"Petitions are occasionally presented to the Court for authority to complete titles to bonds in like circumstances to the present, and powers are granted; but the Accountant is inclined to be of opinion that if the principle of the decision in *Wills'* case be followed, special powers to complete a title and discharge, as desired by the borrower's agents, are not necessary, and that a discharge by the *curator bonis* of the debt due to the ward is sufficient.

"If powers to complete titles are necessary, the Accountant is of opinion that the title should be completed in name of the ward and not in the name of the *curator bonis*."

The curator thereupon presented a note to the Court for authority to complete a title and grant a discharge of the bond, upon which the Lord Ordinary officiating on the Bills (KINCAIRNEY) pronounced the following interlocutor:—

> "The Lord Ordinary officiating on the Bills having considered the note No. 67 of process, Refuses the same as unnecessary, and decerns: Dispenses with the reading of this decree in the minute-book: Finds that the expenses of the note and relative procedure, as the same shall be taxed by the Auditor, form a proper charge against the ward's estate," &c.

Counsel for the Noter—Cook. Agents—Webster, Will, & Ritchie, S.S.C.

Tuesday, May 16.

SECOND DIVISION.

[Lord Low, Ordinary.

EARL OF HOPETOUN *v.* NORTH BRITISH RAILWAY COMPANY.

Railway—Mines and Minerals—Shale in Banks of Cuttings — Construction of Special Act and Disposition following thereon.

A special Act of Parliament in 1838 authorising the making of the Edinburgh and Glasgow Railway enacted that in the price of the lands to be purchased by the railway company from the Earl of Hopetoun was to be included "the value of the whole stone, lime, coal, ironstone, silver, tin, lead, or slate which may require to be dug up or excavated in the formation of the said railway through the said lands."

By deed of submission between the Earl and the railway company, dated in 1839, "all the claims of the Earl for the agricultural value of the lands to be taken over by the railway company, and for the value of any stone or minerals to be taken and used by the said railway company out of the said estates," were referred to arbiters and oversman, and in terms of the decreet-arbitral following thereon a disposition of land was granted by the Earl in favour of the company, "excepting from the said conveyance and reserving to me and my foresaids all freestone, coal, ironstone, limestone, slate, or other mines or minerals under" the land conveyed.

Held that the railway company were not under the said disposition and Act of Parliament the owners of the "minerals," including under that term "shale," above the formation level of the railway forming part of the sides of cuttings through which the railway ran, and within the railway company's fences.

Under the Act of 1838 (1 and 2 Vict. cap. 58), which authorised the making of the said Edinburgh and Glasgow Railway, now incorporated with the North British Railway Company, it is enacted by section 28—"That in the price of the land to be purchased from the said Earl of Hopetoun, there shall be included the value of the whole stone, lime, coal, ironstone, silver, tin, lead, or slate which may require to be dug up or excavated in the formation of the said railway through the said lands; provided, nevertheless, that it shall be in the option of the said Earl of Hopetoun, and his heirs and successors, at any time to require the said company to lay down upon his or their property, at convenient places, not exceeding the distance of 100 yards from the places where such coal, ironstone, silver, tin, lead, or slate shall be dug or excavated, all such coal, ironstone, silver, tin, lead, or slate as aforesaid, which may be dug up or excavated after such option is declared, or such part thereof as the said Earl of Hopetoun, his heirs and successors, may think proper and direct, which the said company shall be bound to do; and in such case the said company shall not be bound or obliged to pay to the said Earl, or his heirs or successors, for any such coal, ironstone, silver, tin, lead, or slate as aforesaid so received by him or them."

