this case at all and make the workman stand deprived of the right correlative to the examination to which I have referred. I bear in mind further that in the ordinary case, which is the case we are dealing with here, a case admitted to be apart from speciality, I cannot conceive any harm done either to the workman or to the medical adviser of the employer by having a second doctor on the spot. There is to be no charge to the employer, for it is to be done at the workman's own cost, and for my own part my recollection, I think, bears me out in saying that my experience of that great profession would be that 95 per cent. of doctors would prefer another doctor being present so far as their own satisfaction and the ease of the situation and the settlement of the truth were concerned.

But in the present case there is a special use attached to the presence of the other medical men. Section A of the schedule is not a section applicable to proceedings *in foro*. It is a section applicable to this situation where only notice of accident has been given, and where it must be the desire of both parties that an amicable and reasonable arrangement shall be come to. How desirable it is in those circumstances that this situation should be eased in the particular matter that both doctors shall agree as to what is wrong and what would be a suitable remedy. All the demand that the workman has made here is that that agreement should be facilitated by the presence of his medical man. I cannot think that in its nature to be unreasonable. There are no facts in this case proved or proceeded upon to make it unreasonable or to suggest that it was unreasonable; and unless it is found in fact to be unreasonable owing to special circumstances I do not think this House should be debarred from holding that the workman had that right apart from such circumstances.

As I have observed, I do not think the decision come to in the Courts below was a decision in fact. I do not think the Sheriff had addressed himself to it as a decision in fact. He has treated the case as one of absolute right (conditioned in the sense I have explained)—a right which he concludes not from fact but from a construction of the Act of Parliament. In my view that is a matter of law. My whole view may be summed up in this proposition, that in the general case in my humble opinion it cannot be reckoned as a refusal if a workman makes an examination by his own medical man a condition of his willingness to submit to examination by the medical adviser of his employer. I cannot agree that in the Courts which have decided this case the fact *ipso jure* of the adjection of such a condition is a refusal or obstruction. I hold it is nothing else than a reasonable thing, not displaced from its reasonableness by any fact proved. Accordingly I respectfully dissent from the judgment proposed.

LORD CHANCELLOR—I just wish to add one sentence. According to my own opinion it is a question of fact whether or not the presence or absence of the workman's doctor is reasonable in the particular case, and your Lordships are not judges of fact. That is all I intended to convey.

Their Lordships dismissed the appeal with expenses.

Counsel for the Appellant—The Lord Advocate (Ure, K.C.)—Fenton. Agents—Hay, Cassels, & Frame, Hamilton—Simpson & Marwick, W.S., Edinburgh—Deacon & Company, London.

Counsel for the Respondents—D.-F. Scott Dickson, K.C.—Beveridge. Agents—W. T. Craig, Glasgow—W. & J. Burness, W.S., Edinburgh—Beveridge, Greig, & Company, London.

Monday, November 13.

(Before the Lord Chancellor (Loreburn), Lord Atkinson, Lord Gorell, and Lord Shaw.)

ROSIE *v.* MACKAY.

(In the Court of Session, June 14, 1910, 47 S.L.R. 654, and 1910 S.C. 714.)

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 16 (1), *and Sched. II* (17) (*b*)—*Appeal—Statute—Jurisdiction.*

The Workmen's Compensation Act 1906, sec. 16 (1), enacts—"This Act shall come into operation on the first day of July 1907, but, except so far as it relates to references to medical referees and proceedings consequential thereon, shall not apply in any case where the accident happened before the commencement of this Act." Schedule II (17) (*b*) gives an appeal to the House of Lords from a decision of the Court of Session.

In an arbitration under the Workmen's Compensation Act 1897, arising out of an accident which occurred on 20th November 1906, the arbiter, with consent, remitted to a medical referee, and on his report, without further evidence, gave his decision reducing the compensation previously paid by a half. The employer appealed by stated case to the Court of Session, whose decision was that compensation should be ended.

Held that the House of Lords had no jurisdiction to entertain an appeal, as the words in the Workmen's Compensation Act 1906, sec. 16 (1), "proceedings consequential" on references to medical referees, would not cover the case.

The case is reported *ante ut supra*.

Mackay, the workman, appealed to the House of Lords.

LORD CHANCELLOR—We were promised an interesting discussion upon a point of law under the Act of 1897 which I am afraid we shall be debarred from the pleasure of

hearing, because I think there is no jurisdiction in this House to entertain this appeal.

