

Judicature Act by section 40 provides that in certain cases, as soon as an order or interlocutor allowing a proof has been pronounced in an inferior court, it shall be competent to either party to advocate that case in order that it may be tried before a jury instead of before the inferior judge who allowed the proof. But it is obvious that the meaning of that section is that when the inferior judge has ordered inquiry into the merits of a case which he is asked to determine, the parties, or either of them, if they think proper, may have the same question—the merits of the case—determined before a jury instead of before a judge. It would not have occurred to me that that covered the case of any inquiry which was antecedent—necessarily and properly antecedent—to the inquiry into the merits. The provision of the statute seems to me to apply only to the allowance of proof on the merits of the case.

LORD MONCREIFF—I am of the same opinion. I had some slight doubts as to the competency of the appeal, but these have been entirely removed by what your Lordships have said. I think it would be very much to be regretted if we were obliged to hold this appeal to be incompetent. In the first place, the first interlocutor dealing with the claim at common law is that of 24th November 1897; and it would be anomalous if we held that the appeal was bad when that was the first interlocutor dealing with the main ground of action. In the second place, Mr Constable admitted that he did not dispute on the merits that the notice was well given.

The Court approved of the pursuer's issue as the issue for the trial of the cause.

Counsel for the Pursuer—M'Clure.
Agents—R. C. Bell & J. Scott, W.S.

Counsel for the Defender—Constable.
Agents—Simpson & Marwick, W.S.

Friday, January 14.

FIRST DIVISION.

[Lord Pearson—Bill Chamber.

EBBW VALE STEEL, IRON, AND
COAL COMPANY, LIMITED v.
MURRAY (WOODS' TRUSTEE)
AND OTHERS.

Lease—Termination of Lease—Clause Providing a Break in Favour of the Tenant on Certain Conditions—Bankruptcy of the Tenant—Breach of Contract—Measure of Damages.

The lessees of a mineral field sub-let the subjects held by them under their lease. The sub-lease provided that the sub-tenants should pay an annual dead rent, and should be bound to keep the mines drained—an obligation which the principal lessees

were bound to fulfil by their lease. The agreement also provided that “if the sub-lessees shall at any time sink two pits (one winding and one ventilating) on the property down to the Old Coal, they shall have power to surrender the sub-lease at any time thereafter by giving six months' previous notice in writing.” The sub-tenants were sequestrated, and the trustee on the sequestrated estate declined to take up the sub-lease. The principal lessees re-entered the subjects for the purpose of fulfilling the obligations of their own lease, and lodged a claim in the sequestration of their sub-tenants for the capitalised value of the dead rent for the whole unexpired period of the sub-lease, and for the expense incurred and to be incurred in pumping operations which were necessary for the fulfilment of their obligation to keep the mines drained. The trustee rejected the claim, and on appeal the Court, after a proof, held (aff. judgment of Lord Pearson) that as there was no likelihood of the appellants being able to make a profitable use of the subjects, they had gained nothing by obtaining re-access to them which could be set against the loss of the stipulated dead rent; but that the chance that the conditions of the clause providing for a surrender of the lease might have been implemented was appreciable and must be allowed for in assessing the damages; and that, subject to that allowance, with regard to future expenses, as the appellants were bound to their landlord for the pumping of the mines, the claim for the expenses of pumping must also be allowed.

Observations on the above surrender clause as supplying a measure of damages.

The Ebbw Vale Steel, Iron, and Coal Company, Limited, were lessees of mineral property near Pontypool, Monmouthshire. They were also sub-lessees of certain seams of coal under a sub-lease from the Blaendare Coal Company, Limited, which seams were worked through the property comprised in their Pontypool lease. In March 1891 the company entered into an agreement with Messrs James & William Wood, coalmasters, Glasgow, for a sub-lease to them of substantially the whole of the minerals from April 1st, 1891, for a term of twenty-three years from 24th June 1889, except in the case of the Blaendare minerals, the lease of which expired in eleven and a half years from that date. Under the agreement James & William Wood bound themselves to pay a minimum rent per annum of £3600 for the Pontypool estate, and £400 for the Blaendare estate. One of their obligations with regard to the Pontypool estate was “to keep the mines ventilated and drained,” an obligation which the Ebbw Vale Company were bound to fulfil under the lease between them and their own landlord. The agreement also provided that “if the sub-lessees shall at any time sink two pits (one winding and one ventilating) on the

property down to the Old Coal, they shall have power to surrender the sub-lease at any time thereafter by giving six months' previous notice in writing."

