point which has often been referred to, and which may possibly arise some day for decision, as to the effect of an appointment of a mere liferent to an object of the power. A donee of a power of appointment may appoint to one or more objects of the power the income for life, saying nothing about the capital, and then the question would arise whether, in accordance with the principle of *Carver* v. *Bowles*, 19th January 1831, 2 Russ. & Myl. 301, and the more recent decision of the House of Lords in *M'Donald* v. *M'Donald's Trustees*, June 17, 1875, 2 R. (H.L.) 125, it is to be taken as a gift of capital, but subject to limitations which the Court may disaffirm, or whether it is the gift of a life interest, or whether it would not receive any effect at all. But in the present case the testators have not been content with giving the life interests to objects of the power, but in each case the Misses Darling have gone on to deal with the fee in a manner which is bad for two reasons—first, that they postpone the period of division—and I agree with your Lordship that anyone claiming under the designation has a right to he heard on this point, and secondly, because persons are introduced in certain contingencies who are not objects of the power.

LORD PEARSON concurred.

LORD KINNEAR was absent.

The Court answered the first question in the negative, the second in the affirmative, the third in the affirmative, the fourth in the negative, the fifth in the affirmative, and the sixth in the affirmative.

Counsel for the First and Fifth Parties—W. J. Robertson. Agents — Ronald & Ritchie, S.S.C.

Counsel for the Second, Third, and Fourth Parties — Carnegie. Agents — Lindsay, Howe, & Co., W.S.

Tuesday, February 2.

FIRST DIVISION.

[Lord Dundas, Ordinary.

FORTH BRIDGE RAILWAY COMPANY *v.* DUNFERMLINE GUILDRY AND OTHERS.

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

Held that whinstone is a mineral within the meaning of section 70 of the Railways Clauses Consolidation (Scotland) Act 1845.

North British Railway Company v. *Budhill Coal and Sandstone Company and Others*, November 24, 1908, 46 S.L.R. 178, *followed.*

Arbitration—Property—Disposition—Railway — Mines and Minerals — Railways Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. c.* 33), *sec.* 70—*Conveyance in Implement of Decreet-Arbitral—No Express Mention of Minerals—Allegation that Minerals Purchased—Averments—Relevancy.*

In 1883 a railway company served notices to treat on the owners of certain lands required by them. In their claim the owners stated that one of the fields proposed to be taken contained very valuable whinstone rock, and under the heading of "land taken" they claimed, *inter alia*, a sum of £870 for the "rock value" of the field in question. They subsequently lodged an amended claim for a lump sum of £5000 for land taken. The oversman in the arbitration assessed compensation at a lump sum without itemising his award, and a disposition was thereafter granted to the company of the land taken. The disposition did not mention the minerals or refer to the whinstone.

In 1907 the company brought an action against the vendors, concluding, *inter alia*, that the whinstone rock in the land acquired by them in 1883 belonged to them, alleging that they had expressly purchased it or at all events actually paid for it. At the date of the action the arbiters, oversman, and all the chief witnesses were dead, so that no oral testimony (assuming it to be admissible) was available.

Held that as no oral evidence was available to explain the basis of the decreet-arbitral, the disposition following thereon must be taken as the measure of the parties' rights, and as the disposition excluded, by virtue of the Lands Clauses Consolidation (Scotland) Act 1845, sec. 70, the rock in question, the action fell to be dismissed as irrelevant.

Question how far it is competent to refer to arbitration proceedings to interpret a formal conveyance which has followed upon a decreet-arbitral.

The Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33), sec. 70, enacts—"The company shall not be entitled to any mines of coal, ironstone, shale, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug and carried away, or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands unless they shall have been expressly named therein and conveyed thereby."

On 2nd December 1907 the Forth Bridge Railway Company brought an action against the Incorporation of the Guildry of Dunfermline, and Alexander Brunton & Son, quarrymasters, North Queensferry, and Adam Brunton, quarrymaster there, in which they concluded (1) for declarator that under the disposition after mentioned the pursuers were proprietors of the whole whinstone rock lying in or under and form-

ing part of the lands thereby conveyed; or alternatively (2) that the defenders should forthwith execute and deliver to the pursuers a conveyance or disposition of the said whinstone rock; or alternatively (3) for declarator that the pursuers, in implement of the decree-arbitral after mentioned, had paid the defenders the full value of their whole right and interest in and to the said whinstone rock, and that in terms of the decree-arbitral the defenders were bound to exoner and discharge the pursuers of all claims at their instance in respect of the whinstone rock, and to execute and deliver forthwith to the pursuers a full exoneration and discharge of all their said claims. There was also a conclusion for interdict.