By section 26 it is, *inter alia*, provided, "That in forming the said railway through the lands and estates belonging to said Earl of Hopetoun, the said company shall be bound, except in rock cutting, to smooth and carefully soil over and sow down with grass seeds the sides or slopes of the embankments, and of the cuttings through the said lands and estates of the said Earl, and to make such slopes not steeper than one and a-half horizontal to one perpendicular; and the said company shall further be bound to erect and constantly maintain on each side of the said railway, along the bottom of the embankments, and along the summit or top edge of the cuttings through the lands and estates of the said Earl (except in the inclosures at Craigton House and Niddry Castle on the side next the said house and castle to be fenced in manner after provided), a substantial dry stone wall, with cope on edge set in lime, at least four and a-half feet high from the finished surface of the outer side of the wall, and to keep and preserve the said

slopes or banks constantly in grass, which may be cut and carried away, but shall not be pastured with cattle, sheep, or other bestial; and it shall not be lawful to the said company, unless with consent of the said Earl or the proprietor of the estates of Hopetoun for the time being, to dig up, or to plant with trees, shrubs, or bushes, any part of the sides of the said embankments or cuttings, nor to use the same for any other purpose than cutting grass as before expressed: But declaring that the said company shall be entitled from time to time to perform such operations on the said slopes as may be necessary for maintaining the same; and further declaring that, in the option of the said Earl or of the proprietor of the Hopetoun estates for the time being, the said company shall be bound to plant the slopes or sides of the said embankments with trees, and to keep and preserve the same constantly in wood." . . . "Providing always, and be it enacted and declared, that the said Earl, or the proprietor of the Hopetoun estates for the time being, shall have the option, at any time previous to or within thirty days after being called upon by the said company in writing, to make his election of requiring the said company to erect and maintain the said enclosure-walls along the bottom in place of along the summit or top of the whole or any part of the said cuttings through the said lands and estates of the said Earl; and in case the said Earl or the proprietor of said estates for the time being shall think proper to avail themselves of this option in whole or in part, it is further hereby provided and enacted that the said company shall in that case have no right of property in those parts of the banks or slopes forming the sides of the said cuttings enclosed with a wall at the bottom thereof, but that those parts of the slopes or sides of the said cuttings which are so enclosed shall belong entirely to the said Earl or the proprietor of his said estates for the time being, and may be used in any way the said Earl or the proprietor of said estates for the time being may think proper; subject always, however, to this servitude and restriction, that they shall not be used in any manner which might be obstructive or injurious to the said railway communication or endanger the said slopes."

Further, by section 108 it is provided—"That nothing in this Act contained shall extend to give to the said company any coal, ironstone, limestone, slate, or other mines or minerals under any land purchased by the said company under the provisions of this Act, except only so much of such coal, ironstone, limestone, slate, or other mines and minerals as may be necessary to be dug or carried away, or used for the purposes of this Act (unless the said coal, ironstone, limestone, slate, or other mines and minerals shall have been expressly purchased or conveyed by the owner thereof to the said company), but all such coal, ironstone, limestone, slate, or other mines and minerals not necessary to be so dug, carried away, or used as aforesaid, shall (unless the contrary be expressed) be deemed to be excepted out of the purchase and conveyance of such lands; and may, subject to the restrictions hereinafter contained, be worked by the respective owners or lessees thereof under the said lands, or the railway or other works of the said company, as if this Act had not been passed."

And by section 109 it is *inter alia* provided and enacted as follows—"That when and so often as the owner, lessee, or occupier of any mines of coal, ironstone, limestone, slate, or other mines and minerals, lying under the said railway and works, or any of them, or within the distance of forty yards from such railway or works respectively, shall be desirous of working the same, then and in every such case such owner, lessee, or occupier shall give notice in writing to the said company, under his hand, of such intention, at least thirty days before he shall begin to work such mines; and upon the receipt of such notice it shall be lawful for the said company to inspect such mines, or cause the same to be inspected by such person as they shall appoint for that purpose; and if it shall appear to the said company that the getting or working of such coal, ironstone, limestone, slate, or other mines or minerals is likely to prejudice or damage the said railway or works, then it shall not be lawful for the said owner, lessee, or occupier to work or get the same, but the said company shall pay to the said owner, lessee, or occupier respectively full satisfaction or compensation for the loss and injury occasioned by such interruption; and in case the said company and such owner, lessee, or occupier do not agree as to the amount of such satisfaction, recompense or compensation, the same shall be ascertained, settled and apportioned by the verdict of a jury as is hereinbefore directed with respect to the lands which shall or may be taken for the purposes of this Act: Provided nevertheless, that in case the said company do not before the expiration of such thirty days treat with such owner, lessee, or occupier, for the payment of such satisfaction or compensation, then it shall be lawful for the owner, lessee, or occupier of such mines, and he is hereby authorised to work, and get such parts of the said mines as lie under the said railway and works or within the distance aforesaid; provided that in the working of any such mines or minerals no damage be wilfully or negligently done to the said railway or works, and that the said mines and minerals be not worked in an improper manner."

