averment in a question of admission to probation.

But if that be so, this contract was wholly repudiated. It does not appear to me to be sound law to permit a person to repudiate a contract, and thereupon specifically to found upon a term in that contract which he has thus repudiated.

In the second place, on examination these contracts were not one but were three. In the first contract a certain arbiter in this country was named; in the second an arbiter in the Transvaal; and in the third no arbiter at all. If your Lordships look at clauses 33 and 34 of the running contract, it will be found that it is impossible to work out the running contract except as ancillary and supplementary to the main contract, and that these two contracts were so interlinked and intermixed as to make it most difficult and in all likelihood impossible to extricate by separate arbitration the rights emerging under the respective contracts. In these circumstances it does not appear to me that either under the law of Scotland or the law of England courts of law are bound by a judicial enforcement of an arbitration clause to place the parties in a situation not only embarrassing but unworkable.

Finally, the language of this contract appears to me to show that the arbitration was nothing but an executorial arbitration —a term perfectly familiar to the law of Scotland, and I suppose also to the law of England. But to read into an arbitration of that character a power such as I put plainly to Sir Robert Finlay, and which he, for the purposes of his argument, most properly admitted, namely, a power to the arbiter to determine that this repudiation upon the part of his clients was a justifiable repudiation, would be to throw the whole of these protracted proceedings again into the melting pot and to start again under the worst auspices before an arbiter even after he was selected. Upon these grounds I am of opinion that the judgment arrived at fails to achieve the true justice of the situation as between these parties; and I can only say in concluding this part of my opinion that I should not myself anticipate anything of the protracted nature which has been foreshadowed by way of argument. If, for instance, the averments of the pursuers should be substantially proved, they will go largely to dispel the necessity for any protracted inquiry with regard to detail. But upon the merits of the case upon that or other heads, I give, of course, no opinion whatsoever.

On the matter of the guarantee I desire especially to call attention to one passage in the opinion given by Lord M'Laren. He says that "until the failure" of the principals "is established by competent process, either in a court of law or in a court of arbitration, no claim arises against the surety." As your Lordship has pointed out from the woolsack, this contract falls by agreement of parties to be interpreted by the law of England, and so far as that proposition applies, it does not express English law. That being so, I am absolved from the necessity of pronouncing upon that as a Scotch matter, but it having been judicially affirmed in the Court below, I wish distinctly to intimate that I can have no part in such an affirmation, and must reserve my opinion upon any such point.

Their Lordships pronounced an order whereby they remitted the case back to the Court of Session with a direction to allow the parties a proof of their averments and to refuse the prayer of the petition for recal of the arrestments, with expenses to the appellants from the closing of the record.

Counsel for the Pursuers (Appellants) —Clyde, K.C. — Morison, K.C. — Mitchell. Agents—P. Morison & Son, S.S.C., Edinburgh — Faithful & Owen, Solicitors, London.

Counsel for the Defenders (Respondents) —Sir R. Finlay, K.C.—Macmillan—Hon. W. Watson—Fletcher Moulton. Agents—Davidson & Syme, W.S., Edinburgh — Nicholson, Graham, & Beesly, Solicitors, London.

Monday, November 15.

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

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

(In the Court of Session, November 28, 1908, and February 4, 1909, 46 S.L.R. 178, 347, and 1909 S.C. 277, 504.)

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

The Railways Clauses Consolidation (Scotland) Act 1845, sec. 70, enacts—"The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them . . . . and all such mines . . . . shall be deemed to be excepted out of the conveyance of such lands. . . . ."

Held (*rev.* Second Division) that sandstone forming the ordinary rock of the district is not included in the statutory reservation.

Per Lord Chancellor—"In the first place, I think it is clear that by the words 'or other minerals' exceptional substances are designated, not the ordinary rock of the district. In the second place, I think that in deciding whether or not in a particular case exceptional substances are minerals . . . the Court has to determine 'what these words meant in the vernacular of the mining world, the commercial world, and landowners' at the time when the purchase

was effected, and whether the particular substance was so regarded as a mineral."

This case is reported *ante ut supra.*

The pursuers (reclaimers) appealed to the House of Lords, and at the hearing restricted their argument to the question whether the sandstone in question, assuming it to be sandstone, was included in the statutory reservation.

