[HIGH COURT OF AUSTRALIA.]

THE COUNCIL OF THE MUNICIPALITY OF BROKEN HILL . . . . . APPELLANT;

AND

THE BROKEN HILL PROPRIETARY COMPANY LIMITED . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 12; *May* 4.

Knox C.J., Isaacs, Higgins and Starke JJ.

*Local Government—Rates—Valuation—Ascertainment of unimproved capital value—Mine—Valuation based on output—Average annual value of ore during such part of preceding three years as mine had been "worked"—Work on mine stopped by strike—Local Government Act* 1919 (*N.S.W.*) (*No.* 41 *of* 1919), *secs.* 4, 153; *Sched. III., secs.* 12, 20 (1) (*a*).

Sec. 12 of Schedule Three to the *Local Government Act* 1919 (N.S.W.) provides that "(1) In the case of every mine the unimproved capital value thereof shall be ascertained by one or other of the following methods of valuation as the council, either generally or for some period or mine only, may direct, that is to say— . . . (*b*) by valuation based on output in accordance with this section; . . . (3) In the case of a mine other than a coal or shale mine the unimproved capital value thereof ascertained by valuation based on output shall be a sum equal to 20 per centum of the average annual saleable value to the mine-owner of the ore or mineral won from the mine or of the product derived from such ore or mineral during the three years next preceding the year in which the valuation is made, or during such part of that time as the mine has been worked, such value to be determined as such ore, mineral, or product leaves the area within which such mine is situate."

*Held*, by *Knox* C.J., *Isaacs*, *Higgins* and *Starke* JJ., that the word "worked" in sub-sec. 3 means worked for the production of ore, and, therefore, that a mine is not being "worked" if by reason of a strike no ore is being won.

*Held*, also, by *Isaacs*, *Higgins* and *Starke* JJ. (*Knox* C.J. dissenting), that, where a mine has been "worked" for only a portion of the three years preceding the year of valuation, the average annual saleable value under sub-sec. 3 is to

be ascertained by dividing the total value of the ore won from the mine in those three years by the time, expressed in years and a fraction of a year, during which the mine was "worked" during that period.

*North Broken Hill Ltd.* v. *Broken Hill Municipal Council*, (1921) 21 S.R. (N.S.W.), 758, overruled in part.

Decision of the Supreme Court of New South Wales reversed in part.

APPEAL from the Supreme Court of New South Wales.

On an appeal by the Broken Hill Proprietary Co. Ltd. from an assessment by the Council of the Municipality of Broken Hill of the Company's mine, the District Court Judge stated a case, which was as follows, for the opinion of the Supreme Court :—

1. The Broken Hill Proprietary Co. is the occupier of certain land at Broken Hill in and upon which mining operations are carried on.

2. The said land is within the Municipality of Broken Hill.

3. In respect to the said land the said Company was assessed by the said Council upon the unimproved capital value which was ascertained as follows :—The output for the years 1917 and 1918 and a portion of the year 1919 during which the said mine had been worked, viz., 160 days, were added together and the total saleable value of that output was divided by $2\frac{160}{365}$ in order to arrive at the average annual saleable value. Twenty per cent. of that sum was taken as the unimproved capital value, viz., £116,179.

4. This procedure the Council alleges is in accordance with the provisions of sub-sec. 3 of sec. 12 of Schedule Three of the *Local Government Act* 1919.

5. The said Company, being dissatisfied with such assessment, appealed to the District Court at Broken Hill, and contended that the valuation should have been arrived at by taking the saleable value of the output for the three years 1917, 1918 and 1919, dividing it by 3 and thus getting the average annual saleable value. Twenty per cent. of that sum came to £94,428 19s. 11d., which represented, according to the said Company, the unimproved capital value of the said property.

6. As to this point I held that the procedure adopted by the Council was correct, upheld the valuation made by them, and dismissed the Company's appeal.

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7. A further point arose as to whether the mine had been "worked" within the meaning of the section during the whole of the year 1919. The evidence as to this was as follows:—Work was continuous up to 5th May 1919, about 1,040 men being employed, 400 of those being employed underground. Then an inter-union strike occurred, and for the remainder of 1919 only 140 men were employed. These were staff men principally, employed in repairs on the surface works and some employed underground, pumping, keeping the drives in repair. No ore was being produced, sent to the surface or broken underground. No ore was being despatched from the mine.

8. As to this point I held that the mine was not being "worked" within the meaning of the section.

The questions for the decision of the Supreme Court are:—

(1) In ascertaining the unimproved capital value of the mine should the saleable value be divided by $2\frac{1}{3}\frac{6}{6}\frac{9}{5}$ or by 3?

(2) Was I right in holding that the mine had not been "worked" after 5th May 1919 within the meaning of sec. 12 of Schedule Three?

Sec. 12 of Schedule Three to the *Local Government Act* 1919 (which is set out in the judgment of *Knox* C.J. hereunder) is substantially identical with sec. 153 of the Act.

