Court would consult the Auditor before disposing of the matter.

At advising—

LORD PRESIDENT—Although none of the cases cited to us was directly in point, all of them afford capital illustrations of the rule by which our decision must be governed. That rule was never better laid down than in the language of the Lord President (Boyle) in one of the earliest cases, *Erskine v. Aberdeen Railway Company* (1851, 14 D. 119, at p. 120), where he said—"We can award no expenses that the statute does not award. . . . . We have no power to award any expenses against the company except those of a question with the company." If, therefore, the statute expressly warrants the charges which are here challenged, they must be allowed. If the statute does not expressly sanction these charges, they must be refused. I proceed then to consider whether or no the items in the appendix, which were made the subject of controversy here, are authorised by the statute.

The petitioner, who is heir of entail in possession of the estate of Blythswood, asks the authority of the Court to uplift and apply a sum of money due to him by the Railway Company as compensation for a portion of the Blythswood estate taken by virtue of their compulsory powers. His proposal is that the money be applied in the purchase of a heritable property of which he is the fee-simple proprietor, to be settled when purchased upon the same series of heirs and in the same manner as the remainder of the Blythswood estate.

Now this proposal is directly sanctioned by the Lands Clauses Act 1845 (8 and 9 Vict. cap. 119), for by section 67 it is provided that compensation money may be applied "in the purchase of other lands to be conveyed, limited, and settled upon the same heirs, and the like trusts and purposes, and in the same manner, as the lands in respect of which such money shall have been paid, stood settled." There is therefore express authority for this mode of applying the compensation money, and if the petitioner's proposal is carried into effect then the statute expressly provides that he shall have from the Railway Company all expense necessarily incurred thereby, because by the 79th section it is provided that it shall be lawful for the Court of Session to order the expenses of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters—that is to say, the expenses of the reinvestment of the compensation money "in the purchase of other lands, and of re-entailing"—that, of course, ought to be entailing—"any such lands, and incident thereto, and also the expense of obtaining the proper orders for any of the purposes aforesaid."

The Railway Company, however, challenged certain items here as not in practice incurred when compensation money is applied as is proposed under this petition. They direct special attention to charges incident to a remit to a man of skill, and say that while a remit to a man of business is ordinary and proper expenditure sanctioned by practice and principle, remits to a man of skill fall outwith the ordinary practice. We thought it necessary to confer with the Auditor before giving any opinion upon this question. He assures us that in an application such as the present it is the regular practice to remit not only to a man of business but also to a man of skill, and if that is so, then the statute expressly warrants this expenditure and we ought to allow these items. I come to the conclusion, therefore, that the objections stated by the Railway Company ought to be repelled, and for different reasons, no doubt, that the interlocutor of the Lord Ordinary ought to be affirmed.

I should say that I have formed no opinion, and express no opinion, upon the small item, which may raise a question of principle, disallowed by the Lord Ordinary, with regard to which we have heard no argument, an item as I understand not challenged, at all events at the debate before us, by the Railway Company.

LORD MACKENZIE—I concur.

LORD SKERRINGTON—I agree.

LORD JOHNSTON was absent.

The Court adhered.

Counsel for Petitioner — C. H. Brown. Agents—Strathern & Blair, W.S.

Counsel for Respondents (Reclaimers)—Blackburn, K.C.—D. P. Fleming. Agents—John C. Brodie & Sons, W.S. — Hope, Todd, & Kirk, W.S.

HOUSE OF LORDS.

Wednesday, April 22.

(Before the Lord Chancellor (Haldane), Lord Kinnear, Lord Atkinson, Lord Shaw, and Lord Parker.)

MARQUIS OF LINLITHGOW AND OTHERS *v.* NORTH BRITISH RAILWAY COMPANY.

(In the Court of Session June 11, 1912, 49 S.L.R. 804, and 1912 S.C. 1327.)

Mines and Minerals—Canal—Reservation of Minerals—Support—Compensation to Landowner.

The Union Canal Act 1817, authorising the formation of a canal from Lothian Road near Edinburgh, to join the Forth and Clyde Navigation Canal near Falkirk, *inter alia*, enacts—Section 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, basins, tunnels, feeders, trenches, sluices, passages, watercourses, 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." Section 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 daytime, 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 find, 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 or 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 or 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 to the owners, occupiers, or other persons entitled to receive the same. . . ."

The company having intimated to a proprietor, from whose predecessor there had been acquired part of the land on which the canal had been formed, that they would hold him responsible for any damage done to the canal by his, or his mineral tenants', mining operations, he, on the ground that this was "to stop the working" of certain valuable seams of oil shale, called upon the company to make, under section 113, satisfaction for their value.

Held that section 113 did not apply, as the company, outwith the provisions of that section, had, and were entitled if they chose to rely upon, their right of support at common law and as preserved to them in section 112. *Question* if oil shale under an Act of 1817 or the proceedings following thereon was a mineral?

This case is reported *ante ut supra*, where will be found the statutory provisions not quoted above and also the correspondence between parties.

The pursuers, the Marquis of Linlithgow and others, appealed to the House of Lords. (The defenders, the North British Railway Company, had also a cross appeal.)

At delivering judgment—

LORD CHANCELLOR—It is unnecessary for me to set forth in detail the facts and documents in this case. Two of my noble and learned friends have done so in judgments which I have had the advantage of reading.

The appellants' claim was in substance for a declaration that under a reservation of minerals made in a Canal Act passed in 1817 they were entitled to claim as against the respondents the seams of shale and oil-bearing shale below or adjacent to the canal. They also contended that if, which they did not admit, the reservation of mines and minerals under section 112 of the Act of 1817 could not at that date be taken to include shale or oil-bearing shale, as not having been at that time recognised in commercial parlance as minerals, such shale must still be taken to have been reserved to them by virtue of a disposition made in 1862, by which the possession of the predecessors in title of the respondents was clothed with a legal title containing a reservation which at that later date at all events must be construed as including the shale in question.

It will appear that in the view which I take of the case it is unnecessary to decide these points.

The appellants further alleged that it was in fact impossible to work the chief seam of oil shale, known as the Broxburn Main Seam, any nearer to the canal than 40 feet without endangering the canal itself; that it was necessary to stop it; that the appellants had been stopped within the meaning of section 113 of the Act of 1817; and that they were therefore entitled to compensation for the value of these minerals under that section or section 120.

The first two questions—those as to which I have indicated that in my opinion it is not necessary for this House to give judgment—were decided adversely to the appellants by the Lord Ordinary and the majority in the First Division. As to further questions which relate to compensation, one of these, arising under section 120, was decided

adversely to the appellants. The question whether there had been a stoppage within the meaning of section 113, which might have entitled the appellants, had the shale been reserved to them, to compensation under that section, was decided against the respondents, and is the subject of the cross appeal.

