every workman is a contractor, just as this man was, and it cannot be said that he was working outwith the contract when he was doing the work with his own hands. There was another man working with him, but I do not think that makes any difference.

I am therefore, on these plain grounds, of opinion not merely that the statute in its meaning but also in its language applies, and that the judgment of the Sheriff is right.

LORD TRAYNER—I think that to extend the principle of the Workmen's Compensation Act to such a case as the present would be to go far beyond any legitimate interpretation of the Act. I think that this case is ruled by *M'Gregor* v. *Dansken*. I adhere to what I said in that case, and am clearly of opinion that the question should be answered in the negative.

LORD MONCREIFF—The question put to us is whether the deceased Michael Hayden was a workman in the sense of the Workmen's Compensation Act 1897. I am of opinion that he was not. In order to constitute a person a workman in the sense of that Act it is in my opinion necessary that he should work under an agreement of service of some kind. In the case of *M'Gregor* v. *Dansken*, 1 F. 551, I stated my reasons for forming this opinion, which was arrived at after examining not only the definition of "workman," but other provisions of the Act which I think point to that conclusion.

Reliance was placed on the words "or otherwise," which occur in the definition of "workman." I adopt what Lord Trayner says in the same case at p. 548 as to the scope of those words, viz.—"I think it is service of all kinds and degrees, manual labour or skilled labour, foreman, journeyman, or apprentice, regular employment for a stated period at a fixed wage, or the most incidental employment for a trifling return, but still in every case an agreement for service." In the present case the elements pointing to an independent contract greatly predominate. The written offer and acceptance disclose an independent contract pure and simple—a contract to execute a specific and separate piece of work on certain specified terms. The defender did not stipulate for or exercise any control over the contractors; they were allowed to execute the work in their own way and at their own time; they were not subject to the regulations of the quarry. They were not liable to be dismissed as the defender's other workmen were on a day's notice; neither could they have terminated the agreement by giving a similar notice.

In point of fact the deceased man had not previously been in the service of the defender.

Against this all that is to be said is that the deceased man was a labourer and worked with his hands, and that he and his co-contractor were given the use of tools and barrows belonging to the defender. As to the first, the deceased man was not bound to work personally, and the fact that a contractor does work personally does not of itself affect his position.

Secondly, if use of the tools and barrows was given, this no doubt was considered in fixing the payment for the job.

On the whole matter I agree with the majority of your Lordships that the question should be answered in the negative.

The Court answered the question in the negative.

Counsel for the Claimant and Respondent—Watt, K.C.—Munro. Agent—P. R. M'Laren, L.A.

Counsel for the Appellant—Campbell, K.C.—D. Anderson. Agents—Macpherson & Mackay, S.S.C.

HOUSE OF LORDS.

Monday, August 4.

(Before the Lord Chancellor (Halsbury), and Lords Ashbourne, Robertson, and Lindley.)

DAVIDSON'S TRUSTEES *v.* CALEDONIAN RAILWAY COMPANY.

(*Ante*, November 28, 1899, 37 S.L.R. 150, and January 13, 1900, 37 S.L.R. 406. *See also* 33 S.L.R. 25, and 21 R. 1060, and 23 R. 45.)

Railway—Compulsory Powers—Omission to Take through Mistake or Inadvertence—Six Months after Right Finally Determined by Law—Res judicata—Question Alleged to have been Finally Determined in Previous Action Decided More than Six Months before—Right to have Compensation Determined by Arbitration—Expenses—Lands Clauses Consolidation (Scotland) Act 1845 (8 *Vict. c.* 19), *secs.* 117 *and* 119.

A railway company acquired the right of a feuar in certain lands. The feuar's title reserved to the superiors the whole metals and minerals, with certain exceptions. The railway company did not acquire the right of the superiors in the lands. Certain minerals having been excavated by the railway company in the course of making the railway, partly above and partly below the formation level, the superiors brought an action against the railway company, in which it was found on 19th July 1894 that the superiors were the sole proprietors of the minerals, "subject to the rights conferred upon" the feuar "and conveyed" to the railway company, and a proof was allowed in regard to the minerals so far as lying below formation level, "reserving to the pursuers any claim" for minerals above formation level, "to be determined by arbitration in terms of the statute." No steps were taken by either party to have the value of the minerals taken so far as above formation level determined

