

sary. But the announcement actually made on each packet of tea sold showed that he considered it necessary to make some statement in order to prevent mistake on the part of the public. If so, the fact that the appellant, instead of saying in so many words that the weight of the packet including the wrapper was so much, or that the weight of the paper bag was included in the weight sold, used words so ambiguous, is by itself suggestive of an intention, if not to deceive, at least to say as little as he possibly could. And here I may point out that although there is a statement of an understanding in the district of the meaning of the words "gross weight," it is only an understanding among miners, and says nothing either about their families or about other classes of the community.

But, taking the facts proved as a whole, I am not prepared to differ. Traders, however, must not understand that the Court approves announcements such as that of the appellant in this case. Traders will find it to their interest to see that when an announcement of a change of practice requires to be made it should be such as to be universally understood even when hurriedly read by unlettered people.

Collier's Case.

LORD JUSTICE-CLERK—What I have already said in the case of *Masterton* applies to this case, the circumstances being substantially the same. The only real difference is that in this case the words on the wrapper were "Full weight of tea including wrapper." That difference cannot affect the decision, as the words are plainly to the same effect, and indeed are more direct, as indicating that the tea sold did not amount to a full half pound.

LORD SALVESEN—The complaint in this case and the facts found by the Sheriff-Substitute are substantially the same as those in the case just disposed of. The only difference in the facts is that the words printed on the packet were as follows—"Full weight of tea including the wrapper." These words are open to the same objection as the notice in the case of *Masterton*—that they do not give clear and unambiguous notice that the customer does not get the full quantity of tea demanded. At the same time no evidence was led that the words were not understood by persons who frequented the shop; and I cannot think that anyone who considered their meaning could arrive at any other conclusion than that the wrapper had been weighed along with the tea in order to make up the weight demanded. It would have been quite open for the prosecutor to have led evidence of this kind, as it would have had a bearing upon the sufficiency of the notice and as to whether the implied representation constituted by the sale itself had been displaced by the notice. Having in view, however, the long-continued practice and the presumed knowledge of the persons frequenting the shop, I think the notice

was sufficient to do so, and to clear the appellant of any imputation of dishonesty. As I have so fully gone into the question of relevancy in the other case, it is unnecessary to do so again, there being no material distinction between the two cases. The questions submitted to us will fall to be answered in the negative, as in the case of *Masterton*.

LORD GUTHRIE—I concur.

The Court answered both questions in the cases in the negative, sustained the appeals, and quashed the convictions.

Counsel for the Appellant (*Masterton*)—Macmillan, K.C. — Hon. W. Watson. Agent—John Stewart, S.S.C.

Counsel for the Appellant (*Collier*)—Sandeman, K.C.—Wilton. Agent—R. A. Bremner, Solicitor.

Counsel for the Respondent—Clyde, K.C.—J. B. Young. Agent—William Black, S.S.C.

COURT OF SESSION.

Tuesday, June 11.

FIRST DIVISION.

[Lord Skerrington, Ordinary.]

MARQUIS OF LINLITHGOW AND YOUNG'S PARAFFIN LIGHT AND MINERAL OIL COMPANY, LIMITED *v.* NORTH BRITISH RAILWAY COMPANY.

Mines and Minerals—Support—Oil Shale—Union Canal Act 1817 (57 Geo. III, cap. lvi).

A Canal Act passed in 1817 gave power to the company (section 33) "to make, complete, and maintain" a canal between certain places. The Act nowhere specifically gave power to take the lands, but (section 33) it gave power to the company to set out and ascertain such land as they thought necessary for the canal. It enacted (section 50) that the lands and grounds "to be taken or used" for the canal should not exceed a certain width. It gave power (section 60) to trustees and others under legal disability "to contract for, sell and convey" lands set out and ascertained as necessary, and it provided a statutory form of conveyance by which owners of the land might convey to the company all their right, title, and interest "according to the true intent and meaning" of the Act. It enacted (section 61) that all persons hereinbefore "enabled to sell and convey" lands should receive satisfaction for the value of the lands "which shall be taken by the said company for the purposes of the Act" and for the damages sustained in making the works.

It enacted (section 69) that upon payment or consignment of the money contracted for "for the purchase of any such lands . . . or other heritages, or as a recompense for the yearly produce or profit thereof, or as a compensation for damages," it should be lawful for the company to enter upon the land, and "all the estate, use, trust and interest of any person therein" should thenceforth be vested in and become the sole property of the company "to and for the use of the canal." It reserved (section 112) to the owner of the lands in, upon, or through which the canal was made, the mines and minerals "within or under" the said lands, and provided that he might work them, "not thereby injuring, prejudicing, or obstructing the said canal." Section 113 gave a right to the canal company to inspect the mines, provided for the repair of wilful damage at the expense of the mine-owner, and then proceeded—"In case the said company shall find it necessary for the safety of the said navigation . . . to stop the working of any mines and minerals under or near the said canal . . . the said company shall, and they are hereby required to, make satisfaction for the value of such mines and minerals to the owners, occupiers, or other persons entitled to receive the same."

Held (1) that while the company were entitled to support for their canal, yet they must pay for the minerals which, in order to give the required support, were left unworked; (2) that it being proved that it was necessary for the safety of the navigation to stop the working of the oil shale under and near the canal, an intimation from the canal company to the mine-owners that they would hold them liable in damages for any injury to the canal was in effect "to stop the working" within the meaning of section 113, and that the canal company would be liable to pay compensation if oil shale were a mineral; (3) (*diss.* Lord Johnston) that in determining whether or not oil shale was a mineral, the point of time to be regarded was 1818, when the company bought the ground and entered into possession, and not the time of the formal conveyance, which, owing to disputes, did not take place until 1862; and (4) that on the evidence shale was not regarded as a mineral in the vernacular of the mining and commercial world and of landowners in 1818.

The Union Canal Act 1817 (57 Geo. III, cap. lvi), enacts—"33. And be it further enacted that it shall and may be lawful to and for the said company, and they are hereby authorised and empowered, from and after the passing of this Act, by themselves, their deputies, agents, officers, workmen, servants, and assigns, to make, complete, and maintain a canal, of five feet depth of water, to be called the Edinburgh and Glasgow Union Canal, and to be navigable and passable for boats, barges, and other

vessels from the Lothian Road, in the parish of Saint Cuthbert's or West Kirk parish, and county of Edinburgh, through the said parish, and into, through, or near to the several parishes or townships of Collington, Curry, Ratho, and Kirkliston, in the said county of Edinburgh; of Kirkliston, Uphall, Dalmeny, Abercorn, and Linlithgow, in the county of Linlithgow; and of Muiravonside, Polmont, and Falkirk, in the county of Stirling, to join and communicate with the Forth and Clyde Navigation at or near to Lock Number sixteen in the parish of Falkirk, near the town of Falkirk, in the said county of Stirling; and also to make and maintain feeders from" certain rivers and burns. "35. And be it further enacted that it shall and may be lawful to and for the said company . . . and they are hereby authorised and empowered, to enter into and upon the lands and grounds of or belonging to the King's Majesty, his heirs or successors, or of any other person or persons, bodies politic, corporate, or collegiate whomsoever, and to survey and take levels of the same, or any part thereof, and to set out and ascertain such parts thereof as they shall think necessary and proper for making the said intended canal, reservoirs, feeders, and such other feeder or feeders, aqueduct or aqueducts, works and conveniences, as they shall think proper and necessary for making, preserving, improving, completing, maintaining, and using the said intended canal . . . and also to bore, dig, cut, trench, sough, get, remove, take, and carry away, and lay earth, clay, stone, soil, rubbish, trees, roots of trees, beds of gravel or sand, or any other matters or things which may be dug or got in making the said intended canal, . . . and also to construct, erect, make, and do all matters and things which they shall think convenient and necessary for making, effecting, extending, preserving, improving, completing, and using the intended canal, reservoirs, feeders, and other works, in pursuance of and according to the true intent and meaning of this Act, they, the said company, their several deputies, agents, officers, and workmen doing as little damage as may be in the execution of their several powers to them hereby granted, and making satisfaction in manner hereinafter mentioned to the owners and proprietors of, and other persons interested in, any lands, tenements, or other heritages, waters, watercourses, brooks, or rivers respectively which shall be taken, used, removed, diverted, or prejudiced, for all damages to be by them sustained in or by the execution of all or any of the powers of this Act. . . . 50. And be it further enacted that the lands and grounds to be taken or used for such canal and towing paths shall not exceed thirty yards in breadth except in" certain places. "59. And be it further enacted that the vendor or vendors, and all other person or persons interested in the lands to be sold to the said company, as superiors or otherwise, shall be entitled to the same

rights and privileges from the remaining parts of these lands as if such sale or sales to the said company had never been made. 60. And be it further enacted that after any lands, grounds, tenements, or heritages, shall be set out and ascertained for making the said canal, . . . and for providing and constructing the wharfs, . . . it shall and may be lawful to and for all bodies politic, . . . and all and every person or persons whatsoever, though under any legal disability or incapacity whatsoever, who is, are, or shall be seized, possessed of, or interested in any lands, grounds, tenements, or heritages, which shall be so set out and ascertained for the purposes aforesaid, to contract for, sell, and convey the same, and every part thereof, unto the said company; . . . and all such contracts, agreements, sales, conveyances, and assurances shall be made at the expense of the said company; and such of them as shall be made of any lands, tenements, or other heritages to the said company, may be made in the following form, or in words to the same effect, *videlicet*—

“I, A B, of _____, in consideration of the sum of _____ to me paid by _____, do hereby grant, dispoise, and convey to the said company, all [describing the premises to be conveyed] and all my right, title, and interest to and in the same, and every part thereof, to hold to the said company and their successors for ever, by virtue and according to the true intent and meaning of an Act made in the fifty-seventh year of the reign of King George the Third, intituled an Act [here insert the title of this Act], the said premises to be holden blench of and under me, my heirs and successors, for payment of a penny Scots yearly, if asked allenarly. Consenting to the registration hereof in the Books of Council and Session, or others competent for preservation; and thereto I constitute _____ my procurators. In witness whereof I have subscribed these presents. Written by C D at Edinburgh, this _____ day of _____ before these witnesses.”

Which conveyance being registered in terms of the clause of registration therein contained, and recorded in the register of seisins of the county in which the premises conveyed shall be situated, . . . shall have the same effect and be as valid and effectual to all intents and purposes as if a formal disposition had been executed and followed by charter and seisin according to the forms of the law of Scotland, any law, statute, or custom to the contrary notwithstanding. . . . 61. Provided always, and be it enacted, that all and every body or bodies politic, . . . or other persons hereinbefore enabled to sell and convey lands, tenements, and other heritages, . . . may and shall accept and receive satisfaction for the value of such lands, grounds, tenements, mills, or other works, water, and heritages, and for the value of all stone, limestone, clay, gravel, sand, and all other materials whatsoever, which shall be taken by the said company for the purposes of this Act, excepting such as are found in digging the canal,

and for the damages to be sustained by making and completing the said works hereinbefore directed in such manner as shall be agreed upon by and between the said parties interested respectively, or any of them, and the said company; . . . and in case” they “cannot agree as to the amount of such satisfaction, the same shall be ascertained and settled by the verdict of a jury of fifteen. . . . 62. And be it further enacted that the said juries respectively shall award all determinations, judgments, and verdicts which they shall respectively make and give . . . concerning the value of lands . . . and other heritages, separately and distinctly from the consideration of any other damages sustained or to be sustained by any person or persons in consequence of the execution of any of the powers of this Act, and shall distinguish the value set upon the lands, . . . and the money assessed or adjudged for such damages as aforesaid, separately and apart from each other. . . . 69. Provided always, and be it enacted, that upon payment or consignment . . . of such sum or sums of money as shall have been contracted or agreed for between the parties, or ascertained by the sheriff and a jury as aforesaid, for the purpose of any such lands, waters, mills, tenements, or other heritages, or as a recompence for the yearly produce or profit thereof, or as a compensation for damages as herein mentioned to the proprietor or proprietors of such lands . . . it shall and may be lawful to and for the said company, and their agents, workmen, and servants, immediately thereafter to enter upon such lands . . . and other heritages respectively, and then and there such lands, . . . and other heritages, together with the yearly profits thereof, and all the estate, use, trust, and interest of any person or persons therein, shall from thenceforth be vested in and become for ever the sole property of the said company, their successors and assigns, to and for the use of the said canal and other works, but to or for no other use or purpose whatsoever. . . . 112. Provided always, and be it further enacted, that nothing herein contained shall extend to, prejudice, or affect the right of any owner or owners of any lands or grounds, in, upon, or through which the said canal, or any towing paths, wharfs, quays, . . . or other conveniences aforesaid, shall be made to the mines and minerals lying or being within or under the said lands or grounds, but all such mines and minerals are hereby reserved to such owner or owners of such lands or grounds respectively; and it shall and may be lawful to and for such owner or owners, subject to the conditions and restrictions herein contained, to work, get, drain, take, and carry away, to his, her, or their own use, such mines and minerals, not thereby injuring, prejudicing, or obstructing the said canal, or any of the works or conveniences belonging thereto. 113. And be it further enacted that it shall and may be lawful to and for the said company, or their agents or servants, at any time or times, upon reasonable notice, in the day-

time, to enter upon any lands through or near which the canal and works hereby authorised to be made shall be or pass, wherein any mines shall or may have been dug, opened, or wrought, and likewise to enter into such mines, and there to view, search, and measure, latch, and use all other means for discovering the distance of the said canal and towing paths from the working parts of such mines respectively; and in case it shall appear that any mine hath been opened or wrought under the said canal, or any of the works belonging thereto, or so near thereunto as to endanger or damage the same, and that such endangering and damaging the canal or other works has been wilful, it shall and may be lawful to and for the said company, and their agents, servants, or workmen, at the expense, costs, and charges of the owners or proprietors of such mine and mines, and from time to time, to use all reasonable ways and means for repairing, supporting, sustaining, securing, and making safe the said canal, towing paths, and other works; and such expenses, costs, and charges shall, in case such mines shall have been so wrought or worked subsequent to the passing of this Act, be recovered by the said company, in case of non-payment thereof upon demand, by action at law in the Court of Session; and such expenses, costs, and charges shall when recovered be paid into the hands of the clerk of the said company for the time being, for their use and benefit; and in case the said company shall find it necessary for the safety of the said navigation, or any of the works thereto belonging, to stop the working of any mines and minerals under or near the said canal, or any of the works thereto belonging, the said company shall, and they are hereby required to, make satisfaction for the value of such mines and minerals to the owners, occupiers, or other persons entitled to receive the same, to be ascertained and determined by two or more skilful persons appointed for that purpose by the sheriff of the county in which such mines or minerals are situated. 120. And be it further enacted that if at any time or times hereafter any person or persons shall sustain any damage in his, her, or their lands, tenements, heritages, or property, by reason of the execution of any of the powers hereby given, and for which no remedy is hereinbefore provided, then and in every such case the recompence or satisfaction for such damage shall from time to time be settled and ascertained by a jury as aforesaid; and the same may be recovered, levied, and applied in manner herein directed with regard to any other recompence or satisfaction."

