I and the others who subscribed were to be liable for. Pursuer told me he was going to try this case, and I told him we would assist. I am not sure that I showed this sheet to the pursuer. I handed the money that had been subscribed to the pursuer's agent. The pursuer knew that there was going to be a subscription. I cannot say if he knew that it had actually been subscribed. . . . The subscribers, so far as I can remember, are, in addition to myself, Mr Hanley, pipe manufacturer, and William Douglas, grocer. *Re-examined*—I cannot say how much has been subscribed for this action; it is not much."

The agent for the appellant read affidavits to the effect that the appellant had raised this action for his own protection, and relying on his own resources, in consequence of the criminal process against him by the Marquis of Ailsa for fishing in the tidal waters of the Doon, and that he was not prosecuting this appeal on behalf of the public or of any person other than himself.

LORD WATSON referred to the evidence of Alexander Mitchell, and was of opinion that the petition should be refused.

LORD MACNAGHTEN concurred.

This decision was reported to the House and agreed to.

Agent for the Pursuer (Appellant)—J. B. Allan.

Agent for the Defender (Respondent)—W. A. Loch.

This decision was followed by the Appeal Committee on 6th July 1888 in the appeal of *Fauld and Others* v. *Vere and Others* (Court of Session January 28, 1887, 14 R. 425), where the appellants representing the public were defenders in an action brought by the pursuers for declarator that there existed no public right-of-way over certain roads—See L.R., 13 App. Cas. 372, note.

Friday, August 10, 1888.

MAGISTRATES OF GLASGOW *v.* FARIE.

(*Ante*, Jan. 21, 1887, vol. xxiv. p. 253, and 14 R. 346.)

Minerals—Clay—Waterworks Clauses Act 1847 (10 *and* 11 *Vict. c.* 17), *sec.* 18—*Railway Clauses Act* 1845 (8 *and* 9 *Vict. c.* 33).

Held (*diss.* Lord Herschell, *rev.* judgment of First Division) that the provision of the Waterworks Clauses Act 1847, sec. 18, excluding from conveyances of lands purchased under the Act (when not expressly included) "mines of coal, ironstone, slate, or other minerals under any land purchased," did not apply to a seam of clay forming the sub-soil of the lands conveyed.

The Lord Chancellor holding that the word "minerals" fell to be construed in accordance with the ordinary use of the word in dealing with proprietary rights in Scotland, and did not include clay.

Lord Watson holding that the "land purchased" included the soil and sub-soil, and that the exceptional depth of the sub-soil (even if mineral) was no reason for bringing it within the category of excepted minerals.

Lord Macnaghten holding that the exception was limited to mines in the proper and usual sense of underground workings, and to minerals in such mines.

Lord Herschell was of opinion that the word "mines" was not limited to underground workings or to minerals that could be won only by such operations, and that the word "minerals," as used in the exception, must be taken to mean all such non-vegetable substances lying together in seams or strata as are commonly worked for profit, and to include clay.

In the Court of Session, January 21, 1887, vol. xxiv., p. 253, and 14 R. 346.

The pursuers appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—My Lords, I cannot conceal from myself the importance and the difficulty of the question involved in this case. The consequences flowing from a decision either way seem to me to be very grave, and I desire therefore to say at the outset that I wish to decide nothing but what is necessarily involved in the particular case now before your Lordships. That question may be very summarily stated to be, whether clay is included in the reservation of mines and minerals under the Waterworks Clauses Act 1847?

I cannot help thinking that the true test of what are mines and minerals in a grant was suggested by Lord Justice James in the case of *Hext* v. *Gill*, July 22, 1872, L.R., 7 Ch. App. 699, which I shall have occasion hereafter to refer to, and although the Lord Justice held himself bound by authority, so that he yielded to the technical sense which had been attributed to those words, I still think (to use his language) "that a grant of mines and minerals is a question of fact—what these words meant in the vernacular of the mining world, the commercial world, and landowners," at the time when they were used in the instrument it is necessary to consider.

I will not at present say how far I think we are bound by authority, because I desire to keep myself entirely free if the question should arise in this House with respect to any other statute or with respect to any grant not controlled by the statute in question in which the words "mines" and "minerals" occur.

It may be that I am influenced by the considerations to which Vice-Chancellor Wickens referred (L.R., 7 Ch. App. 705) when he said that "some inclination may be thought to have arisen on the part of Judges to give more weight than ought to have been attributed to some small circumstances of context in order to cut down the proper and ordinary meaning of the words 'mines and minerals.'" I think no one can doubt that if a man had purchased a site for his house with a reservation of mines and minerals neither he nor anybody else would imagine that the vendor had reserved the stratum of clay upon

which his house was built under the reservation of mines and minerals.

There is no doubt that more accurate scientific investigation of the substances of the earth and different modes of extracting them have contributed to render the sense of the word "minerals" less certain than when it was originally used in relation to mining operations. I should think that there could be no doubt that the word "minerals" in old times meant the substances got by mining, and I think mining in old times meant subterranean excavations. I doubt whether in the present state of the authorities it is accurate to say that in every deed or in every statute the word "minerals" has acquired a meaning of its own independently of any question as to the manner in which the minerals themselves are gotten.

Lord Justice Mellish, in the case to which I have already referred, sums up the authorities by saying (L.R., 7 Ch. App. 712) that the word "mines" (to use his Lordship's language) combined with the more general word "minerals" "does not restrict the meaning of the word 'minerals,'" and he says that the result of the authorities appears to be "that a reservation of 'minerals' includes every substance which can be got from underneath the surface of the earth for the purpose of profit unless there is something in the context or in the nature of the transaction to induce the Court to give it a more liberal meaning." I cannot myself assent to such a definition. In the first place, it introduces as one element the circumstance that the substance can be got at a profit. It is obvious that if that is an essential part of the definition the question whether a particular surface is or is not a mineral may depend on the state of the market, and it may be that a mineral one year is not a mineral the next.

If, on the other hand, one is to have recourse to etymology or science, and to disregard the mode of working as reflecting any light on the nature of the substance, it is obvious to inquire whether coal is a mineral. Its vegetable origin would to some minds exclude its being regarded as a mineral, while the substance kaolin was held by Vice-Chancellor Wickens (L.R., 7 Ch. App. 705) to be a mineral. "According to the evidence, kaolin or china clay is a metalliferous mineral, perfectly distinguishable from and much more valuable than ordinary agricultural earth, and which produces metal in a larger proportion to its bulk as compared with ordinary ores, but which it is not commercially profitable to work in England for the purpose of extracting metal from it."

