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PERPETUAL TRUSTEE COMPANY (LIMITED) . . . . . } APPELLANT;
RESPONDENT,

AND

PACIFIC COAL COMPANY PROPRIETARY LIMITED . . . . . } RESPONDENT.
APPELLANT,

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

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Oct. 10-14, 24, 31;
Dec. 14.
Viscount Kilmuir L.C., Lords Oaksey, Morton of Henryton, Reid and Tucker.

Mines and Minerals—Coal—Fixed rent plus royalty—Calculation of royalty—Provision prescribed in lease—Arrears—Claim—Royalty a form of rent—Reduction—Statutory provisions applicable—National Security (Prices) Regulations (made under the National Security Act 1939-1940 *(Cth.)), regs.* 3, 23 (2)—*Prices Regulation Order No.* 985, *par.* 2 (*c*)—*Landlord and Tenant (Amendment) Act* 1932-1947 (*N.S.W.*), *s.* 15 (1).

Mines and Minerals—Landlord and tenant—Emergency legislation—"Service"—"Right or privilege"—"Royalty".

By reg. 3 of the *National Security (Prices) Regulations*, made under the *National Security Act* 1939-1940 (Cth.), it was provided: "In these regulations . . . 'service' means—. . . (b) any rights or privileges for which remuneration is payable in the form of royalty . . . based on volume or value of goods produced".

Regulation 23 (2) empowered the Commonwealth Prices Commissioner to "fix and declare the maximum rate at which any declared service may be supplied . . .", and by par. (2) of the Prices Regulation Order No. 985 made by the commissioner on 18th March 1943, it was provided: "I fix and declare the maximum rates per ton of coal mined at which mining rights may be supplied in respect of coal mined from the classes of mining properties mentioned hereunder to be—. . . (*c*) properties not subject to Crown lease which were privately leased on August 31 1939—the amount per ton of coal mined payable on 31st August 1939."

The *Landlord and Tenant (Amendment) Act* 1932-1947 (N.S.W.), which was in force on 31st August 1939, provided, *inter alia*, for a reduction by twenty-two and one-half per cent of "rent reserved by or under any lease" to which the Act applied.

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The appellant, by a mining lease dated 1st September 1919, demised to the respondent, a company incorporated in New South Wales and carrying on the business of coal mining, mines of coal under certain land for a term of forty-three years. The lease reserved a yearly rental of £819, but provided that the respondent should be permitted to win " such a quantity of coal . . . as should at the rate per ton hereinafter mentioned produce in any one year . . . the said sum of £819 and at a royalty per ton of all coal wrought and brought to bank . . . over and above such quantity as may be worked in respect of such rent as aforesaid as follows " : and the lease then set out that the royalty was to be calculated at a rate per ton depending on the selling price of coal free on board at Newcastle.

The appellant claimed against the respondent for arrears of rent and royalty alleged to be due and payable under the lease for (so far as relevant to this appeal) two periods, one from 1st July 1948 to 20th September 1948, and the other from 20th September 1948 to 31st December 1950. The appellant alleged that the Prices Regulation Order No. 985 did not apply to the lease so as to reduce the amount payable by the respondent by way of royalty for the above two periods. The respondent contended that it was, *inter alia*, paying for rights or privileges by way of royalty on goods produced and that therefore the regulations applied.

Held, (1) that the rights which the respondent possessed under the lease were " rights or privileges for which remuneration is payable in the form of royalty " within the meaning of reg. 3 (*b*) of the Prices Regulations. That clause covered every case in which any remuneration in the form of royalty was payable even although part of the total remuneration might be payable in the form of a fixed rent.

(2) That the Prices Regulations contemplated the lessor under a mining lease as providing a supply of mining rights throughout the term of the lease, as and when the lessee exercised those rights, and accordingly when the commissioner made Order No. 985 on 18th March 1943, he had power to fix the maximum rates payable by the respondent under the lease.