The Union Canal Act 1819 (59 Geo. III, cap. 29), section 17, repeats the above provision regarding the ascertainment of the value of the mines and minerals by two persons appointed by the Sheriff, and provides that "such value shall be ascertained in such and the like manner as the value of any lands, heritages, mills, waters, or other property to be taken by

virtue of the said recited Act or this Act is hereby appointed to be ascertained."

The Marquis of Linlithgow, proprietor, and Young's Paraffin Light and Mineral Oil Company, Limited, tenants in a certain area of the Broxburn main seam of oil shale, *pursuers*, raised an action against the North British Railway Company, the successors of the Edinburgh and Glasgow Railway Company, the successors of the Edinburgh and Glasgow Union Canal Company, *defenders*. The pursuers sought to have it found and declared "(first) that the pursuer the said Victor Alexander John Marquis of Linlithgow is heritable proprietor of the whole minerals, and in particular of the seams of coal and shale or oil shale lying under or near the canal and works thereto belonging known as the Union Canal and belonging to the defenders, so far as the said minerals lie within or under" [a certain] "area in the county of Linlithgow, and that the pursuers Young's Paraffin Light and Mineral Oil Company, Limited, by virtue and in terms of the said lease, are tenants of the whole coal and oil shale lying under or near the said Union Canal, so far as the said minerals lie within or under the area" [described]; "(second) that the pursuers' mines and workings in and of the seam of oil shale belonging to them as aforesaid and known as the Broxburn main seam of oil shale, . . . cannot be worked or carried (1) any further in the direction of or towards the defenders' said canal and works thereto belonging, or otherwise (2) within 40 feet or thereby on either side of the waterway of the said canal, without endangering the safety of the navigation of the said canal and the works thereto belonging; and that it is necessary for the safety of the said navigation and the works thereto belonging to stop the working of the pursuers' said mines and minerals (1) further in the direction of or towards the defenders' said canal and works thereto belonging than is shown on" [a certain] "plan, or otherwise (2) within 40 feet or thereby on either side of the waterway of said canal; and that the pursuers have been and now are stopped within the meaning of the Act 57 George III, cap. lvi, and in particular section 113 of said Act, from working their said mines and minerals (1) further in the direction of or towards the defenders' said canal and works thereto belonging than is shown on the said plan, or otherwise (2) within forty feet or thereby on either side of the waterway of said canal; (third) further or otherwise, as alternative to the conclusions of declarator second above written, or any of them, that the pursuers' mines and workings in and of the seam of oil shale belonging to them as aforesaid, and known as the Broxburn main seam of oil shale, have been carried as far in the direction of and toward the defenders' said canal and works thereto belonging as said working can be carried without danger to the pursuers' said mines and the working thereof, and that the pur-

suers are unable to work said mines (1) any further in the direction of or towards the defenders' said canal and works thereto belonging, or otherwise (2) within forty feet or thereby on either side of the waterway of the said canal, without danger arising (a) to the pursuers' said mines and workings from the defenders' said canal and works thereto belonging, and (b) to the defenders' said canal and works and the navigation thereof from the said further working of the pursuers' mines, and that the pursuers have accordingly been prevented working their said mines and winning the minerals therein (1) beyond the limits of said present workings in the direction of or towards the defenders' said canal and works, or otherwise (2) within a distance of forty feet or thereby on either side of the waterway of the defenders' said canal, owing to the execution of the statutory powers with regard to the construction and maintenance or otherwise of said canal and works thereto belonging conferred on the defenders or their predecessors; (fourth) that the defenders are bound, under and in terms of the Acts 57 George III, cap. lvi, and 59 George III, cap. xxix, and other Acts relative to their undertaking, to make recompense or satisfaction to the pursuers according to their respective interests (1) for the value of the said mines and minerals the working whereof has been stopped as aforesaid, or otherwise (2) for the damage sustained by them respectively by reason of the execution of the powers conferred by said Acts, and in any event or otherwise (3) for the value of the said mines and minerals the working whereof has been stopped as aforesaid in so far as said mines and minerals do not lie or are not within or under the lands or grounds belonging to the defenders under and by virtue of a disposition in favour of their predecessors the Edinburgh and Glasgow Railway Company, granted by the Right Honourable John Alexander Earl of Hopetoun, of date 30th May and 7th June and recorded . . . 7th July, all in the year 1862." The pursuers further sought to have the defenders decerned and ordained "to proceed within one month thereafter, or such other period as to our said Lords shall seem proper, to the ascertainment of the recompense or satisfaction falling to be paid to the pursuers as aforesaid, in the manner provided by said Acts before mentioned, and in particular by sections 61 to 66 of the Act 57 Geo. III, cap. lvi."

The parties were in dispute as to whether oil shale was or was not a mineral within the meaning of the Canal Act of 1817, as to how near the workings had approached to the bottom of the canal, and as to whether or not the defenders had found it necessary for the safety of the canal to stop the working of the mines under and near the canal within the meaning of section 113.

The following correspondence had taken place between the parties:—"The agents of the pursuers, by a letter dated 6th June 1907, wrote to the defenders in the following terms, viz.—'On behalf of the Marquis

of Linlithgow, as proprietor, and Young's Paraffin Light and Mineral Oil Company, Limited, as lessees, we have to intimate that the workings from their No. 41 mine, Fawnspar, in the main Broxburn seam of shale, in the lands and estate of Hopetoun, have now reached so far that further workings under and near the Union Canal property, or at least within forty feet of either the north or the south side of the waterway of said canal, will endanger the safety of the navigation of the said Union Canal or of works thereto belonging. We have, therefore, to ask you to have the satisfaction ascertained for the value of the said main Broxburn seam of shale so far as under and near the said Union Canal property, or at least within forty feet of the north and south sides of the said waterway (the working of which seam of shale has been stopped for the safety of the navigation of the said Union Canal and works thereto belonging), and that in terms of section 17 of 59 Geo. III, cap. xxix, and section 61 of 57 Geo. III, cap. lvi. If for any reason you are unwilling to proceed, we shall be obliged by your sending to us an undertaking freeing and relieving the said Marquis of Linlithgow and the said Young's Paraffin Light and Mineral Oil Company, Limited, of all possible claims of damage which may arise to you, the said North British Railway Company, as proprietors of the navigation of the said Union Canal or works thereto belonging, or to any persons or corporations using or being otherwise interested in the said Union Canal or in the said Union Canal undertaking or works thereto belonging, through any further workings by the said Young's Paraffin Light and Mineral Oil Company, Limited, of the said main Broxburn seam of shale under and near or at least within forty feet of either the north or south side of the waterway of said Union Canal. In the event of your preferring to have the satisfaction for the said shale ascertained by arbitration rather than in terms of section 17 of 59 Geo. III, cap. xxix, the Marquis of Linlithgow and Young's Paraffin Light and Mineral Oil Company, Limited, will concur in such method of ascertainment.' To this letter the defenders' secretary replied as follows, on 8th November 1907:—"I duly received your letter of 6th June, and subsequent reminders. The company are not to proceed as you ask, nor will they grant any undertaking. They hold your clients responsible for all injury and damage to the canal or adjoining works from the workings or proposed workings.' After various meetings between representatives of the parties, the agents of the pursuers wrote to the defenders the following letter, dated 11th December 1908:—"Referring to the meeting of Mr Cross and Mr Lennox with you on 17th November, it will be obliging if you can now let us hear from you. Lord Linlithgow is going abroad soon for several months, and we are desirous of communicating your views to him and getting his final decision before he leaves.' To this letter the defenders

secretary replied as follows on 23rd December 1908. [This is the letter referred to by the Lord Ordinary as being quoted in Cond. XII.]—‘Referring to your letter of 11th inst., and meetings with your Mr Lennox and Mr Cross of Glasgow, this matter has been very carefully considered, and in view of the legal opinions we have obtained, the company cannot admit any right on the part of your client or his tenants to work out shale from under the canal if by so doing the canal or relative works or conveniences will be injured, prejudiced, or obstructed, and this company will hold him and them responsible for any injury, prejudice, or obstruction that may be so occasioned. In these circumstances I regret that no arrangements seem possible.’”

On 30th June the Lord Ordinary (SKERINGTON) repelled a plea to the relevancy, and before answer allowed the parties a proof of their averments, and the pursuers a conjunct probation.

Opinion.—“The pursuers are Lord Linlithgow and his mineral tenants, and the defenders are the North British Railway Company, who are the successors of the Edinburgh and Glasgow Union Canal Company. The pursuers seek to establish by declarator their right to statutory compensation in respect of their being compelled to leave unworked a seam of oil shale lying under and adjacent to the Union Canal. The pursuers must prove (1) that this shale is a mineral within the meaning of a private Act of Parliament passed in 1817 and of the conveyance granted in pursuance thereof in 1862; and (2) that it is impossible for them to work it without injuring the canal. The defenders’ counsel, however, maintained that, even if these two points were proved, no compensation would, on a sound construction of the statute, be due to the pursuers. He accordingly moved to have the action dismissed without further inquiry, and both parties concurred in asking at this stage for a decision as to the construction of the statute. One would have expected that some light would have been thrown upon the question in dispute by the conveyance of 1862, which was granted as the result of a long litigation and more than forty years after the Canal Company had entered into possession of the ground—see *The Edinburgh and Glasgow Union Canal Company and the Edinburgh and Glasgow Railway Company v. Earl of Hopetoun*, 1856, 18 D. 655. The disposition, however, makes no reference to minerals, but counsel on both sides agreed that as it was in the statutory form and bore that the lands were to be held ‘by virtue and according to the true intent and meaning of’ the Act of 1817, it must be construed as reserving the minerals under the subjects conveyed, and also as reserving to the grantor such rights, and imposing upon him such restrictions, with reference to the working of the minerals, both sub-jacent and adjacent, as were expressed or implied in the Act.

“The Act 57 George III, cap. lvi, entitled ‘An Act for making and maintaining a

navigable canal from the Lothian Road, near the city of Edinburgh, to join the Forth and Clyde Navigation near Falkirk in the county of Stirling,’ was passed on 27th June 1817. The preamble sets forth that the making and maintaining of the canal will be of great public utility, and section 1 incorporates a company for that purpose. . . . [His Lordship here summarised sections 33, 35, 59, 60, 61, and 62 and quoted sections 112, 113, and 120—*v. sup.*] . . .

“By section 17 of the Act 59 Geo. III, cap. 29, which was passed on 19th May 1819, section 113 of the Act of 1817 was amended as follows. . . . [His Lordship here quoted the section—*v. sup.*] . . .

“Such being the material clauses of the statutes, the general principles of construction applicable to such cases are familiar, and have nowhere been more clearly stated than by Lord Justice Bowen in the case of *London and North-Western Railway Company v. Evans*, [1893] 1 Ch. p. 16. As he points out, these principles are not hard and fast canons of construction, but are merely rules of good sense which one should follow in the absence of some good reason to the contrary. Applying these principles, one would expect that the parliamentary authority to make and maintain the canal would carry with it a right in favour of the company to have the necessary support from the subjacent and adjacent strata. This implication is particularly strong in a case like the present, where the predecessor in title of the pursuers came into contractual relations with the Canal Company by selling it lands. On the principle of the *Caledonian Railway Company v. Sprot*, 1856, 2 M’Queen’s Appeals 449, one would be disposed to hold that Lord Hopetoun and his successors in title were debarred by their own conveyance from doing anything to the prejudice of their own grant. The implication is less strong in the case of a stranger who had not sold lands to the Canal Company, but as the statute contains clauses providing compensation for every kind of injury due to the execution of the statutory powers, I see no reason to doubt that the company acquired a right to support for its canal, which was good not merely against vendors and their successors, but also against owners of subjacent minerals and of adjacent lands and minerals with whom, or with whose predecessors in title, the company had entered into no contractual relation. Counsel for the pursuers referred to section 59, and maintained that that section rebutted any presumption which might otherwise have arisen that the company was entitled to have the canal supported. In my opinion that section has nothing to do with the right of support, its object, as I think, being to secure that a vendor through whose lands the canal passed shall be entitled during the remainder of a lease to recover from his tenant the full rent, leaving the tenant to make good his claim for loss of ground and severance and other damages directly against the company. The clause also

mentions superiors, and is intended to secure to them full payment of feu-duties and casualties out of the remaining lands other than those taken for the canal.

“Section 112, which has been already quoted in full, is consistent with the view that I have expressed as to the true meaning and scheme of the Act. It should be observed, however, that its application is very limited. It has nothing to do with the right of support in general, but merely with cases where there are minerals. Further, I read it as applying only to persons who, or whose predecessors, have sold land to the company, and to minerals which are subjacent to the lands bought by the company. In every case, however, where the section applies its meaning and effect are unambiguous. The mine-owner may work provided he does not thereby injure, prejudice, or obstruct the canal or any of the works or conveniences belonging thereto.