The Full Court answered the first question: "By 3"; and the second question in the affirmative. The reasons given for that decision were those given for the decision in *North Broken Hill Ltd.* v. *Broken Hill Municipal Council* (1).

From the decision of the Supreme Court the Council of the Municipality of Broken Hill now appealed, by special leave, to the High Court.

*Lamb* K.C. (with him *Monahan*), for the appellant. The word "worked" in sec. 12 (3) of Schedule Three to the *Local Government Act* 1919 is used in its ordinary sense of carrying on operations for the purpose of getting out ore. Where a mine is shut down through a strike and the only work that is being carried on is for the purpose of keeping water down, &c., the mine is not being "worked."

(1) (1921) 21 S.R. (N.S.W.), 758.

When a mine has not been "worked" in that sense during the whole of the period of three years preceding the year of valuation, the period during which it has been so worked is to be substituted for the period of three years as that over which the average is to be taken. Otherwise no effect is given to the words "or during such part of that time as the mine has been worked."

*Brissenden* K.C. (with him *Pilcher*), for the respondent. Under sec. 20 of Schedule Three the decision of the Supreme Court is made final and conclusive, and this Court would not have granted special leave to appeal if that had been brought to its attention. The leave to appeal should, therefore, be rescinded. In order to find an "average annual value" there must first be found an annual value in each year, and an annual value means the value of the ore raised in one year. The sum of the annual values divided by 3 gives the average annual value for three years. If there is an annual value for only one year there cannot be an average annual value. The annual value is a real value and not an estimated value, and if a mine is worked for only three months in one year the annual value for that year is the value of the ore won in the three months, and is not four times that value. The object of the introduction of the words "or during such part of that time as the mine has been worked" is to meet the contention that an average annual value during three years could not be ascertained unless the mine were worked during the whole of the three years, and that therefore sub-sec. 3 without those words would only apply to a case where the mine had been so worked. [Counsel referred to *Lysons* v. *Andrew Knowles & Sons Ltd.* (1).] The words "such part of that time as the mine has been worked" have reference to the time which has elapsed since the mine first became a working mine. Once a mine has become a working mine, the fact that it becomes idle owing to a strike does not prevent it from still being a working mine.

*Lamb* K.C. in reply.

*Cur. adv. vult.*

(1) (1901) A.C., 79, at pp. 85, 87, 93; (1900) 1 Q.B., 780, at p. 784.

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The following written judgments were delivered :—

KNOX C.J. The question raised by this appeal turns on the true construction of sub-sec. 3 of sec. 12 of Schedule Three of the *Local Government Act* 1919. Sec. 12 is in the following words :—"(1) In the case of every mine the unimproved capital value thereof shall be ascertained by one or other of the following methods of valuation as the council, either generally or for some period or mine only, may direct, that is to say—(*a*) by valuation of the unimproved value in accordance with sec. 2 of this Schedule; or (*b*) by valuation based on output in accordance with this section; or (*c*) in the case of an undeveloped mine or of a mine which is idle or partially idle by multiplying the annual rent (if any) of the mine by twenty. (2) In the case of a coal or shale mine the unimproved capital value thereof ascertained by valuation based on output shall be a sum equal to 3s. per ton of large coal or shale, and 1s. 6d. per ton of small coal, on the average annual output from the mine during the three years next preceding the year in which the valuation is made, or during such part of that time as the mine has been worked. (3) In the case of a mine other than a coal or shale mine the unimproved capital value thereof ascertained by valuation based on output shall be a sum equal to 20 per centum of the average annual saleable value to the mine-owner of the ore or mineral won from the mine or of the product derived from such ore or mineral during the three years next preceding the year in which the valuation is made, or during such part of that time as the mine has been worked, such value to be determined as such ore, mineral, or product leaves the area within which such mine is situate. (4) Where a valuation is being made, under paragraph (*a*) of sub-section one of this section, of land other than Crown land, the presence of any mineral or mine which is held with the land by the owner of the land, and is not being worked as a mine, shall be taken into account in the valuation."

The respondent is the occupier of certain land within the Municipality of Broken Hill in and upon which it carries on the work of mining for lead and silver. During the years 1917 and 1918 the mine was continuously worked and ore produced therefrom. During the year 1919 the mine was continuously worked and ore produced

therefrom until 5th May, when a strike occurred, and thereafter during that year no ore was produced from the mine, though a number of men were employed in repairs underground and on the surface, in pumping and in keeping the drives in repair.