(3) That the meaning of the words " the amount per ton of coal mined payable on 31st August 1939," in par. 2 (*c*) of the commissioner's order meant the amount of royalty payable per ton of coal mined on 31st August 1939 ; the date referred to the mining of the coal and not to the payment of the royalty. The amount of royalty which the respondent was bound to pay in respect of coal mined on that date depended on the provisions of the lease and of the *Landlord and Tenant (Amendment) Act* 1932-1947 (N.S.W.). The lease required payment at a rate per ton depending on the selling price of coal free on board at Newcastle, and the Act reduced the rent payable by a tenant : as this royalty was a form of rent it therefore reduced the amount of royalty so calculated by twenty-two and one-half per cent.

Judgment of the High Court of Australia (*Pacific Coal Co. Pty. Ltd.* v. *Perpetual Trustee Co. (Ltd.)* (1954) 91 C.L.R. 486), affirmed.

APPEAL from the High Court of Australia.

This was an appeal from a judgment of the High Court of Australia (*Dixon* C.J., *Webb* and *Fullagar* JJ.) (1) allowing the appeal of the respondent from part of a judgment of the Full Court of the Supreme Court of New South Wales.

Sir *Garfield Barwick* Q.C., and *Ian Bailieu* (of the English Bar), for the appellant.

R. Else-Mitchell Q.C. and *K. J. Holland*, for the respondent.

VISCOUNT KILMUIR L.C. delivered the judgment of their Lordships as follows :—

The questions to be decided arise out of an action in which the appellant was plaintiff and the respondent was defendant. The respondent is a company incorporated under the laws of the State of New South Wales, and at all material times was carrying on the business of coal mining in New South Wales. By declaration dated 13th September 1951, the appellant claimed arrears of rent and royalty due and payable under a mining lease (hereafter referred to as " the mining lease ") dated 1st September 1919. The arrears so claimed were the sum of £880 12s. 7d. in respect of the period from 31st December 1931 to 31st March 1934, and the sum of £27,488 14s. 7d. in respect of the period from 31st March 1939 to 31st December 1950. The declaration stated that by the mining lease the plaintiff (appellant) demised to the defendant (respondent) all and singular the mines, beds, veins and seams of coal, shale and minerals of a similar character in or under certain lands therein described " with full liberty to the defendant to search for win get convert carry away sell and dispose of the said mines of coal shale or minerals of a similar character thereby demised together with free way leave and right and liberty of passage and other rights enabling the defendant to load and carry away the said coal shale and other minerals for a term of forty-three years computed from the first day of September One thousand nine hundred and nineteen at a yearly rental of £819 payable quarterly each year provided that the defendant be permitted to win work carry away forth and out of the said mines and seams of coal shale and other minerals of a similar character such a quantity of coal shale and such other minerals as should at the rate per ton hereinafter mentioned produce in any one year of the term thereby created the said sum of £819 and at a royalty per ton of all coal wrought and brought to bank

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from the said mines thereby demised over and above such quantity as may be worked in respect of such rent as aforesaid as follows: when the selling price per ton of round or best coal obtained from the said mines free on board at Newcastle should be less than six shillings and three pence the royalty to be five pence per ton; when the said selling price should be not less than six shillings and three pence but less than seven shillings and three pence the royalty to be six pence per ton; when the said selling price should be not less than seven shillings and three pence but less than eight shillings and three pence the royalty to be seven pence per ton and so on the royalty to be increased by one penny for every increase of one shilling in the said selling price provided that such royalty as aforesaid should be reduced to a fixed and constant royalty of three pence per ton in respect of all small coal so wrought and brought to bank as aforesaid and above such quantity as may be worked in respect of the fixed rent thereinbefore provided and provided further that fractions of a shilling on such selling price as aforesaid should not be taken into account in calculating the said royalty and a royalty in respect of all shale and other minerals of similar character wrought and brought to bank as in the said memorandum of lease provided. . . ."

The respondent pleaded three pleas in answer to the appellant's declaration, and the appellant demurred to those pleas. When the demurrer came on for argument the Supreme Court gave leave to the respondent to amend its pleas. Pursuant thereto the respondent filed six pleas in substitution for the original three pleas and the demurrer was argued as demurrers to each of these six pleas. The present appeal relates only to the fourth and fifth pleas, but it is convenient to summarize the first five pleas, having regard to the arguments presented to the Board.