In August 1892 the collieries held by Messrs Wood under the sub-lease with the Ebbw Vale Company, along with some others held by them, were made over to a company which they had promoted, called the Bryndu Coal & Coke Company, but this company was not accepted by the Ebbw Vale Company as their sub-tenants in place of the Messrs Wood. The Bryndu Company went into voluntary liquidation in May 1894, and a supervision order was afterwards made. The liquidators of the company arranged that Messrs Wood should provide the necessary funds to keep the pumps going to prevent the collieries being filled with water, the expense so incurred to be repaid out of the first funds available after providing for the costs of the liquidation. The sum so paid, along with the expenses of the liquidation, exceeded the whole of the assets of the company; and Messrs Wood ceased to provide the necessary funds in September 1894.

About the same time the Messrs Wood were sequestered. The respondent Murray was appointed trustee on the sequestered estate, and in October 1894 he was called upon by the Ebbw Vale Company to pay the expenses of pumping until he either disclaimed the lease, found a fresh tenant, which he had been endeavouring to do, or admitted the appellants' claim of damages to proof. The trustee took up the position that the lease was brought to an end by the sequestration, and that there was no obligation on him as trustee to continue the pumping of the pits. Consequently the Ebbw Vale Company were obliged to expend the funds necessary to keep the colliery in working order themselves; and they gave the trustee notice that they were going to re-enter under reservation of all claims. They lodged a claim in the Messrs Wood's sequestration for damages for breach of the contract under the agreement of sub-lease, to the extent of £78,249 15s. 7d. The trustee rejected their claim on the grounds that the claimants had taken no steps since the date of sequestration to ascertain whether any loss would be sustained by them, and that if they worked the minerals the expense incurred and to be incurred for pumping and the dead rent, would be earned, and no loss would be sustained.

The Ebbw Vale Company appealed to the Lord Ordinary on the Bills. After a proof, the result of which sufficiently appears from the Lord Ordinary's note and the opinion of the Lord President, the Lord Ordinary (PEARSON) pronounced the following interlocutor on 20th March 1897:—
"Sustains the appeal, and recalls the deliverances appealed from, and decerns: Finds (1) that the claim for £78,249, 15s. 7d. falls to be admitted to the extent (first) of the sum of £512, 6s. 10d., and (second) of the sums of £30,000, 6s. 9d.

and £45,524, 6s. 10d., subject to deduction from the two last-mentioned items of one-fourth part thereof: and finds further that the sum of £2212, 15s. 2d. included in the said claim for £78,249, 15s. 7d. falls to be disposed of in connection with the claim for £14,263 after mentioned," &c., . . . His Lordship then made certain findings with regard to a claim for £14,263 in connection with the Blaendare estate, which need not be further referred to.

Opinion.—" . . . I take it there is no dispute that the Ebbw Vale Company allowed the trustee, and through him the creditors, an opportunity of taking up the sub-lease if they were so disposed, and that it was upon the trustee's distinct intimation that he disclaimed the lease that they entered and fulfilled the minimum of their obligations to their landlord. In these circumstances the Ebbw Vale Company claim damages as for breach of contract, and the real question I have to decide is, what the measure of these damages is, and what is the duty of a tenant upon whom a subject of this nature is thrown back by the bankruptcy of his sub-tenant.