The difficulty of dealing with this case is not diminished but rather increased by the state of the authorities upon the question. In *Bennett* v. *The Great Western Railway Company*, March 18, 1867, L.R., 2 H.L. 27, all that was decided in this House was that the common law principle which would have prevented an owner who had sold his surface land to a railway company from defeating his grant by withdrawing support from the surface land so used, did not apply to a state of things created by the statute in which the statute itself creates the distinction between the surface-owner and the mine-owner, and gives power to the mine-owner to work his minerals unless the railway company purchases or gives compensation to the mine-owner for leaving his mines unworked. In that case it was admitted that the word "minerals" was properly applicable to the substances to be worked, and the only question was the application of the common law principle to which I have adverted. But the Legislature must have meant something when it recognises and acts upon the distinction which as matter of business and understanding in the mining and commercial world I think everyone must be familiar with.

It appears to me that the effect of some of the decisions, pushed to their logical consequences, would be altogether to efface the distinction which all the statutes recognise. One might summarise these decisions and say a mineral need not be metallic, it need not be subjacent, it need not be worked by a mine, it need not be in any one particular distinguished from any part of the substance of the earth, using the word "earth" as applicable to this habitable globe. Even the word "inorganic" must be rejected if applied to some of the substances which form part of the earth. The bones of extinct animals are limestone, and as curiosities for research and scientific inquiry would find a ready market, and would therefore come within that part of the definition which requires that they should be capable of being properly worked. Are they minerals?

I find myself called upon to construe these words with reference to the known usage of the language employed in distinguishing proprietary rights in Scotland, and having relation to Scotch land and Scotch mines or minerals. I am not insensible to the observation that this is only one of a group of statutes which may be supposed to have had the same object, and might be therefore assumed to use the same phraseology in the same sense. Still I am construing the application of general words to a purchase made in Scotland under the statutes, and if there be any difference in the law of Scotland from that of England the Legislature must be supposed to have been familiar with it and to have legislated accordingly.

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

such substances and strata as are ordinarily known by the denomination of minerals in contracts between sellers and purchasers or superiors and feuars."

If that is the correct view, and I find myself unable to differ from it, I think the case of *Lord Breadalbane* v. *Menzies*, June 10, 1818, F.C., *aff.* 1822, 1 Sh. Apps. 225, is a binding authority in this House. There the words were, "haill mines and minerals of whatever nature and quality," and were held not to include a vein of stone suitable for building.

I feel it impossible to resist the reasoning of Lord Mure in this case, but I hold myself free if the question should arise in England to consider, quite independently of this decision, what may be the law as applicable to an English case. I only regret that the test which Lord Justice James suggested, and which I think would have been the true one, and would have satisfied all difficulties, was not adhered to in *Hext* v. *Gill*. In that case, as I have pointed out before, the substance which was called china clay was assumed to be metalliferous ore, and it was held that though the lord of the manor had reserved it he could not work it, because he had not also reserved a right so to work it at the expense of the surface owner. I hesitate very much to adopt the reasoning of that case notwithstanding the high authority by which it was decided.

I am satisfied with the view so clearly put forward by Lord Mure, and upon the reasoning of that learned Lord's judgment I move your Lordships that the interlocutor appealed from be reversed.

Lord Watson—The question raised for decision in this appeal, which is one of general importance, has led to differences of judicial opinion in this House as well as in the Court of Session. For my own part I have experienced considerable difficulty in forming an opinion upon it owing to the very indefinite terms which the Legislature has used to describe the minerals reserved by statute to proprietors whose land is compulsorily purchased for the purposes of railway or waterworks undertakings. The present controversy is between a statutory body of water commissioners and a landowner who is now asserting his right to work out a seam of clay within a parcel of ground about twenty-one acres in extent, which they acquired from him under compulsory powers in the year 1871, but the question which your Lordships have to consider would, in my opinion, have been precisely the same if the purchasers had been a railway company.

The Court below disposed of the case without inquiry into the facts, and these must consequently be gathered from the statements made by the parties on record, which are unfortunately in some respects conflicting. It appears, however—and it was assumed in the arguments addressed to us—that the seam in dispute is composed of ordinary sub-soil clay, such as is generally found throughout the district; that it lies at a depth of not more than two or three feet below the surface of the soil; that it is of considerable but variable thickness, and that it has been wrought open-cast by the respondent in close proximity to the appellants' lands, where its extreme thickness has proved to be from twenty to thirty feet. Since their acquisition of the ground the appellants have constructed upon it two reservoirs, each capable of storing nearly four million gallons of water, which have been sunk into and now rest upon the clay.

The 18th section of the Waterworks Clauses Act 1847 is identical, *mutatis mutandis*, with section 77 of the English, and section 70 of the Scotch Railways Clauses Act of 1845. It enacts that "the undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away, or used in the construction of the waterworks unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby. The Act of 1847 is a British statute, whereas there is separate railway legislation for England and Ireland on the one hand, and Scotland on the other, but it appears to me clear that the Legislature intended the words "mines of coal, ironstone, slate, or other minerals" to have the same meaning in all three countries.

In considering whether sub-soil clay, such as we have to deal with in the present case, is one of the "other minerals" meant to be excepted, I have been unable to derive much assistance from such authorities as *Menzies* v. *The Earl of Breadalbane*, 1 Sh. App. Ca. 225, in which it was held that the reservation by a superior in a feu-contract of the "haill mines and minerals" that might be found within the lands disponed in feu did not give him right to a freestone quarry. Irrespective of other considerations which differentiate that case from the present, there is little analogy between a reservation of minerals, coupled with an obligation to support the surface, and a reservation not only of minerals but of the right to work them without giving support. Nor have I been able to obtain much light from *Hext* v. *Gill*, 7 Ch. App. 699, and other English cases referred to in the opinion of Lord Shand, which his Lordship seems to regard as almost decisive of the present question. The only principle which I can extract from these authorities is this, that in construing a reservation of mines or minerals, whether it occur in a private deed or in an Enclosure Act, regard must be had not only to the words employed to describe the things reserved, but to the relative position of the parties interested, and to the substance of the transaction or arrangement which such deed or Act embodies. "Mines" and "minerals" are not definite terms; they are susceptible of limitation or expansion according to the intention with which they are used. In *Menzies* v. *The Earl of Breadalbane*, Lord Eldon observed (1 Sh. App. 228) that the "reservation is not contained in a lease, but in a feu; and I take it there is a very great difference as to the principles that are to be applied to the construction of a feu and a lease—it is a question of a very different nature." In *Hext* v. *Gill* the controversy, which related to china clay, worked for the purpose of obtaining the felspar which it contained, arose between the lord of the manor and the purchaser of the freehold of a copyhold tenement within the manor, under a contract which excepted "all mines and minerals," and in these circumstances it was

sufficiently clear that the copyholder had only right to the surface, and had no right to minerals of any kind.