The first plea was limited to the sum of £333 17s. 7d., being the amount claimed in respect of the period 31st December 1931 to 31st December 1932, and alleged that that sum represented a deduction of twenty-two and one-half per cent of the rent and royalty payable in terms of the mining lease, which deduction the respondent was entitled to make by virtue of the *Reduction of Rents Act* 1931 (N.S.W.).

The second plea was limited to the sum of £9,513 10s. 2d., being the amount claimed in respect of the periods 1st January 1933 to 31st March 1934, and the period 31st March 1939 to 31st December 1947, and alleged that that sum represented a deduction of twenty-two and one-half per cent of the rent and royalty payable in terms

of the mining lease, which deduction the respondent was entitled to make by virtue of the *Landlord and Tenant (Amendment) Act* 1932-1947. The *Reduction of Rents Act* 1931 had expired on 31st December 1932, and was replaced by the Act last-mentioned, which itself expired on 31st December 1947.

The third plea was limited to the sum of £649 14s. 11d., being the amount claimed in respect of the period 1st January 1948 to 30th June 1948, and alleged that Commonwealth Prices Regulation Order No. 985 applied to the lease so as, in effect, to continue during the said period the right of the respondent to make a twenty-two and one-half per cent deduction from the amount of the rent and royalty otherwise due under the mining lease. The plea alleged that the sum pleaded to was the amount of the deduction which it was so entitled to make.

The fourth plea was limited to the sum of £1,093 10s. 5d., being the sum claimed for the period 1st July 1948 to 20th September 1948 and again relied upon Commonwealth Prices Regulation Order No. 985, but alleged that the order had an effect upon the lease different from that alleged under the third plea. It alleged that the effect of the order was to fix the amount payable by the defendant for the period to which the plea related at the amount which would have been payable under the mining lease on the basis of the selling price of coal f.o.b. Newcastle at 31st August 1939, less a reduction of twenty-two and one-half per cent. It alleged that the sum pleaded to was a sum in excess of the amount so fixed by the Order.

The fifth plea was limited to the sum of £16,778 14s. 1d., being the sum claimed in respect of the period 20th September 1948 to 31st December 1950 and relied upon the same Prices Regulation Order No. 985 as having the same effect upon the mining lease as alleged in the fourth plea but relied upon it as having force under a statute of New South Wales taking the place of the Commonwealth statute and regulations, which had ceased to operate on 20th September 1948.

It will be observed that the total sum mentioned in the first five pleas is the same as the sum sued for, viz. £28,369 7s. 2d.

On 30th November 1953, the Supreme Court (*Street* C.J., *Owen* and *Herron* JJ.) gave judgment for the respondent on the demurrers to the first and second pleas ; judgment was given for the appellant on the demurrers to the third, fourth and fifth pleas, *Herron* J. dissenting as to the fourth and fifth pleas.

The respondent appealed to the High Court of Australia against so much of the judgment of the Supreme Court as related to its

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third, fourth and fifth pleas. The High Court (*Dixon* C.J., *Webb* and *Fullagar* JJ. (1)) allowed the appeal and gave judgment for the respondent on the demurrers to the fourth and fifth pleas. The appellant now appeals from that decision. The High Court did not disturb the judgment of the Supreme Court on the demurrer to the third plea.

The statutes on which the first two pleas were based contain provisions for a reduction by twenty-two and one-half per cent of " rent reserved by or under any lease ", to which the statutory provisions applied (see s. 6 (1) of the *Reduction of Rents Act* 1931 (N.S.W.), and s. 15 (1) of the *Landlord and Tenant (Amendment) Act* 1932-1947 (N.S.W.)). The Supreme Court held that all the payments to be made under the mining lease were rent notwithstanding that only the fixed yearly sum of £819 was therein described as a " rental " and therefore that the two statutes just mentioned reduced the total amount of rent and royalty for the periods covered by the first and second pleas. The appellant did not lodge a cross-appeal to the High Court in respect of the decision on these two pleas.