The following narrative is taken from the opinion, *infra*, of Lord Pearson—"In the year 1883 the pursuers, the Forth Bridge Railway Company, had occasion, for the purposes of their undertaking, to acquire certain subjects at North Queensferry belonging to the defenders the Incorporation of the Guildry of Dunfermline. At that date, and for a good many years previously, there had been extensive quarrying of whinstone rock on the defenders' adjoining lands, which was used for the making of causeway setts and similar purposes. According to the pursuers' statement on record, the circumstance which gave occasion to the present action was an intimation they received from the quarrymasters, who are lessees of the defenders, that they intended to work out the whinstone rock in the ground acquired by the pursuers in 1883. The defenders while disclaiming responsibility for this intimation, decline to admit that the rock in the land in question passed to the pursuers under their conveyance; but they add that they have no present intention of working it. The parties however have joined issue on the question whether the pursuers acquired right to the whinstone rock in the subjects taken by them in 1883, so as to be entitled now to interdict the working of it, on the ground that they have already taken it and paid for it.

"Briefly stated, the proceedings which resulted in the acquisition of the subjects by the pursuers were these:—In February 1883 the pursuers served notices to treat in the usual form, intimating their intention of taking for the purposes of their railway certain portions of the lands of Ferrybarns and of two roads, all as shown on the relative plans. The defenders thereupon served a claim dated 31st March 1883, in which, with reference to one of the fields which was affected by the notice to treat, they claimed for it as arable ground with an addition for severance, and also claimed that it had a feuing value. Further, they claimed that this field also contained 'very valuable whinstone rock,' the quarry having been worked for many years, and the stone being of the best description. Besides claims for severance, they claimed as for 'land taken;' and in respect of the field already mentioned their claim was for £873, 17s. 9d., being 'rock value' of 3 roods 10 poles at £8 per rood, and an additional sum of £361, 11s. 3d. as feuing value. This claim amounted in all to £3025, 7s. 9d., including severance, and was the claim referred to in the deed of nomination of arbiters. In the course of the reference, however, there was tabled an amended claim dated 25th July 1883, in which the narrative was substantially the same as in the claim already mentioned; but the figures were increased to a lump sum of £5000, which was expressed to be 'for land taken and which the company has been called upon to purchase, for severance damage, and for general depreciation in value of remaining property by reason of the execution of the works.' It does not clearly appear which of these two claims was before the arbiters, or whether both were before them, but it would appear that at all events they had the first claim before them. The arbiters, having differed in opinion, devolved the submission on the oversman (the late Sheriff Crichton), who in March 1884 assessed the compensation at a lump sum of £2300, 'said sum to be in full of all their other claims under the first and second heads of their claim.' Then on 11th August 1884 the defenders granted a disposition of the subjects to the pursuers for payment of £2300 with interest, which bears that they dispone to the pursuers 'according to the true intent and meaning of the said Forth Bridge Railway Act 1882 . . . . those parts and portions of land and other property' coloured pink and green on the plan annexed.

The defenders pleaded, *inter alia*—"(2) The disposition libelled, or otherwise the decree-arbitral and disposition libelled, being the formally complete and recorded conclusion of the statutory proceedings leading up thereto, it is incompetent for the pursuers to found upon the said proceedings either (*a*) for the purpose of construing the said deeds, or (*b*) for the purpose of establishing a right in excess of the rights conferred by the deeds. (3) The disposition in favour of the pursuers being on a sound construction thereof exclusive of minerals, including whinstone rock, the present defenders should be assoilzied from the first conclusion of the summons. (4) The said disposition, or otherwise the said disposition and decree-arbitral, being the sole measure of the rights acquired by the pursuers under the arbitration proceedings, the present defenders should also be assoilzied from the remaining conclusions of the summons. (5) In any case, the present defenders having given no notice of their desire to work stone or any other minerals in the lands acquired by the pursuers, the present action is, *quoad* the third and fourth conclusions, premature and unnecessary, and should be dismissed."

On 4th June 1908 the Lord Ordinary (DUNDAS) dismissed the action as irrelevant.

Opinion. — [*After narrating the conclusions of the action*]—"1. The pursuers admitted that the general question whether or not whinstone is a mineral within the meaning of section 70 of the Railways Clauses Consolidation (Scotland) Act is, so

far as my judgment is concerned, concluded in the affirmative by my decision in *North British Railway Co.* v. *Budhill Coal and Sandstone Company and Others* (June 22, 1907), which I understand is to be reviewed by the Inner House. But they argued that, even so assuming, the rock here in question was not a mineral within the meaning of section 70. The argument was based upon certain cases, the most important of which are *Farie*, 1888, 15 R. (H.L.) 94; *Blades*, 1901, 2 Ch. 624; *Todd, Birlestone, & Company*, 1903, 1 K.B. 603; and *North British Railway Company* v. *Turners Limited*, 1904, 6 F. 900. But I think the cases amount to no more than this, that certain kinds of clay have been held not to be 'minerals' within the meaning of the Act, especially where they form the surface or sub-soil, and constitute the land purchased by the undertakers. The pursuers' argument on this point seemed to me to be somewhat elusive. I did not gather distinctly to what distance or depth it was maintained that this whinstone would pass as land under the disposition. One of the learned counsel said *usque ad centrum*, the other down to sea level; neither of which theories appears to me to be free from difficulty. But it is, I think, sufficient to say, as I pointed out at the discussion (and no proposal was made to amend the record) that the pursuers have stated no averment at all upon which such an argument can be based. Indeed, their statement that 'the said rock was sold to the pursuers along with the surface' seems rather to militate against their present contention. The first conclusion, which I do not think was very seriously maintained, must therefore in my judgment fail.

