tion of the annual payments after mentioned the third party is entitled to two-thirds and that the second party is entitled to the remaining one-third of said surplus income derived from the deceased William Moon's heritable estate (except Edenfield) so far as not yet sold, and from the income of the proceeds of his heritable estate so far as sold, but that the third party is not entitled without collation to share in the surplus income so far as derived from the deceased's personal estate: Find in answer to the fourth question that after deduction as aforesaid the second party is entitled to one-third of the said surplus income, whether said income is derived from heritable estate or from the proceeds of heritable estate or from moveable estate, and that in the event of the third party collating, the third and fourth parties are entitled to the remainder of the said surplus income equally among them, share and share alike, and that if the third party does not collate, the fourth parties are entitled equally among them to two-thirds of said surplus income so far as derived from moveable estate: Find in answer to the eighth question that in the event of the third party exercising his right to claim two-thirds of the income derived from heritage or the proceeds thereof, the annual payments directed or empowered by the truster by his trust-disposition and settlement, amounting to £1300 per annum or thereby, fall to be deducted from the last-mentioned income: Find it unnecessary to answer any of the remaining questions: Find all the parties entitled to expenses out of the accumulations of surplus income since 1st October 1897, and remit," &c.

Counsel for the First and Fifth Parties—C. D. Murray. Agents—J. & D. Smith Clark, W.S.

Counsel for the Second Party—Balfour, Q.C.—Salvesen. Agent—George Bennet Clark, W.S.

Counsel for the Third Party—Sol.-Gen. Dickson, Q.C.—Cook. Agents—W. & J. Cook, W.S.

Counsel for the Fourth Parties—Johnston, Q.C.—Clyde. Agents—J. & D. Smith Clark, W.S.

Counsel for the Sixth Parties—Dundas, Q.C.—P. Balfour. Agents—Bell & Bannerman, W.S.

Tuesday, November 28.

SECOND DIVISION.

[Lord Pearson, Ordinary.

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

(*Ante*, vol. xxxiii. p. 25).

Railway—Mines and Minerals—Reserved Minerals—Conveyance from Owner of Surface only—Right to Remove Minerals to Formation Level.

A railway company purchased the rights of a vassal in whose feu-contract the minerals were reserved by the superior. *Held* that the company was not entitled, as proprietor of the surface or otherwise, to excavate minerals down to the formation level of the railway without compensating the superior.

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

The 117th section of the Lands Clauses Consolidation Act 1845 enacts 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 shall appear to be entitled to any estate, right, or interest in such lands which the promoters shall "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 shall remain in the undisturbed possession of such lands, provided within six months after notice of such estate, right, or interest, in case the same shall not be disputed by the promoters, or in case the same shall be disputed, then within six months after the right thereto shall have been finally determined by law in favour of the person claiming such right, the promoters shall purchase or pay compensation for the same, and such purchase money or compensation shall be determined by arbitration in the manner provided by the Act.

Where a railway company had entered upon lands, an interest in which was afterwards claimed and determined in favour of the claimant, *held* that there was no onus on such claimant to take steps to have the compensation to which he was entitled determined by arbitration, and six months from the final decree having elapsed without action on the part of the company, that any right of the company to have the compensation determined by the statutory method was at an end, and the pursuers' claim was one for damages at common law.

On 29th October 1895 decree was pronounced in an action at the instance of the present pursuers against the defenders in this case. The above case is reported in vol. xxxiii. p. 25. It related to the same lands as the present action, and to the same operations on the part of the Caledonian Railway Company.

In 1847 James Davidson of Ruchill disponed to Thomas Allan, and his heirs and assignees whomsoever, two plots of ground. The dispositions were made subject to the following reservation :—"Reserving to me and my heirs, successors and assignees whomsoever, superiors of the said piece of ground, the whole coal, ironstone, freestone, and other metals or minerals in the said piece of ground, and full power and liberty, either by ourselves or others, to work, win, and carry away the same, and for that purpose to sink pits, make roads, levels, drains, or to do any other thing which may be considered necessary for all or any of these purposes on payment of all surface damages to be ascertained by two arbiters mutually chosen, and failing the parties naming arbiters, or the arbiters an oversman, then with power to the Judge Ordinary to do so on the application of either party; declaring that notwithstanding the above reservation it shall be lawful to and in the power of the said Thomas Allan and his foresaids to dig or work the freestone in said piece of ground hereby disponed for erecting houses or 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." The pursuers are now in right of James Davidson.

By the Act 51 and 52 Vict. c. 194, incorporating the Glasgow Central Railway Company, the construction of certain railways therein specified was authorised. The whole powers of the Railway Company under the said Act were transferred to the Caledonian Railway Company under their Act of 1889 (52 Vict. c. 12.) The Caledonian Railway Company, acting under the powers of the above Acts, served a notice to treat on the trustee of the deceased Thomas Allan for the compulsory purchase of the plots of ground mentioned, and they were afterwards conveyed to the Railway Company, "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, and minerals, and freestone." . . .

In carrying out their works the Railway Company excavated freestone on the ground, and on complaint being made on behalf of Davidson's trustees, the company maintained that they were acting within their rights.

An action was raised at the instance of the trustees against the company, and the following interlocutors were pronounced therein, viz.—"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, . . . 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.: "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., for which decern against the defenders for payment to the pursuers," &c. In that action the defenders averred that if decree should be pronounced in terms of the declaratory conclusion of the summons, the omission to serve a notice to treat was occasioned by mistake or inadvertence, and that they were entitled to take the minerals as an omitted interest under section 117 of the Lands Clauses Act of 1845, and that they intended, in the event of such decree, to take and purchase and pay compensation accordingly."

