LORD M'LAREN and LORD PEARSON wer absent.

The Court answered the first alternative of the first question in the affirmative, the second alternative of the second question in the affirmative, and the third question in the affirmative.

Counsel for the First Parties—James Adam. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Second Parties—Macfarlane, K.C.—Grainger Stewart. Agents—J. & F. Adam, W.S.

Counsel for the Third Parties—Macphail—C. H. Brown. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Fourth Parties—Hon. Wm. Watson. Agents—Blair & Caddell, W.S.

Counsel for the Fifth Parties—A. P. Carnegie. Agents—Rutherfurd & Don Wauchope, W.S.

Tuesday, November 24.

SECOND DIVISION.

[Lord Dundas, Ordinary.

NORTH BRITISH RAILWAY COMPANY *v.* BUDHILL COAL AND SANDSTONE COMPANY AND OTHERS.

Railway—Mines and Minerals—Sandstone—Railways Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 70.

Held (Lord Ardwall *dissenting*) (1) that sandstone is a mineral within the meaning of section 70 of the Railways Clauses Consolidation (Scotland) Act 1845, and (2) that the substance comprising the upper portion of the stratum of sandstone lying between the subsoil and the sandstone proper, which was of value when ground down as moulder's sand, was also a mineral in the sense of the section, although it was soft and friable and not hard enough for building purposes.

Railway—Mines and Minerals—Notice of Intention to Work Minerals—Bona Fides—Railways Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 71.

Circumstances in which *held* that a railway company had failed to prove want of *bona fides* on the part of lessees of the minerals under the railway in serving a notice under sec. 71 of the Railways Clauses Consolidation (Scotland) Act 1845 of intention to work the minerals and subsequently working them, although there was evidence that the substance obtained was not of great value and the mode of working it was for it unusual.

The Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33), enacts, sec. 70—"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 and 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 . . . 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 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 part thereof, should be left unworked, and if they be willing to make compensation for such mines or minerals, . . . 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 . . . . 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, and occupier thereof respectively. . . ."

On 14th December 1906 the North British Railway Company brought an action of declarator and interdict against the Budhill Coal and Sandstone Company, Glasgow, and others, in which they sought declarator (*first*) that the pursuers, as proprietors of certain lands at Shettleston Station, in the parish of Shettleston, were proprietors "of (*a*) the soil, (*b*) the clay, (*c*) the sand, and (*d*) the other substances presently being worked and removed by the defenders the Budhill Coal and Sandstone Company, . . . lying in, under, or upon the said lands, and that the said soil, clay, sand, and other substances are not comprehended or included either (1) in the mines of coal, ironstone, slate, or other minerals deemed to be excepted in terms of section 70 of the Railways Clauses Consolidation (Scotland) Act 1845, out of the conveyances of the said lands . . . . or (2) in the mines or minerals expressly excepted out of the said conveyances so far as mines or minerals are expressly excepted therefrom;" (*second*) that the defenders were not entitled to work or remove the above-named substances; and (*third*) that the defenders were not entitled to work or remove any of the said substances so as to injure the pursuers' lands or their works, railway, and station, or so as to interfere with their traffic.

Conclusions for interdict followed.

The lands in question were purchased by the pursuers at different times for the purposes of their railway undertakings. In the case of the portions of land marked Nos. 1, 2, and 2A, all mines of coal, ironstone, slate, or other minerals under these lands were excepted out of the conveyances to the company in terms of the Railways Clauses Consolidation (Scotland) Act 1845. In the case of the portion of land marked No. 3 the disposition held by the pursuers contained a reservation excepting from the conveyance "the whole coal, ironstone, limestone, and fireclay, and whole other metals and minerals in the lands above disponed . . . with full power and liberty to those in right thereof . . . to search for, work, win, and carry away the same, so far as not already done . . . declaring that we and our heirs and successors shall not be liable or responsible in any way to our said disponees or their foresaids for any damage which may be occasioned to the said lands or to the buildings or erections which may be erected thereon by the working and carrying away the minerals and others before reserved. . . ." In the case of the lands marked No. 4 the disposition thereof held by the pursuers contained the following reservation:—"Reserving always from this conveyance the whole coal, mines, and minerals in and under the piece of ground hereby disponed, and full right and liberty to work the same, but only by pits sunk outside of the piece of ground hereby disponed and subject to and in terms of the provisions of the Railways Clauses Consolidation (Scotland) Act 1845."

On 27th December 1905 the Budhill Coal Company sent a notice to the pursuers intimating, in terms of section 71 of the Railways Clauses Consolidation (Scotland) Act 1845, that they intended, after the lapse of thirty days from the service of the notice, to work the minerals contained in their lease under the portion of the railway, and that they intended (without prejudice to their right to vary the order of working) to commence to work the sandstone at a stated point, and to work it in a certain direction, the seam of sandstone being about 12 feet thick, and thereafter to work the building rock underneath the sandstone, and thereafter the seam of coal thereunder, and the fireclay associated with the coal. The company shortly thereafter commenced to excavate and to remove what the pursuers averred to be "soil and common clay, and sand in a more or less consolidated condition mixed with clay."

The pursuers averred—"(Cond. 5) . . . None of these substances are minerals within the meaning of the Railways Clauses Consolidation (Scotland) Act 1845, or of the express reservation hereinbefore quoted. None of these substances so removed is coal, ironstone, or slate, or anything *ejusdem generis*."

In answer the defenders stated—"(Ans. 5) . . . Explained that the defenders' workings are in the upper part of a post or stratum of sandstone about 40 feet in thickness, which extends generally below all the surface of the properties. . . . A bore put down in the north-east corner of the ground coloured blue shows that on the surface there are 3 feet of soil, and then about 8 feet of brown clay, and then 4 feet of hard white sandstone, and then 8 feet of hard white sandstone shading into grey, then 14 feet of fine grey sandstone, then again about 13 feet of hard sandstone; and coal lies below. What the defenders are at present working is part of the fine grey sandstone divided into two or three beds by partings of sandy clay, which vary in thickness from a hair line up to three-eighths of an inch. It is a peculiar sandstone containing less silica and a little more alumina, iron oxide, lime and magnesia than usual, and it is a material of peculiar quality, difficult to procure and well suited, when ground down, for use in some kinds of important castings, and is of a high commercial value. . . . Explained further that neither common clay nor sand nor soil has been wrought by the defenders from the pursuers' lands."

The pursuers further averred—"(Cond. 6) The said notice was not given *bona fide* but *mala fide*. The substances which are being worked are not being worked in the ordinary course of business. The defenders are not working any of the substances in question as stone but as sand. . . . The said substance cannot be worked at a profit, and is not being worked for its value, but with the view to injure the lands, railways, and station, and works of the pursuers, and thereby compel them to treat the substance as a mineral, stop its working, and make compensation." These averments were denied by the defenders.

The pursuers pleaded, *inter alia*—"(1) The pursuers are entitled to decree in terms of the first declaratory conclusion of the summons in respect that—(*a*) The soil, clay, sand, and other substances which are being worked and removed by the defenders . . . are not mines of coal, ironstone, slate, or other minerals within the meaning of the Railways Clauses Consolidation (Scotland) Act 1845. (*b*) The soil, clay, sand, and other substances in the lands belonging to the pursuers . . . are no part of the coal, ironstone, limestone, and fireclay, and whole other metals and minerals excepted and reserved in the foresaid disposition held by the pursuers of the said lands. . . . (3) The notice given by the defenders, the Budhill Coal and Sandstone Company, . . . having been given *mala fide* for the sole purpose of compelling the pursuers to compensate the said defenders, and the workings by the said defenders having been proceeded with *mala fide* not in the ordinary course of working the said substances, but merely to rear up a fictitious claim against the pursuers, interdict should be granted as craved. (4) The pursuers being entitled to support for their lands, railways, station, and works from the adjoining lands are entitled to declarator in terms of the third conclusion of the summons and to interdict as second craved."

The defenders pleaded, *inter alia*—"(5) *Separatim*—The sandstone worked by the defenders being a mineral in the sense of the titles and of the statute, and being worked to profit by the defenders in a manner proper and necessary for such profitable use thereof, the defenders should be assoilzied."