"2. The arguments by which the second conclusion were supported were of a different character and worthy of very careful consideration. They proceed on the assumption that the whinstone rock is 'minerals' in the sense of section 70, and is not conveyed by the disposition. The pursuers say that it appears from the decree-arbitral, and is the fact, that these minerals were purchased and paid for by them, and that they are now entitled, as in full implement of the award, to have a conveyance of them by the defenders. The defenders urge *in limine* that the disposition must speak for itself; and that it is incompetent to construe its language in the light of what is said in the decree-arbitral. The disposition, they say, is perfectly clear and unambiguous; it conveys land, and land only; and its silence as to minerals, read along with section 70 of the Railway Act, is equivalent to an express exception of them out of the conveyance. There is, I apprehend, no doubt as to the soundness of the doctrine laid down by Lord Watson in *Lee* v. *Alexander* (1883, 10 R. (H.L.) 91, 96) that 'the execution of a formal conveyance, even when it expressly bears to be in implement of a previous contract, supersedes the contract *in toto*, and that the conveyance thenceforth becomes the sole measure of the rights and liabilities of the contracting parties,' and in *Orr* v. *Mitchell* (1893, 20 R. (H.L.) 27, 29), that 'when a disposition in implement of sale has been delivered to and accepted by the purchaser it becomes the sole measure of the contracting parties' rights, and supersedes all previous communings and contracts, however formal.' I can see no distinction in principle between a disposition following on a missive of sale and one following on a decree-arbitral. But the pursuers' counsel cited two cases as supporting their view that the decree-arbitral must here be looked at in order to establish that the rock in question was included as part of the subject awarded and paid for. The first of these, *Jamieson* v. *Welsh* (1900, 3 F. 176) does not seem to me to advance their contention. It merely decided that missives of sale, whereby a house with the fixtures and fittings thereof, so far as belonging to the proprietor, was sold, were not superseded by the disposition following upon them—which conveyed the house, but made no mention of fixtures and fittings—in so far as the things sold were moveable. The subjects of the contract were, as the Judges pointed out, of two separate and distinct kinds—the heritage on the one hand, and certain corporeal moveables (which would not be proper subjects of a conveyance) upon the other hand. Accordingly it was held that acceptance by the purchaser of the disposition did not discharge his right to delivery with the house of such moveables as fell within the term 'fixtures and fittings.' The other case founded upon by the pursuers is *Duke of Fife* (1901, 3 F. (H.L.) 2), which is important not only as being a judgment of the House of Lords, but also because it dealt with a disposition following upon a decree-arbitral pronounced in a statutory arbitration between the Duke and a railway company. It was there urged for His Grace that the disposition contained an unambiguous conventional obligation on the company to maintain the effective drainage of his lands in all time coming, and that it was incompetent to refer to the decree-arbitral as qualifying its construction. The Lord Ordinary (Low) rejected these contentions. He considered that the clause in the disposition was 'a very badly expressed sentence,' while 'in the decree-arbitral . . . there is no ambiguity.' He observed that 'if the obligation in the disposition had been, upon a natural construction of the language used, different from the obligation in the decree-arbitral, I think that it would have been necessary to give effect to the former, either as superseding or being in addition to the obligation imposed by the decree-arbitral. But the only question here appears to me to be, to what does an ungrammatical and, if read literally, unintelligible sentence in the disposition refer? A reference to the decree-arbitral makes that clear, and shows that it refers to the obligation which had already been imposed by the decree-arbitral, and to nothing else.' The First Division reversed the Lord Ordinary's decision upon the ground — as the Lord President explained—that the obligation in the disposition was 'perfectly intelligible,' and