At delivering judgment—

LORD CHANCELLOR—Only one point has been argued before your Lordships, whether or not sandstone is a mineral within the meaning of section 70 of the Scottish Railway Consolidation Act 1845, which reserves from the company buying land the following—"any mines of coal, ironstone, slate, or other minerals."

A great number of authorities have been cited, irreconcilable in some respects. It will suffice to state the effect of the more important among them so as to show how qualified is the assistance to be derived from precedent.

Before the Act of 1845 was passed it was decided in the House of Lords in 1818 that building stone does not fall within a reservation by a superior in a feu-charter of the "haill mines and minerals of whatever nature and quality" in the lands feued (*Menzies* v. *Breadalbane*, 1 Shaw's App. 225). In 1841 the Second Division held that freestone or sandstone was not a mineral (*The Duke of Hamilton* v. *Bentley*, 1841, 3 D. 1121). Both those cases related to the construction of the word "minerals" in a private contract. Whether on that account they are to be ignored in construing the same word under section 70 of the Act of 1845 is disputed. Lord Herschell (in *Midland Railway Company* v. *Robinson*, 15 Ap. Cas. 19) and Lord Watson (in *Magistrates of Glasgow* v. *Farie*, 13 Ap. Cas. 657) are inclined to ignore. Lord Halsbury on the other hand (in *Glasgow* v. *Farie*) attaches the utmost importance to them.

I turn now to the Scottish decisions upon the construction of section 70 itself. In 1868 Lord Kinloch held that freestone (which in Scotland includes sandstone) was a mineral within the section (*Jamieson* v. *North British Railway Company*, 6 S.L.R. 188). Lord Adam held in 1879 that limestone was a mineral in the same sense (*Dixon* v. *Caledonian Railway*, 7 R. 216), the point apparently being admitted. The House of Lords decided that a seam of ordinary clay was not a mineral under the Waterworks Clauses Act, which for the present purpose is the same as the Railway Clauses Act (*Glasgow* v. *Farie*). In 1893 Lord Stormonth Darling decided that freestone was a mineral (*Glasgow and South-Western Railway Company* v. *Bain*, 1893, 21 R. 134). Finally, in January 1909 the First Division, following the decision in the case now under appeal, held that whinstone was a mineral, the Lord President intimating that he had grave doubts but was controlled by precedent after these decisions in the Court of Session (*The Forth Bridge Railway Company* v. *The Guildry of Dunfermline*, 1909, 46 S.L.R. 399).

In England the House of Lords refused to restrain the vendor from quarrying for ironstone and limestone on land bought under the similar English Act by a railway company (*Midland Railway Company* v. *Robinson*). But this case turned upon the question whether or not quarries of mineral as well as mines of mineral are reserved in the Act. The point whether limestone of itself is a mineral under the Act was not argued or decided. Clay was held not to be a mineral in 1903 (*Todd* v. *North-Eastern Railway*, 1 K.B. 1903, p. 603). The same of blue brick clay was decided by Buckley, J. (*Great Western Railway Company* v. *Blades*, 1901, 2 Ch. Div. 624). And in the *Great Western Railway Case* v. *Carpalla United China Clay Company*, now under appeal to this House, the Court of Appeal in 1908 held that China clay was a mineral. No decision has, however, gone so far as that of Lord Romilly in the *Midland Railway Company* v. *Checkley*, L.R. 4 Equity, 19. He was construing a Canal Act, practically identical in its terms, and he said—"Stone is, in my opinion, clearly a mineral, and in fact everything except the mere surface which is used for agricultural purposes; anything beyond that which is useful for any purpose whatever, whether it is gravel, marble, fireclay, or the like, comes within the word 'mineral' when there is a reservation of the mines and minerals from a grant of land."

I have thought it right to summarise these cases (and I might have added a few others) lest it be supposed they are lost sight of. It is not possible to extract any uniform standard. The same is true of the opinions expressed by different learned judges. A variety of tests have been propounded which are discussed by Lord Gorell. I agree with him both in his enumeration and in his criticism. Is the substance in common parlance a mineral? Is it so considered by geologists? Is it a substance of any peculiar value? No one principle has been accepted, and every principle appears to have its friends. In these circumstances it would be quite unprofitable to expect a solution by piecing together the dicta of even the most eminent authorities. They are contradictory. Your Lordships find the matter at large so far as this House is concerned.