At the time of the formation of the railway, the railway company and John, Earl of Hopetoun, by deed of submission dated in 1839, referred to arbiters all claims and demands for the agricultural value, &c., of the lands and others to be then taken and occupied by the railway company, "and also all claim or demand for the value of any stone or minerals to be taken and used by the said railway company out of the said estates," all in terms of the agreement referred to in the said submis-

sion and of the 28th section of the said Act, "And, in general, all claims and demands for compensation or damages, of whatsoever nature or description the same may be, arising in, by, through or in consequence of the formation of the said railway and works therewith connected," and which then were or might thereafter in any manner of way be competent to the Earl. The arbiters having differed in opinion, the oversman under the submission awarded, by decreet-arbitral dated in 1846, to the Earl of Hopetoun certain sums, and directed a conveyance of 51 acres and 422 decimal parts of an acre of the Hopetoun estate to be granted in favour of the railway company, excepting therefrom all freestone, coal, ironstone, limestone, slate, or other mines or minerals under the said lands. The railway was opened for traffic in 1842. In the year 1847, after the slopes and fences were all formed and completed, so far as on the Hopetoun estate (the fences being at the top edge of the slopes), John Alexander, Earl of Hopetoun, with consent of his curators, and on the narrative of the submission and decreet-arbitral, granted a disposition in favour of the company of said 51 acres and 422 decimal parts of an acre, "excepting from the said conveyance, and reserving to me and my foresaids, all freestone, coal, ironstone, limestone, slate, or other mines and minerals under the said 51 acres and 422 decimal or one-thousandth parts of an acre imperial measure."

In the year 1884, John Adrian Louis, Earl of Hopetoun, let to Messrs James Ross & Company of Falkirk the shale and other minerals underlying certain portions of the Hopetoun estate near Philpstoun, also the minerals on both sides of and underlying the Edinburgh and Glasgow Railway. In the course of their operations their workings twice (in the years 1888 and 1891) ran in the direction of the railway in the vicinity of Philpstoun station. On each occasion the tenants intimated, as required by the Acts of Parliament, that they intended to work the minerals under the railway, with the result that the railway company purchased the minerals so far as under the formation level, and thereby allowed the minerals to remain unworked for the protection of their line. On each side of the railway are deep cutting slopes, within which the mineral tenants discovered that there was a large quantity of very valuable shale. In 1891 they intimated to the railway company that they proposed to work the shale in these slopes, but the railway company declined to allow them to do so, and refused to purchase the same for the protection of their line, at the same time claiming that the shale so far as within their fences and above the formation level belonged to themselves.

In these circumstances the Earl of Hopetoun raised an action against the railway company to have it found and declared "that the pursuer is the proprietor of the whole stone, coal, shale, ironstone, limestone, slate, and other mines and minerals in or under the whole land conveyed in 1847 to the railway company except the minerals purchased by them in 1888 and 1891," "and that the defenders are not the owners of the said stone, coal, shale, ironstone, limestone, slate, or other mines or minerals, or any part thereof, and have acquired no right thereto by said disposition of 1847 or otherwise: That the pursuer is entitled by himself or his tenants, or others deriving right from him, to work, win, and carry away the whole of the said stone, coal, shale, ironstone, limestone, slate, or other mines or minerals; subject always to such right (if any) as the defenders may have under or in virtue of the special Act of 1838," "or The Railway Clauses Consolidation Scotland Act 1845, section 71; or any other statute, to require the pursuer not to work the said stone, coal, shale, ironstone, limestone, slate, or other mines or minerals, or part thereof, on condition of the defenders paying or agreeing to pay to the pursuer full compensation for not working the same."