I need not refer in detail to the provisions of the Waterworks and Railways Clauses Acts which follow and are connected with the sections of these Acts already noticed. The relation which they establish between seller and purchaser in regard to all minerals which may be held to be excepted appears to me to be, as Lord Westbury said in the *The Great Western Railway Company* v. *Bennett*, 2 E. & I. App. 42, clearly defined, useful to the railway company or waterworks' undertakers, and at the same time fair and just to the mine-owner. The latter, who is forced to part with the surface of his land and all uses for which it is available, is not compelled to sell his minerals, whilst he is not in a position to ascertain their marketable value or the impediments which might be occasioned to the convenient working of his mineral-field by his parting with a strip which intersects it. On the other hand, those who deprive him of a right to a portion of the surface and its uses by compulsory purchase enjoy the benefit of subjacent and adjacent support to their works without payment so long as the minerals below or adjoining these works remain undisturbed, but it is upon the condition that if they desire such support to be continued they must make full compensation for value and intersectional damage whenever the minerals required for that purpose are approached in working, and would in due course be wrought out.

It appears to me that the policy of the Acts in excepting certain minerals from conveyances to compulsory takers of land favours a liberal and not a limited construction of the reservation to the seller. The difficulty which I have felt in construing their enactments is due to the fact that they do not deal with "minerals" as something which may be different from and additional to "mines." They do not except mines and minerals, but "mines of coal, ironstone, slate, or other minerals"—that is to say, they only except minerals which when worked will constitute "mines" within the meaning of section 18 of the Waterworks Act of 1847, and of the corresponding sections of the Railways Clauses Acts. It therefore becomes necessary to consider what meaning ought in these sections to be attributed to the word "mine," and also what are the "other minerals" mines of which are specially excepted? The solution of the second of these queries must necessarily be in a great measure dependent upon the answer to be given to the first.

There is a class of cases in the English books which determine that the word "mine" is, according to its primary meaning, significant merely of the method of working by which minerals are got, but that is not its only or necessary meaning. Shortly after the passing of the Act 43 Eliz. c. 2, it was established by a series of decisions, the soundness of which has often been doubted, that occupiers of mines other than coal mines are exempted from the incidence of the poor rate. That point being settled beyond recal, the Courts gave a restricted meaning to the word "mine," and decided that in the sense of the Act of Elizabeth it must be taken to be a subterranean excavation. It was accordingly held that persons who worked lead, freestone, limestone, or even clay by means of a shaft and underground levels were not liable to be rated in respect of their occupancy, whilst others who worked the same substances by means of excavations open to the light of day were held to be liable as occupiers of land. I do not suggest that the Courts erred in limiting so far as they could the exemption which for some reason or other had been established, but I may venture to express a doubt whether any such exemption or distinction with regard to the mode of working would have been recognised if the Act of 1601 had not become law until the year 1847.

I am unable to assent to the appellant's argument that in section 18 of the Waterworks Clauses Act "mines" must be understood in the same sense which it has heen held to bear in the Statute of Elizabeth. Such may have been its original meaning, but it appears to me to be beyond question that for a very long period that has ceased to be its exclusive meaning, and that the word has been used in ordinary language to signify either the mineral substances which are excavated or mined, or the excavations, whether subterranean or not, from which metallic ores and fossil substances are dug out. It does not occur to me that an open excavation of auriferous quartz would be generally described as a gold quarry, I think most people would naturally call it a gold mine. The whole frame of section 18 indicates, in my opinion, that the Legislature intended it to include minerals got by open working as well as minerals got by what has been termed mining proper. The clause excepts mines of slate, and also of "other minerals," an expression which must at the least include rock strata of the same homogeneous character, and generally worked, or capable of being worked by the same methods as slate.

The fact is of sufficient notoriety to be noticed here, that although in the extreme south-west of the island slate is obtained by subterraneous workings, the reverse is the rule in North Wales and in Scotland where it is quarried. The word "quarry" is no doubt inapplicable to underground excavations but the word "mine" may without impropriety be used to denote some quarries: Dr Johnson defines a quarry to be a "stone mine." In framing section 18 and the corresponding railway clauses the Legislature plainly intended that waterworks' undertakers and railway companies should, at the time when they take land by compulson, pay full compensation for and become at once proprietors of all surface and other strata which are not excepted. To adopt in these clauses the same construction of "mines" which has been followed for the purposes of the English poor-rate would, in my opinion, lead to consequences which the Legislature cannot have contemplated. In that case the extent to which minerals in the lands were sold or excepted at the date of the conveyance would depend upon the mode, underground or open-cast, by which they may be found at some future and far distant time to be workable, or upon the method according to which the landowner might then choose to work them. These factors being indeterminate it would be well nigh impossible at the date of the purchase to arrive at a fair estimate of the compensation payable for it. I cannot conceive that the Legisla-

ture in using the expression "mines of slate" meant to distinguish between the different methods of getting it, and to enact that slate which may never be disturbed shall be taken and paid for at once if it would naturally be quarried, but shall not be taken and paid for until it is actually worked if it would naturally be got by means of an underground level. It was certainly within the contemplation of the Legislature that water or railway works may rest upon excepted minerals, because it is expressly provided that the undertakers or the company are to be entitled to such parts of these minerals as require to be excavated for the purpose of constructing their works. When a railway company or water undertakers excavate in order to obtain a foundation for their works there is no roof to the excepted minerals, and it is difficult to understand how in these circumstances they could be got by proper mining.

I am accordingly of opinion that in these enactments the word "mines" must be taken to signify all excavations by which the excepted minerals may be legitimately worked and got. If coal, ironstone, or slate crops out at any part of the surface taken for waterworks or railway purposes, the undertakers or the company acquire in my opinion no right save the right to use that part of the surface; they acquire no right to the minerals themselves except in so far as these are dug out or excavated in order to construct their works. 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. I may add that, so far as I can see, it is possible that there may be some strata which would pass to the compulsory purchaser if they lay on the surface, but may possibly be reserved to the seller if they occur at some length below it. But I desire to say that in the view which I take of the present case it is not necessary to determine any of these points.

The enactments in question describe the excepted mines of minerals as lying under the land compulsorily acquired, and they appear to me to contemplate that the purchasers as soon as they obtain a conveyance shall become the owners of "the land." That expression, as it occurs in these enactments, obviously refers to surface, and the question therefore arises, what in ordinary acceptation is understood to be the surface crust of the earth which overlies its mineral strata? It is of course conceded that vegetable mould, which commonly forms a large ingredient of the topmost layer of the crust is not within the exception, but it is also the fact that in many districts the cultivatable soil is mainly composed of clay, which is a mineral in this sense, that it is an inorganic substance. I have come to the conclusion that the expression "the land" cannot be restricted to vegetable mould or to cultivated clay, but that it naturally includes, and must be held to include, the upper soil, including the sub-soil, whether it be clay, sand, or gravel, and that the exceptional depth of the sub-soil, whilst it may enhance the compensation payable at the time, affords no ground for bringing it within the category of excepted minerals.

I am accordingly of opinion that the interlocutor of the First Division of the Court of Session ought to be reversed and that of the Lord Ordinary restored.

Lord Herschell—I have the misfortune to differ from the rest of your Lordships who heard the arguments in this case. I confess that my mind has wavered much as to the proper conclusion to be arrived at, and I need hardly say that I have the less confidence in my opinion when I find it differs from those which your Lordships entertain.