If the appellants are not entitled to claim under section 113, I do not think that they can claim under section 120. That section appears to me to have relation neither to anything covered by section 112 nor to a case such as that before us, where a remedy is given in special form by section 113. The only question therefore which it seems to me to be necessary to decide is whether the respondents have brought themselves within the terms of section 113, by finding it necessary for the safety of their canal to stop the working of mines and minerals under or near the canal. If they have not done so, and are simply taking their stand on the restriction in their favour contained in section 112, and if this restriction confers on them an independent and unqualified right, they ought to succeed in this litigation.

I have come to the conclusion that section 112 gives to the respondents a right which stands by itself and is independent of a further right conferred by section 113. Section 112 deals only with cases in which mines and minerals are reserved. It is expressed to relate exclusively to the lands or grounds "in, upon, or through which" the canal and the works connected with it are made. The scheme of the statute is to enable the undertakers to make a canal of a certain depth and description in a definite line. For this purpose they are empowered to enter upon the necessary lands. Section 61 entitles the owners and occupiers of the lands, tenements, and other heritages "through, in, or upon which" the canal and its works were made to claim satisfaction for what has been taken for this purpose, and for damages sustained by the making and completing the works. It will be observed that the words in section 112, "in, upon, or through which," correspond to the similar expression in section 61. Section 112 enacts that the right of the owner of land or grounds of this character to his mines and minerals within or under them is not to be prejudiced, but such mines and minerals are reserved to the owner, who may, subject to the conditions and restrictions in the Act contained, work them, provided that the canal and its works are not thereby injured, prejudiced, or obstructed.

This section appears to me to be simply a section reserving the right to subjacent and contiguous mines and minerals, subject to the very important restriction that they are not to be worked so as to injure the canal.

Section 113 confers rights not on the landowner but on the undertakers. They may enter not only on the lands through which the canal passes, but on lands near it in any of which mines have been opened or worked, and they may examine the distance of the workings from the canal. This is the first right conferred. They may, if they find that the opening or working has been such as to endanger or damage the canal, secure it at the expense of the mineowner.

This is the second right conferred by section 113 on the undertakers. Finally, as a third right they may, if they find it necessary for the safety of the canal, stop the working of the mines and minerals under or near it, and in that case they must pay compensation for the value of such mines and minerals.

The rights conferred by section 112 are primarily rights conferred on the landowner, and the qualification in favour of the undertakers, however important, is only incidental. The rights conferred by section 113 are, on the other hand, given to the undertakers primarily. They have incidentally a right to be protected from injury to the canal under the restriction contained in section 112. But under section 113 they acquire what are, in my opinion, new and independent rights. Under section 112 the undertakers, by virtue of the restriction placed on the power of the landowner to whom the mines and minerals under the land "in, through, or upon which" the canal is made are reserved, may stop the working of the mines. Under section 113 the undertakers have a direct and much more extensive set of rights, which apply not only to such land, but also to adjacent land "near" the canal, and they may stop the working if they find it necessary on compensating the landowner for the value of the mines. This right appears to me to be wholly independent of whether or not the mines belong to an original granter of the land through which the canal is made, and are lands which have been reserved by the operation of section 112. The mines referred to in section 113 may be the mines of a stranger, or of an owner of severed minerals under the canal, who never possessed surface rights or made any grant to the undertakers.

The words are wide enough to cover, in addition to these cases, the right of an original granter whose mines have been reserved, and it is easy to conceive a case in which, although such an owner of minerals proposes to work them in such a fashion as not at once to injure the canal, the undertakers may think it necessary for its safety to stop further working. But the important point for the purposes of the question before us is that section 113 relates to a more extensive category of landowners than section 112 and confers a different right. The undertakers in effect enjoy under sections 112 and 113 two separate rights, with remedies which they can pursue independently. They can, in a proper case, simply refuse to permit working under section 112, or they can in a class of case which overlaps that provided for by section 112 stop the working on payment of compensation.

On examining the correspondence I think that what the respondents have done is carefully to confine themselves to their right under section 112. When the conclusion is once reached that the two sections do not

relate to the same matter, but to different rights, the foundation of the able argument which Mr Clyde addressed to us disappears, and with it there disappears the title to the declaratory conclusions which the appellants seek to enforce.

The grounds on which I understand that we agree in this House to dispose of the appeal are in certain respects different from those on which the Lord Ordinary and the First Division based their interlocutors, but the practical result is not different, and I concur with my noble and learned friends in what they are about to propose, that the judgment appealed from should simply be affirmed, and that the respondents should have their costs of this appeal and the cross appeal, in addition to the costs to which they have been declared entitled in the Courts below.

[The LORD CHANCELLOR left the House and LORD ATKINSON presided.]

LORD KINNEAR—[*Read by Lord Shaw*]—I am of opinion that the interlocutor of the First Division appealed against should be affirmed, but I do not find it necessary to consider the particular ground in law upon which the judgment proceeds. I think this is superseded by a previous question, as to which I am, with great respect, unable to agree with the learned Judges.

The appellants, Lord Linlithgow and his tenants, complain that they have been stopped from working a seam of oil shale belonging to them, by the exercise of a power given to the defenders by their Act of Parliament 57 George III, c. 56, and they maintain that by force of the condition on which this power is conferred they are entitled to compensation from the defenders for the value of the mines and minerals whereof the working has thus been stopped. The answer of the respondents is that shale is not a mineral within the meaning of the statute, and that if it were so they have not stopped the working.

I agree with the Lord President that in logical order the last-mentioned point comes first, because if the appellants have not been stopped within the meaning of section 113 of the Act from working their seam of shale, it is unnecessary to consider whether that is, in the sense of the Act, a mineral or not. The Lord President states the point in a somewhat different way when he says that the respondents asked a judgment to the effect that an absolute right of support for the canal is given by the statute, on a transference or sale effected in accordance with its provisions.

I agree that the respondents' case involves a claim for an absolute right to support by the strata lying "under or within the ground" acquired for the canal from the appellants' predecessor Lord Hopetoun. But their right to lateral support depends on different considerations. The action, however, is not brought by them to define their right of support, but by the appellants, who complain that their mineral workings have been disturbed, and I think the question may be more conveniently and exactly stated in the form which the appellants have adopted when they ask, in the second conclusion of their summons, for a declaration that they "have been and are now stopped within the meaning of" section 113 of the Act from working their shale. This is an allegation upon which they of necessity based their claim to be compensated in terms of the statute. Whether it is made good depends on the true meaning and effect of section 113. But that section cannot be construed in isolation from other provisions of the statute, and in particular from those which determine the legal character of the right which the Canal Company is to acquire in lands taken for the purposes of their canal. I agree with the Lord President that this is a right of property. This is matter of express enactment, because it is declared in the sixty-ninth section that "the lands and all the estate, use, trust, and interest of any person or persons therein shall be vested in and become for ever the sole property of the company, their successors and assigns."