"The first and most obvious duty of anyone in a position of that sort is to permit the creditors of the bankrupt to take up the contract. If he refuses to do that, he is held to have taken the subject instead of damages. The creditors here had an opportunity, through the trustee, of taking up the contract, and they declined to do so. It is also the duty of the tenant in such a case to take reasonable means to re-let the subjects so as to keep down damages as much as he can. He is not entitled just to say, 'I refuse to have anything to do with it, and will leave it unworked until I get the damages I claim; then I will go in and make what I can of it.' Now, the duty to take reasonable means for re-letting the subject seems to me to have been sufficiently fulfilled in this case. The parties themselves concurred in making attempts to let the subjects in order that the damages might be diminished. Advertisements were made in various likely quarters, and a good many inquiries were made in the course of the years 1894 and 1895. These all came to nothing, not, as I understand, through any reluctance on the part of the Ebbw Vale Company to make terms or even to make concessions in order to induce a new tenant to come in, but because of the difficulty of being sure that the subjects could be worked at a profit at all, and at all events of being sure that they could be worked at a profit without such a large outlay of capital that the working would be very risky. If the subjects had been re-let, the ordinary claim for difference of rent, if the re-let had been less favourable than the original sub-lease, would have been the appropriate claim.

"Then the question comes to be, what if these duties on the part of the over-lessee have been fulfilled and no re-let results?"

"The measure of damages in that case which is contended for by the Ebbw Vale Company, and which forms the substance of their claim, may be stated shortly thus.

They say—We have certain obligations to our landlord of which we got substantial relief by the sub-lease to you, and by bringing that sub-lease to an end you have become liable to give us a ranking for the amount which it will cost us to put ourselves right with our landlord in all matters falling within the sub-lease, and also for the additional £600 a-year of dead rent which you undertook to pay, these two items representing the value of the sub-lease to us.

“This claim is, as far as concerns the present purpose, in three heads. The first head (£512, 6s. 10d.) is the amount which has actually been paid to the liquidators of the Bryndŷ Company for pumping the Glyn pits and keeping them in order according to the obligations of the sub-lease, and that is charged at £46 per week. I may say that £46 per week seems to me to be amply proved to be a reasonable figure to put upon the absolutely necessary work in order to keep the pits open in conformity with the obligation. The next item is expenditure to be incurred for doing the same thing during the remainder of the lease, at £46 a-week for seventeen and a-half years—of course discounting for a present payment—and that amounts to just £30,000. Now, if £46 per week be, as I think it is, the proper figure, that represents the present value of the expenditure which will be necessary in order that the Ebbw Vale Company may keep themselves right with the landlord under their contract with him, which I assume contains no break affecting the duration of that over-lease. The third item is the present value of the dead rent, or the fixed rent as we call it, payable under the sub-lease, and which they lose by the sequestration. That rent they state at £3600 a-year, which is the rent stipulated for in the sub-lease. They themselves are liable to their landlord in only £3000 a-year of fixed rent, but the £600 can hardly be assumed to be altogether profit rent, because it would only be so if the stipulations in the lease and sub-lease were identical, which they are not.

“Now, that is the state of the claim as to Pontypool. The trustee has disallowed it *in toto* on the ground that ‘the claimants have not, since the date of the sequestration, worked the minerals, and are taking no steps to do so, with the view of ascertaining whether or not any loss will be sustained;’ and further, the trustee ‘is advised that if they did work the minerals, the expenditure incurred and to be incurred, and the dead rent, would be earned, and no loss would be occasioned.’ That deliverance was pronounced, of course, before any proof was taken. The proof, however, renders it impossible, in my opinion, to accept the principle which the trustee there lays down, and the test which he applies, as determining the rights of the parties in this case. A very full proof has been led, in which the appellants have sought to instruct the damages which they have sustained, and will sustain, otherwise

than by way of going in and working the pits. This proof seems to me to result in the main in substantiating their claim, subject to this consideration, that the claim takes no account of the diminished value to them of the sub-lease with the clause of surrender in it, as compared with the value of it had there been no such clause. The clause is this—[*His Lordship read the clause quoted above.*] That is, I think, to be taken into account in estimating the damage which the Ebbw Vale Coal Company has sustained through the termination of the sub-lease, but it is impossible to arrive with any accuracy at the pecuniary amount to which the value of the sub-lease is affected by the existence of such a clause.

