[HIGH COURT OF AUSTRALIA.]

THE RAILWAY COMMISSIONERS OF NEW SOUTH WALES . . . } . APPELLANTS;
DEFENDANTS,

AND

THE PERPETUAL TRUSTEE COMPANY, LIMITED . . . . . } . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Sept.* 23, 24, 25, 29.

Griffith C.J., Barton and O'Connor JJ.

Resumption—Coal mines—Prohibition of work—Compensation—Claim by lessors—Basis of assessment—Deductions—Interest—Public Works Act (*N.S.W.*), (*No.* 26 *of* 1900), *sec.* 135.

When land under lease for coal mining purposes has been resumed for an authorized work under the *Public Works Act*, 1900, and the working of the mines has been prohibited, the lessees, although they may be the only persons desirous of working the mines, and entitled to give notice of their intention to do so under sec. 135 of that Act, are not necessarily the only persons entitled to compensation. If the lessors are able to show that, over and above the interest which they have conveyed to the lessees, they retain an ulterior interest, which is immediately and injuriously affected by the prohibition, and in respect of which they may receive compensation, they have a claim to compensation under sec. 95 and the following sections of the Act.

The principles governing the rights of lessors and lessees to compensation in such cases, as stated in *Smith* v. *Great Western Railway Co.*, 3 App. Cas., 165, applied.

Coal-bearing land was leased by the owners to a colliery company for a term of which about 30 years had still to run. The lessees were at liberty to mine under any part of the land, and to pay a "fixed rent" of £700, and "rent or royalty" at a specified rate on all coal &c. over and above such quantity as might be worked in respect of the fixed rent, and might work such quantity of coal, &c., as should, at the specified rate of royalty, produce £700 without paying rent or royalty in respect of it, with permission to make up any deficiency in the amount worked in any year in the succeeding year. A strip of the land was resumed by the Railway Commissioners, and the lessors and lessees gave notice of their intention to work the coal under and within forty yards of the boundary of the strip. The Commissioners forbade such working

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except so far as might be necessary to connect the workings on either side of the strip. The lessors brought an action for the assessment of compensation for loss and injury caused by the prohibition. The Judge who tried the case, having estimated the quantity of coal within the inhibited area, and the number of years that it would take to work it out, having regard to the other probable work of the mine, divided the royalty payable on that quantity of coal into equal annual instalments, and awarded as compensation a sum equal to the present value of these calculated as of the day when the first would have been payable, together with interest from the date of the notice to judgment. His decision was affirmed by the Full Court, on appeal.

Held, that the lessors were entitled to compensation as for a present interference with a present proprietary right, and that therefore the basis of assessment was right so far as it proceeded upon the present value of the profits to be derived from the coal which was about to be worked immediately, and not upon the reversionary value of that coal at the expiration of the lease; but that the present value should have been calculated as at the date when the notice not to work was given; and a deduction made from each annual instalment of a sum bearing the same proportion to £700, as the probable output from the inhibited area would have borne to the total output from the mine; and, (following *In re Richard and Great Western Railway* (1905) 1 K.B., 68), that interest should not have been awarded in respect of the period between the giving of the notice and the making of the assessment.

Decision of the Supreme Court (unreported), varied, and a new trial ordered for re-assessment of damages, on these principles, unless the respondents consent to a reduction of the verdict.

APPEAL from a decision of the Supreme Court of New South Wales.

The following statement of the facts and the proceedings is taken from the judgment.

The respondents in this case were owners of a tract of coal-bearing land about 2000 acres in extent, through which the appellants constructed a railway, having resumed a strip of the surface for that purpose. The minerals remained the property of the respondents. By two indentures, dated respectively 8th July, 1887 and 28th January, 1897, the minerals under the land were demised to a colliery company for terms of which about thirty years had still to run on 23rd December, 1901, which is a material date for the purposes of the present case. The conditions of the two leases were substantially identical, and the case was treated throughout on the same footing as if there had been one lease only comprising the whole of the land. The

lessees were entitled under the leases to mine and take the minerals under any part of the land without payment of any royalty except as expressly stated. Rent was reserved under both leases at the respective rates of £200 and £500 per annum, £700 in all—described as "fixed rent," and a further "rent or royalty" calculated at a specified rate on all coal and like minerals wrought in the mines over and above such quantity as might be worked in respect of the fixed rent, and it was stipulated that the lessees might work such quantity of coal &c., as should at the specified rate of royalty per ton produce the sum of £700 without paying any rent or royalty in respect of it, with permission to make up any deficiency in the amount worked in any year in the succeeding year.