Their Lordships now turn to the legislation which is relevant in respect of the fourth and fifth pleas. The *National Security Act* 1939-1949 (Cth.), empowered the Governor-General of the Commonwealth, for the purposes of the defence of the Commonwealth, to make regulations controlling (*inter alia*) rents payable under all leases, including mining leases, and to control prices of goods and moneys payable under contract or otherwise. Many regulations were made under this Act and were from time to time amended by the Governor-General. The regulations which are material to this appeal are the *National Security (Prices) Regulations*. The Prices Regulations were first made on 22nd August 1940. They were amended from time to time, and on 18th March 1943, being the date of the making of the Prices Regulation Order No. 985 by the Commonwealth Prices Commissioner (which was relied upon in the fourth and fifth pleas) the material parts of the regulations are as follows :—

" 3. In these Regulations, unless the contrary intention appears— ' declared service ' means any service declared by the Minister, by notice in the *Gazette*, to be a declared service for the purpose of these Regulations ; ' Service ' means—(*a*) any service supplied or carried on by any person or body of persons, whether incorporated or unincorporated engaged in a public utility undertaking or an

(1) (1954) 91 C.L.R. 486.

industrial or commercial enterprise ; and (*b*) any rights or privileges for which remuneration is payable in the form of royalty, stumpage, tribute, or other levy based on volume or value of goods produced, and includes any other undertaking or service which is declared by the Minister, by notice in the *Gazette*, to be in his opinion essential to the life of the community ; ' rate ' includes every valuable consideration whatsoever, whether direct or indirect ;

22. (2) The Minister may, by notice in the *Gazette*, declare any service to be a declared service for the purpose of these Regulations ; Provided that the Minister shall not make any declaration under this sub-regulation with respect to any service supplied or carried on by the Government of any State except with the concurrence of the Executive Government of that State ; (3) Any declaration by the Minister in pursuance of this regulation may be made generally or in respect of any part of Australia or any proclaimed area or in respect of any person or body or association of persons ; (4) Any such notice may, by notice in the *Gazette*, be amended, varied or revoked by the Minister ;

23. (2) The Commissioner may, with respect to any declared service, from time to time, in his absolute discretion, by order published in the *Gazette*—(*a*) fix and declare the maximum rate at which any declared service may be supplied or carried on generally or in any part of Australia or in any proclaimed area ; or (*b*) declare that the maximum rate at which any such service may be supplied or carried on by any person or body or association of persons shall be such rate as is fixed by notice by the Commissioner in writing to that person or body or association of persons.

(2A) In particular, but without limiting the generality of the last preceding sub-regulation, the Commissioner, in the exercise of his powers under that sub-regulation, may fix and declare—(*a*) different maximum rates according to differences in the quality, description or volume of the service supplied or carried on or in respect of different forms, modes, conditions, terms or localities of trade, commerce or supply ; (*b*) different maximum rates for different parts of Australia or in different proclaimed areas ; (*c*) maximum rates on a sliding scale ; (*d*) maximum rates on a condition or conditions ; (*e*) maximum rates for cash or on terms ; (*f*) maximum rates according to or upon any principle or condition specified by the Commissioner ; and (*g*) maximum rates relative to such standards as he thinks proper, or relative to the rates charged by individual suppliers on any date specified by the Commissioner, with such variations (if any) as in the special circumstances of the

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case the Commissioner thinks fit, or so that such rates will vary in accordance with a standard, or time, or other circumstance, or shall vary with profits or wages, or with such costs as are determined by the Commissioner.

(3) The Commissioner may at any time by order published in the *Gazette* amend, vary or revoke any order made in pursuance of this regulation."

On 30th November 1942, the Minister acting under the power conferred on him by the Prices Regulations had declared that, with certain immaterial exceptions, all services supplied or carried on in Australia were " declared " services for the purposes of the Prices Regulations.