as an omitted interest under section 117 of the Lands Clauses (Scotland) Act 1845. Thereafter, the railway company on 7th December 1896 having denied liability for these latter minerals, the superiors brought an action in which they claimed damages for the excavation of the minerals above formation level from the railway company as trespassers, and maintained that the question as to the right of the railway company to take these minerals was *res judicata* in the previous action, and that, as they had failed to give notice to treat, the period for compulsory purchase as an omitted interest had expired. The railway company maintained that the removal of the minerals in question was within their rights, but this contention was negatived by the Court. *Held* that the question as to the rights of parties with regard to the minerals above formation level had not been determined in the previous action, and that, as consequently six months had not elapsed since that question was finally determined by law, it was still open to the railway company to have the amount of compensation determined by arbitration under section 117 of the Lands Clauses (Scotland) Act 1845.

Opinions that if the question was finally determined in the previous action, it was the duty of the superiors as claimants and not the duty of the railway company to initiate proceedings for determining compensation under section 117.

Order pronounced as to expenses under sec. 119.

This case is reported *ante ut supra.*

The Caledonian Railway Company appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—I confess this somewhat intricate performance was not easily understood at first, but, thanks to the argument of the learned counsel, I think your Lordships have now very clearly before you the matters which when looked at admit of a very easy solution in one direction. It is clear that the whole question now is, whether or not the machinery provided for assessing compensation between the Railway Company and the claimants is still alive and in existence, or whether by reason of the lapse or the supposed lapse of six months the Railway Company, who are now in possession, are trespassers, so that the amount of compensation which is to be obtained is no longer compensation within the Acts upon principles perfectly familiar to the Courts, but what they have done is to be treated as an act of trespass, thereby admitting of all the aggravation of the claim incident to an act of trespass as distinguished from compensation for lands or interests by the ordinary course of arbitration contemplated by the statute.

It appears to me that the whole question comes to two very short points. In the first place, whether there has or has not been, more than six months before the initiation of this action, a final determination by the Courts of what the rights as between the parties were. I do not think there has. It appears to me that although in a certain sense the question of Allan's rights was determined, yet what those rights were and how far they were involved in the determination, or what was to be paid in respect of them, was in dispute between the parties, and, inasmuch as there has been no final determination within the language of the 117th section, I do not think the six months has elapsed.

Further, it appears to me that apart from that, after the history we have had of the proceedings between these parties, there is the further question, if that was a final determination, upon whom the obligation rested to initiate such further proceedings as would within the postponed period of six months have enabled the parties to arrive at a proper conclusion, and whose fault it was if they were not initiated. I certainly am of opinion myself that it was the duty of the claimant to make a claim which it would have been possible for the Railway Company to satisfy. It would seem in common sense that it is so. Supposing there were no litigation and no necessity for any further discussion of the matter, but that the company were prepared to pay, is it suggested that they are themselves to find out what the claimant wants? Surely, as a matter of common sense, a man who wants to be paid something must say what it is that he wants; the Railway Company might say, We will pay you what you ask. But instead of that neither party appears to have done anything, and the result is that it is now claimed that the period within which the matter could be settled has elapsed, and the Railway Company are therefore to be treated as trespassers. That does not appear to me to be business or common sense. The person who is claiming ought to have said what he claimed, and then, under the series of sections which the Lord Advocate has pointed out, when compensation was claimed the company might either have agreed to pay that sum or if they wanted to dispute it, then the whole course of procedure would have been that which is pointed out by the statute.

It appears to me that on both these grounds the appellants are entitled to judgment, and I therefore move your Lordships that the interlocutor appealed from be reversed.

LORD ASHBOURNE—I entirely concur in the conclusion at which my noble and learned friend the Lord Chancellor has arrived. We have to deal with a very protracted series of litigations which have been proceeding for a very considerable number of years in the Scotch Courts, and have finally resulted in the appeal which has been addressed to your Lordships, and which largely turns upon the consideration of some very technical matters.

