bears that a different remedy may be concluded for, and that the record may be amended so as to permit the Court to give effect to it. I am, therefore, clearly of opinion that it is within our competence to allow the amendment proposed.

(2) The next question is, whether it is expedient in the circumstances of this case to allow the amendment. I think it is so, in the interests of both parties. At first sight it would seem somewhat late in the day, after six years' litigation, to allow such an amendment, but this would be a very superficial view to take. The case, so far as I can judge, would have taken precisely the same course as it has done although the alternative conclusion now sought to be added to the summons had been there from the first. The pursuers desire specific implement if they can obtain it. The defenders profess their willingness to give specific implement; and all the procedure that has hitherto taken place has been with the view of defining the rights of parties with regard to the obligation on which the declaratory conclusion is founded. The question whether a decree for specific implement can yet be given has not been finally decided; although now for the first time it appears that this may be ultimately impossible should the Board of Trade's adviser adhere to the views expressed in his reports and the Board feel themselves constrained to act upon his advice. I think it would be unfortunate if we thought ourselves compelled to decern the defenders to execute works, at a cost of £800 or thereby, in order merely to see whether the execution of such works might affect the mind of Colonel Yorke, when he has already indicated that it would not do so. On the other hand, it does not in the least follow that the only remedy which the pursuers have is one of specific implement; and if so it is desirable that that question should be determined in the present process, rather than that a new litigation should be started which would inevitably involve much additional delay and expense. I think therefore we should exercise our discretion by allowing the amendment to be added to the record.

[*His Lordship then dealt with a point on which the case is not reported.*]

LORD ARDWALL—I consider the question whether the proposed amendment of the record, including the summons, should be allowed is mainly one of expediency, and I confess I have had difficulty in coming to a conclusion satisfactory to myself upon that matter. At first I was disposed to think that it would be well to get the case for specific implement disposed of by itself, and then the Court would be in a position to judge whether, looking to the causes which rendered specific implement impossible, the pursuers had or had not a good claim of damages against the defenders in a fresh action of damages. On the other hand, however, I recognise that it is perfectly possible that the keeping separate in two actions of the alternative remedies of specific implement and damages, especially if a proof were to be required with regard to each of them, might lead to considerable difficulties in the conduct of the proof, and also to considerable expense.

On the whole matter, therefore, and seeing that after the summons as amended will merely be brought into the shape which it would originally have taken had the pursuers contemplated the impossibility of obtaining specific implement, I am not disposed to differ from your Lordships in the course proposed.

I may add that upon the competency of the amendment I agree with the view taken by my brother Lord Salvesen.

The LORD JUSTICE-CLERK concurred.

LORD DUNDAS was absent.

The Court allowed the record to be amended in terms of the minutes for the parties, and allowed them a proof of their respective averments so far as bearing on the alternative conclusion of damages.

Counsel for Pursuers—Morison, K.C.—Ramsay—Macmillan. Agents—Webster, Will, & Company, W.S.

Counsel for Defenders—Clyde, K.C.—Cooper, K.C.—King. Agents—Hope, Todd, & Kirk, W.S.

Friday, February 10.

SECOND DIVISION.

[Lord Cullen, Ordinary.

CALEDONIAN RAILWAY COMPANY *v.* SYMINGTON AND OTHERS.

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

The lessee of the freestone in an estate through which a railway passed claimed right to work the freestone under the railway line as being excepted from the grant to the company under section 70 of the Railways Clauses Consolidation (Scotland) Act 1845. He averred—(1) "The said freestone rock does not form the substratum of the soil and is not the common rock of the district in which the respondent's quarry is situated. On the contrary, it is a fine red sandstone of exceptional character both in point of evenness of grain and composition. Besides being adapted for the finest kinds of building work, it is specially suitable for use in the form of grindstones and for many other commercial purposes for which ordinary or common sandstone is unsuitable. It is thus of great commercial value." And (2)—"Such rock as that here in question was at that time" (1852, the date when the company acquired the subjects) "universally recognised and admitted in the mining and commercial world and by all

railway companies, and by all proprietors in or through whose lands railway companies had occasion to construct railway lines and relative works, to be a mineral within the meaning and for the purpose of the statute."

Held that it had been decided by the case of *The North British Railway Company* v. *Budhill Coal and Sandstone Company*, 1910 S.C. (H.L.) 1, 47 S.L.R. 23 (*rev.* Court of Session, 1909 S.C. 277, 46 S.L.R. 178), that freestone was not within the exception contained in section 70 of the Railways Clauses Consolidation (Scotland) Act 1845, and that the averments were irrelevant.

Railway—Mines and Minerals—Notice of Intention to Work, with Counter-Notice to Leave Unworked, as Constituting Contract to Pay Compensation—Railways Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 71.

The lessee of the freestone in an estate through which a railway passed gave notice to the company in terms of sec. 71 of the Railways Clauses Consolidation (Scotland) Act 1845 that he intended to commence working the freestone under the line. The company gave notice that they desired certain areas to be left unworked, and expressed their willingness to pay compensation. By nomination and submission arbiters and an oversman were appointed to settle the question of compensation. The lessee ceased or altered his quarrying operations.