The point for decision in this case is a simple one, and may be shortly stated, but to my mind it is one of very considerable difficulty. The appellants in 1871 purchased a piece of land from a predecessor in title of the respondent for the purpose of constructing works authorised by the Glasgow Corporation Waterworks Act 1886, for the sum of £11,000, and have constructed their works upon it. The disposition to the appellants contained a reservation in favour of the sellers of "the whole coal and other minerals in the said lands in terms of the Waterworks Clauses Act 1847."

The Act just named, which is incorporated with the appellants' private Act under which the land was purchased, provides (section 18) "that the undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the waterworks, unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they have been expressly named therein and conveyed thereby."

I may observe here that I cannot accede to the view that the present case is to be dealt with as if the "coal and other minerals" had been reserved to the respondent by operation of the disposition alone without regard to the statutory provision I have quoted. It appears to me that whatever the statute excluded from the purchase was excluded in the present case, and that the issue between the parties depends entirely upon the construction to be put upon the statute in relation to the circumstances before us. Within and under the lands purchased, and the adjoining lands, there is a seam of clay which the respondent had been for some time working in the adjoining lands, and in March 1885 he intimated that he was desirous of working it under the ground acquired by the pursuers, and called upon them to state whether they would avail themselves of their right to prevent his working the seam by making him compensation therefor in terms of the Waterworks Clauses Act 1847. Hence the present action, the appellants insisting that the clay was included in their purchase, and that the respondent had no title to it.

In the 4th article of the condescendence it is alleged that the seam of clay lies at an average depth of only two feet below the surface, and that it can be worked only by open workings, which would destroy or endanger the appellants' works. This is not admitted by the answer, which alleges that the clay in the ground adjoin-

ing "has been wrought open-cast, but previous tirring of the surface is not necessary." I understand this to mean that the clay under the appellants' land could be worked otherwise than from the surface. The answer further states that the seam is of great value. No proof was led, the learned Lord Ordinary being of opinion that it was unnecessary to do so. Upon the allegations I have referred to the question arises—and I think it is the sole question in the case—whether this seam of clay was reserved within the terms "mines of coal, ironstone, slate, or other minerals," or whether the whole of it lying under the land conveyed passed by the conveyance.

The real question, then, to be determined is the meaning to be given to the words "mines or other minerals" in construing the Act of 1847. And I doubt whether we are very much assisted by the interpretation which has been put upon the same words appearing in a different collocation or in other instruments or enactments.

Your Lordships were referred to various English authorities for the purpose of showing that clay had been held in a case in the Court of Appeal to be within a reservation of minerals, and that in other cases a definition of minerals had been adopted sufficiently wide to include it. On the other hand, reliance was placed upon some Scotch authorities, and notably on *Menzies'* case in your Lordships' House, as establishing that in a contract between superior and vassal a reservation of mines and minerals did not comprise freestone which could only be obtained by quarrying. Lord Mure, whose judgment in the Court below was in favour of the appellants, based his opinion on the ground that though it might be settled by the English authorities that minerals had the extensive meaning contended for, yet it was settled by the Scotch law that in an ordinary contract of conveyance a more restricted interpretation must be adopted, and that there was no reason for construing differently the statutory reservation in question. It is to be observed, however, that the enactment with which we have to deal is intended to be incorporated with all Waterworks Acts, whether in England or Scotland, and that both the Scotch and English Railways Clauses Acts contain similar provisions. When the object and purview of these various statutes is regarded it is not to be supposed that the Legislature intended the same or similar enactments in these various statutes to have a different meaning.

What we have to do then is, I think, to look at the purview and intent of the Acts, and to consider what the Legislature meant by the language they have employed. It is impossible to peruse the various provisions of the Act we are considering without seeing that the words "mines" and "minerals" are somewhat loosely used. Before proceeding to the interpretation of them it may be well to inquire what was the object of the Legislature in reserving the minerals, and not vesting them in the undertakers of the works authorised by the Acts with which the general Act is incorporated.

This object is, I think, clearly stated by the learned Lords who delivered their opinions in the case of *Bennett* v. *The Great Western Railway Company*, 2 E. & I. App. 27. I think these provisions were inserted for the common advantage of the landowner and the undertakers. He was not to be compelled to sell minerals which were not needed for the purpose of the undertaking, and they were not to be compelled to purchase and pay for minerals which they did not want, which the owner of them might never desire to work, and as to which it would be often difficult to determine beforehand whether their working would be likely to affect the waterworks or railway constructed on the surface of the land. I think, then, that we should expect to find reserved all minerals under the land of such a nature as are commonly worked, and which possessed a value independent of the surface.

I propose first to inquire what meaning ought to be attached to the meaning of the word "minerals," supposing only the words "coal, ironstone, slate, or other minerals" had been employed without any mention of "mines." I think that the word "minerals" imports *prima facie*, and apart from any context, all substances other than the vegetable matters forming the ordinary surface of the ground. In this widest sense clay is unquestionably a mineral. But we have to look to the context to see whether the word is here used in a more limited sense, and if so, what is the limitation to be put upon it. I think the popular use of the word is often narrower, and that when people talk of minerals they frequently use the word in reference to metals or metalliferous ores. But it is impossible to give this restricted meaning to the word in the enactment we are seeking to construe. Coal and slate are specifically mentioned, and the words "other minerals" cannot be confined to metallic substances. Coal, slate, and ironstone are minerals most dissimilar in their character, and I have sought in vain for any mode of restricting the word "minerals" in this section, whether by confining it to things *ejusdem generis* with those specified or otherwise. There is no common *genus* within which coal, slate, or ironstone can be comprised except that they are mineral substances of sufficient value to be commonly worked.

But the words which I have hitherto discussed do not, as has been seen, stand alone. The things reserved are "any mines of coal, ironstone, slate, or other minerals" under the land purchased. It appears to me that this limits the reservation to mines of the substances named, and therefore to "mines" of the "other minerals" included in the general term. What then is the interpretation to be put upon the word "mines?" I think the primary idea suggested to the popular mind by the use of the word is an underground working in which minerals are being or have been wrought. It is certainly often used in contrast to quarry as indicating an underground working as opposed to one open to the surface. But to limit it in the enactment we are construing, to an underground cavity in which minerals are being or have been wrought, would be obviously inadmissible. The enactment was clearly intended to extend to minerals lying underground which had hitherto been undisturbed. Is the true interpretation to be found by limiting the provision to those minerals which are commonly worked by means of underground working? The word "mines" is, I think, in a secondary sense very frequently applied to a place where minerals commonly worked under-

ground are being wrought, though in the particular case the working is from the surface. For example, where iron is got by surface workings they are spoken of as iron mines, and so too with coal which crops out at the surface. No one, I think, ever heard of a coal or iron quarry. On the other hand, the term "slate quarry" is undoubtedly sometimes made use of though the workings are underground. I think it is impossible to obtain any assistance from this use of the word "mines" in construing section 18. It is no doubt exceptional to obtain coal and iron except by underground workings, but this is not so with slate, and the word "mines" is used alike in reference to all these substances.