The pursuer pleaded—"(1) In respect of the terms of the statute and disposition of 1847 referred to, the pursuer is entitled to decree as concluded for. (2) The shale in question being the property of the pursuer, he is entitled to decree as concluded for."

The defenders pleaded—"(1) The defenders are entitled to absolvitor, in respect that the subjects in dispute belong to them. (2) *Separatim*—They alone are entitled to remove the minerals in dispute, on complying with the provisions of the 28th section of the special Act. (3) In any case the pursuer is not entitled to interfere with the subjects in dispute without the consent of the defenders, since they are within the boundaries of the land purchased by the defenders or their authors, and may at any time be required for the widening of their line or otherwise."

On 24th January the Lord Ordinary (Low) pronounced the following interlocutor:—"Finds that all minerals within the limits of the lands set forth and described in the conclusions of the summons, acquired from the pursuer's predecessor by the Edinburgh and Glasgow Railway Company, now represented by the defenders, above the formation level of the railway constructed by the said company, and now belonging to the defenders, and forming part of the sides of cuttings through which the said railway runs, belong to the defenders. To that extent assoilzies the defenders from the conclusions of the summons, and decerns; and *quoad ultra* finds, decerns, and declares, in terms of the conclusions of the summons, &c.

"*Opinion.*—I am of opinion that this case is ruled by the decision of the First Division in the case of *Nisbet Hamilton* v. *The North British Railway Company* (13 R. p. 454).

"It is true that that decision turned upon the construction of certain sections in the Railway Clauses Act of 1845; while the present question is in regard to the provisions of the special Act (1 and 2 Victoria, cap. 58) passed in 1838, under which the Edinburgh and Glasgow Railway was

constructed. The sections to be construed are, however, almost identical in the two cases, and obviously the same considerations fall to be taken into account in construing both statutes.

"The question in the case of *Nisbet Hamilton* was, whether rock within the limits of the land acquired by the company, above the level of the railway line, and forming the sides of a cutting, belonged to the railway company, there being no express conveyance to them of mines and minerals. The Court held that the company was entitled to all the minerals in the lands conveyed to them down to the level of the line, whether dug or carried away or used in the actual construction of the railway or not.

"The case turned upon the construction of the 70th and 71st sections of the Railway Clauses Act.

"The portion of the Act in which these sections occur is prefaced by the general words—'and in respect to mines lying under or near the railway.'

"The 70th section enacts that, unless expressly conveyed, the company shall not be entitled to any minerals 'under land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works.'

"The 71st section enacts that if the owner or lessee of minerals 'lying under the railway,' or within a certain distance therefrom, desired to work the minerals, he should give notice to the company, who should have the option of purchasing the minerals.

"It will be observed that while the general preamble and the 71st section speak of minerals lying under or near the railway, the words used in the 70th section are 'under any land purchased by' the company.

"Miss Nisbet Hamilton accordingly maintained that as the rock in question lay under land purchased by the company, and as minerals were not specially conveyed to the company, the rock must be held not to belong to them, in terms of the 70th section.