On 22nd June 1907 the Lord Ordinary (DUNDAS) after a proof, the import of which sufficiently appears from his Lordship's opinion (*infra*), dismissed the action.

Opinion.—" . . . The proximate cause of the action was a notice by the defenders, the said lessees, to the pursuers, dated 27th December 1905, whereby they intimated, in terms of section 71 of the Railways Clauses Consolidation (Scotland) Act 1845, that they intended, after the lapse of thirty days from the service of the notice, to work the minerals contained in their lease under that portion of the railway shown upon the accompanying plan, it being their intention (without prejudice to their right to vary the order of working) to commence to work the sandstone at or near a stated point in the area coloured blue, and to work it in a northerly and north-westerly direction, the seam of sandstone being about 12 feet thick, and thereafter to work the building rock underlying the said sandstone, and thereafter the seam of coal thereunder and the fireclay associated therewith. The pursuers served no counter notice, and the said defenders commenced operations at or near the point indicated by sinking a mine and carrying their workings under a portion of the ground coloured brown, and shown on the plan, with the result that a certain amount of subsidence occurred at and near Shettleston Station. During the proof and in the arguments a variety of questions of general importance were developed. I shall endeavour to deal with these; but I do so under the protest that the summons is not, as I shall presently explain, so framed as, in my opinion, to raise them sharply for decision. The pursuers' counsel argued that sandstone is not a mineral within the meaning of the conveyances to the Railway Company, or any of them; and further that, in any event, what the defenders are at present working and removing is not of that character. It is, I think, absolutely concluded by authority, so far as I am concerned, that the exception of 'mines of coal, ironstone, slate, and other minerals' in section 70 of the Railways Clauses Consolidation (Scotland) Act 1845 covers freestone, including in that generic term sandstone and limestone. That was decided in the recent case of *Glasgow and South Western Railway* v *Bain*, 1893, 21 R. 134. But *Bain's* case does not stand alone. In *Jamieson*, 1868, 6 S.L.R. 188, the Lord Ordinary (Kinloch) so decided in regard to limestone, and his decision, which was acquiesced in, was expressly approved by the Inner House in *Nisbet Hamilton*, 1886, 13 R. 454, and by some, at all events, of the judges in *Farie*, 1887, 14 R. 346. It is true that the last-cited case was reversed on appeal by the House of Lords (1888, 15 R. (H.L.) 94), but I observe that Lord Watson, who was one of the majority in that House, said (at p. 101) 'the important question still remains, what are the minerals referred to other than coal, ironstone, or slate? My present impression is that "other minerals" must necessarily include all minerals which can reasonably be said to be *ejusdem generis* with any of those enumerated. Slate being one of them, I do not think it would be possible to exclude freestone or limestone *strata*.' In Bain's case (*sup. cit.*) the Lord Justice-Clerk said, 'Accordingly, in the case of *Farie*, in the House of Lords, it appears to have been regarded as impossible to exclude freestone and limestone when slate was included.' I may also refer to the decision of the House of Lords in *Midland Railway Company*, 1889, 15 A.C. 19, which is to the same effect. It was, indeed, argued for the pursuers that the exception in section 70 does not include stone at all. This argument was based upon certain dicta by Lord Macnaghten in *Farie's* case (15 R. (H.L.) at pp. 110, 111), where his Lordship, in developing his view (which has since been overruled, *e.g.*, in *Midland Railway Company, sup. cit.*) that 'mines' do not include open cast workings, dealt with sections 25 and 36 of the Scots Act of 1845 'with respect to the temporary occupation of land.' I doubt whether Lord Macnaghten's dicta, which of course must be regarded as of great weight, go the length of supporting the pursuers' argument, but if they do so, then I think they must give way to the series of decisions already referred to, which directly negative the pursuers' proposition. The pursuers' counsel further founded upon the cases of *Menzies* v. *Breadalbane*, 10th June 1818, F.C. *aff.* 1822, 1 Shaw App. 225, and *Duke of Hamilton*, 1841, 3 D. 1121. In the first of these, the 'Bolfracks' case, the rubric in the Court of Session report is—'Found that a reservation by the superior in a feu-charter of "the haill mines and minerals, of whatever nature and quality," does not comprehend a quarry of fine stone of peculiar qualities useful for building.' The report describes the subject in dispute as 'a vein of stone of a rare species, peculiarly fitted for architectural purposes by its admitting of ornamental finishings and by its resisting the weather.' The defender there argued that 'in a feu-grant, particularly of a highland property, the parties must have intended to convey all the rocks of which the property was composed, because in many districts the property consists of little else.' The Lords by a majority, and reversing the Lord Ordinary (Pitmilly), found as above. The judgment was affirmed by the House of Lords. The rubric in 1 Shaw App. 225, broadly describes the subject as 'a quarry of freestone.' The briefly reported opinion of the Lord Chancellor (Eldon) proceeds upon the distinction between the canons of construction applicable to leases and feu-charters respectively and concludes thus—'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.' The *Duke of Hamilton's* case decided 'in conformity with the case of *Menzies* v. *Breadalbane*, that a reservation in an excambion of the liberty of working coal and other metals, fossils and minerals, did not comprehend freestone.' The learned Judges evidently regarded *Menzies'* case as establishing a general principle to the effect stated — a view which, with all respect, I think might require to be reconsidered if a similar question should arise. But it is sufficient for the present purpose to observe that cases decided upon the construction of feu-charters or other agreements between parties can afford little or no assistance in determining the true meaning of a statutory conveyance embodying the statutory exception of mines and minerals. This has been repeatedly enunciated by the highest authorities, and is perhaps nowhere more clearly laid down than it was by Lord Herschell in *Midland Railway Company*, 1889, 15 A.C., at p. 27. So far, therefore, as regards the pursuers' conveyances of the lands Nos. 1, 2, 2A, and 4 are concerned, I am of opinion that sandstone is within the exception expressed in section 70 and impliedly embodied in the deeds. It may be open to question whether a similar proposition can be affirmed in regard to the pursuers' title to the pink lands No. 3. But I see no reason to decide that matter one way or the other, because there is no suggestion that the defenders are about to carry their workings under that area, and there are obvious reasons which render such a course improbable.

"I turn now to the pursuers' subsidiary argument, viz., that what the defenders are at present removing by their workings is not sandstone within the meaning of the said exceptions in their titles. There is, I think, no dispute that there is a large amount of undoubted sandstone in this district, though its quality is said to vary from part to part. The defenders are at present engaged in blasting the upper portion of the material and converting it into moulders' sand, for which it appears to be suitable. They state that their intention is, when they reach what they allege to be harder sandstone suitable for building, to work that for sale by open cast quarry. The question raised by the argument must, I consider, be looked at in the light of the whole evidence as to the character of the subjacent materials in the vicinity of the defenders' workings. The pursuers' witnesses describe the material which is now being got out as 'a peculiar kind of rotten stone, decomposed stone,' 'consolidated sand and clay,' 'rotten sandstone,' 'a soft rotten rock,' 'stone by courtesy, not building stone,' and so forth. The defenders' witnesses, on the other hand, say that what is presently being wrought is suitable for moulders' sand, and that below there is a quantity of good building sandstone. Some of them describe the latter more modestly as 'an ordinary building freestone, poor of quality,' 'a poor variety of building stone but could be used as such,' 'a first-class quarry of good working freestone for speculative building purposes,' 'the usual building stone, I would not compare it with the best, such as Craigleith,' and so forth. The pursuers' counsel argued, as I understood him, that neither the softer stuff now being wrought (with which alone the summons deals), nor the alleged harder material below (which appears to be included in the language of his first plea-in-law), can be dealt with as minerals, because, as he put it, they are of no merchantable value, not being capable of being wrought to profit. I pause to observe that I do not think that capacity of earning profit is the true test of whether or not a stone is 'merchantable' and is therefore a mineral, in such a question as this. For example, if a person owned a small seam of coal under a railway, I do not imagine that the company would be entitled to prohibit him from removing it merely because he might not be able to sell it at a profit. The proposition which the pursuers contend for is said to have been laid down in *Nisbet Hamilton*, 1886, 13 R. 454. In that case a proprietor sought payment for rock removed by a railway company from the sides of a railway cutting within the limits of the land compulsorily acquired from her by the company. The latter argued in defence (*a*) that the rock did not belong to the pursuer but to the company, because by their conveyance they acquired the land and all that might be in it, within the limits of the conveyance, down to formation level; (*b*) that the rock was not a mineral within the meaning of section 70; and (*c* that nothing had been removed except what was necessary for the safe working and maintenance of the line. The Lord Ordinary (Fraser) decided in favour of the company solely upon the third ground. Lord Adam, who pronounced the opinion of the Court in the First Division, had some doubt about the ground of decision, but he decided for the company upon the broad general argument first above stated. Nothing else was necessary to the judgment; but Lord Adam, in considering the second of the company's contentions, did express an opinion that 'while the stone was of some value to the defenders for making or repairing embankments . . . . it was of no merchantable value whatever.' By this I do not think his Lordship intended to express or imply that in order to come within the exception in section 70 it is necessary that stone should be wrought, or capable of being wrought, at a profit. I am confirmed in this view by what the same learned Judge said in *Farie's* case, 14 R., at pp. 366, 367. Lord Adam there quoted, with approval, the tests applied by English judges, viz., that the material should be 'of some value' or 'of commercial value;' and he also referred to the opinion of Lord Romilly, M.R., in *Checkley*, L.R., 4 Equity 19, where his Lordship used the words 'anything . . . which is useful for any purpose whatever.' If I have rightly interpreted Lord Adam's meaning,

