LORD KINNEAR, who was absent at the advising, gave no opinion.

The Court found in answer to the question of law stated in the case that there was evidence upon which it could be competently found that the death of the deceased John Drylie resulted from injury by accident arising out of and in course of his employment; therefore affirmed the award of the arbitrator, and decerned.

Counsel for Claimants and Respondents —D.-F. Dickson, K.C.—Wilton. Agent—D. R. Tullo, S.S.C.

Counsel for Defenders and Appellants —Horne, K.C.—Carmont. Agents—W. & J. Burness, W.S.

Wednesday, January 29.

SECOND DIVISION.

[Lord Cullen, Ordinary.

CALEDONIAN RAILWAY COMPANY *v.* SYMINGTON.

(*Reported ante*, 1911 S.C. 552, 48 S.L.R. 539; 1912 S.C. (H.L.) 9, 49 S.L.R. 49; 1912 S.C. 1033, 49 S.L.R. 751.)

Process — Proof — Diligence to Recover Writs—Confidentiality—Letters Passing between Party's Law Agents and Arbiters, Engineers, Contractors, and Officials—Statement of Fact.

A railway company brought an action of suspension and interdict against the lessee of a freestone quarry to interdict him from quarrying the freestone under land which the company had purchased under the Railways Clauses Consolidation (Scotland) Act 1845. The respondent averred—"In selling and purchasing respectively the land in question both the sellers and the complainers treated with each other, in respect of the said freestone rock, on the footing that it was admittedly a mineral within the meaning and for the purposes of the said Railways Clauses Act," and sought a diligence to recover excerpts from the letter books of the complainers' law agents of all letters which contained references to freestone as a mineral, written in connection with similar sales of land and passing between the complainers' law agents and the arbiters in arbitration proceedings relating to such sales, and between the complainers' law agents and the complainers' engineers, contractors, and officials. The complainers objected to the diligence on the ground that the letters were confidential.

The Court, in the circumstances, *granted* the whole diligence, expressly reserving for the Lord Ordinary the question of the confidentiality of any excerpt to be made by the commissioner.

The Caledonian Railway Company, *complainers*, brought an action of suspension and interdict against Hugh Symington, contractor and quarrymaster, Coatbridge, *respondent*, to interdict the respondent from quarrying the freestone under land which the complainers had purchased under the Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33).

The respondent averred—"In selling and purchasing respectively the land in question both the sellers and the complainers treated with each other, in respect of the said freestone rock, on the footing that it was admittedly a mineral within the meaning and for the purposes of the said Railways Clauses Act"—see *previous report*, 1911 S.C. 552, at p. 554, 48 S.L.R. 539, at p. 541.

The Lord Ordinary (CULLEN) allowed a proof, and after sundry procedure—see especially *previous report*, 1912 S.C. 1033, 49 S.L.R. 751—on 19th December 1912 granted a diligence to the respondent for the recovery of the documents contained in article I, heads 1 and 2, and article 3 of the following specification, disallowing the other articles:—

"1. All letter-books and business ledgers kept by or on behalf of Hope, Todd, & Kirk, W.S., Edinburgh, and their predecessors in business, Hope & Oliphant; Hope, Oliphant, & Mackay; Hope & Mackay; Hope, Mackay, & Mann; and Hope, Mann, & Kirk, all Writers to the Signet, Edinburgh, that excerpts may be taken therefrom of (1) the letters by the said Hope, Oliphant, & Mackay to Robert Elliot, Ecclefechan, dated 4th June 1850, 23rd October 1850, and 2nd November 1850; and (2) all other letters passing between the said Writers to the Signet or anyone on their behalf, as agents for the complainers, and the said Robert Elliot, Horn, and any other arbiters, oversmen, or clerks (or anyone on their behalf) acting in arbitrations between the complainers and the proprietors after mentioned, containing references to freestone as a mineral or otherwise, and tending to show whether the complainers regarded freestone as a mineral or otherwise in dealing with said proprietors and their claims, or containing instructions regarding claims made by said proprietors in respect of freestone or sandstone acquired, taken, used, or reserved by the complainers or their contractors for or in connection with the construction of their railways, or in any way relating to such claims, or the arbitration proceedings following thereon, viz.—(*a*) the proprietors of Woodhouse estate between the years 1845 and 1868; (*b*) the proprietors of the following estates, namely—(1) Burnfoot, (2) Kirkpatrick, (3) Cove, (4) Barncleugh, (5) Longbedholm, and (6) Mossknowe, between said years; and (*c*) the proprietors of Mount Annan estate between the years 1845 and 1875; and (3) all entries in any way relating to such instructions to said arbiters, oversmen, and clerks in arbitrations, or to communications to or meetings with them with reference to such claims and arbitration proceedings between said respective dates.