I thought for some time that the language used must be construed as applying only to those seams or strata of the specified and other minerals which were capable of being wrought by underground workings. It seems to me that there is much to be said for that view, but after reflection I do not feel that it affords a safe basis for decision, nor is it clear that it would assist the appellants. It must be remembered—and I think this has an important bearing on the view adopted by the learned Lord Ordinary—that it is part of the scheme of the statute that the undertakers do not purchase any right to the support of the underlying strata of minerals. No one has doubted that if they refuse to purchase the reserved minerals, whatever is really within the reservation may be got even though the result be to cause a serious subsidence and even dislocation of the surface. In this respect the case differs from an ordinary reservation in a deed unaffected by statutory provisions. In such a case the owner of the reserved minerals can only work such portions of them as can be removed without causing disturbance of the surface, or if he remove more he must provide some substituted means of support. Therefore when it is suggested that the reservation in question embraces only such mineral seams as are capable of being worked underground, that cannot mean such as are capable of being so worked without disturbing the surface.

Once this conclusion is arrived at it is difficult to see any firm basis for a distinction between seams which lie at a considerable depth below the surface, the removal of which would be likely to affect it little, and those which lying near it could not be got without very seriously affecting it. What valid distinction could be drawn between a seam of coal or ironstone a hundred yards beneath the surface and one which came within two feet of it? and if the latter would be within the reservation, how can a seam of clay similarly situated be excluded? I have said that it is not clear that the proposed interpretation of the section would be of any advantage to the appellants, for proof not having been led, I cannot assume that the clay might not be got otherwise than by surface operations by working on from the adjoining land, though of course its removal would cause subsidence and great disintegration of the surface. I own I have entertained very grave doubts as to the proper conclusion to be arrived at, but I do not see my way to differ from the judgment of the Court below. I think the reservation must be taken to extend to all such bodies of mineral substances lying together in seams, beds, or strata as are commonly worked for profit, and have a value independent of the surface of the land.

I desire to guard myself against being supposed to decide more than I do. The pursuers in their action seek to interdict the defender altogether from working the clay under their land in any manner whatsoever. All that in my opinion arises for decision is whether they are entitled to do so. I say this because it was contended before us that inasmuch as the statute authorises the use of such part of the minerals as may be necessary for the pursuers' works, and the bed of clay forms the bottom and sides of their reservoir, the defender cannot be entitled to take away this clay. But this point, which is well worthy of consideration, does not appear to me to be raised at the present time. I therefore forbear from expressing any opinion upon it, or (assuming it to be well founded) upon the further question, how much of the clay can be considered as having been used for the purpose of the waterworks, and therefore as having become the property of the appellants. I think the interlocutor appealed from ought to be affirmed.

Lord Macnaghten—Your Lordships are called upon to determine the meaning of the word "mines" in the 18th section of the Waterworks Clauses Consolidation Act 1847. That section is the first and most important section in a group of clauses collected under the heading "With respect to Mines." Corresponding provisions are to be found in the Railways Clauses Consolidation Act 1845, and the Railways Clauses Consolidation (Scotland) Act 1845.

The argument before your Lordships proceeded on the ground that so far as the present question is concerned the three Acts must be construed alike, and that in regard to mines under or near lands purchased for the purpose of the undertaking railways are in precisely the same position as waterworks. The case therefore is one of considerable importance. But the question lies in a narrow compass, and must, I think, depend for its solution on an examination of the sections in the Waterworks Act which bear upon the subject, with the aid of such light as may be derived from parallel passages in the Railway Acts.

Section 18 of the Waterworks Clauses Consolidation Act 1847 (corresponding with section 77 of the English Railways Act and section 70 of the Scotch Act) is in the following terms—"The undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the waterworks, unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands unless they shall have been expressly named therein and conveyed thereby."

The exception in favour of the vendor comprehends, it will be observed, mines of all sorts, mines of coal, ironstone, and slate, and mines of other minerals, but nothing else. Taking the words in their ordinary signification and in their grammatical construction, the exception does not extend to minerals other than minerals of which mines are composed. This seems clear from the

latter part of the section, where the expression "such mines" refers to and sums up everything covered by the words of description previously used.

On this exception there is engrafted an exception in favour of the undertakers. It is one of very limited extent. But it throws, I think, considerable light on the meaning of the word "mines." It excepts only "such parts" of the mines under the lands purchased "as shall be necessary to be dug or carried away or used in the construction of the waterworks."

Now, the meaning of the word "mines" is not, I think, open to doubt. In its primary signification it means underground excavations or underground workings. From that it has come to mean things found in mines or to be got by mining, with the chamber in which they are contained. When used of unopened mines in connection with a particular mineral, it means little more than veins or seams or strata of that mineral. But however the word may be used, when we speak of mines in this country there is always some reference more or less direct to underground working.

In *Darvill* v. *Roper*, May 26, 1855, 3 Drewry's Reps. 294, and again in *Bell* v. *Wilson*, March 9, 1865, 2 Drewry & Smale's Reps. 395, Vice-Chancellor Kindersley had to consider the meaning of the term "mines." In the latter case he asks the question, "What is a mine?" and he answers it thus—"I cannot entertain the smallest doubt that a mine and a quarry are not the same. It would perhaps require some labour to define precisely what each is, but we know this, that a mine, properly speaking, is that mode of working for minerals by diving under the earth and then working horizontally or laterally; whereas a quarry is where the working is *sub dio*. There is not the slightest doubt in my mind as to the difference between them." The case of *Bell* v. *Wilson* was taken to the Court of Appeal. In his judgment on the appeal (1 Ch. 303, 308) Lord Justice Turner asks the same question, and after referring to dictionaries answers it in much the same way. As regards that part of the case he expressed his entire concurrence with the Vice-Chancellor. It was admitted that there is no reported case which throws any doubt on the accuracy of the language used by the Vice-Chancellor in defining or describing a mine. If one wanted a recent authority to confirm the Vice-Chancellor, and to emphasise the ordinary meaning of the word "mines," one could not, I think, do better than turn to the judgment of Mr Justice Kay in the *Midland Railway Company* v. *Haunchwood*, March 22, 1882, 20 Ch. Div. p. 552. In describing the case the learned Judge says—"The subject of litigation in this case is a bed of clay used for making a peculiar kind of brick, and of some value, from the circumstance that it contains a certain amount of iron. There are three or four feet of surface earth above this except at one point where it crops out, but it is in no sense a mine, being got entirely by open workings."