Held, in an action of suspension and interdict, that the notice and counter-notice did not constitute a contract entitling the lessee to compensation and debarring the railway company from claiming that they themselves were the owners of the freestone under their line, inasmuch as it did not fall within the exception of "mines of minerals" contained in section 70 of the Railways Clauses Consolidation (Scotland) Act 1845.

The Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33) enacts—Section 70—"The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals, under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby." Section 71 — "If the owner, lessee, or occupier of any mines or minerals lying under the railway, or of any of the works connected therewith . . . be desirous of working the same, such owner, lessee, or occupier shall give to the company notice in writing of his intention so to do thirty days before the commencement of working, . . . and if it appear to the company that the working of such mines, either wholly or partially, is likely to damage the works of the railway, and if the company be desirous that such mines or any 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 under the railway or works . . . which they shall desire to be left unworked, and for which they shall be willing to make compensation, and in such case such owner, lessee, or occupier shall not work or get the mines or minerals comprised in such notice; and the company shall make compensation for the same, and for all loss or damage occasioned by the non-working thereof, to the owner, lessee, and occupier thereof respectively; and if the company, and such owner, lessee, or occupier, do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation."

The Caledonian Railway Company (*complainers*) brought an action of suspension and interdict against Hugh Symington, contractor and quarrymaster, Coatbridge, and against James Falconer, W.S., Edinburgh, and others, the arbiters and oversman in certain deeds of nomination and submission, for any interest they might have, (*respondents*), (1) to interdict the respondents from proceeding under a nomination of arbiters and oversman for the purpose of valuing certain freestone lying under the complainers' line of railway in the parish of Kirkpatrick-Fleming and county of Dumfries, and (2) to interdict the respondent Hugh Symington, and all others acting under his authority, from entering or encroaching upon the property and subjects belonging to the complainers lying in the said parish, and in particular any portion of the freestone rock lying within or under the said property and subjects. The complainers, for the purpose of their railway undertaking, had acquired by conveyance in 1852 certain portions of the estate of Woodhouse, in the parish of Kirkpatrick-Fleming. The respondent Hugh Symington was the assignee of a lease, dated October 1896, by Robert Shand Anderson of Woodhouse, of the sole and exclusive right of quarrying for and removing freestone rock upon the estate of Woodhouse for twenty-one years.

The complainers pleaded—"(1) In respect that the complainers are owners of the freestone rock under their property, the respondent Hugh Symington is not entitled to work the same, or to claim compensation in respect of its being left unworked, and the complainers are entitled to have the arbitration proceedings suspended and the respondents interdicted as craved."

The respondents pleaded—"(2) The complainers not being the owners of the freestone rock under their property, the note should be refused, with expenses. (3) The complainers having by statutory notices,

given under and in pursuance of the said Railways Clauses Consolidation Act, reserved the portions of freestone rock in question to be left unworked, they are now bound to pay to the respondent compensation therefor in terms of said Act. (4) The complainers having admitted that the freestone rock in question is mineral, and having by the said statutory notices under the said Railways Clauses Consolidation (Scotland) Act 1845 contracted to pay compensation therefor in pursuance of said Act, they are not entitled to interdict as craved in either of the conclusions of the note. (5) The respondent having, on the faith of the complainers' undertaking to pay compensation in terms of the said Act, suspended, or ceased, or varied their quarrying operations from time to time, and thereby incurred great loss, damage, and expense, the complainers are barred *rei interventu* from insisting in the note. (6) The freestone rock in question being in fact a mineral within the meaning of the said Act, the respondent is entitled to compensation in respect of the non-working of the portions of freestone rock reserved by the complainers, as the same may be ascertained by arbitration in terms of the Railways and Lands Clauses Acts."

The *notices* referred to in the respondent's plea 3 were as follows: By notices dated 17th and 30th July 1907 and 30th January 1908, the respondent Hugh Symington gave notice to the complainers in terms of the Railways Clauses Consolidation (Scotland) Act 1845, and particularly of section 71 thereof, of his intention to commence working certain areas of freestone rock lying under the complainers' property. Thereafter the complainers, by notices dated 12th December 1907 and 17th April 1908, gave the respondent notice that they desired to be reserved and left unworked two areas of freestone rock under the complainers' property.

The notice given on 12th December 1907 (and that of 17th April 1908 was in similar terms) was as follows:—"Whereas . . . you gave notice that you were lessees of certain minerals, including the right of quarrying for and removing freestone rock in that part of the estate of Woodhouse . . . known generally as the Annanlea Quarry, and that it was your intention after the lapse of thirty days from the date of said notice to work the freestone which is below the Caledonian Railway Company's line and property at the place in question, I do hereby on behalf of the Caledonian Railway Company give you notice that the said company are desirous that the area of freestone rock situated under and within the area tinted pink upon the plan annexed and signed as relative hereto should be left unworked, and that the said company are willing to make compensation therefor in pursuance of the said Railways Clauses Consolidation (Scotland) Act 1845, and I require you accordingly not to work or get the area of freestone rock above specified. . . . J. BLACKBURN,
Secretary of the Caledonian Railway Company."

