LORD JOHNSTON—The pursuer sought to arrest in the hands of trustees a legacy due to his debtor out of the trust estate. His debtor's *jus crediti* in the legacy was certainly arrestable. The only question is, Were the arrestments effectually laid on?

The ideal way of arresting in the hands of trustees is to find them present at a trustees' meeting and then and there arrest in their joint hands. This is rarely practicable, and therefore an equivalent must be found by arresting in the hands of the individual trustees what is due by them jointly. But to make such arrestment complete it must be laid on the hands of the whole trustees or at least of a quorum (*Black* v. *Scott*, 8 S. 367), else a *nexus* on the trust estate or that part of it due to the beneficiary is not effected, for there would remain a quorum of the trustees who would not be interpelled by the arrestment from paying away the fund. Now that course has been properly followed here. Arrestment has been laid on in the hands of the two surviving trustees. And no objection could be taken *ex facie* of the execution of arrestments. But objection is taken that the schedules of arrestment do not warrant the execution, and then that the arrestment was not in reality properly laid on, in respect that in each case the messenger said that he arrested in the hands of you the said A B "as one of the surviving trustees under the trust-disposition and settlement" of X Y "the sum of £350, more or less, due and addebted by you as trustee foresaid" to the common debtor. The ground of objection is that no sum was due and addebted by the individual trustees, even as trustee, to the common debtor, but only by the body of trustees of whom he was one jointly, and that therefore the schedule should have run "due and addebted by you the said A B and C D (naming his co-trustee) as trustees foresaid." I confess I think that this or some equivalent form of words would have been more logically consistent with the situation, and I should not by myself have been disposed to disturb the Lord Ordinary's judgment. But while everything relating to the execution of diligence must be critically examined, this objection may well appear to be hypercritical, as there is here, as I fully admit, the substance of a good arrestment. I therefore acquiesce in the judgment your Lordship proposes, and in which I understand Lord Salvesen concurs. I do so the more readily that it is desirable in a matter of this sort to recognise a definite form which secures the essentials of a good arrestment and may be a guide to practitioners.

LORD SALVESEN—I entirely agree with the opinion of Lord Kinnear.

The LORD PRESIDENT was present at the advising, but not having heard the case delivered no opinion.

The Court recalled the interlocutor of the Lord Ordinary, repelled the defences, decerned against the compearing defenders in terms of the conclusions of the summons, and *quoad ultra* remitted the cause to the Lord Ordinary.

Counsel for the Pursuer (Appellant)—Johnston, K.C.—Hepburn Millar. Agents—Forman & Bennet Clark, W.S.

Counsel for the Defenders (Respondents)—Morison, K.C.—Mitchell. Agents—Gill & Pringle, W.S.

Friday, July 15.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

CALEDONIAN RAILWAY COMPANY *v.* GLENBOIG UNION FIRECLAY COMPANY, LIMITED.

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

Held (*aff.* judgment of Lord Skerrington, Ordinary), in the circumstances of the case, that a fireclay which varied from 60 to 140 feet below the surface of the ground, and did not form part of the subsoil of the place in question, was a mineral within the meaning of section 70 of the Railways Clauses Consolidation (Scotland) Act 1845.

Opinion (*per* the Lord President) that the cases of *Great Western Railway Co.* v. *Carpalla United China Clay Co.*, 1910, A.C. 83, 47 S.L.R. 612; and *North British Railway Co.* v. *Budhill Coal and Sandstone Co. and Others*, 1910 A.C. 116, 47 S.L.R. 23, established three propositions—"(1) Each case is a question of fact and must be decided on its own circumstances; (2) whether a particular substance is a mineral or not must be considered in the light of whether at the date of the conveyance that substance was described as a mineral in the vernacular of the mining world, the commercial world, and landowners; (3) nevertheless, inasmuch as the words to be interpreted are those which define the exception to a grant, they must not, whatever their meaning in such vernacular, be so applied as to make the exception swallow up the grant, which would be the case if the substance in question forming the ordinary subsoil of the district were held to be a mineral and within the exception."

The Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. c. 33) enacts—sec. 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 and 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 ex-

pressly named therein and conveyed thereby." Section 71—"If the owner, lessee, or occupier of any mines or minerals lying under the railway . . . 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 part thereof should be left unworked, and if they be willing to make compensation for such mines or minerals, . . . 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 . . . 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. . . ."

The Caledonian Railway Company brought an action of suspension and interdict against the Glenboig Union Fireclay Company, Limited, in which they craved the Court "to interdict, prohibit, and discharge the respondents, and all others acting under their authority, (*first*) from entering or encroaching upon the property and subjects belonging to the complainers lying in the parish of Old Monkland and county of Lanark . . . (*as shown on a map produced*), . . . and in particular upon any portion of the beds or seams of fireclay or clay lying under or within the said property and subjects of the complainers, or otherwise interfering with the said property and subjects of the complainers; and (*second*) from working the beds or seams of fireclay in the lands of Castlespails, Gartverrie, and Ramoan (and adjoining the said property of the complainers) forming the subjects let to the respondents, . . . either under or adjacent to the said property and subjects of the complainers, in such manner or way as to injure or let down the property or subjects of the complainers, or from damaging or obstructing their railway or works or any part thereof."

The complainers pleaded, *inter alia*—"(1) The respondents having threatened to enter or encroach upon the property of the complainers as condescended on, the complainers are entitled to suspension and interdict as craved in the first place. (2) In respect that the respondents, as tenants of the said adjoining seams of fireclay, are not entitled to work the same in such manner as to injure or bring down the property or subjects of the complainers or their railway or works, and the respondents having given statutory notice of their intention to do so, the complainers are entitled to suspension and interdict as craved for in the second place."

