Reid to Paton, in order that Paton might give Reid credit or money, but that Scott made statements — false and fraudulent statements — to Paton in order that the bank might get from Paton payment of part of the debt which Reid owed to the bank. I entertain no doubt that what Scott is said to have done was done by him in the course of his service, and in that sense within the scope of his authority, and for which, consequently, the bank is answerable. It is not to be lost sight of in connection with this point that the bank are retaining the benefit which (according to averment) they obtained through their agent's fraud.

LORD RUTHERFURD CLARK was absent.

The Court pronounced the following interlocutor:—

"Recal the interlocutor reclaimed against; open up the record and allow the pursuers to add an additional plea thereto; and the addition having been made, of new close the record and appoint the pursuers to lodge issues within ten days; find the pursuers entitled to expenses since the date of said interlocutor."

Counsel for Pursuers — Dickson — Salvesen. Agent—J. Smith Clark, S.S.C.

Counsel for Defenders The Clydesdale Bank, Limited—Asher, Q.C.—Ure—King. Agents—Ronald & Ritchie, S.S.C.

Counsel for Defender Alexander Scott—Sol.-Gen. Murray, Q.C.—King. Agents—Ronald & Ritchie, S.S.C.

Tuesday, October 29.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

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

Railway—Compulsory Purchase—Omission to Purchase through Mistake or Inadvertency—Lands Clauses Consolidation Act 1845 (8 *Vict. c.* 19), *sec.* 117.

By sec. 117 of the Lands Clauses Consolidation Act 1845 it is enacted, that if at any time after the promoters of the undertaking shall have entered upon any lands, which they were authorised to purchase, any person should appear to be entitled to any estate, right, or interest in, or charge affecting such lands, which the promoters should, "through mistake or inadvertency," have failed or omitted duly to purchase, or to pay compensation for, then whether the period allowed for the purchase of lands shall have expired or not, the promoters should be entitled to purchase such omitted estate, &c., the purchase money to be settled by arbitration in like manner as if the promoters had purchased the omitted estate, &c., before entering on the lands.

Held that where the promoters of a railway undertaking had never manifested any intention, while their compulsory powers existed, of taking any of the minerals lying under the lands acquired by them, except such as were situated above the authorised formation level of the railway, they were not entitled under this section afterwards to acquire minerals situated below formation level at a price to be settled by arbitration in terms of the statute.

Railway—Mines and Minerals—Formation Level — Compensation — Damages—Measure of Damages.

The promoters of a railway undertaking who had acquired ground, the title to which expressly reserved the minerals to the superior, worked out the whole freestone above formation level, and a large quantity of the freestone below formation level, sold some of it, and used the rest for the construction of stations, sidings, and other purposes connected with the undertaking.

Held that, as regards the freestone below formation level, the superior was entitled to damages, and not merely to statutory compensation, and that the measure of the damages was the price which the company would have required to pay for the stone if they had purchased it in the market, less the expenses of working and bringing it to the surface, and not the value of the stone *in situ* to the superior.

Livingstone v. *Rawyards Coal Company*, February 13, 1880, 7 R. (H. L.) 1, *distinguished.*

Railway—Mines and Minerals—Reserved Minerals—Sub-Reservation in Favour of Vassal.

By the terms of a feu-contract the minerals were reserved by the superior, but it was declared that it should be lawful for the feuar to dig or work the freestone on the said piece of ground, "for erecting houses and offices or walls and other buildings upon the said piece of ground, or for making or repairing roads thereon."

Held that a railway company who had acquired the feu, were entitled to work out and use the freestone for the erection of stations, sidings, or other buildings connected with their undertaking so far as situated upon the feu so acquired, and for the construction and repair of their line within the limits of the feu.