By notice of claim dated 18th May 1909, the respondent gave notice—"(*First*) that he desired to have such compensation settled by arbitration, unless the complainers agreed to pay the amount of compensation claimed by him, and (*Second*) that his interest in said freestone rock was as lessee thereof, and (*Third*) that the amount of compensation claimed by him was £177,486, 6s. 9d."

Thereafter by deed of nomination and submission the respondent Symington nominated as arbiter the said James Falconer; the complainers under protest also nominated an arbiter. The two arbiters accepted office and appointed an oversman.

As to the *nature of the freestone rock*, the complainers averred, *inter alia*—"(Stat. 11) The freestone rock within or under the complainers' property was included in the conveyance by which the complainers acquired their property, and is not within the subjects reserved therefrom under and in terms of the Railways Clauses Consolidation (Scotland) Act 1845. The said freestone rock forms the substratum of the soil and is the common rock of the district. It is neither rare nor exceptional, and the respondent's stone quarries are just the same as other stone quarries in the district."

The respondent (Symington), *inter alia*, averred—"Explained that the said freestone rock does not form the substratum of the soil and is not the common rock of the district in which the respondent's quarry is situated. On the contrary, it is a fine red sandstone of exceptional character both in point of evenness of grain and composition. Besides being adapted for the finest kinds of building work, it is specially suitable for use in the form of grindstones, and for many other commercial purposes for which ordinary or common sandstone is unsuitable. It is thus of great commercial value. Explained further, that in selling and purchasing respectively the land in question both the sellers and the complainers treated with each other in respect of the said freestone rock on the footing that it was admittedly a mineral within the meaning and for the purposes of the said Railways Clauses Act. The complainers desired to and did purchase only such freestone as was necessary to be dug or carried away or used in the construction of the railway works. They did not purchase, and they paid no compensation for, any portion of the freestone rock now in question. Such rock as that here in question was at that time universally recognised and admitted in the mining and commercial world and by all railway companies, and by all proprietors in or through whose lands railway companies had occasion to construct railway lines and relative works, to be a mineral within the meaning and for the purpose of the statute. In accordance with the universal practice in cases in which railway companies did not desire to purchase and take such rock under and within the area of lands required for the construction of the railway and relative works, they paid compensation

for the taking of said area of land on the basis of surface value only, agricultural value, or feuing value, as the case might be. But where railway companies desired, purchased, or took rock under and within the area of land required for the construction of the railway and relative works, they treated with the proprietors expressly therefor, and the basis of the price was entirely different. [Averments were then made of particular transactions in which the proprietors were paid for freestone rock below the formation level of railways.] The complainers have treated and admitted the said freestone rock here in question as a mineral within the meaning and for the purposes of the said Act continuously from the time when they purchased and took the land for the railway down to the time when they gave the respondents the notices dated 12th December 1907 and 17th April 1908, and in and by said notices they not only treated the said freestone rock as a mineral but contracted and agreed to pay compensation therefor as the same might be settled in terms of said Railways Clauses Act and relative Acts of Parliament."

As to the *actings* following on the *statutory notices*, the respondent made the following averments—"Explained that in said notices the complainers, upon a recital of the respondent's foresaid notices, gave notice to the respondent not merely that they desired the said certain areas of freestone rock to be left unworked, but also that they were willing to make compensation therefor in pursuance of the Railways Clauses Consolidation (Scotland) Act 1845, and required the respondent accordingly not to work or get the said areas of freestone rock. In consequence of said statutory notices the respondent accordingly left the said areas of freestone rock unworked. This necessitated extensive variation of his quarrying operations, and thereby entailed loss, damage, and expense to the respondent. Explained further, that when the respondent was in course of working the freestone rock within the area hatched blue upon the plan produced herewith, and particularly that portion thereof which is situated within the railway boundary, the complainers called upon the respondent to remove a crane, employed by him for that purpose, on the ground that it overhung the railway and would be a source of danger to the railway and the traffic thereon. After sundry communings and correspondence between the parties, the complainers, by letter of 29th January 1908 undertook that in any statutory proceedings with reference to any claim of compensation that might be made by the respondent in respect of the area of rock thus reserved by the complainers, the complainers would agree that any loss or additional expense in the working of the quarry through the removal of the crane to another position should be deemed to be loss or damage occasioned by the non-working of the reserved rock, the compensation for which fell to be determined by arbitration between the parties under the statute."

On 6th December 1910 the Lord Ordinary (CULLEN) pronounced this interlocutor—"The Lord Ordinary having heard parties, before answer, allows them a proof of their averments, . . ., the respondents to lead in the proof."