it appears to be in harmony with the views upon this matter of the learned Lords in *Farie's* case, and particularly with that expressed—15 R. (H.L.), at p. 96—by the Lord Chancellor (Halsbury). I observe that in a recent English case his Lordship reiterated his opinion upon the point, and said, during the course of the argument—'I think it is absolutely wrong to say that the question whether a thing can be worked at a profit or not is to determine whether it is a mineral or not'—*Todd, Birleston, & Company*, 1903, 1 K.B. 603, at p. 606. I refer also to Lord Herschell's explanation in *Midland Railway Company*, 1889, 15 A.C., at pp. 26-27 of his opinion in *Farie's* case, 15 R. (H.L.), at p. 105. But I need not labour this matter further, because I think it is clear, looking to the mass of evidence *hinc inde* contained in the proof, that I am not in a position here and now to affirm, even to the restricted extent and effect which the summons contemplates, that the 'substances presently being worked' are not such as fall within the exceptions referred to; and still less that such is the case as regards the 'similar substances in the remainder of said lands' to which the pursuer's first plea-in-law seems to extend.

"I believe that this is the stage at which I ought to notice an argument which was strenuously advanced for the pursuers, but of which I can find no trace upon the record. It was to the effect that, even assuming that the substances which the defenders have begun to work out are minerals within the exception contained in section 70, they have no right so to work them as to injure or bring down the surface of the pursuers' land. It was conceded that the contrary was decided forty years ago by the House of Lords in the English case of *Bennett*, 1867, 2 E. and I. App. 27, which has not only been followed by numerous decisions in England, but has hitherto been regarded as good law in Scotland—see, for example, *Haunchwood Brick, &c., Company*, 1882, 20 Ch. Div. 552; *Ruabon Brick, &c., Company*, 1893, 1 Ch. 427; *Blades*, 1901, 2 Ch. 624; *Todd, Birleston & Company*, 1903, 1 K.B. 603; *Farie's* case, *sup. cit.*; *Dixon*, 1879, 7 R. 216 (*per* Lord Adam), referred to in *Farie's* case by Lord President Inglis and Lord Adam, 14 R., at p. 353 and p. 365, and by Lord Herschell in *Midland Railway Company*, 1889, 15 A.C., at p. 32; Ferguson's 'Deas on Railways,' p. 192. It is, however, now urged that there is a vital though hitherto unnoticed distinction between the language of section 79 of the English Act and the corresponding section 72 of our own statute. I am satisfied, upon a careful study of the two sections, that this is an entirely mistaken idea. The language of the sections is, for some reason, different, but the meaning appears to me to be the same. The scheme of the English section is that if before the expiration of the thirty days the company do not state their willingness to treat with the mine owner or lessee for payment of compensation, it shall be lawful for the latter to work the mines, or any part thereof for which the company shall not have agreed to pay compensation, '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 where the same shall be situate;' and then the section proceeds, quite intelligibly, though perhaps tautologically, to provide that if any damage be occasioned to the railway by 'improper working of such mines,' the same shall be repaired and made good by the mine owner at his own expense. Section 72 of the Scottish Act is not, to my thinking, substantially different. It provides that, upon the same hypothesis, it shall be lawful for the mine owner or lessee to work the mines, or such parts thereof for which the company shall not have agreed to make compensation, up to the limits of the mines for which they shall have agreed to make compensation, 'in such manner as such owner, lessee, or occupier shall think fit, for the purpose of getting the minerals contained therein,'—the words quoted seem to me to be substantially equivalent to those which I quoted from the English section, the idea of both being, as I think, proper as contrasted with improper mining operations; and the section proceeds, perhaps unnecessarily, as in the case of the English section, to state the converse proposition, viz., that if any damage be occasioned to the railway '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,'—and this is, I think, the analogue of the 'improper working' of the English section,—the damage shall be made good by the owner or lessee, at his own expense.

"If the views which I have now expressed, perhaps at too great length, are correct, I think it is manifest that no practical effect can be given to the (*first*) declaratory conclusion of the summons. There is no evidence that the defenders are removing 'soil' or 'clay,' except very thin streaks of clay, the removal of which would be a necessity of working the sandstone, assuming that the defenders are entitled to work out the latter. As regards 'sand' and 'other substances,' the summons is not framed so as to meet in any adequate manner the evidence and arguments to which I have referred, and in regard to which my opinion is substantially adverse to the pursuers. Nor, in my opinion, can the (*second*) declaratory conclusion, and the interdict relative to it, receive practical effect if the views already expressed are sound, unless, indeed, the allegation of *mala fides* on the part of the defenders, to which I shall presently allude, is well founded.

"The (*third*) declaratory conclusion can, in my judgment, be disposed of in a few words. It is really based upon a claim by the pursuers for adjacent support; and their counsel referred to the recent case of *Turners Limited*, 1904, 6 F. 900. But assuming everything else in the pursuers' favour, it seems sufficient to say that there

is nothing, so far as I can see, in the record or in the evidence, to warrant the conclusion.