In October, 1901, notices were given by both the lessees and the respondents to the appellants of their intention to work the coal under the land taken for the railway and within 40 yards from the boundary of the land so taken, and on 23rd December, 1901, the appellants forbade such working except so far as might be necessary to connect the workings on either side of the intervening strip of land.

Section 135 of the *Public Works Act* 1900 provides as follows:

"(1) If the owner, lessee, or occupier of any mines or minerals lying under any authorized work or any work connected therewith, or within forty yards from the boundary thereof, is desirous of working the same, such owner, lessee or occupier shall give the Constructing Authority notice in writing of his intention so to do, thirty days before the commencement of working.

"(2) Upon the receipt of such notice the Constructing Authority may cause such mines to be inspected by any person appointed by him for that purpose.

"(3) If it appears to the Constructing Authority that the working of such mines or minerals is likely to damage the authorized work, and if the Constructing Authority is willing to make compensation for such mines or any part thereof to such owner, lessee or occupier, then he shall not work or get such minerals.

"(4) If the Constructing Authority and such owner, lessee or occupier do not agree to the amount of such compensation, the

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same shall be settled as in other cases of disputed compensation as provided in Division 2 of Part VII. hereof."

The appellants signified their willingness to make compensation under this section to the lessees and also to the respondents, and the question arising for determination was the principle on which compensation to the respondents should be determined.

The respondents claimed compensation in respect of loss of royalties on an estimated quantity of 1,993,000 tons of coal situated within the inhibited area, and estimated to produce £44,000, of which the present value was stated to be £27,680. The claim, which was not sent to the appellants until June, 1904, not being admitted, they brought their action in the Supreme Court, which was heard before *Owen* J. without a jury. The respondents case was based upon the assumption that their tenants had a right to work, and were prepared to work, the coal in the inhibited area, that in the ordinary course of the working it would have taken several years to work it out, during which other parts of the mines would also have been worked. The learned Judge found as facts—and his decision on this point was not impeached—that the quantity of coal within the inhibited area, was 700,000 tons, on which a royalty (if calculated on the total amount) of £16,203 would have been payable, and that it would have taken ten years to work the coal out, having regard to the other probable work of the mine. He accordingly treated this royalty as divided into ten equal annual instalments, and awarded to the respondents a sum of £13,667 19s. 10d., which was intended to represent the present value of those instalments, calculated as of the day when the first would have been payable together with interest to the date of judgment, 31st March, 1905, making in all £14,368 7s. 5d.

The appellants moved before the Full Court for a rule *nisi* for a new trial, which was refused, and from that decision they now appealed.

C. B. Stephen and *Scholes*, (*Pilcher* K.C. with them), for the appellants. The allowance of interest was wrong. There was

no interest accruing until the amount of compensation was ascertained: *In re Richard and Great Western Railway* (1).