On 18th March 1943, the Prices Commissioner made the Prices Regulation Order No. 985, the material parts of which are as follows :—" Order 985 Issued by the Commonwealth Prices Commissioner.

1. . . .

2. I fix and declare the maximum rates per ton of coal mined at which mining rights may be supplied in respect of coal mined from the classes of mining properties mentioned hereunder to be— (*a*) Properties subject to Crown lease which are sub-leased by the Crown lessee on 31st August 1939—the amount per ton of coal mined now payable under the Crown lease plus the amount per ton of coal mined paid by the sub-lessee on the 31st August 1939 (after deducting the amount then payable under the Crown lease). (*b*) Properties subject to Crown lease which were not sub-leased on 31st August 1939, but have since been sub-leased—the amount at present payable under the Crown lease per ton of coal mined plus one penny. (*c*) Properties not subject to Crown lease which were privately leased on 31st August 1939—the amount per ton of coal mined payable on 31st August 1939. (*d*) Properties not subject to Crown lease which were not previously leased on 31st August 1939—threepence per ton.

3. . . .

4. For the purpose of this order ' lease ' includes any contract or agreement, express or implied, whereby rights to mine coal are granted or leased for some fixed or ascertainable period on a consideration of the payment of a royalty, tribute or other levy based on coal mined—and ' leased ' has a corresponding meaning."

After the making of Order No. 985 the Prices Regulations were amended from time to time in certain respects, but having regard to the view which they have formed as to the construction and

effect of reg. 23 (2) their Lordships find it unnecessary to refer to any of these amendments.

The appellant contended that the rent payable under the mining lease now in question was not capable of being controlled, and was not in fact controlled by Order No. 985 ; consequently its demurrers to the fourth and fifth pleas should have been upheld. Before considering in detail the questions which arise on this contention their Lordships must mention a further argument which Sir *Garfield Barwick* sought to advance for the appellant. He pointed out (1) that the respondent had succeeded on their first and second pleas on the basis that the State Act of 1932-1947 operated to reduce the rent under the mining lease, including the so-called royalty, up to 31st December 1947, (2) that the respondent now sought to argue that Order No. 985 operated to reduce the royalty as from 1st January 1948. He desired to argue that the respondent was estopped from putting forward this argument, for if Order No. 985 so operated as from 1st January 1948, it must also have so operated from 18th March 1943. The State Act and the order could not both have operated to reduce the royalty, during the period from 18th March 1943 to 31st December 1947 ; therefore, said Sir *Garfield*, the arguments now sought to be put forward by the respondent are inconsistent with the judgment already given in their favour by the Supreme Court on their first and second pleas, and they are estopped from advancing this argument. Mr. *Else-Mitchell* for the respondent submitted that the appellant should not be allowed to advance this plea of estoppel at the present stage of the proceedings. With this submission their Lordships agree. The alleged inconsistency in the respondent's pleas was present when the original pleas were delivered on 2nd November 1951 ; yet the appellant did not base any argument upon this point in the Supreme Court. Next, this same plea of estoppel could have been advanced in the High Court, since at that stage the Supreme Court had given its decision on pleas 1 and 2 and there was no appeal from that decision. Moreover, their Lordships think that the plea raises questions of some complexity, the answer to which would depend, to some extent at least, on the rules of pleading in force in Australia and on decisions of the courts in Australia. Their Lordships have not the advantage of a judgment upon this point by the High Court, since the appellant did not think fit to take it in that Court. In these circumstances their Lordships decline to allow the appellant to advance the plea of estoppel at this stage, and they now turn to a consideration of the questions arising for decision on this footing.