"I now come to a question which, if I do not mistake, lies at the very core of the pursuers' case, but which, oddly enough, is not specifically referred to in their summons, though it might probably be given effect to, if necessary, under the conclusions for interdict. The point is sharply enough raised by the pursuers' third plea-in-law, and is to the effect that the defenders' notice was 'given *mala fide* for the sole purpose of compelling the pursuers to compensate the said defenders,' and that their workings have been proceeded with *mala fide*, 'not in the ordinary course of working the said substances, but merely to rear up a fictitious claim against the pursuers.' I do not doubt that now and again unfounded claims are brought against the railway companies with the sole object, in the words of the pursuers' witnesses, of 'harassing' or 'getting at' the company, nor that if such a case were fairly proved the Court would be entitled and bound to interfere on the company's behalf. But I think that very clear proof would be required to justify such intervention. A case of this sort was presented, but failed, in *Midland Railway Company*, 1887, 37 Ch. Div. 386. *affd.* 1889, 15 A.C. 19. In that case there had been no workings, nor had any lease of the minerals been granted. I entirely accept the law there laid down by Cotton, L.J., and quoted with approval by Lord Herschell, that 'there must not only be an expression of the desire, but an honest actual existence of the desire, to work either by himself or his lessees, to justify an owner in giving such a notice. If he gave the notice when it was obvious that there were no minerals, or that he could not possibly intend either to let or work them himself, that would be vexatious, and the Court would not allow that to be acted upon.' But the pursuers' case falls in my judgment far short of the sort of case there supposed. It depends upon the evidence as to the history of the Mathers' estate and of its minerals; upon the methods resorted to by the lessees for mining out the 'rotten rock' for moulders' sand; and upon the opinions of the pursuers' skilled witnesses as to the impossibility of working any of the subjacent materials to a profit. The pursuers' case is I think at its best one of suspicion. On the other hand, I saw no reason, so far as their demeanour was concerned, to doubt the honesty of the evidence given by Mr Mather and the Messrs Loudon. Further, I find it difficult to suppose that a scheme which is being carried on under the auspices and with the approval of Mr Rankine, a witness upon whose experience and integrity the Court is accustomed to rely, is one of the *mala fide* character which is alleged against it. Mr Rankine depones that he 'had nothing to do with the actual looking out for a tenant,' but after the tenants were accepted the matter came before him. He 'unquestionably approved of the sandstone being let in the area in question.' He considers that the defenders' mine, the sinking of which was accomplished before his advice was sought, is 'an excellent means of ascertaining what is there,' and says that 'what has been done in the way of opening out the stone here has been properly done with a view to the getting of the material in the shape of sandstone in this ground, although I would regard it as preliminary to open cast for the harder material.' Other witnesses of experience in their respective lines of business, such as Mr M'Laughlan and Mr Barlas, speak confidently as to the future prospects of the concern; and there is a considerable body of evidence to the effect that the defenders' sandstone is at least nowise inferior to that obtainable at Haughyett Quarry, the contents of which appear to have been regarded in *Bain's* case (21 R. 134) as being good workable freestone. Mr Tatlock, the well-known analyst, also depones—'The harder rock which I saw recently appeared to be fair building rock. It would not rank with the best, such as Craigleith, but it is quite as good as well-known building stones that I have had to examine.' I may observe in passing that Mr Tatlock's earlier reports upon the samples submitted to him seem to me to have as little to do with the real merits of this case as Mr Marshall's much vaunted bottle of muddy water. I do not refer to these witnesses for the defenders as indicating that I agree with their evidence, but merely for the purpose of showing why I cannot accept the view that this claim is a wholly *mala fide* and vexatious one. I carefully refrain from making the smallest indication of any formed opinion as to the value, if any, of the defenders' subjacent materials. That is a question which in my judgment must, failing agreement, be decided by arbiters or an oversman and not by this Court. All that I now say is that I am not prepared upon the evidence before me to sustain the pursuers' third plea-in-law. In conclusion I may refer to a passage in the opinion of Chitty, J., in the *Midland Railway* case (37 Ch. Div. p. 392), as fairly representing my views upon the point, and perhaps affording some answer to Mr Hall Blyth's complaint as to his experience of 'inflated damages.'

"I do not think that there is any other point which requires to be dealt with. Upon the whole matter I am satisfied that the action must be dismissed with expenses. The chief regret which I entertain is that it should have been necessary to deliver so long an opinion in regard to a summons which does not directly raise any of the issues with which I have thought it my duty to deal."

The pursuers reclaimed, and argued—(1) The substance *de facto* being mined was not sandstone but sand which had not reached such a degree of consolidation as to pass from sand to sandstone. Accordingly it was not a mineral within the meaning of section 70 of the Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33). It was admittedly unsuitable for building purposes, though no doubt when ground down it had a certain value as moulders' sand. Sand was admittedly not a mineral. A mine-owner

had no further right than to remove soft substances round or above a mineral; he was not entitled to sell it—*Ruabon Brick and Terra Cotta Company* v. *Great Western Railway Company*, [1893] 1 Ch. 427. (2) Assuming that the substance being worked was sandstone, sandstone was not a mineral within the meaning of sec. 70 of the 1845 Act. Owing to the diversity of judicial opinion as to the meaning of the term 'mineral' it was impossible to get a criterion of general applicability; the best manner of determining the question was to consider each *subjecta materies*, and see if it came within the words of the statute. At common law a reservation of minerals in a conveyance had been held not to include freestone—*Menzies* v. *Breadalbane*, June 10, 1818, F.C., *aff.* 1822, 1 Sh. App. 225; *Duke of Hamilton* v. *Bentley*, June 29, 1841, 3 D. 1121. "Mines and minerals" must receive the same interpretation under the Railways Clauses Act as they received at common law—*Magistrates of Glasgow* v. *Farie*, January 21, 1877, 14 R. 346, 24 S.L.R. 253, *rev.* August 10, 1888, 15 R. (H.L.) 94, 26 S.L.R. 229. The only cases where sandstone had been held to be a mineral were *Jamieson* v. *North British Railway Company*, 1868, 6 S.L.R. 188, and *Glasgow and South-Western Railway Company* v. *Bain*, November 15, 1893, 21 R. 134, 31 S.L.R. 98; but in the first of these the judgment went on the assumption that every substance of merchantable value below the soil was a mineral, and this assumption was negatived by the cases of *Magistrates of Glasgow* v. *Farie*, *cit. supra*; *North British Railway Company* v. *Turners Limited*, July 2, 1904, 6 F. 900, 41 S.L.R. 706; *Todd, Birleston, & Company* v. *North-Eastern Railway Company*, [1903] 1 K.B. 603; *Midland Railway Company* v. *Haunchwood Brick and Tile Company* (1882), L.R., 20 Ch. D. 552. The substance in question here though merchantable as sand was not merchantable as sandstone, and could not fall under the statutory reservation—*Nisbet Hamilton* v. *North British Railway Company*, January 15, 1886, 13 R. 454, 23 S.L.R. 295. (3) The defenders' notice to the Railway Company was not given *bona fide*, for (*a*) this was the only case in Scotland where moulders' sand was worked by mining, the normal method being by working open-cast; (*b*) the direction of the workings, namely, towards the railway, was not the reasonable direction; (*c*) the work was not being done at a profit, the advice taken by the defenders from experts was to the effect that it could not be worked profitably; and (*d*) the defenders had endeavoured to feu the ground for building purposes, and this was not consistent with a belief that this was a rich mineral field. On the question of *bona fides* reference was made to *Glasgow and South-Western Railway Company* v. *Bain* (*cit. supra*); *Midland Railway Company* v. *Haunchwood Brick and Tile Company* (*cit. supra*); *Midland Railway Company* v. *Robinson*, (1887) L.R., 37 Ch. Div. 386, *aff.* 1889 L.R., 15 A.C. 19; *Magistrates of Glasgow* v. *Farie* (*cit. supra*).

Argued for the respondents—(1) The substance being worked was sandstone; there was evidence to show that it was capable of being used for building purposes, and the fact that the defenders chose to grind it down did not deprive it of its character as sandstone. (2) Sandstone was a mineral in the sense of section 70 of the 1845 Act. The material being worked and what was admittedly sandstone formed parts of a stratum, and the soft upper part had a special value as moulders' sand. The only two elements necessary to make it a mineral protected by the 1845 Act were therefore present—*Midland Railway* v. *Checkley*, (1867) L.R., 4 Eq. 19; *Nisbet Hamilton* v. *North British Railway Company* (*cit. supra*). Further, it was settled that the reservation in section 70 covered freestone, including in that generic term sandstone and limestone—*Glasgow and South-Western Railway Company* v. *Bain* (*cit. supra*); *Jamieson* v. *North British Railway Company* (*cit. supra*); *Midland Railway Company* v. *Robinson* (*cit. supra*); *Caledonian Railway* v. *William Dixon, Limited*, November 13, 1879, 7 R. 216, 17 S.L.R. 102. The pursuers' argument was based upon the divergence of the views of the judges in *Magistrates of Glasgow* v. *Farie* (*cit. supra*), and they had cited no authority to show that the law and practice in Scotland for the last forty years had been altered. (3) As to the *bona fides* of the defenders, (*a*) the working the substance by mining instead of open-cast was the only method open to the defenders without trespassing on the pursuers' property; (*b*) the pursuers had no right to dictate as to the direction in which the mine was to be worked—*Eden* v. *North-Eastern Railway Company*, [1907] A.C. 400; (*c*) the pursuers were not entitled to question the motives of the defenders in working as they chose—*Mayor of Bradford* v. *Pickles*, [1895] A.C. 587. Unless the pursuers could show that there were no minerals being worked and that the defenders had no real desire to work, they were not entitled to interdict—*Midland Railway Company* v. *Robinson* (*cit. supra*).