The complainers reclaimed, and argued—There was no relevant averment that the freestone in question was an excepted mineral in the sense of sec. 70 of the Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33). It was authoritatively settled that freestone was not a mineral in the sense of that section—*Budhill Coal and Sandstone Company* v. *North British Railway*, 1910 S.C. (H.L.) 1, 47 S.L.R. 23. That case followed upon the Scots cases of *Menzies* v. *Earl of Breadalbane*, June 10, 1818, F.C., 1 Sh. App. 225, and *Duke of Hamilton* v. *Bentley*, June 29, 1841, 3 D. 1121. The expression "mines of minerals" fell to be interpreted in the same way here as in a general reservation of mines and minerals in a disposition or charter—*North British Railway Company* v. *Budhill Coal and Sandstone Company* (*sup. cit.*), Lord Chancellor at 1910 S.C. (H.L.) 4, and Lord Shaw at 10. The enumeration of certain specified matters showed that the object of section 70 was to except exceptional matters. Freestone was not an exceptional matter—it was found everywhere, and was the substratum of the soil at the place in question. If, however, the subject was of exceptional quality, then the question arose, was it at the time of the contract regarded as a mineral in the ordinary sense in which the word was used in the mining and commercial world and by landowners—*Budhill Coal and Sandstone Company* v. *North British Railway Company* (*sup. cit.*); *Caledonian Railway Company* v. *Glenboig Union Fireclay Company, Limited*, 1910 S.C. 951 (Lord President at 961, and Lord Salvesen at 963), 47 S.L.R. 823; *Magistrates of Glasgow* v. *Farie*, August 10, 1888, 15 R. (H.L.) 94, 26 S.L.R. 229. It must in the first place be relevantly averred that the freestone was exceptional, but the respondent's own notices showed clearly that freestone formed the ordinary substratum of the soil at this place. It was not relevant for the respondent to say that the sandstone was of exceptionally fine quality and composition. It had been decided that that would not do—*Menzies* v. *Breadalbane* (*sup. cit.*). This being so, the question of opinion at the time of the contract did not need to be considered. (2) The respondent was not entitled to compensation on the ground that the statutory notices constituted a contract entitling him thereto. Notice to leave unworked, coupled with a willingness to pay compensation, did not mean that the complainers conceded the validity of the respondents' title. It left the question of title open, and did not preclude the complainers from disputing the right of the respondents to any compensation whatever—*Clippens Oil Company, Limited* v. *Edinburgh and District Water Trustees*, February 22, 1901, 3 F. 1113 (Lord Kinnear at 1127), 38 S.L.R. 354; *Campbell* v. *Mayor*

and Corporation of Liverpool, 1870, L.R., 9 Eq. 579; *The East and West India Docks Company* v. *Gattke*, 1851, 3 Mac. and G. 155. The respondent could only get compensation if he were the owner of the minerals. It was absurd to suppose that the complainers should have to pay £170,000 for stone that belonged to themselves.

Argued for respondents—The question whether a substance was a mineral or not was a question of fact in each case to be decided by evidence—*Caledonian Railway Company* v. *Glenboig Union Fireclay Company* (*sup. cit.*) (Lord President at 1910, S.C. 961, Lord Salvesen at 963). *Menzies* v. *Breadalbane* (*sup. cit.*) did not affect the present case. It was there decided that the sandstone in question was just the ordinary substratum of the soil. The ordinary ground could not be held to be a mineral. That would make a disposition of land a mere farce, as the exception would swallow up the grant. But the present case was different. It was relevantly averred that this fine red sandstone was of exceptional kind. It was true that common blue clay had not been held to be a mineral—*Farie* v. *Magistrates of Glasgow* (*sup. cit.*)—but china clay on the other hand had been so held—*Great Western Railway Company* v. *Carpalla United China Clay Company*, [1910] A.C. 83—and so had fireclay—*Caledonian Railway Company* v. *Glenboig Union Fireclay Company* (*sup. cit.*). These last were exceptional kinds of clay; in the present case the freestone was averred to be exceptional. The respondent was therefore entitled to a proof of his averment that the freestone here was an exceptional substance. That being so, the Court had next to determine whether the substance was regarded as a mineral by the mining world, the commercial world, and landowners, at the time when the purchase was effected. It was here averred to be. The respondent accordingly was asking proof of the very things that the House of Lords in the *Budhill* case considered should be the subject of proof—*Budhill Coal and Sandstone Company* v. *North British Railway Company* (*sup. cit.*), Lord Chancellor at 1910 S.C. (H.L.) 4, Lord Gorell at 8, and Lord Shaw at 12. Indeed, there must be proof before the *Budhill* case could be applied. If the complainer's contention were right, he was getting all this valuable freestone for nothing. He had not paid for it on purchase. (2) The complainers had bound themselves by the statutory notices to pay compensation. It was an unqualified contract. *Campbell* v. *Corporation of Liverpool* (*sup. cit.*) and *East and West India Docks* v. *Gattke* (*sup. cit.*) were not in point. They were cases under the Lands Clauses Act, where the notice to treat was quite different. Lord Kinnear's dictum in *Clippens Oil Company* v. *Edinburgh and District Water Trustees* (*sup. cit.*) was merely *obiter*; *Glasgow and South-Western Railway Company* v. *Bain*, November 15, 1893, 21 R. 134, 31 S.L.R. 98, was also referred to.