The Railway Company did not after decree in the last action make any compensation to Davidson's trustees for the freestone or other minerals excavated above formation level, nor did they give notice to treat or adopt other statutory procedure for acquiring the trustees' interests in the lands. No arbitration followed in pursuance of sec. 117 of the Lands Clauses Act 1845 or otherwise. On 22nd May 1896 the trustees' agents opened negotiations with the Railway Company with the object of proceeding to have compensation assessed for what had been excavated above formation level, and on 7th December 1896 the company denied liability for such compensation.

Thereupon Davidson's trustees raised the present action against the Caledonian Railway Company. In it they sought (1) a decree of declarator that the defenders were not entitled to remain in possession of the plots of ground above mentioned, and (2) of removal therefrom, and (3) a decree for payment of £8000, or otherwise for compensation for the freestone above formation level.

They averred—"(Cond. 2) It is *res judicata* by said decrees (in the preceding action) that the defenders have no right in or to the minerals which are the subject of this action, or right to remove the same. (Cond. 5) They have failed to give notice to treat or adopt the other statutory procedure necessary to acquire the pursuers' interests in the said lands, and the period allowed by the defenders' Act and the Acts incorporated therewith for the compulsory

purchase of lands, whether as an omitted interest or otherwise, has long since expired." . . .

The defenders denied that the right claimed by the pursuers in the minerals was *res judicata*. They averred that the land conveyed to the defenders by said disposition was urban property as regards character and situation. The defenders as disponees were, they maintained, entitled to make all the use of the surface of the ground which the disponers or any other proprietors could have made of it as building land. This right included any removal of the surface and sub-strata, including minerals either on the surface or in forming the sub-strata incidental to the building of tenements or other erections of an urban character, or other uses of the ground for purposes of business, trade, or manufacture. They therefore asserted that in forming and erecting their station, railway, and other works, and in excavating the surface and sub-strata for that purpose, they had done no more than the disponers or any other proprietor of the surface of the ground was entitled to do.

In reference to their averment of omitted interest in the previous action the defenders "explained that the defenders' averment and plea in that action, that the pursuers' interest was an omitted interest falling under section 117 of the Lands Clauses Act 1845, was only made in case decree should be pronounced in terms of the declaratory conclusion of the summons in that action, which was not done; and further, it was not in consequence of the defenders' averment and plea referred to that compensation in respect of the minerals above authorised level was not assessed in that action, but because the pursuers' claim to the minerals above authorised level, which is disputed in the action now pending, was not then determined."

They maintained that "the defenders' removal of the freestone was within their rights as proprietors of the surface of building land; that the freestone could never have been worked to a profit by the pursuers; and looking to its situation and quality, and the expense necessarily involved in the working of it, it had not, and never could have had, any commercial or marketable value. The defenders accordingly maintained and averred that no compensation was payable by them to the pursuers."

The pursuers pleaded—"(1) The defences are irrelevant, and in particular they are excluded by the judgment of the Court in the previous action between the parties. (2) The pursuers as proprietors of the minerals in said land, are entitled to decree of declarator, removing, and interdict, as craved. (3) In respect of their rights under their titles, and in respect that the defenders have not acquired any right to the minerals in question, or to the space formerly occupied by them, the pursuers are entitled to decree of declarator, removing, and interdict. (4) The defenders having wrongfully excavated and used the pursuers' minerals as above set forth, are bound to make compensation to the pursuers for the value of the minerals removed, and the minerals rendered unworkable (6) Alternatively, the defenders are bound to pay compensation for said minerals under their Act, and the loss suffered by the pursuers by removing the same, and are bound to adopt the statutory procedure for having the amount of compensation ascertained, and the pursuers are entitled to decree to that effect."

The defenders pleaded—"(3) The removal of the said freestone and others being within the defenders' rights (*a*) as a railway company, and also (*b*) as proprietors of the subjects in question, the defenders are entitled to absolvitor. (4) The materials in question being of no value, the defenders should be assoilzied. (6) In any event, the pursuers being themselves entitled, in terms of the Railways Clauses Consolidation (Scotland) Act 1845, and the Lands Clauses Consolidation (Scotland) Act 1845, to adopt the statutory procedure for having the amount of compensation payable to them in respect of the minerals in question determined, the action should be dismissed.

The Lord Ordinary (PEARSON) pronounced the following interlocutor — "Finds and declares in terms of the first declaratory conclusion of the summons, and decerns: Further, allows to the parties a proof of their averments relative to the third conclusion of the summons, and to the pursuer a conjunct probation, and proof to proceed on a day to be afterwards fixed; and grants leave to reclaim."

Opinion.—"I have now heard parties on the amended record. The defenders pleaded that the removal of the minerals now in question was within their rights (1) as a railway company, and (2) as proprietors of the subjects in question. They now take their stand on the latter part of the plea; and they have added averments to the second article of their answers, to the effect that the land, when they acquired it, was urban property, was in the immediate vicinity of rapidly extending streets and tenements, and was itself building land.

"They then set forth their right as disponees to make all use of the surface which the disponers or any other proprietors could have made of it as building land, including any removal of the surface and subsoil, whether minerals or not, incidental to the building of tenements or other erections of an urban character, or other uses of the ground for purposes of business, trade, or manufacture. And they aver that excavations for such purposes are common to a depth of 30 feet or upwards, and that in forming their station and railway they have done no more than any owner of the surface was entitled to do.

"The pursuers' first reply is that all this was determined adversely to the defenders in the previous litigation. Certainly the previous summons was adapted to try and decide that question; and indeed the Lord Ordinary did decide it, adversely to the defenders, when he gave declarator in terms of the first alternative conclusion

of the summons. But that was recalled by the Inner House, not merely as regards the minerals below formation level, but as regards all the minerals, and the pursuers were found to be proprietors of the whole minerals, "subject to the rights conferred upon Thomas Allan, and conveyed by his trustee to the defenders." They then allowed a proof as to the minerals below formation level, and as to the rest, which are the minerals now in question, they reserved to the pursuers any claim they might have for them to be determined by arbitration in terms of the statute. The report bears that these last words were the subject of concession by the pursuers. It does not appear to me that the defenders in standing on their amended averments, and asking for a proof of them, are going in any respect counter to anything that was the subject of decision in that action, though it may be they are going against the assumption of the pursuers when they made the concession, namely, that the company admitted liability for the minerals above formation level, and were willing to go to arbitration under the statute to ascertain the amount to be paid for them as compensation.

