respondent's counsel fastened on these passages as implying that in every case the meaning of the word "minerals" is a question of fact to be determined by evidence. Parole evidence as to the meaning of words is competent in certain cases, but in general it is for the Court and not for witnesses to interpret the language of a legal instrument. In accordance with the formula above quoted in construing an ordinary business transaction as to minerals, one begins by discarding both the popular and also the scientific meaning, and one endeavours to interpret the word in a business sense. *Prima facie* a court is competent without the aid of evidence to perform this function. If every quarry-master in Scotland is entitled to lead evidence as to the excellence of his free-stone, and also as to the meaning of the word "mineral" as understood by his expert witnesses, the judgment in the *Budhill* case will not, as was hoped by Lord Shaw, tend to put an end to the confusion previously existing, but will make the former confusion worse confounded.

The respondent has a separate plea to the effect that certain notices given him by the complainers requiring him not to work the freestone under the railway constitute a contract to pay compensation which binds the complainers even if the freestone is their own property. The complainers' notices were in answer to notices by the respondent representing that the freestone under the railway was within his lease. I do not consider this contention tenable. The respondent also founds upon a letter in which the complainers agreed that if he removed a crane which overhung and endangered the line of railway any additional expense in working the quarry through the removal of the crane to another position should be deemed to be loss or damage occasioned by the non-working of the reserved rock in any arbitration proceedings for recovery of statutory compensation. This agreement proceeded upon the assumption that the reserved rock fell within the lease, and it cannot be interpreted as deciding in favour of the respondent a question which had not at that date occurred to either party.

The result is that the Lord Ordinary's interlocutor should be recalled and that interdict should be granted as craved.

The LORD JUSTICE-CLERK concurred.

LORD DUNDAS was absent, and LORD SALVESEN was sitting in the Lands Valuation Appeal Court.

The Court recalled the interlocutor reclaimed against, sustained the first plea-in-law for the complainers, and granted interdict as craved.

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

Counsel for Respondent — Sol.-Gen. Hunter, K.C. — Murray, K.C. — Gentles. Agents—Dove, Lockhart, & Smart, S.S.C.

Friday, February 24.

SECOND DIVISION.

(SINGLE BILLS.)

[Lord Johnston, Ordinary.

THE KILMARNOCK THEATRE COMPANY, LIMITED, IN LIQUIDATION, AND OTHERS *v.* BUCHANAN AND OTHERS.

Expenses — Company — Liquidation — Unsuccessful Action by Company and Liquidators—Personal Liability of Liquidators—Form of Decree.

In an action at the instance of a limited company and the liquidators thereof the Court assoilzied the defenders and found them entitled to expenses. On the motion in Single Bills for approval of the Auditor's report the defenders moved the Court to decern against the liquidators "personally" for the expenses. The Court *refused* the motion, on the ground that the effect of a simple decree against the pursuers for expenses involved their personal liability in the event of their not having sufficient assets belonging to the company in their hands.

Observations (*per* Lord Salvesen) on *Craig* v. *Hogg*, October 17, 1896, 24 R. 6, 34 S.L.R. 22.

The Kilmarnock Theatre Company, Limited, in liquidation, and Alexander Mitchell and James Robert Mackay, the liquidators thereof, brought an action against Robert Colburn Buchanan, threatrical manager, Glasgow, and others, in which the Court, on 9th November 1910, recalling the interlocutor of the Lord Ordinary (Johnston), assoilzied the defenders from the conclusions of the action, and found them "entitled to expenses," remitting the same to the Auditor to tax and report. The defenders' account of expenses was taxed at £503, 9s. 3d.

On the Auditor's report coming up for approval in Single Bills the defenders moved the Court to add the word "personally" to the decree against the liquidators.

The pursuers opposed the motion, and argued—The motion came too late. It should have been made at the time when expenses were found due, and not on the motion for approval of the Auditor's report —*Warrand* v. *Watson*, 1907 S.C. 432, 44 S.L.R. 311; *s.s.* "*Fulwood*," *Limited* v. *Dumfries Harbour Commissioners*, 1907 S.C. 735, 44 S.L.R. 566. Defenders were seeking to make pursuers liable in a capacity in which they had not appeared. They had appeared in a representative capacity, and the Court could not find them personally liable unless they were satisfied that the action was one which should never have been brought. To insert the word "personally" might prejudice questions eventually arising between the liquidators and the company.