"The main grounds upon which the judgment of the Court proceeded I take to have been these—Before entering upon the lands and proceeding to execute their works, the Company must pay the price of the lands, and must also pay for all damage which the execution of the works may cause, once for all. After obtaining the lands the company has power to dig, carry away, and use the whole minerals within the limits of the lands, down to the level of the line, if that is necessary for the construction of their works. It cannot be known before the execution of the works how much of the minerals above the level of the railway the company may require to carry away or use. It is therefore to be presumed that the owner has claimed and has been settled with on the footing, that the company will execute their power to the full extent, that is, that the whole mineral above the construction level will be carried away or used. The owner, on the one hand, does not claim upon the footing that a quantity of mineral undetermined is to be carried away or used, and the company, on the other hand, must pay for everything which they have right to carry away and use, that is, the whole minerals above the level of the line, and within the limits of the lands.

"The Court also founded to some extent upon the words in the preamble and in the 71st section, 'under or near the railway,' but the substantial ground of judgment appears to me to be that which I have stated.

"In the present case, although the summons concludes for declarator in general terms that the pursuer is entitled to all the minerals in or under the whole lands acquired from him by the company, the only matter in regard to which there is any dispute between the parties is in regard to shale, which is contained in the sides of a cutting near Philipstoun. The subject of dispute, therefore, is the same as that in the case of *Nisbet Hamilton*.

"The most important sections in the special Act are the 28th, the 108th, and the 109th, which are quoted in articles 2 and 3 of the condescendence.

"By the 28th section it is provided that in the price of the land to be purchased from the Earl of Hopetoun there shall be included the value of the whole stone and other minerals 'which may require to be dug up and excavated in the formation of the said railway.' The option is then given to Lord Hopetoun to require the company to hand over to him all minerals which shall be dug up or excavated, in which case the company shall not be obliged to pay for such minerals. The option was not exercised by Lord Hopetoun, and it is the first part of the section which requires to be construed in this case.

"The 108th and 109th sections are practically identical with the 70th and 71st sections of the Railway Clauses Act.

"There is therefore this difference between this case and that of *Nisbet Hamilton*, that whereas in that case there was only the general provisions of the 70th and 71st sections of the Railway Clauses Act—represented in this case by the 108th and 109th sections of the special Act—to be construed, there is in this case also the special section, the 28th, applicable to the Hopetoun estates, to be considered.

"The scheme of the special Act is this. It first deals with particular estates through which the line is to pass, and makes special provisions applicable to these estates. The 28th section is one of those dealing with the Hopetoun estate, and there is a similar provision in regard to the estate of Lord Dundas in section 34. Then sections 108 and 109 apply generally to all land purchased under the provisions of the Act.

"The question therefore comes to be, whether the special provisions in the 28th section take this case out of the rule laid down in *Nisbet Hamilton*, because, if they do not, the only distinction between the cases is, that in the special Act the 108th

and 109th sections are not preceded by the general explanatory words with which the 70th and 71st sections of the Railway Clauses Act are prefaced. That, however, is not, I think, a matter of any importance, because I apprehend that the decision in *Nisbet Hamilton* would have been the same if the Act had not contained the words of preface.

"Apart from that, the only difference between the two cases appears to me to be, that in the *Nisbet Hamilton* case the Court had only to construe the negative enactment that the company should not be entitled to any minerals under any land purchased by them except such part as should be necessary to be dug, carried away, or used in the construction of the works, while here there is not only that enactment but a positive provision that the price to be paid by the company shall include the value of the minerals which may require to be dug up or excavated in the formation of the railway. It seems to me that this distinction amounts to no more than that while the Railway Clauses Act only declares that the company shall not be entitled to certain minerals, the special Act provides in addition that they shall be bound to purchase certain other minerals.

"It was also pointed out that the 28th section does not contain the words 'or used,' which occur in the 70th section of the Railway Clauses Act and the 108th section of the special Act. It was therefore argued that what the Company were entitled (and bound) to purchase under the 28th section were only such minerals as they might require actually to dig up or excavate in the formation of the railway.

"But here I think that the argument which prevailed in *Nisbet Hamilton* is applicable.