Dealing therefore with section 18 alone, there seems to be no reason for giving the word "mines" a strained or unnatural meaning. It has indeed been suggested that the mention of slate tends to show that the word "mines" is used in a loose way without reference to any particular mode of working, because slate is usually got by open working. But, as everybody knows, there are places where slate is worked underground. The Act excepts mines of slate; it is silent as regards slate quarries. The more natural inference would be that slate mines are excepted, and that slate quarries are not, especially as the Railways Clauses Acts make mention of slate quarries in another group of sections. It has also been suggested that the exception in favour of the undertakers points to minerals near the surface, and therefore to minerals which may be got by quarrying. But it seems to me that there is little force in this suggestion. The exception rather tells the other way. In constructing railways and waterworks, in deep cuttings, in tunnelling, or in sinking wells, it is at least possible that minerals contained in mines may be met with. On such an event occurring, were it not for the exception, the operations of the undertakers or of the company might be brought to a standstill, and so the Act gives them as included in their purchase such parts of the mines, or, in other words, so much of the minerals contained therein as they are obliged to interfere with in the construction of their works. But it gives them nothing more. How strictly railway companies are tied down when their powers are limited by reference to what is necessary is shown by the decisions on sec. 16 of the English Act as to the diversion of roads and rivers—*The Queen* v. *The Wycombe Railway Company*, January, 26, 1867, L.R., 2 Q.B.D. 310; *Pugh* v. *The Golden Valley Railway Company*, May 31, 1880, 15 Ch. Div. 330. The rights of the undertakers or of the company are limited by the necessity of the case. They are not at liberty to interfere with mines or to use the minerals contained therein merely because it may be a convenience or a saving of expense to do so. If the intention of Parliament had been to reserve to the vendor under the exception of "mines" all minerals of every description however they might be worked, and therefore all such things as clay, stone, and gravel, which are ordinary materials for constructing or repairing the works, one would have expected to find the undertakers and the company authorised to use not merely such parts of the mines as might be necessary, but such parts as might be useful or proper for constructing their works, and, on the other hand, required to pay for what might be so used, and to work under the direction or inspection of the mine-owner or his surveyor.

So far there seems to be no difficulty. The difficulty, such as it is, is created by the sections which follow, and which regulate the rights of owners of mineral property (if I may be allowed to use that expression as a neutral term) lying under or near the lands of the undertakers or the company. In these sections we find the expressions "mines or minerals," "such mines," "such mines or minerals," "such minerals, parts of mines," and "mines, measures, or strata," all applied to the mineral property within the scope of the enactment.

Now, the word "minerals" undoubtedly may have a wider meaning than the word "mines." In its widest signification it probably means every inorganic substance forming part of the crust of the earth other than the layer of soil which sustains vegetable life. In some of the

reported cases it seems to be laid down or assumed that to be a mineral a thing must be of commercial value or workable at a profit. But it is difficult to see why commercial value should be a test, or why that which is a mineral when commercially valuable should cease to be a mineral when it cannot be worked at a profit. Be that as it may, it has been laid down that the word "minerals," when used in a legal document or in an Act of Parliament, must be understood in its widest signification, unless there be something in the context or in the nature of the case to control its meaning. It has also been held that the use of the word "mines" in conjunction with "minerals" does not of itself limit the meaning of the latter word. At the same time it cannot be disputed that the term "minerals" is not unfrequently used in a narrower sense, and one perhaps etymologically more correct as denoting the contents or products of mines. Nor indeed are the authorities all one way in preferring the wider meaning of the word "minerals." For example, in *Church* v. *The Inclosure Commissioners*, January 31, 1862, 11 C.B., N.S. 664, Mr Justice Williams observed, and apparently the rest of the Court agreed, that minerals in the ordinary sense meant "minerals which could be worked in the ordinary way underground, leaving the surface or crust unaffected."

In dealing with the sections which follow section 18, it is to be observed that their scope is not, like the scope of section 18 and the corresponding sections of the railway Acts, limited to mineral property lying under the lands purchased and excepted or deemed to be excepted out of the conveyance. These sections have a much wider bearing. They extend to mineral property under the lands of the undertakers or the company, however it may have been severed in ownership from those lands. They also extend to mineral property within the prescribed distance, although the lands under which it lies do not belong to the undertakers or the company. It would therefore not be enough for the respondents to make out that these sections deal with minerals not contained in mines. They must show that on the fair reading of these sections the word "mines" includes minerals, whether got by mining or not. If that could be established it would go far towards proving that the word "mines" must have that meaning in section 18 and in the corresponding sections of the Railway Acts.

It may be conceded that in several places in these later sections the word "mines" is used as comprehending whatever is comprehended by the term "minerals" as therein used. But then comes the question—Is the word "minerals" to have its wider signification, and therefore to enlarge the meaning of the word "mines" or is the word "mines" to control the meaning of the word "minerals?" In the absence of an explanatory context or some indication to be gathered from the nature of the case, it has been held that the narrower meaning of the word "minerals" is not to be preferred. Still it is not a strained or unnatural meaning. You are giving a strained and unnatural meaning to the word "mines" if you make it include minerals not got by mining, and therefore if the question were which of the two words should yield to the other, there could, I think, be no doubt as to the answer. The more flexible word must give way. You must do as little violence as possible to the language you have to construe.

Apart, however, from this argument it seems to me that if you look at these enactments, carefully comparing one with the other, you will find enough to show that the minerals spoken of are minerals that are "parts of mines," or minerals that are "contained in mines." I will illustrate my meaning by one or two instances. The sentence in section 78 of the English Act "if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway," becomes in the Scotch Act, section 71, "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." In the rest of the latter section the two expressions "parts of mines" and "minerals" are used indifferently as convertible terms. The section proceeds as follows—"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, lessee, or occupier of such their desire, and shall in such notice specify the parts of the mines . . . . which they shall desire to be left unworked, ... and in such case such owner, lessee, or occupier shall not work or get the mines and minerals comprised in such notice." In the following section (section 72 of the Scotch Act) there is a passage which refers to minerals as being contained in mines, and the context shows that the minerals so referred to are the only minerals in the contemplation of the framers of the Act. The section begins with the following sentence—"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, lessee, or occupier"—(that is, 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) "to work the said mines, or such parts thereof for which the company shall not have agreed to make compensation up to the limits of the mines and minerals 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." Now, the expression "the minerals contained therein" must mean "the minerals contained in the mines." So the purpose to which the owner of the minerals, and the purpose to which the owner of the mines is limited are one and the same, and the purpose of the owner of minerals in working is not to get minerals, using the word in its widest signification, but to get minerals contained in the mines.