At advising—

LORD LOW—I am of opinion that the interlocutor reclaimed against should be affirmed, and I agree so entirely with the opinion of the Lord Ordinary that I have very little to add.

The first question is whether sandstone is a mineral within the meaning of section 70 of the Railways Clauses Consolidation (Scotland) Act 1845? I am of opinion that that question must be answered in the affirmative. I think that so far as this Court is concerned the matter is concluded by authority. There is first the judgment of Lord Kinloch in the case of *Jamieson*, 6 S.L.R. p. 188, that freestone was a mineral within the meaning of the Act. That judgment, which was acquiesced in, was pronounced so long ago as 1868, and has been referred to in subsequent cases with approval. In the next place, in the *Glasgow and South-Western Railway Company* v. *Bain*, 21 R. 134, it was decided by this Division, affirming the judgment of

Lord Stormonth Darling, that freestone was a mineral. Finally, in *Midland Railway Company* v. *Robinson*, 15 A.C. 19, ironstone and limestone were held by the House of Lords to be minerals. I think that it is plain that for the purposes of the Act no distinction can be drawn between limestone and sandstone. It therefore seems to me that the judgment in the *Midland Railway Company* forms a direct binding authority in the present case. I may add that apart from authority I should have come to the same conclusion upon the grounds stated by Lord Watson in the *Midland Railway Company*, and also in the previous case of *Magistrates of Glasgow* v. *Farie*, 15 R. (H.L.) 94.

The next question is whether the substance which the defenders are working is sandstone? What they are, or at least were, working when this action was brought is the upper portion of a bed the lower parts of which are undoubtedly sandstone. Part of that upper portion has become so disintegrated and so friable by percolations from the surface that it cannot be used for building purposes, but if ground down it is merchantable as moulders' sand. The lower portions of the sandstone bed, on the other hand, are capable of being used for some building purposes, although at the best the stone is of poor quality. In these circumstances I do not think that it can be said that no part of the stratum is sandstone in the sense in which sandstone is a mineral for the purpose of the 70th section. The lower and harder parts of the stratum are plainly sandstone, and I cannot assent to the view that the stratum, in so far as it is hard enough for building purposes, is excepted from the conveyance to the Railway Company, and in so far as it is not hard enough for building purposes is not excepted. I think that the stratum must be taken as a whole, and so taken I do not think that it could be described as anything else than a stratum of sandstone, although there are some parts of it from which the binding substance has been washed out to such an extent that but little pressure is required to reduce the stone to sand.

The question remains whether the notice given by the defenders of their intention to work the sandstone was given in good faith, or for the sole purpose of compelling the pursuers to purchase. The most precise statement of the law on this subject is that given by Cotton, L.J., and adopted by Lord Herschell in *Midland Railway Company* v. *Robinson* (*supra*). Lord Justice Cotton said that to justify the owner of minerals in giving a notice that he desires to work them, there must be "an honest actual existence of the desire to work either by himself or his lessees;" and, he proceeded, "if he gave notice when it was obvious that there were no minerals, or that he could not possibly intend either to let or work them himself, that would be vexatious, and the Court would not allow that to be acted upon." I think that if minerals were either so worthless or so expensive to win that, if there were no railway company in the question, an ordinarily prudent proprietor would never think of working them, notice to work would fall within that rule, and would be regarded as being a vexatious notice which would not be enforced. And that is the kind of case which the pursuers have attempted to make here, but which, I think, they have failed to establish. I am satisfied upon the evidence that the defenders' sandstone, although of inferior quality, is by no means worthless, and there is a large quantity of it, and therefore it seems to me to be impossible to affirm—what in my judgment must be affirmed if the pursuers are to succeed—that if it had not been for the chance of compelling the pursuers to purchase the sandstone, the defenders would never have worked or attempted to work it.

That, I think, is sufficient to dispose of the question which I am considering, because I do not think the method of working which the defenders have adopted, and which the pursuers founded on as indicating bad faith, is of any importance. The defenders, instead of working by the ordinary method where sandstone is concerned, of open-cast, have sunk a mine, through which they are bringing the soft material to the surface and reducing it to sand. The pursuers' suggestion is that that novel method was adopted by the defenders simply because, by carrying the mine under the railway works and thereby imperilling their stability, they hoped to be able to force the pursuers to come to terms with them. Even if it were proved that that was the reason why the defenders adopted the method of mining, it would not aid the pursuers if I am right in thinking that the defenders' notice cannot be refused effect on the ground that it was given in bad faith, because, if the defenders were entitled to give the notice, they are also entitled to work the sandstone in any way they choose, and the reason for which they adopt a particular method cannot affect their right. I am of opinion, however, that it is not proved that the defenders adopted the method of working by mine for the reason suggested. I see no reason to disbelieve the defenders' evidence to the effect that they adopted that method for the twofold purpose, first, of ascertaining where the best building material was situated, and second, of extracting the soft material in a pure condition, so that it could at once be ground down to moulders' sand.

I am therefore of opinion that the third plea for the pursuers cannot be sustained, and upon the whole matter I am for adhering to the Lord Ordinary's interlocutor.

LORD ARDWALL—The most important question raised under the present reclaiming note is whether sandstone or freestone, as it is frequently called from the ease with which it can be worked, does or does not fall under the reservation contained in sec. 70 of the Railways Clauses Consolidation (Scotland) Act 1845. That section is in the following terms—". . . [*Quotes section supra*] . . ."

The Lord Ordinary has held that the question is concluded by authority, and undoubtedly there have been two Outer House decisions—*Jamieson*, 1868, 6 S.L.R. 188, and *Glasgow and South-Western Railway Company* v. *Bain*, 1893, 21 R. 134—in both of which it was decided in express terms by Lord Kinloch and Lord Stormonth Darling respectively that sandstone fell under the above reservation. The case of *Bain* was taken to the Inner House, but the point argued and decided there was whether a proof ought not to be allowed. Therefore, although apparently the opinions of the Judges were in favour of the Lord Ordinary's view on this matter, it can hardly be regarded as a decision after argument by the Inner House upon that point. An opinion *obiter* is expressed by Lord Watson in the case of *Farie*, 1888, 15 R. (H.L.) 94, to the effect that his impression was that freestone or limestone strata should be held to fall within the term "minerals." Thus there is a considerable amount of authority in favour of holding sandstone or freestone to be included in the terms "mines and minerals."

On the other hand, there is a formidable body of authority to the effect that building stone and the like, which are usually obtained by quarrying or open-cast workings, are not included in the reservation of minerals in the Act.

A recent case in which the construction of sec. 18 of the Water-works Clauses Act 1847, which is in precisely similar terms to sec. 70 of the Railways Clauses Act, was under consideration, was the *Lord Provost, Magistrates, and Council of the City of Glasgow* v. *Farie*, reported in 14 R. 346, and in the House of Lords, 15 R. (H.L.) 94, and L.R. 13 A.C. 657. In that case Lord Halsbury, L.C., made the following observation (p. 671)—"I find myself called upon to consider these words with reference to the known usage of the language employed in distinguishing proprietary rights in Scotland, and having relation to Scotch lands and Scotch mines and minerals"; and he further adds that if the Lord Ordinary's (Lord M'Laren) opinion in that case is the correct view—and he agrees with it—he considers that the case of *Lord Breadalbane* v. *Menzies*, 1 Sh. App. 225, is a binding authority on the House of Lords. And he further says that he is satisfied with the view so clearly put forward by Lord Mure, and upon the reasoning of that learned Lord's judgment he moved the House that the interlocutor appealed from be reversed.