In 1847 James Davidson of Ruchill disponed to Thomas Allan and his heirs and assignees whomsoever two plots of ground. The disposition was made subject to the following reservation:—"Reserving to the said James Davidson, and his heirs, successors, and assignees whomsoever, superiors of the said piece of ground, the whole coal, ironstone, freestone, and

other metals or minerals whatsoever in the said piece of ground, and full power and liberty, either by themselves or others, to work, win, and carry away the same . . . Declaring that, notwithstanding of the above reservation, it shall be lawful to and in the power of the said Thomas Allan and his foresaids, his heirs and assignees whomsoever, to dig or work the freestone in the said piece of ground hereby disponed, for erecting houses and offices or walls or other buildings upon the said piece of ground, or for making or repairing the roads thereon, but he and they are hereby expressly restricted from selling any part of the said freestone, or disposing of the same to any other purpose or use whatsoever." . . .

In January 1891 the Caledonian Railway Company, acting under the powers of the Acts 51 and 52 Vict. c. 194 (Glasgow Central Railway Act) and 52 Vict. c. 12, gave notice to the trustee of the then deceased Thomas Allan to treat for the compulsory purchase of the two plots of ground. In the course of the negotiations for the purchase, but after the period allowed by the Acts for giving notice for compulsory purchase had expired, it came to the knowledge of the Railway Company that Mr Allan's titles contained the reservation above narrated in favour of the superior. In consequence of this reservation the conveyance by Mr Allan's trustee to the Railway Company, which was dated 26th July 1892, conveyed the two plots of ground, "together with . . . the mines, metals, and minerals (including therein the freestone rock) under and within the lands, . . . in so far and to such extent only as I, as trustee foresaid, have right to the said mines, metals, minerals, and freestone."

Thereafter the Caledonian Railway Company began to excavate the freestone under the land. In August 1892 the agent for the superiors, the trustees of the deceased James Davidson, complained to the company that they were quarrying his clients' freestone without having acquired it or paid for it. The Railway Company took up the position that they were acting within their rights, and continued to work and use the freestone down to formation level, and to a small extent below it. Thereupon Mr Davidson's trustees brought an action against the Railway Company concluding for declarator that they were sole proprietors of the whole coal, ironstone, freestone, and other metals or minerals in the ground, and that the defenders had no right therein, and for payment of £16,000 as damages for freestone alleged to have been removed by the Railway Company.

The defenders maintained that under their titles they were entitled to work out and remove the freestone so far as it was necessary for the construction of their railway and works. Further, in January 1894 they obtained leave to amend their defences by averring that if decree should be pronounced in terms of the declaratory conclusions, then the omission to serve notice on the pursuers was occasioned by mistake or inadvertence on the part of the defenders, and that they were entitled and intended to take the minerals as an omitted interest under and in terms of the 117th section of the Lands Clauses Consolidation Act 1845, and to pay compensation therefor as the same might be fixed by arbitration in terms of the Lands Clauses and the Railway Clauses Consolidation Acts 1845; and they therefore pleaded, *inter alia*, that in the event of their being so entitled the petitory conclusions of the summons were incompetent.

On this branch of the case the pursuers denied that the defenders had omitted to purchase the minerals through mistake or inadvertence, and pleaded — "(8) The defenders not having omitted through mistake or inadvertence to purchase the rights and interests of the pursuers in the said freestone, and the powers of compulsory purchase conferred upon them by their statutes libelled having now expired, are not entitled to acquire the said freestone or to have the pursuers' present claims against them in respect of their having taken the same determined by arbitration under the Lands Clauses Consolidation (Scotland) Act 1845."