contained 'no ambiguity at all.' His Lordship added, 'Unless there is such an ambiguity I do not think that we have got anything to do with the decree-arbitral or with the statute.' The House of Lords reverted to the judgment of Lord Low, and upon the same grounds, expressing the view that the decree-arbitral was 'quite properly referred to by the Lord Ordinary as expounding what is the extent and meaning of the language of the disposition'—*per* Lord Halsbury, p. 10. My attention was particularly called to the opinion of Lord Macnaghten. His Lordship points out that the Duke of Fife's argument had this peculiarity upon the face of it, that 'if the Railway Company have indeed undertaken the obligation which the learned Judges of the First Division fasten upon them, they have taken upon themselves a burden from which the Railways Clauses Act' (sec. 65) 'expressly and in terms protects railway companies.' Later on, the following sentences occur in his Lordship's opinion, upon which the present pursuers strongly founded—'The conveyance merely purports to repeat what is contained in the award. If there be any error or slip in the repetition, or if the words seem to have some different meaning when found in the conveyance, the error or slip must be corrected, or the matter put right, by referring to the decree-arbitral.' One must, I think, bear in mind that the language I have quoted was used with reference to 'a somewhat ungrammatically drawn' clause in the disposition, which was said by the respondent to import a conventional obligation upon the Railway Company for all time to come, contrary to the general policy of the Public Act of Parliament, and related to a matter which had been specifically dealt with in the decree-arbitral, and, though included in the conveyance, was not a part of it necessary to constitute a title to the lands. It seems to me that the question which I have now to decide is of a very different kind. The language of the disposition is quite unambiguous; it is *ex facie* in accordance with the terms of section 70 of the Public Act; but the pursuers desire by reference to the decree-arbitral, to show that the very subject-matter of the conveyance ought truly to have been something different from and greater than what is in express terms conveyed. I confess that to make reference for this purpose to the decree-arbitral would be, to my mind, incompatible with the strict but salutary rules of law clearly laid down in the cases of *Lee* v. *Alexander* and *Orr* v. *Mitchell*, to which I have referred, and which do not seem to me to be inconsistent with the decision or anything said in the *Duke of Fife's* case.

But it is not, in my opinion, necessary to base my decision upon this view, because even if it is competent to refer to the language of the decree-arbitral, with such additional light as can be obtained from that of the claims in the arbitration, I do not think the pursuers' argument can be successfully maintained. I may observe, before adverting to these documents, that the pursuers' case has this specialty, that they are not seeking to construe an ambiguous clause in the disposition by reference to the unambiguous language of the decree-arbitral; for the terms of the disposition are perfectly free from ambiguity, while the decree-arbitral is expressed, to say the least of it, in words which are not unambiguous. In other words, it is sought to interpret *clarum per obscurum*. The pursuers' notices to treat were in ordinary form, and said nothing about minerals. By the decree-arbitral the oversman, as already stated, found the pursuers liable in payment to the defenders of £2300 'for the lands to be acquired by them as aforesaid from the said Incorporation of Guildry, said sum to be in full of all their other claims under the first and second heads of their claim'; and, on payment by them to the defenders of the sums decerned for, ordained the defenders to execute and deliver to the pursuers a conveyance of the lands. Now there were, as I have explained, in fact two claims, which proceeded upon narratives substantially identical, both of which made reference to whinstone rock being contained in parts of the land acquired by the pursuers. The actual claim stated in the earlier document was for—'1. land taken,' and, in the classified valuation which followed, part of the land was claimed for 'at rock value of £8 per rood of 36 square poles,' the total claim for land taken being £2255, 15s. 3d. '2. Severance,' the total claim for which was £769, 12s. 6d., bringing the amount of the whole claim to £3025, 7s. 9d. The second claim was framed thus—'(1) For land taken and which the company has been called upon to purchase, for severance damage, and for general depreciation in value of remaining property by reason of the execution of the works of the company, £5000. (2) Accesses. All claims for accesses to the remaining portions of the claimants' property are reserved, in the event of its being found that the railway deprives them of present accesses.' The pursuers' counsel argued that the oversman's allusion to 'the first and second heads of their claim,' must refer to those heads as stated in the first and not in the second claim. This may be so, though I am not satisfied that it is so; and I think it is difficult to apply the words quoted from the award with perfect accuracy to either of the claims as stated. But however this may be, the real question seems to me to be whether or not the pursuers can establish by reference to the decree-arbitral and the claims—assuming such reference to be competent—that the whinstone rock lying in or under the lands acquired by them were, in the words of section 70 of the Act, 'expressly purchased' by them from the defenders? I think the answer to that question can only be in the negative; and if I am right in this, the pursuers' arguments in support of the second conclusion of the summons appears to me to fail. I did not understand the pursuers' counsel to suggest that there could, or ought to be,

inquiry by way of proof upon this part of the case; but in any view I consider that such a suggestion would be quite inadmissible, for reasons which I shall have to refer to in connection with the remaining matters upon which argument was submitted to me.