It makes no difference that this is said to be "for the use of the said canal and for no other use or purpose whatsoever," because this is not a qualification of the right of property, but a recognition of the incapacity of a company which is the creature of statute to use its property for purposes which the statute does not authorise. But if the effect of this section were open to question, it is conclusive that the statute requires the owner whose lands have been taken to grant a conveyance in a certain form, which according to the settled rules of conveyancing imports a feudal right of absolute property to be holden blench under the granter and his heirs, and it enacts that when this conveyance has been registered in the register of sasines it shall have the same effect as if a formal disposition had been executed and followed by charter and sasine. It is a conveyance in this form which now constitutes the respondents' right in the lands in question. These lands were acquired by the Canal Company in 1818, and after much delay and litigation, the cause of which is immaterial, it was decided by the Court of Session in 1855 that the Earl of Hopetoun was bound to execute a disposition of land specifically described in favour of the respondents as assignees of the original company. This was accordingly done, and the respondents are now owners in fee of the lands in question, and by force of the statute they are duly infeft.

I have dwelt upon this point because one of the learned Judges, Lord Johnston, whose opinion is entitled to respect, considers that the Canal Company acquired nothing more than a right of aqueduct and right-of-way, and it therefore became necessary to examine the title with attention. I cannot agree with Lord Johnston as to the effect of the original transaction, but since it has been carried out by a formal conveyance the respondents' right must depend upon the terms of the deed, which in my opinion leave no room for doubt. Were it not for a reference to the Canal Company's Act, the disposition in their favour would import an absolute right of property in the whole sub-

ject conveyed—*a solo ad centrum*. So far as the dispositive clause goes, there is no division of the surface from the underground estate. But inasmuch as the conveyance bears to be granted "by virtue and according to the true intent and meaning of the Act," it is common ground that the disponee is made subject to the statutory provisions regulating or restricting rights in mines and minerals.

The most important of these for the present purpose is the 112th section. This section enacts that nothing contained in the Act shall extend to, prejudice, or affect the right of any owner of land or grounds in, upon, or through which the canal shall be made "to the mines and minerals lying or being within or under the said lands, but all such mines and minerals are hereby reserved to such owner or owners."

Reading this provision with reference to the respondents' title, there can be no question that it reserves to the disponer the mines and minerals which but for the reservation would have been carried to the disponee as part of the subject conveyed. It is applicable only to minerals within or under the lands conveyed, but as far as these are concerned they remain the undoubted property of the disponer. If the enactment had stopped there I should have agreed with the learned Judges that the respondents' right to support from subjacent as well as from adjacent strata must have rested on the principle established in *Sprott* v. *Caledonian Railway*, that when a statutory authority is given to take the surface of land for the purpose of a railway or canal there is given along with it, by implication, a further right to such adjacent and subjacent support as is necessary to effectuate the purpose of the grant.

But in so far as subjacent support is concerned this is not in the present case left to implication of law, but is made matter of express enactment. For after the words I have already cited the 112th section goes on to provide—"And it shall and may be lawful to and for such owner, subject to the conditions and restrictions herein contained, to work . . . and carry away to his own use such mines and minerals not thereby injuring, prejudicing, or obstructing the said canal or any of the works or conveniences belonging thereto."

The right to work reserved minerals is therefore allowed only under the express condition and restriction that the mineowner is not to injure the canal, and this restriction is imported into the conveyance in exactly the same way and with as much effect as the right to work which it qualifies. The condition amounts to an absolute obligation to give all necessary support both to the surface and to the works constructed upon it so far as regards subjacent strata. This is part of the right conveyed, in accordance with the statute, to the Canal Company; and as the conveyance cannot be demanded until the price has been ascertained, it is to be assumed that in calculating the price the landowner must have taken into account, not merely the soil in which the canal is to be formed, but also the right to support which must of necessity be included in the grant. It is said that the value of the shale now in question was not known at the time, and therefore could not be estimated in fixing the price. If so be, that is a circumstance which may have some bearing upon the question whether shale is a mineral in the sense of the Act. But it cannot alter the meaning and effect of the contract between the Canal Company and the landowner, or disturb the statutory conditions on which it proceeds.

The answer to the appellants' point is that given by the Court of Appeal in *London and North-Western Railway Company* v. *Evans*—"If the right of support was not substantially measured in the price given for the lands taken and used, it might have been demanded and estimated in the price had the owners been sufficiently prescient; and after this length of time it must be assumed that all was paid for which was capable of calculation or measurement, and which was thought worth claiming by the owners, and that all conditions-precedent have been fulfilled which were requisite to give the canal proprietors the right to the necessary support for the maintenance of their canal." This is the right which the landowner sold to the company. If he afterwards finds that he cannot win minerals under or within the lands conveyed without letting down the canal, that only means that he cannot go on working without violating his own grant, and violating at the same time the condition upon which alone the Act of Parliament allows him to work at all.

But then it is said that all this is altered by a provision at the end of section 113, that whenever the working of minerals is stopped for the safety of the canal the company must make satisfaction for the value of any minerals which the mineowner is prevented from winning. The words of the clause referred to will not bear this construction, and when it is read with the context in proper sequence it becomes evident that the condition for compensation has no connection, grammatical or logical, with the duty imposed on the mineowner by section 112. It comes at the end of a somewhat lengthy section conferring upon the Canal Company specific powers to protect their property which are neither expressed nor implied in any previous part of the Act, and it is a condition of their putting these powers in force for their own benefit that they are required to make satisfaction for minerals which they do not allow to be carried away. They are empowered in the first place, "at any time or times upon reasonable notice, in the day time, to enter upon any lands through or near which the canal . . . may be or pass wherein any mines may have been dug, opened, or wrought, and likewise to enter into such mines," and there to view, search, and measure, and use all means for discovering the distance of the canal and towing-paths from the working parts of the said mines respectively.

Then the Act goes on to provide for the different contingencies which may arise as the result of this examination of mines—"In case it shall appear that any mine hath

been opened or wrought under the canal or any of the works belonging thereto, or so near thereunto as to endanger or damage the same, and that such endangering or damaging has been wilful, it shall and may be lawful for the company, at the expense, costs, and charges of the owners of such mines, to use all reasonable means for repairing, supporting, and making safe the said canal, towing-paths, and other works, and in case the company shall find it necessary for the safety of the navigation to stop the working of any mines and minerals under or near the canal" they are required to make "satisfaction for the value of such mines and minerals to the owners or other persons entitled to receive the same."

The parties are in controversy as to the grammatical connection between the clauses of this enactment. It is said on the one hand that the antecedent of the words "to stop the working," is to be found in the words "it shall be lawful for the company," and on the other hand that the final words of the clause are grammatically referable to no antecedent expression of power or right, but only express the condition upon which an assumed right may be exercised.