By section 117 of the Lands Clauses Consolidation (Scotland) Act 1845 (8 Vict. cap. 19) it is enacted—"If at any time after the promoters of the undertaking shall have entered upon any lands which under the provisions of this or the special Act, or any Act incorporated therewith, they were authorised to purchase, and which shall be permanently required for the purposes of the special Act, any party shall appear to be entitled to any estate, right, or interest in, or charge affecting, such lands which the promoters of the undertaking shall through mistake or inadvertence have failed or omitted duly to purchase or to pay compensation for, then whether the period allowed for the purchase of lands shall have expired or not, the promoters of the undertaking shall remain in the undisturbed possession of such lands, provided within six months after notice of such estate, right, interest, or charge, in case the same shall not be disputed by the promoters of the undertaking, or in case the same shall be disputed, then within six months after the right thereto shall have been finally established by law in favour of the party claiming the same, the promoters of the undertaking shall purchase or pay compensation for the same . . . and such purchase money or compensation shall be agreed on or awarded and paid in like manner as according to the provisions of this Act the same respectively would have been agreed on or awarded and paid in case the promoters of the undertaking had purchased such estate, right, interest, or charge before their entering upon such lands, or as near thereto as circumstances will permit."

A proof was allowed. The evidence showed that freestone appeared to be the only metal or mineral in the land. The defenders had excavated all the freestone above the authorised formation level of the line, but down to the date of the raising of the action they never intended to take, and, except to a slight extent, had not in fact taken, the freestone below the

authorised formation level, their evidence regarding the freestone taken being in conformity with their original defence that they were entitled under their conveyance from Allan's trustees to work out and remove all the freestone above formation level, and so much below as was necessary for the construction of their railway and works.

On 1st June 1894 the Lord Ordinary (STORMONTH DARLING) pronounced an interlocutor granting decree of declarator, and finding that the defenders under the 117th section of the Lands Clauses Consolidation (Scotland) Act, 1845 were entitled to purchase or pay compensation for the pursuers' estate, right, and interest in the minerals in question on the terms and in the manner set forth in the said section.

"*Note*— . . . The next question is, whether the defenders have brought themselves under the 117th section of the Lands Clauses Act. If so, they say on record that they are willing and intend to purchase the pursuers' minerals (by which I understand they mean the whole minerals), and to pay compensation therefor as the same may be ascertained in terms of the statutes.

"On that part of the case I am with the defenders. The purpose of the 117th section is to provide that when promoters have entered on lands which they were authorised to take, and have discovered that there is some estate right or interest in such lands which by mistake or inadvertency they have omitted to purchase, they shall nevertheless remain in undisturbed possession, provided they purchase or pay compensation for the same within a certain prescribed time. The time varies according as they admit or dispute the estate, right, or interest so emerging. In the present case the defenders have disputed it, for they have maintained to the last that they themselves acquired the minerals (down to formation level) by their purchase of the subject. Still the Act says they shall have the right of purchasing within six months after the right has been finally established by law. It seems to me that all the conditions are present which are required by the Act. The defenders had entered on the lands before they knew anything about the pursuers' interest in the minerals. They did not actually know till June 1892, when they examined the titles. They might no doubt have known two months earlier, because the titles were sent to them in April. But long before that earlier date they had begun to work the freestone, and that seems to me enough to let in the 117th section. . . . I do not quite understand why the pursuers resisted the defenders' case of 'mistake or inadvertency.' They cited two English cases—*Martin*, 1 Ch. App. 501, and *Stretton*, 5 Ch. App. 751—in which the plea of mistake was held not to have been made out. *Martin's* case I confess I do not follow, but *Stretton's* was a case of something very like fraud, because the company knew perfectly well before they entered on the lands that the claimant was proprietor of a portion of the land on which they were entering. It is therefore quite distinguishable from the present case, where the mistake was a perfectly honest one."

The pursuers reclaimed, and at the hearing conceded that with respect to the minerals above the authorised formation level, the rights of the parties fell to be settled by arbitration in terms of the statutes.