In considering whether sandstone is a mineral within the meaning of section 70 of the Act of 1845, it is as well to look at the purpose which was in view when that Act was passed. The purpose was to enable a railway company to acquire land and build a railroad thereon to carry passengers and goods. Minerals, however, were not to be acquired (except by express agreement). It would be more accurate to say that mines of minerals were not to be acquired, but this distinction need not be dwelt upon here.

Now, the leading purpose being to lay the permanent way, how are we to regard this exception of minerals? It cannot be better put than in a single sentence which

I quote from Lord Ardwall's opinion. He says—"Any provision inconsistent with the leading purpose for which railway companies are empowered to take land must be viewed as introducing an exception, and falls to be construed strictly, and not extended beyond what the words of exception clearly cover." I apply that to the present case. In many parts of England and Scotland sandstone forms, as here, the substratum of the soil, with, no doubt, other kinds of rock intermixed. If it be a mineral, then what the railway company bought was not a section of the crust of the earth subject to a reservation of minerals, but a few feet of turf and mould, with a right to lay rails upon it, and liable to be destroyed altogether unless the company chose on notice to buy the ordinary rock lying beneath it. For no one pretends that there is anything exceptional in this sandstone either in point of higher value or rarity. It was agreed at the bar that this was the ordinary freestone or sandstone. If the respondents are entitled to work this substance under this railway, the same must be true of chalk or clay or granite, or any other rock which forms the crust of the earth. I am aware that there are expressions of great judges favourable to such a contention. There are also other expressions in a diametrically opposite sense. Speaking for myself, I will not adopt so startling a conclusion unless I am compelled by a decision of this House from which there is no escape. There is no such decision.

No doubt a railway company is not entitled to support from minerals as an ordinary purchaser would be. No doubt, also, it is an advantage to railway companies that on acquiring lands for their enterprise they are not compelled to purchase minerals lying thereunder, and may wait and enjoy the support until the mineral owner requires them either to purchase the minerals or to take the risk of forfeiting the support. But it seems to me that these circumstances do not affect the separate question—What, in fact, are the minerals so reserved? I cannot believe Parliament ever intended that the common rock of the district should be included in these words of reservation. If that were intended, I can see no need for inserting such words as "mines of coal, ironstone, slate, or other minerals." The Act is throughout consistent with the view which, with all respect, appears the obvious and common sense view, that the railway company is by the conveyance to acquire the land in general, and the reservation is only of what is exceptional, as Lord Ardwall clearly says.

I desire to add that in my opinion the decisions in 1818 and 1841 as to the meaning of the word minerals in private conveyances are of the greatest importance in interpreting this statute. When an Act of Parliament uses a word which has received a judicial construction it presumably uses it in the same sense. The Act merely says what shall be deemed to be reserved out of the conveyance. It is the same as though there was in the conveyance a written exception of the substances reserved. It would be very strange if a Court having before it two conveyances with a reservation of minerals in both, were obliged to treat the reservation as meaning one thing in the first and a quite different thing in the second, merely because the one was a voluntary conveyance by agreement and the other was compulsory under the Act. The Act does not say this. Why should it be said by the Court?

It is impossible to give an exhaustive definition of the meaning of the much debated words that are to be found in section 70. But I hope your Lordships may assist in their interpretation. In the first place, I think it is clear that by the words "or other minerals" exceptional substances are designated, not the ordinary rock of the district. In the second place, I think that in deciding whether or not in a particular case exceptional substances are minerals, the true test is that laid down by Lord Halsbury in *Magistrates of Glasgow* v. *Farie*. The Court has to determine "what these words meant in the vernacular of the mining world, the commercial world, and landowners" at the time when the purchase was effected, and whether the particular substance was so regarded as a mineral.

Accordingly I move your Lordships to allow this appeal.

LORD ATKINSON—I have had the advantage of reading the judgment which has just been delivered by my noble and learned friend on the Woolsack; I have also had the advantage of reading the judgment which is about to be delivered by my noble and learned friend Lord Gorell. I concur fully with both of them, and with the reasoning by which they have arrived at the conclusions which they have reached, and I have therefore nothing to add.

LORD GORELL—The decision of your Lordships in this case is of very great importance to railway companies and landowners in Scotland, for the question raised is whether or not sandstone is a mineral within the meaning of section 70 of the Railway Clauses Consolidation (Scotland) Act 1845, which is as follows:—"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."