As to the main point, the claim of the respondents is not properly a claim for compensation, but for damages. It is only the lessees who are entitled to compensation. They were the only persons immediately affected by the prohibition to work, and to them only was notice given. The respondents are reversioners and are only at present concerned with rent and royalty. They can only claim damages for diminution of income owing to the resumption. The evidence does not disclose any such loss. During the whole 30 years the lessors would receive the full rent of £700, and just as much by way of royalty as if there had been no prohibition. It was therefore a matter of indifference to them which part of the mine field was worked during the term, and their claim is confined to compensation for loss during the term. But the only parties who will suffer loss or injury during that term are the lessees: *Smith* v. *Great Western Railway Co.* (2). The difference between the positions of the lessors and the lessees is plain, because it might be that the whole of the coal in a lease would be worked out during the term. A prohibition from working part of the coal would in such a case injure the lessees, but would not necessarily affect the lessors at all. It was therefore for the respondents to show that the injury to the value of the mine would continue till after the end of the term. In that event they will be entitled to damages, not compensation, and the damages cannot be computed until the expiration of the term. [They referred to *Rust* v. *Victoria Graving Dock Co. and London and St. Katharine Dock Co.* (3).] For the purpose of the present inquiry the lessees are the owners of the coal, and may take it all. There was no evidence of a satisfactory nature as to the number of years it would take to work out the coal in the leased land. It was essential to prove that in order to assess the damages: *Bwllfa and Merthyr Dare Steam Collieries* (1891) *Ltd.* v. *Pontypridd Waterworks Co.* (4). No evidence has been given of any diminution of income since the prohibition, and it cannot be assumed that there ever will be.

(1) (1905) 1 K.B., 68.
(2) 3 App. Cas., 165, at p. 191.
(3) 36 Ch. D., 113.
(4) (1903) A.C., 426.

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The lessors cannot get less than £700 a year, and ten years of that would easily cover the royalties on the coal in the prohibited area. In any case that area would have been wholly worked out at the end of the term, and the respondents, having been paid for it, will be no worse off for having lost it in this way than if it had merely been worked out by the lessees.

Even if the respondents were entitled to compensation to the extent of the present value of the coal in the prohibited area, there should have been a deduction of £700 from the amount allowed for each year. That amount is assured to the lessors and is not affected by the resumption. Up to that amount therefore there is not, and cannot be, any loss. If the gross royalties during those ten years would have amounted to more than £700, but for the resumption, then the loss caused each year by the resumption is represented by the difference between £700 and the amount of royalty that would have been earned. It is that balance only to which they are entitled. Taking the calculation of ten years made by His Honor as correct, he has allowed them not only the full royalty for those years, but also the £700 which would have covered the value of the prohibited coal in each year, and consequently has allowed them twice over for the same coal. The whole £700 should have been treated as royalty on which the resumption had had no effect whatever.

Want K.C., and *Knox* (with them *Ferguson*), for the respondents. The appellants' argument proceeded on the assumption that the whole mine would be worked out in 30 years, and that the lessors would therefore exhaust the revenue producing capacity of their property during the term. But the Judge's finding is inconsistent with that, and can not be impeached here. The appellants are not entitled to set off the coal outside the prohibited area against the coal in that area. The two areas should be dealt with separately. The resumed area is worth the royalty payable on the coal it contains, irrespectively of the rent of £700. This is not a case of the sale of all the coal for a fixed rent. The returns depend upon the amount of coal available and wrought, with a proviso that not less than £700 is to be paid in each year by way of royalty. When the time for compensation comes the

respective interests of lessor and lessee must be determined and the compensation apportioned in accordance therewith.

The lessors are entitled to be placed in the same position as if there had been no resumption. It is no answer to say that the lessors have other land which may contain coal. That might be a good answer if all the coal in the leasehold area had been sold to the lessees, and it would have been all worked out by the end of the term. The Judge rightly dismissed from consideration the possibilities of the rest of the area, in respect of coal bearing. It was for the appellants to cut down the claim, and they brought no satisfactory evidence as to the relative richness of the different areas. [They referred to *Bwllfa and Merthyr Dare Steam Collieries* (1891) *Ltd.* v. *Pontypridd Waterworks Co.* (1).] The respondents were entitled to *compensation* for the particular piece of coal land actually resumed, and no question of damages or diminution of income can arise. Even if it was merely a question of damages, the onus was on the appellants to satisfy the Judge that the respondents had not suffered any, and his finding that they had, being one of fact, will not be interfered with. The division of ownership can make no difference in the total amount of compensation. The lessors were entitled under the lease to compel the lessees to work the mine in a proper manner. There was evidence that to leave the prohibited area unworked would not have been working it in a proper manner. The lessees could have been compelled to work that area first, and thus to leave a corresponding amount of coal in the unresumed area at the end of the term. The resumption has deprived the lessors of that right, and therefore has diminished their royalties to that extent. They have in effect been prevented from selling that particular portion of their coal. [They referred to *Gowan* v. *Christie* (2); *Smith* v. *Great Western Railway Co.* (3); and *In re Barrington*; *Gamlen* v. *Lyon* (4)]. That is a present loss which should be assessed as at the date of the resumption, making allowance for the time which would be spent in extracting the coal. The £700 was royalty, not rent. But, if it can be deemed rent in any sense, the lessees