In the year 1920 the appellant assessed the unimproved capital value of the mine at £116,179. This assessment was made by valuation based on output, the calculations being as follows :—The total saleable value of the ore won from the mine during 1917, 1918 and 1919, was ascertained to be £1,416,434. This amount was divided by $2\frac{160}{365}$, which was taken as representing the two years and the fraction of the third year during which ore was actually being produced from the mine. The result, £580,897, was taken to be the average annual saleable value to the mine-owner of the ore won during the statutory period ; and 20 per cent. of this—£116,179—was assessed by the appellant as the unimproved capital value of the mine. The respondent appealed to the District Court against this assessment, contending that the total saleable value of the ore won (£1,416,434) should have been divided by 3 instead of $2\frac{160}{365}$ in order to ascertain the average annual saleable value of the ore won. If this contention were correct the unimproved capital value would be reduced to £94,428.

The learned District Court Judge held that the method adopted by the appellant was correct, and that during the period from 5th May 1919 to 31st December 1919 the mine was not being worked within the meaning of sub-sec. 3 of sec. 12 set out above, and at the request of the respondent stated a case for the opinion of the Supreme Court under sec. 20 of Schedule Three, the questions submitted for decision being (1) In ascertaining the unimproved capital value of the mine should the saleable value be divided by $2\frac{160}{365}$ or by 3 ? (2) Was I right in holding that the mine had not been worked after 5th May 1919 within the meaning of sec. 12 of Schedule Three ?

On the case coming on before the Supreme Court, the present appellant was not represented, and the Court, having heard argument by counsel for the present respondent, ordered that question 1 be answered " By 3 " and question 2 be answered " Yes." From this decision the present appellant obtained special leave to appeal

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to this Court. On the application for special leave the fact that the appellant had not appeared before the Supreme Court was not brought under the notice of the Court which dealt with the application.

The first question is whether the Supreme Court was right in deciding that in ascertaining the unimproved capital value of the mine the total saleable value of the ore won should be divided by 3. Sec. 12 prescribes three methods of valuation for ascertaining the unimproved capital value of a mine, the Council having the right to adopt which method it chooses. The method adopted in the present case was by valuation based on output. The procedure to be followed in ascertaining the unimproved capital value of a mine other than a coal or shale mine by valuation on output is prescribed by sub-sec. 3.

The appellant contends that on the true construction of that sub-section the process followed by the Council in ascertaining the unimproved capital value of this mine was correct. In testing the validity of this contention, the following matters should be borne in mind. In the first place, it is clear from the words of sec. 12 that the basis of the valuation on output is actual not hypothetical or potential output. The expression "valuation based on output" points in this direction, and the conclusion is established by the use in sub-sec. 3 of the phrase "saleable value to the mine-owner of the ore or mineral *won* from the mine." It is also clear that the adoption of this method of valuation is optional with the Council. It has the choice of three methods, and may adopt in any case the particular method it thinks proper. Consequently, no argument can be rested on the view that on a particular construction of the sub-section the adoption of this method of valuation may result in an unduly low unimproved capital value. Further, it is the "average annual saleable value" that is to be ascertained. Before examining the words of the section in detail, the contention put forward by the appellant may be considered. It is, I think, demonstrable that this contention involves the use as a factor of a hypothetical or potential output in place of the actual output of the mine. According to the argument, when a mine is producing ore for a portion only of any year included in the statutory period the divisor to be applied in

respect of that year, for the purpose of ascertaining the average annual saleable value, is to be reduced from 1 to a fraction of which the numerator is the number of days on which ore was produced and the denominator the number of days in a year. Hence the substitution in the present case of $\frac{160}{365}$ for 1 in respect of the third year, though it is not quite clear how the number 160 was obtained. If this rule applies to one year it must apply to every year in the period in which the production of ore has not been continuous for the whole year. The method may be tested by a supposititious case:—Take a mine which is producing ore in each year of the statutory period. Suppose that in the first year ore is won on $\frac{2}{5}$ths of the total number of working days in the year, in the second year on $\frac{3}{5}$ths of the total number of working days in that year, and in the third year on $\frac{4}{5}$ths of the total working days in that year. Suppose the saleable value of the ore won to be in the first year £10,000, in the second year £15,000 and in the third year £20,000. According to the appellant's contention the average annual saleable value is to be found by dividing the total saleable value—£45,000—not by 3, but by the sum of the fractions $\frac{2}{5}$, $\frac{3}{5}$ and $\frac{4}{5}$. The quotient of £45,000 divided by $\frac{9}{5}$ is £25,000; and this is said to be the average annual saleable value to the mine-owner of the ore won from the mine during the period. In fact the mine-owner never won from the mine in any one year during the period ore of a saleable value exceeding £20,000, but the average annual saleable value to him is said to be £25,000. It is clear from this that the basis of the appellant's calculation must be a hypothetical output and not the actual output. His method can only be applied by assuming that the mine-owner on every working day of a year on which no ore was produced won from the mine ore of a saleable value equal to that won on the daily average of the working days on which ore was produced. In fact the appellant discards actual output and substitutes assumed output—the assumption being that the mine if worked on every day would produce in a year ore of a saleable value proportionate to that of the ore produced on the days on which ore was won. This appears to me to be a serious departure from the expressed intention of the section.