The importance of the case is probably equally great to railway companies and landowners in England, for the 77th section of the English Act of the same year is in the same terms as the aforesaid section, and although it may possibly be suggested that different considerations apply in

England, in substance the question is the same in both countries.

The question depends on the true construction of the section, and although there have been numerous decisions upon it and the corresponding section of the English Act, many of which are referred to in the judgments of the learned Judges of the Second Division, and much difference of opinion is to be found amongst learned Judges who have considered the sections, there does not appear to me to be any decision of this House which prevents a free consideration by your Lordships of the said 70th section, except possibly that in *The Midland Railway Company* v. *Robinson*, 15 A.C. p. 19. In that case it was held by Lords Herschell and Watson that the exception in the 77th section of the English Act included not only minerals got by underground working but such as can only be worked by open workings. Lord Macnaghten dissented, and maintained the opinion he had previously expressed in the case of *The Lord Provost of Glasgow* v. *Farie*, 13 A.C. 657.

Which of the two views expressed is correct I do not think it is necessary to consider in this case, even if it be open to do so.

If that decision had been the other way, sandstone, or freestone as it is termed in Scotland, would not be considered as falling within the exception, for, as I understand, the stone in question is obtained by open workings; but it still remains for consideration whether it is a mineral within the meaning of the section, and to what extent the words "mines of" limits or qualifies the generality of the term "minerals."

I do not propose to examine in detail all the other decisions. Their effect is very clearly stated in the judgment of the Lord Chancellor, which I have had the opportunity of reading.

If the question be considered by inquiring into the object of the section and of those sections which follow it, and the language used, it seems at the outset to be reasonably clear that the word "minerals" must receive some limitation. The sections come under a heading "And with respect to mines lying under or near a railway, be it enacted as follows." The sections are to regulate the rights of railway companies who purchase land with the object of making a permanent line of railway with necessary works on the land, and the rights of owners of land who sell to them. The object of the companies is to obtain such an interest as will enable their lines and works to be properly constructed and maintained. For this they do not require to take the benefit of mines of minerals and the exploiting thereof, and therefore an exception of these is made so that an owner thereof who may not at the time his land is taken know whether it does or does not contain minerals, can either work the minerals, or, if a company does not wish him to do so for fear of injury to their line and works, they may prevent him from doing so by paying him adequate compensation.

The language used in the sections to carry out this object is somewhat vague. In the heading the term is "mines"; in the section the words "mines of coal, ironstone, slate, and other minerals"; and in subsequent sections the words "mines or minerals" and "mines" are found. That is to say, that except as regards coal, ironstone, and slate, indefinite terms are used which are obviously capable of limitation or expansion according to the intention with which they are used. The object of the sections appears to have been to permit of the establishment of a permanent way and yet to allow landowners to retain the benefit of matters which might prove of exceptional value to them unless the company chose when the time came to compensate them for the loss of such value.

Bearing these considerations in mind, it has to be ascertained in what sense the indefinite term "minerals" has been used in the section. Several interpretations either have been or may be suggested.

These are:—1. That the term "minerals" includes everything except the vegetable surface, or everything except the mere surface which is used for agricultural purposes.

2. That it includes everything below the soil and subsoil.

3. That it includes every substance which can be got from underneath the surface of the earth for the purpose of profit.

4. That it includes 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.

5. That the words "other minerals" include minerals which can reasonably be said to be *ejusdem generis* with coal, ironstone, and slate, and that stone is *ejusdem generis* with slate.

6. That these words are used in the ordinary sense in which they are understood and used by landowners and those engaged in mining and commerce.

The first meaning is that which was given by Lord Romilly to the term "mineral" in a statutory reservation of "mines and minerals" in *The Midland Railway Company* v. *Checkley*, 4 Eq. 19, where he said—"Stone is, in my opinion, a mineral; and in fact everything except the mere surface, which is used for agricultural purposes; anything beyond that which is useful for any purposes whatever, whether it is gravel, marble, fireclay, or the like, comes within the word minerals where there is a reservation of the mines and minerals from a grant of land; every species of stone, whether marble, limestone, or ironstone, comes, in my opinion, within the same category."

To give this meaning to the words as used in the 70th section would, in my opinion, be inconsistent with the object of the statute, would not give adequate effect to the use of the word "mines," and would render the introduction of the words "coal, ironstone, and slate superfluous." If it had been intended to reserve everything except the surface, it is natural to

suppose that such intention would have been expressed in very different language.