"But the pursuers further dispute the relevancy of the company's new averments, at all events as an answer to the first conclusion of the summons, and here I think they are right. It will be observed that the averments are not directed to the date of the original feu-right in 1847, but to the date of its acquisition by the defenders in 1892. But letting that pass, and giving every weight to the undoubted though rather indefinite right of the surface-owner to excavate the subsoil (including minerals) for purposes incidental to the use of the ground contemplated by the parties to the contract, I cannot hold that what has been done down to formation level can be justified on any such ground. The cutting and levelling for a railway, and the excavation for a goods and passenger station, do not appear to me to be supported by the averments of the defenders as to the character of the neighbourhood and the frequency of excavations for building, even assuming that they might have done substantially the same things legitimately in the erection of tenements. Their excavations do not seem to me to come within the rights of a surface-owner as such, in the circumstances set forth in the amended record; and their case is certainly not strengthened by the clause in the feu-right giving special power to the feuar to work the freestone in the ground for erecting houses, or offices, or walls, or other buildings upon the said piece of ground. I presume it was under that clause that the company obtained a deduction in the previous litigation in respect of stone used for their station and buildings.

"The cases relied on by the defenders were *Robinson*, 1884, 53 L.J. Chan. 1070; and *Elwes*, 1886, 33 Ch. Div. 568. The latter was only appealed to as furnishing the principle that where there is a licence to excavate, the question as to the extent of the implied permission to dispose of what might be excavated is to be determined by what may reasonably be inferred to have been the intention of the parties. The case of *Robinson* is nearer the present. The defender there had a long building lease of the surface, with provisions as to his putting up buildings of a stipulated value, which he had done. The mines and minerals were reserved. It was held that while the right to build carries with it the right to dig foundations, and to dispose of the materials dug out, this only holds with reference to some definite building about to be erected, and does not justify excavations with a view to improve the land for selling or letting, or in order to carry on a trade in the materials dug from the subsoil. Neither of these cases appears to me to be sufficiently near the present to furnish a rule for its decision.

"I think it follows, on well-settled principles, that the defenders have no right to remain where they are unless and until they take such steps as may still be open to them to legalise their position; and I therefore propose to give the pursuers decree in terms of their first declaratory conclusion.

"I further allow a proof of the averments relating to the pecuniary conclusion. It may be a question whether the new averments I have referred to above are not available to the defenders as affecting the amount which they may have to pay. This is a matter which may arise at the proof; and it is not necessary that I should decide upon it at present.

"The shape which the action has taken precludes any question at this stage as to the application of section 177 of the Lands Clauses Act, assuming that it is open to the defenders to raise it on this record."

The defenders reclaimed.

The Court pronounced the following interlocutor:—"The Lords having heard counsel for the parties on the reclaiming-note for the defenders against the interlocutor of Lord Pearson, dated 4th November 1898, Recal *hoc statu* the finding of the said Lord Ordinary in regard to the first declaratory conclusion of the summons: *Quoad ultra* remit to the said Lord Ordinary to allow the parties a proof of their averments."

Proof was led, and the Lord Ordinary thereafter pronounced the following interlocutor:—"Finds (*first*) that the pursuers were sole proprietors of the whole coal, ironstone, freestone, and other metals and 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; (*second*) that the defenders have failed to instruct that the removal of the minerals in question without paying therefor was within their rights as a railway company, or as proprietors of the said pieces of ground; (*third*) that the defenders are bound, as a condition of remaining in undisturbed possession of the subjects in question, 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 117th section of the Lands Clauses Consolidation (Scotland) Act 1845, and relative sections: Sists process *hoc statu*, that either party may take such steps as they may be advised to initiate proceedings under the said 117th section: Finds the pursuers entitled to expenses as between agent and client down to 4th November 1898, reserving as to expenses *quoad ultra:* Allows an account thereof to be lodged, and remits the account to the Auditor for taxation and report; and grants leave to reclaim."

Opinion.—"According to the position taken up by the parties at the hearing, the questions which it is necessary to determine in the first instance are, whether the interest of the pursuers in the minerals in question was by mistake omitted to be purchased within the meaning of section 117 of the Lands Clauses Consolidation Act 1845; and whether that section can still be invoked by the defenders.

"In considering these questions it is necessary to have special regard to what took place in the previous actions between the same parties.

"The first action was raised in 1892 for declarator that the pursuers were the sole proprietors of the minerals, and that the company had no right of property in them, and no right to work them, or at least no right except what was conferred on the feuar by the titles; or otherwise, that the company were not entitled to work them except on condition of paying compensation in terms of the Lands Clauses Acts. There was also a conclusion for interdict against working the minerals, and a pecuniary conclusion for £1500. In 1893 a second action was raised, differing only in the pecuniary conclusion, which, on fuller information, was raised to £16,000; and the two actions were conjoined.

"These actions included the whole minerals, both above and below formation level.

"The company, in defence, stated that the feuar and his tenants were the only persons in apparent possession of the ground taken; that their compulsory powers expired on 10th August 1891; and that the titles had not come into their hands until April 1892, by which time they had purchased, as they believed, the whole subjacent minerals as well as the land itself. All these averments were traversed by the pursuers.