I ought perhaps to refer to the passage in which the word "minerals" originally occurs in the later sections of the Waterworks Act. It occurs first in section 22, where it is provided that "if the owner, lessee, or occupier of any mines or minerals lying under or near" the works should be desirous of using the same he is to give the prescribed notice, and then certain consequences follow. Every subsequent use of

the word may be traced to that passage. Now, if the word "minerals" there means minerals whether got by mining or not, the word "mines" is plainly superfluous whatever meaning be given to it. But if the word "minerals" be restricted to minerals contained in mines, I doubt whether either word is superfluous. The risk to be guarded against, as it seems to me, was the loss of support by the withdrawal of minerals from the mines. The minerals might be worked by the owner, lessee, or occupier of the mines. But they might be worked by persons who could not properly be described as owners, lessees, or even as occupiers of the mines. They might be worked by persons having merely a licence to enter and search for minerals, and a grant of the minerals when obtained. The word "minerals" may have been added out of abundant caution to meet such a case as that, and being a less awkward expression for the draftsman's immediate purpose than the expression "parts of mines" which occurs in section 18. At the same time if the word "minerals" in the sense of "parts of mines" or "minerals contained in mines regarded as separate from the chamber which contains them" be deemed superfluous, I would point out that less care seems to have been given to the framing of these sections than to the framing of section 18. The section and the corresponding sections of the Railway Acts, *mutatis mutandis*, are word for word the same. In the sections which follow in each of the three Acts there are changes from the language of the other two, and also variations of expression in the same Act in many cases where it is impossible to suggest any difference in meaning. These sections seem to have been taken at random from the different common forms without any attempt at precision or uniformity of language. In such a composition it is not surprising that a superfluous word should be found. It would be singular that in a short clause like section 18 of the Waterworks Act, which exhausts the particular subject dealt with, the leading word should be used in a strained and unfamiliar signification, and that the same peculiarity should be found in all three Acts.

There is no passage in any one of the Acts which requires the wider signification of the word "minerals." On the other hand, the provisions for inspecting mines, both before and during working, and the provisions for the ventilation of the minerals, for making air-ways and mining communications, all seem to point in the same direction, and to show that the Acts throughout these clauses are dealing with mines, using the word in its proper and usual signification.

Little or no assistance is to be derived from the rest of the Waterworks Clauses Act. But it may be observed that section 12 authorises the undertakers to dig and break up the soil of the lands which they enter under the powers of their special Act, and "to remove or use all earth, stone, mines, minerals, trees, or other things dug or gotten out of the same." The mention of earth and stone in conjunction with minerals seems to show that these substances were not considered by the framers of the Act to be necessarily comprehended by the term "minerals."

In considering the Railways Clauses Acts it is, I think, worth while to refer to the group of sections prefaced by the heading—"With respect to the temporary occupation of lands near the railway during the construction thereof." (Sections 30 to 43 of the English Act, sections 25 to 36 of the Scotch Act.) These sections empower the company for certain specified purposes to enter upon and use any lands within a distance from the centre of the line not measured by or necessarily corresponding with the limits of deviation, and to do so at any time before the expiration of the period limited for the completion of the railway, a period which generally, if not always, extends beyond the duration of the company's powers for the compulsory acquisition of land.

The purposes specified in the Acts include "the purposes of taking earth or soil by side cutting therefrom," and "the purpose of obtaining materials therefrom for the construction or repair of the railway." In exercise of these powers the company is authorised "to dig and take from out of any such lands any clay, stone, gravel, sand, or other thing that may be found therein useful or proper for constructing the railway." Then comes a *proviso*, "that no stone or slate quarry, brick-field, or other like place which at the time of the passing of the special Act shall be commonly worked or used for getting materials therefrom for the purpose of selling or disposing of the same shall be taken or used by the company."

It is clear therefore that in certain cases and for certain purposes a railway company may enter upon lands containing brick-earth, and use that brick-earth, although the lands may not be delineated in the deposited plans, and although the powers of the company to take lands compulsorily may have expired. But while working as temporary occupiers they are bound (section 41 of the English Act) to work in accordance with the directions of the surveyor or agent of the owner of such lands.

Now, section 42 provides that in all cases where the company enters upon lands for temporary purposes the owner may "serve a notice in writing on the company requiring them to purchase said lands." The company thereupon is "bound to purchase the said lands."

Nothing is said about mines or minerals in this section, or in this part of the Act, and, as I have already pointed out, there may be cases when the company is not in a position to serve a counter notice requiring the owner to sell his mines.

Section 43 provides that "where the company shall not be required to purchase such lands" compensation shall be made for their temporary occupation, and that such compensation shall include "the full value of all clay, stone, gravel, sand, and other things taken from such lands."

It seems to follow from the consideration of these sections that where lands taken by the company for temporary purposes are purchased in pursuance of a statutory notice given by the owner the purchase vests in the company as part of the property purchased, clay, stone, gravel, sand, and other things of that sort, useful or proper for constructing the railway, although not expressly purchased or expressly named in the conveyance and conveyed thereby, and also that after the purchase the company are free to work as they please, without being subject to the directions of the surveyor or agent of the vendor.

This result, however, seems somewhat incompatible with the view which the respondent takes of the meaning of the term "mines" in section 77. It must be borne in mind that that section is not confined to lands which the company require to purchase for the purpose of their undertaking. It applies to "any land purchased" by the company, and therefore to lands which the owner requires the company to purchase under section 42. If the respondent's view be correct, a railway company which has lawfully entered on lands for the purpose of taking clay or gravel therefrom might find its operations suspended by a notice to purchase those lands. If clay and gravel be comprehended in the term "mines," and if the time for compelling the landowner to sell mines has passed, the company is helpless. Purchase it must. But the purchase prevents it using the lands for the only purpose for which they were wanted, unless indeed you are prepared to do extreme violence to plain language, and to read the provision vesting in the company such parts only of the mines under the lands purchased by them as shall be necessary to be used in the construction of the railway as vesting in them to an unlimited extent whatever may be useful or proper for constructing the railway.

It was urged before your Lordships that the enactments dealing with mines were passed for the benefit of persons authorised to construct waterworks and railways, that, to use Mr Justice Kay's language, there was "no reason therefore for putting a narrow or restricted construction upon the word 'mines,'" and that consequently the word ought to be held to include minerals of every description. I am inclined to think that when you make the word "mines" include that "which is in no sense a mine," you do something more than avoid a narrow and restricted construction. And I am not convinced that it is a proper mode of construing an Act of Parliament to strain the language in favour of those for whose benefit the enactment may be supposed to have been passed.

However that may be, it appears to me that the enactments under consideration were not intended to benefit waterworks or railways at the expense of those whose lands might be required for the purpose of the undertaking. Indeed, if Lord Cranworth's suggestion in *The Great Western Railway Company* v. *Bennett*, L.R., 2 E. & I. App. 27, be right, the main object of these enactments in their ultimate shape was to prevent the hardships resulting to landowners from the application of common law rights to compulsory purchases. I doubt whether railway companies were special favourites with the Legislature in those days. I should rather have supposed that Parliament considered the division of property and the adjustment of rights effected by these enactments a fair arrangement, and one equally beneficial to both parties. And so it is if the language used has its ordinary and proper signification. Confine the enactment to mines, and nothing can be fairer. Where lands containing mines are taken by a railway company it would probably be a most serious injury to the vendor to compel him to include his mines in the sale. In most cases he would be selling a long narrow strip of minerals which might form an impassable barrier in the middle of his mines. If the sale were a voluntary sale to an ordinary purchaser it would be a matter of course to reserve the mines. On the other hand, neither railway companies nor persons who construct water-works require mines as such, or are capable of working mines for profit. Mines are only useful to them so far as they may contribute to the support of the lands under which they lie. In many cases they may be worked without interfering with the beneficial enjoyment of the surface.