"3. The pursuers' counsel urged that, if I were against them upon the points I have dealt with, the defenders ought to be ordained to grant them a discharge of all claims at their instance in respect of whinstone rock in and under the lands in question, as craved by the third conclusion of the summons. The argument was based upon the declaration in the decree-arbitral that 'on receiving payment of the said sums hereby decerned for, and on this decree-arbitral being otherwise implemented, the said Incorporation of Guildry shall be bound to exoner and discharge the said Railway Company of all claims at their instance in the premises and of this decree-arbitral.' The theory of the pursuers' demand is that they have paid the defenders for the rock, though no title to it has been given to them, or (*ex hypothesi*) is to be given. I think this conclusion will not do at all. The demand made is a very unusual and peculiar one. I do not think the words quoted from the award were intended to include, or are capable of including, such a claim. There is, in my judgment, considerable force in the plea stated for the defenders to the effect that, as they have given no notice of their desire to work stone or any other minerals in the lands acquired by the pursuers, the third conclusion (as well as that for interdict) is premature and unnecessary, and ought to be dismissed. But the point is raised and may be dealt with. The pursuers ask a proof, but I do not find any averments which would warrant the allowance of an inquiry the object of which would apparently be to re-open the field of dispute in the arbitration. The question is raised, without any explanation of the reasons for such delay, more than twenty years after the close of these proceedings. I am told, and it seems probable, that not only the three members of the tribunal, but all the witnesses engaged (with one exception) are now dead. Even if the oversman had been available for examination as a witness, his evidence would only have been competent within narrow and well-defined limits—*Glasgow City and District Railway Company*, 1886, 13 R. 609; *Duke of Buccleuch*, 1872, L.R., 5 E. and I. App. 418. I think it would be out of the question to allow the pursuers now to endeavour to prove that a certain (or uncertain) amount of rock, other than what was necessary to be dug or carried away or used in the construction of the works, was truly included in the award, and paid for by them. It seems to me that the request for a proof of this kind is an instructive illustration of the sound and salutary nature of the rules of law to which I have referred, which, after a formal and unambiguous disposition is once granted and accepted, prevent reference, in order to construe the true scope of the conveyance, to prior contracts, however formal, or to prior communings, written or spoken. If the pursuers' case is true in fact, there may be some hardship in the result of my decision, but I think they were (upon that assumption) themselves to blame in accepting a disposition in the terms of No. 7 of process. On the other hand, there would, I think, be great hardship to the defenders if they were to be now put to re-try matters concluded by the decree-arbitral, and the disposition which followed on it.

"Upon the whole matter, my opinion is that the pursuers' averments are irrelevant to support the conclusions of the summons, or any of them, and that the action must accordingly be dismissed, with expenses."

The pursuers reclaimed, and argued—(1) The pursuers were entitled to a supplementary conveyance, for they had bought the rock in question. That was clear from the decree-arbitral. It was competent to look at the decree-arbitral to see what was meant to be conveyed. *Esto* that it was incompetent to go behind an ordinary disposition to the missives, that rule did not apply to a conveyance following on a decree-arbitral, for the latter was the measure of the parties' rights. The missives were not, for they might be altered at any time prior to the disposition. Therefore the rules laid down by Lord Watson in *Lee* v. *Alexander*, August 3, 1883, 10 R. (H.L.) 91, at p. 96, 20 S.L.R. 877, at p. 880; and *Orr* v. *Mitchell*, March 20, 1893, 20 R. (H.L.) 27, at p. 29, 30 S.L.R. 591, at p. 592, relied on by the respondents, were inapplicable. Where, as here, the extent of the conveyance was ambiguous, it was clearly competent to refer to the decree-arbitral—*Jamieson* v. *Welsh*, November 30, 1900, 3 F. 176, at p. 191, 28 S.L.R. 96; *Duke of Fife* v. *Great North of Scotland Railway Company*, March 12, 1900, 3 F. (H.L.) 2, 37 S.L.R. 630. The decree-arbitral following on the claim (which was tantamount to an offer to convey the minerals) gave the pursuers the rock in question. What was conveyed was land consisting in part of rock, and it was immaterial to consider whether in law that rock was or was not a mineral, for the pursuers had expressly bought it. It was not necessary that the notice to treat should expressly mention minerals, for "land" in the sense of the Railways Clauses Act included much more than the mere surface; it included the minerals—*Gerard* v. *London and North Western Railway Company* [1895], 1 Q.B. 459; *Holliday* v. *Mayor, &c. of Borough of Wakefield*, [1891] A.C. 81; *Smith* v. *Great Western Railway Company*, 1877, L.R., 3 A.C. 165, per Cairns, L.C., at p. 180; *Magistrates of Glasgow* v. *Farie*, August 10, 1888, 15 R. (H.L.) 94, per Lord Watson, at p. 101, 26 S.L.R. 229. *Esto*, however, that it was incompetent to go behind the conveyance, then the conveyance was not necessarily the measure of the purchase, for many railway companies took no conveyance at all—entry and user being a sufficient title—*e.g.*, *Duke of Fife's* case (*cit. supra*). (2) Assuming, however, that the minerals were

