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

diminish the same by such amounts and at such dates, as the Court might think fit, in terms of section 16 of the First Schedule to the Workmen's Compensation Act 1906—A. G. Moore & Company contending that the incapacity of James Paterson for work in respect of which the said weekly payment was agreed to be made, had, at the date—12th April 1909—when the arbitration was begun, entirely ceased, or at least become greatly lessened.

James Paterson being dissatisfied with the award of the arbiter, who found that incapacity for work had ended, appealed by way of stated case.

The following statement was given by the arbiter—"I found it admitted or proved that the said James Paterson had not at the date of my interlocutor recovered from the effects of his accident, and was unfit to resume his former work as a miner; but that he had for the year from Whitsunday 1908 to Whitsunday 1909 carried on the business of a public-house keeper in the Coylton Arms Inn, Coylton, Ayrshire; that when he started that business he invested about £100 of capital therein; and that the nett profits of the said business for said year, after allowing for interest on capital, wages, and other expenses, amounted to about £98, which sum of £98 I treated as the measure of the earning capacity of the said James Paterson.

"His average weekly earnings previous to the date of the accident were £1, 16s. 6d., giving an annual income of about £94. It is, therefore, evident that his annual earnings of £98 in the public-house were about £4 more than his previous annual earnings of about £94 as a miner. In these circumstances, I, on the 15th June 1909, found that his incapacity for work resulting from his said injuries had terminated, and I ended as from said date the weekly payment of 18s. 3d. agreed upon by the parties to the arbitration, of which agreement a memorandum was recorded in the Special Register of the Sheriff Court of Ayrshire at Ayr on 30th March 1909. I also found the said James Paterson liable to the said A. G. Moore & Company in the expenses incurred by them in the arbitration.

The *question of law* was—"On the said admitted or proved facts, was I right in ending as from 15th June 1909 the said weekly payments of 18s. 3d."

Argued for the appellants—The Sheriff's way of arriving at wage-earning capacity was fallacious. He should have inquired what work if any the man actually did, and how much that work was worth.

Argued for the respondent—After an accident the standard by which recovery was to be judged was not necessarily the man's earnings or the worth of his work, for he might not work his hardest. The test was his capacity to earn. Here the Sheriff had applied his mind to what return was attributable to capital and what to individual effort, and that was a question of fact. What was actually earned in an independent business of his own was a proper matter for consideration —*Norman & Burt* v. *Walder*, [1904] 2 K.B. 27.

LORD PRESIDENT—This is a stated case between James Paterson, miner, and the firm of Moore & Company, the respondents. Paterson was injured, and compensation was paid to him at the rate of 18s. 3d. per week. The employers then made application to have that payment reviewed or ended, and the Sheriff-Substitute allowed a proof. He remitted to certain doctors to examine the appellant, and their evidence was taken before him. The result of the proof, in so far as it is founded on by the Sheriff, is thus stated by him in the case. He says—"I found it admitted or proved . . . *quotes v. sup.* . . . which sum of £98 I treated as the measure of the earning capacity of the said James Paterson." He then finds that the appellant's previous average weekly earnings did not amount to as much as £98 in the year, and he accordingly ended the payments.

I must say that I think the learned Sheriff has gone upon an altogether wrong view of what he had to inquire into. He had got to fix the amount of compensation; and the portion of the Act which has most to do with that is the portion of paragraph 3 of the First Schedule, which says that 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 weekly amount which he is earning or is able to earn in some suitable employment or business after the accident." There is no question here about the appellant's average weekly earnings before the accident, and what had to be discovered was the average weekly amount he was earning or was able to earn at some suitable employment or business after the accident. That is often spoken of—although the expression is not to be found in the statute—as "his average earning capacity." It seems to me that the man's wage-earning capacity is a perfectly different thing from the question of what profit he makes in a business; and the learned Sheriff, upon the statement of the case, has considered nothing else. He has taken the business which this man ran. He has taken the net drawings, then he has deducted the expenses; he has allowed for interest upon capital at a fixed sum, and has deducted wages which he paid to other persons, and then the remainder he has taken as the wage-earning capacity. That seems to me a perfectly different thing. The amount remaining may be his wage-earning capacity, or it may not. But you cannot get at the man's wage-earning capacity by finding out what he is making in business. I agree that the question of what he is earning, or able to earn, is not to be so rigidly interpreted as it is when you are to look at nothing except the wages which he gets from some other person. It may be that the business he is in makes him his own master; but none the less his wage-earning capacity is what he would make if he was employed as a servant.