In Lord Mure's opinion, which will be found in 14 R. upon page 354 and following pages, he deals first with the expression "mines and minerals" as it would be judged of by the rules of common law, and he points out 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. He proceeds thus—"Such a reservation must, I apprehend, be held to be restricted to these substances which in common parlance are understood to be minerals, namely, 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 these substances matter of special reservation. That is, I think, the fair import of the decisions I have mentioned." These decisions were, first, the case of *Menzies* v. *Breadalbane*, reported in the Faculty Collection, June 10, 1818, and in the House of Lords, July 17, 1822, 1 Sh. App. 225. The clause of reservation in that case was in these terms—"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 taking the same." It will be remarked that this is a very comprehensive exception, but it was there held that a vein of stone fitted for architectural purposes, and which is called in one of the reports a "freestone," was not included under that reservation: and in deciding the case in the House of Lords, Lord Chancellor Eldon made this observation—"It does appear to me to be the better opinion that mines and minerals in this view did not mean stone quarries."

This case was followed by the case of the *Duke of Hamilton* v. *Bentley*, June 29, 1841, 3 D. 1121, in which it was held that freestone was not comprehended in a reservation of "coal and other fossils and minerals." Lord Mure then proceeds to say that he considers these cases settle most authoritatively that 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; and then he goes on to say that in *Farie's* case the mineral was clay, not sandstone, but that he saw no reason for coming to a different conclusion.

Accordingly I think it may fairly be said that it was decided by the case of *Menzies* v. *Breadalbane* in the House of Lords that freestone did not fall within the exception of mines and minerals, and according to the opinion of Lord Mure and Lord Halsbury that decision is a decision sound in itself and still binding, no sufficient reason having been adduced for applying a different interpretation of these words in a private disposition of lands at common law and a clause of reservation of minerals in a public statute. In this state of the authorities I hold that I am not precluded from now considering the question as an open one.

There are two opposing interpretations that may be placed on sec. 70. The first may be expressed in the words of Lord Romilly, M.R., in the case of *The Midland Railway Co.* v. *Checkley* (L.R., 4 Equity 19). That case depended upon the construction of a clause in a Canal Act which was practically identical with section 70, and referred to the right to work a stone quarry. Lord Romilly there said—"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 it is gravel, marble, fireclay, or the like, comes within the word 'mineral' when there is a reservation of the mines and minerals from a grant of land." This interpretation has the merit of simplicity, for according to it the word "mineral" comprises stone of every description which is useful "for any purpose whatever." It includes, in the first place, all building stone. Now, dealing with Scotland, it is the case that in Aberdeenshire and part of the stewartry of Kirkcudbright, granite is largely used for building; in some parts of the country, blue silurian whinstone, which is a water rock, is the only building material, while in other parts igneous whinstone, conglomerate, and numerous other varieties of rock are used for building, because in Scotland clay, as a rule, is so scarce and stone so plentiful that brick is very rarely used in the building of houses except for inside partition walls.

But building is not the only purpose for which stone or rock may be usefully employed. Since the present case was decided in the Outer House, my learned brother Lord Dundas has decided another case in which he has held that whinstone falls within the "minerals" excepted by section 70 (see *Forth Bridge Railway Co.* v. *Guildry of Dunfermline and Others*), 4th June 1908, 16 S.L.T. p. 185. The whinstone in that case is an igneous rock of a basaltic character, and is used principally for making rectangular paving stones. It is whinstone of an undoubtedly valuable description as compared with some other varieties of the rock known by that name. But as there are very few kinds of rocks that may not be used for being broken up into road metal for the macadamising of roads, or into material for concrete work now so common throughout the country, it may be assumed that almost all the rocks forming the crust of the earth are, according to the interpretation above given, included in the exception created by section 70. It follows that all that is held to be included in a conveyance of land to a railway company is the agricultural soil, and possibly any beds of sand, clay, and gravel that may underlie it. I must confess, however, that I see no very cogent reason for making a distinction between the ordinary varieties of rock on the one hand, and sand, clay, or gravel on the other, which may all be considered minerals if the dictum of Lord Romilly is held to be correct.

The second interpretation is that the word "minerals" as used in the section designates only those mineral substances which are of such intrinsic value as to render it profitable to sink or drive mines in order to obtain them, and such, accordingly, as are usually obtained by way of mining as opposed to quarrying. I am of opinion that this is the sound interpretation of the statute.

In the first place, as is pointed out by Lord M'Laren, Lord Mure, and Lord Halsbury in the case of *The Magistrates of Glasgow* v. *Farie*, above quoted, this interpretation is consistent with that attached to a reservation of minerals in a private conveyance of land, according to Scots law and practice, and there seems no reason to suppose that the expressions when used in the statute were intended to have a different meaning from that which they had according to the understanding of proprietors of lands and men of business at the time, and as they had at that time been interpreted by courts of law and by the House of Lords, so far as Scotland was concerned, by the cases of *Menzies* and the *Duke of Hamilton*, *supra cit.* It is true that the effect of this and the subsequent clauses is to except mines and minerals in the lands taken unless expressly conveyed. But this is only substituting a reservation under the statute for the usual reservation of minerals in an ordinary conveyance.

A strong reason for rejecting the first interpretation in favour of the second is that in section 70 the word "quarry" or "quarries" does not occur. Now as stone of every kind throughout the country is, with very rare exceptions, got by means of quarrying, it is most surprising that there is no reservation of quarries in the clause, but only of mines. If it had been intended that stone of all kinds and descriptions should be included in the reservation of minerals, I think it is certain that the word "quarry" would have been used, because, *ex hypothesi*, that is the mode of working applicable to all minerals except a very few of great intrinsic value such as coal, ironstone, limestone, and the like. The introduction of slate into the clause, I think, emphasises the abstention of the Legislature from the use of the word "quarry," because, as pointed out by Lord Watson (13 A.C., p. 677), while slate is obtained in the extreme south-west of the island by subterraneous workings, the reverse is the rule in other parts of England, in Wales, and in Scotland, where it is quarried; and accordingly, had it not been desired to avoid the mention of quarries altogether, one would have expected that the clause would have contained the words "slate quarries." Lord Watson in the passage just quoted founded an argument on this in favour of mines and quarries having practically the same meaning, but in answer to that it seems enough to say that both in fact and in ordinary language there is a broad and well-recognised distinction between them.

As I am considering at present the introduction of the mineral "slate" into the clause, I may express my view as to how it came to be included, and why its inclusion should not be held to have the effect of extending the meaning of the words "mines and minerals."

At the time the Act was passed it was well known, as it still is, that slate was a substance of great intrinsic value. It had come practically into universal use as the best means of keeping the roofs of houses and other buildings wind and watertight. But, on the other hand, so far as the better qualities of slate were concerned, it was a

substance of comparatively rare occurrence, and consequently of considerable scarcity. As stated by Lord Watson, it is found to some extent in the extreme south-west of the island, but apart from that the places where alone it is found are Wales, the Western Highlands of Scotland, at Easdale and Ballachulish, and in smaller quantities in Cumberland, and at Aberfoyle in Perthshire. It is therefore not surprising that although slate was got by quarrying, and was in point of fact a species of rock or stone, it should be put into this clause as a valuable mineral; another reason for this probably was that in ordinary parlance hardly anyone would think of describing slate as either a stone or a rock or anything else than "slate," but I take it that its inclusion in the clause was not intended to have the effect of amplifying the clause so as to include quarries or stones and rock of all descriptions, but rather for the purpose of specially mentioning a kind of rock which, but for being specially mentioned, might not have been held to be included in the term "mines and minerals." If I am right in this, the argument that has been founded in various cases upon the fact of slate being mentioned, to the effect that such mention wholly alters the scope of the clause at once disappears, and I must say that looking at the question as one of common sense it would be rather an extraordinary result that the insertion of "slate" in a clause dealing with a very special class of minerals should have the effect of including in that class other mineral substances which neither by reason of their value nor of the method of obtaining them would have been held to have fallen within it. It appears to me a far-fetched argument to say that the mention of slate has the effect of bringing building stone of all descriptions under the clause on the ground that slate is used in the building of houses, and that all building stone must be held to be *ejusdem generis* with slate. It would be almost as good an argument to say that clay is included because it is used when burned for making tiles for the roofs of houses and bricks for building them. I am further of opinion that it is not legitimate to hold that the expression "other minerals" means other minerals *ejusdem generis* with slate. Slate appears to me to be a mineral *sui generis*, and for that reason to have been specially mentioned in a clause in which it was, so to speak, entitled to be on account of its intrinsic value, but was not entitled to be on account of the method of obtaining it.