It is, I think, equally clear that this method of calculation gives

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no real effect to the word "annual" in the phrase "average annual saleable value." "Average annual value," in my opinion, means the result obtained by dividing the total value realized over a given period of years by the number of years in the period. The average obtained by the appellant's method applied to a mine which has not produced ore continuously for a whole year is really an average based on potential daily output, and not an average based on actual annual output. The total value of ore won in a given number of days is in effect divided by that number and multiplied by 365, the result being the total saleable value which would have resulted if ore had been won on the whole 365 days and of the same value as that won on the given number of days. These considerations point to the conclusion that the contention of the appellant cannot be supported.

Taking the words of the sub-section as they stand, it appears to me that the first factor to be ascertained is the saleable value to the mine-owner of the ore won from the mine during the three years next preceding the year in which the valuation is made or during such part of that time as the mine has been worked. Until this has been done it is manifestly impossible to proceed further. In the present case, the valuation being made in the year 1920, it was necessary to ascertain the saleable value to the respondent of the ore won from the mine during the years 1917, 1918 and 1919, or during such part of that time as the mine has been worked. "Year" is defined by sec. 4 of the Act as meaning "the period from the first day of January to the thirty-first day of December." Consequently the first question to be answered is: "What was the saleable value of the ore won from the mine (*a*) during the period which elapsed between 1st January 1917 and 31st December 1919, or (*b*) during such part of that period as the mine had been worked? If "worked" in this question means "worked so as to produce ore," it is apparent that in any given case there can only be one answer to this question; for the saleable value of all the ore won from the mine during any period can be no more and no less than the saleable value of the ore won from the mine on the days on which during that period ore was being produced or won from it. In the present case it can be found by calculation from the figures given in par. 5 of the special case

that the total saleable value of the ore won from the mine between 1st January 1917 and 31st December 1919 was £94,428 19s. 11d. × 5 × 3, that is £1,416,434 18s. 9d., and this sum must also represent the saleable value of the ore won from the mine during such part of the whole period as the mine was working. Having found this sum, the next question is: What is the average annual saleable value of the ore so won? The word "annual" is, in my opinion, the governing word in this phrase. If the question were simply what was the average annual saleable value during the period from 1st January 1917 to 31st December 1919, it must, I think, be conceded that the only way to ascertain it would be by dividing the total saleable value of the ore won during that period by 3. Do the additional words "or during such part," &c., make any difference in this respect? In my opinion they do not. The average value to be obtained is still the average "annual" value, and the language of the section makes it clear that actual and not hypothetical results are to be the basis of calculation. "Average annual value of ore won," in my opinion, means the value of the ore actually won in a year (*i.e.*, between 1st January and 31st December), taking one year with another. The substitution of $2\frac{160}{365}$ for 3 as the divisor can only be justified if the meaning of the section is that, if a mine is producing continuously during the whole three years, the basis of calculation is actual output, but, if it has been producing at intervals only during that period, the basis of calculation is the hypothetical output ascertained on the assumption that if the mine had been producing continuously it would have produced ore of a saleable value proportionately greater than that of the actual output. Such a construction of the section might easily result in the unimproved capital value ascertained by valuation of output being increased although during the relevant period the actual output had diminished. The added words, in my opinion, afford no justification for construing the section in this way. I think they were introduced in order to make it clear that, even if a mine had not been producing ore during each of the three years preceding the year in which the valuation was made, the unimproved capital value might still be assessed on the basis of valuation of output. In the absence of some such words it might well have been argued that production of ore during each of the three years

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comprised in the period was necessary in order to afford a basis. A similar argument found favour with the Court of Appeal in *Lysons* v. *Andrew Knowles & Sons Ltd.* (1). The decision was reversed by the House of Lords (2), but only because the word "average" was held to have been loosely used in the Act. The section as it stands, in my opinion, provides that, if a mine has been working (*i.e.*, producing ore) during any part of the period of three years immediately preceding the year in which the valuation is made, a council may, if it chooses, adopt the method of valuation by output to ascertain the unimproved value of the mine. If the council thinks it will be more advantageous to adopt one of the other methods of valuation prescribed, it is at liberty to do so. It may be observed that the method prescribed by sub-sec. 3 is purely arbitrary. The result obtained by that method does not necessarily bear any relation to the unimproved capital value of the mine. For it is clear that if that method be applied the unimproved capital value of a mine with twenty years' working life ahead of it would be identical with the unimproved capital value of the same mine in the last year of its working life, provided only that in each case the saleable value of the output during the three years preceding the valuation is the same. The intention of the enactment must, of course, be gathered from the words used. But I think it is legitimate in construing the section to assume that the Legislature, in enacting it, had in view the notorious fact that the value of a mine of the kind dealt with by sub-sec. 3 is peculiarly subject to fluctuation both by reason of the abnormal risks inherent in mining and by reason of the fluctuations of the market value of the ore or its product. The present case affords an example of the risks referred to, the mine having been laid idle for eight months in consequence of an inter-union strike, which I take to mean a strike caused not by any grievance against the employers but by quarrels between the employees.

