

[HOUSE OF LORDS.]

LIVINGSTONE APPELLANT; H. L. (Sc.)
 THE RAWYARDS COAL COMPANY . . . RESPONDENTS. 1880

Feb. 13.

Coal Mine worked by Mistake beyond Boundary—Compensation—Evidence of the Measure of Damage—Royalty—Surface Damage—Way-leave.

A. was the owner of a small feu of about an acre and a half in extent. The surface of the ground was occupied by miners' cottages, and underneath was coal. When *A.* purchased the feu, he was under the impression that all the minerals under the feu, as under all the ground surrounding it, had been reserved to the superior; but that was a mistake, for in the deed granting the feu there was no reservation of coal. The superior granted the whole property in the coals in all the surrounding land to *R.* and *C.* They, under the impression that they had the whole of the coal, including the coal under the acre and a half, worked out and disposed of the coal under *A.*'s acre and a half; and in doing so damaged the surface.

A. could not have worked the coal to a profit himself; there was no person to whom he could dispose of it but to *R.* and *C.*; and the element of wilful trespass, and the element of special and exceptional need of support to the surface, were absent.

In a claim by *A.* for (1) the value of the coal; (2) a sum for "way-leave" and the advantage obtained by working through instead of round the feu; and (3) for damages done to the houses on the surface:—

Held, affirming the decision of the Court below, that the value of the coal taken must be the value of the coal to the person from whom it is taken, at the time it is taken, and that the best evidence in the peculiar circumstances of this case of that value was the royalty paid by *R.* and *C.* for the surrounding coal field; therefore *A.* was entitled to the lordship on the coal excavated, calculated at that rate; together with the payment of a sum for damage done to the houses on the surface.

Held, also, that as the question of "way-leave" was not argued before the First Division of the Court of Session, it could not be entertained in this House.

The principle of *Jegon v. Vivian* (Law Rep. 6 Ch. 742) sustained.

APPEAL from the First Division of the Court of Session in Scotland.

In 1837 Mr. *Gavin Black*, then proprietor of the lands of *Rawyards*, near *Airdrie*, *Lanarkshire*, feued out a small portion of land, namely, 1 acre 30 falls and 21 ells, to the *Monkland Iron and Steel Company*. By the feu disposition the grantor specially

H. L. (Sc.) reserved to himself, his heirs and successors, the whole ironstone
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In 1869 the Appellant, Mr. *James Livingstone*, purchased the feu, and some thirty miners' cottages, which covered the surface, for £80, from the *Monkland Iron and Steel Company*. The Appellant appears to have been under the impression that all the minerals under the feu, as under all the ground surrounding it, had been reserved by the superior.

In 1871 Mr. *Gavin Black* died, and was succeeded by Mr. *John Motherwell*, the present proprietor of the lands of *Rawyards*. He, in the belief that all the coal on the estate had been reserved, granted in 1872 a lease of the whole property in the coal—as far as this appeal is concerned—to the Respondents, the *Rawyards Coal Company*, at a royalty of 6*d.* per ton. They, just as the Appellant was ignorant of his rights, were ignorant of theirs; for they believed they were the owners of all the coal, including the coal under the Appellant's feu. Accordingly, in the ordinary course of their working, and between May, 1871, and May, 1876, they wrought out and removed the coal under the Appellant's acre and a half, to the amount of 5895 tons. When this was done, and the coal disposed of, it was discovered what the real titles were, through the Appellant examining his titles for the prosecution of a claim for surface damage; for the Respondents in working under the acre and a half had, by letting down the ground, caused damage to the miners' cottages. The question under these circumstances came to be, what was the measure of damages the Appellant was entitled to. It was admitted that what was done, was done in perfect ignorance, and that there was no bad faith, nor sinister intention on the part of the Respondents. The Appellant in his action claimed (1) the value of the coal, under the deduction of proper allowances for raising the same; (2) a sum for way-leave, in respect that large quantities of coal had been carried from the adjacent coal field through the Appellant's feu; (3) damages done to the miners' cottages. The Respondents, admitting they had taken the Appellant's coal, tendered in discharge of the action £450 10*s.* This offer being

refused by the Appellant, the Lord Ordinary (1), after a proof, found, June 10, 1878, *inter alia*,