“The respondent says that the existence of this clause furnishes in itself a more accurate measure of damages than that which the appellants have adopted. He says that, assuming damages to be due, the measure of them must be the cost of sinking such pits as would have put Messrs Wood in the position of being entitled to break the lease. Now, in the first place, the claim not being so stated, and there being no suggestion that it should be amended to the effect of stating the damages in that way, even alternatively, I can hardly deal with the suggestion in aid of the claim of the appellants. But is the respondent’s position a sound one? The parties are not agreed—indeed they are very widely divergent—as to what is the meaning of the clause itself. They are at variance as to whether, taken in conjunction with the plan which was before the parties, it sufficiently indicates any point on the ground at which these pits were to be sunk. The appellants maintain that the sinking of two costly pits to the dip near the western boundary was necessary before the option to break was open. The respondent, on the other hand, contends that the two pits called No. 3 pits, which were sunk during the time of the Bryndŷ Company, would, if sunk, further so as to reach the ‘Old Coal,’ have been sufficient fulfilment of it. I am disposed to hold that, according to the agreement of parties, the power to surrender could have been acquired by the sub-lessees by a sinking much less costly than the ‘proposed new pits,’ but that on the other hand the No. 3 pits, even if sunk to the Old Coal, would in the circumstances not have satisfied the requirements of the clause. But whatever may be its true construction as applied to the ground, it seems to me that it is impossible to regard that clause as furnishing of itself the measure of damage to the appellants. It might be so if the appellants had had a similar clause in their own lease, but as they have not, it seems to me that this clause can only be used as bearing on the terminability of the sub-lease, and (through its terminability) on its value to the principal lessee. The respondent attempts to use it in a very different way. He says

that, inasmuch as the Messrs Wood could have implemented that condition for a matter of £4000 or £5000, so as to enable them to bring the sub-lease to an end, he is entitled now to put off the appellants with so much as will enable them to do what the sub-lessees would have been entitled to do, to break the sub-lease. And he does not even propose to put the appellants in funds to do that, but puts them off with a ranking on the sequestrated estate to enable them to do it. It seems to me that that will not do. The conclusive answer is that, if the case is to be approached from that point of view, the respondent's position involves his taking up the contract, and if he takes up the contract he must either sink the pits in order to bring himself within the clause, or at the very least he must put the appellants in funds to do so by giving them the money, and not by merely offering them a ranking, though I do not suggest that even if he offered to put the appellants in funds to sink the No. 3 pits to the Old Coal, that would be any answer to the present claim of damages. As I have said, the clause truly bears on the case only as it affects the value of the sub-lease in respect of the chance of the Messrs Wood availing themselves of it if they had remained solvent and continued in possession. And in this connection it is necessary to bear in mind (1) that according to the appellants' evidence the sinking of the costly pits at the west end is practically the only way in which the field can now be developed and worked to profit; and (2) that the clause, according to my reading of it, would have enabled the sub-lessees to surrender the sub-lease upon a much smaller expenditure by sinking at a different place.

"The respondent, however, goes further, and says that the value of the lease to the Ebbw Vale Company is affected by another and quite different set of considerations, and a large part of the proof was directed to these. He maintains that the coalfield in question is capable of being so dealt with now by that company as to pay expenses and pay the fixed rent, and to enable them to fulfil all their obligations to the landlord, including the pumping of the pit and the keeping of the roadways; and he says that there are three methods in which that could be done even at the present price of coal, which is low. He suggests, in the first place, that the field might be dealt with by breaking it up and sub-letting substantial parts of it to neighbouring collieries. In the second place, he says that the No. 3 pits which the Bryndu Company sank can be made available for working, which would result in paying expenses and dead rent, and enabling them to fulfil the obligations. In the third place, he says that, going strictly by the obligations of the lease and the sub-lease, the Glyn pits may be made available for that purpose by extending the main drift to the western part of the property following the dip of the coal as enjoined in the specification of works. His contention is that if any one of these

three modes were adopted there would be no damages at all.

