appellant craved a case to be stated, in terms of his previous intimation, and such a case was granted." I think that in such circumstances the case before us would be substantially that of judgment given subject to a case stated, and the difficulty I have in concurring with your Lordships' judgment is that I am not sure it is not too strict a reading of this minute to hold that that was not in substance what was here done. It is difficult to see why the Justices before giving judgment recorded the fact that each party had requested a case to be stated, unless the purpose was that this having been agreed to, it was desired to keep everything open. If the Justices had resolved not to give a case, or treat this as a matter on which the unsuccessful party might attempt an appeal if he thought fit, it occurs to me that no such passage would have been in this minute, or the minute would have contained a statement that the request had been refused. But at the same time, as your Lordships have unanimously held that the minute as expressed is not sufficient to make this a judgment subject to a case stated, and as I cannot dispute that the matter has not been made so clear as it certainly might have been, I am not disposed to say that I differ from the result at which your Lordships have arrived, although I confess I should more willingly have concurred if the judgment had been the other way.

It has been suggested by your Lordship in the chair that even if this had been a judgment given subject to a case stated, the case would still be incompetent, and there would have been no remedy, because by the judgment the appeal was dismissed, while no alternative statement is given of the judgment to be pronounced if in the opinion of the Court the Justices have taken a wrong view of the law. In that opinion I cannot concur. The point decided by the Justices is one of law arising on the facts stated. In respect of their view upon the legal question the complaint has been dismissed. But if it had been dismissed subject to a case stated—as I think was intended—and this Court were of opinion that in point of law the justices were wrong, it appears to me that our course then would have been, under the statute, to remit the case with our opinion, and with a direction to recal the judgment, dismissing the complaint, and to proceed with the cause. The complaint having been dismissed upon a wrong view of the law, the Justices did not proceed to fulfil their duty, which would have been to take up the case upon the merits, and to dispose of it by imposing the penalties, modified or otherwise, which they should think right. I see no reason to doubt, so far as my opinion is concerned, that under the statute we could competently so have dealt with it—that the terms of the statute which enables this Court to give a direction would have entitled the Crown to obtain a remit of that kind. But as your Lordships are of opinion that this is really not a judgment subject to a case stated, but a judgment against which one of the parties is practically attempting an appeal, of course the observation I have now made can in this case have no practical effect.

The Court dismissed the appeal as incompetent.

The Dean of Faculty for the respondents moved for expenses on the ground that the Revenue authorities had brought an incompetent case before the Court—*Sumner* v. *Middleton*, *supra*.

The Lord Advocate for the Inland Revenue—The respondents should have taken the objection to competency in the Single Bills. They had, on the contrary, given no notice of their objection either before the Justices or anywhere else until the case came up for discussion on the merits.

The Court refused the respondents' motion.

Counsel for Appellant—The Lord Advocate (Watson)—The Solicitor-General (Macdonald)—Rutherfurd. Agent—The Solicitor of Inland Revenue.

Counsel for Respondent—The Dean of Faculty (Fraser)—Mackintosh. Agent—W. G. Roy, S.S.C.

Thursday, November 13.

SECOND DIVISION.

[Lord Adam, Ordinary.

CALEDONIAN AND GLASGOW AND SOUTH-WESTERN RAILWAY COMPANIES *v.* WM. DIXON (LIMITED) AND OTHERS.

Railway—Mines and Minerals—Notice to Purchase—Railway Clauses Consolidation Act 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 71.

The 71st section of the Railway Clauses Consolidation Act 1845 provides that if the owner or lessee of minerals under a railway is desirous of working them, he shall give the railway company before he begins working thirty days' notice of his intention to do so. The 72d section provides that if before the termination of thirty days from the notice the railway company do not give a counter notice of their desire that the minerals should remain unworked, the mine-owner may begin to work them as he thinks fit. *Held* that the effect of the latter section was to prevent the mine-owner from beginning to work within that time, and that the railway company were not thereby precluded from giving the counter notice at any future time that they considered their safety required it, they making compensation to the mine-owner for his loss thereby.

The Caledonian and the Glasgow and South-Western Railway Companies brought this note of suspension and interdict against William Dixon (Limited), and the managing director and secretary of that company, for the purpose of preventing them working out the minerals under a certain portion of the Beith Branch Railway, of which the complainers were proprietors. That railway passed through the estate of Caldwell, belonging to Colonel Mure. The railway companies had purchased from him the land occupied by the railway so far as passing through that estate, their term of entry being 12th October 1866. The mines and minerals under the land were not expressly purchased along with it, and therefore under the Acts of Parliament they fell to be excepted out of the conveyance.