For the reasons I have stated, I am of opinion that the answer given by the Supreme Court to the first question submitted by the special case was correct.

If this view were to prevail, it would be unnecessary to consider the second question; but, as I have the misfortune to differ from

(1) (1900) 1 Q.B., 780. (2) (1901) A.C., 79.

the majority of the Court on the first question, I should express my opinion on the second. In the circumstances it is sufficient for me to say that I see no reason to doubt that the answer given by the Supreme Court to this question was correct.

In my opinion the appeal should be dismissed.

ISAACS J. This appeal arises under Schedule Three of the *Local Government Act* 1919. The case is stated under sec. 20 of the Schedule, and raises two questions of law with relation to sub-sec. 1 (*a*), namely, the principle on which any objection should be determined. No question of fact can be the subject of appeal, because no such appeal is provided for.

The first question is: Assuming the mine was worked only during two years and 160 days, as found in the three next preceding the year of valuation, should the divisor for the purpose of ascertaining the average annual value be 3 or $2\frac{160}{365}$? The Supreme Court held that 3 was the proper division. And the ground on which it was so held was this: that, leaving out the words referring to part of the time and considering only the words "ore or mineral won . . . during the three years next preceding the year in which the valuation is made," the Act required, for liability according to sec. 12 (1) (*b*) of Schedule Three, "continuous working" the whole time (*Wade* J.), or, in other words, that the mine "commenced to be worked three years prior" to the year in which the rate is struck (*Cullen* C.J. and *Pring* J.); and I understand it is connoted that the working continued throughout the three years.

The subsequent words put in by way of amendment in the Act of 1919—not to meet any judicial decision but to guard against something which can only be ascertained by inspection—are said to have been inserted simply to meet the possibility of the work not being continuous over the whole period of three years. But it is also said that the Legislature left the divisor 3, even in that case, if the working covered any portion of the third year, and 2 if the working was more than one year, and not more than two. I think it is also to be gathered from the judgments that, if the working was not more than one year, the sub-section did not apply at all. The additional words are "or during such part of that time as the mine

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has been worked." Now, it is material to observe that by sec. 132 of the Act "*all land* in a municipality . . . (whether the property of the Crown or not) shall be rateable except"; and then follow certain specified exceptions which do not include the respondent's mine. By sec. 1 of Schedule Three the provisions of the Schedule apply to all rateable land within the area of a council, and by sec. 12 of Schedule Three a choice of any one of three methods is given to the council in respect of ascertaining the unimproved capital value, wherever possible. The first method is to estimate the sum which the fee simple of the land might be expected to realize if offered for sale on such reasonable terms and conditions as a *bonâ fide* seller would require, assuming no improvements—with a deduction for profitable expenditure or visible and effective improvements not on the land, &c.; the second method is "valuation based on output," and the third is in the case of a mine undeveloped or idle or partially idle by multiplying the annual rent (if any) by 20. The addition of the words "if any" are significant because there is no similar expression attached to "three years," such as "(if so long)."

The first method would naturally involve the consideration, if the mine were working, of what it had already produced. It would also naturally (since the repeal by sec. 135 of the 1919 Act of sec. 63 of the *Valuation of Land Act* 1916 (No. 2 of 1916) involve regard being had to the "mineral contents." A *bonâ fide* seller would calculate, on the basis of the net annual value of his output and taking into account, *inter alia*, the opinion he had of the mineral contents of the mine, the sum he would ask for the fee simple unimproved.

The second method, the one adopted here, is a fixed statutory method of ascertaining the unimproved capital value by a valuation based on output, and leaves no room for discussion as to necessary factors so long as the procedure indicated by the sub-section is followed. The unimproved capital value of the mine by this method shall be a sum equal to 20 per cent. of (*a*) the "average annual saleable value," to the mine-owner, (*b*) of the ore or mineral won from the mine or the produce derived from such ore or mineral, (*c*) during one of two periods mentioned, and which must, for better