(1) (1903) A.C., 426, at pp. 428, 432.
(2) L.R. 2 H.L. Sc., 273.
(3) 3 App. Cas., 165.
(4) 33 Ch. D., 523.

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are by the resumption relieved *pro tanto* from liability to pay it, and therefore no deduction should be made from the amount of compensation in respect of that sum.

As to the interest, the lessors were entitled to compensation in January 1902. If, therefore, the value of the coal is assessed as at that date, there should be an allowance of interest up to date.

Pilcher K.C. in reply. The coal taken by the appellants was not the property of the respondents, it had passed to the lessees under the lease, and the £700 per annum is the payment for it. That is in no sense a royalty. It has to be paid whether coal is worked or not. The effect of the covenant is that up to £700 worth of coal the lessees pay no royalty, but their rent goes on whatever happens, as long as the lease subsists. The lessors had no interest remaining over and above the rent and royalty, and are not entitled to be placed in a better position now than they would have been in if there had been no resumption. There was no finding on the question of diminution of income. That was the vital point in the case, for it is purely a question of compensation for loss, not purchase of the coal: *Bwllfa and Merthyr Dare Steam Collieries* (1891) *Ltd* v. *Pontypridd Waterworks Co.* (1). The Judge was bound to come to some decision on that point, notwithstanding the difficulty of calculation as to the revenue producing capacity of the balance of the land, and the case should go back to him for a finding on that point. [He referred to *Smith* v. *Great Western Railway Co.* (2).]

Cur. adv. vult.

The judgment of the Court was read by

Sept. 29.

GRIFFITH C.J. [His Honor having stated the facts and referred to the terms of the leases as already set out, continued.] The effect of these stipulations was that, as to so much coal as would produce a royalty of £700 a year calculated at the specified rate, the lessors were in the same position as to beneficial ownership as if they had agreed to sell that quantity of coal to the lessees at the fixed price of £700. We will speak of this coal as the £700 worth of coal. With respect to the rest of the coal, the lessors

(1) (1903) A.C., 426, at p. 428. (2) 3 App. Cas., 165.

had agreed to sell to the lessees for the agreed royalty so much of it as might be brought to bank during the term of the lease. With regard to the excess, therefore, beyond the £700 worth, the lessors retained a beneficial interest in the coal equal to the amount of the royalty. For, as pointed out by Lord *Cairns* L.C. in *Gowan* v. *Christie* (1), a mining lease is in effect a sale of the minerals to the lessee for the stipulated rent or royalty. The leases contained a stipulation that if the mines were worked out during the term the rent should cease.

Sec. 135 of the *Public Works Act* 1900 provides as follows: [His Honor read the section, and proceeded]: That section does not in express terms provide for compensation to any persons except the person, whether owner, lessee or occupier, by whom the notice of the intention to work the mine is given, but it was held in *Smith* v. *Great Western Railway Co.* (2), that under a corresponding section (78) of the English *Railways Clauses Consolidation Act* 1845, when such a notice is given by the person immediately entitled to work the mines, and compensation is offered to him, all other persons interested in the mines are also entitled to compensation, while on the other hand their right to work the mines is also inhibited. This result was arrived at by calling in aid sec. 6 of that Statute, which provided that "the company shall make to the owners and occupiers of, and all other persons interested in, the lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used." The *Public Works Act* 1900 does not contain any section in terms identical with sec. 6 of the *Railways Clauses Consolidation Act*, but it was conceded by the appellants that sec. 95 of the Act and the following sections conferred on the plaintiffs a corresponding right.