The second interpretation may be suggested by the language used by Lord Watson in *Farie's* case at page 679, 13 A.C., though I do not think that he meant by stating 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 subsoil, whether it be "clay, sand, or gravel," to intimate that everything below the subsoil was to be considered "minerals." Almost the same observations which I have made on the first interpretation may be made on this.

The third meaning is to be found placed by Lord Justice Mellish upon the term "minerals" in the deed in the case of *Hext* v. *Gill*, 7 Ch., at page 712. But he qualifies it by saying "unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning."

The fourth is adopted by Lord Herschell at page 685, 13 A.C.

To my mind these two interpretations do not give sufficient effect to the context. If it had been intended in framing the section to adopt either of them, it would have been unnecessary to specify particularly coal, ironstone, and slate. Moreover, they would make the decision depend on the cost of production and labour and the state of the market, and render uncertain that which those framing the section must have contemplated as reasonably certain. And further, they are inconsistent with the decision at which this House arrived in *Farie's* case, that clay (which appears in that case to have been of considerable value), was not within the exception in the 18th clause of the Waterworks Clauses Act 1847, a clause which was similar to that in question. The purpose of profit may have a bearing upon the question whether certain substances have been recognised as included in the term "minerals," but does not necessarily determine that they have been ordinarily understood to be so included.

With regard to the suggestion that the words "other minerals" include substances *ejusden generis* with those enumerated, I confess I have a difficulty in following the point. The usual construction of general words following particular matters enumerated is to limit them by restricting their application to matters similar in kind to those specifically mentioned; see, for instance, the Marine Insurance Act 1906, 1 Sch., Rule 12, and *Cullen* v. *Butler*, 5 M. & S. 461.

But it must first be shown that the general words cover the matter under consideration, and then it becomes a question whether the effect of limiting the general words by reference to the particular matters enumerated is to exclude the matter in doubt. It is, therefore, necessary in the present case to inquire, first, whether sandstone is a mineral within the general words. If it is not, then the exception does not apply. If it is, then a question might arise whether it is *ejusdem generis* with those enumerated.

The argument for the respondents was that the effect of the words of enumeration was to expand the general words, and that because stone is like slate therefore it is a mineral within the meaning of the general words. This seems to me to be illogical and contrary to the principles applied in dealing with general words; moreover, there is, so far as I can understand, no common genus within which coal, ironstone, and slate can be comprised, and no basis for the suggestion that stone is to be considered as of the same genus as slate. Arguments founded on one mineral being of like kind with another hardly seem applicable. Lead, copper, tin, salt, I presume, would be considered minerals, but can they be said to be *ejusdem generis* with coal, ironstone, or slate?

The last suggested interpretation remains for consideration. In my opinion the true test of what the section means by "mines of minerals" is there indicated.

This interpretation forms the foundation of the judgments in the Scottish cases of *Menzies* v. *Lord Breadalbane*, 1 Shaw App. 225, and *The Duke of Hamilton* v. *Bentley*, 3 Dunlop 1121, though those cases depended upon the construction of deeds. Lord Mure's view of these cases, expressed 14 Ct. Sess. Cas., 4th Series, 357, is that they "settle in the most authoritative manner that by the law of Scotland adjudicated upon in the Court of last resort, a reservation of 'mines and minerals' in a disposition of property does not comprehend a reservation of freestone or a right to work freestone within that property."

In the *Duke of Hamilton's* case freestone quarries were said not to be included in "common parlance" in "mines and minerals." It is true that these cases depended upon the deeds, the context in them, and the relative position of the parties, but I cannot think that they are of no assistance in ascertaining the meaning of the words used in the section in question, though these cases were not applied in *Jamieson* v. *North British Railway*, 6 S.L.R. 188, where Lord Kinloch held that sandstone was a mineral and within the exception.

The decision in that case appears to have been influenced by two English cases—*The Earl of Rosse* v. *Wainman*, 14 M. & W. 859, and *Micklethwaite* v. *Winter*, 20 L.J., N.S. 313, but these cases seem to have been decided on the special terms of Enclosure Acts, and the two previous Scottish cases above mentioned are not referred to in the report of the judgment. The case still stands, but its correctness is questioned on this appeal.

