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

not know in the least whether they can or not, but if those statements can be established—then the Court may come to the conclusion that this substance is a mineral.

I have as yet really failed, I am afraid, to understand wherein the averments in the pleadings are not sufficiently specific. I suppose that in the Scots law the object is to make people state clearly what it is that they mean to prove, not to require them to state evidence, but so to aver that there is sufficient particularity and that there will not be embarrassment or surprise to their adversaries. I presume that is the general object. In my opinion it is quite sufficiently stated here.

I must observe that this point of pleading does not appear, so far as I see, to have been in the least degree mentioned in the Court below. I am not sure that it is mentioned even in the respondents' case in this House. If it is, at all events I think it has really no substance in it.

I will only make one further observation, which is this. It is greatly to be regretted that in cases of this kind you have to decide upon the particular facts of each case upon evidence. I do not believe myself this requirement will prove so formidable as some people seem to assume; but the only alternative that I can see is to allow it to be treated as a matter of law. Now how the question whether freestone or any other kind of stone or substance which might be found in the soil is or is not a mineral can be treated as a matter of law really passes my understanding. The law has sufficient tasks to undertake, but the judges in a court must be inspired if they are able to answer for themselves what is pre-eminently a question of fact by evolving the answer from their own inner consciousness. There is no method except to ascertain these things as matter of fact according to the rules that have been laid down by the Courts.

I therefore think that there ought to be proof in this case, and that the judgment of the Court below ought to be reversed.

LORD ATKINSON—I concur.

LORD GORELL—I take the same view. I concur in the judgment proposed.

LORD SHAW—In this case the Lord Ordinary allowed a proof. It is pled by one of the parties that the stone in question formed an exception to the general rock of the district. That exception must be established by evidence, and the *onus* of doing so rests upon the person proponing the exception. In the pleadings of parties under the law of Scotland there is a wholesome rule to the effect that a proof will not be ordered or evidence taken upon a vacuous generality. The whole question in this case is whether this pleading can be so characterised. If so, a party would be prejudiced by the lack of sufficient notice of the other party's case.

I cannot, in view of the passages that have been cited from answer 11, hold that this is a mere generality in pleading. I think the specification is sufficient to entitle the Lord Ordinary to have allowed the proof, and I think the burden of proof should be where I have ventured to put it. I am accordingly of opinion that the appeal should be sustained and a proof allowed, the appellants to lead therein, as was provided by the interlocutor of the Lord Ordinary, Lord Cullen, on the 6th December 1910.

Their Lordships reversed the judgment appealed from with expenses.

Counsel for the Complainers, the Caledonian Railway Company, Respondents—Clyde, K.C.—Morison, K.C.—Hon. Wm. Watson. Agents—Hugh R. Buchanan, Glasgow—Hope, Todd, & Kirk, W.S., Edinburgh—Grahames, Currey, & Spens, Westminster.

Counsel for the Respondent, Symington, Appellant—Sir R. Finlay, K.C.—The Solicitor-General for Scotland (Hunter, K.C.)—Gentles. Agents—Borland, King, Shaw, & Company, Writers, Glasgow—Dove, Lockhart, & Smart, S.S.C., Edinburgh—Balfour, Allan, & North, London.

COURT OF SESSION.

Saturday, November 4.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

SCHULZE AND ANOTHER (LEES' TRUSTEES) *v.* DUN AND OTHERS.

Trust—Personal Liability of Trustees—Breach of Trust—Negligence of Original Trustees and Negligence of Succeeding Trustees—Action by Succeeding Trustees against Representatives of Original Trustee Twenty-one Years after his Death—Mora—Personal Bar.

Testamentary trustees who were empowered to sell the truster's house to his eldest son R., executed and delivered to R. in 1870 a disposition of the house without getting payment of the price. In 1887 all the original trustees except one having died, two new trustees, one of whom was a beneficiary, were assumed. No steps were taken by either the original or the assumed trustees to recover from R. payment of the price of the house until 1902, after the death of the last original trustee, when the assumed trustees raised an action against R., but recovered nothing owing to the death of R., hopelessly insolvent. In 1909 the assumed trustees raised an action to recover the price of the house against the representatives of one of the original trustees who had died in 1887. The defenders pleaded that the pursuers were barred by *mora* and taciturnity, and by their negligence in taking no steps to recover from R. between 1887 and 1902.

Held (1) that in a question with the beneficiaries, whom the pursuers repre-