The respondents pleaded, *inter alia*—"(4) The beds or seams of fireclay under the lands purchased by the complainers being deemed to be excepted out of the conveyances of the lands in the complainers' favour, the complainers are not entitled to interdict in terms of the first crave of the prayer. (5) The fireclay let to the respondents being a mineral within the meaning of the Railways Clauses Consolidation (Scotland) Act 1845, and the complainers after due notice not having desired the respondents to leave unworked the said fireclay so far as under the complainers' works, or offered to make compensation therefor, the respondents are entitled to proceed with the working thereof. (6) The working by the respondents of the fireclay let to them in the subjects adjoining the property of the complainers not being calculated to injure or bring down the railway or works of the complainers, the second crave of the prayer of the note should be refused."

The *facts* as established in a proof are given in the opinion (*infra*) of the Lord Ordinary (SKERRINGTON), who on 28th November 1908 recalled the interim interdict previously granted, and refused the prayer of the note of suspension and interdict.

Opinion.—"The respondents are subtenants of the beds or seams of fireclay in the lands of Gartverrie and Ramoan in the estate of Gartsherrie. The principal lease was for 19 years from Martinmas 1876, but it was extended in October 1885 for a further term of 20 years from Martinmas 1895. Prior to October 1885 the complainers had, in pursuance of their statutory powers, acquired several parcels of ground, part of the said lands, for the purposes of their railway. The parties are agreed that 'any mines of coal, ironstone, slate, or other minerals under' the land purchased by the complainers are, in terms of section 70 of the Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33), impliedly excepted from the conveyances in favour of the complainers—subject, however, to this exception, the lands purchased by the complainers are vested in them *a cœlo usque ad centrum*. On 25th January 1908 the respondents gave notice to the complainers that it was their intention at the expiry of thirty days to proceed to work out the fireclay in the lands of Gartverrie and Ramoan underneath and adjacent to the complainers' railways, whereupon the complainers instituted the present proceedings. If the fireclay which the respondents propose to work underneath the complainers' railways is not a 'mine of a mineral' within the meaning of the said Act it belongs to the complainers, and the latter are entitled to interdict the respondents from interfering with it in terms of the first conclusion of the prayer of the present note of suspension and interdict. Furthermore, upon the same assumption the complainers are entitled, in terms of the second conclusion of the prayer, to restrain the respondents from working the fireclay outside of the com-

plainers' property and within the respondents' leasehold in such a way as to injure or let down the complainers' property.

"The expression 'mine of a mineral' is an unusual one, and has not unnaturally given rise to judicial discussion. According to Lord Watson in *Midland Railway Company* v. *Robinson*, 15 A.C. p. 34, it is used by the Legislature 'to denote the minerals *in situ*, without reference to the manner in which they can be worked.' Further, it is, I think, immaterial whether the minerals have in point of fact been worked or not. The result seems to be that the word 'mines' in section 70 may be disregarded, and that the only question between the parties is whether the fireclay referred to in this action is a mineral within the meaning of the statute.

"The seams of clay which the respondents have been working in the past and which they propose to work under and adjacent to the complainers' railway are two in number. The lowest, known as the 'Glenboig seam,' consists of a fireclay of a very high grade. The other seam, which consists of a clay known as 'compound,' lies immediately above the Glenboig seam. It also is a fireclay, but its fire-resisting quality and its value are considerably less than those of the Glenboig seam. As the fireclay wares manufactured by the respondents have obtained a high reputation in the market, the respondents prefer to use only the best of their fireclay, viz., the Glenboig clay, for the manufacture of such goods. They use the 'compound' for the manufacture of sanitary wares, which do not require to resist great heat, and also for making a mortar which is suitable for cementing together fireclay bricks. It was not argued that the use which the respondents make of the 'compound' is of any materiality in the present question, and I am of opinion that its character as a mineral must stand or fall along with that of the Glenboig clay. The thickness of each seam varies, but the average thickness of the 'compound' seam is about 4 feet, and of the Glenboig seam about 9 feet. For shortness I shall refer to both seams as 'the Glenboig seam.'

"An elaborate proof has been led which establishes in great detail the position and situation of the Glenboig seam, the physical and chemical properties of the fireclays worked by the respondents, and the mode of working them, and also so far as known the general character of the strata lying between the Glenboig seam and the surface. There is no real controversy about these matters, but it may be convenient that I should shortly summarise the results of the proof in regard to these points.

"(1) The Glenboig seam, so far as situated under the complainers' railway, lies at a depth varying from 60 to about 140 feet under the surface. It is interrupted by faults, which bring it at one point nearer to the surface than at another point, and which also alter its dip or inclination. Roughly speaking, the lie of the seam may be compared to a basin one lip of which crops out to the north-east of and outside of the disputed area, and the other lip of which crops out westwards of and outside of the disputed area at a place called Inchneuk. The outcrop at this latter point is about 600 yards to the west of Glenboig Station, and is probably nearer to some parts of the disputed area.

"(2) The Glenboig seam is worked by means of underground mining according to the stoop-and-room system. The workings are approached by means of a stone mine which leads from the bottom of the Star Shaft, which is situated outside and to the north of the disputed area. They are also approached by means of a mine which leads down from the outcrop at Inchneuk. At the outcrop a small area about 1½ acres has been worked opencast.

"(3) The fireclays worked by the respondents are so hard that they have to be removed by blasting. After the lumps have been brought to the surface they are broken by a stone-breaking machine before they are put through the rolling mill commonly used by brickmakers and potters. Neither of the two seams worked by the respondents is homogeneous. The miners have instructions to send up to the surface only the good pieces, and the lumps are again assorted before being put into the stone-breaking machine.