"As to the relevancy of this reply which the respondents make, I must say I have considerable doubt. There are certain well-known obligations which rest upon anyone who is in the position of the appellants. I have adverted to some of them, and I have said that in my opinion they have fulfilled all the ordinary obligations of a man who has a lease thrown back upon him by his sub-tenant's sequestration, and I am not sure that there is any further duty upon the Ebbw Vale Company to diminish the damages. Certainly I do not think there is any such duty unless it can be shown beyond controversy that by taking a certain line of action the damages will be diminished and the sequestrated estate practically freed from the claim.

"As regards the first proposed mode of dealing with the field, viz., the breaking of it up and sub-letting it to neighbours, I think that part of the case was ultimately confined to the suggestion that the Patent Nut and Bolt Company, who are the neighbours on the south, might well come in and relieve the Ebbw Vale Company of a large and valuable part of the unworked minerals; and the manager of the Patent Nut and Bolt Company was examined, and said he thought it lay convenient to their ground, and that if he could get favourable enough terms he would recommend his directors to take it. That is very far from being enough to satisfy what, I think, are the only conditions on which this argument could succeed; and it seemed to me to be rendered quite hopeless when it turned out that the Patent Nut and Bolt Company directors had never had the question before them—that it had never even reached the stage of consideration, much less of offer. Then as to the position of the No. 3 pits, I think it is made out that, whatever other reasons may have induced the Bryndu Company to sink them, they were sunk mainly for the purpose of winning coal beyond the disturbed ground to the north in an area of no more than about 30 acres. They are cheap pits built on the Scottish timber system, and not on the Welsh brick system. They are pits which do not go down more than about 70 fathoms, and would require to be sunk a good many fathoms more before they reached the bottom seam; and one of the respondent's witnesses said they would not be available for that purpose, but would need to be reconstructed. I do not think it is proved, or anything like proved, that the No. 3 pits by themselves could be made available in order to develop in the proper sense the unwrought minerals in the Pontypool field. But then it is said that they may be used in connection with the existing Glyn pits; and especially that if you carry forward, as the specification of works contemplated, the main drift of the Glyn pits down to the dip at the western boundary, you will have command of marketable coal sufficient to pay expenses and the fixed rent. Here there is a remarkable conflict of evidence in the views of the skilled witnesses for the

appellants and for the respondents. The appellants' witnesses scout the idea of extending the main drift in order to win the rest of the workable coal. They say that the cost, not of the drift itself—for that would not cost many thousand pounds—but of working out the available coal through that main drift, would be so large as to be prohibitive, and therefore there would be no chance whatever of effecting what the respondent promises would be effected, viz., payment of dead rent and expenses and the fulfilling of the other obligations of the lease. They further say that the proper mode of developing this mineral field is to put down two large and costly new pits at the west end. The respondents' skilled witnesses, on the other hand, when this proposal is brought under their notice, say it would be madness to do that; and each set of skilled witnesses gives passable reasons for imputing insanity to the proposals of the other. I may say that I greatly prefer the skilled evidence led for the appellants on all these points; and if I had to balance between a proposal to develop this field by the new pits or by the drift, I should without any hesitation choose the former. In the view I take, however, that is not the issue that I have to decide. I think it lies upon the respondent to show beyond a doubt that there is something left which the appellants ought to do in the way of dealing with this mineral field in order to diminish or wipe out the damages they claim. I cannot take it that it is sufficient for the respondent to show that there is a mode of developing the workings which will not involve a very large outlay of capital to begin with, but which, in the opinion of their men of skill, would result in just paying their way, when that evidence is contradicted by a body of skilled evidence, which I prefer, to the effect that it would be a dead loss and that the cost would be absolutely prohibitive.