At advising—

LORD ARDWALL—This is a note of suspension and interdict brought by the Caledonian Railway Company against Hugh Symington, quarrymaster, carrying on business under the name of the Annanlea Quarry Company, to interdict further proceedings under a nomination of arbiters and oversman for the purpose of valuing freestone under the complainers' line of railway, and also for interdict against the respondent entering or encroaching on the freestone rock lying under their line of railway in the parish of Kirkpatrick-Fleming.

The ground of the complainers' action is set forth in their first plea-in-law which is to the following effect . . . (*quotes v. sup.*) . . .

The Lord Ordinary has allowed a proof, in which the respondents were ordained to lead, and the complainers have presented the present reclaiming note against his judgment on the ground that the respondents have stated no relevant case, and that the respondents' pleas ought to be repelled and interdict granted in terms of the note.

I am of opinion that the complainers' contentions are well founded. As appears from the respondents' statements, the material which they claim right to excavate under the Railway Company's line is freestone rock. This also appears from the statutory notices, which intimate that the respondents are now about to work the freestone below the Railway Company's line and property, which it is stated they have the right of quarrying for and removing under their lease. This makes it perfectly clear, first, that the substance which the respondents claim to work is freestone, and next, that they are intending to work it by means of quarrying.

It was authoritatively settled by the judgment of the House of Lords in the case of the *North British Railway Company* v. *The Budhill Coal and Sandstone Company*, A.C., 1910, p. 116, that sandstone or freestone (for the terms are synonymous) is not a mineral within the meaning of section 70 of the Railways Clauses Consolidation (Scotland) Act 1845. It is therefore somewhat surprising to find the respondents now claiming that the freestone under the complainers' railway belongs to them and was excluded from the conveyance to the Railway Company of the lands in question as being a mineral within the meaning of the said section. They make a number of explanations and averments which they maintain are sufficient to differentiate the present case from the *Budhill* case. I think none of these averments are relevant, and that they ought not to be admitted to proof. In the first place, they say that the said freestone rock does not form the "substratum of the soil" at the place in question. Now it appears, as I have already said, from their own notices and also from their lease, which is in process, that freestone rock does form the

substratum of the soil at that place. As I have already pointed out, the notices bear that the lease gives them a right of quarrying for and removing freestone rock at the place in question, and referring to the lease itself, which is dated 15th and 17th October 1896 and which is in process, I notice that the respondents are specially authorised "to perform all operations necessary for opening up, working, and developing the said quarry which the tenants consider necessary and proper, and to deposit the tir baring and rubbish at proper places in a suitable manner." And the plan which is produced in process shows that the freestone is being got by open quarry workings which have now come to encroach upon the railway company's property. If further proof were needed of this matter, the respondents' allegations regarding the position of a crane which I shall afterwards refer to show that what they desire to take away is freestone rock lying immediately under the defenders' railway and truly forming the substratum of the soil there. A statement that it does not do so cannot be accepted at the hands of the respondent. It is further stated that it is not the common rock of the district in which the respondents' quarry is situated. I do not think this is relevant. It is sufficient for the purpose of this action to say that it is the rock which underlies the railway company's line at that place, and as anyone who has had occasion to travel between Scotland and England by the west coast route knows a large piece of country near the place in question is dotted over with freestone quarries, the cranes of which are visible from both the main lines of railway between Scotland and England at that place.

The respondent next goes on to say that "it is a fine red sandstone of exceptional character both in point of evenness of grain and composition; that it is adapted for the finest kinds of building work, and is suitable for use in the form of grindstones and many other commercial purposes for which ordinary or common sandstone is unsuitable." Now it seems to me that none of these averments are sufficient to take the rock in question out of the category of freestone or sandstone. Building work is, of course, the ordinary use to which sandstone is put, and as far as I know grindstones all over Scotland are made of sandstone either red or white, and while possibly finely grained sandstone is more suitable than rough grained sandstone for such purposes, yet I do not think that that has any relevancy to the present question, as it does not affect the admitted fact that this is a quarry of sandstone or freestone. I may refer in this connection to the old case of *Menzies*, 1 Shaw's Appeals, 225, and F.C., June 6, 1818, where the sandstone was described as a vein of stone of a rare species peculiarly fitted for architectural purposes by its admitting of ornamental finishing and by its resisting the weather, and there the contention was given effect to that such a substance was no more a mineral than any other building stone, and this was given effect to both by the Court of Session and by the House of Lords.

On this point the sandstone dealt with in *Menzies'* case may be usefully compared with the sandstone which was the subject of decision in the *Budhill* case. In the latter case it was proved that the sandstone there was of so loose a character and texture that in point of fact it could not be used for building purposes. It was accordingly ground down and used as moulders' sand. I was of opinion in that case that, even assuming sandstone to be a mineral in the sense of the section, the upper part of the stratum which consisted of this disintegrated rock was not sandstone, but that view was rejected both in the Court of Session and in the House of Lords. Accordingly it has been decided that all sandstone, whether of a fine character and useful for the best building purposes on the one hand, or so coarse and friable in texture as that it was useless for building purposes on the other hand, are both freestone. Both fall within the category cf sandstone, and necessarily all intermediate grades and descriptions of sandstone and freestone between these two extremes have been decided to fall within the general category. It is therefore in my opinion quite futile to endeavour to exclude the sandstone in the present case from the rule laid down in the cases just alluded to.