At advising (on 19th July 1894, 21 R. 1060)—

LORD JUSTICE-CLERK—The pursuers' counsel having stated that they are willing that any question which may be between the parties regarding the minerals above the authorised formation level of this line of railway may be reserved to be settled by arbitration, we are now in the position of having to deal solely with the question regarding the minerals under the authorised formation level. The Railway Company say that through inadvertence they did not include such minerals in their notices, and that they wish to get the benefit of the clause in the Act which provides for such cases of inadvertence. Now, I am unable to see that there has been any inadvertence here. I am unable to see that there is anything to show that the Railway Company intended to take the minerals below the authorised formation level. Indeed, in the course of this debate we were practically told that so far from the company having any intention of taking the minerals, they have never taken them at all. That was part of their case as regards the minerals below formation level—that if anything below the formation level has been taken it is something very trifling, and was taken solely because of the bad character of the strata at the particular point. There was no inadvertence, and the company's powers of taking have expired. Therefore the question now is, if they have taken any such minerals, how compensation for these minerals is to be decided. They had their rights under their notice to Allan's trustee, and the superiors have their rights subject to Allan's rights and subject to such rights on the part of the Railway Company as Allan's trustee gave them by transfer. Beyond that they got nothing. I think therefore that the proper course is to allow a proof in regard to the minerals below formation level.

LORD YOUNG concurred.

LORD RUTHERFURD CLARK—I am clearly of opinion that the Railway Company never manifested any intention, while their compulsory powers existed, of taking anything below the formation level, and consequently I think there is no case of inadvertence under the 117th section. The result is that they must pay for the minerals below the formation level which they may have taken, and we must allow a proof upon that matter and also of any facts necessary to show the extent of the use they have made under their title.

LORD TRAYNER concurred.

The Court pronounced the following interlocutor:—"Find that the pursuers are sole

proprietors of the whole coal, ironstone, freestone, and other metals or minerals in the two pieces of ground mentioned in the summons, subject to the rights conferred upon Thomas Allan, and conveyed by his trustee to the defenders: Allow both parties a proof of their respective averments on record in regard to the freestone and other minerals situated in the said pieces of ground, so far as lying below the authorised formation level of the railways to be constructed thereon by the defenders in terms of the Act 51 and 22 Vict. cap. 194, reserving to the pursuers any claim they may have for the value of the coal, ironstone, freestone, and other metals or minerals in the said lands above the authorised level of said railway, to be determined by arbitration in terms of the statute," &c.

In terms of this interlocutor the Lord Ordinary (STORMONTH DARLING) heard proof, and on 3rd July 1895 pronounced the following interlocutor:—"Finds that the defenders have excavated and removed freestone belonging to the pursuers below the authorised formation level of the railway to the value of £4657, 7s., for which sum decerns against the defenders, &c.

"*Note.*—What I have to do under the judgment of the Second Division is to ascertain a sum of money which will indemnify the pursuers for the wrongful act of the defenders in appropriating the pursuers' freestone, so far as lying below the authorised formation level of the railway, in a small plot of ground at Maryhill. Of the freestone in that situation the defenders have taken a portion and left a portion. With the portion which they have left I am not concerned. It remains the property of the pursuers, and although in all probability they will never be able to work it to profit, they have not succeeded in showing that this result is due to the act of the defenders in removing the remainder. The truth I rather take to be, that before the defenders acquired the ground, they would have found it exceedingly difficult to work any of the stone.

[*His Lordship then dealt with the evidence relating to the amount of the stone excavated below the formation level, which he found to be* 11,122 *cubic yards*].

"There has been, as is usual in such cases, a great conflict of evidence as to the value of the stone so excavated. But I am disposed to attach the greatest weight to the evidence of James Paterson, the foreman of the contractor who actually removed the stone, particularly as the defenders have not seen fit to call the contractor himself. The stone was mainly used in building bridges and other works all along the line, the remainder being sold in carts of rubble to builders, some of whom have also appeared as witnesses. Paterson's estimate is that one-half of the stone so excavated consisted of cubestone, worth 10d. per cubic foot, that one quarter consisted of rubble, the value of which was tested by sales at 3s. per cart of 25 cwts. each, and that the remaining quarter consisted of waste on which no price can be put. This brings out a sum of £6881, 15s.