“That the coal removed from the Pursuer’s (Appellant’s) feu by the Defenders (Respondents) consisted of 4300 tons or thereby of free (or common) coal, 1275 or thereby of dross, and 320 tons or thereby of gas coal, in all 5895 tons or thereby; and the value of these at the pithead, according to a reasonable calculation of the market value, was as follows: common coal, at 6s. per ton, £1290; dross, at 1s. 6d. per ton, £95 12s. 6d.; and gas coal, at £1 3s. 11d. per ton, £382 13s. 4d.; thus amounting in all to . . . . . £1768 5 10

“(5) That a fair price for working the said coal may reasonably be fixed at 4s. 3d. per ton over head, this sum including everything except lordship and capital charges, the amount at this rate being in the aggregate . . . . . 1252 13 9

“And leaving as free profit or value in the hands of the Defenders, derived from coal belonging to the Pursuer, the sum of . . . . . £515 12 1

“In the second place that the Pursuer is entitled to recover the said sum of £515 12s. 1d. from the Defenders: finds Pursuer entitled to the expenses of process, &c.”

The Lord Ordinary disallowed the Appellant’s claim for damage to his houses by subsidence of the surface, holding that was a loss which the Appellant must necessarily have incurred had he himself worked out the coal. The Lord Ordinary also rejected the claim by the Appellant for “way-leave,” amounting to £33 6s. 8d., calculated at the rate of about 2d. per ton; and the Appellant’s claim for £110 9s. 8d., as the amount alleged to have been saved to the Respondents by working through, instead of round the Appellant’s feu. And these claims were not mentioned by the Appellant’s counsel when the case was argued before the First Division. The Respondents being of opinion that the Lord Ordinary had misapprehended the nature of their contention, and had greatly underrated the expense of working the coal, presented a reclaiming note against his decision. The First Division, on the 20th of May, 1879, reversing the Lord Ordinary’s interlocutor, found that the Appellant was entitled to £171 7s. 6d., being the amount of lordship on the coal excavated, calculated at the rate paid by the Respondents to the superior for the surrounding coal field, with, in addition, a further sum of £200 as

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H. L. (Sc.) compensation for damage done to the houses on the surface. In respect of the tender their Lordships gave the Respondents their costs from the date of the said tender (1).

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Mr. *Davey*, Q.C., and Mr. *Guthrie Smith*, for the Appellant, contended that he was entitled to the value of the coal after deduction of the cost of severance and bringing it to the surface. Here the value of the coal was the free profit made by the Respondents. The Appellant was content with the Lord Ordinary's finding; but the judgment of the First Division was in effect to compel the real owner of the coal to receive a royalty, giving the whole profit made to the trespassers. That finding was not consistent with the principle of *Jegon v. Vivian* (2) and the earlier cases. Where the coal is taken by fraud or negligence, the proper estimate of damage is the value of the coal when gotten, without deducting the expense of getting it: *Martin v. Porter* (3), *Wild v. Holt* (4), and *Phillips v. Homfray* (5). But where taken by mistake, and an encroachment under title, a milder rule prevails, though in *Morgan v. Powell* (6) the Defendant was not allowed the cost of the severance of the coal. So in *Wood v. Morewood* (7), a case at *Nisi Prius*, *Parke*, B., told the jury that if they thought the defendant was not guilty of fraud or negligence, but acted fairly and honestly, in the full belief that he had a right to do what he had, they might give the fair value of the coals as if the coal field had been purchased from the Plaintiff. The jury found that there was no fraud, and estimated the damages accordingly. That case was the precedent for the principle on which *Jegon v. Vivian* (2) was decided: see also *Hilton v. Woods* (8), remarks of *Malins*, V.C. (9); *In re United Merthyr Collieries Company* (10).

The value of the coal taken was the profit admittedly gained by the Respondents, but the Court below thought the question of

(1) Court of Sess. Cas. 4th Series, vol. vi. p. 922; Scotch Law Rep. vol. xvi. p. 530.

(2) Law Rep. 6 Ch. 742.

(3) 5 M. & W. 351.

(4) 9 M. & W. 672.

(5) Law Rep. 6 Ch. 770.

(6) 3 Q. B. 278.

(7) *Ibid.* 440, n.

(8) Law Rep. 4 Eq. 432.

(9) *Ibid.* at p. 440.