"2. All letter-books and business ledgers kept by or on behalf of Hope, Todd, & Kirk,

W.S., Edinburgh, and their predecessors in business, Hope & Oliphant; Hope, Oliphant, & Mackay; Hope & Mackay; Hope, Mackay, & Mann; and Hope, Mann, & Kirk, all Writers to the Signet, Edinburgh, that excerpts may be taken therefrom of —(1) letters by the said Hope, Oliphant, & Mackay to (*a*) John Willet, C.E., Carlisle, dated 17th May 1849; (*b*) Stephenson & Company, contractors, or Mr Woodhouse of said firm, dated 15th August and 27th November 1849 and 3rd January 1850; and (*c*) James Davidson, writer, Lockerbie, dated 5th October 1847 and 4th April 1848, all relating to the claims after mentioned; (2) all letters passing between the said Writers to the Signet, or anyone on their behalf, as agents for the complainers; and (*a*) engineers employed by the complainers; (*b*) contractors employed by the complainers; and (*c*) officials in the complainers' employment, and anyone on behalf of any of them, containing references to freestone as a mineral or otherwise, and tending to show whether the complainers regarded freestone as a mineral or otherwise in dealing with the proprietors after mentioned and their claims, or containing instructions and reports regarding or in any way relating to claims made by the said proprietors in respect of freestone required, taken, used, or reserved by the complainers or their contractors for or in connection with the construction of their railways or in any way relating to such claims, or the arbitration proceedings following thereon, namely—(*a*) the proprietors of Woodhouse estate between the years 1845 and 1868; (*b*) the proprietors of the following estates, namely—(1) Burnfoot, (2) Kirkpatrick, (3) Cove, (4) Barncleugh, (5) Longbedholm, and (6) Mossknowe, between said years; and (3) all entries in any way relating to such instructions and reports or to communications or meetings with reference to such claims, and arbitration proceedings between said respective dates.

"3. Failing principals of all or any of the books and documents called for, drafts, duplicates, excerpts, jottings, or copies thereof are called for."

The complainers reclaimed, and argued—The Lord Ordinary was right in disallowing article 2 of the specification, but he erred in allowing article 1. Communications passing between Mr Elliot and the company's solicitors were as much entitled to the privilege of confidentiality as were the other communications which the Lord Ordinary had refused, for Mr Elliot, although with regard to one matter he had acted in the capacity of an arbiter, was in reality the expert adviser of the company. Moreover, in those days arbiters were just in the same position *quoad* confidentiality as solicitors, because, as was shown by the evidence in the present case, arbiters were accustomed to act as the protagonists of the party who employed them. With regard to article 2 the Lord Ordinary was right in disallowing it. It was incompetent to recover communications passing between a company and its solicitors, &c., because such communications were confidential. A diligence to recover such documents was clearly incompetent according to the rule of English law—*Greenough* v. *Gaskell*, January 31, 1833, 1 Mylne and Keen, 98, *per* Lord Brougham at p. 103, and the rule of Scots law was the same—Begg's Law Agents, 2nd ed., p. 316, *et seq.*; *Lady Bath's Executors* v. *Johnston*, F.C., November 12, 1811; *Lumsdaine* v. *Balfour*, November 13, 1828, 7 S. 7; *M'Cowan* v. *Wright*, December 14, 1852, 15 D. 229, *per* Lord Wood at p. 237; *Munro* v. *Fraser*, December 11, 1858, 21 D. 103. *Wheeler* v. *Le Marchant*, April 6, 1881, L.R., 17 Ch. Div. 675, merely laid down the principle that in order to establish the plea of confidentiality in the case of a solicitor and client it was necessary to show that the solicitor was actually acting in that capacity. It was true that the present action had not commenced at the time the letters were written, but the question between the parties was the same then as now.

Argued for the respondent—The Lord Ordinary was right in allowing article 1 of the specification, but he ought to have allowed article 2 also. With regard to article 1 there could not possibly be confidential relations between the arbiter in a case and one of the parties to it, since the arbiter was the judge. With regard to article 2 the documents there called for did not fall within the category of confidential documents which the reclaimers were entitled to withhold, because the respondents only desired to obtain excerpts from them at the sight of the commissioner with regard to a particular statement of fact contained in them, and the respondents were not attempting to recover anything in the nature of confidential advice or information—Taylor on Evidence, 10th ed., section 911, *et seq.*; *Wheeler* v. *Le Marchant* (*cit*). The crux of the present case was, did the parties who wrote these letters regard freestone as a mineral, and the answer to that question depended on what the word "freestone" meant in the vernacular of the mining world, the commercial world, and landowners—*North British Railway Company* v. *Budhill Coal and Sandstone Company*, 1910 S.C. (H.L.) 1, *per* Lord Chancellor (Loreburn), quoting Lord Halsbury, at p. 4, 47 S.L.R. 23, at p. 25. That was a pure question of fact, and it was only a historical fact, for the letters were written long ago. They were written, moreover, in connection with a matter entirely different from the subject-matter of the present *lis*, and where it was sought in one action to obtain communications which had passed in connection with another and different action the rule about confidentiality did not apply. The evidence contained in the letters was the best evidence to prove what the word "freestone" meant, because it was evidence of the intention of the parties themselves, which could best be ascertained from the letters they themselves wrote. The reclaimers had attempted, but had failed, to obtain the principals of the letters, and therefore having

exhausted the primary evidence, they were entitled to fall back on secondary evidence, viz., copies of the letters—*Caledonian Railway Company* v. *Symington*, 1912 S.C. 1033, 49 S.L.R. 751.