"But Paterson goes on to say that the cost of working was about 4s. per cubic yard, making a sum of £2224, 8s. Now, is this sum to be deducted or not? The pursuers found on some English cases relating to the unauthorised working of coal, which seem to turn on certain technical rules of the English common law, and to result in rather arbitrary distinctions between the cost of getting the coal and the cost of bringing it to bank. I gather from the opinion of Lord Macnaghten in the case of *The Peruvian Guano Company*, L.R., 1892, App. Cases (pp. 173-177), that these rules might not now be applied in an English Court administering equity as well as law. But in any case a Scottish Court is not bound by them. I am free to consider in this particular case whether it would be equitable to deny to the defenders the expense which they have incurred in working this stone, and I am very clearly of opinion that it would not be. The defenders, no doubt, acted in rather a high-handed way, and under a mistaken view of their rights. They were trespassers, but it would be absurd to call them thieves; and it was a fortunate circumstance for the pursuers that they came to the ground, for I do not think that otherwise the pursuers would have found it easy to make any use of their stone at all. The proper result therefore, in my opinion, is to allow the defenders no profit on the stone which they removed, but to charge them with the full value of it, less the expense of converting it to marketable use. I accordingly deduct the sum of £2224, 8s, from the sum of £6881, 15s., leaving the sum of £4657, 7s., for which I shall give decree.

"I would only add that the defenders' argument on the declaration in Allan's feu-contract seems to me quite untenable. The power thereby conferred on the feuar was to dig or work freestone 'for erecting houses, or offices, or walls, or other buildings upon the said piece of ground, or for making or repairing the roads therein.' That plainly contemplated the use of the ground as a residential subject, and could not possibly justify the use of the stone for building bridges and other railway works even on the ground itself, and much less in other places."

The defenders reclaimed, and argued—(1) The pursuers had sustained no loss by reason of the railway company having excavated the freestone. They themselves could not have worked it at a profit. The Lord Ordinary admitted this. If that was the case, what was the sum of money which would "indemnify" the pursuers for the act of the defenders in appropriating the freestone. Indemnification signified "being kept free from loss." No loss having been sustained by the pursuers, they were entitled to nothing. (2) In any event, they were not entitled to the market value of the stone. If what had been done by the defenders was wrongful, it was not malicious, and what would practically amount to heavy damages should not be awarded against them. The only customer the superiors could ever have got for their

freestone was the Railway Company. The superiors would therefore be fairly compensated by receiving a lordship on the freestone excavated. A fair rate would be one-third or one-fourth of the market value —*Livingstone* v. *Rawyards Coal Company*, February 13, 1880, 7 R. (H. L.) 1, L.R. 5 Ap. Cas. 25. (3) In any view of the case, the defenders, under their title, were entitled to work and use the freestone for railway works and buildings within the feu. The value of the stone so used should be deducted from the amount in the Lord Ordinary's decree.

Argued for the pursuers—(1) Here the freestone had been excavated by the defenders wilfully and in spite of repeated warnings. The case was therefore different from that of *Rawyards*. The Railway Company having knowingly taken what was not theirs could not now plead equitable considerations. The measure of payment was the amount which they would have required to pay for the stone if they had purchased it elsewhere. The coming of the railway had converted the freestone into a marketable subject, and the owner of the freestone was entitled to benefit just as the owner of land was benefited by a railway passing through his property. (2) The declaration in the titles in favour of the vassal did not apply to the defenders. The charter contemplated the use of the ground as a residential subject, and the words of the clause could not be extended so as to apply to railway works. The interlocutor of the Lord Ordinary should be affirmed.