"The company pleaded (1) that they did, in fact, purchase the whole minerals, looking to the terms of section 70 of the Railways Clauses Act; and (2) that if they did not, and if decree should pass in favour of the pursuers in terms of the first declaratory conclusion which I have mentioned, then the case would fall within section 117 of the Lands Clauses Act as to interests omitted to be purchased. In that event they stated—"The defenders are willing, and intend to take and purchase the rights and interests of the pursuers in the said pieces of ground, and the mines, metals, and minerals therein and thereunder, and to pay compensation to the pursuers in respect of their said rights and interests, as the same may be ascertained by arbitration, in terms of" the Lands Clauses Act and the Railways Clauses Act.

"On 2nd February 1894 a proof was allowed, limited to the averments of mistake and inadvertence, that is to say, limited to the question whether the case fell within section 117.

"On the question of law arising under section 70 of the Railways Clauses Act, the Lord Ordinary without hesitation decided against the company, holding that in no view could that section apply to minerals below formation level; and that as to minerals above that level the section could not apply where the mineral estate was not vested in the surface owner, with whom alone the company had been in treaty.

"On the question of fact the Lord Ordinary decided in the company's favour, that there had been mistake or inadvertence as regards all the minerals, whether above or below formation level, so as to bring the case within section 117. He found accordingly, and awarded the pursuers expenses as between agent and client down to the date when proof was allowed, in terms of section 119.

"On a reclaiming-note this interlocutor was recalled. (1) The pursuers were found to be sole proprietors of the minerals, subject to the rights conferred upon Thomas Allan, the original feuar, and conveyed by his trustee to the defenders. This finding had the effect of negativing the defenders' plea upon section 70 of the Railways Clauses Act. (2) A proof was allowed in regard to the minerals so far as lying below formation level. This resulted in decree against the company for £4257, 7s., being £4657, 7s. (the value of the stone excavated by the company below formation level), less £400, the agreed value of stone used in buildings upon the feu. (3) There was expressly reserved to the pursuers any claim they might have for the value of the minerals above formation level, 'to be determined by arbitration in terms of the statute.'

"The distinction thus taken between minerals above and below formation level was at the root of this judgment. The report of the case (21 R. p. 1062) bears that the pursuers 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 statute.'

"Accordingly, the opinion of the Lord Justice-Clerk begins thus:—'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.' And in conformity with this general understanding the Court inserted in their judgment the reservation I have already quoted as to the ascertainment of the value of the minerals above formation level by a statutory arbitration.

"Obviously, the assumption on which all this proceeded was that, as regards the minerals above formation level, the case did fall under section 117. The Lord Ordinary had so found; and although his interlocutor was recalled, yet these minerals were dealt with in the judgment in such a way as to demonstrate that this was the footing on which the Court proceeded. For they expressly reserved the claim for their value to be dealt with by statutory arbitration. Now, the compulsory powers had expired long before; and the only possible door through which such an arbitration could then be approached was by section 117.

"Unless this was so, I do not see why the question now raised as to the application of section 117 to the minerals above formation level was not fought out and decided in that action. The pleadings were adapted to try and to decide it. The proof allowed included a proof of the facts bearing on it. The Lord Ordinary decided it; and though his interlocutor was recalled, there is no suggestion that the Court took a different view of the facts as to that part of the case. On the contrary (as I have said) the reservation of the question for statutory arbitration demonstrates that in their view section 117 applied to that extent.

"One naturally looks to the record in the present action to see the views of the parties on this matter. They are to be found in article 5 of the condescendence and answers. The pursuers there say distinctly that the company pleaded section 117 in the previous litigation, and that in consequence of that plea the compensation in respect of the minerals above formation level 'was not assessed by the Court, but was reserved as before mentioned.' The defenders explain in answer that 'it was not in consequence of the defenders' averment and plea referred to that compensation in respect of the minerals above authorised level was not assessed in that action, but because the pursuers' claim to the minerals above authorised level, which is disputed in the action now pending, was not then determined.'

"In this the defenders are technically right. The pursuers' right to the minerals above formation level was not then finally ascertained, because it was only affirmed 'subject to the rights conferred upon Thomas Allan and conveyed by his trustee to the defenders.' This left it open to the defenders to plead, as they now plead in this action, that they are not liable in any compensation, the removal of the stone now in question having been within their rights as proprietors of the feu. In support of this plea they made certain averments as to the character of the neighbourhood, as to the depth to which excavations were commonly made for building purposes, and as to the extent to which this ground might have been built on with materials excavated on the feu, in order to show that they did no more than any owner of the surface was entitled to do.

"The defenders' position therefore is (using the language of section 117 of the statute) that the pursuers' 'estate, right, and interest' in these minerals, which has hitherto been disputed by them, is only now being finally determined, and that if it be affirmed then a period of six months will run from the date when it is finally established, within which the defenders must pay full compensation as a condition of being allowed to remain in possession. They say that the 'mistake' does not require to be averred and pleaded, for if their pleas are right there is no mistake. It is only if they are found to be wrong that it turns out they have been under a mistake which will let in section 117.

"In my opinion this is a sufficient answer on the part of the defenders to the pursuers' criticism of the record as containing no averment of mistake or inadvertence. The defenders' contention really is, that though the pursuers may have a title, they have on the facts no interest in the minerals in question capable of being estimated in money. If it now turns out that they have such an interest, I see no reason why this should not let in the application of section 117, as having been a mistake resulting in an omission to purchase the pursuers' interest. I am the more disposed to take this view, because it is in entire accordance with the assumption of all parties in the previous litigation; and it was only not made matter of decision then because parties were content to let it rest on the reservation which I have already quoted.