The respondents were lessees of the minerals,

consisting of limestone rock lying under the railway, conform to lease by Colonel Mure in favour of their authors, dated 1st and 12th November 1870. On 8th July 1878, in terms of the 70th and eight subsequent sections of the Railway Clauses Consolidation (Scotland) Act 1845, they had given notice to the complainers that they were desirous of working, and intended to work, the mines and minerals, including limestone, lying under the railway. The complainers did not before the expiration of thirty days from the date of that notice intimate to the respondents their desire to have the mines and minerals left unworked, and their willingness to make compensation; but they subsequently did so by a notice dated 20th February 1879.

By the 70th section of the Railway Clauses Act it was provided that the minerals under a railway remained the property of the owner of the land unless they are expressly purchased by the company.

The 71st section provided that if the owner or lessee of minerals not purchased by the company was desirous of working them, he should give to the company notice in writing of his intention to do so thirty days before the commencement of working. Power was also given to the company "upon receipt of such notice" to inspect the mines. If it should appear to the company that the working of the mines was likely to damage the works of the railway, and if they were desirous that such mines or parts thereof should be left unworked, and they were willing to make compensation therefor, they were further empowered to give notice to that effect. If such notice was given, then it was declared that the owner or lessee should not work the mines or minerals comprised in such notice, and that the company should make compensation for all loss and damage caused by the non-working.

The 72d section provided that if before the expiration of such thirty days the railway company did not give notice of their desire to have such mines left unworked, it should be lawful for the owner or lessee to work the said mines, in such manner as such owner or lessee should think fit, for the purpose of getting the minerals contained therein.

The complainers further objected to the notice of 8th July that it was given when the rights of the parties in regard to the minerals were *sub judice*, under a note of suspension and interdict in the Court of Session in which the railway company sought to have William Dixon (Limited) interdicted from quarrying or working the limestone lying under the railway, by open cast workings or otherwise, so as to destroy the surface of the railway. In that case the interdict had eventually been refused.

The complainers pleaded, *inter alia*—"(1) Upon a sound construction of the statutes the complainers are entitled at any time to stop the working of the minerals under and adjacent to their railway upon undertaking to pay compensation therefor to the parties in right of the said minerals. (2) In any view, the respondents' notice of 8th July having been given while the legal rights of parties in the said minerals were *sub judice*, the effect of the said notice was superseded during the dependence of the said process."

The respondents pleaded, *inter alia*—"(1) The complainers' notice of 20th February 1879 is not a valid statutory notice in terms of the 71st and 72d sections of the Railways Clauses Consolidation (Scotland) Act 1845, and the respondents are not bound to recognise it as such. (2) The respondents are entitled to work and remove the whole minerals referred to in their notice of 8th July 1878, and interdict against them doing so ought to be refused, in respect that the said minerals were not expressly purchased by the complainers along with the lands, and that the complainers have failed to adopt the only other statutory procedure which entitles them to have the said minerals left unworked."

The Lord Ordinary (ADAM) on 18th June 1879 repelled the pleas-in-law for the complainers and refused the note of suspension and interdict. His Lordship added the following note:—

"*Note.*—[*After stating the facts*]—In the opinion of the Lord Ordinary it was the intention of the Legislature that a railway company should have thirty days and no more within which to determine whether or not to purchase the minerals. He does not think that the effect of the notice given by the owner or lessee was to confer on the company a power of purchasing the minerals compulsorily, which they might exercise at any time hereafter—which is the complainers' contention. The company is to give notice to the owner or lessee of those minerals which they desired to have 'left unworked.' If no such notice is given, the owner or lessee is entitled to conclude that the company do not desire to take the minerals, and to make his arrangements for working them accordingly. He is to be entitled to work the minerals for which the company shall not have agreed to pay compensation—that is, as the Lord Ordinary reads the clause, shall not have agreed to pay compensation before the expiration of the thirty days.

"The Lord Ordinary is therefore of opinion that the complainers' plea that they are entitled at any time to stop the working of the minerals under and adjacent to their railway upon undertaking to pay compensation therefor is not well founded.

"But it is further maintained by the complainers that the respondents' notice of 8th July having been given while the legal rights of parties in the minerals were *sub judice*, the effect of such notice was superseded or suspended during the dependence of the process.

"The facts upon which this plea is founded are, that in the month of March 1877 the respondents' workings had reached to within about 40 yards of the complainers' railway. Thereupon a correspondence took place between the parties, which resulted in an arrangement being come to that the respondents should be allowed to work the limestone up to within 10 feet of the centre of the existing line of rails, and that when the workings reached that point both parties should decide as to future operations.