I must confess that I do not find it necessary to solve this grammatical puzzle. The language is inartistic, but in either view of it the meaning seems to me to be sufficiently clear for the present purpose, and the point the appellants make upon it to be equally unsound. They say that inasmuch as there is no express power to stop working given by the 113th section, the condition for compensation must be read as qualifying generally all rights of support which may belong to the company, and therefore that whenever it is found that the prosecution of mineral working will endanger the canal the mineral owner is entitled to compensation. This seems to me an irrelevant conclusion. It makes no difference to the argument whether the power to stop working is conferred in express terms or by implication plain. The point to be observed is that a new right and remedy is conferred by section 113 which is not to be found elsewhere in the Act, and that it is to the effective exercise of this new power, and to that alone, that the condition for compensation is attached.

The appellants, however, argue that the condition for satisfaction is imported into the 112th section by the reference in that section to "the conditions and restrictions herein contained," and therefore that the right of support from subjacent minerals is conditioned upon satisfaction being made for the value of unworked minerals at any time when it shall appear that they cannot be removed without withdrawing support. I do not think it doubtful that the words "herein contained" include conditions contained in other parts of the Act as well as those of the 112th section. But they are, in terms, conditions, and restrictions upon the owner's right to work and carry away minerals, and not upon the Canal Company's right to support, and the first of these conditions is an absolute prohibition against injuring the canal by working minerals lying under or within the lands sold. This is an absolute obligation without any qualification whatever, and it creates a corresponding right in the Canal Company for whose benefit it is imposed, since their vendor would be guilty of a wrongful act if he used his reserved right to obtain minerals so as to injure the canal. I cannot see that this unconditional right is taken away because a further and different remedy is given to the company under conditions. The 112th section affords an incomplete protection to the canal, the 113th goes on to provide further rights and remedies, in order to secure both vertical and lateral support from lands which are beyond the scope of the 112th section and outside the conveyance to the company. They may enter upon any lands near the canal, if mines have been opened or wrought within them, and may protect themselves either by taking means for supporting and sustaining the canal in the case where that course is authorised, or, in case they find it necessary, by stopping the working altogether.

It is true that the words of description are undoubtedly wide enough to cover minerals which fall within the obligation already imposed by section 112; and it may be that in working out the statutory remedies some difficulty might be occasioned by the overlapping of these two sections. But still they are different remedies. The only right given to the company by the 112th section is that which arises by necessity of law from the obligation imposed upon the owner from whom they have acquired land. If that obligation is violated, their remedy is an action for damages, and there is no cause of action for damages until injury is done.

I do not dispute that since the mine-owner would *ex hypothesi* be answerable in damages for a legal wrong, an interdict might be granted to prevent the wrong being done. But an interdict founded on the 112th section alone could be granted only in case of certain and imminent danger, it would be limited to minerals lying under the lands sold, it would not be based on the discoveries made in the exercise of a power to enter and inspect lands and mines, and it would not be an interdict against working absolutely, but only against working so as to injure the canal.

Whether such an interdict would be obtainable except under the condition as to satisfaction in section 113 is a question to be reserved until it actually rises. But, at all events, the remedy which may be supposed to arise under the one section differs in material respects from that expressly allowed by the other. And however that may be, the material point is that the right to compensation for unworked minerals is in express terms made to depend on the effective interference of the company to stop the working. But their power to stop the working is not arbitrary. It is dependent upon their finding, after due inspection, that it is necessary to do so for the safety of the canal or the works thereto belonging. They are not bound to inspect if they are content to rely on the owner's

observance of his special obligation under section 112, or of the general obligation arising from the relative position of the subjects, not to use his own property so as to injure his neighbours. If they inspect and judge in good faith that it is necessary to stop working, they may do so, but only under the reasonable condition that they must make satisfaction for the value of minerals which they do not allow to be worked.

I see no ground for holding that this condition abrogates or modifies the obligation not to injure the canal by working the reserved minerals if the company does not think fit to interfere. Nor do I find in the Act of Parliament any support for the appellants' argument that they are entitled to compensation if at any time the existence of the canal, irrespective of interference by the respondents, prevents their working out their mineral seam. The construction and maintenance of the canal are not unlawful uses of the respondents' property, because they are authorised by statute. If the use of neighbouring lands is thereby impaired, that is the natural consequence of the statute, and the only remedy of the landowner must be that provided by the statute itself.

The appellants' contention requires that the words "in case the company shall find it necessary for the safety of the navigation to stop," should be read as meaning "in case the owners or occupiers shall think it expedient for the safety of the mines to cease working." This is a simple question of construction, and I cannot think the appellants' construction admissible.

The question then comes to be, whether the respondents did in fact stop the working of the mine in question. I think upon the evidence that the working was stopped by the appellants' themselves because they had strong ground for apprehension that if they went on their mine would be flooded.

No doubt this means that further working would let down the canal, and they thought it expedient to give the respondents an opportunity for stopping the work accordingly and paying compensation. But the respondents have declined to interfere. If they had thought it necessary to protect themselves by prohibiting working, they might have done so. But if they thought it better to take their risk of losing support by leaving the mineowners to their own judgment, there is nothing in the Act of Parliament to compel their interference.

It is said that they have stopped the working effectually by threatening an action of damages. But that implies that the appellants intend something which would constitute a legal wrong. They incur no liability for damages if they do nothing unlawful, and the respondents, as I read the correspondence, simply stand upon their legal rights. It is noticeable that in their final answer they assert no right excepting that given by section 112. They decline to pay compensation, they do not pretend to forbid working under section 113, and the one right which they deny to Lord Linlithgow and his tenants is "to work out shale from under the canal" so as to injure it. They rely upon the express words of the 112th section, and the suggestion that this amounts to a stoppage of working under section 113 seems to me extravagant. It does not follow that because the respondents are entitled to reserve such rights as the law gives them they will have a good action of damages if their canal is injured. That will depend upon whether the injury, if any, is caused by breach of an obligation incumbent upon the appellants, and it may or may not be a good answer that while duly performing their obligation they have only exercised a right which the respondents might have bought off if they had chosen, but of which they have preferred to take the risk. It is impossible to decide any such question beforehand. The result is that in my opinion the action fails and that the respondents are entitled to be assoilzied, and therefore that the interlocutor of the First Division should be affirmed. The cross appeal, however, raises the question whether that part of the interlocutor which adheres to the Lord Ordinary's interlocutor of June 1909 should not be excepted from the affirmance. It follows from what I have said that the Lord Ordinary's reasoning is in my opinion erroneous. But the interlocutor which it is adduced to support is a mere incidental step of procedure which I should think it too late to disturb even if it were clear, which I think it is not, that the case would have been better conducted otherwise.