"Has, then, the proof which has been led demonstrated that the removal of the whole freestone above formation level was within the defenders' rights as proprietors of the surface? If this could be affirmed as the result of the proof the defenders might indeed have to get a title from the pursuers, but they would not have to pay anything as compensation or damages. But in order to withdraw the pursuers' pecuniary claim from the cognisance of an arbiter or the Court this prior right of the defenders must be made out quite clearly. It must amount to this, that in no view that could be taken was anything due at all. I think the result of the proof falls considerably short of that. The defenders, as surface owners of building land, have sought to carry their rights of excavation from the surface downwards, first, 3 feet for the foundations of the houses, then 20 or 30 feet more for cellars; and they have further pointed to the existence of old coal wastes within the ground, to which a builder might reasonably have been held entitled to go down for greater security. They further point to the rock which the pursuers themselves would have had to leave in for support to the boundary roads, and to the fact that in the south corner of the ground there is a considerable area of useless rock. But taking all these together, I think the defenders fail to make out that the removal of the stone was wholly within their rights. This being so, their exclusive plea fails, and section 117 applies to the effect of letting in arbitration.

"In the view I take, the six months will

run from final decree in this action, and if so, it is not necessary now to decide whether it lies on the claimant or on the promoters to put that section in motion. There is, however, an alternative view urged by the pursuers to which it is right I should advert, namely, that the 117th section attached (if at all) in October 1895, when final decree was given in the previous litigation, and that it being incumbent on the Railway Company to take action within the six months in order to save eviction, and the company having failed to do so, there is now no alternative open except removing and damages. I have had a fuller argument than I heard previously as to the true construction of section 117 in this particular, and I have come to be of opinion that it is not incumbent on the promoters under that section to serve a notice to treat. The section proceeds on the assumption that the company is in possession of the subjects, so that there is no necessity for a notice and plan to show how much they mean to take. What is wanted to start the procedure is a pecuniary claim by the owner for the value of his interest in what has already been *de facto* taken. The company are to remain in undisturbed possession provided within six months they purchase or pay compensation. This they are unable to do without the initiative of the claimant, and if (as here) the claimant makes no move, the period of six months cannot run against the company.

"In either view, however—whether it is incumbent on the company to give notice to treat or on the pursuers to make their claim—there is the possibility that the matter will take end in a statutory arbitration. This being so, it would, I think, be wrong if I were to follow the pursuers' invitation to pronounce on the result of the proof as to the question of damages. To the limited extent to which I have already adverted to it, the proof has been necessary in order to clear up the extent of the defenders' rights under their titles as surface owners of building land. But the bulk of the proof took the shape of an ordinary valuation trial, and it is right I should explain that it was intimated to me from time to time from the opening of the proof down to the last speech that parties were in expectation of adjusting a joint-minute to obviate the difficulty that the ascertainment of damages and of compensation were appropriated to different tribunals. If the parties had agreed, I should most readily have aided them in settling this long-standing dispute. But the proposal seems to have fallen through at the last moment, with the result that in my view I am precluded from addressing myself to the question of damages until it is certain that there will be no statutory arbitration.

"I have therefore sisted the action *hoc statu*, that either party, if so advised, may proceed under section 117. I have not made the sist for a definite time, because if it is for the pursuers to take the initiative no definite period (of six months or otherwise) is current. It will be open to either party to move for a recal of the sist.

"As to expenses, I have already noted that expenses as between agent and client were awarded to the pursuers in the previous litigation, this being the interpretation given to the allowance of 'full expenses' in section 119 of the Lands Clauses Act when the estate or interest of the claimant has been disputed by the company. In this action the pursuers' interest has again been called in question by the company, though on different grounds; and I think the pursuers are entitled to have the same rule applied down to the date when proof was allowed."

The defenders reclaimed, and argued—There can be no damages due. If anything is due it is compensation, and on the proof the pursuers are not entitled to a penny on that head. Sec. 117 of the Lands Clauses Act 1845 does not require notice to treat. The pursuers therefore ought to have put the machinery in motion, and they did not do so. The pursuers' title to the freestone is so qualified that they could never work it to a profit. This is not a case of omitted interest. It is injurious affection, to be dealt with under sec. 6 of the Railways Clauses Act. Under sec. 70 minerals require no notice to treat. The scheme of the statute is to regard only the surface—*Magistrates of Glasgow* v. *Fairlie*, 1888, 15 R.(H.L.) 94, *per* Lord Watson, 101. If the surface is taken, the company has right to take out minerals so far as necessary to the construction of the works. The arbitrator has no right to determine whether injurious affection has occurred, that fact being the title to claim, and within the cognisance of the Court alone—*Beckett* v. *Midland Railway Co.*, 1866, L.R., 1 C.P. 241; *Read* v. *Victoria Station and Pimlico Co.*, 1863, L.J., 32 Ex. 167; *Campbell* v. *Lord Mayor of Liverpool*, 1870, L.R., 9 Eq. 579; *Brierly Hill Local Board* v *Pearsall*, 1884, 9 A.C. 595; *Edinburgh and Leith Glass Co.* v. *North British Railway Co.*, 24 D. 1236. There is no right to demand compensation in respect of minerals which are of no merchantable value — *Nisbet Hamilton* v. *North British Railway Co.*, 13 R. 454, *per* Lord Adam, 461. If this was an interest that had to be purchased, the defenders could still put themselves under section 117. To show the six months have elapsed, the pursuers must show the result in the section is penal. The land was urban, and the defenders had right to use the freestone for building houses on it—*Robinson* v. *Milne*, 1884, L.J., 53 Ch. 1070; *Elwes* v. *Brigg Gas Co.*, 1886, 33 Ch. D. 562. As matter of fact the stone was just a little less than would be required for building houses on the land.