Argued for pursuers—Where a liquidator

litigated unsuccessfully he was personally liable in expenses to the other party — *Liquidator of the Consolidated Copper Company of Canada* v. *Peddie*, December 22, 1877, 5 R. 393, 15 S.L.R. 81; *Craig* v. *Hogg*, October 17, 1896, 24 R. 6, 34 S.L.R. 22; and the effect of the interlocutor finding expenses due was to make the liquidators personally liable. If this were not so, they should be made personally liable now, and it was not too late to do so. The cases quoted by pursuers did not apply to the present case. To insert the word "personally" in the decree would not prejudice questions arising between the liquidators and the company, and in any event the defenders were quite willing that such questions should be expressly reserved.

At advising—

LORD ARDWALL—I am of opinion that in this case decree for the taxed expenses should be pronounced against the liquidators, who are the pursuers in the action, and in that decree that they should be designed as they are in the summons, viz. —"Alexander Mitchell, chartered accountant, Glasgow, and James Robert Mackay, chartered accountant there, the liquidators of the Kilmarnock Theatre Company, Limited."

In my opinion the defenders' motion to have the word "personally" inserted after the names of the liquidators in the decree ought to be refused. If that word were to be inserted, it would mean that the liquidators had improperly raised and carried on this litigation, and must pay the expenses out of their own pockets without recourse against the assets of the liquidation. No grounds were stated to justify this treatment of the liquidators.

I do not think that the question now raised is affected by the case of *Warrand* v. *Watson* (1907 S.C. 432, 44 S.L.R. 311), for there what the Court were asked to do was to pronounce a decree at variance with the finding for expenses which had formerly been pronounced. In the present case the only finding of the Court is in these terms, "Find the defenders entitled to expenses." It is quite consistent with that finding, and indeed I think it is the natural interpretation of it, to hold that the defenders are entitled to expenses against the liquidators, who are the pursuers in the action.

The effect of such decree will be that the liquidators must pay the expenses as in a question with the defenders, but they will be entitled as in a question with the company, which is in liquidation, to get the expenses out of the company's assets under their charge, if there are any. I may refer to two cases, one in England and one in Scotland, in which apparently it was recognised that in such cases this was the proper form of decree. The first is *Ferrao's* case (L.R., 9 Ch. Appeals 355), where it was decided that where an application of the official liquidator is refused with costs, the order will be that the official liquidator do pay the costs, and the Court said there in answer to counsel, "that such would be the order in similar cases, the intention being that the liquidator was to pay the costs whether he did or did not get them out of the estate." The same course was followed in Scotland in the case of the liquidator of the *Consolidated Copper Company of Canada* v. *Peddie* (1877, 5 R. 393, 15 S.L.R. 274), where the respondents moved for expenses against the liquidator "personally," and where it was admitted that the funds of the company in his hands were insufficient to meet the expenses. In that case the Court found the liquidator liable in expenses without the addition of the word "personally." Both of these were cases in which the liquidator had applied to the Court by petition to have certain persons placed on the lists of contributories and failed, and where there was a great deal to be said for holding that the liquidators should not be found liable in expenses at all except out of the estate of the liquidation, as the liquidators were only performing an official duty in trying to get the company's register put right. The present case is *a fortiori* so far as the propriety of granting a decree against the liquidators is concerned, because the present is the case of an ordinary litigation, and accordingly I think it clear that decree should go out against the liquidators by name for these expenses; but as there is no suggestion that there is anything improper in their instituting and carrying on the litigation so far as the company in liquidation was concerned, it would manifestly be unjust to debar them from such recourse as they may have against the assets of the liquidation in order to recoup themselves for the expenses which they will be compelled to pay to the other party in the cause.

LORD SALVESEN—I concur in Lord Ardwall's opinion. As the case of *Craig* v. *Hogg* was, however, founded on in the argument and is not referred to by Lord Ardwall, I should like to make some observations upon it. So far as the decision is concerned, it is of no general importance, for the decision turns mainly on the construction of an interlocutor which had been somewhat unfortunately expressed. It was pronounced in an action in which a judicial factor was sued as such for payment of a debt due by the factory estate. He defended the action unsuccessfully, and decree was pronounced against him ordaining him as judicial factor to make payment to the pursuer of £159, and finding him as judicial factor liable in expenses to the pursuer. A majority of a Court of Seven Judges held, differing from the Lord Ordinary who originally pronounced the interlocutor, that the finding for expenses was intended to limit the defender's liability to the factorial estate and did not involve him in personal liability. So far therefore the decision has no general application except to interlocutors expressed in precisely similar terms. On the other hand, the majority of the Court were of opinion that if the latter part of the interlocutor had been expressed thus: "and finds the defender