"I therefore hold that on that part of the case the respondent has failed, and the only other element which I think he asked me to take into account is this. He says all this is based upon the present price of coal, which is very low, and that if the price rises as it may well do in the near future, and at all events within the period of this lease, that would make all the difference even if the previous calculations are a little fine. There would then be a probability of working the whole field at a profit, and what the respondent objects to is that the appellants should get their ranking now for the full amount necessary to keep the pits dry and open, when, after all, a rise in the price of coal might enable them to make a fortune before the end of the lease, without any chance of the bankrupt estate being recouped for damages which it may turn out had not been sustained. This criticism would apply to every case in which future damage has to be estimated. I do not say that that is not an element for consideration, but the fluctuations in the price of coal seem to me too problematical to have much effect upon

the amount of damages in this case.

"I think I have dealt with all the points which were laid before me in argument. The result I take to be this. The first head (£512, 6s. 10d.) I think must be sustained as it stands. As to the second and third heads, I think I must sustain the claim as made subject to some deduction in respect of the existence of the clause of surrender, which I think must be taken into account as affecting the value of the sub-lease, and also (though to a smaller extent) in respect of a possible rise in the price of coal during the term of the sub-lease, which might ensure profitable working. The amount to which the value is thus affected is incapable of accurate ascertainment, and I cannot say that I have much confidence in arriving, as I do, at the conclusion that the second and third items ought to be subject to a discount of 25 per cent. in respect of these uncertainties to which I have referred. I understand that the fourth head—dead rent—is admitted to fall under the Blaendare compromise."

The respondents reclaimed, and argued—The position of the appellants was the same as if a solvent tenant had thrown up his lease. They were bound to make efforts to find a new sub-tenant, or to work the subjects to a profit themselves, to diminish the damages. If they sub-let portions of the mineral field and worked the remainder, no loss would be sustained by them. In any case, the measure of damages should be the sum that the respondents would have had to expend in order to put themselves in a position to take advantage of the clause in the agreement permitting them to surrender the sub-lease. By further extending two of the existing pits so as to reach the Old Coal, at a cost of £2000 or £3000, they could have implemented the conditions of that clause, and that should be the measure of damages. The lease must be looked to as in the converse case of *Fleming v. District Committee of the Middle Ward of Lanarkshire*, November 15, 1895, 23 R. 98. The appellants were not entitled to recover the expenses of pumping to keep the pits in working order, and at the same time claim the capitalised value of the dead rent on the footing that the pits were unworkable to profit, and would be unworked. In order to recover the damages claimed they were bound to show that for seventeen and a-half years they could make no profit out of the subjects either by sub-letting or working. They were not entitled to get a colliery rent free, and be paid the expenses of pumping, and at the same time be dealt with on the footing that the colliery was worth nothing. The cases of *Bankier Distillery Company v. Young & Company*, July 20, 1892, 19 R. 1083, and July 27, 1893, 20 R. (H. of L.) 76; *Bethune v. Morgan*, December 16, 1874, 2 R. 186, were cited for the respondent.

Argued for the appellants—A landlord who has his subjects thrown back upon his hands is not bound to work at his own expense, to his loss, in the event of his

being unable to find a new tenant, in order to save the tenant who surrenders. It was necessary for the interpretation of the clause providing for a break in the lease, in the event of the tenant sinking pits to the Old Coal, to look at the contract as a whole, and the site of the pits which were to be sunk in order to implement the condition was marked on plans which were incorporated with the contract. The existing pits, which it was contended might be sunk to the Old Coal, were not at the place marked on the plans, and further, were not "one winding and one ventilating," and from their structure could not be made so — *Nene Valley Drainage Commissioners v. Dunkley*, November 7, 1876, 4 Ch. Div. 1. In measuring the damages it was impossible to take into consideration the contingency that pits might possibly have been sunk to the Old Coal, seeing that they were not sunk at once, when the sinking of them would have been of most value to the sub-lessees. The appellants were bound by their own lease to keep the pits drained, and they were entitled to recover the expenses of pumping necessary for the fulfilment of this obligation from their sub-tenants, who had contracted to fulfil it.