Counsel for the respondents referred to certain cases regarding clay, and pointed out that while in the case of *Farie*, 13 A.C. 657, common blue clay was held not to fall within the exception in question, yet in the case of the *Great Western Railway Company* v. *The Carpalla United China Clay Company*, A.C. 1910, p. 83, it was held that china clay did fall within the minerals excepted, and that in the case of the *Caledonian Railway Company* v. *The Glenboig Union Fireclay Company*, 1910 S.C., p. 951, it was held by the First Division of the Court of Session that fireclay was a mineral within the meaning of section 70, and he argued that as different decisions were given regarding varieties of clay according to the individual character of clay in each case, the same principle should be applied to sandstone or freestone. It is sufficient answer, I think, to this argument to say that freestone or sandstone, while it may vary, and often does even in the same quarry, in texture or colour, yet is nevertheless one and the same description of rock; whereas, as was proved in the cases just alluded to, china clay was shown to be a wholly different substance from common clay, and fireclay to be a wholly different substance from either. The respondents then go on to make this averment—"Such rock as that here in question was at that time universally recognised and admitted in the mining and commercial world, and by all proprietors in or through whose lands railway companies had occasion to construct railway lines and relative works, to

be a mineral within the meaning and for the purpose of the statute." Now to ask a proof of this averment seems to me to be simply to ask a proof that the decision in the case of the *North British Railway Company* v. *The Budhill Coal and Sandstone Company* was wrong, and I do not think that such proof should be allowed. Apart from the impossibility of proving that rock such as is here in question was universally recognised as a mineral within the meaning of the statute "by *all* railway companies and by *all* proprietors in or through whose lands" railway lines passed, it appears to me that the proof proposed would be wholly irrelevant in view of the decision in the case last mentioned.

The rest of the respondents' averments refer, for the most part, to particular transactions in which it is averred that railway companies and the complainers in particular bought from proprietors and paid for freestone rock below the formation level of the railways. If proved, these instances would only show that railway companies had mistaken their true legal position, misled doubtless by an erroneous reading of said section 70, and by the erroneous Outer House decisions in the cases of *Jamieson*, 6 S.L.R. 188, and *Glasgow and South-Western Railway Company* v. *Bain*, 21 R. 134, which, of course, were overruled by the decision in the *North British Railway Company* v. *The Budhill Coal and Sandstone Company*, following on the old decisions in the case of *Menzies*, 1 Shaw's Appeals, 225, and *The Duke of Hamilton*, 3 D. 1121.

The respondents' record is plainly framed so as to endeavour to obtain a reversal of the decision in the *Budhill* case, and for *that* purpose they have made averments founded on various dicta of the noble and learned lords and learned judges who have taken part in the decisions in that and other similar cases. In my opinion, however, this attempt fails, and that on the broad ground that the *Budhill* case decided, in my view once and for all, that freestone did not fall to be regarded as one of the excepted minerals within the meaning of section 70 of the Railways Clauses Consolidation (Scotland) Act 1845, and that being so, it appears to me that the respondents' averments are irrelevant and insufficient, even if proved, to lead to a reversal of that decision.

Alternatively, however, to their first ground of defence to this suspension and interdict, the respondents maintain that they are entitled to compensation for the freestone in question, and to have that fixed by arbitration on the ground that the statutory notices given by the complainers followed by the cessation of work on the part of the respondent constitute a contract entitling the respondent to receive compensation for said freestone. The question thus raised has to be considered in view of what I have, for the reasons above stated, held to be established, namely, that freestone is not one of the excepted minerals under the statute. This being so, it follows that the freestone in question is the property of the Railway Company and not of the respondent or his lessors, and that accordingly the respondent has no right or title to work the same. He is accordingly in the position of having no title to the freestone or to work the same, and therefore is not vested in anything which he is entitled to give in return for compensation. It necessarily follows, in my opinion, that he has no right to compensation whatever, and that the notices which have been given on the footing that he has such a right must be treated as inept, and pleas 3, 4, and 5 stated for the respondents repelled.

I do not think that any separate question is raised by the respondents regarding the position or removal of a crane, for any compensation due in respect of that was treated as depending on and following upon the right of the respondent to obtain compensation in respect of his refraining from working the freestone, and as I hold that that right has fallen, the subsidiary right to compensation in respect of disturbance of his workings must fall also.

I am therefore of opinion that the Lord Ordinary's interlocutor should be recalled, that the first plea-in-law for the complainers should be sustained, and that the answers should be held to be irrelevant and repelled, and the prayer of the note granted, with expenses.