liable in expenses to the pursuer," such a finding would have involved personal liability, and that a judicial factor in the general case is not exempt from the consequences which attach to any person, whether in a representative capacity or not, who litigates unsuccessfully. The minority, who were of a different opinion, held that, apart from misconduct on the part of the judicial factor in conducting litigation, he does not incur personal liability for expenses, but the grounds of their opinions were based on the fact that the judicial factor is an officer of Court who must often act on his own responsibility where he is charged with the interests of minors, lunatics, or others from whom he can obtain no guarantee that will protect him in the event of unsuccessful litigation. These reasons do not apply in favour of the liquidators of public companies, who can always protect themselves against personal liability by obtaining an indemnity from the creditors who will benefit if the litigation upon which the liquidator enters should prove successful. The decision in the case is thus chiefly of value as to the correct way in which a finding for expenses should be expressed where the party to the litigation who is unsuccessful has been litigating in a representative capacity and sounds a note of warning against qualifying the decree for expenses in any way, unless it is intended by the Court which pronounces it to limit its enforcement to the funds which the unsuccessful litigant holds in his representative capacity.

As to the effect of a simple decree in this case against the pursuers for expenses, I agree with your Lordship in thinking that such a decree will involve the personal responsibility of the pursuers in the event of their not having sufficient assets belonging to the company which they represent in their hands. I agree in the general proposition enunciated by Lord M'Laren in *Craig's* case in these terms—"If a decree is simply against the pursuer or the defender, I should understand this as meaning that the individual decerned against must pay the expenses, reserving his claim to be indemnified out of the trust estate;" and I understand this to have been the view of the majority in cases applying to trustees in bankruptcy, liquidators of public companies, and testamentary trustees. No doubt the decree might be expressed against the pursuers as liquidators and as individuals; but that might be held to prejudge questions arising between the liquidators' constituents and themselves as to their right to appropriate the assets towards payment of expenses which—as Lord M'Laren said, in defining the statement of the law from which I have quoted above—"cannot be determined one way or the other in an action to which beneficiaries are not parties." On the other hand, I cannot assent to the view maintained for the defenders here that the decree for expenses should be expressed against the pursuers personally, because that would imply that they were not to have a claim to be indemnified by the trust estate. The proper decree, according to the practice on which I consistently acted in the Outer House, is therefore one against the pursuers simply. In a question with the defenders that means that the pursuers must pay the expenses, and the defenders are not concerned where they get the funds from if they implement the decree. The decree itself, however, when so expressed, is a decree against the pursuers as individuals and can be enforced against their individual estates. It is they who as individuals have occasioned the expenses for which they are liable to compensate the defenders; and it is nothing to the purpose that it would have been the estate under their charge and not they themselves who would have been enriched had the action been successful. Of course occasional cases may be figured—of which this is not one—where a person litigating in a representative capacity may be exempted by the Court by which the action is decided from personal responsibility; and in such cases it would be proper to limit the decree for expenses to the estate for whose benefit the unsuccessful litigation was undertaken. And, for the sake of clearness, it might be well in future to use some such phraseology as "only as judicial factor" or "trustee," or as the case may be. In that case no difficult question of construction would arise, as in the case of *Craig* v. *Hogg*, where there was so much divergence of judicial opinion.

LORD JUSTICE-CLERK—I am quite satisfied that the request that the Court should attach the word "personally" to the decree for expenses against the liquidators would in the circumstances be quite wrong, implying, as it would, that the liquidators were personally blameworthy. While undoubtedly a trustee or a liquidator is liable in the ordinary case for expenses if he litigate unsuccessfully, he, if he has not been personally blameworthy, is entitled to relief from the funds officially in his hands. I cannot see anything in this case which would justify a decree in any other than the usual form, and I agree with the opinions which have been delivered by your Lordships both on the law and as to the proper form for the interlocutor to be pronounced.

LORD DUNDAS was absent.

The Court pronounced this interlocutor—

"Approve of the Auditor's report on the defenders' account of expenses, and decern for payment of £503, 9s. 3d. against Alexander Mitchell, chartered accountant, Glasgow, and James Robert Mackay, chartered accountant there, the liquidators of the Kilmarnock Theatre Company, Limited."

Counsel for Pursuers (Respondents)—Wilson, K.C.—M. P. Fraser. Agents—Smith & Watt, W.S.

Counsel for the Defenders (Appellants)—Blackburn, K.C.—MacRobert. Agents—Dove, Lockhart, & Smart, W.S.