At advising—

LORD PRESIDENT—The argument before us on the merits was directed exclusively to the Lord Ordinary's findings as to dead rent and pumping, but those questions involve large sums and complicated questions. I have come to be satisfied with the Lord Ordinary's conclusions, and agreeing, as I do, in his Lordship's careful and elaborate reasoning, I shall state my grounds of concurrence with comparative brevity.

When the trustee in the sequestration of the tenant of a mine or a farm declines to take up the unexpired lease, a claim of damage opens to the landlord against the estate for the loss arising from the tenant's failure to fulfil his contract. In assessing the damage, regard must be had to the fact that while the landlord loses the stipulated rent, he, on the other hand, regains access to the use of the subject of the lease, and can draw whatever profit it may yield, either under his own possession or in the form of rent from a new tenant. It is, for example, quite clear that if, on the trustee's declining to take up the lease, the subjects were let to a solvent tenant at the same rent, the damages would be nominal; or if it were let, after fair trial, at a reduced rent, the damages would be the amount of the difference between the two rents capitalised as for a present payment. On the other hand, if it be the case that the subject can only be worked at a loss, and therefore cannot be either let or worked to profit by the landlord himself, then there is nothing to set against the claim for the amount of the rents which would have been paid each year till the end of the lease, and which, owing to the bankruptcy, will no longer be paid.

I have spoken hitherto of the simple case

of a lease for a term of years certain. The matter is more complicated where, as in the instance before us, the tenant is bound for a term of years, but with a power of terminating the lease upon his doing certain things. Here the question is, what are the probabilities that the tenant, if he had remained solvent, would have done those things, and thus terminated his obligation to pay the stipulated rent, and at what period would he have done so? According as these chances are appraised by the tribunal considering the claim of damages, may the unexpired term of, say, twenty years be treated for practical purposes as no more than fifteen or five. Obviously the calculation of any contingency cannot pretend to exactitude, and must necessarily be conjectural; but this constitutes no objection to the system, and furnishes no alternative to it.

In the application of these principles the first question of fact which is attended with complication or difficulty is whether there is any reasonable likelihood of the appellant company being able to make a profitable use of the subjects during the seventeen years which form the unexpired period of the Woods' sub-lease? In my opinion, on the evidence before us, there is not. The first proof of this is that reasonable means were taken to find a new tenant, and none offered. Again, when the history of the mine is known, the reason for this is not far to seek. For a series of years, long enough to found an induction, the working of the mine has been attended with no profit and heavy loss. Going still further into the question, it is established by a distinct preponderance of evidence that without the execution of very expensive works the same conditions which have led to loss in the past would lead to loss in the future. Accordingly, I am satisfied that for practical purposes it may be held that the mine is not workable to profit, and is not likely to be so within the period which we have to consider. The result is that, by obtaining re-access to the premises through the failure of the Woods, the appellant company have gained nothing which can be set against the loss of the stipulated dead rent.

It remains to consider to what extent the clause in the lease providing a break in the tenant's favour on his executing certain works affects the length of the period during which it may be held that the dead rent could have continued payable. This clause, it must be remembered, bears on the question before us solely in so far as it affects the chance of duration of the lease. Now, the sub-tenant could only get free if he sank two pits as specified in the sub-lease, and the likelihood of his doing so depends mainly on the less or greater cost of this operation. The appellant company sought to make out that it was matter of agreement between the parties that the pits must be sunk at a particular place marked on a certain plan where the works would have cost a very large sum of money. On this I am against them. I do not think that the marking on the plan is to be read

into the break clause, which of itself prescribes no place, and makes no reference to the plan. The reference to the plan in another part of the contract is for another and more general purpose.