not conveyed, then whinstone was not a mineral in the sense of section 70 of the Railways Clauses Consolidation (Scotland) Act, and therefore it must be held to have passed as part of the lands conveyed. As to the meaning of the word "mineral" reference was made to *Menzies* v. *Earl of Breadalbane*, June 10, 1818, F.C., *affirmed* July 17, 1882, 1 Sh. App. 225; *Duke of Hamilton* v. *Bentley*, June 29, 1841, 3 D. 1121; *Jamieson* v. *North British Railway Company*, December 18, 1868, 6 S.L.R. 188; *Caledonian Railway Company* v. *William Dixon, Limited*, November 13, 1879, 7 R. 216, 17 S.L.R. 102, *affirmed* July 12, 1880, 7 R. (H.L.) 116, 17 S.L.R. 816; *Midland Railway Company* v. *Haunchwood Brick and Tile Company*, [1882] L.R., 20 C.D. 552; *Loosemore* v. *Tiverton and North Devon Railway Company*, 1882, L.R., 22 C.D. 25, at p. 42; *Nisbet Hamilton* v. *North British Railway Company*, January 15, 1886, 13 R. 454, 23 S.L.R. 295; *Magistrates of Glasgow* v. *Farie*, January 21, 1887, 14 R. 346, 24 S.L.R. 253, *rev.* August 10, 1888, 15 R. (H.L.) 94, 26 S.L.R. 229; *Midland Railway Company* v. *Robinson*, [1889] L.R., 15 A.C. 19; *Glasgow and South Western Railway Company* v. *Bain*, November 15, 1893, 21 R. 134, 31 S.L.R. 98; *Ruabon Brick, &c. Company* v. *Great Western Railway Company*, [1893] 1 Ch. 427; *Great Western Railway Company* v. *Blades*, [1901] 2 Ch. 624; *Todd, Birlestone & Company* v. *North Eastern Railway Company*, [1903] 1 K.B. 603, at p. 609; *North British Railway Company* v. *Turners, Limited*, July 2, 1904, 6 F. 900, 41 S.L.R. 706; *Great Western Railway Company* v. *Carpalla United China Clay Company, Limited*, July 14, 1908, 24 T.L.R. 804, *affirmed* November 23, 1908, 25 T.L.R. 91; *North British Railway Company* v. *Budhill Coal Company*, November 24, 1908, 46 S.L.R. 178. These authorities showed that the question whether whinstone *per se* was or was not a mineral was still open.

Argued for respondents—(1) The disposition was final, and having accepted it, the reclaimers were bound by its terms. Their title was the disposition, on which they had possessed for twenty-three years, and not the decree-arbitral. *Esto*, however, that the latter could be referred to, that did not advance matters, for the ultimate rights of parties depended, not on the decree but on the Act of Parliament and the notice to treat, the arbitration proceedings being merely executorial. The notice to treat did not include the minerals. A railway company was not bound to take the minerals, and a notice to treat would not be read so as to make them purchase what they did not intend and were not bound to buy. The minerals, if meant to be taken, must be "expressly" purchased. If mineral were meant to be taken, a second notice would have been necessary. *Esto* that the claim spoke of rock—that meant the rock on the surface, for the notice to treat referred to the surface. The conveyance purported to give all that the decree gave. It was incompetent to go behind the decree-arbitral any more than behind the conveyance, for the former was even a more formal deed than the conveyance. (2) *As to the meaning of mineral*—Whinstone was a mineral in the sense of the Railways Clauses Consolidation (Scotland) Act 1845, sec. 70. *Esto* that there was no case dealing with whinstone, it followed from the principles laid down by James, L.J., in *Hext* v. *Gill*, 1872, L.R. 7 Ch. App. 699, that whinstone was a mineral. The scientific criterion was not a relevant consideration, for the words of the section were to be read in their ordinary and popular sense. The general practice at the date of the Act was important, for the meaning of the Act did not vary with the progress of scientific knowledge—*per* Halsbury, L.C., in *Farie* (*cit. supra*). Freestone, ironstone, and sandstone had all been held to be minerals, whereas clay had or had not been held mineral according as it was or was not part of the soil or subsoil. The criterion therefore was, Was this rock part of the soil or subsoil? *Esto* that in *Farie* (*cit. supra*) and the three cases which followed it, viz., *Great Western Railway Company* v. *Blades* (*cit. supra*), *Todd, Birlestone, & Company* (*cit. supra*), and *Turners Limited* (*cit. supra*), certain things were held not to be mineral, that was because these substances were really part of the soil. The real value of these cases was that they decided that what was part of the soil or subsoil was not a mineral. The fact that underground strata of rock protruded above ground did not prevent the rock being mineral in the sense of the section. A railway company might lay its rails on the protruding rock, and if the owner wished to work it the company could buy it as mineral—*Great Western Railway Company* v. *Bennet* (1867), L.R. 2 Eng. and Ir. App. 27. The tendency was to hold that stone or clay which was not part of the surface was mineral—*North British Railway Company* v. *Budhill Coal Company (cit. supra)*; *Great Western Railway Company* v. *Carpalla United China Clay Company, Limited* (*cit. supra*). It was immaterial whether it was wrought by underground working or open quarrying—*Midland Railway Company* v. *Robinson* (1887), L.R., 37 C.D. 386, at p. 398, *affd.* 1889, L.R., 15 A.C. 19. There was really no difference between whinstone and freestone (which had been held a mineral), apart from the distinctions of scientific geology, which *quoad hoc* were irrelevant. Being a mineral it was excepted in the conveyance. The judgment of the Lord Ordinary was therefore right and should be affirmed.