"(4) Fireclay is composed of a mixture of minute particles of various rocks which in prehistoric times were carried by water and deposited at the bottom of seas or lagoons. The same is true of most other clays—the most notable exception being the peculiar substance known as 'China clay.' The peculiarity which distinguishes fireclay from ordinary clay is the possession of a larger portion of refractory or fire-resisting materials, as compared with the fluxes or melting materials. The fire-resisting quality of a clay further depends to some extent upon the proportions *inter se* of the various fluxes, and also upon the size of its particles. The chemical change known as melting takes place more slowly where the particles are large than where they are relatively small. Accordingly it is impossible for a scientific man to say at what point a clay ceases to be a fireclay and becomes an ordinary clay.

"(5) The strata lying between the Glenboig seam and the surface are of a highly variegated character. None of them has been worked, and it is impossible from the evidence to say whether any ever will be worked. The same is true of the strata below the Glenboig seam. The complainers have caused five bores to be made between the eastern and western boundaries of the disputed area. Roughly, the strata above the Glenboig seam may be divided into two groups. Immediately above the 'compound' there is a variegated series of strata, most of which are described by the borer as fireclays. Above this there is a variegated series of strata, and consisting mainly of what are described by the borer as sandstones and whinstones. This latter series reaches nearly to the surface, which is covered with a few feet of moss or clay or other material. The sections show

that the same stratum is not of the same thickness at each bore, and that a stratum found in one bore may be altogether absent in another. The explanation is that the deposits were 'lenticular,'—in other words, were thick in the middle and tapered away to nothing, like a lens.

"(6) The fireclay worked by the respondents is, of course, incapable of sustaining vegetable life in consequence of its situation and its hardness. Though the complainers dispute the fact, I hold it to be proved that even after the fireclay has been removed to the surface and exposed to the air in a bing for many years it does not become like ordinary surface clay. It disintegrates to some extent, but it does not become plastic, and nothing will grow upon it.

"With reference to the question whether fireclay is a mineral, the respondents allege that 'both in commercial and scientific parlance fireclay is and has always been described as a mineral.' This averment was remitted to probation, and evidence was led in regard to it without objection. The geological and mineralogical experts who were examined as witnesses agreed that fireclay was composed entirely of mineral substances, but they differed upon the question whether it could scientifically be described as a mineral. Some of them maintained the affirmative, others thought that the term mineral should be confined to homogeneous substances having a definite physical structure and a definite chemical composition. Fireclay does not fall within this definition, and accordingly it is not a mineral in the stricter sense. The question is one of classification, and although it bulks largely in the proof, the counsel on neither side maintained in argument that it had any bearing upon the construction of the statute. In the narrower sense of the term, as used by men of science, coal, ironstone, and slate, the three substances specified in section 70, are not minerals. With reference to the commercial meaning of the word 'mineral,' the complainers' counsel did not, I think, dispute that fireclay is generally regarded as a mineral by mining engineers and other business men, but he argued that this proved too much. He elicited from most of the witnesses who were examined on this matter the admission that they drew no distinction between fireclay and common clay. Some of them attempted to distinguish between the two, but not very successfully.

"Upon the whole I have come to the conclusion that fireclay is considered to be a mineral by business men in this country, and that it was so regarded at the date of the statute. In forming this opinion I was influenced by the same considerations which weighed with Lord M'Laren in *Farie's* case (*Magistrates of Glasgow* v. *Farie*, 14 R. 346), and which led him to draw a distinction between fireclay and ordinary clay. He said (14 R. 349)—'In our country the fireclay which is associated with coal in the coal measures is commonly wrought along with the coal and ironstone where it is of good quality. I have no doubt that the right of working it would pass under a grant in the terms of the conveyance in question, and this not because it is mineralogically different from ordinary clay, but because it is one of the things ordinarily wrought as a mineral, and is thus within the fair meaning of the term as used in a deed or contract.' I do not understand Lord M'Laren to mean that fireclay is a mineral only when actually worked in connection with coal. He referred, I think, to the close association between coal and fireclay as explaining why fireclay had come to be regarded as a mineral by business men. I am further influenced by the fact that, unless in exceptional cases, fireclay is obtained by means of underground mining. Although the method of working has been rejected as a test of whether a substance is a mineral within the meaning of the statute, the fact that a substance is generally obtained by means of underground mining is not, I think, irrelevant to the question whether it is ordinarily regarded as a mineral.

"It is, however, familiar law that the interpretation which would be put upon the word 'mineral' as used in an ordinary conveyance or lease is not conclusive as to its meaning in the statute. In the first place, a mineral, in order to fall within the statute, must be *ejusdem generis* with one or other of those specially mentioned in section 70. In the second place, in construing the statute regard must be had to the relative position of the parties interested and to the substance of their transaction. For both these propositions I refer to the opinion of Lord Watson in *Farie's* case (15 R. (H.L.) 98). In regard to the first point, I have no difficulty in holding that fireclay is *ejusdem generis* with coal. But the second point presents greater difficulty. The complainer's counsel argued that the decision of the House of Lords in *Farie's* case had established certain principles for the construction of the Railway Clauses Act and similiar statutes which excluded the fireclay referred to in the present action from the category of a 'mineral,' and which placed it in the same category as the brick-clay which formed the subject-matter of that decision, and which was held to be part of the 'land' purchased by the Water Commissioners for the purpose of their undertaking.

"The case of *Magistrates of Glasgow* v. *Farie* (1887), 14 R. 346, reversed (1888) 15 R. (H.L.) 94, was followed in England in *Great Western Railway* v. *Blades* (1901), 2 Ch. 624, and *Todd, Birleston, & Company* v. *North-Eastern Railway* (1903), 1 K.B. 603; and in Scotland in *Turners* v. *North British Railway* (1904), 6 F. 900. A number of other cases were referred to in the argument, but they are of little value so far as regards the present question. In some it was assumed that clay was a mineral; in others the question related to 'china clay,' a substance so different from fireclay that a decision in regard to it is of little help.