LORD ATKINSON—The canal of which the respondents the North British Railway Company are now the owners was constructed under the provisions of the 57 Geo. III, cap. 56, and of the amending Act 59 Geo. III, cap. 29, by a company incorporated for that purpose by the first of these statutes, styled the Edinburgh and Glasgow Union Canal Company. By a disposition dated the 30th of May and 7th of June 1862, and recorded on the 7th of July 1862, certain lands were by the then Earl of Hopetoun, the predecessor in title of the Marquess of Linlithgow, granted, disponed, and conveyed to the company for the purposes of their undertaking. The deed did not contain any express reservation of the minerals underlying these lands.

The first of the above-mentioned statutes by its 59th section provided that the vendor or vendors, and all other person or persons interested in lands sold to the company, as superiors or otherwise, should be entitled to the same rights and privileges from the remaining parts of the lands, a portion of which was so sold, as if this sale had never taken place. After the sale, therefore, the Earl of Hopetoun's ownership of the land, if any, abutting on the lands conveyed, was as absolute and complete as if he had never sold to the company. He was entitled, amongst other things, to the minerals underlying the land retained, and these latter lands were entitled to lateral support from the lands sold where the two abutted upon each other. By the 61st section provision was made for the ascertainment of the amount of "satisfaction" to be paid to

the owner for, amongst other things, the value of the land sold, which would of course, *prima facie*, mean that land with all its natural rights, including the right to lateral support from the lands retained by the grantor where the latter abutted upon the former, and also including *prima facie* the minerals underneath them; but by the 112th section these minerals are expressly reserved to the grantor.

The wording of this section is somewhat obscure. The words land "granted or conveyed or disponed" do not occur in it. It merely enacts that "nothing herein contained shall extend to prejudice or affect the right of any owner of any land or grounds in, upon, or through which the said canal towing path, &c., shall be made to the mines or minerals lying or being under such lands or grounds, but all such mines or minerals are hereby reserved to such owner or owners of such land or grounds respectively." Stopping there for a moment, it is I think clear, first, that the words "herein contained" mean contained in the statute, not merely contained in the 112th section itself, and second, that the word "reserved" must, according to its ordinary meaning, be held to apply to something reserved out of that which had been already granted, namely, the land conveyed to the company. It would have been quite unnecessary to reserve to the owner mines and minerals underlying lands not so conveyed, since he already owned them quite independently of the reservation. The ownership of these mines would not of course entitle him to deprive the company of any lateral support to which they might be entitled for the lands they had acquired.

The section proceeds—"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 thereunto belonging." I think that in this part of the clause, as in the earlier part, the words "herein contained" mean contained in the entire Act.

Now the rights conferred upon the company by this section to enable them to protect their property were, first, to bring against the owner or tenant of the minerals an action for damages if he or they, in mining and winning the minerals underlying the land sold, "injured, prejudiced, or obstructed the canal or the works or conveniences belonging thereto." And second, to obtain an interdict against him or them if that prejudice, injury, or obstruction, though not actually done or caused, was threatened or projected, or if actually done or caused, an interdict against its continuance or repetition.

It is quite obvious that these rights did not, or that the framers of the statute thought they did not, afford to the company adequate means of protecting their undertaking from injury or prejudice, or of securing the safety of their navigation. And accordingly they proceeded by the provisions of the succeeding section to empower the company to do several things touching, not merely lands through which the canal passed, but lands "near" these latter, and also touching the mines and minerals underlying lands of either or both of these descriptions. It is expressly enacted that "It shall be lawful for the company or its agents upon reasonable notice to enter either descriptions of these lands whenever a mine or mines shall have been opened on them to the same, and to enter the said mine and there to view, search for, measure, and use all other means for discovering the distance of the 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 canal or any of the works belonging to it, or so near thereto as to endanger or damage the same, and that such endangering or damaging had been wilful, it shall be lawful for the company and its servants from time to time, at the expense of the owner of the mine and mines, to use all reasonable ways and means for repairing, supporting, sustaining, securing, and making safe the canal towing paths," &c. Now in the first place the provision leaves apparently uncovered the case where the endangering or damaging above mentioned is not wilful. It does not expressly deal with such a case. And in the second place the section contemplates that the endangering and damaging, whether wilful or not, might recur. The words "from time to time" show this. A further and more effectual safeguard is therefore provided, namely this, that "in case the company shall find it necessary for the safety of the said navigation or any of the works thereunto belonging 'to stop' the working of any mines and minerals under or near the said canal or the works belonging thereto, making satisfaction in manner thereinafter provided for the value of such mines and minerals to the owners, occupiers, or other persons entitled to receive the same."

It is upon the construction of this latter member of this section 113, coupled with the correspondence which has taken place between the parties, that the question for decision in the cross appeal turns. It is, I think, plain that the antecedent to the infinitive "to stop" is the phrase "It shall and may be lawful for the said company," where the same occurs for the second time in the section. And that the words "in case the said company shall find it necessary for the safety," &c., taken in connection with this antecedent phrase, confer upon the company a discretion to stop the works or not to stop them. The condition which must be fulfilled before this discretionary power can be exercised is that the company shall have *bona fide* come to the conclusion that it is necessary for the safety of the navigation or some of the works belonging to it that the working of the mines should be stopped, but it does not, in my view, by any means follow that, as Mr Clyde contended, a statutory duty is imposed upon the company to stop the working of the mine as soon as they have come *bona fide*

to that conclusion. Once they have stopped the mines it is imperative upon them, no doubt, to compensate the owners and the other persons mentioned for the value of the minerals they require to be left *in situ*. The words are "shall and are hereby required to make compensation," but these are the only imperative words used in the section. They, no doubt, impose an absolute obligation, but all the earlier provisions of the section are merely enabling or permissive. The company may examine, they may repair, they may stop the working of the mines, but they cannot, in my view, be compelled to do any one of these things. They were entitled if so disposed to permit the grantor of the lands sold and those claiming under him to exercise the rights this statute and the law confer upon him, subject, however, to all the obligations and liabilities that the same statute and the same law impose upon him.

The same remark applies to the owner of the lands adjacent to the land sold and those claiming under him, though the company by the acquisition—the purchase in fact—of these lands acquired the right to have them supported laterally by the lands abutting upon them. Whether they acquired the right to have them equally supported when burdened with the contemplated works is quite another question. The provisions of the fifty-ninth section would in my view suggest that the company only acquired the more limited right, but however that may be, it is, I think, clear that the company did not acquire the right to have their land supported laterally by any particular stratum or strata of minerals underlying the adjacent land. The owner of this latter land, whoever he might be, might mine for, win, and take away those minerals so long as he did not remove that lateral support to the lands of the company to which they were entitled. And it did not matter in the slightest degree whether that support was afforded by leaving a portion of the minerals *in situ* or by providing artificial substitutes for portions which might be removed provided only the support was adequate.