Further, Lord Justice James suggested, and would, but for prior cases which bound him, have adopted, as I understand, this interpretation of "mines and minerals" reserved in a grant (*Hext* v. *Gill*, 7 Ch., at p. 719); Lord Justice Buckley wished he could adopt it (*Great Western Railway Company* v. *Blades*, 1901 Ch., at p. 637);

and Lord Halsbury approved of it in his judgment in *Farie's* case, 13 A.C., p. 668, *et seq.*, and held clay not to be a mineral within the meaning of the exception. He also quoted with approval Lord M'Laren's judgment, 14 Rettie, at p. 349. Do not his reasons apply with equal force to the common stone of the country?

It seems to be reasonably clear that the exception has limits. It is found in an Act which regulates the relative rights of railway companies, landowners, and persons engaged under them in mining "under and near" railways, and had to be applied by these parties. Is it not also reasonable to assume that the Legislature in framing it intended it to be acted upon as those parties would understand it? The enumeration of certain specified matters tends to show that its object was to except exceptional matters, and not to include in its scope those matters which are to be found everywhere in the construction of railways, such as clay, sand, gravel, and ordinary stone. This is emphasised by the use of the term "mines."

There was no evidence in the present case that "mines of minerals" were, either at the time of the passing of the Act or of the conveyance, or are now, understood and used by such parties as aforesaid as including ordinary sandstone, and if this could have been done, it was, in my opinion, for the respondents to prove it.

In my opinion the appeal should be allowed.

LORD SHAW—At various dates between 1869 and 1876 the appellants, the North British Railway Company, acquired from the respondents, or their authors, certain portions of land for the purposes of the railway undertaking. The conveyances to be construed in this action applying to certain portions of these lands were granted in terms of the Railways Clauses Consolidation Act 1845. Other portions of the lands were acquired under ordinary conveyances, with the reservation of minerals expressed as "subject to and in terms of the provisions of" the same statute.

It appears that these lands contain freestone. The railway company maintain that this freestone is included in the conveyances to them. The respondents maintain that freestone falls within the exception from the conveyance of all mines of coal, ironstone, slate, or other minerals. The Second Division of the Court of Session, Lord Ardwall dissenting, have affirmed the latter contention. As the language of section 70 of the Scotch Act is similar to that of section 77 of the English Railway Clauses Act, the question to be determined is of importance in both kingdoms. Two general principles apply to such a position. First, that unless there be some controlling reason to the contrary, the interpretation in both countries should be the same. This is manifest enough. In the second place the language of the statute should be interpreted in accordance with its plain and ordinary meaning as generally understood, and all artificiality of signification which by being imported into the statutory language would differentiate it from such plain and ordinary meaning referred to and from the meaning in conveyances at common law falls to be avoided. I should have thought that this proposition was as manifest as the other, were it not that upon the authorities cited at your Lordships' Bar it appears that the subject has occasioned differences of opinion among Judges of great eminence.

Fortunately, there is little room for doubt that under a conveyance according to the common law of Scotland freestone is not included within an exception or reservation of mines and minerals, and that it goes with and is reckoned as part of the land conveyed. This was settled by the case of *Menzies* v. *Breadalbane*. From the report of the case in the Faculty Collection it appears to have been keenly and repeatedly argued, and even the succinct report of the pleadings contains an anticipation of not a little of the arguments on both sides in both countries on the topic ever since.

The term for construction in that case was of "The haill mines and minerals of whatever nature or quality," this reservation occurring in a feu-charter. It was held that certain particular building stone was not contained within the exception. On appeal to this House the judgment was affirmed, Lord Eldon observing—"It does appear to me to be the better opinion that mines and minerals in this feu did not mean stone quarries."

The case was followed by that of the *Duke of Hamilton* v. *Bentley*, where the expression "coal and other metals, fossils and other minerals" was decided not to comprehend freestone. These decisions are analysed and commented upon in a careful and elaborate judgment of Lord Mure, in *Farie's* case in the Court of Session. I pause here to say that I do not think it has ever been doubted since the two cases of *Menzies* and *Hamilton* that in all ordinary charters or conveyances in Scotland freestone is not comprehended within an exception of mines and minerals. I ask myself what is the reason, or what reason has ever been assigned, for giving a different interpretation to the same language when that language is employed in a statutory conveyance. It is not without significance that the *Duke of Hamilton's* case, accepting the settled law as above described, occurred in the year 1841. The Railways Clauses Act was passed within four years. I have for myself the greatest difficulty in understanding how it can be suggested that Parliament then and thus using the language "mines," "minerals," &c., did so in a sense different from that authoritatively accepted as the common law of the land. In the present case, however, the majority of the Judges have so held. Lord Dundas says "it is sufficient for the present purpose to observe that cases decided upon the construction of feu-charters or other agreements between parties can afford little or no assistance in determining the true meaning of a statu-