"The import of the judgment in *Farie's*

case is stated as follows by the Lord President (Lord Kinross) in *Turners'* case, quoting the words of Mr Justice Buckley in the case of *Blades*—'Clay forming a surface or subsoil, and constituting "the land" purchased for the purposes of the undertaking, is not a "mineral" within section 77 (corresponding to section 70 of the Scotch Railways Clauses Consolidation Act 1845) of the Railways Clauses Consolidation Act 1845, as interpreted by *Lord Provost of Glasgow* v. *Farie*.' The Lord President adds — 'This statement was expressly approved of by Lord Alverstone in *Todd, Birleston, & Company* v. *North-Eastern Railway*.' Conversely, in the words of Lord Watson in *Farie's* case, 'the "land" purchased by the Railway Company cannot be restricted to vegetable mould or to cultivated clay, but it naturally includes, and must be held to include, the upper soil, including the subsoil, whether it be clay, sand, or gravel, and the exceptional depth of the subsoil, whilst it may enhance the compensation payable at the time, affords no ground for bringing it within the category of excepted minerals.'

"No proof was led in *Farie's* case, but the decision proceeded upon the footing that the clay there in question was a bed of 'the common clay which constitutes the subsoil of the greater part of the land of this country' (*per* Lord M'Laren, 14 R. 349). Upon this clay the Magistrates of Glasgow had built their reservoirs after acquiring in terms of the Waterworks Clauses Act 1847 the 'land,' with the exception of the 'coal and other minerals' therein. This clay came to within 2 feet of the surface, was about 36 feet in thickness, and was valuable for making bricks. In *Blades'* case, a decision specially founded upon by the complainers, the clay was the South Staffordshire blue brick-clay common in the district. On an average the bed was found within a foot of the surface, and the evidence showed that, 'subject to some trifling strata of sandstone which lay within it,' its thickness was from 300 to 400 feet or more. The complainers adduced as a witness Professor Dawkins, who had given evidence in *Blades'* case. He proved that the interrupting strata of sandstone were of considerable thickness, the two principal ones being respectively 12 feet 6 inches and 5 feet thick, but I must assume that Buckley, J., was right in treating the bed of clay as practically continuous. In the case of *Todd, Birleston, & Co.* the clay lay immediately under the surface or vegetable soil, and had been proved to a depth of 100 feet. It was the ordinary clay of the district, and was used for brickmaking. In *Turners'* case the clay came to within 18 inches of the surface, was about 100 feet in depth, and was used for making pottery and bricks. In all these cases the clay was worked opencast, but extended much deeper below the surface than the subsoil in the agricultural sense of the term.

"Obviously no valid distinction could be drawn between the clay with which the Courts were concerned in the three later cases and that which was the subject of dispute in *Farie's* case. The complainers' counsel maintained that the fireclay worked by the respondents is substantially similar to all these clays both in its character and in its situation with reference to the surface.

"The first stage of his argument was intended to show that any differences between the Glenboig fireclay and the brick-clays above referred to constitute mere differences in quality, and in the proportions in which the same constituents have been intermingled. He pointed to the fact that some kinds of fireclay bricks fetch a lower price than a high quality of bricks suitable for facing the front of a house. All these clays, he said, resemble each other in respect that they are natural sedimentary deposits; that they are used 'in bulk,' *i.e.*, are not used like ironstone for the purpose of extracting another substance out of them; that they are plastic when mixed with water and assume a permanent form when baked; that they are highly heterogeneous in composition, and that the chemical analyses of all of them are similar except in regard to the proportions of the ingredients. The hardness of the Glenboig fireclay, according to his argument, is a mere accident due to the weight of the superincumbent strata, and is not very materially greater than that of the lower strata of the clay in *Blades'* case. It is also an irrelevant accident that the Glenboig clay is worked by underground mining. At the outcrop this same clay is worked opencast; in one district of England this is the usual method of working fireclay; whereas in other districts in the same country brick-clay is won by underground mining.

"The second stage of his argument was intended to show that the Glenboig fireclay is part of the 'subsoil' in the sense in which that term was used in the decisions above referred to. No witness was found to say that the Glenboig fireclay forms part of the subsoil, but the witnesses who were examined on this point probably understood the term in its agricultural sense. The sections of the bores negative, in my opinion, the suggestion that the Glenboig seam is part of the subsoil. Even if the whole series of unworked fireclays (so called by the borer) lying above the Glenboig seam is regarded as forming one continuous stratum along with it, this whole stratum remains severed from the surface by a series of sandstones and whinstones. The complainers' counsel, however, argued with great confidence that *Farie's* case, as interpreted by the later decisions, decided that clays, sand, and gravel, which are 'characteristic of the outer layer of the earth's crust,' are not 'minerals' but part of the 'land,' and that the fireclay in question falls within this definition.

"After giving the best consideration in my power to these arguments, I am of opinion that the complainers are endeavouring to apply the judgment in *Farie's* case to circumstances essentially different from those which induced the House of

Lords and the English and Scottish Courts to decide that the clays then in question were not 'minerals' in the sense of the statute. It is enough to say that the fireclay in dispute does not, in my opinion, form part of the subsoil. Should a question hereafter arise as to this same fireclay at the outcrop, or as to a bed of fireclay forming the ordinary subsoil of a district, different considerations may apply. I do not propose to express any opinion as to a case which may never occur, but if such a case should arise, there is some authority for the view that certain strata might pass to the compulsory purchaser if they lay on the surface, but might be reserved to the seller if they occurred at some depth below it (per Lord Watson, 15 R.(H.L.) 101).

"I accordingly recal the interim interdict and refuse the note, with expenses. . . .