“The pursuers’ counsel argued that the concluding words of section 112 must be construed, not according to their natural meaning, but as referring to mineral workings of an unnecessary or extraordinary character. He referred to the case of *Dudley Canal Navigation Company v. Glazebrook*, 1830, 1 B. & Ad. (K.B.), 59, which was followed in *Stourbridge Canal Company v. Dudley*, 1860, 30 L.J.Q.B. 108, and which was approved of by the Lord Chancellor (Chelmsford) in the *Great Western Railway Company v. Bennett*, L.R., 2 E. and I. App. 27, p. 39. I am of opinion that these authorities have no application to the present case. In the *Dudley Canal Company* case the private Act enacted that the mine-owner should not work the minerals under the canal, or within a distance of twelve yards therefrom, without first giving notice to the company, which was thereupon authorised to stop the work on paying compensation, failing which the mine-owner was expressly authorised to work his minerals. The Court held, rightly no doubt, that this express statutory authority to work the minerals was irreconcilable with the proviso that no injury should be done to the canal, and accordingly they found themselves compelled to reconcile the two clauses by holding that the proviso applied only to workings of an unnecessary or extraordinary character. In the statute under construction I find nothing which compels me to interpret section 112 otherwise than according to its natural meaning. On the contrary, the natural and obvious meaning of the section is in harmony with what I have already stated to be in my opinion the meaning and scheme of the statute as a whole. In support of his argument the pursuers’ counsel further referred to the fact that section 113 makes special provision for the case where the mine-owner ‘wilfully’ endangers or damages the canal, and he argued that the inference was that ordinary and proper working was permitted even although the canal was thereby endangered or injured. I do not so construe this part of section 113. That clause was,

I think, intended to confer upon the Canal Company a valuable right which would not have belonged to it at common law, or under any other section of the Act. Assuming, as I do, that the company was entitled to have the canal supported, it still remained lawful for the mine-owner to remove the adjacent and subjacent strata, and he was not guilty of any legal wrong until damage actually took place, although he might be restrained from working if injury was imminent and certain—see *Darley Main Colliery Company v. Mitchell*, 1886, 11 App. Cas. 127, per Lord Bramwell, p. 145. It follows that if the injury to the canal was trifling, the pecuniary damages—i.e., the cost of repair—might be small, though there might be grave reason to fear that in the future a serious subsidence involving much greater injury to the canal might take place. In such a case it might be of importance to the Canal Company to possess the right conferred upon it by section 113 of using all reasonable means for repairing, supporting, and securing the canal at the expense of the mine-owner—a right, however, which is given only where the mine-owner had acted wilfully. I agree with the defenders’ counsel that this part of section 113, and the first part, which confers a power of inspection upon the Canal Company, are conceived entirely in the interest of the company. The defenders’ counsel, founding upon the principle *noscitur a sociis*, argued that the concluding words of section 113 were also conceived solely in the interests of the Canal Company, and were intended to confer upon it a right to stop the working of the minerals under or near the canal in circumstances where it could not prove that the workings would certainly injure the canal, and where it could not therefore obtain interdict founding on section 112. He also argued that it would be an advantage to the Canal Company to be able to avoid litigation and insure absolute safety to the canal by making full compensation to the mine-owner if and when the directors in the exercise of an honest discretion ‘found’ this course ‘necessary for the safety of the said navigation.’ The objection to this construction is that the defenders read section 113 as if it had enacted that ‘it shall and may be lawful to the company to stop the working’ of the minerals in certain circumstances. There is no such enactment in the section. It merely assumes, correctly I think, that the company possesses the power to stop the working of the minerals where that is necessary for the safety of the navigation, and it enacts that if this power is exercised compensation shall be made to the mine-owner. Of course it is possible to construe section 113 as conferring upon the company a right of stoppage different from and additional to that already conferred upon it, but I do not think it legitimate to resort to implication for the creation of a right when the language used receives full and satisfactory effect without it. I accord-

ingly hold that if the Canal Company enforces the right of support conferred upon it by the statute, and by so doing injures the mine-owner, compensation must be paid in terms of section 113 — in other words, the language of that section is sufficient to rebut the presumption which would otherwise have arisen that all claims, present or future, at the instance of Lord Hopetoun or his successors in respect of injury to mineral workings had been completely satisfied and paid for when the canal was made in 1818. If section 113 had been silent as to compensation for injury to minerals, any such claims at the instance of a vendor or his successors in title would have fallen to be assessed in terms of sections 61 and 35 before the Canal Company took possession of the ground.

“The defenders’ counsel submitted another and an alternative argument. *Esto* that the defenders would have to pay compensation if they interdicted the working of the minerals, founding on section 112, or if they in so many words called upon the mine-owner to stop working, still they had, in point of fact, done neither of these things. They had not thought it necessary to consider whether the proposed workings would or would not injure the navigation, and accordingly they could not be said to have ‘found it necessary to stop the working.’ It appears, however, from their secretary’s letter of 23rd December 1908 (quoted in Cond. 12) that they intimated that they would hold the pursuers liable in damages for any injury to the canal. The defenders accordingly stand upon their rights under the Act of 1817, and withhold their consent to any working which will injure the canal. If the defenders’ position was that they had no objection to the pursuers working so as to injure the canal, no one could say that the defenders were stopping the working of the minerals. But I can conceive no more effectual way of stopping the working than to call the mine-owner’s attention to section 112 and to threaten him with an action of damages.

“The defenders’ counsel founded upon a decision by Lord Kinneir in an unreported action at the instance of the *Clippens Oil Company, Limited v. Edinburgh and District Water Trustees*, dated 8th January 1887. It was explained to me that in that case the parties had proceeded upon the assumption that their rights were governed by the Water-works Clauses Act 1847, and accordingly the judgment is a decision upon the construction of that statute, which is, I think, substantially the same as regards minerals as the Railway Clauses (Scotland) Act 1845. According to that familiar code, if the undertaker after receiving notice refuses to make compensation, the mine-owner’s right and remedy is to go on with the working even if he destroy the pipe or the railway. Parliament no doubt assumed that a municipality or railway company would not allow its undertaking to be destroyed in order to avoid paying compensation. In the peculiar circumstances

of the *Clippens* case the remedy which I have described was really no remedy, because the Water Trustees told the Clippens Company that they were welcome to go on with their workings even although the result might be to drown the miners and to create a water famine in Edinburgh. Lord Kinneir’s judgment, as I understand it, came to no more than this, that he could find in the Water-works Clauses Act no provision compelling the Water Trustees to buy the minerals and make compensation. The question in the present case is an entirely different one, viz., whether the defenders have or have not stopped the mineral workings. I decide that question against the defenders, on the assumption of course that the pursuers can prove that it is impossible for them to work without injuring the canal.

“I accordingly repel the first plea-in-law for the defenders, and allow the parties a proof of their averments and to the pursuers a conjunct probation.”

On 14th February 1911 the Lord Ordinary pronounced this interlocutor—“*Assoilzie* the defenders from the first conclusion of the summons in so far as relating to the seams of shale or oil shale under the canal, and *quoad ultra* dismisses said conclusion: Dismisses the second and third conclusions of the summons, and *assoilzie* the defenders from the fourth conclusion thereof and decerns: Finds the defenders entitled to expenses against the pursuers,” &c.

Opinion.—“The question in this case is whether oil shale is to be reckoned a ‘mineral’ as between a canal company and the owners of the estate through which the canal passes. The latest authorities on this branch of the law are the *North British Railway Company v. The Budhill Coal and Sandstone Company*, [1910] App. Cas., p. 116, and *Great Western Railway Company v. Carpalla United China-Clay Company, Limited*, [1910] App. Cas., p. 83, in the House of Lords, and the *Caledonian Railway Company v. The Glenboig Union Fireclay Company, Limited*, [1910] S.C. 951, in the Court of Session, but now under appeal. These cases turned upon the construction of the Railway Clauses Consolidation Acts 1845, which refer to ‘coal, ironstone, slate, or other minerals.’ In the Canal Act of 1817 there is no mention of any special kinds of mineral, but only of ‘mines and minerals.’ In the opinions delivered in the *Budhill* case some importance was attached to the enumeration of particular minerals as limiting the general term, and of course the clauses of the Act of 1845 which have to be incorporated into a conveyance of land for the purpose of making a railway are different from the corresponding clauses of the Canal Act. Notwithstanding these differences, I am of opinion that no material distinction can be drawn between the two statutes, and that the three decisions cited are binding and conclusive as regards the general principles to be applied in construing the reservation of mines and minerals in the Canal Act.

“It does not seem to me doubtful that at the present day and in Scotland, according to the vernacular of the mining world, the commercial world, and of landowners (whom for shortness I shall refer to as business men), oil shale is a mineral of great value and importance. I merely mention in passing that it is obtained by underground mining, the working being either stoop-and-room or longwall, and that since 1872 ‘mines of shale’ have been subject to the same inspection and regulation as coal mines. I have, however, come to the conclusion that the rights of the parties must be determined in view of the state of matters which existed in 1818, when the Canal Company bought the ground and entered into possession. The work began in that year and the canal was opened for traffic in 1822. The sum of £3000, the agreed-on price of the ground, was consigned by the Canal Company in 1818 under authority of the Court for behoof of the heirs of entail in the lands and barony of Hopetoun, and £1597, the remainder of the compensation money, being damages as assessed by arbitration in 1826, was similarly consigned in 1830. In 1851 the Canal Company and its statutory successor the Edinburgh and Glasgow Railway Company sued Lord Hopetoun for declarator that he was bound to execute a conveyance of the lands bought by the Canal Company, and a final decree in favour of the pursuers was pronounced on 23rd February 1856. It was not until May and June 1862 that a disposition was granted by Lord Hopetoun, with consent of the Canal Company, in favour of the Railway Company. This disposition was in the statutory form permitted by section 60 of the Canal Act, and it was recorded in the Register of Sasines on 7th July 1862. Although such a disposition when recorded is declared to be equivalent to a disposition followed by charter and seisin, it did not in the actual circumstances operate as a transfer of property, but merely expressed in formal shape the transfer which had taken place many years before. Upon consignment of the last instalment of the price in 1830 the property of the ground passed once for all from the heirs of entail, and was from thenceforth vested in the Canal Company and its successors in virtue of the express provisions of section 69. This section is imperative, whereas section 60 is permissive unless one or other of the parties insists upon a conveyance being granted. That happened in the present case, and accordingly the proper evidence of the parliamentary title is the disposition. It seems to me, however, that an informal statutory title under section 69 and a formal statutory title under section 60 are one and the same thing except as to the mode of proof, and that each vests in the Canal Company neither more nor less than what it purchased. It would be unjust, and also contrary to the true intent and meaning of the Act that any portion of the heritable subjects which the company had bought and paid for under its statutory

powers should be excluded from its title. There is nothing either in the statute or in the disposition which compels me to adopt such an unreasonable construction. I accordingly decide that the seams of oil shale underlying the canal are the property of the defenders, as the successors of the Canal Company, and of the original Railway Company, unless the pursuers can show that oil shale was known to business men and regarded as a mineral in 1818. There is a dictum of the Lord Chancellor at the close of his opinion in the *Budhill* case which supports my view that the crucial date is that of the purchase; and there is a dictum of the Lord President in the *Glenboig* case apparently to the opposite effect, but I interpret the latter as meaning merely that the rights of the company depend upon a construction of their conveyance. What I have said as to the property of the oil shale under the canal, applies equally to the question whether the pursuers are now entitled to compensation in terms of section 113 of the Canal Act for the injury caused by the stoppage of the oil shale workings in the Hopetoun estate on each side of the canal.

“Shale, or as it is called in Scotland ‘blaes,’ is commonly found immediately above and below seams of coal and ironstone, and quantities of it have to be cut away in forming the underground passages. In long-wall workings it is useful for filling the wastes, but in other cases it must be taken to the surface and put into bings. Mineral leases often bind the tenant to pay rent for the ground so occupied, and to restore the surface at the end of his lease. Some blaes heaps will burn if set on fire, and the material after being burned becomes hard and can be utilised for metalling roads. This method of disposing of blaes heaps may be challenged as a nuisance—*Hislop v. Fleming*, (1882) 10 R. 426, *aff.* 13 R. (H.L.) 43. Inflammable or bituminous shale was well known in Scotland long before 1818, but there is no evidence that it was generally or commercially used for road-making before that date. Within the last thirty years it has been discovered that composition bricks can be made out of blaes, and in some cases a lordship is paid for the contents of what was formerly regarded as a refuse heap. The only kind of shale which is proved to have possessed any commercial value before 1818 is the alum ore or schistus, which came before the Courts in *The Hurlet and Campsie Alum Company v. Earl Glasgow*, (1850) 12 D. 704, *aff.* 7 Bell’s App. 100. This substance forms the roof of certain very ancient and extensive coal wastes near Glasgow. Through long exposure to the air it decomposes *in situ* and ultimately becomes suitable for the manufacture of alum. This shale as a subject of commercial value and manufacture was in 1818, and still is, exceptional. What is now called oil shale was formerly included within the more general description of bituminous shale. Its characteristic feature is the presence of volatile hydro-carbons, which by the process of destructive distillation

June 11, 1912.

yield crude oil, ammonia water, and gas. The latter is used in the works as fuel, but the two former are of great commercial value, and the crude oil is the basis of an important manufacturing industry. It is impossible to draw a hard and fast line between bituminous shale in general and oil shale in particular, either from a scientific or from a commercial standpoint. The practical test is distillation. Oil shale was first worked in Scotland between 1850 and 1860 by persons who wished either to rival Dr James Young or to evade his well-known patent for obtaining paraffin from bituminous coal. This patent was dated in 1850, and the material used was the Boghead or Torbanehill mineral, which a jury in 1853 found to be a coal and not a shale. The oil shale to which I have referred was found associated with coal in the coal districts of Scotland from Bathgate on the east to Ayrshire on the west. Distilleries were established in these districts both before and after 1860, but they are all now extinct. Oil shale is, however, still worked in the coal districts for the manufacture of illuminating gas. Chemically there is a considerable resemblance between gas coal and oil shale, and in some cases they are practically indistinguishable. As a rule, however, oil shale is easily distinguishable both in appearance and also chemically. Generally it is less valuable than gas coal, as it contains a larger proportion of ash on the one hand, and a smaller proportion both of fixed carbon or coke and also of volatile hydro-carbons. The Broxburn oil shale cannot be described as a coal except as a matter of scientific classification. The present mining and manufacturing oil shale industry of the Lothians is in a district which geologically is not part of the coal measures, and which does not extend west of Bathgate. Oil works were erected at Broxburn in 1860, and at West Calder in 1862. The earliest lease of 'oil, mineral, or shale' in the Lothians that has been produced was in August 1861, and refers to an estate immediately adjoining the part of Hopetoun now in question. There have also been produced two leases of 'bituminous shale' commencing at Martinmas 1861 in estates a few miles distant from the same locality. From 1866 the Broxburn seams of oil shale in the Hopetoun estates have been continuously worked and used for distillation.