"The company was bound to pay the purchase price before entering upon the lands and proceeding with their works. But until their works were executed it was impossible to say how much of the shale the company might require to excavate; and, upon the other hand, their right was to excavate the whole shale, if they found that to be necessary, within the limits of the lands purchased. I must assume therefore—there is nothing said to the contrary—that Lord Hopetoun claimed and was paid upon the footing that the Company might, if they found it to be necessary, excavate the whole of the minerals down to the construction level of the railway.

"It was further argued that this case could be distinguished from that of *Nisbet Hamilton*, in that there was no mention of minerals made in the disposition, while here all mines and minerals were expressly excepted. I am of opinion that the terms of the disposition do not aid the pursuer. Because, apart from the question whether, there being no special bargain, the terms of the disposition could prevail against the provisions of the Act of Parliament, it is plain that the exception and reservation of minerals in the disposition cannot be construed literally. The disposition is of the lands acquired by the company, and it is not disputed that they acquired the minerals so far as they might require to dig or excavate them. The reservation and exception therefore must be qualified to the extent of excepting from it those minerals. But if they are excepted it is simply by virtue of the provisions of the 28th section. It follows, therefore, that all minerals to which the company have right upon a sound construction of the 28th section, are excepted from the reservation of minerals in the conveyance.

"I am therefore of opinion that the present case does not differ in any material particular from that of *Nisbet Hamilton*, and is ruled by the decision in that case."

The pursuer reclaimed, and argued—The Lord Ordinary's judgment was erroneous. It was based entirely on the case of *Nisbet Hamilton* v. *North British Railway Company*, January 15, 1886, 13 R. 454. That case did not apply; its circumstances were quite distinct from the present. It was decided on construction of section 70 of the Railway Clauses (Scotland) Act 1845 (8 and 9 Vic. cap. 33. In this case a special Act had to be construed. No section like section 28 of the special Act occurred in the Railway Clauses Act, and the argument in *Nisbet Hamilton* being based entirely on the latter Act did not apply. The words "or used" which occurred in the 70th section of the Railway Clauses Act did not occur in section 28 of the special Act, and it was only minerals excavated in the formation of the railway which were included in the price of the lands under section 28. Besides, in the disposition following on the Act minerals were expressly reserved, while there was no express reservation of minerals in the case of *Nisbet Hamilton*. If the latter case was held to determine this case, the result would be that the railway company in fixing the price to be paid to a proprietor would have to pay for the minerals on both sides of their line within the fences, even although these minerals were not excavated in the formation of the line. Authorities founded on—*Great Western Railway Company* v. *Bennett*, March 18, 1867, L.R., 2 H. of L. 27; *Midland Railway Company* v. *Robinson*, December 9, 1889, L.R., 15 App. Cas. 19. Shale was included in the term minerals—*Ruabon Brick and Terra Cotta Company* v. *Great Western Railway Company*, December 6, 1892, L.R,. 1893, 1 Ch. 427.

Argued for the defenders—The Lord Ordinary's judgment was right. (1) The railway company were the owners of the slopes at the side of the railway within their fences and everything in these slopes, both in terms of their disposition and of the Railway Acts. Under both the Railway Clauses Act and the special Act the scheme proposed was that the railway company should schedule certain lands for the formation of their railway, and that in purchasing these lands they bought everything down to formation level. In the price paid for the lands was included the amount of all damage done to the land. The slopes at the side of the railway

were as much a part of the works of the railway as anything else, and the minerals in the slope were as much minerals taken in the construction of the railway as those actually removed during the formation of the line. The whole minerals above the formation level and within the fences of the railway company had been bought and paid for, and the reservation of minerals in the disposition did not apply to anything above the formation level. (2) The reservation was limited to certain specified substances which did not include shale. Shale was not a mineral included in section 28 of the special Act, which must be strictly construed. Its value was not known in 1838, and it was in the same position as rotten rock or common earth.