At advising—

Lord Trayner—This case comes before us now upon a proof which was taken by the Lord Ordinary under a remit by us when the case was previously before us; and it does not appear to me that there are many points raised on the interlocutor at present under review which require serious consideration. The Caledonian Railway Company, who are now reclaiming, are proprietors by purchase of the piece of ground originally disponed or feued out by the superior to Mr Allan, and have, in the exercise of their undoubted rights, used the ground for erecting a railway station upon it, and putting down sidings and other accommodation works which as a railway company they require. But in laying down their rails, and in erecting their offices and other accommodation works, they have excavated the freestone which lay below the surface. It appears to me to be not open to question that the stone which they have so excavated was the property of the superiors, because when the superiors feued off this ground to Mr Allan they distinctly reserved to themselves the whole freestone and other minerals within the ground so feued. Accordingly, the right of property in the minerals never passed out of the superiors. But they did give Mr Allan their vassal a certain limited right in the minerals which was expressed in this way:—"Declaring that notwithstanding of the above reservation"—that is, the reservation of the freestone and minerals to the superiors themselves—"it shall be lawful to and in the power of the said Thomas Allan and his foresaids to dig or work the freestone in the said piece of ground hereby disponed for erecting houses and offices or walls or other buildings upon the said piece of ground, or for making or repairing roads therein, but he and they are hereby expressly restricted from selling any part of the said freestone."

Now, the state of the title being as I have put it, and the Railway Company having excavated a great part of the mineral below this feu, the question arises, what is the Railway Company bound to pay for the mineral so excavated, if anything. The Railway Company maintain, first, that they are not bound to pay anything for the freestone excavated, because it was of no value to the owners. That is an argument that I am afraid I could not listen to with very much patience. It may have been a subject of very little value at one time to the superiors. It may have been so situated and the working of it so difficult that it would be almost impossible to get a customer for it, and it might not be worth the while of the superiors to work it for themselves. But all that was changed when the Railway Company came there, because the Railway Company came not only as a customer who might buy the freestone, but who, as one sees from the proof, was glad to get it so conveniently. The company needed just this stone for their erections; they got it on the ground, where it was to be put into use in the shape of houses, and were saved the trouble and expense of bringing it from a more distant point. Therefore it is vain for the Railway Company to say it was of no value to the superiors. They got a customer when the Railway Company came there, who must pay to the superiors the market value of the subject. The market value of that subject has been ascertained on evidence there seems no reason for doubting, and the Lord Ordinary has estimated the value of the subject at the price which the proof warrants. The second view which was presented to us by the Railway Company was, that if we were of opinion that the Railway Company were bound to pay for this stone they should at least not be called upon to pay the market value, but should only be called upon to pay what the superior might reasonably have expected to get by way of royalty or lordship if he had let the ground as some adjoining ground had been let to a quarrier to work, and in support of this view the case of the *Rawyards Coal Company* v. *Livingstone* was cited to us. I think that case is different from this. That is a case—into the details of which I need not go, because your Lordships are familiar with them—which is distinguished from the present in this important particular, that there the pursuer of the action might have known from his own titles that the defenders were trespassing upon his property, while the defenders by their title could not have ascertained that for themselves; they worked the coals in