At advising—

Lord Pearson—[*After the narrative of facts quoted supra, and stating the conclusions of the summons*]—Lord Dundas, whose interlocutor is under review, deals first with the question whether this whinstone is a mineral within the meaning of sec. 70 of the Railways Clauses Consolidation (Scotland) Act, and we have had a very full argument on the authorities as to the scope of that clause. Lord Dundas found himself precluded from entering on this question by a

recent decision of his own in the case of the *North British Railway Company* v. *The Budhill Coal Company* (46 S.L.R. 178), in which a reclaiming note was then pending in the Second Division. He there found that sandstone or freestone is a mineral within the meaning of section 70. His judgment has since been affirmed by the Second Division (November 24, 1908), although there was an important dissenting opinion by Lord Ardwall; and the result is that there is express authority against the pursuers on the very point, unless some valid distinction can be drawn between freestone and whinstone sufficient to take the latter out of the scope of the section. In some of the decided cases (including the case of the *Budhill Coal Company*) proof was led as to the nature of the substance in question and as to its relation to the other strata. In this case, however, the pursuers do not aver any reason why the whinstone should be regarded as being subject to a different rule from freestone or limestone, and the arguments submitted to the contrary, founded on the cases as to claysoils and subsoils, seem to me to have no application here.

I hold, therefore, that this case must be dealt with on the footing that the statute applies, and the result is that, excepting the minerals above formation level, the pursuers are not entitled to the minerals unless the same shall have "been expressly purchased," and that the "minerals shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby." Now regarding first the latter words, it cannot, I think, be maintained that in the disposition of 11th August 1884 in favour of the Railway Company the minerals are expressly named, and if they are not, then they are "deemed to be excepted out of the conveyance." But the pursuers fall back upon the prior words of the statute and maintain that the minerals were "expressly purchased," and further, that they were paid for. For my own part, if that were clearly made out upon the award, I do not think that the cases cited by the Lord Ordinary would stand in the way of complete justice being done. In that view the disposition or conveyance might be regarded as only part fulfilment of the award. The pursuers' case is that they should now have the matter completed, by a declarator that the whinstone rock is theirs by purchase and payment of the price, and that they should now either have a conveyance of it or at least have a discharge from the defenders of all claims at their instance in respect of the whinstone rock. Now the disposition is quite clear in its terms. It narrates the payment of £2300 with interest, and it is prefaced by an apparently full narrative of the proceedings, and bears no reservation of any additional rights or claims beyond the rights expressly dealt with. Turning to the award, we find it decerns for payment by the pursuers of £2300 with interest, upon delivery of a conveyance of the lands proposed to be acquired by them in the notices served on the defenders, and of two additional pieces of ground; and it was declared on receiving payment of the sums decerned for, and on the decree-arbitral being otherwise implemented, the defenders should be bound to exoner and discharge the railway company of all claims in the premises and of the decree-arbitral. There was one reservation made, but only one, namely, of all claims competent against the pursuers for damage to drains or water supply. Neither of these documents really gives any support to this part of the pursuers' case. Their case rests upon the claims on which the arbitration proceeded; and it is pointed out that in those claims there is a distinct reference to the "very valuable whinstone rock" comprised in one of the fields. In the first of the two claims, which was dated 31st March 1883, under the head of "Land taken," there is distinctly claimed for the defenders for field No. 19, "remaining ground at rock value of £8 per rood of 36 square yards 3 roods 10 poles, . . . £873, 17s. 9d"; and this is explained as being the capitalised value of the rent payable by the quarrymaster in his then current lease of the whinstone. In the second claim, which is dated 25th July 1883, while the "valuable whinstone rock" is referred to, and the rent of it is described in the same terms, the claim is not itemised, but is a slump claim for £5000 "for land taken and which the company has been called upon to purchase, for severance damage, and for general depreciation in value of remaining property by reason of the execution of the works of the company." I think it may be taken that the first claim was before the arbiters; while it does not clearly appear whether or to what effect the second claim was before them.