At advising—

LORD JUSTICE-CLERK—The defenders' predecessors obtained in 1838, at the time of the making of the Edinburgh and Glasgow Railway, a special Act by which the construction of that line was authorised. I think that that Act—together with the disposition by Lord Hopetoun—gives the law of this case. Had I thought that the question was ruled by the case of *Nisbet Hamilton*, I should have thought it necessary to give very careful consideration to that decision and the grounds stated by the judges who decided it, which seem to me to be such as might require reconsideration. But that decision does not, in my opinion, rule the present case. It was a decision upon the Railway Clauses Acts, and we are here dealing with the special Act of 1838, and with the disposition which Lord Hopetoun granted in terms of it.

The disposition granted by Lord Hopetoun and accepted by the defenders' predecessors as giving them the right which they had acquired is quoted on record, and is as distinct as could be. It bears that the granter dispones a certain piece of land rather exceeding 51 acres, "but always for the purposes, with the powers, and under the restrictions contained in the said Act of Parliament, and excepting from the said conveyance, and reserving to me and my foresaids all freestone, coal, ironstone, limestone, slate, or other mines or minerals under the said 51 acres." . . . When we turn to the special Act we find that by section 28 it is provided "that in the price of the land to be purchased from the said Earl of Hopetoun there shall be included the value of the whole stone, lime, coal, ironstone, silver, tin, lead, or slate which may be dug up or excavated in the formation of the said railway through the said lands." That means that as the railway could not be made without interference with the ground, and that in doing so minerals might be removed, the value of these must be included in the price, with this proviso, that there is an option to the Earl of Hopetoun to require the company to lay down these minerals for him at a convenient place, in which case the company was not to pay the price.

Now, what was done by the disposition was quite consistent with that clause. The minerals belonged to Lord Hopetoun, and the railway company got no right to any minerals. If the company took them out they were to pay the price. If the Earl of Hopetoun required them to lay them down and leave them to him they were not to pay the price. That is all in consonance with the reservation in the disposition. The company had power to remove the minerals—if necessary to cut down to the level of the line. Removing them, they were either to lay them down for the owner or pay the price to the owner. Now, that being the state of matters as to mineral which was taken out in forming the line, I do not see how the company obtained right to any minerals at all. Those in the banks are included in the reservation which I have read. But it is said that sections 108 and 109 make a difference. Section 108 is as follows—[*His Lordship quoted the section*]. I think that there is nothing in that section which helps the case of the defender. It is a section which provides that nothing in the Act gives the railway company right to any minerals except so much as is dug out in the course of forming the line. Then section 109 is simply a section directing what is to be done in the event of the proprietor of the land or a mine-owner desiring to work out the minerals, and in so doing to approach near to or pass under the line so as to cause risk to its stability or working. The restriction it contains is that the proprietor of the minerals must give notice to the company of his intention, and the railway company may stop his operations within a certain distance from the line on making compensation. But we have not here any case of that class. We are not considering the interruption of the workings or the effect upon the line, but the demand of the proprietor to a declarator of his property. If Lord Hopetoun or his tenants propose to work close to the line, notice must be given to the company, and they will have an opportunity of protecting themselves from injury. But the sole question here being one of property, I can find nothing in the Act—as there is certainly nothing in the disposition—to prevent the pursuer obtaining the decree of declarator which he seeks, and I move your Lordships to recal the interlocutor of the Lord Ordinary and granting decree to the pursuer in terms of the conclusions of the summons.

LORD YOUNG—The Lord Ordinary considers this case to be ruled by that of *Nisbet Hamilton*. I rather gather from his note that but for that case he would have come to a different conclusion. Now, I think that that case is not applicable and does not govern the case before us. We have here a conveyance of ground which the company had right to take under their private Act, which conveyance expresses the understanding of the parties, and which expressly reserves to the disponer the minerals in the ground. The conveyance was postponed, as was pointed out to us, until the price had been fixed by arbitration,