Argued for the pursuers—The claim is for damages for entering on the pursuers' land without a title and taking the minerals. The defenders only got Allan's title. A reservation of minerals reserves a separate estate in land. In the previous case it was decided that the pursuers had right to the whole minerals subject to the rights of the feuar, who could only use them for building on the feu. The defenders have not used the whole of what they excavated for

that purpose. The defenders could only excavate the minerals down to formation level as part of the works if they had acquired right to minerals as well as the surface. Conveyance from the owner of both surface and minerals gives this right. The defenders only come under section 117 where there is inadvertence, and then he remains in possession only if he pays compensation within six months—*Stretton* v. *Great Western Railway Co.*, 1870, L.R., 5 Ch. 751. Where there is knowledge of the existence of an estate there can be no inadvertence—*Stonehaven* v. *London, &c. Railway Co.*, 1871, L.R., 7 Q.B. 1. The initiative under the section is with the undertaker—*Hyde* v. *Mayor of Manchester*, 1852, 5 De G. & S. 249; *Martin* v. *London, Chatham, and Dover Railway Co.*, 1866, L.R., 1 Ch. 501. There was no inadvertence here. Damages are therefore due. *Beckett* and other cases founded on by the defenders only decided that where an arbiter included in his award something for which compensation was not payable, his award will not stand. *Robinson* is a case of interpretation of a contract.

At advising—

LORD TRAYNER—The parties to this case have been before us more than once in reference practically to the same question, or at all events with reference to different phases of the same question. I do not detail the circumstances out of which the action at the instance of the pursuers against the defenders arose, as these are to be found in the published reports. With a view to the opinion I am about to express, however, I may state briefly and in the most general way how the questions already decided and now to be decided have arisen. The pursuers feued a piece of ground at or near Maryhill to a Mr Allan, reserving to themselves in the feu-contract the whole minerals, including the freestone in the ground feued, but with liberty to Mr Allan to work the freestone for erecting houses or walls or other buildings upon the feu, or for making or repairing the roads thereon. Mr Allan was expressly restricted from selling any part of the freestone, or disposing of it otherwise than as above provided. The defenders subsequently (in 1892) acquired the feu by agreement from Mr Allan's trustees for the purposes of their railway. They removed a great portion of the freestone in the feu, both above and below the authorised formation level of their line, part of which they used for erections made upon the ground, part of it for purposes connected with their railway elsewhere than on the ground, and part of it they sold.

The defenders having refused to pay the pursuers for any part of the stone so removed and used by them, the pursuers raised their first action, in which they concluded (1) for declarator that they were the sole proprietors of the minerals in said feu, (2) that the defenders had no right to work or remove or sell the freestone in the feu, and (3) for damages on account of the defenders having wrongfully worked and removed the freestone. In that action (21 R. 1060) it was decided (on 19th July 1894) that the pursuers were the sole proprietors of the freestone subject only to the rights conferred by the feu-contract on Mr Allan. The claim for damages was thereupon (neither of the parties objecting) divided into two parts), the one for the freestone removed above formation level, and the other for the freestone removed below formation level. With regard to the first of these, the pursuers agreed that their claim should be determined by arbitration, while with regard to the second it was decided (contrary to the defenders' contention) that they had not failed to acquire the pursuers' rights in the freestone below formation level by mistake or inadvertency, and were therefore not entitled to have the compensation for such freestone fixed by arbitration as provided in the Lands Clauses Act 1845, sec. 117. A proof was therefore allowed to the pursuer in common form to ascertain the amount due to them for the freestone removed by the defenders below formation level. After that proof was taken, it was decided that the defenders had removed and used stone belonging to the pursuers to the value of £4657. From this there was deducted a sum of £400, which was represented by the defenders themselves to be the value of the stone used on the ground, and which Allan (and the defenders in his right) was authorised to take and use under the provision in the feu-contract already mentioned. Decree was accordingly pronounced in favour of the pursuers for £4257 on 29th October 1895. This disposed of the pursuers' claim for the value of the stone taken by defenders from below formation level. As regarded the claim for the price of the stone taken out by the defenders above formation level—(which was reserved to be dealt with by arbitration)—nothing appears to have been done until May 1896, when a correspondence commenced between the agents of the parties on the subject. The details need not be considered further than to observe that the pursuers asked the defenders what course they were to take to ascertain the compensation to be paid, and that they ultimately received (in December 1896) an intimation from the defenders' agent that the defenders did "not admit liability for compensation for rock removed above formation level." The present action was thereafter raised. After some procedure, to which I need not particularly advert, a proof was allowed to the pursuers of their averments and claim, on considering which the Lord Ordinary pronounced the interlocutor under review. The defenders maintain that they are not liable to pay or compensate the pursuers for the freestone removed above formation level, (1) because in doing so they were within their right as a railway company, and also as proprietors of the ground, (2) because the freestone removed was of no value, and (3) that if they are liable, their liability must be determined and the amount of it fixed by arbitration in terms of the Lands Clauses

and Railway Clauses Acts. The Lord Ordinary has decided against the defenders on the first and second of these defences, but he has in effect sustained the third, and has sisted process to allow either of the parties to put in motion the statutory proceedings.

I concur in the findings of the Lord Ordinary except the third. In my opinion the pursuers are now entitled to a decree such as I shall hereafter mention.

It is now too late for the defenders to maintain that as proprietors of the ground or otherwise the removal of the freestone above formation level was within their rights. It was decided in July 1894 that the pursuers were the sole proprietors of the freestone, and it follows that no one but the pursuers had the right to work it. It is also too late to maintain that they are not liable to the pursuers because the stone removed was of no value. The same contention was maintained in the first action and on the same ground, namely, that the pursuers could never have worked their minerals at a profit. That contention was negatived by the Court when pronouncing final judgment in the first case in October 1895; and in my opinion should also be negatived now. I do not repeat here the grounds on which I think so, but refer to the opinions delivered by Lord Young and myself, in which the Lord Justice-Clerk concurred. The defenders are not now claiming credit for any stone used by them in buildings on the ground as they formerly did. All the stones used by them under the right which they had as Allan's successor, was allowed to them in the former action. They do not even aver that any of the stone now in question was so used.