These considerations, however, do not apply to the case of gravel and clay and things of that sort, which may be termed surface minerals. Remove surface minerals from under the track, and the railway becomes a heap of rubbish. For the very existence of the line it is necessary that they should be left undisturbed. And yet, according to the respondent's argument, a railway company is not to pay for the use they make of surface minerals which do not belong to them. Why? Because the person to whom they do belong does not actually want his property just yet. In the meantime it is more useful to the railway company than it is to the owner. In other words, to put it plainly, a railway company is to have a forced loan of their neighbour's property without consideration—without any corresponding advantage to him, so long as he may be unable to work it or get it worked at a profit. The doctrine involved seems to me somewhat advanced, and I should hesitate to attribute it to the Legislature unless I found it clearly expressed in an Act of Parliament.

Observe how unreasonable the proposition is. The surface minerals must either add to the value of the lands at the time of the purchase or not. If they do not add to the value, why is the railway company paying the full value of the lands not to have the surface minerals? They may be useful for the construction of the line; they are necessary for its existence. On the other hand, if they do add to the value of the lands, why is the landowner not to be paid for them at once, though he may not be able for some time to deal with them profitably when they are separated in ownership from the surface? In the case of surface minerals there is no peculiar hardship in taking a strip of the minerals. If the landowner were selling a strip of his lands to an ordinary purchaser, he would in ordinary course sell the surface minerals too, and so get a better price. When he is made to sell for the benefit of the public, why should he be made to sell his property in slices, and to wait for half the price (to take the figures from the present case) until he is in a position to intimidate the railway company? This seems very unreasonable and very unfair to the landowner, who gets nothing by way of compensation if the Act, as interpreted by the respondent, be honestly carried out. But I must say I much doubt whether the Act so interpreted could be carried out honestly. There is no difficulty in valuing lands on the assumption that they contain no mines. But there would, I think, be considerable difficulty in arriving fairly at the value of lands required for a railway, treating them merely as so much surface not entitled to any right of support, and as separated for the purpose of valuation from such ordinary constituents of the subsoil as gravel, clay, and stone. If the decision under appeal be upheld railway companies may no doubt protect themselves in

future purchases. But I suspect in many cases of past sales a railway company would be called upon to pay over again for what it has bought and paid for long ago.

It was said that unless the word "mines" be held to include surface minerals railway companies may be exposed to the risk of having the safety of their works endangered by the removal of clay and gravel and other surface minerals in the immediate proximity of their lands. The answer is that the railway company must judge for themselves what extent of land is required, and take sufficient to secure the stability of their works against accidents which can readily be foreseen when the nature of the sub-soil is known.

I desire to base my judgment on what seems to me to be the plain meaning of the words of the Acts, but at the same time it is satisfactory to find that the result is consistent with what may be presumed to have been the intention of Parliament, and not likely to lead to inconvenient consequences.

For these reasons I am of opinion that the interlocutor under appeal should be reversed.

Interlocutors appealed from reversed; interlocutor of the Lord Ordinary of the 16th December 1885 restored, the respondent to pay to the appellants their costs in the Court below and in this House.

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COURT OF SESSION.

Thursday, January 24, 1889.

SECOND DIVISION.

[Sheriff of Aberdeen.

MOLLISON *v.* NOLTIE.

Contract—Stock Exchange—Joint Agreement to Sell Stock not in Seller's Hands—Speculation as to Rise and Fall of Stock.

On the joint employment of two persons a broker sold a certain amount of railway stock. Neither of the parties possessed the stock at the time. The stock was continued for some months, when it was closed at a loss, and the sum due to the broker for commission and differences was paid by one of the principals.

In an action at his instance against the other adventurer for repayment of one-half of this sum, the defender pleaded that the action should be dismissed in respect that the transaction was of a gambling nature. *Held* that as the stocks had been sold to a real purchaser, and the transaction between the principals was a joint-adventure in stocks, and not a joint-adventure in gaming, the pursuer was entitled to recover from the defender the amount sued for.

Upon 16th January 1888 Hugh Mollison, late farmer, Burnside, Ruthrieston, Aberdeen, and James Noltie, grocer and spirit merchant, Aberdeen, agreed to enter into a joint-adventure in the sale and purchase of Grand Trunk Railway Company of Canada First Preference Stock. They accordingly on said date instructed Mr Alexander S. Sutherland, stock and share broker, Aberdeen, to sell for them 500 said Grand Trunk Railway Company of Canada First Preference Stock at 54$\frac{1}{8}$ per cent. Mr Sutherland made said sale. No such stock was in the hands of the parties at the time. The stock was continued till, on the 11th day of June 1886, the said quantity of stock was purchased through Mr Sutherland at 63$\frac{3}{8}$ per cent., in order to close the adventure. The sum which thus fell due to the broker for commission and differences amounted to £49, 15s. 11., which sum was paid by Mollison, who in October 1887 brought this action against Noltie for £24, 17s. 11d., being the half of the above-named sum.

The defender averred, *inter alia*—"In the beginning of March 1886 the defender called on Mr Sutherland and instructed him to close the 500 Trunks, and to let the pursuer know this. Mr Sutherland agreed to do so. From that time till 9th August 1886, two months after the stock had been purchased, the defender was not aware that said account had been closed. He believes and avers that if said stock was continued it was so continued in the name of the pursuer alone. The defender has no knowledge with whom the pursuer was dealing, and never received any sale notes, nor was he otherwise informed that a sale had been effected."

The pursuer pleaded—"(1) The defender having agreed to enter into said joint-adventure with the pursuer, and having done so, defender is bound to bear his share of the loss arising therefrom."

The defender pleaded—"(2) The defender having instructed his broker to close his account at a time when no loss would have been incurred, the defender is in the circumstances not liable to pursuer. (5) The transaction being of the nature of gambling transactions, the action should be dismissed."

After a proof, which was mainly directed to the question whether the defender had instructed Mr Sutherland to close the account in March 1886, the Sheriff-Substitute (Brown) upon 30th June 1888 sustained the defender's 5th plea-in-law, and dismissed the action.

On appeal the Sheriff (Guthrie Smith) on 25th September 1888 issued this interlocutor:—"Recals the interlocutor: Finds it proved that on their joint employment Mr A. S. Sutherland, stockbrocker, sold on their account certain railway stock, with the result that they became indebted to him in the sum of £49, 15s. 11d. for commission and differences: Finds in law that the pursuer having paid this sum to the said A. S. Sutherland, is entitled to recover from the defender his share thereof, being the sum sued for: Therefore repels the defences; decerns in terms of the conclusions of the summons; finds the defender liable in expenses, &c.

"*Note.*—On the 16th January 1886 the pursuer