The principle governing the right of lessors and lessees to compensation in such cases is thus stated by Lord *Cairns* L.C. in the case just cited (3). "It appears to me that what is intended by the legislature with regard to mines under a railway is this: the railway company is to be under no obligation to compensate

(1) L.R. 2 H.L. Sc., 273, at pp. 283, 284.
(2) 3 App. Cas., 165.
(3) 3 App. Cas., 165, at p. 179.

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any person until there is someone who has a right to work, and who is prepared to work, the mines. When that person gives the notice of his intention to work the mines, the directors are to come to an agreement or settlement with that person, and to come to a settlement with that person according to what his rights may be; if the rights of that person are to take away the coal, to exhaust it entirely, and if he has a tenure the length of which will enable him to take away the coal and to exhaust it entirely, the railway directors may be bound, and, I should think, would be bound, to compensate that person to an extent equal to the whole value of the minerals. If his right is not so great; if he cannot take away the whole, or if the extent of his tenure is not such as would enable him to take away the whole, the directors would have to compensate him to an extent less than the value of the whole. Then, as it seems to me, the Statute makes, in the 6th section, another provision which is to be read along with this 78th section as to the lessee, and which, as I really think, entirely protects the right of the reversioner." His Lordship then read the 6th section, and proceeded: "Of course 'lands' includes mines, and I read this therefore as a general provision that all other persons interested in the mines shall be compensated for the amount of their interests therein." After again referring to the 78th section, he went on (1): "My Lords, that appears to me to be the solution of the whole of this case—Mr. *Smith* (the landlord) may be able to show that over and above the interest which the lessee had in these mines, an interest which would enable him, the lessee, to work and take away the whole of the coal, there was some farther, some ulterior interest, which he, Mr. *Smith*, was entitled to, and in respect of which he may receive compensation; and if he is able to show that, he may support a claim for compensation under the 6th section."

In the same case Lord *Penzance* said (2): "There is further to be observed, that the directors are not only to arrange with the lessee, but, if he is a person who is entitled to take all the coal, the compensation for preventing him from taking the coal, must

(1) 3 App. Cas., 165, at p. 181. (2) 3 App. Cas., 165, at p. 185.

be the full value of the coal left :" and again (1), referring to the particular circumstances of the case : "I have had the greatest difficulty in seeing, from the beginning to the end of this case, how (I take it on the supposition in the first instance that the rent was paid) the lessor could have any interest in the question whatever. The lessor ascertained what the value of the coal was, and entered into an agreement by which he handed over to the lessee the right to take the whole of the coal. He granted him a lease which was so calculated in point of time as to enable him to take the whole of the coal, and he took a rent which represented the whole value of the coal, and supposing that rent had been paid to him, it passes my comprehension to see what possible interest the lessor had remaining. He got the value of his coal, the whole value of his coal had been paid in the shape of rent, and it would be absolutely immaterial to him whether the tenant had taken out the coal, and sold it, or whether the tenant had, under the 78th section of this Act, been obliged to leave the coal there, and received the value of it as compensation from the railway company. The position of the lessor in either the one event or the other would have been precisely the same. Therefore I really do not see what interest remained in the lessor." Lord *O'Hagan* said (2): "In the case before us the lease of *Hodgkins* constituted, substantially, a sale of the coal. Its value was estimated on the face of the instrument, and the payment was, as for rent, arranged with the plain understanding that the whole of it should be removed, within a term of fifteen years. As Lord Justice *Mellish* said : 'In the case of minerals, if a man is the lessee of minerals, and has time to take the minerals, and has the right to take the minerals, he does take the minerals, however limited his interests may be; and, when he has once taken and got the minerals and sold them, the person who has to come in after him is just as much deprived of the minerals as if the person who got them had been the owner in fee simple.' Here the lessee had the right and the time to take the minerals, and therefore a property in them over which he had full control. He sold that property and got the worth of it in the way indicated by my

(1) 3 App. Cas., 165, at p. 187. (2) 3 App. Cas., 165, at p. 191.