"Since the foregoing opinion was written I have had the advantage of reading the proof sheets of the opinions of their Lordships of the Second Division in the case of *North British Railway* v. *Budhill Coal and Sandstone Company*, 24th November 1908. Neither the judgment nor the opinions seem to have any direct bearing upon the question in dispute in the present action."

The respondents reclaimed, and argued—There was no direct decision as to fireclay being a mineral. There were only two *obiter dicta* on the question, which were to be found in *Magistrates of Glasgow* v. *Farie*, January 21, 1887, 14 R. 346, *per* Lord M'Laren, p. 349, 24 S.L.R. 253, and in *Errington* v. *Metropolitan District Railway Company*, L.R. (1882), 19 Ch. Div. 559, *per* Jessel, M.R., p. 571. But the expression "mines and minerals" in the Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33), sec. 70, had been the subject of much judicial interpretation since then. The latest and most authoritative of the decisions on the subject was the case of *North British Railway Company* v. *Budhill Coal and Sandstone Company and Others*, 1910 A.C. 116, 47 S.L.R. 23. From that case there were two tests to be extracted—(1) Is what is claimed to be a mineral rare and exceptional, or at least exceptional, or is it truly part of the land acquired? (2) If it is exceptional, is it what is known as a mineral in the vernacular of the mining world, the commercial world, and landowners? These criteria completely displaced the criteria laid down in the earlier decisions starting with *Great Western Railway Company* v. *Bennet*, 1867, L.R., 2 E. & I., Ap. 27. The view taken there was that the railway company purchased only enough of the surface of the land to make their railway. This was based on the idea that there was a difference between a voluntary and statutory conveyance, and that under the latter everything not agricultural surface might be a mineral. The view taken in *North British Railway Company* v. *Budhill Coal and Sandstone Company and Others* (*cit. sup.*), on the contrary, was that exceptions were to be strictly read, and that there was no difference in principle between a voluntary and statutory conveyance. *Magistrates of Glasgow* v. *Farie*, August 10, 1888, 15 R. (H.L.) 94, 26 S.L.R. 229, carried the rights of railways a little further than *Great Western Railway Company* v. *Bennet*. According to Lord Watson in this case, the land conveyed included both soil and subsoil, and as long as you followed down through the same subsoil you had the land. What, therefore, was excepted from the land in this view was something different from the soil and subsoil. The only other ground of judgment in *Magistrates of Glasgow* v. *Farie* (*cit. sup.*) was the *ejusdem generis* argument, which, however, had not been accepted by the House of Lords in *North British Railway Company* v. *Budhill Coal and Sandstone Company and Others* (*cit. sup.*). The next step in the definition of the expression was to be found in L.-J. Bowen's opinion in *London and North-Western Railway Company* v. *Evans*, [1893] 1 Ch. 16, and this case formed the foundation of the judgment in *North British Railway Company* v. *Turners Limited*, July 2, 1904, 6 F. 900, 41 S.L.R. 706. The ground of L.-J. Bowen's judgment was that where the Act gave a right of compensation to the landowners the presumption was that land taken for a specific purpose under an express statutory right would be entitled to support. In his judgment he put the cases of *Sprot* v. *The Caledonian Railway Company*, 1856, 2 Macq. 449, and *Elliot* v. *North-Eastern Railway Company*, 1863, 10 Clark (H.L.) 333, on the same foundation, *i.e.*, it made no difference whether the grant was voluntary or under the compulsory powers of a statute. Finally, in *North British Railway Company* v. *Budhill Coal and Sandstone Company and Others* (*cit. sup.*) we have the principle that what is a mineral must be what is exceptional. This was the criterion laid down also in *Great Western Railway Company* v. *Carpalla United China Clay Company, Limited*, 1910 A.C. 83, 47 S.L.R. 612, where the words used were "rare and exceptional." The fit subject of reservation must be the exceptional, unexpected, or rare. Coal and ironstone were common and more or less universal, and accordingly these and slate were expressly named in the section. *Menzies* v. *Earl of Breadalbane*, July 17, 1822, 1 Sh. App. 225, was practically the only case in the books where there was an attempt to determine the phrase "the haill mines and minerals." Duff, Feudal Conveyancing, p. 70 (*g*), gave an extensive enumeration of reserved minerals which included building stone but omitted clay and fireclay. The word "mineral" was capable of application to everything in the land except the surface, but it was impossible to give it this application in a common law conveyance. In such a conveyance, apart from extrinsic circumstances, a reservation of mines and minerals would not give anything except actual metalliferous ores and coals. The way the matter stood now, therefore, was that under the decisions in *North British Railway Company* v. *Budhill Coal and Sandstone Company and Others* (*cit. sup.*),

and *Great Western Railway Company* v. *Carpalla United China Clay Company* (*cit. sup.*), the railway company got everything except certain excepted subjects. These were three extremely common substances, but outside these the reservation was limited to those things which were not the ordinary rock of the district but were rare and exceptional. It was not, however, possible to say that fireclay in Glenboig was exceptional, *i.e.*, something other than the ordinary rock of the district. It might be commercially valuable, but this under present views would not make it a mineral. Not only must the criterion of value be put aside, but also the consideration that it was in general mercantile use. As to the definition of "exceptional," this would depend on the proportion the substance in question bore to the total substance of the land. The question really was—Was there nothing present but a specimen of the ordinary geological series characteristic of the district. On the evidence fireclay was one of the regular characteristics of the carboniferous series, which in this place extended for miles, interrupted only by whinstone and freestone, both of which were now mineral and belonged to the appellants. It was proved that here there was fireclay of various qualities, extending from a short distance below the surface to the seam worked. But it was impossible to draw a distinction between the pure fireclay and the compound or to fix a boundary where you had a gradual gradation. The evidence showed further that the seam itself varied from place to place. On Mr Justice Eve's test in *Great Western Railway Company* v. *Carpalla United China Clay Company, Limited*, [1909] 1 Ch. 218, at 225, ft., fireclay would thus not be a mineral. The views stated by the Master of the Rolls, at p. 229, ft., Fletcher Moulton, L.J., p. 231-233, and Farwell, L.J., 237, in the same case, confirmed the argument. Particularly pregnant was the test stated by Farwell, L.J., in the last sentence of his opinion—"It is not taking the soil itself, but extracting a mineral substance from the soil." In the present case the respondents proposed to take the soil itself. The particular elements founded on to make china clay a mineral were just those that distinguished it from fireclay, which was one of the ordinary rocks of the district, and came up to the surface in varying degree—*Hext* v. *Gill*, 1872, 7 Ch. App. 699, *per* Mellish, L.J., 712, and James, L.J., 719; *Great Western Railway* v. *Blades*, [1901] 2 Ch. 624, *per* Buckley, J., at 638; and *Todd, Birleston, & Company* v. *North-Eastern Railway*, [1903] 1 K.B. 603.