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The first question is whether the rights which the respondent possessed under the mining lease were " rights or privileges for which remuneration is payable in the form of royalty " within the meaning of reg. 3 (*b*). Counsel for the appellant argued that they were not. It submitted that the words " rights or privileges " were apt to cover rights exercised over the land of another, but not to describe the incidents of ownership of the soil, whether in fee or for a term of years ; that the phrase " remuneration in the form of royalty " is not apt to describe rent payable by a lessee to a lessor ; and that reg. 3 (*b*) only applied where the whole of the " remuneration " was payable in the form of royalty whereas under the mining lease, part at least of the remuneration (i.e. the dead rent of £819) was admittedly payable in the form of rent. Their Lordships appreciate that there is much force in these arguments, but they have come to the conclusion that they must fail, having regard to the wording of the regulations as a whole, and to their object as revealed by that wording. They think that when a lessee takes and carries away coal he may fairly be described as exercising a right, even although it is a right which is incident to his interest in the soil as lessee. They recognize that the sum described as a " royalty " in the mining lease has been held by the Supreme Court to be part of the rent reserved by the lease, but they think that a rent which is payable at a rate per ton of coal wrought and brought to bank is ordinarily referred to as a royalty, and it is noteworthy that this is the word which is used in the mining lease itself. Finally, they think that counsel's last argument on this point must be rejected. To accept it would be, in effect, to alter " remuneration " to " *the* remuneration " or to insert the word " only " after the words " for which remuneration is payable " in reg. 3 (*b*). In their Lordships' opinion the clause covers every case in which any remuneration in the form of royalty is payable even although part of the total remuneration may be payable in the form of a fixed rent.

Regulation 3 (*b*), which has just been construed, forms part of the definition of " service " which is contained in reg. 3. Reading this regulation in conjunction with reg. 23 (2) their Lordships reach the conclusion that in the regulations the lessor under the mining lease is regarded as the " supplier " of a service, namely mining rights, and the lessee is regarded as a person who is paying the lessor remuneration for the " supply " of these rights. This is a curious use of words, but as the High Court observed in its judgment, " by definitions and the introduction of conclusive presump-

tions into the regulations . . . many unnatural meanings have been given to words."

The next question arises on the wording of reg. 23 (2). It is admitted that the supply of mining rights under the mining lease, if it is a service, is also a " declared service " by reason of reg. 22 (2) and the declaration, already mentioned, which was made by the Minister on 30th November 1942. Regulation 23 (2) empowers the commissioner to " fix and declare the maximum rate at which any declared service may be supplied." Counsel for the appellant contended that this regulation gives the commissioner no power to fix the rate of royalty to be paid under the mining lease, since the words " may be supplied " can only refer to a " supply " of a service after the date of an Order fixing the rate, whereas the mining rights exercised by the appellant under the mining lease were " supplied " once and for all when the mining lease was executed in 1919, and thereafter there could be no " supplying " of rights. This contention was rejected by *Herron* J., in the Supreme Court. The High Court did not find it necessary to express a final view upon the point, but indicated an inclination to the view that the contention on behalf of the appellant was ill-founded. Their Honours observed: " Now it seems to be clear enough that par. (*b*) of the definition of the word ' service ', operating as it does upon and therefore through the expression ' declared service ', extends the application of reg. 23 (2) beyond its natural meaning and must, so to speak, be read into it. Regulation 23 (2) (*a*) thus should be understood as if expressed to authorize a fixing and declaring of the maximum rate at which any declared service including any rights or privileges for which remuneration is payable in the form of royalty etc. may be supplied or carried on. The incongruity of the word ' supply ' with rights or privileges for which a royalty is payable is obvious. But another word inappropriately chosen is ' remuneration ' to describe a royalty. These words evidently were intended to receive a flexible meaning in accordance with the context and the subject matter. It seems almost undeniable that they cover royalties payable in connection with the exercise of rights or privileges granted after the making of an order fixing or declaring the maximum royalty payable therefor. Do they cover royalties payable in connection with the exercise of rights or privileges granted before the making of an order fixing or declaring the maximum royalty, and before the making of the regulations ? There is much to support the view that they do. The regulations were dealing with ' goods and services ', a collocation familiar in economics, and they were assigning to the latter category the providing of rights and privileges to

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be exercised for the production of goods at a royalty etc. The word ' supply ' in relation to the category if it were not artificially extended would be equivalent to ' perform ' and, if it is to be moulded to fit the extension of the category, the analogous meaning is to maintain the enjoyment of the right rather than to grant it once for all. The subject is ' price fixing ' as a war measure and it is obvious that what must be controlled are the rates that affect the cost of production and go into the price of the goods. It is the royalty charged *de die in diem* that matters, not the grant of the right and the initial fixing of a royalty. It is to be noticed that royalties on the value of goods produced were included. That doubtless was because a rise in value would mean a rise in the royalty. And that would be so irrespective of the term for which the right or privilege was granted " (1).