In the earlier litigation which was started a controversy arose as to the posi-

tion of the appellants, the Railway Company, in respect of their dealing with minerals above and below the authorised formation. After many vicissitudes in that first litigation one of those matters was decided —that is, the rights in reference to the minerals that were taken from below the authorised formation. But the Court scrupulously indicated their intention of not giving, in my opinion, any final decision in reference to the other matters, because on the face of their Order they put —"Reserving to the pursuers any claim they may have for the value of the coal, ironstone, freestone, and other metals or minerals in the said lands above the authorised level of the said railway, to be determined by arbitration in terms of the statute." And to make it abundantly clear that it was the intention of the Order not to deal conclusively or finally with that matter, but to leave the claim largely open, the Lord Justice-Clerk, in giving the decision upon which that Order was founded, in his earlier sentences makes it abundantly plain, and states that in fact he was acting in putting in that reservation on the suggestion of the pursuers—that is to say, the respondents here, —and I would judge from the closing words of the Lord Advocate that he had expressed no opinion in reference to that, and that the putting in of those words was mainly the action of those who were then representing the pursuers.

That being the position of the first action, nothing appears to have been done for a considerable time. There was then a correspondence, and finally there was the institution of the present action. When it came before the Lord Ordinary (Lord Pearson), he, in a considered and very closely reasoned judgment, gave his views upon the broad matter in controversy, which was this — whether the Railway Company were entitled to be treated as having rights under section 117, the effect of which would be to have their compensation assessed on one clear basis, or whether they were in the event which happened to be regarded as trespassers and to have damages assessed against them on that basis. Lord Pearson, on that broad topic of controversy between the parties, arrived at the conclusion that the Railway Company were entitled to the benefit of having their compensation assessed under section 117 of the statute so often referred to. That was reversed by the learned judges who sat in the Second Division, and they arrived at the conclusion that practically the Railway Company were deprived of the protection and the benefit of section 117, and that they were bound to submit to the assessment against them of damages practically as trespassers. It is from that decision this appeal is brought.

That has been met on behalf of the Messrs Davidson, the claimants, with a technical answer; they have said that there was a time when section 117 might have been appealed to with effect on behalf of the Railway Company, but that the time has lapsed; that they were only entitled to six months from the final decision, and that that date is to be found in the final decision which was pronounced in the first action, and that the six months having expired they have lost the right to appeal to section 117, and they must therefore submit to the assessment of damages against them as trespassers. Of course it is obvious that that is a technical answer; if it is well founded it must be yielded to; if it is not, it must be overruled. I concur in the conclusion that has been announced by my noble and learned friend on the Woolsack in the result that he has arrived at as to the date from which the six months must run. The litigation must be taken as a whole, and I cannot regard the decision which contains the reservation which I have read, which was pronounced in the year 1894, as being a fixed decision in reference to the matter which was discussed so much, and which was practically the subject matter of the second action. If that is so, the date from which the six months must run is to be found not in the first action but in the final decision which is to be pronounced now in the second action. That being so, it is enough to warrant a reversal of the decision which has been arrived at.

The second ground referred to by my noble and learned friend on the Woolsack is not so entirely clear to my mind. I am disposed to think that possibly either side might have taken some action to call into effective operation section 117, but I am inclined to think, in accordance with the opinion at which my noble and learned friend has arrived, that the claimants were the persons most called upon to formulate in some set terms what was their claim in respect of the compensation which they sought for the stone and minerals which were to be found above the foundation level. But the first ground is sufficient for our decision. For these reasons I entirely concur in the motion which my noble and learned friend has made.

LORD ROBERTSON — The ground on the merits ultimately maintained and pressed by the Lord Advocate is that any money which he is liable to pay is compensation under section 117 as for an omitted interest; but the question whether he is entitled to that remedy depends upon the position of his first alternative ground, which is his contention, that under the title which he acquired from Allan's trustees he was entitled as of right and without paying compensation to work out the minerals which he has excavated.

Now, the higher plea is unquestionably stated upon the record, and has been made the matter of adjudication by the Lord Ordinary in this case. But it is met now in a somewhat awkward way by the plea that that has already been decided in the previous action, the practical result pressed for by the respondents being that therefore the remedy under section 117 is cut out because it is too late. The precise question is whether the main contention on the title derived from Allan's trustees was negatived

in the action which preceded this one. It is really a plea of *res judicata*, at least it raises precisely the same question.

Now, when one turns to the interlocutor of the Second Division founded on, I observe these things—first, that confronted with the interlocutor of the Lord Ordinary which had dealt on its merits with that question, the Second Division recalled that interlocutor; secondly, that instead of negativing the plea upon Allan's title, it found that the pursuers were sole proprietors of the whole of the coal and other minerals, subject to the rights conferred upon Thomas Allan and conveyed by his trustee to the defenders; and thirdly, that that which is reserved for the determination of the arbitration is any claim that the pursuers may have for the value of any coal and other minerals in the lands above the authorised level.