I differ from the Lord Ordinary's third finding because I am of opinion that the defenders have no right to claim that the compensation due by them shall be determined by arbitration as provided by the statutes.

I shall state shortly my reasons for taking this view.

The defenders can only claim to take advantage of the provisions of the 117th section of the Lands Clauses Act 1845 if (after the expiry of the period during which their compulsory powers existed, as is the case here) they can show that they failed or omitted to acquire any interest necessary to their undertaking "through mistake or inadvertency," and proceed within six months to purchase or pay compensation for the same. The defenders have not shown that they failed or omitted to acquire the pursuers' estate in the minerals through mistake or inadvertency, and the whole circumstances disclosed in this and the former action exclude the idea that any such mistake or inadvertency on their part did or could exist. When the defenders acquired the property from Allan's trustees, the terms of the disposition in their favour put them on their inquiry (to say the least of it) whether and how far the minerals in the land belonged to Allan's trustees. That disposition, dated 26th July 1892, conveyed the lands with the minerals "in so far as the disponer had right thereto." No doubt before accepting any conveyance from Allan's trustees the defenders saw the title of the disponers, which contained the reservation of all the minerals in favour of the superior, except the very limited right to the vassal (Allan) which has already been noticed. I cannot conceive of the defenders buying or accepting a conveyance to any land without seeing the seller's title. But suppose that the defenders so far departed from universal practice as to take the disposition in their favour without seeing the seller's title, they were not long left in ignorance of its terms. They were formally certiorated of the superior's rights on 30th August 1892, in a letter from the pursuers' agents, who challenged the defenders' working of the freestone as wrongous, and as a violation of the pursuers' rights. This letter remained unanswered, practically, until November 1892, when the defenders wrote that the operations complained of were within their rights, and declined to make any proposal for acquiring the pursuers' rights. The defenders were thus made aware in August 1892 that the freestone and other minerals in the land they had purchased from Allan's trustees was a separate estate in the pursuers. They could have satisfied themselves of this by an examination (if they had not already examined it) of the feu-contract in favour of Allan. Instead of doing so, they simply maintained the position that their operations were within their rights. So far there was no mistake or inadvertency, but the pursuers' right was denied. The question of right was tried before us, and it was decided on July 1894 that the pursuers were the sole owners of all the minerals in Allan's feu, and the defenders' pretended right to them was negatived. That finding by the Court was not challenged—and the decree for payment of £4257 which followed on that finding was implemented. There was thus a final judgment in July 1894 determining that the pursuers were the owners of the minerals in question which had been disputed by the defenders. The defenders had still six months from that date to acquire the pursuers' interest under the provisions of section 117, but they did not do so. Not having done so, any right or privilege conferred on them by section 117 is lost.

The defenders do not now admit the pursuers' right to be one which they require to purchase or compensate. They simply repeat their claim to the minerals which has already been repelled. They maintained now, however, that their privilege of acquiring the pursuers' rights in the minerals under section 177 has not been lost, because the pursuers have taken no steps to compel them to arbitrate. In my opinion it did not lie on the pursuers to take any steps. If the defenders did not proceed to acquire the interest which through mistake or inadvertency they had failed or omitted to acquire within the specified time, their privilege was gone, and the result would have been the ejection

of the defenders from the place they had unwarrantably occupied. It was for them to do anything that was necessary to secure to them the privilege which the statute conferred.

It is not immaterial to keep in view that the defenders have in the present action, without objection, gone into a proof as to the value of the freestone in question, and I think they cannot now be heard to ask that the proof so taken (a very great part of it having been lead by themselves in support of their defence) should now be simply set aside and the pursuers' claim referred to arbitration.

To resume what I have said—the freestone which the defenders have worked was the freestone of the pursuers; the defenders have removed it without warrant or right, and used and sold it; they must now compensate the pursuers for it.

The only question remaining is, what have the pursuers proved to be the market value of the stone abstracted at the time of abstraction, for that I take to be the measure of the compensation due to the pursuers by the defenders. On this question the Lord Ordinary has expressed no opinion, but I think it would be undesirable to send the case back to the Lord Ordinary on that question alone. If the parties cannot adjust the amount due to the pursuers on the bases of this opinion, we should require to hear the parties further as to the amount of compensation to be awarded, as on that question I am not able at present to form an opinion.

Lord Moncreiff—There is no doubt about the soundness of the first finding of the Lord Ordinary, "that the pursuers were sole proprietors of the whole coal, ironstone, freestone, and other metals and minerals in the two pieces of ground mentioned in the summons, subject to the rights conferred on Thomas Allan, and conveyed by his trustees to the defenders." This is plain on the face of the defenders' title, and was found in terms in the interlocutor of the Court in the first action, reported 21 R. 1063. It results from this, that the defenders were not entitled to remove the minerals in question without purchasing the same or making compensation therefor, except in so far as the limited faculty conferred on them by their title extended. It is admitted that they did not give notice to treat to the pursuers, and that the time for giving notice has long since expired; they dealt only with the owner of the surface. That being so, their only course was to proceed under the 117th section of the Lands Clauses Act of 1845, and this they were only entitled to do if they could show that they had omitted to take this estate, right, or interest through mistake or inadvertency. It is also provided in that section that promoters who desire to avail themselves of its provisions must take proceedings within six months after notice of such estate, right, or interest, or if the same is disputed within six months, after the right is finally established by law.

I am of opinion that the defenders were fully certiorated of the existence of the pursuers' right in those minerals at latest when the judgment in the Inner House was pronounced in the previous action; and that they should have proceeded under the 117th section within six months of that date. But they failed to do so, and it is now, in my opinion, too late for them to proceed under the statute.