"An elaborate proof was led, which was interesting both from a scientific and from a historical point of view, but it did not, in my opinion, go any length towards establishing the pursuers' case. It consisted to a large extent of references to the writings of mining surveyors and of scientific men published during the eighteenth and early years of the nineteenth century. For example, in a Natural History of the Mineral Kingdom, by John Williams, mineral surveyor, published at Edinburgh in 1789 (vol. 1, p. 82), the author mentions that certain kinds of blaes are called by Scotch colliers 'creeshy blaes'—that is, greasy blaes. On pages 83 and 235 of the same volume he refers to 'coal blaes' lying

in heaps at Pitfirran in Fifeshire which contained such a quantity of natural mineral oil or petroleum that it burned if set on fire, though it was not consumed. He states that this shale, after burning, turned red and hard and formed a good material for making roads. He also observed (pp. 263-4) that shale or schistus 'impregnated with the fossile oil' is a 'false symptom of coal,' and is found at a great distance from coal. Some of the allusions by Williams and the other early writers may refer to strata soaked in mineral oil, naturally distilled by the intrusion of igneous rocks among oil-bearing strata. Again, the Pitfirran blaes heaps probably consisted not of what we call oil-shale but of blaes containing a certain, though commercially unimportant, amount of carbonaceous matter. Still, after making all due allowances, there seems no reason to doubt that the mining man of the eighteenth century in Scotland and elsewhere had come upon oil-shale, and that they had supplied to the scientific writers of the period the information and the specimens which the latter utilised in their writings, their mineral collections, and their chemical analyses. Mr Jameson, Regius Professor of Natural History and Lecturer on Mineralogy in Edinburgh, in his 'System of Mineralogy,' of which a second edition was published at Edinburgh in 1816, describes (vol. i, p. 434) 'Bituminous Shale' in words which may apply to oil shale, and cites a number of foreign authors who mention it. He also prints an analysis by a German chemist of a fairly rich specimen which contained carbonated hydrogen gas, empyreumatic oil, thick pitchy oil, ammoniacal water, carbon, etc. Long before the publications referred to, viz., in 1681, a patent had been granted for the manufacture of pitch and tar from coal. In 1694 there was a patent for the extraction of 'pitch tar and oil out of a sort of stone of which there is sufficient plenty within our dominions of England and Wales.' At that date no one would have described coal as a 'stone,' but it may be that the inventor thought to make a fortune out of a material which was then and is still sent to the rubbish heap. In 1742 there was a patent for a medicinal oil to be extracted from a black pitchy flinty rock 'which is commonly found lying next and immediately over the coal in coal mines.' Such an oil is stated in an eighteenth century book of *Materia Medica* to have been actually distilled—in the laboratory no doubt, but still as a commercial product. The value of 'Virtue-wells' had been known from of old, and the artificial imitation of natural mineral oil was inevitable. There were patents in 1779 and 1781 for making tar pitch, oils, etc., from coal. There were also patents in 1837, 1845, and 1853 for the distillation of bituminous schistus. In England there is an oil shale called 'Kimmeridge Coal' from the village of that name in Dorsetshire, which has been used locally for centuries as a fuel. The same seam extends to Derbyshire and Yorkshire, where it has

been used to some extent as fuel. Oil shale was commercially distilled in France and also at Kimmeridge before 1850. At the London Exhibition of 1851 medals were awarded for the distillation of oil from shale and also from bitumen. The evidence as a whole shows that long before 1818 the potential value for industrial purposes of bituminous shale had become apparent to many practical men, and that the only obstacle to its use in manufacture was the want of a process that was commercially practicable. Destructive distillation in the laboratory had proved that bitumen, a well known and valuable mineral substance, was contained in many shales, and accordingly I agree with the pursuers' counsel that bituminous shale during the eighteenth and early years of the nineteenth centuries bore a certain resemblance to some of the auriferous rocks of South Africa and copper ores of Arizona which till recently were commercially worthless because their valuable contents could not be extracted otherwise than in the laboratory. Why oil shale was not used before 1818 for making illuminating gas is not explained, but probably in a comparatively new industry practical men preferred not to make further and unnecessary experiments. The pursuers have, in my judgment, failed to prove that oil shale was known and regarded by business men in Scotland as a mineral until many years after 1818. If necessary, I should go further, and hold that it is a legitimate inference from the proved facts that prior to 1818 bituminous shale, if and in so far as it was known to business men in Scotland, was regarded by them as a form of rubbish which increased the cost of production of coal and iron, and which no sane man would bring to the surface if he could avoid doing so. If the year 1862 is of any importance as regards the present question, my verdict would be that shale was regarded as a mineral at that date, even in the practically undeveloped district of the Lothians.

"Incidentally and in the course of the proof the defenders were allowed to lodge a horizontal and also a vertical section of the canal at the place in question. These sections, if correct, demonstrate that the canal has been cut through the seams of Broxburn oil shale, and that its puddle lining is bedded in and rests upon either the main seam or on one or other of the upper seams of the same shale. Assuming for the moment that oil shale has always been recognised in Scotland as a mineral, and that it would have been generally included within a reservation of minerals, it could not have been so reserved in the present case, because that interpretation of the reservation would deprive the Canal Company of the ownership of the land upon which their canal is built and would leave them with nothing more than a way-leave. Such a result would defeat the intention of the statute as expressed in sections 35, 60, 61, 66, and 69. I refer also to sections 112 and 113, which show that if oil shale is held to be a reserved mineral at

this place the Canal Company could never buy, and the heirs of entail could never sell, the site on which the canal was built. The present case is a *fortiori* of one under the Act of 1845, seeing that a railway company may expressly purchase minerals before the expiry of its compulsory powers. As at present advised, I see no answer to this argument, but the defenders have of set purpose precluded themselves from urging it. They thought to gain a tactical advantage by refusing to admit that the shale workings must be stopped for the safety of the canal. In their anxiety to grasp at a shadow they have dropped the substance. Their counsel did not move to be allowed to amend the record; and in the circumstances an amendment could not have been allowed except on stringent conditions, including permission to the pursuers to lead further evidence. As regards the defence, which I have described as shadowy, the proved facts are (1) that the oil shale under and near the canal cannot be further worked without destroying the canal, and (2) that the pursuers, being neither law-breakers nor lunatics, are not likely to work so as to injure the canal, even although the defenders have astutely refrained from calling upon them to 'stop the working.'

"My decision as to the ownership of the shale under the canal does not affect the pursuers' right to use a mine running under the canal which was constructed with the consent of the defenders as an access to the workings on the north of the canal.

"The result is, that the defenders are entitled to absolvitor from the first conclusion of the summons in so far as relating to the seams of shale or oil shale under the canal, and that *quoad ultra* this conclusion should be dismissed, as it raises questions which are not controversial. The second and third conclusions fall to be dismissed, and the defenders are entitled to be assolized from the fourth conclusion."

The pursuers reclaimed, and argued—
1. Shale was known and regarded as a mineral in 1862, the date when the conveyance was made. [Counsel for the defenders admitted that shale was known as a mineral in 1862.] The date to be looked to in determining whether shale was a mineral was not the date of the Act (1817), nor the date when possession was given (1818), but the date of the conveyance. Though there was no direct decision on the matter, their contention was supported by dicta in the following cases—*Earl of Hopetoun v. North British Railway Company*, May 17, 1893, 20 R. 704, Lord Rutherford Clark at 711, 30 S.L.R. 622; *Magistrates of Glasgow v. Farie*, August 10, 1888, 15 R. (H.L.) 94, Lord Halsbury, L. Ch., at p. 95, 26 S.L.R. 229; *North British Railway Company v. Budhill Coal and Sandstone Company*, 1909 S.C. 277, 46 S.L.R. 178, 1910 S.C. (H.L.) 1, Lord Loreburn, L. Ch., at p. 4, 47 S.L.R. 23; *Caledonian Railway Company v. Glenboig Union Fireclay Company, Limited*, 1910 S.C. 951, Lord President at 961-2, 47 S.L.R. 823, [1911] A.C. 290, Lord Loreburn, L. Ch., at 299,

1911 S.C. (H.L.) 72, 48 S.L.R. 526. It must be presumed that parties in the conveyance of 1862 used the language of 1862 to express what they agreed was the bargain in 1817. In *North British Railway Company v. Budhill Coal and Sandstone Company*, 1910 S.C. (H.L.) 1, at p. 6, 47 S.L.R. 23, the six meanings suggested of minerals in various cases were summarised by Lord Gorell. Reference was also made to *Midland Railway Company v. Robinson*, 1889, 15 App. Cas. 19; *in re Todd, Birlestone, & Company v. North Eastern Railway Company*, [1903] 1 K.B. 603; *Glasgow and South-Western Railway Company v. Bain*, Novem-15, 1893, 21 R. 134, 31 S.L.R. 98; *North British Railway Company v. Turners, Limited*, July 2, 1904, 6 F. 900, 41 S.L.R. 706; *Great Western Railway Company v. Blades*, [1901] 2 Ch. 624; *Great Western Railway Company v. Bennett*, 1867, L.R., 2 H.L. 27; *Caledonian Railway Company v. Symington*, 1912 S.C. (H.L.) 9, 49 S.L.R. 49. Even if 1817 or 1818 and not 1862 were the date to be taken, shale was then regarded as a mineral by the mining world, the commercial world, and landowners. It undoubtedly was so now and in 1862, and the onus was on the defenders to show that in 1817 and 1818 it was not so regarded—*Caledonian Railway Company v. Glenboig Union Fireclay Company, Limited* (*cit. sup.*), *per* Loreburn, L. Ch. Not only had the defenders failed to discharge this onus, but the pursuers had proved that, though not indeed worked commercially, it was yet regarded as a mineral and as potentially valuable. A shale mine would undoubtedly fall under the Income Tax Act 1842 (5 and 6 Vict. cap. 35), sec. 60, No. 3. 2. Assuming that shale was a mineral, the pursuers were entitled to compensation for the value of the shale which they had been stopped working. The rules of construction which should be applied here were those referred to by Bowen, L.J., and A. L. Smith, L.J., in *London and North-Western Railway Company v. Evans*, [1893] 1 Ch. 16 (where the power given was to make and maintain a canal), *viz.*, (1) there was a presumption that a statutory undertaking was entitled to support subjacent and adjacent; (2) this presumption was very strong if compensation was given therefor; (3) if no compensation for injury was given, then support will not be held to be given unless given elsewhere in the statute expressly or by clear implication. They submitted as a fourth canon (4) that where there were separate mineral clauses which dealt with compensation for minerals then the inference that compensation was given in full when the land was taken was overturned. Under this Act of 1817 the minerals could not, as under the Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33), be taken *ab initio*, and there was no obligation to pay compensation for minerals unless and until loss arose. Section 112 was to be contrasted with section 70 of the 1845 Act. The Act confined what was taken to land and not minerals. It was really only the surface of the land that was taken.

Sections 35, 60, 61, and 69 dealt with land, and did not apply to minerals or the damage done to them. Sections 112 and 113 dealt with the minerals, and provided for compensation when loss arose from the working being stopped. Section 113 gave a right of examination to the company, and if on examination it turned out that the safety distance had been infringed damages or expenses followed. If it was evident it would be infringed, then compensation was payable. The third part of the section was not a mere option given to the company. It imposed on them a duty to pay compensation if they had to stop the working. The safety distance must in fact be known or ascertainable, and the company, when it was brought to their notice that it was about to be infringed, were bound to inspect and to form an honest judgment on the matter. The intimation that they would hold the pursuers liable for any injury to the canal was stopping the work in the meaning of the section. The reason for having separate mineral clauses was the difficulty of adjusting compensation for an unknown quantity. Compensation was postponed until the parties could contract in knowledge. If it had not been for sections 112 and 113 the case of *Evans* (*cit. sup.*) would have been against them, but with these sections it was in their favour. Reference was also made to *Dudley Canal Navigation Company v. Grazebrook*, 1830, 1 B. & Ad. (K.B.) 59; *Great Western Railway Company v. Bennett* (*cit. sup.*); *Dixon v. Caledonian and Glasgow and South-Western Railway Companies*, 1880, 5 App. Cas. 820, 7 R. (H.L.) 116, 17 S.L.R. 816; *Edinburgh and District Water Trustees v. Clippens Oil Company, Limited*, February 3, 1898, 25 R. 504, 35 S.L.R. 425, and 1 F. 899, Lord Pres. Robertson at 908, 36 S.L.R. 72. 3. Oil shale was not the common rock of the district.

Argued for the defenders and respondents—1. Even assuming that oil shale was at the material period (whether that were 1817 or 1862) regarded as a mineral, the pursuers' claim for compensation was not well founded under the Act of 1817. Neither section 112 nor 113 (nor any other) took away from the company their right of support at common law. Where there was a conveyance of land for a specific purpose there was carried with it by implication a right of support so far as reasonable and necessary for the works to be erected, and this implication applied whether the conveyance was voluntary or in virtue of statutory powers, unless the statute itself clearly negated this right—*Caledonian Railway Company v. Sprot*, June 16, 1856, 2 Macq. 449; *Elliot v. North-Eastern Railway Company*, 1863, 10 Clark (H.L.), 333; *London and North-Western Railway Company v. Evans*, [1893] 1 Ch. 16; *Clippens Oil Company v. Edinburgh Water Trustees*, [1904] A.C. 64, 6 F. (H.L.) 7, 41 S.L.R. 124; *North British Railway Company v. Turners, Limited*, July 2, 1904, 6 F. 900, Lord Pearson at 906, Lord President (Dunedin) at 911, 41 S.L.R. 706; *Heat v. Gill*, 1872, L.R., 7 Ch. App. 699; *Midland Rail-*

way Company v. Checkley, 1867, L.R., 4 Eq. 19; *London and North-Western Railway Company v. Howley Park Coal and Cannel Company*, [1911] 2 Ch. 97; *Dudley Canal Navigation Company v. Grazebrook*, 1830, 1 B. and Ad. 59. [The LORD PRESIDENT referred to *in re Corporation of Dudley*, 1881, 8 Q.B.D. 86.] Here the statute, so far from negating this right, impliedly gave a right of support, both subjacent and adjacent, for section 112 provided that the mine-owner must not derogate from his grant by injuring the canal by his working the minerals, and even if that section applied only to subjacent support, at any rate it did not derogate from the common law right of adjacent support. Section 112 was a substantive section, and not a mere proviso or appanage to section 111. Section 113 was entirely in the interests of the Canal Company. It gave them a right to damages on showing that the canal had been wilfully damaged or endangered by the working of the mines, and it gave them an option to stop the working, if they found it necessary for the safety of the canal, on paying compensation. The judges of the zone of safety were to be the Canal Company, and not the mine-owners nor the Court. They were not in agreement with the pursuers as to what the zone of safety was in fact, but even if the limit had been reached and the result of further working would be to drain the canal, they were entitled to abstain from stopping the working, for an option could not be construed as an obligation—*Ruabon Brick and Terra-Cotta Company v. Great Western Railway Company*, [1893] 1 Ch. 427; *The Queen v. Great Western Railway*, 1893, 62 L.J., Q.B. 572; *Scottish North-Eastern Railway Company v. Stewart*, March 28, 1859, 3 Macq. 382; M'Swinney on Mines, p. 322. It must be presumed that the original compensation paid covered all grounds of claim, including the possibility that the Canal Company might not choose to stop the working—*Edinburgh and District Water Trustees v. Clippens Oil Company, Limited*, November 27, 1900, 3 F. 156, Lord Pearson at 163, 38 S.L.R. 121, aff. 6 F. (H.L.) 7, 41 S.L.R. 124; *Glamorganshire Canal Navigation Company v. Nixon's Navigation Company, Limited*, 1901, 85 L.T. (N.S.) 53; *Cromford Canal Company v. Cutts*, 1848, 5 Rail. Cas. 442; *The Queen v. Aire and Calder Navigation*, 1861, 30 L.J., Q.B. 337; *The King v. Leeds and Selby Railway Company*, 1835, 3 Ad. and E. 633; *Dunn v. Birmingham Canal Company*, 1872, L.R., 7 Q.B. 244, aff. 1872, L.R., 8 Q.B. 42; *Lancashire and Yorkshire Railway Company v. Knowles*, 1887, 20 Q.B.D. 391, 14 App. Cas. 248; *London and North-Western Railway Company v. Evans* (*cit. sup.*). In point of fact, the defenders had not stopped the pursuers working the mine, but the latter had stopped voluntarily. In any case, there was no conclusion for declarator that the pursuers had been stopped. 2. In determining whether shale was or was not a mineral, the test to be applied was, Was it a mineral "in the vernacular of the mining

and commercial world, and of landowners?"—*Heat v. Gill* (*cit. sup.*), (*per James, L.J.*); *Magistrates of Glasgow v. Farie* (*cit. sup.*), (*per Lord Halsbury, L.Ch.*); *North British Railway Company v. Budhill Coal and Sandstone Company* (*cit. sup.*) (*per Lord Loreburn, L.J.*). And the period to which the test was to be applied was "the time when the purchase was effected"—*North British Railway Company v. Budhill* (*cit. sup.*) (*per Lord Loreburn*). On the question of what was a mineral and when the test was to be applied, reference was also made to *Great Western Railway Company v. Carpalla United China Clay Company, Limited*, [1910] A.C. 83; *Gillespie v. Russell* (*Torbanehill case*), February 18, 1854, 17 D. 1; *Menzies v. Earl of Breadalbane*, July 17, 1822, 1 Sh. App. 225. The purchase was effected by the Act of 1817, or at latest in 1818 when possession was given. The statutory title was in itself good—*Kelvinside Estate Company v. Donaldson's Trustees*, June 5, 1879, 6 R. 995, 16 S.L.R. 597; *Aitken's Trustees v. Rawyards Colliery Company, Limited*, December 19, 1894, 22 R. 201, 32 S.L.R. 157; *Caledonian Canal Commissioners v. Smith*, July 27, 1900, 8 S.L.T. 124. The pursuers could not benefit by their delay to grant a conveyance—a delay which was in *Union Canal Company v. Earl of Hopetoun*, February 23, 1856, 13 D. 655, held to be unjustifiable. The proof showed that shale was not regarded as a mineral in 1817 or 1818. 3. Shale was the common rock of the land taken, and the exception could not swallow up the grant.