These are in my view the respective rights and obligations of the parties touching the matters in dispute.

The next question for decision is one of fact, namely this, did the company stop the working of the Broxburn mine within the meaning of section 113. I do not know that it clearly appears from the correspondence that the company had ever in fact come to the conclusion that it was necessary for the safety of their navigation (which admittedly means the canal—the physical thing as well as its user), or the works thereunto belonging, that the working of this mine should be stopped; but however that may be, it is, I think, clear from the correspondence that they most carefully abstained from doing anything which amounted to a prohibition of the further working of the mine, or a requirement that it should not be further worked, and the unwon minerals be thereby left *in situ*. In the letter dated the 6th of June 1907, written on behalf of the appellants, the company are informed that the further working of the main Broxburn seam of shale will "endanger the safety of the Union Canal and the works belonging thereto," and are in effect asked to put in force their powers under the final clause of section 113, and have the satisfaction for the value of the mines and minerals mentioned therein ascertained, or in the event of the company being unwilling to take that course, asking them to undertake to free the appellants from all liability for all damages which might be caused to the company's undertaking by the further working of the mine.

The reply to that letter is contained in the letter of the secretary of the respondent company dated the 7th of October 1907. It amounts to an absolute refusal to have "satisfaction" ascertained as requested, or to give the undertaking asked for. The secretary then adds, "They hold your clients" (the appellants) "responsible for all injury and damage to the canal from the workings or proposed workings." But this is only another way of saying, as the respondents were entitled to say, We stand upon our legal rights, continue to work the seam of shale mentioned if you so please, but we will hold you responsible for any injury or damage you may cause to our canal or works. From that position the respondents never receded. The whole foundation upon which the action of the appellants is based, in my opinion, therefore fails. These mining operations were not in my view stopped by the respondents within the meaning of the 113th section of the statute. On the contrary, the appellants were left free to proceed with their operations subject to the obligations and liabilities which the law of the land and this statute imposed upon them in favour of the respondents. I express no opinion on the other point raised in the case.

I concur with my noble and learned friends Lord Kinnear and Lord Shaw as to the form of order which should be made.

LORD SHAW—Your Lordships are fully in possession of the references to the sections of the Act 57 Geo. III, c. 56, which are material to the determination of this appeal. The Act was passed to authorise the making of a navigable canal "from the Lothian Road near the City of Edinburgh to join the Forth and Clyde Navigation Canal near Falkirk." Its line passed through portions of the estate of the author of the appellant, the Marquess of Linlithgow. The Act was passed in the year 1817, and the construction of the canal almost immediately began. I need not requote or indeed recapitulate, these sections, and so far as I am concerned it appears to me that my views may be expressed most compendiously in the following propositions:—

1. I am humbly of opinion that the proprietors of the canal are duly vested therein as a heritable subject, that their right is not merely confined to a right-of-way or aqueduct, but that they are the heritable owners thereof, and that as such their property has a common law right to support. This right is not by way of easement, but is a natural right flowing of necessity from the grant of lands. It is a right which can

be vindicated both for subjacent and adjacent support, but it is a right under which no ownership of minerals is created in the grantees.

2. On the contrary, these minerals are expressly reserved by and to the appellant Lord Linlithgow's author and his successors in title, and it is expressly declared by section 112 that it is lawful to work and remove these minerals, "not thereby injuring, prejudicing, or obstructing" the canal.

3. On a survey of clauses 61, 112, and 113, I am of opinion that at the time when the Act passed, nearly a century ago, it is fairly certain that it was within the contemplation both of the Legislature and of the parties that the proprietary right on the one hand to the canal, and on the other to the minerals reserved, could be exercised without any necessary interference with each other, the first being used and the second being wrought concurrently. It may be that, notwithstanding the change of ideas and of methods of working, this original intention can still quite well be carried into effect. An additional safeguard was, however, provided against prejudice, injury, or obstruction to the canal.

4. In that state of matters there were, in my opinion, two options conferred upon the owners of the canal, and each of these, that is to say, the whole of section 113, was conceived in the interest and for the protection of the Canal Company. Under the first option if on any lands through or near which the canal passed a mine had been opened, and minerals were being worked, the Canal Company had the power of entering the mine, discovering the distances, and in the case where they could establish that there was wilful danger or damage to the canal the right was conferred upon them to do all works necessary for making the canal safe and for charging the mineowner with the expense.

The second option, however, was of a different and in one view a more comprehensive character. The Canal Company was the owner of an undertaking twenty-four miles in length, and the working out of the underlying minerals at any particular point might produce a damage far in excess both in dimensions and in result of all the considerations applicable to the particular locality or local operation. At the point of possible danger the minerals may have become the subject of separate ownership; it may have become evident that an owner of limited means might produce by the working of his minerals a damage far beyond his resources to recoup. And on other grounds which need not be figured it may have become clearly the interest of the Canal Company to preserve, so to speak, at all hazards their undertaking—to take if they pleased the timid view on that subject, and to exercise an option in their own favour, namely, to stop the mineral workings when in their opinion they found it necessary for the safety of the navigation or works of the canal. By such a resolution duly communicated to the mineowner the latter would become bound, and the Canal Company would have obtained what it thought necessary, namely, that the minerals should remain *in situ*. The condition of the exercise of this option is the payment to the mineowner of the value of such minerals.

5. Whether it is so necessary may, as it humbly appears to me, be the subject of great difference of opinion. On the one hand the mineowner may be advised that such precautions of support may be taken as to avoid completely all injury either to the superincumbent strata or to the canal itself. On the other hand, the risk may be considered by the Canal Company, either with or without skilled advice, as a very serious one for its undertaking. It is in this situation that the Canal Company is given the option to stop the workings, agreeing to pay compensation. If, however, it does not so stop them by exercising its option, and if the owner goes on excavating the minerals and does endanger or injure the canal, he will necessarily be liable to answer both to an interdict and to an action of damages, because the condition that he shall not prejudice or endanger the canal attaches primarily to the reservation to himself of the minerals with the power to remove them.