Now, it seems to me that that does not present the material for a plea of *res judicata*. There must, for a plea of *res judicata* to be sustained, be a clear and distinct adjudication of the question submitted to the Court, and either expressly or by clear implication decided by the Court, and I should certainly not, upon the terms of this interlocutor, hold that this contention was excluded as regards the minerals above the level. But I find a strong confirmation of this view when I come to the proceedings of the Second Division themselves in the present action, because the Lord Ordinary discusses this very question of the effect of the proceedings in the first action upon the plea, and he holds that everything was open. I put it concisely, but that is the substance of his judgment. He says—"It does not appear to me that the defenders, in standing on their amended averments and asking for a proof of them, are going in any respect counter to anything that was the subject of decision in that action, though it may be they are going against the assumption of the pursuers when they made the concession, namely, that the Company admitted liability for the minerals above formation level, and were willing to go to arbitration under the statute to ascertain the amount to be paid for them as compensation." That is a perfectly unambiguous declaration in favour of the freedom of the present appellants to raise this question. What does the Second Division do? On the 23rd of December 1898, "The Lords having heard Counsel for the parties on the reclaiming-note for the defenders against the interlocutor of Lord Pearson dated 4th November 1898, Recal *hoc statu* the finding of the Lord Ordinary in regard to the first declaratory conclusion of the summons: *Quoad ultra* remit to the said Lord Ordinary to allow the parties a proof of their averments." First of all, that recal of the declaratory conclusion really set things still more at large than they had ever been before; and secondly, as regards the adherence to the allowance of a proof, that would have been wholly unnecessary if the view of the Court had been that the matter was concluded and decided by the previous interlocutor. Therefore I am not prepared to sustain the plea that this matter was settled as regards the upper minerals by the decision of the Court in 1894. I think the fair reading of that decision is that it cut the case into two as regards the upper and the lower minerals, that it decided the case as regards the lower minerals, and purposely left everything at large as regards the higher minerals. That is sufficient for the decision of this case.

On the second question, as to who requires to take the initiative in a proceeding of this kind, I should like to speak with some little reserve. At present I am disposed to agree with what was said by my noble and learned friend on the Woolsack. At the same time, as the matter is one of some intricacy and I have not had an opportunity of maturely considering it, I should desire to express reserve as to a more mature opinion upon that point, though I see no reason to differ from what has already been said on the subject.

LORD LINDLEY—I am of the same opinion. Some difficulty arises in discovering the true construction and effect of the Order, but one thing is perfectly plain to my mind—that it did not settle the rights of Allan's Trustees and the Railway Company as claiming under them in any final way. The fact is that those rights have been disputed up to the present time, and there has been no decision yet as to what the Company's rights as his successors really are. What has been decided, and all that has been decided, so far as I can make out, is that the value of the minerals used on the premises is £400—that is all. But that is not by any means an end of the controversy; it may be taken as one item, and probably that item is disposed of; but there are much larger questions which were in dispute and have been in controversy ever since, and have never been decided at all. I cannot therefore think that the right to have this claim ascertained as a matter of compensation is precluded by the lapse of six months. That, to my mind, carries the whole case.

The order of the House of Lords was as follows:—

> "It is ordered and adjudged, by the Lords spiritual and temporal in the Court of Parliament of his Majesty the King assembled, that the said interlocutors of the Lords of Session in Scotland, of the Second Division, of the 28th day of November 1899, and the 13th day of January and the 17th day of March 1900, complained of in the said appeal be, and the same are hereby, reversed, and that the said interlocutor of the Lord Ordinary in Scotland of the 9th day of May 1899, complained of in the said appeal, be, and the same is hereby, varied by striking out therefrom the words, 'Sists process *hoc statu*, that either party may take such steps as they may be advised to initiate proceedings under the said 117th section: Finds the pursuers entitled to expenses as between agent and client down to the 4th