At advising—

LORD PRESIDENT—I do not think I need to give an account of the circumstances of this case, because they are set forth with great precision in the opinions of the Lord Ordinary which are under review.

The Railway Company, as proprietors of the canal, although under the Lord Ordinary's decision they have won their case, yet take advantage of the reclaiming note to raise the question which I think logically comes first. They asked us, as the case, they said, would go further, to pronounce a judgment upon the statute in question here, to the effect that the provisions of the statute were such that under a transference or sale effected in accordance with its provisions an absolute right of support was given, which would make it unnecessary to consider whether this particular substance is a mineral or not.

I think they are entitled to our opinion upon that matter. The case is, perhaps, on this branch not altogether easy, and for this reason, that the statute with which we have here to deal is one of the comparatively early instances of this class of legislation, indeed I may say a very early instance so far as Scotland is concerned, although in England, with a very much larger canal system, there are a larger number of instances, and it is possible to find decisions, as was done in the very able argument that we had presented to us by counsel, and to abstract

from these decisions dicta which raise formidable arguments upon the one side and upon the other. I do not think, although it was proper that these decisions should have been brought to our notice and that we should have had the advantage of being referred to them, it would be to any good purpose that I should examine those older cases, because after all is said and done, each case comes to be a decision upon its own statute and its own statute alone, and the phraseology of these statutes undoubtedly does vary, and some small expression in one which you do not find in another may give a turn to the interpretation. I therefore go straight to the statute with which we have here to deal. It is not out of place to remember that, although we are now dealing with the large corporation of the North British Railway Coy., that company is merely the successor of a very small company which got power to make a canal from the Lothian Road in Edinburgh to Falkirk. It was not a work of extraordinary magnitude, and it was not a work that could have gone on at all if a very extravagant price was to be paid for the facilities to the landowner. The Act is what I may call of doubtful expression, even upon the question of acquiring. The Legislature had not at its date settled down into the forms with which we are now so familiar after the long train of decisions under the Railway Clauses Acts and the Lands Clauses Act. It had not settled down to allowing people to take lands according to the provisions of these Acts, and the original expression here rather reminds one of the older effort of the Legislature in connection with the making of the Caledonian Canal and afterwards of the Crinan Canal, where the power given is not one first of all to take lands and then to construct works, but a power to make and maintain a canal. A power is also given to take various things in connection with the canal, that is to say, there are powers given to take water, and there are powers given to take materials, and there are various phrases about compensating for damage so done. But without the precision of expression which one afterwards finds I do not think one can read the Act without seeing that it was intended that the lands upon which the canal itself actually is set should be taken; in particular, you have in section 60 a provision for a statutory conveyance. Such a provision was at that date something entirely novel; it was, in fact, a sort of precursor of the system which did not come into general use for many many years afterwards—I mean the system which was first introduced by the legislation of 1847, under which the registration of a conveyance was given an effect equivalent to the seisin of the lands conveyed. Section 60 provides for this sort of conveyance, and says that its registration shall have the same effect as if a formal disposition had been executed and followed by charter and seisin; there is a general damages clause in section 61; and there

are provisions for vesting of the property, which I shall deal with hereafter.

I confess that if the statute had stopped there I do not think there would be any doubt. One would then have been within the law of *The Caledonian Railway Company v. Glenboig Fireclay and Brick Company*, namely, that as there is an intention to allow land to be taken for the purposes of a canal, and as the land is to be devoted to that purpose, it must be assumed that there was given with the land an obligation for support, without which the grant of the lands would be really useless. But the statute does not stop there, and we come to sections 112 and 113. There was a good deal of argument upon the way this section 112 came in. I do not think that in a statute of this date any weight can be put upon the fact that the phraseology introduces it as if it were a proviso. I think it is immaterial whether it is so conceived or not. The enactment is in these words—"Nothing herein contained shall extend to prejudice or affect the right of any owner or owners of any lands or grounds in, upon, or through which the said canal . . . shall be made, to the mines or minerals lying or being within or under the said lands or grounds, but all such mines or minerals are hereby reserved to such owner or owners of such lands or grounds respectively; and it shall and may be lawful to and for such owner or owners, subject to the conditions and restrictions herein contained, to work, get, drain, take, and carry away, to his, her, or their own use, such mines and minerals, not thereby injuring, prejudicing, or obstructing the said canal, or any of the works or conveniences belonging thereto." Now if that section had stood alone I confess I should not have been dislodged from my opinion, but it is to be observed that the reservation of minerals is "subject to the conditions herein contained," and I also observe this, that that section obviously treats mines and minerals as known things, that is to say, either known in the most extensive sense of the word, that is to say, worked at the present moment, or being ready for anybody to work. It does not treat the terms as scientific terms, leaving it to the future to find out whether particular substances were minerals or not. Coming next to section 113, this section allows the Canal Company at any time to enter into any mines—that must obviously mean mines that are open—and there to make such investigations as seem to them proper for finding out whether there is any damage likely to come to the canal, and if they find that danger has been created to the canal, and that that danger has been wilfully created, they are entitled to put things right at their own expense and charge the mining company the cost of so doing. The section concludes with these words—"And in case the said company shall find it necessary for the safety of the said navigation or any of the works thereto belonging to stop the working of any mines and minerals under or near the said canal, or any of the workings thereto

belonging, the said company shall, and they are hereby required to, make satisfaction for the value of such mines and minerals to the owners, occupiers, or other persons entitled to receive the same," and that is to be determined by arbitration. There is also a general clause of damage in section 120.

Now the general result of section 113, to my mind, is that it does mean to make the Canal Company pay for the mineral which cannot be obtained otherwise than by endangering the safety of the canal, and that the obligation of support, which, but for the words of the section is given, is taken away to this extent, that a payment must be made where it is necessary, in order to support the canal, to sacrifice the working of minerals. Accordingly upon that point I am against the contention of the Railway Company, or, in other words, I agree with the Lord Ordinary. I quite agree with the Lord Ordinary that you cannot put stress upon the words being stopped by reading them as only meaning physically stopped or stopped by interdict. I think the North British Railway Company effectually did stop the working of the minerals when they said they maintained all rights and held the mining company liable for all damage that might ensue for any destruction of the canal by the water being drawn off. In other words, I think the words I have already used are really substantially accurate, that when minerals have to be sacrificed as a commercial subject, then the payment comes in.

That makes it necessary to decide whether the particular material which is being worked here is a mine or mineral. When we come to this question it seems to me now we come directly into the track of authority which has recently been worked out by the House of Lords in cases under the Railways Clauses and Land Clauses Acts, and here, I think, one is bound to take the criterion laid down by Lord Halsbury in *Magistrates of Glasgow v. Fawcett*, and accepted by the Lord Chancellor in the *Budhill* case, and to determine what was the meaning of these words in the vernacular of the mining world, the commercial world, and landowners "at the time when the purchase was effected." The Lord Ordinary has said that there is an expression of mine which seemed to go against that in the *Caledonian Railway Company v. Glenboig*, in which I say that the question whether a particular substance was a mineral or not must be considered in the light of whether at the date of the conveyance that substance was so described as a mineral. There was no question in that case as between the date of the acquisition and that of the formal conveyance, and if it were necessary to do so I should explain that I was using the words "at the date of the conveyance" in an absolutely general sense, and not trying to draw a distinction between the question of a written conveyance and the time the transfer takes place. I think that the matter must obviously be

judged of at the time when the lands passed, because when the lands passed, then was the time when something was given and something was reserved. If it had been matter of ordinary bargain, the terms of the bargain would have had to express what was given and what was reserved; as it is, the statute expresses the reservation, and says minerals must be reserved. You must take the application of that at the time when the bargain was made. This matter, I think, is quite settled by the 69th section, which provides that when the money is ascertained and consigned then the heritages are to be vested in and to become for ever the sole property of the said company, their successors and assigns. That happened in 1817 in this case, and the mere fact that the actual written conveyance was not executed for many years thereafter is neither here nor there. Taking it in 1817, then I come to the same conclusion as the Lord Ordinary. I do not think that in the view of the mining world, the commercial world, and landowners at that date shale, as it is now known, was a mineral. I look upon the matter in exactly the same way as the Lord Ordinary, that if the shale was removed at all at that time it was removed in order to open up a way to more valuable material. It is true that chemists and geologists of the period knew that there were certain properties in this stuff, but it was not as matter of fact commercially worked, and I do not think, if you come to it, that there is any better proof of that than the ordinary use of language. If you talk nowadays, ever since the oil industry has been extant, about shale, you mean oil-shale, oil-bearing shale. Nobody at that time would have talked about shale in that sense, and "blaes," which was what they called it, was not at all a synonym, although this oil-bearing shale was included in what was then called blaes. Nowadays, if you talk to a miner about "blaes," he would understand any blaes, and not necessarily the blaes only which is composed of oil-bearing shale. In other words, I think the use of the word "shale" as equivalent to oil-bearing shale in ordinary parlance really is the best proof that shale has assumed its place among the commercial minerals. In those days nobody knew it could be worked to produce oil, and it was only when the Torbanehill mineral was worked that it assumed the practical character it now has. On that matter I need not say more, because I entirely agree with the result at which his Lordship has arrived.

There is one further question in the case which I have not found it necessary to determine, but on which, if I had to give a judgment, it would also be in favour of the Railway Company. It has been settled, as I expressed it in the *Glenboig* case, that "inasmuch as the words to be interpreted are those which define the exception to a grant, they must not, whatever their meaning in such a 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." I think practically this case comes within that observation, not that I can say that the whole subsoil of the district is shale, but rather on the ground that this canal is really located in a seam of shale, and to hold that by their conveyance the Canal Company got nothing would, I think, be driving the whole matter too far, and therefore I think on this ground also it is necessary that the Railway Company should be entitled to succeed.

I say also that I think if it had been the case that the value of shale was recognised as it now is, no canal would ever have been made, because I do not think the small company could have afforded to pay the price that they would have required to pay. I think that probably throws a light on what people thought at that time when they were talking about minerals. Accordingly my view is that the judgment of the Lord Ordinary should be affirmed and the reclaiming note refused.

LORD JOHNSTON — We have in this case to determine the rights and responsibilities of the Marquis of Linlithgow as proprietor and of the North British Railway Company as owners of the Union Canal, in relation to the seams of oil shale which underly the canal as it passes through the Marquis's property and to the working of these seams. The case involves the now familiar question of the rights in minerals where land is compulsorily taken. But the canal was made under Acts of 1817 and 1819, which long preceded the Lands Clauses Acts of 1845 and the relative legislation, and the terms of its special Acts are peculiar and differ from those of the general Acts under which most of the cases on this subject have arisen. Moreover, it is the fact that the commercial importance of oil shale was wholly unknown at the time the Canal Acts were passed and the canal made, and in fact only came to be known about the year 1860, and as no case of the kind has yet arisen regarding oil shale the present case becomes of great importance, not merely to the parties, but to those engaged in the paraffin industry of Scotland generally.

It is first necessary from my point of view to ascertain from the proof certain facts of a general nature. As these depend on scientific evidence and there is difference of opinion in detail, it is not easy to be quite sure of one's ground. But I think that the following is satisfactorily substantiated.

Much of the evidence was directed to clear up the relation between coal and shale, the pursuers seeking to bring shale under the general head of coal, and the defenders disputing this proposition. I have no hesitation on the evidence in concluding that though shale comes in a sense under the same category as coal, and though coal shades off into shale in such a way that it is difficult if not impossible to draw a boundary line between coal and

shale, shale is not coal as that term is ordinarily understood both scientifically and practically. It is true that some coals might as well be classed as shales and some shales as coals, and that there is as much difference between some descriptions of coal and other descriptions of coal as between the former and some descriptions of shale. But notwithstanding, it is impossible to arrive at the conclusion that the same generic term covers them all.

Both coal and shale are deposits which have been subjected to pressure. But it is generally accepted that coal is a deposit of organic matter of vegetable growth, deposited *in situ*, where it has grown, just as a peat moss is, and subsequently overlaid by other strata and compressed thereby, and that shale is a sedimentary deposit transported in suspension by water, and settling as matters in suspension do, the substance in suspension being of the nature of the mud that forms clay beds, but sometimes carrying with it, also in suspension, organic matter probably derived from aquatic vegetation, and, in the same way as coal, being subsequently overlaid by other strata and subjected to compression. Coal may therefore be said to have mainly an organic or carboniferous origin and shale an argillaceous, though in the former there may be a mixture of the inorganic element in varying degree, and though in the latter there may be a mixture of the organic or carboniferous in equally varying degree.

The word "coal" signifies something which when kindled will glow as it is consumed, and its root idea is something which can be used for fuel. "The fire of coals on the hearth" of the Authorised Version was doubtless a fire of wood. The word "shale" signifies something which is laminated or scaly, akin to the word slate, and its root idea is not derived from its use or its properties, but from its formation. The word "shale" is therefore *per se*, in mining parlance, a word of much more indefinite application than the word "coal."