tory conveyance embodying the statutory exception of mines and minerals." This, of course, does not assign any reason for adopting a difference in signification. Such a reason, however, is proponed by two other Judges of the highest eminence. Lord Herschell, in the case of *The Midland Railway* v. *Robinson*, 15 Appeal Cases, page 27, speaking of agreements between parties unaffected by any statutory enactment, says: —"In such agreements, in the absence of a distinct indication of the contrary intention, it is always to be assumed that the reserved mines are only to be worked in such a manner as is consistent with the surface remaining undisturbed. But in the case of mines reserved under section 77 of the Railways Clauses Act the case is different. It is clear that the mines reserved, if not purchased by the company, may be so worked as to interfere with the surface, the only limitation being that the working must be according to the usual manner of working such mines in the district where the same are situate."

Lord Watson had given the same reason in the case of *Farie*. "Irrespective," he says, dealing with the case of *Menzies*, 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."

I regret that I am unable to see the cogency or sufficiency of the presence or absence by law of a right to support of the surface as a rule or reason for differentiation or distinction as within the category of minerals reserved. It is sometimes the case that in common law conveyances minerals are expressly reserved, and by the same deed a feuar or disponee is declared to have no right to support, and no claim in respect of failure to support, the surface. A well-known and much commented on instance of this was the case of *Buchanan* v. *Andrew* (10th March 1873, 11 Macph. (H.L.) 13, L.R. 2 Scotch Appeals, 286). I cannot think that in such a case as *Buchanan's* much countenance would have been given to the suggestion that because the conveyance excluded the right to support therefore the reservation of minerals would fall to be construed differently from a reservation in an ordinary common law conveyance.

Further, when one considers that under the Railways Clauses Act, although the right to support is not in the initial conveyance dealt with or guaranteed, still provisions are made whereby after notices served the subjacent support can be secured as of right, the reason for differentiation in substance disappears.

I may also observe that while the railway undertaking traverses the lands of the same or various proprietors, some instances may occur of common law conveyances for reasons connected with the expense attending statutory procedure and the like, while other instances will occur of statutory conveyances. In the present case before your Lordships' House the instance of varieties of conveyance, even from the same proprietor, occurs. It would be indeed strange if the rights of the owner and of the railway company respectively, with reference to the contents of the conveyances of adjoining lands, differed because the language "mines and minerals' meant one thing when it was derived from the statute and another when derived from ordinary conveyancing language. On this part of the case I respectfully adopt the language used by Lord Halsbury in the case of *Farie*, page 97.

I trust the decision of your Lordships House in this case will put an end to the confusion which undoubtedly exists in the mind of the public and of the profession on the subject in hand. That confusion arises from two main causes which ought to be noted. The first cause is the judgment of the Lord Ordinary (Kinloch) in *Jamieson* v. *N.B. Railway Company*, holding that sandstone was a mineral within the statutory exception. This judgment was not reclaimed against. And I agree with Lord Gorell that it may have proceeded to some extent upon a misapprehension of the two English cases interpreting Enclosure Acts, to which my noble and learned friend refers. Further, the judgment appears to take no stock or account of the cases of *Menzies* and *Hamilton*, and the common law interpretation which they establish. The second cause of confusion has arisen, I venture to say, from treating a dictum of Lord Watson's in a manner which that most distinguished Judge had distinctly by anticipation repudiated, namely, as a decision upon the point. The language of Lord Watson in *Farie's* case, which must be alluded to, is—"My present impression is that" . . . "other minerals must necessarily include all minerals which can be reasonably said to be *ejusdem generis* with those enumerated. Slate being one of them, I do not think it would be possible to exclude freestone or limestone strata;" and his Lordship almost immediately adds, "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." Yet this very guarded and non-decisive utterance is thus treated by the Lord Justice-Clerk in *Glasgow and South-Western Railway* v. *Bain* (21 R. 137) as follows—"Slate is one of the things which are expressly mentioned, but slate is not in the ordinary sense a mineral; it is a thing quarried out of the ground to be used for building purposes, just as stone is; and accordingly in the case of *Farie* in the House of Lords it appears to have been regarded as impossible to exclude freestone and limestone when slate was included." It humbly appears to me that such a view of the matter decided in *Farie's* case is erroneous, and that the decision of *Bain's* case was largely governed by this mistake. The embarrassment produced by the case of *Bain* is manifest from the recent case of *Forth Bridge Railway Company*. v *Guildry of Dunfermline*, (4th June 1908), in which, while constrained