observation, be separated. The first period is "during the three years next preceding the year in which the valuation is made." The second period is "during such part of that time" (that is, during such part of the said period of three years) "as the mine has been worked." The rest is immaterial. The first concrete factor is the saleable value of the output, that is, the ore or mineral or product actually won or produced during the relevant period. The second concrete factor is the relevant period, which is the time actually worked within the specified space of three years to get that output. The result of applying those two factors will give the actual saleable value for the actual time—but no average. But what the Legislature wants to get, as the next step, is an average value. To get the true bearing of the word "annual," let us see how the matter would stand if the word "annual" were omitted. The words then would be "the average saleable value" of that ore actually produced. You would not then know how to apply the two concrete factors to each other. But if you put in "daily" or "monthly" or "annual," you can at once proceed to find the average saleable value with reference to a day or a month or a year, no matter how long the time actually occupied in working has lasted. It then becomes a simple proportion sum in which in this case $2\frac{69}{365}$ is the divisor. The period of three years is marked by termini. The later terminus is the day before the beginning of the valuation year, which (sec. 4 "year") begins with the first day of January 1920; in other words, the later terminus is 31st December 1919. The earlier terminus is therefore 1st January 1917. If the second period had not been inserted and the actual working had been as stated in the case, there would not, in my opinion, have been any impossibility to apply the sub-section, either on the ground that there had not been continuous working over every working part of the three years, or on the ground, if such were the case, that the working had not commenced three years before. I do not think the word "during" means over the whole unbroken period uninterruptedly. The question, to my mind, would, in the case supposed, be this: Having regard to the total saleable value of the ore actually won, and having regard to the fact that this saleable value was obtained during the only stated statutory period of three years,

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Isaacs J.

how much per annum does that represent? The divisor would necessarily be 3. But the Legislature could see the manifest inequality of taking the same time-factor whether the mine was working a full three years or only (say) three months, and could see that in the latter case the divisor gave no real indication of what was sought, viz., the unimproved *capital* value of the mine. And so, when it introduced the second period, it clearly did so as a corrective. It must be admitted on all sides that *some* change was intended to be worked by the new words. I have shown why I am unable to accept the change suggested in the Supreme Court. Dr. *Brissenden*, for the respondent, suggested that prior to the change you looked at each year to see if there were any ore produced. If in more than one year you got some ore, you divided the total selected value by 3 or 2 as the case might be, and so got the average. But if you got ore in one year only, you got no average; and therefore the procedure was inapplicable. If, for instance, the mine worked the whole of the year 1919 and not in the other years and got £100,000 worth of ore, it was outside the sub-section. If, however, it worked two years and got £50,000 worth in each year, it was within the sub-section. If, again, it worked a month in each year and got only £30,000 of ore in all, it was still within the sub-section, though, as stated, if £100,000 were obtained in one year, showing a vastly more valuable mine according to output, it went untaxed by this method. This was contended to be the necessary result of the word "average." I am unable to accept this view. The phrase "the average annual saleable value to the mine-owner of the ore actually won from the mine" during two years and 160 days means the average saleable value to him per annum (that is, year in and year out) of the ore in his mine assuming it to be regularly produced at the same rate and of the same quality. The period of three years is limited as a sufficiently long period, prior to the valuation, to test the average value of the mine, in order to arrive at the present capital value, and the added alternative factor denotes the intention of the Legislature to accept the time within that period occupied in actual production as the true factor by which to gauge the value of the mine in an average year.

Consequently the view taken by the Valuation Court was correct,

and the question should have been answered by saying that the total saleable value should be divided by $2\frac{60}{365}$.

The second question was rightly answered "Yes." The question being one of law only, it is: Was there evidence upon which the Valuation Court could have found as it did? It is clear there was. The word "worked" was rightly interpreted by the Supreme Court. Its meaning, as applied to a mine, is primarily that the ore or mineral is won. In *Jegon* v. *Vivian* (1) Lord *Hatherley* uses the word in the sense I have indicated, and adds that it does not connote continuity. To "work" a mine means getting or attempting to get out the mineral. Merely maintaining a mine in the condition in which it has been already worked is not "working" it. If, for instance, a lessee were under a covenant to work a mine continuously, could it be said he was observing his covenant if he merely kept the mine by repairing and pumping in exactly the same state as he obtained it? I cannot think so. Consequently I am of opinion that on this branch of the case, as well as on the other, the Valuation Court decided rightly, and that the appeal should be allowed.

Higgins J. The difficulties in this case arise from the amendment introduced into sec. 132 (2) (*a*) and (*b*) of the Act of 1906 by sec. 153 (2) and (3) of the Act of 1919. The words added are "or during such part of that time" (the three years preceding) "as the mine has been worked." It is improbable that such words would have been added to the two sub-sections unless they involved some additional meaning, some distinctive effect; and it is our duty to find that meaning and effect. As Lord *Westbury* said in *Ricket* v. *Metropolitan Railway Co.* (2), "the general rule is, that a deliberate change of expression must be taken *primâ facie* to import a change of intention."

The object of the section is to apply a tax on the unimproved capital value of land to the case of mines. The section leaves the council free to adopt any one of three methods—(*a*) by ordinary valuation in pursuance of the *Valuation of Lands Act*; (*b*) by valuation based on output in accordance with the section; (*c*) in the

(1) (1871) L.R. 6 Ch., 742, at p. 757. (2) (1867) L.R. 2 H.L., 175, at p. 207.

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case of an undeveloped mine or of *a mine which is idle or partially idle*, by multiplying the annual rent (if any) by 20. It has to be borne in mind that, if the method of reaching the value by output would lead in the case of any particular mine to an unsuitable result, the council has the power to fall back on actual valuation (sec. 153 (1) ).