Their Lordships have found this a difficult and doubtful point, but they have come to the conclusion that the appellant's argument fails. Their Lordships are impressed by the considerations mentioned in the judgment of the High Court and by the reasoning of *Herron* J., and they think that the Prices Regulations contemplated the lessor under a mining lease as providing a supply of mining rights throughout the term of the lease, as and when the lessee exercises these rights.

It follows that on 18th March 1943, when the commissioner made Order No. 985, he had power to fix the maximum rates per ton of coal payable by the lessee under the mining lease, and the last question which arises is as to the true construction of par. 2 (*c*) of that Order, which has already been set out.

What has to be determined is the meaning, in this context, of the words in the paragraph " the amount per ton of coal mined payable on 31st August 1939 ". In their Lordships' judgment this means the amount of royalty payable per ton of coal mined on 31st August 1939 : the date refers to the mining of the coal and not to the payment of the royalty. It was argued that this provision cannot be applied unless it is proved that coal in respect of which royalty was payable was in fact mined on 31st August 1939, but in their Lordships' view that is much too narrow a meaning to attach to this provision. The Order is not concerned with what actually happened on that date : what it is concerned with is the rate of royalty which was then in operation. In effect it poses this question : if coal in respect of which royalty was payable had

(1) (1954) 91 C.L.R., at p. 500.

been mined on that date what would have been the rate of royalty payable in respect of that coal ?

If coal in respect of which royalty was payable had been mined on 31st August 1939, it is not now disputed that the amount of royalty which the tenant was bound to pay in respect of it depended on two factors—the provisions of the lease and the provisions of the *Landlord and Tenant (Amendment) Act* 1932-1947. The lease required payment at a rate per ton depending on the selling price of coal free on board at Newcastle and the Act reduced the rent payable by a tenant : as this royalty is a form of rent it therefore reduced the amount of royalty so calculated by twenty-two and one-half per cent. For example, if the result of applying the provision of the lease had been that in respect of the amount of coal mined on that date the tenant was liable to pay royalty amounting to £100 the Act would have reduced the tenant's liability so that the tenant would only have been bound to pay £77 10s. In effect the Act reduced the rate of royalty to seventy-seven and one-half per cent of the rate required by the lease for it can make no practical difference whether the full rate of royalty is first multiplied by the total tonnage and the total is then reduced by twenty-two and one-half per cent or the full rate of royalty is first reduced by twenty-two and one-half per cent and then multiplied by the total tonnage.

It was argued that the amount of royalty per ton payable on 31st August 1939 was the full amount provided in the lease because the calculation must be taken in two stages : before the Act can apply the total amount of royalty payable under the lease must first be calculated by using the rate provided by the lease. In other words the Act, so it was argued, has nothing to do with rate per ton ; it is only concerned with the total. This argument is not without force but in their Lordships' judgment it does not give sufficient weight to the word " payable " in the Order. Nothing was payable in 1939 except what remained after the Act had operated the statutory reduction. Strictly speaking it is not perhaps very accurate to refer to an amount per ton being payable—what is payable is a sum of money : but in their Lordships' view what is meant by " the amount per ton . . . payable " is the amount which the tenant has to pay in respect of each ton mined and the tenant did not have to pay anything until the Act had operated to reduce his liability. Their Lordships must therefore reject the argument of the appellant.

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For the reasons given their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed with costs.

Solicitors for the appellant, *Galbraith & Best*, by *Frank A. Davenport & Mant.*

Solicitors for the respondent, *Light & Fulton*, by *Minter Simpson & Co.*

J. B.