At advising—

LORD JUSTICE-CLERK—His Lordship, dealing with the fourth specification of documents called for by the respondent, has, with a minor exception, allowed the first article and disallowed the second. On leave granted both parties have reclaimed.

In the argument before us both the complainers and the respondent founded on the opinion of Lord President M'Neill in the case of *Munro* v. *Fraser* (21 D. 103). His Lordship said—"The general rule is that communications passing between client and agent are confidential. A party is entitled to have advice, and to communicate with his law adviser confidentially, and such communication is not to be laid open except in particular circumstances and positions"; and he added, "Each case, of course, rests on its own particular circumstances."

It is plain that the litigant who is desirous to have a specification sanctioned cannot have it sanctioned in such form as will lay open to him confidential advice given to his opponent or his predecessors. But, on the other hand, I think it equally plain that in endeavouring to recover what may be called historical facts a litigant cannot be debarred from obtaining those parts of any document which are not of a confidential character. A letter which conveys information as to facts only might be admissible. Also a letter which in part states facts, and in part may be held confidential, can, if the statements of fact are separable in the language from that which may be held confidential, be excerpted and made available to the party seeking to ascertain facts. For example, suppose that in a case relating to minerals there should be in a letter—or its press copy in a letter-book—a quotation from a report of an expert regarding the character in fact of a particular bore made to ascertain the nature of the ground below the surface, it would appear to me that such a statement of fact occurring in a letter written in the far past could be fairly granted, means being taken by sealing up, or by copying, of giving that information, while excluding all which was not fact, but it might be comment or suggestion.

It appears to the Court, therefore, that in dealing with the specification which is now before the Court the Lord Ordinary has gone too far in disallowing altogether the second head of the specification.

There are here special circumstances which make it necessary that the letter-books and business ledgers called for in the specification should be produced, reserving the question of confidentiality of any excerpt made by the commissioner for the consideration of the Lord Ordinary.

In the first place, the purpose of the proof which has been allowed must be kept in view. The respondent Hugh Symington avers in answer 11—"In selling and purchasing respectively the land in question both the sellers and the complainers treated with each other, in respect of the said freestone rock, on the footing that it was admittedly a mineral within the meaning and for the purposes of the said Railways Clauses Act." Thus the inquiry in connection with which the diligence is asked relates to transactions alleged to have taken place at a time when, it is said, no dispute existed, or owing to the views then held by all parties could have existed, and when, therefore, no occasion arose for confidential communications or consultations between agent and client or between employer and employed in regard to that matter.

The next special circumstance is the period, in some cases extending over more than sixty years, to which the investigation relates. Obviously no oral evidence is now obtainable from any of the parties to the earlier of these transactions. This fact might, however, have been negligible had the documents forming the primary evidence of the transactions been in existence, but it is admitted that these so far as consisting, for example, of the proceedings in arbitrations, have been destroyed in ordinary course. If the respondent is to prove the averments remitted to probation, it must be to some extent at least by secondary evidence.

But it does not follow that the respondent is entitled to unrestricted access to the whole documents called for by him. There may be documents falling under the diligence to which, in whole or in part, the objection of confidentiality will apply.

We think the proper course is to grant the diligence as craved, expressly reserving all questions of confidentiality to be determined by the Lord Ordinary. The letter-books and business ledgers will be examined by the commissioner, who will make excerpts of such letters and entries as fall under the call, and these excerpted letters and entries (so far as objection is taken to their being produced) will be admitted or excluded in whole or in part by the Lord Ordinary, according to his view of whether they are or are not confidential.

This is the opinion of the Court.

The Court consisted of the LORD JUSTICE-CLERK, LORDS DUNDAS and GUTHRIE, LORD SALVESEN being absent.

The Court pronounced this interlocutor—

> "Recal the said interlocutor: Grant diligence against havers at the instance of the compearing respondent for recovery of the documents called for in the specification as originally lodged, expressly reserving all questions of confidentiality."

Counsel for the Reclaimers—Clyde, K.C. —Hon. W. Watson. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Respondents—Murray, K.C. — Macmillan, K.C. — D. Jamieson. Agents—Dove, Lockhart, & Smart, S.S.C.