends you back to see what is done in the section itself; and when you come to the section itself you do not have a scheme of proper conveyance at all but this scheme of notice and counter-notice. Therefore I venture to think there is no provision here for transference of mines, and that the admission cannot be sanctioned.

I may say I am considerably fortified in this matter by, I will not say, the judgments, but by the dicta of Judges in giving judgment in several English cases. There is the case of *Errington* v. *The Metropolitan District Railway*, 19 Ch. Div. 559. The case itself, I may say, merely decided that under a notice to take you must serve a special notice for minerals; but then the whole matter was discussed, and in particular the 78th section of the English Act (which is the equivalent of the 71st section of the Scottish Act) was considered, and Lord Justice Brett there says—"Under the 78th section, after the compensation has been paid by the railway company the minerals do not belong to the railway company. They continue to be the property of the landowner. The railway company cannot touch the minerals." And in the same way, in the case of the *Great Northern Railway Company* v. *The Inland Revenue Commissioners, aff.* [1901] 1 K.B. 416, I find that on page 427 Lord Justice Collins, speaking again of this section, says—"No 'property' and 'no estate or interest in any property' was transferred to or vested in a purchaser. All that happened was that the mineowner came under a statutory obligation not to work or get a certain defined portion of coal which continued to be his own property."

Now, these are opinions which of course are not binding on us, but are of very great weight so far as the argument of this use of the word "purchase" is concerned. That was equally plain there, for you will find just the same use of "purchase" in the 81st section of the English Act, which is the counterpart of section 74 of the Scottish Act. For these reasons I am of opinion that your Lordships should answer the first question in the negative.

LORD ADAM concurred.

LORD M'LAREN—It is certain that there are no express words in the Scottish Act giving a railway company or a public company, as it may be, a right to demand a conveyance in exchange for payment of compensation for minerals. In this respect the statutory provision stands in marked contrast to the provisions regulating the acquisition of lands, where the acquirer of the lands is entitled to a conveyance, and the form of the conveyance is prescribed by the statute. I cannot help thinking that this was not an undesigned omission, but, on the contrary, that for a reason that I shall immediately indicate, it was not intended that the company acquiring a right to have the minerals unwrought should also be entitled to a conveyance as on a purchase. The key to the interpretation I think is furnished by Lord Selborne's opinion in the case of *Dickson* v. *The Caledonian and South Western Railway Companies*, where that very eminent and learned Judge says that even if a company pay compensation they have not a right to work the minerals for which they have paid. Following Lord Selborne's opinion, I can come to no other conclusion than that the compensation was to be paid merely for support, and that a company which makes a payment is not to be entitled to a conveyance which would entitle the company if it thought proper to sell the minerals. As long as they are not allowed to sell the minerals the company is not likely to claim anything more than is necessary for the support of the line, and that is all that was intended by statute that it should get. There are some other dicta on the subject in the Scottish cases, but none of them appear to touch this point. I notice that in the case of *Nesbit Hamilton* Lord Adam uses the word "purchase," but then he is speaking about the right to acquire mines above formation level, which is an incident of the original purchase of the lands, and that cannot be cited as an authority in aid of the contention of the company in this case. In another case, I think the case of the *Caledonian Railway Company* v. *Henderson*, Lord President Inglis speaks of the company acquiring the minerals. I do not know that this expression goes very far, because a company certainly acquires the the minerals for a purpose—for the purpose of support—and that really does not touch the question whether the company is entitled to all the rights which a proprietor holding a conveyance would have. And then there is Lord Fullarton's dictum in the case of the *Barrhead Railway Company*, which seems to me to be just as inconclusive as all the rest.

In these circumstances, so far as authority is concerned, I agree with your Lordship in the chair in attaching greater weight to the English decision in which the point was raised at all events by clear implication, and I think the same observation may be made with reference to Lord Selborne's opinion in *Dickson's* case, because his Lordship would not have come to the conclusion that the company was not entitled to work the minerals if he had thought that they were to get a conveyance that would give them all the rights of heritable proprietors. I therefore agree that the first question should be answered in favour of the Duke of Hamilton's trustees.

LORD KINNEAR—I am very clearly of the same opinion for the reasons your Lordship has given.

The Court answered the question stated in the negative, and decerned.