All this is sufficient to raise some doubt—I would say considerable doubt—in one's mind, as to whether the rock value in the larger sense—that is say, *usque ad centrum*—was not claimed by the defenders and allowed in the award of £2300. And if this were a question arising on the award itself, it might still be legitimate to show that on a sound construction of it it was not exhausted by the conveyance which followed upon it. It is, however, a different matter to go behind the award and to criticise the terms of the claims, and specially so in a case where the award is for a round sum. Nor can the case be taken on the footing that there was no other possible explanation of the appearance of rock value in the defenders' claim; for the question of rock value might well come in with reference to the rock to be taken out down to formation level, although the terms of the first claim as to rock value appear to go beyond that. When all is said, the thing is left in doubt; and it may be that the parties, or one of them, had not in the conduct of the arbitration attended particularly to the question now raised. Moreover, all this happened twenty-five years ago, and we were told that the arbiters and oversman and all the chief witnesses examined, except one, are now dead; so that it is not a case in which oral testi-

mony is available, even to the very limited extent to which it is competent in examining arbitration proceedings. It follows, in my opinion, that the pursuers have stated no relevant case in support of the second conclusion.

Nor is their case for the third conclusion any stronger. Indeed, it is open to all the objections just mentioned, and to this additional one, that it is premature, seeing the compearing defenders have given no intimation of their intention to work the rock in the lands acquired by the pursuers. It seeks to have the defenders ordained to grant them a discharge of all claims in respect of the whinstone rock on the ground that the pursuers have already paid them the full value of the whinstone. This is substantially the same claim over again, though in a different form, and I think it must be dealt with in the same way.

For these reasons I think the interlocutor reclaimed against is right and should be affirmed.

LORD M'LAREN—I concur.

LORD KINNEAR—I concur, and I also agree that if the question whether the whinstone in dispute were excepted from the conveyance by force of the provision as to mines and minerals in the 70th section of the Railways Clauses Act were open, I should think it one of considerable difficulty, but I agree that it is not open and that we are bound by authority.

LORD PRESIDENT—I concur in the opinion just delivered as regards what may be called the special point in this case. I think it is impossible to spell with certainty out of the documents which are still left what was precisely decided in the arbitration. That a mention was made of rock value seems clear enough. But then whether that rock value represented rock value *a coelo usque ad centrum*, or was merely the rock value of the surface, I cannot tell. And I cannot tell what the arbiter did, because the eventual award being a slump sum and the oversman being dead, I cannot tell with certainty what he allowed and what he did not allow. In that state of uncertainty it seems to me that we must go by the conveyance, that is to say—when I can learn no more from the oversman—I think we must assume that the conveyance was a proper implement of the bargain which had been come to, and been carried into effect by means of the arbitration.

Then if it comes to a question of the interpretation of the conveyance—there I feel that I am shut up by authority. I do not disguise, for my own part, that if the matter were open, I think there are grave reasons against holding that rock of this sort is mineral in the sense of the statute; but the matter is not open to me. In the first place, I think we are obviously bound by the recent decision of the Second Division, because I think it is hopeless to say that there is any distinction between whinstone and sandstone. There is no ground for importing into the statutes what may be called geological distinctions as to different sorts of stone. And then, if you take the only other thing which discriminates one stone from another, as far as I know, namely, commercial value, although the value may be different, yet here there is a commercial value in whinstone as well as in freestone.

But what I feel is this, that this Court is not in the position to clear the law if it is to be cleared. We are bound hand and foot by various judgments of the House of Lords, and it really is for the House of Lords, and the House of Lords alone, to further explain the statute if such explanation is possible.

The Court adhered.

Counsel for Pursuers (Reclaimers)—Clyde, K.C.—Cooper, K.C.—Hon. W. Watson Agents—Millar, Robson, & M'Lean, W.S.

Counsel for Defenders (Respondents)—Dean of Faculty (Dickson, K.C.)—Constable, K.C.—Macmillan. Agent—John Stewart, S.S.C.

Tuesday, February 2.

FIRST DIVISION.

PATERSON'S TRUSTEES *v.* PATERSON AND OTHERS.

Charitable and Educational Trusts—Uncertainty—"Charities or Benevolent or Beneficent Institutions."

A testatrix directed her trustees to pay certain legacies, one being to the Western Infirmary, Glasgow, and to divide the residue "among such charities or benevolent or beneficent institutions (including the Western Infirmary) as they in their sole discretion shall think proper, and in such proportions as they may think proper."

Held that the bequest was to be construed as a bequest in favour of charitable objects, the epithets "benevolent or beneficent" being merely exegetical, and was not void from uncertainty.

Hay's Trustees v. *Baillie*, 1908 S.C. 1224, 45 S.L.R. 908, *followed*.

Thomas Paterson and others, the trustees of the deceased Helen Paterson, who resided latterly at 119 North Montrose Street, Glasgow, acting under and in virtue of her trust-disposition and settlement dated 22nd June 1903 (*first parties*), and Thomas Paterson, John Paterson, Alexander C. Paterson, and Mrs Janet Paterson or Johnston, the brothers and sister respectively of the said Helen Paterson, and Hugh Miller and Thomas Miller, the only children of Mrs Paterson or Miller, who was a sister of and predeceased Helen Paterson, being all the heirs in moveables of the said Helen Paterson (with the exception of a brother whose address was unknown) (*second parties*), brought a Special Case to determine the validity of her disposal of the residue of her estate.