November 1898, reserving as to expenses *quoad ultra:* Allows an account thereof to be lodged, and remits the account to the Auditor for taxation and report; and grants leave to reclaim,' and that subject to the said variation, the said interlocutor of the said Lord Ordinary be, and the same is hereby, restored; And it is further ordered that the cause be, and the same is hereby, remitted back to the Second Division of the Court of Session in Scotland to do therein as shall be just and consistent with this declaration and judgment: And it is further ordered, that the appellants do pay, or cause to be paid, to the respondents, the expenses incurred by them in the Court of Session and in this House, in terms of the 119th section of the Lands Clauses Consolidation (Scotland) Act 1845, with this declaration, that the Auditor of the Court of Session, subject to the review of the said Court of Session, and the Clerk of the Parliaments respectively, shall determine and certify what expenses in the action in the Court of Session and of the appeal to this House properly fall within the said 119th section, such expenses to be taxed as between agent and client; and it is further ordered, that the said respondents do repay, or cause to be repaid, to the said appellants the principal sum of £4148, 13s. 6d., specified in the said interlocutor of the 13th day of January 1900, hereby reversed, together with the interest thereon from the 13th day of April 1897 to the 26th day of April 1900, amounting to £631, 19s. 1d., already paid by the said appellants to the said respondents, and do also repay, or cause to be repaid to the said appellants the pursuers' expenses in the Court of Session, amounting to £649, 15s. 8d., together with interest thereon to the said 26th day of April 1900, amounting to £3, 18s. 4d., and the Court dues of extract, amounting to £2, 4s., already paid by the said appellants to the said respondents; and it is further ordered, that the said respondents do pay, or cause to be paid, to the said appellants the expenses incurred by them in the Court of Session and in this House, other than those falling within the said 119th section, the amount of the said expenses of the appeal to this House to be certified by the Clerk of the Parliaments."

Counsel for Davidson's Trustees (Pursuers and Respondents)—Solicitor-General for Scotland (Dickson, K.C.)—J. D. Fitzgerald, K.C. Agents—Brown, Mair, Gemmill, & Hislop, Glasgow—Campbell & Smith, S.S.C., Edinburgh—John Kennedy, W.S., Westminster.

Counsel for the Caledonian Railway Company (Defenders and Appellants)—Lord Advocate (Graham Murray, K.C.)—Haldane, K.C. Agents—H. B. Neave, Glasgow—Hope, Todd, & Kirk, W.S., Edinburgh—Grahames, Currey, & Spens, Westminster.

COURT OF SESSION.

Tuesday, October 14.

BILL CHAMBER.

YOUNGER & SON, LIMITED, PETITIONERS.

Bankruptcy — Sequestration—Awarding— — Death of Debtor after Petition for Sequestration Presented — Award of Sequestration of Estate of Deceased Debtor—Process.

The Bankruptcy Act 1856 (19 and 20 Vict. c. 79), sec. 34, enacts— . . . "If the debtor shall die after the petition for sequestration has been presented, the proceedings shall notwithstanding be followed out in terms of this Act, so far as circumstances will permit."

A creditor presented a petition in the Bill Chamber for the sequestration of a debtor's estate. On September 30th an order for service was pronounced and commission granted to recover evidence of the debtor's notour bankruptcy. On October 1st the debtor was duly cited to appear and show cause why sequestration of his estates should not be awarded. On October 4th the debtor died.

The Lord Ordinary on the Bills (Trayner) on October 14th, without ordering citation of the representatives of the deceased debtor, *found* that the debtor was notour bankrupt at the date of his death, and awarded sequestration of his estates *de plano.*

On September 30th, 1902, Younger & Son, Limited, as creditors of Thomas Hall, publican, Bonchester Bridge, near Hawick, presented to the Lord Ordinary on the Bills a petition craving for an order to cite Hall to compear within the statutory period and show cause why sequestration of his estates should not be awarded. On the same date service and intimation in the *Gazette* were ordered, and commission was granted to recover evidence of notour bankruptcy and other facts necessary to be established. On 1st October Hall was duly cited to appear and show cause why sequestration of his estates should not be awarded. He died within three days thereafter, viz., on 4th October.

Thereafter the petitioners executed their commission, recovered evidence of notour bankruptcy, and lodged in the Bill Chamber a minute craving an award of sequestration of the estate of the deceased, and also an order on his representatives to cede possession of any portion thereof to which they had made up a title to any trustee to be elected thereon.

Argued for the petitioners—This motion was founded on section 34 of the Bankruptcy (Scotland) Act of 1856 (quoted in the rubric). The report of commission showed that the bankrupt was at the date of his death notour bankrupt, and