There was an arbitration under the Workmen's Compensation Act 1897 in respect of an accident which happened before the Act of 1906 came into operation. Under the old Act of 1897 there was no appeal to the House of Lords at all, and therefore, if it had not been for the particular interval of time during which this question has arisen, there could have been no pretence for saying that there was an appeal to this House—that has been decided. But then comes the Act of 1906. Now the effect of the Act of 1906 is that an appeal to this House is given in cases which come within that Act. But there is also something further in the Act of 1906. The Act of 1906 in effect provides that "so far as it relates to references to medical referees and proceedings consequential thereon," the Act of 1906 is to apply at once, that is to say, immediately upon its passing, before the month of July 1907 at which the whole Act came into effect.

In this arbitration a point did arise in regard to a reference to a medical referee; it was referred to a medical referee who made his report, and that report was acted upon by the Sheriff; and it is now said that because there was a reference under the Act of 1906 in the case of an arbitration which arose under the Act of 1897, the effect is to draw to that arbitration the power of appeal to this House which did not exist in respect of the arbitration as it originally was commenced.

I cannot entertain the view that that is right. In my opinion accidents which happened before the Act of 1906 came into effect were governed and are governed by the Act of 1897 in regard to all their incidents excepting "so far as relates to references to medical referees, and to proceedings consequential thereon." I cannot think that "proceedings consequential thereon"—proceedings following upon a reference—include a judgment of the Court of Session; and accordingly, in my opinion, the contention that the power of appeal is constructively attached to a pending arbitration, by virtue of those words in the statute of 1906, cannot be supported, and the jurisdiction of this House does not exist. Accordingly this appeal will have to be dismissed, and I move your Lordships accordingly.

Lord Atkinson—I agree.

Lord Gorell—I concur.

Lord Shaw—I also concur.

Their Lordships dismissed the appeal.

Counsel for the Appellant—A. M. Anderson, K.C.—Robert Hendry. Agents—John S. Morton, W.S., Edinburgh—E. J. Marsh, London.

Counsel for the Respondents—Atkin, K.C.—Constable, K.C.—Jameson. Agents—Simpson & Marwick, W.S., Edinburgh—Smiles & Company, London.

Thursday, November 16.

(Before the Lord Chancellor (Loreburn), Lord Atkinson, Lord Gorell, and Lord Shaw.)

CALEDONIAN RAILWAY COMPANY v. SYMINGTON.

(In the Court of Session, February 10, 1911, 48 S.L.R. 539, and 1911 S.C. 552.)

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

It is a question of fact, to be decided on the circumstances of the particular case, whether "freestone" is a mineral falling within the exception contained in section 70 of the Railways Clauses Consolidation (Scotland) Act 1845.

This case is reported *ante ut supra.*

Symington, respondent in the Court of Session, appealed to the House of Lords.

At delivering judgment—

Lord Chancellor—We have had the advantage of hearing this case argued by counsel of great eminence and authority, but I think the order appealed from cannot be supported.

I think we ought always in cases of this kind to distinguish between decisions upon questions of law and decisions upon questions of fact. I am not about to repeat the law; it has been decided in this House in the *Budhill* case and in the *Glenboig* case, and there is a most admirable exposition of the law also in the Lord President's judgment in the *Glenboig* case, but we do not repeat every time we have to decide a case all propositions of law relevant to it.

The judgment of the Court of Session seems to me to amount to this, that in no circumstances can freestone be a mineral within the meaning of the statute. I cannot accept that proposition. It is always a question of fact. I think myself it is very seldom that freestone is likely to be a mineral, but whether it is so or not is to be decided in regard to the particular facts of the case.

Now that view of the law was not really supported in argument at your Lordships' bar, but there was substituted for it an ingenious and somewhat subtle argument to the effect that in the pleadings in this case the averments were not sufficiently specific to justify a proof. It seems to me that they were. It is stated in the pleading that the substance in question was understood to be a mineral in the vernacular of the mining world, the commercial world, and of landowners—that was necessary. It was stated to be exceptional in use, in value, and in character, part of which at all events is necessary. And it was stated also in the pleading that it was not the common rock of the district or substratum of the soil, so that the exception did not, as alleged in this case, swallow up the grant. Now those statements were made. If they can be established—I do