I am aware that it has been decided by at all events a majority of the noble and learned Lords who have given opinions in many of the cases quoted at the debate that proprietors of minerals such as coal and limestone are entitled to work them by open-cast workings should they appear on the surface. If I may say so, I agree with these decisions, because once any particular substance is held to be clearly within the definition of a "mineral" there seems no good reason why such portions of it as can best be worked by open-cast workings should not be so worked if the Railway Company do not take the statutory means of preventing it by either purchasing the minerals or paying compensation. But it does not seem to me that these decisions enter into the interpretation of the clause itself, because they only deal with the method of obtaining what has already been determined to be a mineral within the sense of the clause, and the decision that they can be worked open-cast does not have the effect of bringing into the definition of minerals such substances as are generally worked open-cast and not by means of mines.

Another advantage which it appears to me the second definition has is, that it rests upon something which may fairly be viewed as a standard of value. It has been suggested in one or two cases, principally by Lord Adam in the case of *Nisbet Hamilton* v. *The North British Railway Company* (13 R. 454), that "value is the proper test of whether any particular stone falls within the exclusion or exemption or not." He says—"Common earth and sand are minerals, but no one will contend that they are intended to fall within the description of minerals under that 70th section. Stone may or may not fall within it according to its quality and value. Where it is valuable it certainly does, as was decided in the case of *Jamieson* v. *The North British Railway Company*, but where the stone is of such a quality or description as to be of no merchantable value, I am of opinion that it does not."

In that case Lord Adam said further that he held that the stone was of no merchantable value, but it is to be noticed that engineers and builders described it as "good building rock." It humbly appears to me that this general test of whether minerals can be worked for profit is not a sound test of value, because that would lead to this difficulty, that the same substance might be deemed a mineral in one part of the country and not in another, according as it could or could not be worked at a profit. This would be a strange criterion as to whether a substance was a mineral or not in the sense of the statute, whereas if it be held that the clause refers to such minerals as are of such intrinsic value that it pays to obtain them by means of the expensive process of mining, that supplies what may be regarded as a standard of value in determining whether any particular substance is or is not a mineral within the sense of the Act. And it has been so applied in the case of china clay.

But in determining which of the two interpretations is most in accordance with what may be presumed to have been the intention of the Legislature, it is of importance to notice that under the Lands Clauses Act and the Railways Clauses Act provision is made for the compulsory taking of lands by a railway company for the purpose of its undertaking, and that purpose is the laying of lines of railway over the lands acquired for the safe transit of passengers and goods. The presumption therefore is that land taken and paid for for such pur-

pose carries with it the whole ordinary rights of a landlord—among others the right not only to the agricultural soil on the surface of the land, but to the crust of the earth below that, without which support in great parts of the country no lines of railway could be safely laid. Any provision inconsistent with the leading purpose for which railway companies are empowered to take land must be viewed as introducing an exception, and falls to be construed strictly, and not extended beyond what the words of exception clearly cover.

Now if what I have called the first interpretation be adopted, it would have the effect, especially in Scotland, where in most parts of the country the rock is not very far below the surface, of not providing railway companies with the necessary support for their railways. I cannot think that this was the intention of the Legislature. I think that by using the terms "mines and minerals," and omitting "quarries and stone," it was intended to make a very limited exception to the rights which usually pass with a conveyance of land, especially where that conveyance was made for a special purpose requiring stability and support.

It is true that the statute, by the combined effect of the 70th, 71st, and 72nd clauses, has the effect of taking away the common law right of support for the railway so far as "mines and minerals" are concerned, but it does this by substituting for it a statutory power of purchasing minerals or preventing the working of them upon payment of compensation. But of course this only applies, and I think can only have been intended to apply, to a very limited class of minerals.

Amongst the minerals that have been held by decisions to be included in the expression "mines and minerals" are limestone and china clay, but I think that their inclusion within these excepted minerals, according to the second interpretation I have mentioned, may well be justified—china clay by reason of its high intrinsic value, and limestone both on that account and because in point of fact, in Scotland at all events, it is most frequently obtained by means of mines. Further, limestone is an analogous mineral to ironstone, the one being a form of iron ore and the other a form of calcium ore, and limestone is very largely used in connection with the smelting of ironstone and other iron ores.

Accordingly, both these substances may properly be held to be *ejusdem generis* as the minerals mentioned in the clause, interpreted as last above suggested.

Some observations have been made in the decided cases to the effect that section 70 was in one view greatly for the benefit of the railway company, as it did not compel them at once to purchase minerals, but only when the prospect of their being worked threatened danger to their line. That is quite true; but I fail to see that that consideration throws any light on the construction of the term "mines and minerals." On the contrary, I think it points to the true construction being that it was only such minerals as were of considerable intrinsic value that were intended to be excepted. If all stone, rock, and minerals of every description other than the agricultural soil and subsoil were intended to be excepted, it appears to me that that would amount, not to making an exception in favour of the railway company regarding the purchase of valuable minerals, but of practically compelling them to pay two prices for the land in every case—one for the surface, and the other for everything under it, whatever that might be, as soon as it came to be wanted for road metal or any other purpose.

On all these grounds I am of opinion that sandstone is not one of the excepted minerals within the meaning of section 70 of the Railways Clauses Act, but if it be held to be so I see no stopping-place short of holding that all a railway company gets by a conveyance of land is simply the surface, or little more than a mere wayleave.

II. But the pursuers maintain, that even assuming sandstone in the proper sense of the term to be one of the excepted minerals, what they seek interdict against the removal of is not sandstone, but a mixture of sand and clay interspersed with nodules of hard rock, and that this the defenders are not entitled to remove. I am of opinion that if it be held that sandstone rock in the proper sense of the term falls within the excepted minerals, and sand and clay do not, the pursuers are entitled to the interdict they ask.

There is conflicting evidence as to the nature of the material which at the date of raising this action the defenders were getting by means of their mining operations; but there is this outstanding fact, that at the date of the proof in this case the defenders had not obtained from their somewhat extensive mine a single block of building stone, but they did obtain a quantity of agglomerated sand or half-formed stone, which they ground into sand in a mill and sold for moulders' sand.

This question is raised by the first conclusion of the summons and the fourth head thereof, asking for declarator that the pursuers are proprietors within a certain area of (*a*) the soil, (*b*) the clay, (*c*) the sand, and (*d*) the other substances presently being worked and removed by the defenders, and then they ask for interdict against such removal. There seems no doubt that they are entitled to be declared to be proprietors of the soil and the clay, but these have not been removed by the defenders, so the question at issue is narrowed to the matter of the sand and other similar substances.

The importance of this question to the pursuers is this:—The defenders, apparently for the first time in the history of mining, have adopted a system of mining by stoop-and-room for the alleged purpose of obtaining sandstone. The dark blue lines upon the plan produced show the extent and progress of these mines, but it is proved that no sandstone in the ordinary sense has been taken out, the passages of the mine being, indeed, too small to admit of blocks

of sandstone being carried through them. In point of fact the defenders did not endeavour to win sandstone at all by what they were doing. On the contrary, it is proved by witnesses on both sides that when they came to a hard piece of stone they avoided it and kept working on in the soft stuff immediately below the clay, which forms the subsoil at that part, and have taken out considerable quantities of what may be termed agglomerated sand. It is to my mind quite apparent that these mines have been driven in the direction they have been solely for the purpose of endeavouring to compel the Railway Company to buy the minerals underlying the ground on which their offices and approaches are situated. But the defenders are entitled to do this if they are doing so for the purpose of exercising their legal rights. Assuming that they are entitled to undertake operations with a view to getting sandstone proper out of the area in question, I am of opinion that they are not entitled to keep mining immediately under the clay portion of the subsoil for the purpose of obtaining substances which are not properly minerals, but which, according to all the decisions, seem to belong to the pursuers as consisting chiefly of clay and sand.