(10) *Ibid.* 15 Eq. 46.

the profit realized by the trespasser not of the least relevancy. If that judgment is right then the real owner would be wrong in claiming his own coal lying at the pit's mouth, for it would be a sufficient answer for the trespasser to tender the lordship. The fact ought to weigh that the Appellant did not want the coal removed, on the contrary it was of great value to him having a firm foundation in a county so honeycombed as *Lanarkshire*.

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[LORD BLACKBURN:—The Court below decided this case on the peculiar circumstances that no one could work this coal at a profit unless he had the facilities of the Respondents.]

It was no answer that the Appellant could not have worked the coal himself. He was entitled to have the chattel taken, restored, or, if that was impossible, then the profit made out of it must be handed over to him.

The Appellant was satisfied with the amount awarded by the Court below for surface damage, but submitted he was also entitled to the clear profit made out of the coal.

They further maintained that a sum should be allowed the Appellant for "way-leave," or for the advantage reaped by the Respondents by working their tramways through, instead of round the feu.

[EARL CAIRNS:—That question was not argued before the Inner House, and it is not usual to argue points in this House that have not been argued before the Court below.]

" On the whole matter they submitted that the Appellant was entitled to the profit made, and to costs.

Mr. *E. E. Kay*, Q.C., and Mr. *Gloag*, maintained for the Respondents—putting aside the compensation for surface damage—that all the Appellant was entitled to was the value of the coal *in situ*; that principle was laid down in both *Wood v. Morewood* (1) and *Jegon v. Vivian* (2). The question was not what the trespasser made of the coal, but what the owner *could* have made of it. The Appellant had no right to follow the coal; nor was the profit made on it by the Respondents any test of its value

(1) 3 Q. B. 440, n.

(2) Law Rep. 6 Ch. 742.

H. L. (Sc.) *in situ*. The circumstances here were most peculiar,—the Appellant could not sink a shaft and work the coal himself at a profit; nor was there a single person he could sell the right of working it to, except the Respondents; and the Appellant's own surveyor advised him to take the ordinary royalty given for the coal in the neighbourhood. Therefore the value of the coal to the Appellant was accurately given by the Court of Session, and the principle of the cases cited had been applied.

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Mr. *Guthrie Smith*, in reply.

EARL CAIRNS, L.C. :—

My Lords, there are two minor points in this appeal which I may mention in the first place, for the purpose of putting them on one side. I mean the question of an allowance for way-leave, and the question of an allowance for what is termed the advantage obtained by working through, instead of round, the feu of the Appellant. Both those points were insisted upon before the Lord Ordinary; but when the matter came before the First Division, the contest of the Appellant with regard to those points does not appear to have been renewed; and, therefore, to enter upon them now would be in substance to entertain in this House an appeal from the Lord Ordinary, and not from the First Division.

Upon the main question which has been argued the case is one of some peculiarity. The Appellant is the owner of a small feu of about an acre and a half in extent near *Airdrie*. The surface of the ground is occupied by miners' cottages or houses, and underneath there was coal. When the Appellant bought the feu some time ago he appears to have been under the impression that the minerals under this feu, as under all the ground which surrounded it, had been reserved by the superior. In point of fact that was a mistake. The superior kept in his hand the minerals under all the ground around, but under this acre and a half the coal had not been reserved in the grant of the feu now owned by the Appellant. The Appellant, therefore, although he did not know it, was the owner of the coal under this acre and a half of ground. The superior granted the whole property in all the surrounding

land to the company who are the Respondents, and they, just as the Appellant was ignorant of his rights, appear to have been ignorant of theirs. They appear to have been under the impression that they had the whole of the coal, including the coal under the acre and a half. They had the coal which surrounded the acre and a half, but they had not the coal which was underneath the acre and a half. In the process of their working they worked out the coal under the acre and a half, and when that was done it was ascertained (it is unnecessary to observe how the discovery came to be made) what the real titles were, and that this coal really belonged to the Appellant, and did not belong to the Respondents, who had got it and disposed of it. I ought to add that in working under the acre and a half of ground they had, by letting down or cracking the ground, caused some damage to the miners' cottages which stood upon the surface of the acre and a half.