Argued for the respondents — The evidence to a large extent consisted of the views of experts as to what "mineral" meant. This, however, was what the Court had to decide, and the views of the experts was irrelevant just as was the evidence of the experts in *Gillespie* v. *Russell*, November 14, 1854, 17 D. 1 (*Torbanehill* case), which the Court had refused to regard as decisive. In the existing state of the authorities there were three recent decisions as to clay, viz., *Great Western Railway* v. *Blades* (*cit. sup.*), *Todd, Birleston & Company* v. *North-Eastern Railway* (*cit. sup.*), and *North British Railway Company* v. *Turners, Limited* (*cit. sup.*). These cases decided that clay forming the soil or subsoil of the lands purchased was not a mineral. There was also one decision that a particular kind of clay, viz., china clay, was a mineral—in *Great Western Railway Company* v. *Carpalla United China Clay Company, Limited* (*cit. sup.*). Appellants' case lay in steering between these decisions and in attempting to assimilate fireclay to ordinary clay. It could not, however, be abstractly laid down on any case that common clay in all circumstances and under all conditions was or was not a mineral. What the authorities decided was that clay of the particular description in question was not a mineral. The meaning of "clay" was not expiscated. In the older decisions in Scotland clay was regarded as a mineral. The reason why clay was not so regarded in the three cases above cited was because it was part of the soil or subsoil, and this fact reconciled these cases with the opinion of the Lord Chancellor in *North British Railway Company* v. *Budhill Coal and Sandstone Company and Others* (*cit. sup.*). The crust of the earth was composed of earth and rock. In the crust were certain substances. If the substance differed from the normal structure of the earth at the place in question, it was a mineral, but if it was part of the earth's normal structure, it was not, and it passed in that case under the conveyance. Looking at *North British Railway Company* v. *Budhill Coal and Sandstone Company and Others* (*cit. sup.*), from this point of view, it presented no difficulty to the respondents' contention. It followed that what was a mineral in one district might not be so in another. Rare and exceptional as a criterion, was, however, putting the *onus* too high. All this brought one back to Lord M'Laren's test in *Magistrates of Glasgow* v. *Farie* (*cit. sup.*), which was still the best criterion, viz. (p. 349)—"Everything that is usually wrought under the denomination mineral and capable in the particular case of being profitably worked." Did fireclay satisfy this test? Was it within the fair meaning of the words as a business man would construe them? Unlike other substances, fireclay satisfied every test which had been proposed. These tests had been collected by Lord Gorell in *North British Railway Company* v. *Budhill Coal and Sandstone Company and Others* (*cit. sup.*). If the clay cases were compared with the sandstone case it would be found that the reasons which induced the Court to hold clay not a mineral were the same as induced the Court to hold sandstone not a mineral. In all these cases the clay formed the surface or subsoil and extended over the district. The same remark applied to the earlier case of *Magistrates of Glasgow* v. *Farie* (*cit. sup.*) In *North British Rail-*

way Company v. *Budhill Coal and Sandstone Company and Others* (*cit. sup.*), again, the sandstone was the land and so could not be excepted from it. The criteria, therefore, to be extracted from these cases was that a thing was not a reserved mineral in the sense of the statute if it constituted the general substance of the district. The appellants' argument, however, assumed that these cases decided that common clay was not a mineral, and starting from this assumption they asked respondents to differentiate their fireclay from common clay. There, however, respondents could appeal confidently to common usage and practice. The lines of demarcation were never drawn accurately in nature; but any commercial man knew well the difference between fireclay and common clay. It might be that they possessed the same constituent parts though mixed in different proportions, but the vital point was that this difference produced physically a quite different result, and gave fireclay a commercial value which it otherwise would not have had. The appellants must further recognise that in *Great Western Railway Company* v. *Carpalla United China Clay Company* (*cit. sup.*) a particular kind of clay, viz., china clay, had been recognised as a mineral. It was in vain, however, that they attempted to distinguish it from fireclay either by its method of working or by its constituent elements. All clays—fireclay, china clay, and common clay—were composed of the same elements. It was impossible to draw a hard and fast line between them, and the House of Lords had decided that china clay in that particular case was a mineral, because it was not part of the land at the place, but a substance having a value independent of the land. The same considerations applied to fireclay. It had a high value in the market, and was a well-recognised substance obtained by working in mines with ordinary shafts and levels. The mine in the present case was 100 feet deep with well defined strata, intercalated between other strata, and in no sense continuous with the body of the earth. In these respects the fireclay here presented the features which the Court had required in the case of a mineral. Fireclay, further, was associated very closely with coal. It constituted the soil on which the trees which became coal grew, and was thus *ejusdem generis* with coal. It was not the case that *Great Western Railway Company* v. *Bennett* (*cit. sup.*) had been subverted by *North British Railway Company* v. *Budhill Coal and Sandstone Company and Others* (*cit. sup.*). The former case was a deliberate judgment for the purpose of construing this particular section of the Act, and still held good. When dealing with minerals under this section the cases of *Sprot* v. *The Caledonian Railway Company* (*cit. sup.*), and *Elliot* v. *North Eastern Railway Co.* (*cit. sup.*), and the whole series of common law cases, had nothing to do with the question. But even under the old law the reservation was construed widely—Bell on Leases, vol. i., 343, referring to *Bethune* v. *Jervice*, 1778, M. 15,267 (right of landlord to shell-marl), and *Colquhoun* v. *Watson*, 1778, M. 15,253 (right of landlord to pipeclay); Hunter, Landlord and Tenant, vol. ii, 207. In *Magistrates of Glasgow* v. *Farie* (*cit. sup.*), *Todd, Birleston, & Company* v. *North Eastern Railway* (*cit. sup.*), and *North British Railway Company* v. *Turners Limited* (*cit. sup.*), it was distinctly stated that the reservation was to have a wide meaning. There was no ground for saying that Lord Watson's view in *Magistrates of Glasgow* v. *Farie* (*cit. sup.*), that a mineral might be anything under the soil or subsoil, had ever been displaced. The appellants attached an exaggerated importance to *North British Railway Company* v. *Budhill Coal and Sandstone Company* (*cit. sup.*), which even as to sandstone did not decide that sandstone was never a mineral. In America the respondents' view was also taken that what was a mineral was a question of fact—Shamel, Mining, Mineral, and Geological Law, p. 55.