Lord Skerrington—This case is important, not only because the quarrymaster's claim against the Railway Company in respect of freestone left unworked for the safety of the line is very large, but also because it involves a decision of general interest as to the interpretation and practical application of the judgment of the House of Lords in the recent case of *North British Railway Company* v. *Budhill Coal and Sandstone Company and Others*, 1909 S.C. p. 227, *rev.* 1910 S.C. (H.L.) p. 1, A.C. p. 116. It was there decided that a sandstone quarry was not a "mine of a mineral" within the meaning of the Railways Clauses Act 1845 as applied to certain purchases of land by a railway company made about the year 1846. Questions of this kind have been described by eminent judges as questions of fact, and they are so in one sense though in another sense they are questions of law involving the construction of the railway company's title. In construing such a title, as in construing any other legal instrument, it may be necessary to lead parole evidence as to the subject-matter of the transaction or for the purpose of showing that some word bears a technical or trade meaning. It is only in exceptional cases that evidence as to the meaning of words should be admitted, as was pointed out by Lord Watson in *Sutton & Company* v. *Ciceri & Company*, (1890) 17 R. 40, A.C. p. 144. In the present case the dispute arises under the same statute as in the *Budhill* case, with reference to a freestone quarry under and on each side of the complainers' line of railway. The complainers' title to the land was formally completed in the year 1852, but they bought the ground and took

possession in 1846. The respondent is tenant of the quarry. The freestone on each side of the railway is undoubtedly within his lease, as is also the freestone under the railway line if it falls within the reservation of minerals and so belongs to the lessor. The complainers appeal against an interlocutor of the Lord Ordinary allowing the respondent a proof of his averments.

The first averment remitted to proof relates to the quality of the freestone in the respondent's quarry, and is intended to differentiate it from the sandstones or freestones which in the *Budhill** and earlier cases were decided not to be minerals. He avers—"The said freestone rock does not form the substratum of the soil, and is not the common rock of the district in which the respondent's quarry is situated. On the contrary, it is a fine red sandstone of exceptional character, both in point of evenness of grain and composition. Besides being adapted for the finest kinds of building work, it is specially suitable for use in the form of grindstones and for many other commercial purposes for which ordinary or common sandstone is unsuitable. It is thus of great commercial value." In my judgment this averment is irrelevant. Freestone quarries which are worked to profit differ very much from each other as to the grade of stone which they produce and also as to the purposes for which it is suitable. Apart from the fact that some kinds of stone are exceptionally valuable from their durability, beauty, and other qualities, there are marked differences between the produce of the very best quarries. For this reason architects and engineers are careful to specify that the stones to be used for a particular piece of work shall be taken from a quarry selected by themselves. Some stones are more suitable than others for certain climates or for use when exposed to water or buried in earth. I assume that the respondent will be able to prove that his freestone differs from ordinary commercial sandstone both in superior fineness and value and also in the uses to which it can be put. These differences relate merely to the quality of the respondent's freestone but do not take it out of the class described as freestone. In *Menzies* v. *Breadalbane*, June 10, 1818, F.C., *aff.* 1 S. App. 255, the freestone was alleged to be a "stone of a rare species peculiarly fitted for architectural purposes by its admitting of ornamental finishing and by its resisting the weather." It would in my opinion require averments of a very different kind from those made by the respondent in the present case to entitle him to the proof which he asks. It would be dangerous to speculate as to what may happen in other cases that may arise hereafter with reference to freestone, but by way of illustration I may refer to the cases which have arisen in regard to clay. Although ordinary clay, however valuable, is not a mineral, the opposite has been decided as to china clay, which has been regarded as "exceptional," and in fact a different substance. No doubt it is called a clay, and it is in fact a clay from a chemical point of view, but its origin, its distribution over the earth's surface, and various other attributes create a real and practical distinction between it and ordinary clay. The Court of Session has decided the same thing in regard to fireclay, but the question is now under appeal. I should not describe fireclay as either "rare" or "exceptional," any more than I should so describe coal or ironstone; none the less I think that the Court was right in treating it as a thing apart from ordinary clay. For these reasons I am of opinion that the Lord Ordinary ought not to have allowed a proof of the averment which I have quoted.

The respondent's remaining averments are to the effect that the complainers did not buy and did not pay for the freestone in question, and that "such rock" was universally recognised as a mineral in the mining and commercial world and by railway companies and landowners at the date when the complainers bought the ground. It cannot avail the respondent to prove that men of business in Scotland acted upon a construction of the Act of 1845 which the House of Lords has now held to be erroneous, nor is it material whether the complainers did or did not pay for the freestone under their line of railway. The law as now laid down must be applied, and the only remedy, if any, open to landowners is to set aside on the ground of common error such transactions as are not protected by prescription. As regards private transactions, the case of *Hamilton* v. *Bently* (1841), 3 D. 1121, is conclusive as to the opinion and practice of men of business in the middle of the nineteenth century. Accordingly these averments also are irrelevant and cannot be remitted to proof.