which was done upon the footing that the conveyance should contain the reservation which was inserted in it. The narrative clause of the disposition I observe narrates that the oversman decreed that the conveyance should be one "excepting . . . all freestone, coal, ironstone, limestone, slate or other mines or minerals under the said lands." It is difficult, I think, to see any reasonable objection to this declarator of that right which was so expressly reserved. The one word used in the declaratory conclusion which is not in the decree-arbitral or the reservations in the conveyance itself is "shale." We know that in the *Torbanehill* case there was much litigation as to whether shale could be accounted coal in the sense of a lease, but there was even then no dispute that shale was a mineral. But if there be any question on that head it was not argued to the Lord Ordinary nor mentioned on record, and I deal with the case on the footing that the declarator is a declarator of what is contained in the decree arbitral and the reservation clause of the disposition.

Now, I observe that the clause of reservation is, as the defenders argue, to be interpreted with reference to the special Act. But the only clause said to be inconsistent with the reservation is the 28th. I see in that clause nothing inconsistent with the declarator asked or the reservation on which that declarator proceeds. Notwithstanding the declarator the railway company would still be entitled to remove minerals if that was necessary for the construction of their line, either handing them over to the Earl, or paying their price as provided in the Act of Parliament.

I think that the pursuer is entitled to the declarator which he seeks.

LORD RUTHERFURD CLARK—I concur. We must determine the question by referring to the date on which the defenders granted the disposition. I therefore set aside the case of *Nisbet Hamilton* as having no bearing on this case. I am satisfied on looking into the conveyance that it contains an express reservation of minerals, and the disponee gets no title whatever to them under the conveyance. This, so far as I can see, is his only title, and I think it is consistent with the terms of the statute. I think that we should give decree of declarator, and that we can properly include shale in the decree, as I think shale is included in the expression minerals.

LORD TRAYNER—I agree with the conclusion arrived at. The Earl of Hopetoun was in 1838 proprietor of the land and the minerals, and he gave part of his property to the defenders' predecessors by disposition. They obtained no more than he gave them by that disposition, and it was subject to an express reservation of minerals. The defenders' predecessors therefore took nothing by the disposition; under their title they have no right to the minerals whatever. They were, and still are, the property of Lord Hopetoun, the pursuer, unless they were conveyed from him by some other authority than that conveyance, which did not convey them. The defenders say that they became their property in consequence of Act of Parliament—being section 28 of the special Act. I agree with your Lordships that that section does not give them any such right or impinge in any way on Lord Hopetoun's right to the minerals. Therefore, on the ground that the Earl of Hopetoun is proprietor of the minerals, and that his rights thereto are not trenched on by the disposition, I think he is entitled to the decree of declarator which he asks for.

The Court recalled the interlocutor of the Lord Ordinary, and granted decree in terms of the conclusions of the summons.

Counsel for the Pursuer—Dickson—C. K. Mackenzie. Agent—James Hope, W.S.

Counsel for the Defenders—Rankine—Jameson. Agent—James Watson, S.S.C.

Wednesday, May 17.

FIRST DIVISION.

R. & C. ROBERTSON, PETITIONERS.

Diligence — Bill — Messenger-at-Arms—Sheriff-Officer.

The petitioners were holders of a bill which the acceptor had failed to meet when it fell due. The bill had been protested, the protest had been recorded and extracted, and a charge given to the acceptor. The petitioners stated that the acceptor was possessed of property and effects in Shetland, and that there was no messenger-at-arms resident in Orkney or Shetland, and they craved the Court "to grant warrant to any sheriff-officer in Shetland or Orkney to carry into execution the said extract registered protest by arrestment, poinding, and sale, and other competent diligence." The Court *granted* the application.

Counsel for the Petitioners—Galloway. Agents—Carmichael & Miller, W.S.

Thursday, May 18.

SECOND DIVISION.

[Sheriff of Inverness, Elgin, and Nairn.

MOORE *v.* REID.

Reparation — Slander — Charge of Dishonesty against Servant in Inn by Resident therein—Malice—Privilege.

A maidservant in a hotel raised an action for damages for slander against a resident in the hotel. The pursuer averred that while she was cleaning