The words of sec. 153 (3) have been set out already. What is the meaning of "the average annual saleable value to the mine-owner of the ore or mineral won from the mine . . . during the three years next preceding the year in which the valuation is made, or during such part of that time as the mine has been worked"?

The first difficulty is as to the meaning of the word "worked." Are we to treat a mine as being "worked" during a strike—if up to 5th May 1919 there were about 1,040 men employed, 400 of them underground, and then during the remainder of 1919, a time of strike, there were 140 men employed in repairs of the surface works, in underground pumping, in keeping the drives in repair? The language used is popular, not technical. People would say, I think, that a mine is "idle," as in sec. 153 (1) (*c*), if by the refusal of miners to work no soil were in course of being extracted; and people would not say that a mine was being "worked" if for the same cause no attempt was being made to extract soil. The vernacular expression "we do not keep the pits idle for fun" points to this popular use; and the words at the end of sec. 153 (3) also point in the same direction—that "working" involves extraction: "such value to be determined as such ore, mineral or product leaves the area within which such mine is situate." The words are not "during such time as the mine is open." A mine may be "open" so as to enable a tenant for life to begin to work it although it has not been "worked" for years.

There are cases not referred to in argument, in which the Courts have refused to declare a forfeiture of a lease or quasi-lease of a mine for not working, where it was shown that the lessee had not been working the mine continuously. In a case relating to tin-bounders in Cornwall, *Rogers* v. *Brenton* (1), Lord *Denman* said:—"Nothing we have said compels the bounder to strictly continuous working:

(1) (1847) 10 Q.B., 26, at p. 64.

such reasonable time for consideration, preparation, and due selection of places and planes, must always be allowed as the nature of the undertaking reasonably requires; and, when he has once *bonâ fide* worked, his ceasing to work for a time will be therefore open to explanation, *so as to prevent a forfeiture.* It is only when the conduct of the bounder is such as to warrant the conclusion that he has ceased to be, in good faith, *pursuing that object* which alone justified his entry on the land, and which is the reasonable foundation of his title [*sic*]."

Here, the Broken Hill Company was, no doubt, still "pursuing its object" of mining as far as it could. But it does not follow that the principles on which the Court refuse to declare an existing right of property to be forfeited are applicable to this section. If the object of the section is to reach an "average *annual* value" of ore won having regard to the fact that the ore was not being won during part of the period over which the average *annual* value is to be computed, the position is quite different. This brings one to the second difficulty.

Assuming that the mine is not to be treated as "worked" during the time of strike, what is the object of the added words "or during such part of that time as the mine has been worked"? If the construction put upon the present section by the Supreme Court is right, these words are objectless and have no effect. Under this construction, we are simply to find what ore was won in fact during the three years (whether the mine was idle for a time or not), what was its saleable value, divide that result by 3, and treat $\frac{1}{5}$th of the quotient as being the unimproved capital value of the mine. The result is precisely the same as if the words in question had not been inserted. If the construction of the District Court Judge be accepted, the words mean that the *annual* value is to be roughly computed by taking the value of the ore won during the time of working in any year, and then by assuming that if the mine had been worked for the rest of the year there would be proportionately equal returns. Under this construction the basic fact taken is the actual value of the ore actually won during the 160 days of working, and to this fact is to be applied the presumption that if working

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had been continued for the whole year the actual value would have been proportionately greater—as 365 : 160.

It is easy to imagine anomalous results from either construction. For instance, if the mine had been worked for one day in each of the three years, the average annual value for the three years would, on the Supreme Court's construction, be an absurd guide to the unimproved capital value. On the construction of the District Court Judge, the result would be most unfair if on these three days the Company were extracting from a rich pocket of ore; and the unimproved capital value would have to be treated as nil if the soil actually extracted had no payable ore. But such possible anomalies in the results are not of much weight where, as here, the Council is not compelled to use the method of valuation based on output in ascertaining capital value. The matter is left to its discretion as a public body.

On the whole, I am of opinion that the mine is to be treated as not being worked during the time of strike; that no effect can be given to the added words unless they mean that we are to find the actual value of the ore won during the rest of the three years, and to find the average *annual* value of that ore *having regard to the fact that the ore actually won was won within a period less than a year.* In other words, the section tells us to assume that if the ore actually won was won in half a year, then double the value of that ore would have been won in a full year. This gives the *annual* value for that year; and $\frac{1}{5}$th of the *average* annual value so reached for the three years is to be treated as showing the unimproved capital value of the mine for the purposes of the tax.

In my opinion, the appeal should be allowed, and the decision of the District Court Judge restored.