Now, my Lords, under these circumstances the question arises, what is the measure of damage to which the Appellant is entitled? We may put aside some elements which might occur in some cases, but which do not occur in the present case. There is absent here the element of any wilful trespass or wilful taking of coal, which the person taking it knew did not belong to him. What was done was done in perfect ignorance, and there was no bad faith or sinister intention in that which was done. We may put aside another element which might have occurred. It might have been the case that the support of the coal under this acre and a half of ground had been of some peculiar advantage or benefit to the Appellant, for which no money would compensate him. Either by some use made of the surface, or by some specific use intended to be made of the surface, there might have been a peculiar need for the support of the minerals underneath, which might either have made it impossible to estimate the damage, or might have made the estimate of the damage exceptionally high. Neither of these elements occurring—neither the element of what I will call wilful trespass, nor the element of special and exceptional need of support—the case is one in which your Lordships have simply to ascertain what is the ordinary measure of damage for the coal taken, or what, in other words, is the value of the coal that was taken.

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Of course the value of the coal taken must be the value to the person from whom it was taken, because I do not understand that there is any rule in this country, or in *Scotland*, that you have a right to follow the article which is taken away, the coal which is severed from the inheritance, into whatever place it may be carried or under whatever circumstances it may come to be disposed of, and to fasten upon any increment of value which from exceptional circumstances may be found to attach to that coal. The question is, what may fairly be said to have been the value of the coal to the person from whose property it was taken at the time it was taken.

I own that it appears to me that the Court of Session have adopted a principle which is not unsatisfactory for the purpose of ascertaining that value. They have said, The value to this Appellant is not the value which he could have derived from himself working the coal and taking it into the market, because he could not have worked it; the area is so small that it would have been impossible for himself to have worked and used the coal, and earned a profit, or put an additional value upon the coal by so working it; he must have gone to some person, or waited till some person came to him who had the power of working the coal from adjacent working; therefore (say they) the value is that which he could have obtained from somebody else who would have come and taken the coal as it stood *in situ*, and who would have worked it and turned it to account. Then they go to the witnesses of the Appellant, and they must take Mr. *Rankine*, his principal witness; and I observe that another witness of the same stamp and character as Mr. *Rankine* immediately follows, who wishes his testimony to be taken as repeating Mr. *Rankine's in omnibus*. Therefore those two witnesses must be taken to say this. Mr. *Rankine* is asked this question: "Suppose you had been asked by Pursuer whether it would be advisable for him to sell the whole of these minerals to Defenders for £100, the Defenders paying compensation for the damage to the houses, would you have advised him to take it?" And his reply is: "The advice I have invariably given—I have done it in two instances within the last two years—is, 'Don't let your coal for a less lordship than that obtained by the adjoining proprietor;' and in that case I should have said to the Pursuer,

‘Do not take less than £171 7s. 6d. for the coal, plus the damage to the houses.’” He says that the advice which he would have given to his client would have been not to sell for less than (which implies, of course, to sell for) £171 7s. 6d., plus the damage done to the surface; that is to say, that if there had come to him some person who, from possession of the adjoining property, had been able to work this coal, and had asked the Appellant to sell the coal to him, the Appellant would have been advised to reply, “I will sell you the coal for a royalty, that is to say, a sum per ton which will produce to me £171 7s. 6d.; but in addition, you must undertake to pay me whatever damage is done to my houses which are upon the surface of the land;” and, for the purpose of the present argument the amount of damage as ascertained and not objected to is a sum of £200.

Upon that evidence the Court of Session say, “We are of opinion that the value to this Appellant of this coal was the money that would have been produced if he had sold the coal, and the money that he would have got if he had sold the coal would have been £171 7s. 6d.; but that would have been accompanied and guarded by a further payment which would have indemnified him for the damage done to the houses upon the surface in getting the coal, and that further sum he must have, in addition to the £171 7s. 6d.”

My Lords, I own that under the very peculiar circumstances of this case, there being only the element to consider to which I have referred, namely, the element of value to the Appellant, I think he has received in the judgment of the Court of Session that which is the proper value, and I see no reason for differing from the judgment of the learned Judges. I therefore advise your Lordships, and move your Lordships, that the appeal be dismissed with costs.

LORD HATHERLEY:—

My Lords, after carefully considering the case I have come to the same conclusion, though at one time I was under the impression that there was more in the question of the sale by royalty being as it were enforced than I at present think.