The Lord Ordinary lays stress on the evidence of Mr Rankine with regard to these matters, but I think a reference to his evidence shows that he had nothing to do with advising the defenders to adopt mining as the method of getting either sandstone or sand. Mr Rankine repudiates altogether the idea of mining for sandstone, but he defends what has been done by saying that, having come to this soft stuff, they were quite right as a commercial speculation to go on working it for moulders' sand. This is quite true if they were entitled in a question with the pursuers to dig and remove that sand, but not otherwise.

The following passage occurs in Mr Rankine's evidence, and he is the defenders' witness — "(Q) Do you know any case where stuff such as this is underlying the surface in any part of Scotland? (A) I said this was unique. This is not a stuff that one ordinarily comes to look for, it being mined, and I daresay it would not have been mined here but for its being got under the conditions in which it has been got. (Q) Supposing there had not been the North British Railway to the north of the blue area, would you have advised this stuff being got by mining? (A) I did not advise this being got by mining. (Q) Supposing you were called in to this place to advise, and there had not been the North British Railway to the north, would you have advised the defenders to drive a mine into that stuff? (A) I think I would advise them to begin working open cast if they had been untrammelled on the surface." Again he says — "(Q) Why, if they have got to good building stone, have they turned aside and not worked it? (A) Because the mine has not been laid out for working. The mine that has been driven is no good for the working of building stone. (Q) Is it the case that this mine is only good for working the soft stuff which is going to the mill to be ground down for moulders' sand? (A) Combined with the proving of the field. (Q) If it were only a question of proving, need they have driven more than one or two heads at the most? (A) They came on a substance which, to use your own expression, they thought commercially valuable, and which they thought they were entitled to work, and which, like sensible men, they proceeded to work. (Q) Has not the only thing that they have done been to work out this stuff which is turned into moulders' sand? (A) That is so, and to prove the stone." Further on he says—"My view is that this stuff is a mineral. I was a witness in *Turners'* case. My view there was that clay was a mineral."

Another witness for the defence, Mr George Barlas, a builder and quarrymaster in Glasgow, is asked—"(Q) If it is a good enough building stone, can you account for those people blowing it into shivereens? (A) Because it is only a sand quarry just now. It is not being worked for building stone. I have never seen a mine worked to get sand out of it."

I do not refer to the pursuers' evidence here more than to say generally that it supports the propositions in fact, which I think can be drawn from the passages I have above quoted, to the effect, first, that the defenders' present operations are not for the purpose of getting building stone, but only for the purpose of procuring sand; that what they are working in is not proper rock, but a mixture, such as I have above described, of sand and clay, with nodules here and there of stone throughout it.

According even to the opinions of such judges as have held that sandstone is a mineral, I think this stuff must be held to belong to the Railway Company as not being one of the excepted minerals.

III. The third ground on which the pursuers rely in asking interdict is that the notice given by the defenders was given *mala fide*, and not with the *bona fide* intention of working the minerals, but merely of compelling the pursuers to enter into an arbitration regarding them. If, as I hold, sandstone is not a mineral, there is no necessity for going into this matter; if, on the contrary, it is held to be a mineral, I do not think that there is sufficient evidence to entitle the Court to hold that the proceedings of the defenders in giving notice are *mala fide*. I certainly think their whole proceedings are open to the strongest suspicion, but there is evidence to the effect that good sandstone may be got in the area in question below and beyond the defenders' mining operations; and if this be so, it does not seem to me to matter for the purposes of this case whether the hope of mulcting the Railway Company was or was not the motive of the defenders in giving the notice which they were legally entitled to do. It will, of course, be a matter for the consideration of the arbiters whether, if there had been no railway company here,

anyone in his senses would have begun a quarry at the outcrop of the strata he was proposing to work.

On the whole matter my opinion is that the pursuers are entitled to succeed in their action, on the ground that sandstone is not a mineral within the meaning of the 70th section, and even should it be held that it is, I still am of opinion that the pursuers are entitled to succeed, on the ground that the defenders were not entitled, under the pretence of seeking for sandstone, to carry on a system of mining in the mixed material under the subsoil and to remove it, with the result of injuring the surface of the land belonging to the pursuers. I therefore am of opinion that the interlocutor of the Lord Ordinary ought to be recalled and decree granted in terms of the conclusions of the summons.

LORD JUSTICE-CLERK—It is plain that the term mineral has reference, not to the nature of the substance, but to the place from which it is taken. In ordinary language "mineral" has for a long time signified material of some value, other than ordinary earthy matter, taken out of the ground by underground working as distinguished from quarrying against an exposed face. To my mind two questions only arise here—(1) Is the work in question of a mining character; and (2), Is what is being taken out an ordinary substance—a well-known mineral in the sense in which that term has been used hitherto? These two questions, as it seems to me, must be answered in the affirmative. That the pursuers were recovering the material by means of a mine is not disputed; it is only alleged that this was done in bad faith. I agree with what Lord Low has said on that matter. As regards the second question, we have so complete and valuable a digest of the decisions in the Lord Ordinary's opinion, that I consider it quite unnecessary to do more than to say that his opinion has my entire concurrence. I could add nothing to it which would, as I think, be useful. I only wish to add this, that I cannot concur in the view that mineral includes what may come to be valuable as a mercantile product although it was not of value when the reservation was made. It would, as I think, be strange, if a substance which was not intended to be included in a reservation should be held to be included because at some later date it was found to have increased in value in consequence of some scientific discovery or industrial invention. Such a view might, I think, lead to very anomalous results.

The Court (Lord Ardwall dissenting) adhered.

Counsel for Pursuers and Reclaimers—Cooper, K.C.—Macmillan. Agent—James Watson, S.S.C.

Counsel for Defenders and Respondents—Dean of Faculty (Campbell, K.C.)—C. H. Brown. Agents—Smith & Watt, W.S.

Tuesday, November 24.

SECOND DIVISION.

[Sheriff Court at Kirkcaldy.

BLACK *v.* THE FIFE COAL COMPANY, LIMITED.

Reparation—Master and Servant—Negligence—Common Law—Failure to Provide Competent Servants—Coal Mine.

In an action against his employers by the widow and children of a miner, who was killed while at work in a coal mine by an outbreak of carbon monoxide gas, evidence was led that the mine was ventilated by an air current led past the seat of an old fire which, though it had been built up, was still smouldering; that such a fire might give off carbon monoxide gas, a comparatively rare gas, of which a small percentage in the atmosphere would prove fatal; that the defenders had experience in another colliery of carbon monoxide gas being generated by such a fire and resulting in the death of several workmen; that they had thereafter issued to the managers and officials in that colliery a pamphlet instructing them as to the methods to be employed in dealing with such fires, and in detecting the presence of carbon monoxide gas; that the manager, under-manager, and firemen in the mine where the deceased was killed, though they possessed the qualifications and experience usually required of persons holding such offices, had no experience of carbon monoxide gas; that though these officials were aware during two days preceding the accident of circumstances which might indicate the presence of gas in the mine, they did not withdraw the workmen or take any steps to avoid injury to them.

Held that the defenders were not bound to appoint officials with a knowledge of carbon monoxide gas; that they were not negligent in appointing the officials above mentioned; and that they were not liable at common law to make reparation to the pursuers.

Reparation—Master and Servant—Negligence—Statutory Duty—Breach by Servant—Liability of Master at Common Law for Consequent Death of Fellow-Servant—Common Employment—Coal Mines Regulation Act 1887 (50 *and* 51 *Vict. cap.* 58), *sec.* 49, *Rules* 4 (1), 7; *sec.* 51, *Special Rule* 37.

The Coal Mines Regulation Act 1887, sec. 49, provides—Rule 4 (1)—that before the commencement of each shift inspection shall be made, by a competent person, appointed by the owner for the purpose, of every part of the mine in which workmen are to work or pass during the shift; (Rule 7) that if it is found by the person for the time being in charge of the mine that by reason of inflammable gases, or of any cause whatever,