At advising—

LORD PRESIDENT—The question in this case is whether certain seams of fireclay passed to the Railway Company in virtue of a conveyance to the Railway Company after the date of the Railways Clauses Act. That depends on whether the said seams fall within the words of the exception of the 70th section, "mines of coal, ironstone, slate, and other minerals."

The Lord Ordinary has decided that the seams in question fall within the said exception. But since his Lordship's judgment the subject on which there was much not easily reconcilable authority has been elucidated by the judgments of the House of Lords in the cases of *Great Western Railway* v. *Carpalla Clay Company* and *North British Railway Company* v. *Budhill Company*.

I am of opinion that the propositions deducible from these latest and most authoritative judgments may be thus stated—1. Each case is a question of fact and must be decided on its own circumstances. 2. Whether a particular substance is a mineral or not must be considered in the light of whether at the date of the conveyance that substance was described as a mineral in the vernacular of the mining world, the commercial world, and landowners. 3. Nevertheless, inasmuch as the words to be interpreted are those which define the exception to a grant, they must not, whatever their meaning in such vernacular, be so applied as to make the exception swallow up the grant, which would be the case if the substance in question forming the ordinary subsoil of the district were held to be a mineral and within the exception.

The Lord Ordinary has held as proved in fact (1) that fireclay is considered to be a mineral by business men in this country;

(2) that the fireclay in dispute does not form part of the subsoil of the country at the place in question.

With both of these conclusions in fact I agree. It is true that to (1) he adds—and was so considered at the date of the statute. As I have already indicated, although the date of the statute must be taken for the question of the general meaning of the words used, the date of the conveyance must be the date at which the particular application is sought. But fireclay was certainly not less a mineral in the eyes of business men in 1856 than it was in 1845, and that, as a question of common parlance, it is held as a mineral up to the present day is well evidenced by the terms of the Coal Mines Regulation Act 1887 (50 and 51 Vict. cap. 58), schedule 3, which treats it as such *eo nomine.*

With regard to (2) I think the matter is conclusively shown by the bores.

I am therefore of opinion as a question of fact that this fireclay is within the exception and that so to hold it does not defeat the grant.

I should like to add that with the exception of two passages—one as to the inapplicability of the interpretation of ordinary conveyances to the interpretation of statute, and the other as to the doctrine of *ejusdem generis*—there is nothing in my opinion in the Lord Ordinary's careful and elaborate note which does not square with the opinions in the House of Lords cases subsequently delivered.

I am therefore for refusing the reclaiming note.

LORD KINNEAR—I concur.

LORD JOHNSTON—I concur.

LORD SALVESEN—The law which applies to this case has been authoratively settled by two recent decisions of the House of Lords—*North British Railway* and *Great Western Railway Company*—both reported in App. Cas. 1910; and all that is necessary for us to do is to apply that law to the facts as stated by the Lord Ordinary. The simple question which we have to decide is whether the fireclay worked by the respondents is a mineral within the meaning of section 70 of the Railways Clauses Consolidation (Scotland) Act 1845.

The fireclay in question, so far as under the complainers' railway, lies at a depth varying from 60 feet to 140 feet under the surface. It is worked by underground mines according to the stoop-and-room system. It is so hard that it requires to be removed by blasting. In composition it is distinguished from ordinary clay by its containing a larger proportion of refractory materials which make it valuable for the manufacture of bricks capable of resisting high temperatures. The bricks so made are sold at about 60s. per 1000, as compared with a price of 20s. to 25s. for ordinary bricks. The upper strata consists largely of other seams of clay and fireclay which are of inferior quality for commercial purposes, but there also occur bands of sandstone and whinstone separating the various layers or seams of clay. One of these bands is over 30 feet in thickness as shown by the sections of bores made on behalf of the Railway Company. These various propositions briefly summarise the Lord Ordinary's findings in fact with regard to the particular seam of fireclay in question.