to follow *Bain*, Lord Kinnear stated that if the question had been open he should have thought it one of considerable difficulty, and the Lord President Dunedin suggested that there were grave reasons against holding that whinstone or sandstone were minerals in the sense of the statutory exception. I entirely agree with the learned Lord President that this is so. A true interpretation, when it takes the form of a definition, may be open to danger, but for practical purposes I respectfully agree with Lord Halsbury in his adoption of the language of Lord Justice James in *Hext* v. *Gill*, 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." The same canon of interpretation had a generation before been adopted by Lords Meadowbank and Medwyn, although in much simpler language, in *Hamilton's* case.

"If you were to ask anyone," said the latter Judge, "whether a common freestone quarry comes under a reservation of mines and minerals they would answer that it did not." This was decided to be the law of Scotland and is so still. I do not think, as I have stated, that any case has been made out, apart from the authorities with which I have dealt, for a different or artificial interpretation of similar words because they occur in a statute.

I have thought it right to treat with some fulness the Scotch decisions. I agree, substantially, with the result arrived at by the learned Lord Ardwall in the Court below. I have had the great advantage and pleasure of reading the judgments of my noble and learned friends the Lord Chancellor and Lord Gorell, who have dealt with the state of the law as reached in England. I respectfully agree with those judgments and with the course proposed from the Woolsack.

LORD CHANCELLOR — Lord James of Hereford has asked me to express his agreement in the opinion which I have conveyed to your Lordships.

Their Lordships allowed the appeal.

Counsel for the Pursuers (Appellants)—Sir A. Cripp, K.C.—Cooper, K.C.—Macmillan. Agents—James Watson, S.S.C., Edinburgh—John Kennedy, W.S., Edinburgh.

Counsel for the Defenders (Respondents) — Clyde, K.C.—C. H. Brown. Agents — John Stewart and Gillies, Writers, Glasgow—Smith & Watt, W.S., Edinburgh—Ballantyne, M'Nair, & Clifford, Solicitors, London.

COURT OF SESSION.

Tuesday, October 26.

FIRST DIVISION.

PATERSON *v.* A. G. MOORE & COMPANY.

Master and Servant — Compensation — Review of Weekly Payment — Average Weekly Wage Earning Capacity after Accident—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule* (2) (*a*) *and* (3).

The Workmen's Compensation Act 1906, First Schedule (3) enacts—" . . . in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is earning or able to earn in some suitable employment or business after the accident."

Employers applied to a Sheriff as arbiter to diminish or end the weekly payment of 18s. 3d. agreed to be paid by them to a miner injured in their employment on 15th April 1908, and maintained that his incapacity had ceased or at least was lessened. The arbiter found that the miner had not recovered from the effects of the accident, and was unfit to resume work as a miner; that his average weekly earnings prior to the accident were £1, 16s. 6d., giving an annual income of about £94; that he had from Whitsunday 1908 to Whitsunday 1909 carried on a public-house; that he had invested about £100 of capital therein; and that the nett profits for said year, after allowing for interest on capital, wages, and other expenses, amounted to about £98. The Sheriff took this sum of £98 as the measure of the earning capacity of the miner, and accordingly found that the miner's incapacity for work had terminated, and ended the weekly payment.

The Court *held* that the Sheriff's method of arriving at wage-earning capacity was fallacious, and remitted to him to inquire what work the man actually did in the public-house, and what these services would have been considered worth if he had been serving someone else instead of himself.

A. G. Moore & Company, coalmasters, Shieldmains Colliery, Coylton, by Ayr, in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII cap. 58), craved the Sheriff-Substitute at Ayr (SHAIRP), as arbiter, to review the weekly payment of 18s. 3d. agreed to be paid by them to James Paterson in respect of injuries by accident sustained by him while in their employment as a miner on the 15th day of April 1908, and to end the said weekly payments at such date, or to