On the other hand, I am unable to hold with the trustee that the comparatively cheap operation of deepening two existing pits, which as matter of fact were never intended for any such purpose, would be a compliance with the condition of the break clause. Holding as I do that the pits stipulated for might have been sunk at another place than that indicated in the plan, I am at the same time satisfied that to meet the condition they must be of such construction as would involve expenditure very much larger than the modest sum indicated by the trustee's witnesses for the deepening of the existing pits. Tied apparently to the theory which I reject, the trustee has not led evidence to show what would be the expense of proper pits at such a position as a tenant would naturally choose for the purpose. Accordingly, I have no reason to suppose that it would be anything so much less than the appellants estimate as to largely increase the probability that the sub-tenants would have fulfilled the conditions and terminated the lease. At the same time the chance that this might have occurred is appreciable and must be allowed for. The difficult question, how much should be allowed, has been solved by the Lord Ordinary in a way for which I cannot suggest any substitute which would be better supported by reason.

The remaining question is as to pumping. Now, I must say that I was at first adverse to the idea that the full claim should be allowed, and that simply because it is hard of belief that the best thing a man can do with a profitless colliery is to go on pumping for seventeen years. A closer consideration has led me to a different conclusion. In the first place, the appellant company are themselves bound to their landlord for this pumping. Now, I go upon the theory, which I have already adopted, that the mine will not be worked, and the questions then arise, shall the appellant company pump? or shall they cease pumping? It is, of course, plain that if you cease pumping your colliery will be drowned, and loss will result from the drowning. Well, I could have understood the trustee saying—"I face that, and I shall prove that a prudent man in the position of the appellant company would intimate his intention to break his obligation to his landlord, and he would not have been compelled to fulfil it." But there is no evidence of this. Again, it might have been said that for all concerned the best thing would be to let the colliery drown, and the appellant company would only have to find the cost of putting it in order after the seventeen years are out. But then this is a question of fact, and there is no evidence to support the proposition that this course is practicable, and that it would cost less than pumping. On the other hand, the witnesses for the appellant company expressly affirm that owing not merely to the

rights of the landlord, but to the rights of the adjoining mine-owners, the company would have no choice but to pump, and that no prudent man would do anything else. What those witnesses say in discussing the question a good deal removes the *prima facie* objection to the course which they support, and what is still more important, the trustee, after cross-examining these witnesses, brought none of his own to support the only alternative course, that of letting the mine drown.

As the duty of pumping would last as long as and no longer than the duty to pay dead rent, the Lord Ordinary deducts 25 per cent. from the claim for pumping as well as from the claim for dead rent. I am satisfied with these conclusions, and am for adhering to the interlocutor.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Appellants—Johnston, Q.C.—Salvesen. Agents—Bell & Bannerman, W.S.

Counsel for the Respondent—Sol.-Gen. Dickson, Q.C.—Wilson. Agents—Millar, Robson, & M'Lean, W.S.

Friday, January 14.

FIRST DIVISION.

[Lord Kincairney, Ordinary.]

MORRISON & MASON, LIMITED v.
 CLARKSON BROTHERS.

Sale—Sale of Machinery—Completion of Sale—Rejection on Ground of Disconformity to Contract—Personal Bar.

A firm of contractors accepted the offer of a firm of hydraulic engineers to supply them with a pump to "throw the water 329 feet vertical." The pump was delivered on 11th March 1895, and was at once placed by the contractors in the shaft at a depth of 120 feet, where it was used for about ten days. The price was paid on 1st May 1895. After the ten days' trial referred to the contractors removed the pump, took it to pieces, and left the pieces lying in the open air, till in November 1895 the pump was put together and placed at the bottom of the completed shaft 320 feet from the surface. The pump failing to do its work, the makers, at the contractors' request, sent a fitter in December to examine the pump, and thereafter made sundry alterations on it without, however, making it more efficient. The contractors intimated their rejection to the makers on February 1896.

In an action raised by the contractors against the makers to recover the price of the pump, and for payment of a sum for extra wages and loss of time due