I should not have thought it necessary to say any more about what seems to me to be a very clear case if it had not been that the respondent's demand for a proof betrayed a misconception of the meaning and effect of the *Budhill* decision which ought to be corrected. His counsel founded especially upon a passage at the end of the Lord Chancellor's opinion and another at the end of Lord Gorell's opinion. The Lord Chancellor there adopted and expanded the formula originally suggested by James, L.J., in *Hext* v. *Gill*, L.R., 7 Ch. 719, and afterwards approved by Lord Halsbury in *Farie's* case, to the effect that the Court must determine what the expression "minerals" meant in the vernacular of the mining world, the commercial world, and landowners at the time of the purchase, and whether the particular substance was so regarded as a mineral. In the other passage Lord Gorell stated that no evidence had been led to the effect that the phrase "mines of minerals" had been at the time of the passing of the Act or of the conveyance understood and used as including ordinary sandstone. He added—"If this could have been done, it was, in my opinion, for the respondents to prove it." The

respondent's counsel fastened on these passages as implying that in every case the meaning of the word "minerals" is a question of fact to be determined by evidence. Parole evidence as to the meaning of words is competent in certain cases, but in general it is for the Court and not for witnesses to interpret the language of a legal instrument. In accordance with the formula above quoted in construing an ordinary business transaction as to minerals, one begins by discarding both the popular and also the scientific meaning, and one endeavours to interpret the word in a business sense. *Prima facie* a court is competent without the aid of evidence to perform this function. If every quarry-master in Scotland is entitled to lead evidence as to the excellence of his freestone, and also as to the meaning of the word "mineral" as understood by his expert witnesses, the judgment in the *Budhill* case will not, as was hoped by Lord Shaw, tend to put an end to the confusion previously existing, but will make the former confusion worse confounded.

The respondent has a separate plea to the effect that certain notices given him by the complainers requiring him not to work the freestone under the railway constitute a contract to pay compensation which binds the complainers even if the freestone is their own property. The complainers' notices were in answer to notices by the respondent representing that the freestone under the railway was within his lease. I do not consider this contention tenable. The respondent also founds upon a letter in which the complainers agreed that if he removed a crane which overhung and endangered the line of railway any additional expense in working the quarry through the removal of the crane to another position should be deemed to be loss or damage occasioned by the non-working of the reserved rock in any arbitration proceedings for recovery of statutory compensation. This agreement proceeded upon the assumption that the reserved rock fell within the lease, and it cannot be interpreted as deciding in favour of the respondent a question which had not at that date occurred to either party.

The result is that the Lord Ordinary's interlocutor should be recalled and that interdict should be granted as craved.

The LORD JUSTICE-CLERK concurred.

LORD DUNDAS was absent, and LORD SALVESEN was sitting in the Lands Valuation Appeal Court.

The Court recalled the interlocutor reclaimed against, sustained the first plea-in-law for the complainers, and granted interdict as craved.

Counsel for Complainers (Reclaimers)—Clyde, K.C. — Morison, K.C. — Hon. W. Watson. Agents—Hope, Todd, & Kirk, W.S.

Counsel for Respondent — Sol.-Gen. Hunter, K.C. — Murray, K.C. — Gentles. Agents—Dove, Lockhart, & Smart, S.S.C.

Friday, February 24.

SECOND DIVISION.

(SINGLE BILLS.)

[Lord Johnston, Ordinary.

THE KILMARNOCK THEATRE COMPANY, LIMITED, IN LIQUIDATION, AND OTHERS *v.* BUCHANAN AND OTHERS.

Expenses — Company — Liquidation — Unsuccessful Action by Company and Liquidators—Personal Liability of Liquidators—Form of Decree.

In an action at the instance of a limited company and the liquidators thereof the Court assoilzied the defenders and found them entitled to expenses. On the motion in Single Bills for approval of the Auditor's report the defenders moved the Court to decern against the liquidators "personally" for the expenses. The Court *refused* the motion, on the ground that the effect of a simple decree against the pursuers for expenses involved their personal liability in the event of their not having sufficient assets belonging to the company in their hands.

Observations (*per* Lord Salvesen) on *Craig* v. *Hogg*, October 17, 1896, 24 R. 6, 34 S.L.R. 22.

The Kilmarnock Theatre Company, Limited, in liquidation, and Alexander Mitchell and James Robert Mackay, the liquidators thereof, brought an action against Robert Colburn Buchanan, threatrical manager, Glasgow, and others, in which the Court, on 9th November 1910, recalling the interlocutor of the Lord Ordinary (Johnston), assoilzied the defenders from the conclusions of the action, and found them "entitled to expenses," remitting the same to the Auditor to tax and report. The defenders' account of expenses was taxed at £503, 9s. 3d.

On the Auditor's report coming up for approval in Single Bills the defenders moved the Court to add the word "personally" to the decree against the liquidators.

The pursuers opposed the motion, and argued—The motion came too late. It should have been made at the time when expenses were found due, and not on the motion for approval of the Auditor's report—*Warrand* v. *Watson*, 1907 S.C. 432, 44 S.L.R. 311; *s.s.* "*Fulwood*," *Limited* v. *Dumfries Harbour Commissioners*, 1907 S.C. 735, 44 S.L.R. 566. Defenders were seeking to make pursuers liable in a capacity in which they had not appeared. They had appeared in a representative capacity, and the Court could not find them personally liable unless they were satisfied that the action was one which should never have been brought. To insert the word "personally" might prejudice questions eventually arising between the liquidators and the company.

Argued for pursuers—Where a liquidator