What is commonly regarded as coal varies on the one side from the best anthracite, which is almost entirely fixed carbon with little or no ash or inorganic matter, through household, which contains little, and manufacturing, which contains more, to stuff containing so much ash or dirt as to be of little or no value, and on the other side from the commonest gas coal to the Torbaneites, at which stage one is reaching substances which are so much on the borderland that it is difficult to determine whether to account them coals or shales.

But shale varies in an equal degree. It has been fairly described as indurated clay. It is most frequently found in connection with coal on the pavement or roof of the coal seams. But it is also found apart from the coal measures altogether. It is a miner's term for what is to all appearance a laminated rock met with in coal mining, and some of which, when it overlies the coal to a considerable extent, comes

away with the coal and has to be dealt with. But the term is more extensively used by miners in England. In Scotland the substance is more generally termed "blaes," from its prevalent colour. When Scottish miners talk of "blaes" they refer to a scaly material of a clayey composition, as when they talk of "faikes" they refer to a similar material of a more sandy composition, both being to them useless and a hindrance in coal mining. When they talk of shale as distinguished from "blaes," it is either the same substance of markedly formed or concentrated character, or more commonly it is a shale of a special and peculiar character which is oil-producing and is being worked for its own sake. This shale has acquired the name of oil shale.

All shale, then, is not oil-bearing or oil shale. It may be that many shales contain the substance productive of oil, though except in the distinctly oil shales in a degree approaching the infinitesimal. It is only some shales that contain this substance to a profitable degree. These are the oil shales. It has been ascertained that in these shales there is embedded a quantity of microscopic corpuscles of a yellowish colour, and that the richness of the shale in oil depends upon the proportion of these corpuscles present. They are, as I have said, supposed to be of aquatic vegetable origin and to have floated down in suspension with the mud, and so to have become embedded in the mud which on settling formed the clay afterwards indurated. That is only a scientific deduction. What is certain is that the richness of the shale in oil corresponds with the proportion of these corpuscles present. Coal is a fuel, though from at any rate some coal oil can be distilled as well as gas produced. Shale is not a fuel, though some shales can be kindled and made to burn, but without consuming. It is the oil which is a product of oil shale that can be used either as a fuel or as an illuminant. This oil does not permeate the shale and cannot be expressed. It can only be obtained by destructive distillation.

If, then, shale be found to be scientifically a mineral, it is quite clear that it is only some seams of shale which are commercially a mineral.

But much difficulty in determining the true position of oil-shale is introduced by the fact that, chemically, some substances classed as coal vary so little in their composition from oil shale that it is difficult to account for their being classed as coal, without admitting the oil shales along with them into that category. These are the various forms of what is known as gas coal, and the still more doubtful substances known as Boghead coal, Torbanehill mineral, and its congeners the Torbaneites. All these may be used indiscriminately for the production of gas or oil, and equally oil shale may be used, and sometimes is used, for the production of gas instead of oil. At the same time, for some recondite reason the so-called gas coals are more profitably and economically used for production of gas, and oil shale

for the production of oil, and thence their industrial and commercial application.

To illustrate the difficulty of the problem, where does coal end and oil shale begin, the case of *Gillespie v. Russel* (17 D. 1) may be referred to. The question was there raised whether the Torbanehill mineral was included in a lease of the coal in the estate of Torbanehill. The case, as it involved directly a question of damages, was sent to a jury, who returned as the result of their verdict an affirmative answer to the above question. While the verdict could not be set aside as against evidence, it is, I think, open to doubt on the evidence whether the Torbanehill mineral was included in the term coal within the meaning and intention of the parties to the lease, or even whether it was a coal in any proper sense, and whether a court would so have found. And it is remarkable that the substance never has been called coal, but always Torbanehill mineral, as if it was something unique. The closer bearing of the case on the present arises from this, that Torbanehill mineral is the substance which was first used for the distillation of oil. Dr Young in the fifties of last century had discovered the possibility of commercially producing oil from substances of the gas coal nature, and in the application of his patent he selected Torbanehill mineral as the best medium. This was the start of the paraffin oil industry as a commercial undertaking. In the next decade, however, it was found by Bell that the same oil could be distilled in the same way from shale, and that by the use of shale he could circumnavigate Young's patent. Hence, while the paraffin industry in general dates from about 1850, the paraffin industry using shale as its raw material, or the shale-oil industry, dates from about 1860.

It is thus from the close analogy of the oil-bearing shales to the gas coals, headed by the Boghead coal and the Torbanehill mineral and the Torbaneites, that there is difficulty in determining that, though these have been classed among coals, oil-bearing shales are to be excluded from that category. The identity of their chemical composition (for it must be borne in mind that Dr Tatlock's tables refer to gas coals and not to household coals) gives strong indications that the higher grade gas coals have had the same origin as shale rather than as coal proper. And the fact that in the Torbanehill mineral there are found present an excess over any shale yet found of the yellow corpuscles already referred to, confirms the impression that there is no real generic distinction between, at any rate, the higher grade gas coals and oil shale.

I have gone into this matter at some length because I regard the point as very narrow. My own conclusion is that if oil shale is a mineral, it is so because it is a mineral *per se*, and not because it is a coal and coal a mineral; but that the fact that other substances have been classed as coals and therefore minerals, which are very doubtfully coals, and equally possibly

shales, while it does not compel to the classification of oil shales as coal, does have a material bearing upon the point still to be considered, viz., whether oil shale is a mineral within the conception of the Union Canal statutes.

That question depends, in the first place, upon whether oil shale is to be regarded, in the sense of the railway and other statutes, as a mineral in the present day. If it is not, it must be so by reason that the shale formation is merely a common rock of the district, and that oil shale is just an indistinguishable part of the general shale formation. It is indeed difficult, if not impossible, to draw from the opinions of the learned Judges who have been engaged in the decision of cases on this subject any accepted definition of "mineral" in the sense of the statutes, but I think it may be taken as generally agreed that all which is scientifically a mineral is not necessarily a mineral in the sense of the statutes, and that those substances only which are neither part of the soil or subsoil nor the common rock of the district are so. Yet when it comes to discriminate and deal with any particular substance agreement ceases. Thus common clay, lying in beds under the surface soil has been excluded, though fireclay lying in seams among the strata below, has been included among statutory minerals. Sandstone, again, though, like the clays, inorganic, even where found among strata below the subsoil, has been excluded. It is difficult to say exactly why. But I think the reason may be thus expressed—because it is part of the ordinary support of the surface, and only available for man's use in its natural condition and not as a raw material, from which by production, education, elimination, or transformation, other substances can be derived. Shale, where not of oil-producing quality, but merely indurated clay, may possibly be classed with sandstone as ordinary rock of the district, part of the support of the surface. But where a band or bed of shale is oil producing, it ceases to be common rock. It is as distinct from common blaes or shale as china clay is from common clay. It must be kept in mind that while ordinary shale is, like sandstone, commonly found over large areas of the country, and particularly in those both in England and Scotland which are carboniferous, oil shale is only found in a few places, chiefly, though not entirely, in Scotland, and that where found the superficial extent of the strata is very limited, even in Linlithgowshire, the district in question, which is by far the most important. I cannot conceive any reason for classing it as common rock of the district, or for now excluding it from the term "mineral" in the sense of the statutes, or, in that connection, distinguishing between it and the many descriptions of natural deposits, also of very limited area, which, practically identical with it in chemical composition, and not impossible in origin, have been classed as coals, and therefore accepted as statutory minerals. It must, I think, be at all hands

admitted that if common shale is one of the ordinary rocks of the country underlying the subsoil, there is something exceptional in this class of shale, the oil shale, both in the point of higher value and of rarity, to apply the expression used by Lord Loreburn, Lord Chancellor, in the *Budhill* case, [1910] A.C., at p. 126. And this I consider to be a feature in the present case of essential importance. To discuss the question further would, I think, be a waste of your Lordships' time.

But it has to be admitted that though oil shale may be a mineral in the sense of the statute in question, it was not so regarded in 1817, when the first Union Canal statute was passed, and it is maintained that that only is in each case a statutory mineral which was so regarded at the time the statute was passed, or at least at the time the parties came to transact by virtue of the statute. But to say that in 1817 oil shale was not regarded as a mineral means simply that it was not regarded at all. Its uses were not known; and it therefore received no consideration practically or commercially in relation to mining. It was neither considered as a mineral, nor was it considered as not a mineral; it had received no practical or commercial consideration at all. But, for all that, it was in 1817 known to geological and mining engineers—then, no doubt, very few in number—that certain substances of a rocky nature, chiefly found in connection with coal, but also separate, sometimes unnamed and sometimes called shale or schistus, which is the foreign equivalent, were, as they said, impregnated with oil. Their attention had been drawn to this fact because in some cases oil was found oozing from the rock, and in others because the substances had a greasy appearance and could be kindled, though they would not consume. From the descriptions the oil could be nothing but petroleum, and the rock oil shale. The explanation of the oil being sometimes found to ooze from the rock must be that intrusive igneous rock had caused naturally to a small extent the destructive distillation which, for commercial purposes in Scotland, is now effected artificially, for oil shale is not impregnated with oil, though it will produce it.

I do not think that it is possible to read the excerpts from the various works adduced by the pursuer without being satisfied that, though scientific mining, mineralogy, and geology had not made great advances by the end of the eighteenth century, it was known to those who were engaged in the study of mining, and from a practical and not merely a scientific point of view, that the substance now commonly called shale was occasionally oil bearing. At the same time it is equally clear that prior to the making of the Union Canal these persons were not aware that the fact could be turned to a commercial use, and had not even directed their attention to that question, though certain experiments made with different classes of coal certainly showed that things were tending in that direction.

I think, therefore, that the question starts at 1817 in this position, that the qualities of oil shale were, though its potentialities were not, known to scientific inquirers in relation to mining, and that they, if asked, would have classed the substance as a mineral; but that neither its qualities nor its potentialities were known to, or considered by, the ordinary miner, or by commercial men, or by landowners. This, however, is not, to my mind, conclusive.

I think it is necessary at this stage to look with some care at the particular statute in question, for what it means by a reference to "minerals" depends not so much upon *a priori* considerations as upon its purview and scope. I have, therefore, given to the statute a careful perusal as a whole, and not merely to excerpted clauses. I know that it is impossible, where the land itself is conveyed, to describe in strict conveyancing language the right of the donee as a combined right of aqueduct and of way. But the Canal Statute of 1817 does not go very strictly to work from the conveyancing point of view, and rather makes the theoretical and technical bend to the practical, as, for instance, in the provision in section 60 of a statutory form of conveyance, which, on registration, was to be equivalent to a disposition followed by charter and seisin—an impossibility according to the conveyancing law of the time, strictly applied. And so I think, notwithstanding the wider terms used, that the statute really contemplates rather the grant of a combined right of aqueduct and of way, than of property in the full sense in the land.

Having been passed at a date long prior to the reduction of the law of compulsory purchase to a code, the Act of 1817 does not follow quite the same logical sequence as do the general statutes of 1845-1847. After constituting the subscribers a company, the Act (section 33) proceeds to authorise them to make a canal, to be called the Edinburgh and Glasgow Union Canal, within certain enumerated parishes, and to supply it with water from certain streams. At first sight this would appear to be a roving commission to make the canal according to the company's discretion, but subsequent sections (sections 50 and 51) contain limitations upon the power, restricting the breadth of land to be taken and used for the canal and towing paths to 30 yards in breadth, and on the line set out on a deposited plan, with relative book of reference, though (section 53) with a limited power of deviation. The important feature, however, of section 33 is that the authorisation is limited to the making and maintaining a canal of 5 feet depth of water, except (section 114) at one particular spot. This limitation favours the view that in the mind of the Legislature it was in reality a right of aqueduct with a right of way for the towing path which was being conferred on the company. It is further noticeable that the powers conferred by section 33 are not preceded or accompanied by any express power to take. The power to take land

is entirely inferential, and continues so through the whole course of the statute.

Passing to section 35, the Act authorises the company to enter upon lands in order to set out and ascertain such parts as they may consider necessary for making the intended canal. Though it is not expressly said so, this power must be read as controlled by the Parliamentary plan and book of reference of sections 50 and 51 already referred to. But then the section goes on to empower the company to dig, cut, trench, get, remove, take, and carry away earth, clay, stone, soil, beds of gravel or sand, or other matter or things "which may be dug or got in making the said intended canal." This is a somewhat remarkable special power and quite unnecessary to be conferred if the property in the land is really given and taken in the ordinary sense, and again, as it seems to me, this confirms the impression that, notwithstanding the implied compulsory power to take land, the contemplation of the Legislature was merely to confer a surface right.

There follows, however, an important clause (section 59) enacting that the vendors and all persons interested in the lands to be sold to the company "shall be entitled to the same rights and privileges from the remaining parts of these lands as if such sale or sales to the said company had never been made." This effectually disposes of any claim on behalf of the company, at any rate for lateral support—*cf. Bennett v. Great Western Railway Company, L.R., 2 (H.L.) 27*. But further, it expressly leaves the proprietor free to exercise his proprietary right, so far as at any rate as adjacent minerals are concerned.

The compulsory power to take is, as I have said, entirely inferential. Section 60 empowers all persons whatsoever, even though under disability, interested in the lands, etc., which should be set out and ascertained as above mentioned, for the purposes of the canal, to contract for, sell, and convey the same to the company; and section 61 provides that all such persons may and shall accept and receive satisfaction for the value of such lands, &c., and for the value of all stone and other minerals (there being a prior power to take such for construction purposes from adjoining lands), which shall be taken by the company for the purposes of the Act, "excepting such as are found in digging the canal," and for damages to be sustained by making and completing the works, as such satisfaction and damages should be agreed upon or ascertained by a jury, it being (section 62) a special direction that the value of lands, and the damages sustained in consequence of the execution of the powers of the Act, should be separately and distinctly ascertained. In the "excepting such as are found in digging the canal" there is the return of the idea of aqueduct merely.

That the Legislature had in view nothing but a surface right is again made clear by section 69, which provides for a right of entry and possession on payment or tender of the purchase money. In the first place,

it speaks of the sum or sums agreed on or ascertained for the purchase of such lands, &c., as a "recompense for the yearly produce or profit thereof;" and in the second place, it vests the estate and interest of the vendor in the company "to and for the use of the said canal and other works, but to or for no other use or purpose whatever." That the compensation was expressly to be for the yearly produce or profit of the land is, I think, most material; and entirely consistently with this, as spoken to by Mr Watson, the solicitor for the company, in his evidence, the satisfaction actually paid for the lands at the time they were taken was by agreement thirty years' purchase of an accepted agricultural or surface rental.