the belief that they had been leased to them by the person who had right to the minerals, and were held in that case only liable to Mr Livingstone in such a sum as he would have got had he leased the coal on the same terms as the surrounding mineral field was leased to the Rawyards Company. Here the case is different. The title which the Railway Company took informed them in express terms that the minerals were reserved by the superior. Notwithstanding this we have it in evidence that the Railway Company not only worked out the minerals so reserved, but, in violation of the express terms of their title, sold part thereof, and also used other parts for their works outwith the feu in question. They were distinctly warned that this was not their property, and that they were not to use it without keeping a distinct note of that which they were taking, and what they were doing with it, because the pursuers intended to raise the question of their liability therefor. In these circumstances I think the case of *Rawyards* is distinguishable from this, and affords no standard by which the defenders' liability ought to be ascertained. These two points being taken out of the way the only thing we require to consider is the effect of the deduction which the defenders claim in respect of the minerals and freestone used upon the ground of the feu as being within the authority conferred upon Allan, and therefore upon them, to use the freestone for erections and buildings upon the feu itself. Upon that matter the reclaimers have not given us the information necessary to enable us to fix the exact amount of the deduction to which they are entitled, because I think, differing from the Lord Ordinary, that they are entitled to a deduction from the pursuers' claim of the market value of the minerals which they used for making roads and erecting walls or buildings of any kind upon the ground in question. The Lord Ordinary in the end of his note says—"The defenders' argument on the declaration in Allan's feu-contract seems to me quite untenable." I think, with great deference to the Lord Ordinary, that that is not a sound view, and in so far as that view has influenced the interlocutor of the Lord Ordinary under review, and in so far as he has refused in that interlocutor effect to the defenders' contention, I think he is wrong. If the parties can ascertain or agree upon the amount of the deduction to be made in respect of the freestone used upon the feu itself, we may dispose of the case now. If they cannot agree, we must then consider the case further as to whether the proof before us will enable us to fix a sum, or whether the Railway Company should be authorised to supplement their proof to the effect of showing what is the exact amount of deduction to which they are entitled.

LORD YOUNG—I am of the same opinion, and I do not think I have anything material to add. I indicated, indeed, my view upon the leading points in the case in the course of the discussion. It seems to me to be clear—and indeed ultimately it was not disputed—that the freestone which the Railway Company took out of the pursuers' ground and used for their own purposes was the property of the pursuers, and the contention that they are entitled to take the property of the pursuers and use it for their own purposes without paying for it is not far from the extravagant. What they are to pay for it is of course a question depending chiefly upon what was the worth of the article—the property of another—which they took and used for their own purposes. That should not be difficult of ascertainment, and the Lord Ordinary has ascertained it to his own satisfaction. They could only lawfully and regularly get it by a contract with the pursuers, whose property it was. They took it and used it without such contract, and I should think it clear enough that the test of its value is just its worth in the market. What was that property of the pursuers—brought out of the estate, and laid on the surface ready for use by the Railway Company, who wished to use it—worth in the market? Now, that has been ascertained, and that is what the party who took it and used it must pay. They got it, and taking into consideration, of course, the fact that they were at the expense of working it and bringing it to the surface, and making it ready for use by them in their work, what they have got to pay to the owner, without whose consent upon a legitimate bargain, they were not entitled to take it or use it, is simply its market value. I agree with what has been stated by Lord Trayner, and I cannot state it more clearly, that the Railway Company, as the successors of Mr Allan in this feu, have all the rights which he had. They are at liberty to take and use any freestone upon the ground which they feued necessary for buildings upon the ground. Now, Mr Allan himself might not find it necessary to use any or much freestone upon the ground. I suppose he would find it necessary to use as much as he needed to erect the buildings which he undertook to build. But his successor might have no use or a large use for freestone, just as it happened. His successor was the Caledonian Railway Company. The Caledonian Railway Company required stone to make buildings upon the ground, and they were not restrained in the kind of buildings for which they might use the freestone on the ground. I assume therefore that the buildings which they did erect with this freestone were erected in the legitimate exercise of their right on the ground; indeed, that was not disputed. Then they are entitled to freestone to that extent free of charge. That disposes of the whole case, subject only to the parties ascertaining for themselves, which I hope they will be able to do without any further litigation, what is the worth of the freestone which was used upon the ground.

LORD JUSTICE CLERK—I entirely agree in the opinions which have been expressed.

LORD RUTHERFURD CLARK was absent.

Parties agreed that the amount of the deduction to be made in respect of the freestone used upon the feu should be £400.

The Court pronounced the following interlocutor:—

"Recal the said interlocutor: Find that the defenders have excavated and removed freestone belonging to the pursuers below the authorised formation level of the railway to the value of £4257, 7s. sterling, for which decern against the defenders for payment to the pursuers: Find the pursuers entitled to expenses from 19th July 1894 to the date of said reclaiming-note, and to one-half of their expenses since that date."