"In the month of June 1878 the respondents' workings had been carried up to within 10 feet of the centre of the railway. Thereupon the complainers on the 21st June 1878 presented a note of suspension and interdict, in which they sought to have the respondents interdicted from quarrying or working the limestone lying under the railway by means of open cast workings or otherwise, so as to destroy the surface of the railway. They did not dispute the respondents'

right to work otherwise than by open cast workings.

"On the 16th July 1878 the Lord Ordinary on the Bills passed the note and interdicted the respondents from quarrying or working the limestone by means of open cast workings. This interlocutor was adhered to by the Second Division of the Court on 26th October 1878. The case came thereafter to depend in the Court of Session, and was finally disposed of by an interlocutor of the Lord Ordinary, of date 11th February 1879, deciding the case against the complainers and refusing the interdict.

"It was during the dependence of these proceedings that the notice of the 8th July 1878 was given by the respondents.

"It does not appear to the Lord Ordinary that these proceedings had the effect of suspending the statutory effect of the notice given by the respondents. It is said by the complainers that they could not have given a notice of their desire to purchase the minerals within thirty days of the respondents' notice without abandoning the pleas which they were maintaining in the suspension. That may be so, but it has been finally determined that the pleas which the complainers were maintaining were bad. If the complainers preferred trusting to ill-founded pleas to giving the statutory notice of their intention to take the minerals, they must suffer the consequences. The respondents' statutory rights are not to be prejudiced on that account. *Laing* v. *Caledonian Railway Company*, Jan. 19, 1850, 12 D. 481.

"If the Lord Ordinary's opinion is right, the complainers no doubt are left in a very unenviable position as regards these minerals, but he does not think they are entitled to much sympathy. It appears to him that the object of the complainers throughout the proceedings has been to deprive the respondents of the minerals in question, for their own benefit, and without paying for them."

The complainers reclaimed.

At advising—

LORD GIFFORD—The question raised in this case is one of considerable importance. We have been told that there is no express decision on the point, but counsel for the railway companies have stated that in practice such workings as those we have to deal with here have been stopped wherever there appeared to be any danger to the line.

If mineral workings are never to be stopped at all unless notice be given within the 30 days provided in the statute, I should think that a most unfortunate result; and if possible such a state of matters should be put an end to. But I am of opinion that there is no absolute obligation specifying the limit at the 30 days. It would be very hard if it were so. The minerals to be worked might be in all sorts of *strata*—far down or near the surface. The roof to be left might be hard and solid, or quite the reverse, and it would be extremely difficult for a railway company to judge at first whether the working of minerals could be conducted without interfering with them or not. I quite agree that a railway company ought to err on the safe side, but I hesitate to say that they are bound in all cases to provide themselves against the chance of any risk and to make themselves absolutely secure by giving notice to purchase within the 30 days. Yet upon the respondents' contention, if the railway company fail to give notice to purchase within the 30 days, they are to lose all opportunity of stopping the working of the minerals, however dangerous it may be to their line.

I cannot adopt that view; and I am therefore inclined to hold that if the railway company choose at any point of time to appear with the report of men of skill that the purchase of the minerals is necessary for their safety, they are entitled to do so, the only question being one of compensation. I think therefore it would be to apply too strict a rule to this clause to hold that if the railway company do not purchase within 30 days they are never to purchase. I think the Lord Ordinary has construed the Act of Parliament too rigidly, and I am of opinion that on the railway company coming now and offering to pay all expenses and compensation no more can be asked from them.

It has been said that damage has been caused to the respondents by litigation. Now, the very object of the stipulation that caution be found when an interdict is granted is that the party interdicted may have a fund out of which to claim damages if it eventually turn out that the interdict was wrongly used.

The mineral owners here are fully secured that they will get value for their limestone and repayment of any damage suffered.

LORD RUTHERFURD CLARK—(who had been called to this Division in the absence of Lord Ormidale)—I am of the same opinion.

LORD JUSTICE-CLERK—So am I. I think the limit of 30 days is simply the time within which the mine-owners cannot begin to work the minerals; after that the question is one simply of compensation. That the railway company did not purchase within 30 days will not in my opinion entitle the respondents to go on with their workings to the danger of the railway. I think the notice given by the railway company dated 20th February last was quite sufficient within the meaning of the statute to prevent the respondents from proceeding further with the working of the minerals in the area specified, the railway company offering, as they did in that notice, to make the respondents full compensation therefor.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the reclaiming note for the complainers against Lord Adam's interlocutor of 18th June 1879, Recal the said interlocutor; sustain the reasons of suspension; suspend, prohibit, interdict, and discharge the respondents by themselves and others acting under their authority, in terms of the note of suspension and interdict, and decern: Find the complainers entitled to expenses," &c.

Counsel for Complainers (Reclaimers)—Balfour—Mackintosh. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for Respondents—Asher—Jameson. Agents—Melville & Lindesay, W.S.