At a subsequent point in the Act there are special clauses dealing with minerals. Sections 112 and 113 enact, reading them shortly, that nothing contained in the Act should prejudice the right of the owner of any lands or grounds "in, upon, or through which" the canal should be made "to the mines and minerals lying or being within or under the said lands or grounds," that is, to the subjacent as well as to the adjacent mines and minerals, but reserving such mines and minerals to the owner, with power to work such mines and minerals subject to the conditions and restrictions contained in the Act, "not thereby injuring, prejudicing, or obstructing any of the works or conveniences belonging thereto." I pause here to note that adjacent and subjacent minerals are placed in the same category and treated alike, and it is difficult to assume that the statute contemplated a restriction, by reason of the acquisition of the land, regarding the working of an after-discovered mineral subjacent, which was not imposed regarding its working adjacent to the land taken. The restrictions referred to are to the effect that, should it appear from time to time on examination that the workings under or in the neighbourhood of the canal either in a mine open at the date of the Act, or in one opened afterwards, are such as to endanger or damage the same, and that such endangering and damaging has been wilful, a statutory liability shall attach to the mineowner; but that otherwise, should the company find it necessary for the safety of their navigation to stop the working of any mines and minerals under or near the canal, they may do so on making satisfaction for the value of such mines and minerals to the owners. Are, then, the defenders entitled under their powers to stop the working of oil shale in ground adjacent to the line of their canal, if it be assumed not to be a statutory mineral by reason that it was not regarded as a mineral at the date of the Act? Or if they are, must they pay compensation for doing so when it is adjacent but not when it is subjacent? These considerations appear to me to present some initial difficulties in the way of the defenders' contention when it is applied to this particular statute.

In the interpretation of its provisions the case of the *Dudley Canal Navigation Co.*

(1 B. & Ad. 59) appears to me directly in point, and I refer to the opinion of Bayley, J. The scheme of the Act unquestionably is to give the company a surface right sufficient for its purpose of aqueduct and of towing-path, and to confer upon it no power to acquire, and to impose upon it no obligation to pay for, any right either of subjacent or adjacent mineral support, but to give the company right, as and when mineral workings approach the line of its canal, to acquire such support whenever it should find it necessary to do so, leaving the owner free to work, unless the company elect to stop his workings and to compensate him, provided that in working he does no unnecessary damage to the navigation, or no extraordinary damage by working the mines out of the usual mode; for the latter is all which I think is meant, either by "not thereby injuring, prejudicing, or obstructing the said canal," or "wilfully endangering or damaging the same" (*Dudley Canal Navigation Co.*, *supra*).

The distinctive position in which this company is put in regard to minerals as compared with companies whose powers are derived from the legislation of 1845-47, or from Acts drawn on the same lines is, I think, this—They are not entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except such as may be got in the construction of their works, unless the same shall have been expressly purchased; but they may acquire them with their land if they elect to do so; and all such mines shall be deemed to be excepted out of the conveyance of such lands unless they have been expressly named therein and conveyed thereby (*e.g.*, Railways Clauses Act 1845, section 70). But on the other hand, if the minerals are not so acquired, the *onus* is put on the mine-owner, when his workings come within the prescribed distance of the line of the promoters' undertaking, to give notice to the promoters, when, if they think necessary, they may stop the workings on paying compensation; whereas this Canal Company has no power to acquire any particular minerals or minerals generally, and is not entitled to notice. On the contrary, nothing contained in the Act is to prejudice the right of the owner of land "in, upon, or through which" the canal shall be made, to the mines and minerals within or under the said land. This again, as it seems to me, emphasises, as in comparison with the general case, the surface nature of the right acquired by the promoters, and at least places the reserved right of the landowner to his minerals at its very highest as one to minerals in general in the widest sense in which that word can be used relatively to the subject-matter of the statute.

Such being the scope of the Act, I should, if I were left to myself, have concluded that when it provided (section 112) that nothing in it contained should prejudice or affect the right of the landowner from whom a surface right of aqueduct and of way was acquired to the mines and minerals in the lands in, upon, or through which

the canal was to be made, and reserved these mines and minerals to him in the terms which I have endeavoured to analyse, the statute intended to reserve to the landowner the mineral wealth in his lands in the most liberal and comprehensive sense, whether known to be present or yet to be found, whether exploited or not yet exploited, recognised or not yet recognised, and whether the potentialities were known or yet to be discovered.

But I cannot proceed upon such conclusion if it be contrary to authority. Now while it is admittedly impossible to give or to find in the multitude of decided cases a comprehensive definition of the statutory term "mineral" which has met with general acceptance, and while Judges of the greatest eminence have differed in their views, it is contended that the last word on the subject is contained in the cases of *Hext v. Gill*, L.R., 7 Ch. App. 699; *Magistrates of Glasgow v. Farie*, L.R., 13 A.C. 657; and the *Budhill Company's case*, L.R., [1910] A.C. 116. If by the last word it is meant that these are the latest authoritative decisions on the subject, I assent. But if by "last" is meant "final," I hardly think that the noble and learned Lords who took part in these decisions were themselves so sanguine. I think that every decision has to be read in relation to its own circumstances and to the Act on which it proceeds, and every definition attempted as a guide in the same or similar circumstances and under similar Acts only, and not as an inflexible rule to be applied irrespective of circumstances and of the Act in question. The present case presents a new set of circumstances under which the question has never yet, I think, come up for judgment or even for consideration. These circumstances were not in contemplation of the Lords who pronounced in favour of the new criterion, and if I venture to examine its applicability to these new circumstances I trust I may be assumed to do so with entire and respectful acceptance of the judgments in which it was announced. I need hardly repeat that the peculiar and novel circumstances of this case are that we have here an undoubted mineral, the properties of which were unknown and even unsuspected at the date the Act was passed and the land taken, but which was none the less in the land and is now known to be of considerable value.

The criterion assumed to have been adopted in these cases, or rather suggested by the first two of them and adopted in the last, is thus stated by the defenders, viz., that what is meant by "mines and minerals," where lands are taken compulsorily, is a question of fact, what these words meant in the vernacular of the mining world, the commercial world, and landowners at the time when the lands were so taken. The question which I venture to consider is, Was the rule so stated really adopted, and was it intended to be a universal and absolute rule to displace all other considerations?

I take first *Hext v. Gill* (*cit. sup.*), and it

is important to notice that this the first case in which the criterion is suggested was not a case of compulsory taking, but of voluntary acquisition of the freehold of a copyhold tenement, reserving all mines and minerals. The substance was china clay, which at the time of the conveyance, 1799, was not known to exist in the tenement or in the district. But the case was complicated by the fact that the china clay could not be got by underground mining, but only by a system of open-cast working destructive of the surface. Mellish, L.J., held that on the authorities the right to everything under the surface and to all profit to be got from extracting anything from under it was intended to be reserved, but the transaction in question being a voluntary one, subject accordingly to an implied obligation of support, which in the circumstances rendered the reservation nugatory. James, L.J., agreed, holding that the authorities established a very convenient and consistent system, giving the mineral owner every reasonable profit out of the mineral treasures, and at the same time giving the landowner that protection without which the grant to him would be illusory. But he added *obiter*—"But for these authorities I should have thought that what was meant by 'mines and minerals' in such a grant was a question of fact, what these words meant in the vernacular of the mining world and commercial world and landowners at the end of the last century, upon which I am satisfied that no one at that time would have thought of classing clay of any kind as a mineral." As I have said, these words were spoken with reference to such a grant—that is, a conveyance proceeding on a voluntary contract of sale and purchase.

Had there not been at different times a decided difference of opinion as to whether the same considerations applied in interpreting a grant of minerals in a voluntary and in a compulsory sale, I should hesitate to advance the contention that they do not do so, at least where the compelling statute is drawn in such terms as that with which we have to deal. Where parties are transacting voluntarily they may not know whether any minerals exist in the ground which is the subject of sale, and they cannot know their value. But they may fairly be regarded as insisting on and admitting respectively the reservation of the then known and recognised minerals exactly as if they were enumerated, and basing the price agreed to be taken upon the chance of their existing in the subject and on a speculative estimate of their value; and the price agreed to be given may reasonably be supposed to be based on the complete property *quoad ultra* passing with all its chances. But where the sale is compulsory and under reservation by statute, couched at any rate as that in question, it is not a grant under reservation of minerals either particular or general, but it is a grant of the subject "according to the true intent and meaning of" an Act entitled, &c. I quote both from the Act, section 60, and from the

actual conveyance. The grantee is sent to the Act and every clause of the Act for the extent and qualifications of the right acquired. The Act makes it clear that the Legislature intended no limited reservation of minerals, but a reservation *per aversionem*, and there is no pretext for saying that when parties come to transact under the Act and to fix the compensation for the rights compulsorily acquired they either did or were entitled to base that compensation on a limited reservation of certain known minerals only, and on the chance merely of their existing and of their value. Such would, I venture to think, be contrary to the scope and purview of such a statute; and that James, L.J., in suggesting such criterion was regarding it solely in its applicability to a voluntary sale his language makes perfectly clear.

In *Farie's case* (*supra*) the purchase was apparently by agreement, but under compulsory powers, and therefore truly compulsory. But the grant was not such as we have here, but contained an express reservation of "the whole coal and other minerals in said lands in terms of the clauses relating to mines in the Water-works Clauses Act 1847." The question in that case was whether a bed of ordinary clay, though of unusual thickness, fell under the reservation. It was under the soil certainly, but formed the subsoil, and could not be worked except open-cast, and to the destruction of the surface. In that case Lord Halsbury, L.C., while expressly guarding himself at the outset as wishing to decide nothing but what was necessarily involved in the particular case before the House, and finding simple grounds for rejecting the attempted extension of the reservation to common clay—at the same time expressed regret that the test which James, L.J., suggested, and which his Lordship thought would have been the true one and would have satisfied all difficulties, was not adhered to in *Hext v. Gill* (*supra*). Lords Watson, Herschell, and Macnaghten, on the other hand, found the case one of great difficulty, and each entered elaborately on its discussion, which would have been avoided had they been prepared to adopt James, L.J.'s, suggestion.

But in the *Budhill case* (*supra*) lands had been acquired by the North British Railway Company under compulsory powers and by statutory conveyances in terms of the Railways Clauses Acts 1845, and the controversy regarded the working of sandstone which underlay the clay subsoil. In this case the House of Lords certainly adopted the interpretation of the term minerals suggested by James, L.J., in *Hext v. Gill*. I do not for one moment propose to criticise their Lordships' judgments, but I think I am bound to consider the length to which this adoption of James, L.J.'s, criterion was intended to be carried before I apply it to the present case. The House was again engaged in construing the term "minerals" occurring in section 70 of the Railways Clauses Act 1845. They were engaged in determining whether the common substance termed in Scotland

sandstone, in England freestone (for the attempt to prove it exceptional of its class failed), was included under such term, just as the Court in *Farie's case* was engaged in determining whether common clay was included under the same term occurring in the Water-works Clauses Act 1847. The difficulty which I experience in concluding how far the adoption by the House of James, L.J.'s, definition is intended to be carried, arises from the fact that there was another and patent ground of judgment which rendered its application unnecessary. The Lord Chancellor expresses the ground of his judgment thus—"If it [sandstone] 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 choose on notice to buy the ordinary rock lying beneath it. . . . 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. . . . 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. . . . 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 therefore 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." Having thus expressed his grounds of judgment in the particular case, his Lordship adds—"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," and proceeds to re-state James, L.J.'s, canon to this effect. In order to include a substance in the term mineral under the Act of 1845, these two questions must be answered in the affirmative—(1) Was the substance exceptional, and (2) being exceptional, was it regarded as a mineral in the vernacular, &c., at the time when the purchase was effected? This is undoubtedly more than an *obiter dictum*, yet it is not the ground of judgment. And I venture to think that it is expressed as a guide and not as an absolute rule to be followed in all subsequent cases, regardless of all other considerations.

Lord Gorell, again, after stating at the outset what I think is generally admitted, that it is reasonably clear that the word "minerals" in section 70 of the Act of 1845 must receive some limitation, considers six different definitions which had been sug-

gested in previous judgments, and, *inter alia*, (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, and then expresses the opinion that "the true test of what the section means by 'mines of minerals' is there indicated." His Lordship does not in any part of his opinion confine the test to the date of the conveyance, and even in the conclusion adds "or are now," but I admit that he really intended to do so. And though his Lordship states another and in this case sufficient ground of judgment, viz., that the clause of reservation was not meant "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," he undoubtedly does make the application of James, L.J., cover the main ground of his judgment. The judgment of Lord Shaw of Dunfermline is in accordance with these opinions.

I acknowledge the cumulative weight of these three decisions. Yet I am unable to conclude that they were intended to foreclose all future consideration of the question, where a case arose which was clearly not before the minds of the noble and learned Lords concerned in the judgments, and where the rigid application of the canon adopted would in different circumstances work the injustice which it would here.

It is certainly in favour of this view that in the *Carpalla* case, [1910] A.C. 83, decided by the House of Lords a month after, though accidentally reported before the *Budhill* case, in determining whether china clay was a mineral in the sense of the statute, the test so recently approved was not resorted to, but the case was decided on a review of evidence which led to "the conclusion that china clay was not part of the ordinary composition of the soil of the district; its presence was rare and exceptional." China clay was therefore—disregarding, or rather contradicting, James, L.J.'s, opinion in applying his own canon in *Hext v. Gill* to the very same substance—held to be reserved.

I do not think that the question is foreclosed in the present circumstances by the judgment in the *Budhill* case, for these reasons:—

First, the landowner's rights do not depend upon the terms of the general Acts 1845-47, but on the exceptional terms of a very special Act which places the landowner and the company in very special relations as regards minerals. To those I need not refer again in detail, except to add—

Second, that these relations precluded the question of what were to be considered minerals and what not from being considered at the date the land was taken and compensation adjusted. The landowner could secure, and *de facto* did secure, nothing more than the surface value of the soil of the area required.

I am not moved by the argument that it is a hardship on the company having made its canal to call on it to pay for underlying

minerals which were not reckoned on because not known at the time, and which are of such value that, had they been known and reckoned on, the promoters would have dropped their project. The latter is mere conjecture. The same situation would have occurred if, for instance, a good band of blackband ironstone, a mineral then perfectly well known, had unexpectedly been found in the lands. But the contention is a begging of the question. It is equally a hardship on the landowner that he should be deprived of a valuable asset of his land without the probability of payment, and without even the probability of the chance of minerals, whether known or not yet known, underlying his lands entering into the estimate of his compensation for the rights actually taken, and should be not merely deprived of his minerals in the land actually taken, but should be seriously damaged, probably to an extent far exceeding in actual value that of the small amount of minerals claimed not to be reserved, by the disastrous severance of his mineral field. It is an old rule that cases of hardship do not affect the law—the less when there is a greater hardship on the other side.