I think the fallacy of the learned Sheriff-Substitute's method is very easily demonstrated by taking an example. Let me suppose that two workmen have been injured by the same accident, that they have both been injured in the same manner, and that they each afterwards take up a public-house business. The one starts his public-house in the town A and the other starts his public-house in the town B; and the public-house in A, owing to the habits of the inhabitants, is a better business than the business in B. The result would be, if you treated the matter as the Sheriff-Substitute has done, that you would find that the profits made by the one man were very different from the profits made by the other man. Is it not almost absurd to suppose that that represents the wage-earning capacity? There is of course an element of luck in every business, which has nothing to do with the wage-earning capacity.

In the circumstances which we find in this case I think the inquiry the Sheriff-Substitute had to make was in one sense a simple one, although to be decided roughly, as these things must be. If he had discovered how much work this man did in his public-house—that is to say, what he really worked at—then I think that what he would have to apply his mind to would be, What would the services which this man actually rendered have been considered worth if, instead of serving himself, he had been serving somebody else? That is to say, What would he have got in the market if he had gone there for work in that business? It is not for us to know what he would have earned; and I think that the case must go back to the Sheriff in order that he may apply his mind to that inquiry.

LORD KINNEAR and LORD JOHNSTON concurred.

LORD M'LAREN was absent.

The Court recalled the determination of the arbiter and remitted to him to proceed as accorded.

Counsel for the Appellant—Munro—Mair. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondents—Cooper, K.C.—Strain. Agents—W. & J. Burness, W.S.

Tuesday, October 26.

FIRST DIVISION.

[Sheriff Court at Glasgow.

M'CULLOCH (JACK'S TRUSTEE) *v.* JACK'S TRUSTEES.

Bankruptcy — Cessio — Warrant for Examination of Persons who can Give Information "Relative to" the Bankrupt's Estate—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 90 *and* 91—*Bankruptcy and Cessio (Scotland) Act* 1881 (44 *and* 45 *Vict. cap.* 22), *sec.* 10.

The Bankruptcy (Scotland) Act 1856 enacts—Section 90—"The Sheriff may at any time, on the application of the trustee, order an examination of the bankrupt's wife and family, clerks, servants, factors, law agents, and others, who can give information relative to his estate, on oath, and issue his warrant requiring such persons to appear. . . ." Section 91—"The bankrupt and such other persons shall answer all lawful questions relating to the affairs of the bankrupt; and the Sheriff may order such persons to produce for inspection any books of account, papers, deeds, writings or other documents in their custody relative to the bankrupt's affairs. . . ."

A bankrupt disclosed that under the trust-disposition and settlement of an uncle he had or might have right to a legacy of £500. (There was doubt as to whether the right had vested absolutely or subject to defeasance, or whether there was a mere *spes successionis.*) The trustee in bankruptcy presented a petition to the Sheriff for warrant to cite the uncle's testamentary trustees to appear for public examination. It appeared from the correspondence between the parties that the trustee in bankruptcy desired to know how the trust funds were invested, whether the uncle's widow had claimed her legal rights (the probable effect of this under the will would have been to make the bankrupt's legacy at once payable), and the amount of debts on the estate.

The Court (*reversing* Sheriff-Substitute Glegg and Sheriff Millar), *dismissed* the petition, *holding* that the examination of the testamentary trustees, not upon the question of whether the bankrupt had disclosed his whole estate or not, but upon collateral matters which might affect the pecuniary value of the bankrupt's estate, was incompetent.

By the Lord President—"The whole scope of those sections" (*i.e.* 90 and 91) is to trace property which the bankrupt may otherwise have concealed. Once that is traced and identified, there, it seems to me, is an end of the matter. If the property is then recoverable the trustee can sue. If it is not, he must wait."