STARKE J. The Broken Hill Proprietary Co. Ltd. is, and was in the year 1920, the occupier of certain rateable land within the Municipality of Broken Hill upon which there was a mine other than a coal or shale mine. The Municipality proceeded to ascertain the unimproved value of this land for rating purposes for the year 1920, pursuant to the provisions of the *Local Government Act* 1919. The provisions of the Act under which this case falls are, according to

the case stated by the District Court Judge, contained in Schedule Three, sec. 12 (1) and (3), of that Act, and not in sec. 153 (1) and (3), which is referred to by the learned Judges of the Supreme Court. But the differences between the Schedule and the Act are immaterial for the purposes of the case now before the Court.

The relevant provisions of the Schedule are as follows :—" 12. (1) In the case of every mine the unimproved capital value thereof shall be ascertained by one or other of the following methods of valuation as the council . . . may direct, that is to say— . . . (*b*) by valuation based on output in accordance with this section ; . . . (3) In the case of a mine other than a coal or shale mine the unimproved capital value thereof ascertained by valuation based on output shall be a sum equal to 20 per centum of the *average annual saleable* value to the mine-owner of the ore or mineral won from the mine or of the product derived from such ore or mineral during the three years next preceding the year in which the valuation is made, *or during such part of that time as the mine has been worked.*"

The Municipality ascertained the unimproved capital value of the appellant's mine in the following manner : It added together the output of the mine during the years 1917 and 1918 and that of a portion of the year 1919 during which the ore was being produced, namely, 160 days, and divided the saleable value of the total output by $2\frac{160}{365}$, instead of by 3. It is not very clear on the case how the conclusion was reached that the mine worked 160 days before 5th May in the year 1919, but the fact is so found, and we cannot here correct the statement. The Company lodged an objection to the valuation, which came before the Valuation Court; but it was disallowed. A case was then stated for the decision of the Supreme Court, which did not sustain the determination of the Valuation Court (see Schedule Three, secs. 18, 19, 20). Special leave was given to the Municipality to appeal to this Court against the determination of the Supreme Court, and the present appeal was accordingly brought. The question for consideration is whether the method adopted by the Municipality in ascertaining the unimproved value of the land was or was not correct. The answer depends entirely upon the proper construction of the clauses in the Schedule to the *Local Government Act* which have been already set forth.

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The particular method of ascertaining the unimproved capital value of the land in the case which we have to consider is wholly artificial, and the results of the rule will be irregular in operation whatever construction is adopted. Actual output of ore is, in my opinion, the basis of the calculation. And it is the output during the three years next preceding the year in which the valuation is made or during such part of that time as the mine has been worked. Some suggestion has been made that the word "worked" included operations such as repairs, pumping, and keeping the drives in order; but in the context the meaning must be: "worked for the production of ore."

But the difficult words in the Schedule are those requiring the ascertainment of the average annual saleable value of the output. On the part of the Company it is said that this implies the division of the mean amount by some number of years—in this case, 3; on the part of the Municipality, that the direction to obtain an annual average saleable value of ore produced "during such part of that time" (namely, the three years, &c.) "as the mine has been worked," necessarily imports an assumption, on the rule laid down in the Act, that the production is at the same rate for the whole year as during that part of the year in which actual production took place. Thus, on the latter view, if the direction be given to ascertain the average annual saleable value of ore actually produced during $2\frac{1}{2}$ years, it would be a necessary assumption, if any annual average is to be obtained, that the production during the other half of the third year is at the same rate as that in the half year in which the ore was produced. The learned Judges of the Supreme Court took the former view, and *Cullen* C.J. and *Pring* J. limited the closing words of sec. 12 (3) to mines "which had not commenced to be worked three years prior to the year in which the rate is to be struck." But, in my opinion, this judgment cannot be sustained. And in summing up the contention of the Municipality, I have put, in my own words, what I take to be the true operation of the clause here in question. Any other view would, I think, render the closing words redundant, and deprive them of effect.

Perhaps, it is well to notice a suggestion made during the course of the argument. No mine, it was said, worked during the whole of

a year; there are Saturdays, Sundays and holidays on which no work is done. If, however, a mine is worked in the accustomed manner throughout a year for the production of ore, then it must not be assumed, from anything I have said, that such periods as those just mentioned should be treated as non-working periods for the purposes of sec. 12 (3). It is for the tribunal before which the matter comes, to determine, as a question of fact, whether a mine has been worked—that is, as I think, in the ordinary and accustomed manner for the production of ore—over any given period of time.

The appeal ought to be allowed, and the questions answered as follows: (1) $2\frac{160}{365}$; (2) Yes.

*Appeal allowed. Judgment appealed from varied by directing that question* 1 *be answered*: "*By* $2\frac{160}{365}$." *Each party to pay its own costs in the Supreme Court and this Court.*

Solicitor for the appellant, *Justin McCarthy*, Broken Hill, by *A. C. Hobbs.*

Solicitor for the respondent, *J. R. Edwards*, Broken Hill, by *Minter, Simpson & Co.*

B. L.