The limited faculty or right conferred on the defenders in their title no doubt to a certain extent diminishes the value of the minerals to the owner of the minerals, But this does not avoid the necessity for the defenders purchasing or paying compensation for the minerals, whatever their value may be, after deduction of the value of the freestone which they are entitled to take under their title. I go further. I am disposed to think that it is not an averment relevant to oust the statutory tribunal that on a proof it will be found that after deduction of the minerals which the defenders are entitled to remove, little or no appreciable value will be left to be purchased or paid for by the defenders. That, I think, is a matter to be decided by the arbiter.

But the matter does not rest there. It appears from the previous case that the defenders have been already allowed a deduction in respect of minerals which they legitimately used on the ground; and in their defences to the present action they admit having removed and carried away minerals from the ground in contravention, as it seems to me, of the terms of their title.

I was not a member of this Division when the previous case was decided, and therefore I am not so familiar with the earlier stages of the litigation as the rest of your Lordships. But I have had the advantage of reading Lord Trayner's opinion, which has removed the only doubt which I ever entertained—a doubt arising from the wording of some of the interlocutors, viz., whether it was not still open to the defenders to proceed under the 117th section. I am now satisfied that the reservation in the interlocutor of 19th July 1894 did no more than leave it open to the defenders to take steps under that section, and did not free them from the necessity of doing so. I am also satisfied that the interlocutor in this action of 23rd December 1898 was in substance simply an allowance of proof of the value of the minerals wrongfully removed to establish the claim of damages made by the pursuer.

Upon these grounds I think that the defenders are bound to pay damages to the pursuers' for the minerals which they have removed, except in so far as warranted by their title; and that if the parties cannot agree as to the amount of damages they should be further heard upon that question.

Lord Justice-Clerk—I have had the opportunity of reading Lord Trayner's opinion, in which I concur.

Lord Young was absent.

The Court pronounced this interlocutor:—

"Adhere to first and second findings of the interlocutor of the Lord Ordinary, dated 9th May 1899: *Quoad ultra* recal the said interlocutor: Find that the defenders are bound to compensate the pursuers for the freestone removed by them (the defenders) from the piece of ground in question above the formation level of their line; that the compensation which the defenders are so bound to make is the market value of the stone removed at the time of its removal, with interest on the amount thereof as the same shall be hereafter determined, at the rate of five per cent. per annum from the date of citation till paid: *Quoad ultra* continue the cause that parties may be heard on the amount due to the pursuers by the defenders in terms of the above findings."

Counsel for Pursuers — Shaw, Q.C. — Younger. Agents — Campbell & Smith, S.S.C.

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

Wednesday, November 29.

SECOND DIVISION.

[Sheriff of Dumbarton.

CRONIN *v.* ALEXANDRIA FREE CHURCH KIRK-SESSION.

Servitude — Grant of Access by Passage across Lands—"Access" does not Include "Egress."

A deed of servitude granted to the owners of the dominant tenement "the heritable and irredeemable servitude right and tolerance of free entry, road, and passage through, over, and upon the servient tenement, and that as and for an access to the dominant tenement: But declaring that the said servitude of passage shall be limited to the use thereof by carts drawn by horses and laden with fuel or manure allenarly for the use of the possessors of the dominant tenement."

Held that this grant of servitude gave the owners of the dominant tenement no right to use the road or passage in question as a means of egress from their property for carts or other vehicles containing the contents of privy and ashpit or either of them.

Process—Servitude—Proper Action to Determine Limits of Servitude—Interdict—Declarator.

The use of a passage across land under a deed of servitude had been exercised in a certain way for ten years by the owner of the dominant tenement notwithstanding the remonstrances of the owner of the servient tenement, who contended that the meaning of the words conferring the servitude was more limited than that put on it by the other.

Opinion (by Lord Trayner) that declarator and not interdict in the Sheriff Court was the proper action for the owner of the servient tenement to raise in order to dispute the admitted use.

James Cronin, spirit merchant, Bridge Street, Alexandria, raised an action in the Sheriff Court of Dumbarton against the Kirk-Session of the Alexandria Free Church, in which he sought to have the defenders interdicted "by themselves or their factor or servants, or others acting for them or with their leave, from using the road or passage leading from John Street, Alexandria, through the pursuer's property . . . as an egress from their (the defenders') property, situated immediately to the south-south-west of that of the pursuer, for carts or other vehicles containing or conveying the contents of the privy and ashpit, or of either of them, connected with said property belonging to the defenders, or from using said road or passage in any way whatever as a means of conveying the contents of said privy and ashpit, or either of them, from the defenders' said property."

The pursuer averred that the properties of both himself and the defenders consisted of tenement houses, with privy and ashpit accommodation erected on the ground behind. By deed dated 28th January 1881 the following servitude was created over the pursuer's property in favour of that of the defenders—"The heritable and irredeemable servitude right and tolerance of free entry, road, and passage through, over, and upon the servient tenement, and that as and for an access to the dominant tenement: But declaring that the said servitude of passage shall be limited to the use thereof by carts drawn by horses and laden with fuel or manure allenarly for the use of the possessors of the dominant tenement, and that by a passage or road of 9 feet in width at the back of and near to the houses built on the line of Bridge Street, on the servient tenement, and extending said passage or road from the street on the east-south-east of said tenement to the dominant tenement."

He further averred that he acquired the property in September 1889, and since that date, notwithstanding his remonstrances the defenders had from time to time made use of the road or passage as an egress for conveying from their property by carts and other vehicles the contents of the ashpit and privy erected on the dominant tenement, and that notwithstanding they had other means of egress through their own property.

The pursuer pleaded—"(1) The defenders having no right to use said road or passage as a means of egress from their said property for carts or other vehicles containing the contents of the said privy and ashpit, or either of them, erected upon the said dominant tenement, the pursuer is entitled to interdict as craved, with expenses."