Various attempts have been made in the earlier cases which have occurred under section 70 to define the word "minerals." These are all enumerated in the opinion of Lord Gorell in the *Budhill* case, and none of them can be said to be a good working definition by means of which the substances which fall under the term "minerals" can be absolutely distinguished from those which are not included in the term. The fireclay here satisfies all these definitions, but so also did the sandstone which was held in the *Budhill* case not to be a mineral. The ground of decision, however, was that the sandstone there in question was the ordinary rock of the district, just as the clay in the case of *Farie* (15 R. (H.L.) 94) was held to be part of the ordinary subsoil. These two cases seem to settle that mineral substances below the surface of the land are not within the reservation of "mines and mines" if they are not in any case exceptional but form part of the ordinary soil or rock of the district in which the line is made, even although from their situation or thickness or homogeneity they may be capable of being worked to profit. They do not, however, settle that in any given district a bed of freestone or clay of exceptional quality and value may not be a mineral, while in the *Carpalla* case china clay was expressly held to be a mineral, although it was proved in the present case that the constituents of china clay are substantially the same as those to be found in all clays, although the proportions of the constituent elements are by no means the same.

The appellants contended that the true rule to be deduced from the House of Lords cases was that all substances which fall under the reservation of minerals in section 70 must be capable of being characterised as "rare and exceptional," and be also known as minerals in the vernacular of mining engineers, commercial men, and landowners. I think the proposition would be more in accordance with the majority of the opinions if the word "rare" was omitted, and I think it is also plain that "exceptional" is not used in an absolute sense, but relatively to the other constituents of the earth's surface in the district in which the question arises. On the facts here I have no hesitation in reaching the conclusion that the seam of fireclay worked by the respondents is "exceptional," and there appears to be no doubt that such fireclay has been, in the common parlance of all parties interested, treated as a mineral. The very fact that it is a seam of only from 5 feet to 8 feet in thickness, which is nevertheless worked at a considerable depth by mining, indicates that it has a character distinct from the superincumbent strata, however much some of these

may resemble it in their constituent elements. The common rock or common clay or subsoil of a district could never be worked in such a way, and none of the other seams of fireclay in the land in question are at present workable to profit—at all events by means of underground workings. This may not in itself be conclusive, but it presents an element of some importance in considering whether the respondents' fireclay is a substance which is exceptional in the sense in which that word is used by the Lord Chancellor. Taking the evidence as a whole, and applying to it the law laid down by the House of Lords, I reach the same conclusion as the Lord Ordinary on what is primarily and mainly a question of fact, namely, that the respondents' fireclay is a mineral within the meaning of section 70, and that accordingly the appellants are not entitled to the interdict which they ask.

The Court adhered.

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

Counsel for the Respondents—D.-F. Scott Dickson, K.C.—Macmillan. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Saturday, July 16.

FIRST DIVISION.

(EXCHEQUER CAUSE.)

THE SCOTTISH NORTH-AMERICAN TRUST, LIMITED) *v.* FARMER (SURVEYOR OF TAXES).

Revenue—Income Tax—Profits or Gains—Deductions of Interest on Short Loans—Income Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 100, *Sched. D, First Case, Rule* 3.

Held that a financial and investment company in striking the balance of its profits or gains was entitled to debit its profit with interest paid to bankers in New York on short loans, as such loans were not capital.

The Income Tax Act 1842 (5 and 6 Vict. cap. 35) enacts, sec. 100—"And be it enacted that the duties hereby granted, contained in schedule marked D, shall be assessed and charged under the following rules. . ."

"*First Case.*—Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade not contained in any other schedule of this Act."

"*Rules.*"

. . . . . .

"*Third.*—In estimating the balance of profits and gains chargeable under Schedule D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains, on account of . . . . . any capital withdrawn therefrom, nor for any sum employed or intended to be employed as capital in such trade, manufacture, adventure or concern. . . . . ."

"*Fourth.*—In estimating the amount of profits and gains arising as aforesaid, no deduction shall be made on account of any annual interest, or any annuity or other annual payment, payable out of such profits or gains."

The Scottish North-American Trust, Limited, being dissatisfied with a determination of the Commissioners for the General Purposes of the Income Tax Acts and for executing the Acts relating to the Inhabited House Duties for the County of Edinburgh, at a meeting held by them at Edinburgh on 22nd December 1908, required the Commissioners to state a case for the opinion of the Court of Session as the Court of Exchequer in Scotland.

The Case stated—"The Scottish North American Trust, Limited (hereinafter referred to as the company), appealed against an assessment for the year ending 5th April 1909 on the sum of £2404 (duty £120, 4s.) made upon it under the Income Tax Acts in respect of the profits of the business carried on by it, based upon the average yearly profit during the twenty-seven months from the date of the company's incorporation to 31st October 1907. The ground of appeal was that in arriving at the assessable profits deduction had not been allowed of the interest paid by it to bankers in America.

"The assessment was made under 5 and 6 Vict. cap. 35, sec. 100, Schedule D, First Case; 16 & 17 Vict. cap. 34, sec. 2, Schedule D; and 8 Edw. VII, cap. 16, sec. 7, and the sum assessed was arrived at as follows:—

	Year to 31st Oct. 1907.	15 Months to 31st Oct. 1906.
Balance of profit as per P. & L. account	£4911 7 11	£6119 2 5
Less balance brought forward from previous account . . .	1119 2 5	
	£3792 5 6	
Add sums debited as expenses and not allowable as deductions:—		
Suspense account		414 15 4
Income tax . .	108 18 11	378 2 2
Interest paid to bankers in America on loans by them to the company .	457 6 13 4	80 5 4
	£847 7 17 9	£6992 5 3
Deduct taxed dividends received by company . .	2179 0 5	7882 8 5
Profit for year to 31st October 1907	£6298 17 4	
Loss for fifteen months to 31st October 1906 .	890 3 2	
Total profit for 2¼ years . . .	£5408 14 2	
Average yearly rate of profit . .	£2404 0 0	