Counsel for the Pursuers—Shaw, Q.C. —C. S. Dickson — Burnet. Agents — Campbell & Smith, S.S.C.

Counsel for the Defenders—Balfour, Q.C. —Guthrie—Dundas—Clyde. Agents—Hope, Todd, & Kirk, W.S.

HIGH COURT OF JUSTICIARY.

Friday, October 25.

(Before the Lord Justice Clerk, and Lords Young and Trayner).

M'KENZIE *v.* M'DOUGALL.

Justiciary Cases—Public-House—Breach of Certificate—Sale of Victuals Outside of Licensed Premises.

The holder of an hotel certificate in the form of Schedule A, No. 1, annexed to the Public-Houses Acts Amendment (Scotland) Act 1862, which authorises the sale in the house licensed, "but not elsewhere, of victuals and spirits," is not precluded from selling victuals elsewhere than in the house licensed.

Robert M'Kenzie, Spread Eagle Inn, Bridge Street, Kelso, brought a bill of suspension of a conviction by two Justices of the Peace, who had found him guilty of a breach of his certificate.

The breach of certificate charged was that the complainer sold sandwiches, pies, or other articles of food in a refreshment tent outside his licensed premises. The Justices held that this was prohibited by the terms of his certificate, which was in the form prescribed by Schedule A of the Public-Houses Acts Amendment (Scotland) Act 1862. Such a certificate bears that the holder is authorised to keep an inn and hotel "for the sale in the said house, but not elsewhere, of victuals and of spirits . . . or other exciseable liquors."

At advising—

LORD JUSTICE-CLERK—I think it to be quite plain that this conviction is bad. The Act of Parliament requires that a person must have a certificate for premises in which liquor is sold. He can, like any other citizen, sell victuals without any certificate. A person having an hotel licence receives a certificate to sell victuals and spirits, but the fact that victuals are mentioned in the certificate cannot by implication prevent the holder of the certificate from selling, elsewhere than on the licensed premises, articles for the sale of which no certificate is required. No licence is required by any man to sell a ham sandwich or a pie. I am therefore of opinion that the conviction should be suspended.

LORDS YOUNG and TRAYNER concurred.

The Court suspended the conviction.

Counsel for Complainer — Henry Johnston—Dewar. Agent—James Purves, S.S.C.

Counsel for Respondent—James Clark—Addison Smith. Agent—Party.

Friday, October 25.

(Before the Lord Justice-Clerk, Lord Young, and Lord Trayner).

GALBRAITH *v.* DISSELDUFF.

Justiciary Cases—Ambiguous Complaint and Conviction—Prevention of Cruelty to Animals Act 1850 (13 *and* 14 *Vict. c.* 92), *sec.* 1.

A complaint charging a contravention of the Prevention of Cruelty to Animals Act 1850, set forth that two persons, A, a master, and B, his servant, "did cruelly beat, ill-treat . . . or cause . . . . to be cruelly beaten or ill-treated" two horses belonging to A, and that B "did unmercifully and unnecessarily lash them with the shaft of a whip, said animals being in a poor, weak, and emaciated condition and completely exhausted." A and B were convicted of the contravention charged.

In a suspension by A, *held* that the conviction against him was bad, inasmuch as the complaint and conviction taken together left it uncertain whether facts constituting a contravention had been proved against the complainer, and whether he had not been convicted of acts which in the complaint were stated to be the acts of his servant alone.

William Galbraith, carriage-hirer, Kirn, and John Ness, one of the drivers in his employment, were charged in the Justice of the Peace Court at Dunoon with a contravention of the Prevention of Cruelty to Animals Act 1850.

The complaint was in the following terms:—"That William Galbraith, carriage-hirer, Kirn, and John Ness, brake driver, Springbank, Kirn, in the united parishes of Dunoon and Kilmun and county of Argyll, did, on 16th July 1895, cruelly beat, ill-treat, overdrive, abuse or torture,