6. It is, however, in my opinion, not legitimate to convert the Canal Company's option, which I have just described, into an obligation resting upon it apart from option. Such an obligation would be of a remarkable kind, as the scheme of the present summons shows. It would be an obligation to pay for minerals which it had not demanded should remain *in situ*, and had not found it necessary to stop the landlord from working. In my view, such an obligation does not rest upon the respondents. Viewed from another standpoint, it is not legitimate to extinguish the Canal Company's option and to create in its stead a right in the mineral owner to, it may be, large compensation upon the footing that an option which has not, in fact, been exercised ought to have been exercised. In my humble judgment the owner of the minerals has no such right as is thus attempted to be created, and the statute does not confer upon him a power of demanding compensation for minerals notwithstanding that his working thereof is not arrested. His obligations remain entirely where the statute put them, namely, not to injure or prejudice the canal by his workings, and secondly, to bear the responsibility for interdict or damages if he does so, with the added responsibility that if the injury or damage is wilful the repair may be undertaken by the Canal Company at his cost. I do not see my way to hold that anything less than this is the measure of his obligations, and, on the other hand, I do not see my way to avoid the conclusion that all of this, along with the site of the canal and works themselves, was paid for in the original transaction of purchase under the Act.

7. As to the contention that the respondents did in fact stop the appellant from working the mineral under or near to the canal, I am of opinion that the correspondence did not do so. It must be observed

with regard to this that so serious a change in or addition to the obligations resting upon the Canal Company cannot be lightly inferred. The stoppage which it is said occurred was equivalent to the exercise of an option which imposed financial payments equal to those due by a purchaser of a not inconsiderable extent of subjacent and adjacent minerals. The respondents no doubt had to consider seriously their position, and the letters on both sides show great astuteness. The endeavour of the appellants' representatives was to put the respondents in the position of declaring that the works were stopped. On the other hand, the endeavour of the respondents was with all courtesy to give an answer to the letters, but to decline to be led into such a situation or give any order to stop the workings. I think that Mr Macmillan was justified in his submission that if the respondents had not answered the letters of the appellants' representatives it would have been impossible to construe their silence as an affirmation of the proposition that, finding it necessary to stop the workings of the minerals under the canal, they had done so. They did not adopt that course, but they adopted this other, which, in my humble judgment, seems to have been the correct course. In effect they said, "There is an Act of Parliament which regulates the position of parties. We refer you to the statute." They did nothing more than that; and in my opinion it would be a strained construction of the correspondence to hold that they had walked into a situation into which they had been invited, and placed themselves under large pecuniary obligations by saying or doing something equivalent to arresting mineral workings. I do not think that the company meant to do that, and I do not read the correspondence as if they had done so. The correspondence practically says — "The Act regulates all our rights. Take your own course. If you go on, pray do so; but of course you and we are under a statute which binds both of us."

This view of the averments of parties and of the correspondence would be sufficient, as it humbly appears to me, to end the case, and to entitle the respondents to absolvitor from the fourth conclusion of the summons, which seeks for recompense or satisfaction for the value of subjacent or adjacent minerals. Everything else leads up to that. The first conclusion—a declarator of property—is unnecessary. The second or third contain each a double affirmation, viz., (1) that it is in fact necessary to cease working, and (2) that they have been stopped. For the reasons I have given this last is inconsistent with fact. I should like, however, in justice to the argument submitted, to say that, having considered the evidence, in my opinion the first also is not made out. The necessity, if any, which was proved by the evidence was a necessity, not for the safe navigation, &c., of the canal—with that the respondents would have been seriously concerned — but a necessity (if any) which was established was a necessity for the safety of the mine, and with that the appellants are alone concerned. In my view accordingly there should be a decree of absolvitor on the second and third, as well as one on the fourth conclusion.

The result so reached dispenses with any determination of the interesting point as to whether shale was within the category of minerals in the Statute of 1817, or at the subsequent dates which were put forward as those of the actual contract of parties. Incidentally it also disposes of what occurred in the case on the matter of the relevancy of the action. The Lord Ordinary repelled the plea against relevancy, and the cross appeal is on that subject. All this is now simply a step in the course of the litigation, and as to the cross appeal no order need be made.

I move that the judgment appealed from should be affirmed, and that the respondents should be found entitled to the costs of the appeal and of the cross appeal both here and in the Courts below.

LORD PARKER—The scheme of the special Act of 57 Geo. III, c. 56, which your Lordships have to construe, is clear. The thirty-third section confers on the company incorporated under the Act a general power to make the canal. The thirty-fifth section provides that the company may enter upon the lands and grounds of any person whatever, including His Majesty, and set out and ascertain such parts thereof as may be considered necessary for making the canal and the works connected therewith. The sixtieth section provides for the conveyance of the lands so set out and ascertained to the company. The sixty-first section provides that the company is to make satisfaction to the owners and occupiers of (*inter alia*) the lands taken by the company for the purposes of the Act, as well for the value of the lands so taken as for any damage to be sustained in making and completing the works, the amount of such satisfaction being in default of agreement determined in manner therein mentioned. The 112th section contains a reservation of minerals, and for the reasons stated by my noble and learned friend Lord Atkinson I do not think it has any application other than those underlying the lands actually taken by the company.

Before passing to the 113th section it will, I think, be convenient to remind your Lordships as to what is the effect with regard to rights of support of a conveyance containing a reservation of mines and minerals. Such a conveyance would clearly confer a right to have the surface, as distinguished from anything placed on the surface, of the lands the subject of the conveyance, supported both by the reserved mines and minerals and by the adjacent land of the grantor. Further, if the land were conveyed for a particular purpose within the contemplation of both parties, and involving the erection on the surface of buildings or works requiring additional support, the conveyance would confer a right to such additional support both by the reserved mines and minerals and by the adjacent lands of the grantor. It would seem to

follow that the concluding words of section 112 merely give effect to what would be the rights of support by subjacent mines and minerals if in the conveyance to the company these mines and minerals had been expressly reserved, and if the conveying parties had had notice of the particular purposes for which the company intended to use the lands conveyed. With regard to any rights of support by adjacent land of the conveying parties, these are left to the general law, except so far as the fifty-ninth section of the Act provides to the contrary. It is, I think, clear that every right of support acquired by the company would properly be taken into account in assessing the satisfaction payable under the sixty-first section of the Act.

Passing now to the 113th section, we find that it confers on the company certain additional powers. The first part of the section empowers it to enter upon any lands through or near which the canal or works may be or pass, wherein any mines shall have been opened, and also into such mines, and ascertain the distance of the canal and towing-paths from the working parts of such mines respectively. By the second part of the section, if it appears that any mine has been opened under the canal or any of the works belonging thereto, or so near thereto as to endanger or damage the same, and that such endangering or damaging has been wilful, the company is empowered to carry out certain protective work at the cost of the owners or proprietors of the mine. The third part of the section is as follows:—"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 or minerals to the owners or occupiers or other persons entitled to receive the same, to be ascertained or determined by two or more skilful persons appointed for the purpose by the Sheriff of the county in which such mines or minerals are situated."