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noble and learned friend who last addressed your Lordships, and with him I confess I have difficulty in discovering the existence of any real loss of which the reversioner can complain. The coal was disposed of, purchased, and paid for; and there was an end to any claim to it, save on the part of the compensating company. It was not, as has been well put at the Bar, the case of a farm or of a house, to be used during a term and go back to the owner at the end of it. Here the lessee bought the coal and sold it, and got the price of it, and the offer of the respondents, which will be made effective by your Lordships' judgment, seems to me to have given the appellant more than he has any right to demand. But, even if it be otherwise, and, either with reference to royalties or anything else, he has a title to any further compensation he may enforce that title effectually by a proceeding under the 6th section of the *Railway Clauses Act*."

The duty of the Court in the present case is to apply the doctrines thus laid down to the circumstances appearing by the documents and facts. [His Honor having made further reference to the facts and to the proceedings, as already stated, proceeded:]

The first objection taken is that the learned Judge adopted the wrong principle in the assessment of compensation. It is contended that, having regard to the area of the land under lease, the length of the term, the probable quantity of coal available, and the probable output of the mine, the actual return to the plaintiffs, by way of rent and royalty together, during the residue of the term was not likely to be diminished by reason of the inhibition, and that they would, therefore, not sustain any actual loss until the expiration of the term, when they would get the land back from the lessees subject to the inhibition as to the area in question. There was evidence from which the learned Judge might have drawn this inference if he had accepted the evidence. In this view, the plaintiffs would only be entitled to compensation for the future loss which they would sustain from their inability to work this coal after the termination of the lease. But this, the appellants contended, should be estimated at the present value of what it would have been worth as coal *in situ* at the termination of the lease. The plaintiffs, on the other hand, contended that the case should be considered as one of a present

interference with a present proprietary right which the plaintiffs and their lessees were about to exercise, on the one hand by selling, and on the other by purchasing and taking away, the coal in the area in question. Now, *primâ facie*, the owner of property is entitled to do what he likes with his own, and to dispose of it at such times and on such terms as he pleases. A mining lease is, as already pointed out, in substance a sale of the minerals. In the present case the foundation of the rights of both lessors and lessees is an interference with a present right of which they were prepared to take, and intended to take, immediate advantage. The power exercised by the Commissioners, for the exercise of which they have offered to make compensation, is conferred by law. Their act is therefore not unlawful, but they must make compensation. Now, when one person is authorized to take the property of another against his will on the terms of paying the value, it is not competent for the person exercising this authority to claim that a diminution should be made in the price on the ground that, if he had not taken the property, the owner would probably not have been able to sell it for some time, and that therefore the price should be estimated at the present value of a sum payable *in futuro*, when another purchaser might be expected to be forthcoming. Nor is it competent to him to claim a diminution of price on the ground that the market for the particular kind of property is limited, and that by acquiring the property in question, and so taking it out of the market, the taker has conferred on the owner an opportunity, which he would not otherwise have had, of disposing of other property of the same kind. Such considerations are too remote. The case is dealt with as a present interference with present proprietary rights, and no allowance by way of set off or reduction of price can be rightfully claimed in respect of incidental advantages which the owner deprived of his property may acquire in respect of other property which he has an equal proprietary right to use and dispose of at his will. In some cases the legislature has by express enactment made provision for reducing the price or compensation to be paid in respect of land taken for public works by an amount representing the enhancement in value of other property of the owner, but in the

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absence of such express enactment it is clear that no such allowance can be made.

The same principles apply to the compensation payable in the present case. There is, indeed, no question of enhancement of value to any part of the plaintiffs' coal by reason of the inhibition. The effect of it is that they are prevented from selling to their lessees coal which they would otherwise have sold to them, and the fact that they are at liberty to sell to the lessees a corresponding quantity of other coal is quite irrelevant. If, indeed, the rent payable by the lessees had been a fixed rent, and the lessees had been entitled on payment of the rent to take as much coal as they thought fit during the term of the lease, there would have been in effect a sale of all the coal, and the lessors, so long as they received the full price, that is the rent, would sustain no loss by reason of the inhibition, but the loss would fall entirely on the lessees, and would be considered in estimating the compensation payable to them. If the result of the inhibition were to bring about a cessation of payment of rent by reason of the exhaustion of the coal before the end of the term, this would no doubt be a loss for which the lessors would be entitled to compensation, but the amount would be only the reversionary value of the future rent which they would probably lose. But that is not this case. For these reasons we are of opinion that the basis adopted by the Supreme Court was right so far as it proceeded upon the present value of the profits to be derived from the coal which was about to be worked immediately, and not upon the reversionary value of that coal at the expiration of the lease.