Third, that in laying down in the *Budhill* case the canon referred to, the House of Lords were not only dealing solely with a case under section 70 of the Railways Clauses Act 1845, but had not before them the effect to which these words "at the date of the grant" might be pressed and are being pressed in this case. They were dealing with well-known substances, whose composition, qualities, and uses were equally well known when the Acts were passed, the lands taken, and the question arose. Clay and sandstone and their respective uses had been known from the days of the Pharaohs, and they had never, except by scientists, been regarded as minerals. In this knowledge the Legislature spoke, and the promoters in any particular case took. But in the vernacular these substances were not only not regarded as minerals, but they were regarded as not minerals. For the exclusion of these substances from the statutory minerals I see good reason. But I am unable to see such reason for making the effect of such a general reservation as we have here depend upon the state of knowledge and of practical use at the date when the statute passed or the land was taken. I cannot accept the words used by the noble and learned Lords who decided the *Budhill* case as expressing the deliberate opinion that no substance can fall under the statutory reservation of minerals in any circumstances which was not at the time the land was taken in the vernacular regarded as a mineral. It could not be so regarded among miners, commercial men, and landowners, unless in point of fact it was already in use to be worked at least in some place or district, and was an article of commerce. The result of such a limitation would go to exclude every substance, however truly a mineral, and however

exceptional, and however important, the properties of which at the date the land was taken had not yet been discerned or even investigated, and which was not then regarded in the vernacular as a mineral, simply because it was not regarded at all. Such was not the case to which their Lordships' attention was directed, and I am unable to accept their rule of construction as decisive where a case has occurred in circumstances to which their attention was not directed.

It would be, I think, entirely inconsistent with the scope and purview of the statute with which we are concerned, were we to hold that that which I have no hesitation in saying is a mineral in the sense of the statute, was not reserved because its qualities and uses were unsuspected and its existence unregarded at the date when the Act was put in execution and the land taken.

Fourth, that were it attempted to maintain that shale in general was reserved, I should agree that both the grounds of judgment advanced in the *Budhill* case would properly negative the contention. Shale is ordinarily not an exceptional substance, but a common rock of many districts. And shale has, like clay and sandstone, not only never been recognised in the vernacular as a mineral, but has always been recognised as not a mineral. But oil-shale cannot be disposed of as purely common shale. It is a species exceptional in rarity, in the uses to which it can be put, or rather the products which can be obtained from it, and consequently in its value. There is some analogy between it and china clay. It is shale containing that from which oil may be distilled. China clay is clay formed by the disintegration of a particular rock, as is all clay, but it contains as its speciality the minute particles of felspar which, when separated from its other elements, is of value for the production of china. Hence their respective distinctions from ordinary shale and common clay and their corresponding values. If china clay can be regarded as a statutory mineral though clay is not, equally may oil-shale though shale be not.

For these reasons, while in respect for your Lordship's opinion I must say so with due hesitation, I am unable to accept the Lord Ordinary's judgment.

I have only one other incidental point to touch on, viz., that which was raised by the defenders' sixth plea-in-law, which is intimately connected with the competency and relevancy of the action as laid. Concisely stated, it amounts to this—We, the Railway Company, are not concerned with the damage you may by your workings do to our canal; you may breach the bottom of our canal, but the result will only be to drown your mine, and probably neighbouring mines; when they are full, the water will again rise in our canal, and the damage to us will only be temporary inconvenience. Inconsistently, however, with this somewhat Chauvinist plea, the defenders dare the mine-owner to injure, prejudice, or obstruct their undertaking at his peril.

The defenders cannot take up both attitudes. They misinterpret the last proviso of the 112th section of their Act, and they ignore the 120th. I cannot read their secretary's letters of 8th November 1907 and 23rd December 1908 as anything but a notice to stop working, such as they are entitled to give under section 113. Accordingly, they are bound to accept the consequences of having given such notice.

LORD MACKENZIE—The theory of the action is that the pursuers are compelled to leave unworked a seam known as the Broxburn main seam of oil-shale subjacent and adjacent to the Union Canal.

The first question which arises is whether, assuming the pursuers to be right on the facts, this would entitle them to be paid compensation by the defenders, having regard to the provisions of their private Act of Parliament. In the construction of this statute the principle to be applied is the same as that laid down in *London and North-Western Railway Co. v. Evans*, [1893] 1 Ch. 16. Where an express statutory right is given to make and maintain a thing necessarily requiring support, the statute, in the absence of a context implying the contrary, must be taken to mean that the right to necessary support of the thing constructed shall accompany the right to make and to maintain it—*per* Bowen, L.J.—*North British Railway Company v. Turners, Ltd.*, 6 F. 900; *Elliot v. North-Eastern Railway Company*, 10 Clark (H.L.) 333; *Caledonian Railway Company v. Sprot*, 2 Macq. 449. The title of the Canal Company to what they were permanently to occupy depends upon secs. 35, 60 and 61 of the Act of 1817 (57 Geo. III, cap. 56). They were bound to pay at the start for this, and also to pay damages in respect of anything temporarily interfered with. If there had been nothing but secs. 35, 60, and 61 the position of the defenders would have been unanswerable, but there are sections later on which specially deal with minerals. These are secs. 112 and 113. Although an argument was founded upon section 111, this may be disregarded. The effect of section 112 is to reserve to the owner the subjacent minerals, and it provides that he may work them "not thereby injuring, prejudicing, or obstructing the said canal or any of the works or conveniences belonging thereto." It does not apply to adjacent minerals, for as these could not be held to be embraced in the lands taken so they could not be excepted therefrom. The restriction upon the mode of working has been held by the Lord Ordinary not to be limited to wilful injury, and in this view I agree.

Section 113 deals with both subjacent and adjacent minerals, and its terms are such as to render it impossible for the defenders successfully to maintain that any claims by Lord Hopetoun or his successors in respect of injury to mineral workings had been assessed and paid at the time the canal was made. The difficulty in construing this section arises from the fact that its framers evidently thought

the only risk of damage incurred was by the canal owners. The possibility that there would be even greater damage if valuable mineral workings were drowned out owing to a breakage in the canal does not seem to have occurred to them, or, at all events, is not provided against in unambiguous language. The section is divided into three parts. The first gives a right to the Canal Company to inspect the mines; the second provides for the repair of wilful damage at the expense of the mineowner; the third is in these terms—“In case the said company (*i.e.*, the Canal Company) shall find it necessary for the safety of the said navigation or any of the works thereto belonging, to stop the working of any mines and minerals under or near the said Canal, or any of the works thereto belonging, the said company shall and they are hereby required to make satisfaction for the value of such mines and minerals to the owners, occupiers, or other persons entitled to receive the same.” The defenders argued that this gave an option to the Canal Company alone; that there was no obligation on them to inspect, and that even if they did inspect it was left entirely to them to say whether they would stop the working. Upon a reasonable construction of the section it appears to me that if the Canal Company does inspect, as has been done here, if it is proved as a fact in the case, as the evidence here shows, that it is necessary for the safety of the navigation to stop the working of the mines and minerals under and near the canal, and if the Canal Company intimate to the mine-owners that they will hold them liable in damages for any injury to the canal, this in effect is stopping the working of the minerals. In that event the Canal Company is liable to pay compensation to the owner for the value of what may be held to be minerals. I therefore agree with the Lord Ordinary on this branch of the case.

The next point is whether the shale in question is a mineral which has to be paid for. The test to be applied is that laid down by Lord Halsbury in *Magistrates of Glasgow v. Farie*, 15 R. (H.L.) 94, and the Lord Chancellor in the *Budhill* case, 1910 S.C. (H.L.) 1. The Court has to determine what these words mean in the vernacular of the mining world, the commercial world, and landowners. The Lord Chancellor says this is to be determined at the time when the purchase was effected. In the present case three dates have been suggested as the crucial period, *viz.*—1817, the date of the Act; 1818, the date when possession was obtained; and 1862, the date of the conveyance. As between 1817 and 1818 there would be no difference in result. If however 1862 be taken, there would. At the later date it is conceded that the shale in question was according to the vernacular or in common parlance a mineral. The dispute is whether it can be so regarded at either of the earlier dates. Reference was made to observations by the Lord President in the *Glenboig* case, 1910 S.C., at p. 951, as supporting the view that the date of the

conveyance should be taken. It is evident, however, that the point which is now of importance was not present in that case. For the reasons stated by the Lord Ordinary, I am of opinion that the question must be determined with reference to the year 1818, when the Canal Company bought the ground and entered into possession. This was the date of the purchase. The protracted delay in obtaining a conveyance was due to the position taken up by Lord Hopetoun. The question of fact, therefore, is whether oil shale was regarded as a mineral in 1818. The expression in the Act is “mines and minerals,” and an argument was used that the term “mines” covered anything that could be got by mining. This would be to give much too wide a meaning to the reservation, which in my opinion does not include more than would be covered by the word “minerals” alone. The evidence of some of the skilled witnesses, *e.g.*, Mr Rankine and Mr Gemmell, is to the effect that in their view everything from the roots of the grass downwards is included in the term “minerals.” This view cannot be taken since the decision in the case of *Farie*.

The question is whether in the year 1818 oil shale was according to the vernacular of that period or in common parlance a mineral. In my opinion it was not. The term “oil shale” was not known previous to 1860; what was known before that as a scientific fact was that oil could be distilled from certain shales, but until or shortly before 1860 there was no distillation of shale for oil for commercial purposes. In 1818, although the substance may have been known to exist, and though the fact may have been known to men of science that it had a potential value, the power of realising that value had not been ascertained until Dr Young’s discoveries in the middle of the century. In 1818 it was not in the opinion of the mining or commercial world a mineral. Mention is made by Williams, who, according to the pursuer’s argument, was not purely a scientist, of strata of blaes or shale which are very common and exceedingly numerous in coal countries. This is in the 2nd edition of his work published in 1810, in which he refers to what the Scotch colliers call “creashy” (greasy) blaes, and says that some of these glossy greasy blaes will actually burn when fire is set to it, though it will not consume. Further on he describes the appearance and composition of schistus in language that the pursuer’s counsel maintained was exactly appropriate to oil shale. There is evidence of the use of blaes or shale for fuel, and in Dorsetshire the Kimmeridge shale was put to this purpose two hundred years ago. As regards what Mr Rankine calls “mineral uses,” this was confined at the date in question to its use as waste material for putting on footpaths and carriage drives. Several patents were referred to, the earliest being Bechers in 1681, then Beles in 1694, and Bettons in 1742. This last was for the invention of “an oyl extracted from a flinty rock for the cure of rheumatick and scorbutick and other

cases," the rock being described as "black pitchy flinty rock," which, it was suggested in argument here was shale not coal. The other patents were for coal. The defender's witness Professor Marshall admits that Bettons' patent might refer to bituminous shale, but points out that it was merely a laboratory experiment. In 1781 a patent was taken out by Lord Dundonald for extracting oil from coal, and in Mr Galletly's treatise, published in 1876, the statement is made that works were established at Muirkirk in Ayrshire, which were in operation for fifty years (from 1781 to 1831), for the working of this patent, by which a tar yielding brown oil, naphtha, and ammonia was obtained. Mollerat's patent for an improvement in the manufacture of gas, in which mention is made of the oil obtained by the distillation of pit coal and of bituminous schistus "the use of which has yet been overlooked." The claim in it is for the apparatus therein described for the continuous distillation of bituminous schistus. There is, however, no evidence of any apparatus being worked at or prior to 1818 for the extraction of tar or pitch or oil from shale. Professor Tatlock refers to the earlier patents in his evidence and says he does not think any of those earlier than Dr Young's ever came into practical use. He also refers to Kirkton's Elements of Mineralogy, published in 1794, which describes bituminous shale as looking like bad coal, and Jameson's System of Mineralogy, published in 1816, which includes in the extracts from bituminous shale empyreumatic oil and thick pitchy oil. Shale in its chemical constitution is indurated clay. There are infinite gradations between coal on the one hand and clay on the other. Chemically coal and shale contain the same ingredients, and for this reason Professor Tatlock says he has always regarded coal as a mineral, and shale as a mineral as much as coal. This shows that for the purposes of the present case evidence based on analysis is not of much assistance in determining whether oil shale was a mineral according to the vernacular in 1818. As was pointed out by the Lord President in the *Torbanehill* case 17 D. 1., the fact that Torbanehill mineral consisted of certain component parts which are the component parts of coal would not necessarily make it coal. It depends on the proportions. Coal and shale are distinct and different substances, and as the pursuer's leading witness says "I don't think any mining engineer would designate shale by the term coal." Cannel coal, which is described in the Statistical account of Scotland (Lesmahagow part) for 1793 as having some resemblance to jet, contains a much larger percentage of fixed carbon than shale does. The description given by Professor Gregory is that Fawns-park shale (the shale in question here) stands between the clay on the one hand and the coal on the other, and that it is nearer the coal than the clay on account of its economic value. As regards commercial use he says that though Torbanehill

mineral was used from about 1850, it was 1860 before the other shales were recognised as having a commercial value. Probably the nearest approach to a commercial use before 1818 is that described in Lewis' *Materia Medica* (London, 1761), which, according to the preface, includes the substances commonly prepared as articles of commerce. It is there stated that on submitting mineral bitumens to a degree of heat in closed vessels an acidulous liquor, an oil approaching to the nature of petroleum, is obtained. Reference is also made to the genuine sort of mineral oil which is extracted by distillation from a hard bitumen or kind of stone coal found in Shropshire and other parts of England, and the statement is made that an oil obtained by distillation from a particular bitumen is directed by the London College to be kept in shops. The pursuers' evidence comes to this, that the commercial use of oil shale was not known in 1818, though it was known that oil could be extracted from certain coal measures amongst which shale might have been contained. Except in the case of Lord Dundonald's patent and the use for medicinal purposes, distillation had not been resorted to for practical purposes at that time. It was not until the Geological Survey of Scotland in 1892 that the outcrops of oil shale were shown. In the survey of 1859 there are no shale outcrops indicated, though the coal and limestone are. Shale is included in the Coal Mines Regulation Act of 1872, but not in the Act of 1860.

For these reasons, I am of opinion that oil shale was not regarded as a mineral in 1818, and that the judgment of the Lord Ordinary ought to be affirmed.

LORD KINNEAR was not present.

The Court adhered to the interlocutor of Lord Skerrington, dated 14th February 1911, and to the interlocutor of 30th June 1910; refused the reclaiming note, and decerned.

Counsel for the Pursuers and Reclaimers—Clyde, K.C.—Rankine, K.C.—Hon. Wm. Watson. Agents—Hope, Simson, & Lennox, W.S.

Counsel for the Defenders and Respondents—The Dean of Faculty (Dickson, K.C.)—Cooper, K.C.—Macmillan. Agent—James Watson, S.S.C.