Undoubtedly these words confer on the company, impliedly if not expressly, a power to require that any mines or minerals (whether underlying the canal or works or adjacent thereto) which in their honest opinion cannot be worked without endangering the safety of the navigation or the works belonging thereto, shall be left *in situ*, in which case the company must compensate the persons interested for the value of the mines or minerals so left. The short point which your Lordships have to decide is whether this power is, like the powers conferred by the previous parts of the section, permissive and discretionary, or whether it is obligatory, so that whenever the company is of opinion that the working of any mines or minerals will endanger the safety of the canal or works, it is bound to stop such mines or minerals being worked and to make good their value to the parties interested.

I have come to the conclusion that the power conferred is permissive and discretionary, and that its exercise is not obligatory even if the company have formed the *bona fide* opinion that there will be a danger to its navigation or works. The whole section is framed as a permissive, and not as a compulsory section, and the fact that the exercise of the power to stop the working is contingent, not upon its being necessary so to do for the safety of the navigation, but upon the company being of opinion that this necessity exists, points to the same conclusion. The mineowners may think that they can continue to work the mines without endangering the navigation or works connected therewith, and the company may hold the contrary opinion. In this case they clearly have the power of stopping the work, and if they do so must pay for the minerals as to which they exercise the power. But on the other hand, if they choose to rely on their remedy in damages in case the mineowners contrary to the provisions of the Act, or contrary to the general law, work the minerals so as to let down the surface or the buildings upon the surface of their land, they are, in my opinion, entitled so to do.

The practical difficulties which would arise on any other construction of the 113th section are not without significance. It was not, and could not be suggested that the actual necessity of stopping the working of the mines in order to secure the safety of the navigation was sufficient to bring into force the company's obligation to pay for the minerals. It was conceded that the company must be of opinion that this necessity existed before the obligation to pay for the minerals arose. But how can the company be compelled to form an opinion, and if it has formed an opinion, how is the fact to be proved, and how is it to be established to what minerals such opinion (if any) relates? If the power be discretionary no such difficulty will arise, for the company is not likely to require any minerals to be left *in situ* unless it be of opinion that the necessity for so doing exists, and by the notice exercising their power will specify the minerals required to be so left.

The difficulty I have mentioned is well illustrated in the present case. The company have given no notice requiring any particular minerals to be left *in situ*. The pursuers, however, have endeavoured to prove what opinion as to the necessity of stopping the work the company really entertains, and the particular minerals to which such opinion relates. They have tendered evidence to show that some 40 feet of minerals ought to be left *in situ* on either side of the canal, but the company's witnesses do not accept this. Forty feet may, they say, be necessary at some points, but considerably less at others. If the pursuers are right in the construction they place on the 113th section of the Act, it is almost impossible to make out from the evidence to what precise relief they would be entitled. It would vary from point to point along the course of the canal. It might extend to 40

feet of minerals at one point and considerably less at another point, but I find it almost impossible upon the evidence to specify with any degree of accuracy the particular minerals which at any particular point ought, for the safety of the navigation, to remain *in situ*, and it is still more impossible to specify what particular minerals the company thinks ought to be so left. In construing a section the meaning of which is ambiguous, considerations of this nature are not without relevance.

For the reasons I have given I think the power in question is discretionary and permissive, and in no way obligatory, and I am also of opinion that the company has not in the present case affected or even intended to exercise it. The appeal fails on this ground and it is unnecessary to determine any other point.

Their Lordships pronounced this order—

". . . 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 complained of in the said original appeal be, and the same are hereby, affirmed, except so far as they assoilzie the defenders from the first conclusion of the summons and so far as they refer to expenses: And it is hereby ordered that the said first conclusion do stand dismissed as unnecessary, no judgment being pronounced in this House on the subject of whether the seams of shale or oil-shale were embraced within the term 'mines and minerals' as used in the Act 57 Geo. III, cap. 56: And it is further ordered that the said cross appeal be, and the same is hereby, dismissed this House: And it is further ordered that the appellants in the original appeal do pay, or cause to be paid, to the said respondents in the original appeal the costs incurred by them in the Court of Session, and also the costs incurred by them in respect of the said original and cross appeals in this House, the amount of such last-mentioned costs to be certified by the Clerk of the Parliaments. . . ."

Counsel for the Appellants (Pursuers)—Clyde, K.C., M.P.—Hon. W. Watson, K.C., M.P. Agents—Hope, Simson, & Lennox, W.S., Edinburgh — Grahames, Currey, & Spens, London.

Counsel for the Respondents (Defenders)—Sir Robert Finlay, K.C., M.P.—Macmillan, K.C. — Aubrey S. Lawrence. Agents — James Watson, S.S.C., Edinburgh — John Kennedy, W.S., Westminster.

COURT OF SESSION.

Friday, June 5.

FIRST DIVISION.

(SINGLE BILLS.)

NEWTON *v.* METHVEN.

Process — Appeal — Printing of Record — Failure to Print Amendments—C.A.S., D, iii, 1.

The Codifying Act of Sederunt, Book D, chapter iii, sec. 1, enacts — "The appellant shall . . . print and box the note of appeal, record, interlocutors, and proof, if any, . . . and if the appellant shall fail . . . to print and box . . . the papers required as aforesaid, he shall be held to have abandoned his appeal, and shall not be entitled to insist therein except upon being reponed as hereinafter provided."

In an appeal from the Sheriff Court where the prints of the record boxed did not contain adjustments made at the closing of the record, the Court *allowed* the appellant to box and lodge corrected prints.

Richard Newton, 46 Watson Street, Dundee, brought an action in the Sheriff Court at Dundee against J. C. Methven, "The Cottage," Lochee, Dundee, for payment of £100 as damages for injuries sustained in a collision between his (the pursuer's) motor cycle and the defender's motor car through, as he alleged, the fault of the defender's chauffeur. On 17th February 1914 the Sheriff-Substitute (NEISH) assoilzied the defender. The pursuer appealed.

On the case appearing in the Single Bills the appellant presented a note to the Lord President stating that he had, following the usual practice, printed the record from the certified copy initial writ; that the certified copy did not contain adjustments of parties put on at the closing of the record so as to correspond with the principal initial writ as adjusted; and that the record as printed was thus inaccurate. In these circumstances he craved leave to correct the record by including the amendments referred to.

Counsel for the respondent submitted that the Court had no discretionary power to grant the motion, and that the appeal was therefore incompetent. He cited — C.A.S., D, iii, 1; *Taylor* v. *Macilwain*, October 18, 1900, 3 F. 1, 38 S.L.R. 1; *Lee* v. *Maxton*, February 2, 1904, 6 F. 346, 41 S.L.R. 281; and *Bennie* v. *Cross & Company*, March 8, 1904, 6 F. 538, 41 S.L.R. 381.

LORD PRESIDENT—In this case the failure, as I understand, has been to print the adjustments which were made in the Sheriff Court upon the open record, and there are mere inaccuracies to be corrected. The appellant proposes to box clean prints giving effect to these adjustments, and seeks to be allowed to do so. The record has been printed and boxed timeously, and