The appellants took the further objection that, so far as the £700 worth of coal was concerned, the plaintiffs had sustained no loss, since, on the basis on which the case was treated, they would continue to receive this amount undiminished, and that therefore the sum of £700 a year should be deducted from the probable total annual payments of £1620, which were the basis of the learned Judge's assessment. It has been already pointed out that, so far as regards the £700 worth of coal, it is purchased and paid for. The plaintiffs ought not, therefore, to be paid for it over again. But which part of the output of the mines ought to be regarded as so paid for? The appellants seek to attribute this rent entirely to

the coal within the inhibited area. The respondents claim to be entitled to attribute it entirely to coal obtained from the rest of the mine. Now, the basis of the assessment of compensation, which cannot be more than a *restitutio in integrum*, is that the plaintiffs are to be put in the same position as if the notice not to work had not been given. In that case they would have received rent and royalties in respect of the coal in question, and also in respect of coal from other parts of the mine. To which part of the coal so taken should the fixed rent of £700 be attributed ? Having regard to the terms of the lease, the obvious answer is that it should be attributed to the coal first taken in each year, and, if coal was simultaneously being taken from different parts of the mine, should be attributed to those different parts in proportion to the quantity taken from them respectively. If all the coal would have been taken from the inhibited area, the whole should have been attributed to the coal from that area. If none would have been taken from it, then none of the £700 should be attributed to it. Now, it was assumed throughout the case that the coal which would have been taken from the inhibited area would have formed part only of the total output during the ten years adopted by the learned Judge as the basis of the assessment. It follows that the whole of the £700 cannot be deducted from the gross royalties calculated on that coal. On the other hand it cannot all be attributed to the output from the rest of the mine. The only way, therefore, to do complete justice is to divide the £700 between the output from the inhibited area and the rest of the output in proportion to their probable respective quantities, and to treat the coal represented by the proportion of the £700 attributable to each as paid for in full, and the residue as subject to royalty. It follows that a deduction should have been made from the annual instalments of £1620 of a sum bearing the same proportion to £700 as the probable output from the inhibited area would have borne to the total output from the mine. This calculation was not made by the learned Judge, nor were the necessary inferences of fact upon which it must be founded made by him. The case should therefore be remitted to him for that purpose.

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The learned Judge, as already stated, calculated the present value of the future royalties as of the date when the first of them would have been payable. This was apparently through inadvertence, since it is admitted that the compensation should be estimated as of the date when the notice not to work, which is the act entitling the plaintiffs to compensation, was given. The present value should, therefore, have been calculated, as at 23rd December, 1901, of future instalments, the first of which was payable at the time when the first royalty would have been payable after that date. This is a mere matter of arithmetical calculation.

Another point was taken by the appellants as to the interest allowed by the learned Judge on the sum arrived at as the present value of the instalments. In the case of *In re Richard and Great Western Railway* (1), decided by the Court of Appeal in November, 1904, it was held that interest cannot be awarded in respect of the period between the giving of the notice not to work a mine and the making of the assessment of the amount of compensation payable. This case was apparently not cited in the Supreme Court, but its authority was not contested before us, and we think we ought to follow it.

On these three points, therefore, the amount of damages requires correction.

Unless the plaintiffs consent to a reduction of the verdict in accordance with the principles which we have indicated, it will be necessary formally to set aside the verdict and grant a new trial so far as may be requisite for a re-assessment of the amount of damages on those principles, but without disturbing the findings of the learned Judge on the substantial questions of fact determined by him.

The parties should bear their own costs of this appeal.

Order accordingly.

Solicitor, for the appellants, *J. S. Cargill.*

Solicitor, for the respondents, *F. Davenport.*

C. A. W.

(1) (1905) 1 K.B., 68.