Counsel for the First Parties—Younger, K.C.—Hon. W. Watson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Second Parties—Guthrie, K.C.—Orr Deas. Agents—Hope, Todd, & Kirk, W.S.

Tuesday, July 11.

FIRST DIVISION.

C D *v.* INCORPORATED SOCIETY OF LAW-AGENTS.

(See *ante* October 18, 1901, 39 S.L.R. 4, 4 F. 4.)

Administration of Justice—Law-Agent—Forgery—Restoration to Roll—Efflux of Time since Offence.

In 1901 a law-agent who, having been convicted in 1894 of forging and uttering a pretended interlocutor of Court, and having therefor been sentenced to fifteen months' imprisonment, had had on his own application his name removed from the Register of Enrolled Law-Agents, presented a petition for re-admission, which was supported by letters and certificates testifying to his good conduct since his liberation, and opposed by the Incorporated Society of Law-Agents in Scotland. The Court refused the petition.

In July 1905 the petitioner again, without there being any change of circumstances, presented a petition for re-admission, which was again opposed by the Incorporated Society. The Court *refused* the petition.

Opinion (*per* Lord President) [differing from Manisty (J.) in *re William Unwin* 1882, 72 L.T. 388] that the crime of forgery by a solicitor is not an unpardonable offence.

C D, an enrolled law-agent, who had pleaded guilty to a charge of forging and uttering a pretended interlocutor of Lord Low on 20th July 1894, and on whom, in consequence, sentence of fifteen months' imprisonment had been pronounced, had his name removed from the Register of Law-Agents on his own application in 1896, and in 1897 from the rolls of law-agents practising in the Court of Session and the local Sheriff Court. In 1901 he presented a petition to the Court for an order restoring his name to the said register and rolls, supporting his application by numerous letters and certificates as to character since his liberation. It was opposed by the Incorporated Society of Law-Agents in Scotland, and was refused by the Court (see *ante* October 18, 1901, 39 S.L.R. 4).

On 8th July 1905 C D renewed his application to the Court by presenting the present petition, which however set forth no new circumstance save that eleven years had now elapsed since the date of his offence, and that the petitioner had left the employment of Mr Andrews, solicitor, Edinburgh, in May 1904 after being with him a period of eight years. No letters or certificates of character were annexed to this petition, but reference was made to the previous one and the documents connected with it, and the Court was reminded of the certificates which were then produced.

The petition was ordered to be served upon the Incorporated Society of Law-Agents in Scotland, and the Society appeared to oppose, and lodged answers. In the answers it was averred that no change of circumstances had taken place to warrant the renewed application, and it was stated that the Society had received from the President of the Society of Procurators of Midlothian an excerpt of a minute of a meeting of the Council of that Society held on 2nd June 1905 stating that the Council was, after careful consideration, unanimously of opinion that it would not be in the interests of the profession that the petitioner's application be granted and therefore disapproved thereof.

The petitioner stated at the bar that in the previous application the Lord President had apparently thought the petitioner wished admission to the Society of Law-Agents. The petitioner did not wish admission to any society, but merely to be again on the register of enrolled law-agents. That, in the circumstances, the Court might allow, and the prayer of the petition should therefore be granted—*A B* v. *Incorporated Society of Law-Agents*, July 9, 1895, 22 R. 877, 32 S.L.R. 660; *re William Unwin*, 1882, 72 L.T. 388; *in re Robins*, 1865, 34 L.J. Q.B. 121; *Anonymous*, 1853, 17 Beavan, 475.

Counsel for the respondents argued that the petition should be refused. There were few cases of a solicitor getting his name restored to the register, and that only in exceptional circumstances which did not exist here. There was no case where forgery was the offence—*Garbett*, 1856, 18 C.B. 403.

At advising—

LORD PRESIDENT—In this petition for readmission as a law-agent we are called upon to discharge what is always a delicate and sometimes a painful duty. The application is not the first made by the petitioner, because a similar application made by him was refused in 1901. I think I am stating no more than the fact when I say that since the date of that judgment there has been no change of circumstances even alleged except the change operated by the efflux of a certain portion of time. It is a fair consideration for your Lordships whether what may have been considered premature at that time is now any longer premature. Upon the general principles which should guide us I do not think there can be much room for doubt. On the one hand we have to guard very carefully the purity of the roll of law-agents who are admitted to practise before the Courts of this country.