The case is certainly a very peculiar case, and, without with-

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H. L. (Sc.) drawing from any of the principles which I found in the case of  
 1880 *Jegon v. Vivian* (1) to be established by the prior authorities, I  
 LIVINGSTONE think this case may be disposed of, and will be disposed of, by  
 v. your Lordships in entire consistency with those principles. There  
 RAWYARDS is no doubt that if a man furtively and in bad faith robs his  
 COAL neighbour of property, and, because it is underground, is probably  
 COMPANY. not for some time detected, the Court of Equity in this country  
 Lord Hatherley. will struggle, or I would rather say will assert its authority, to  
 ——— punish fraud by fixing the person with the value of the whole of  
 the property which he has so furtively taken, and making him no  
 allowance in respect of what he has so done as would have been  
 justly made to him if the parties had been working by agreement,  
 or if, as in the present case, they had been the one working and  
 the other permitting the working through a mistake.

The Courts have already made a wide distinction between that which is done by the common error of both parties, and that which is done by fraud. In the present case, it is clear on both sides that each party was ignorant of the rights of the Pursuer, and consequently the matter is not to be treated as a case of forced sale, but as a case of sale which has taken place by inadvertence; and what we, as a Court of Justice, have to do is to see that under these untoward circumstances that which never ought to have been done at all, but which has been done either through want of watchfulness or through want of knowledge, as the case may be, and which has occasioned in the doing an injury to either of the parties, is remedied and set right, so far as it can be, upon equitable principles. Those principles are no doubt settled by the authorities, many of which have been cited in the course of this argument; those principles are that the owner shall be re-possessed as far as possible of that which was his property, and that, in respect of that which has been destroyed, or removed, or sold, or disposed of, and which cannot therefore be restored in specie, there shall be such compensation made to him as will in fairness between both parties give to the one party the whole of that which was his, or the whole value of that which was his, and will at the same time give to the other, in calculating that value, just allowances for all those outlays which he would have been obliged to make if he had been entering into a contract for that

(1) Law Rep. 6 Ch. 742.

being done which has, by misfortune and inadvertence on both sides, and through no fault, been done. Perhaps the law may have even gone a step further than in some cases might be necessary. Each case must stand upon its own particular foundation in that respect; but, regard being had to the rule *vigilantibus non dormientibus*, it requires to be carefully considered in each particular case how far the principle is just which deals with property under such circumstances as property which has been acquired by one person from another without payment, and by inadvertence. But when we once arrive at the fact that an inadvertence has been the cause of the misfortune, then the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him in specie.

In this case we are singularly free from any difficulty upon the point, and the parties seem to have carried on the litigation on a principle which does them credit, and on which one wishes to see all litigation carried on. They say, "The misfortune has taken place: we neither of us knew anything about this at the time, and now that it has taken place let us see what can best be done to remedy the misfortune which has so occurred." We find the position of the case to be a very singular one indeed, and one which is not likely to recur in many instances, though it may in some instances—it is this. A small piece of ground, an acre and half in extent, being the property of the Pursuer, is surrounded by the property of the Defenders; and the Defenders thought (and the Pursuer thought so too) that it was included in their property, instead of being a separate portion surrounded by their property. That being the case, one thing was perfectly clear (and I shall make it clearer presently by reading the Pursuer's own evidence), that nothing could be made by the Pursuer of this acre and a half of ground by working it himself. He would not sink a shaft or put up a steam-engine, or use any of the ordinary modes of working a mine, in respect of this acre and a half of ground; and indeed, that is what he tells us himself, because, in words which were read by the learned counsel who last addressed your Lordships, the Pursuer says, in his own appendix of proofs, on re-cross-

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H. L. (Sc.) examination: "If the Defenders had not taken away this coal, I  
 1880 might have arranged with them to take it away through their pit,  
 LIVINGSTONE but I don't think it would have been profitable to have done so;  
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 COAL in which I could have turned this coal into money;" and then he  
 COMPANY. goes to another subject. Several houses were built upon this  
 Lord Hatherley. property; they were apparently small cottages, not of a very  
 heavy description in themselves, and he complains that if he were  
 minded (though it does not appear that he ever was so minded) to  
 build a manufactory or some large building upon the ground, he  
 would not, in consequence of its being so worked by the Defenders,  
 be in a position to find a foundation for his building. Whether he  
 refers to that when he says that he would rather have it remain as  
 it was I do not know, because in his evidence he touches upon it  
 very lightly; but he says that he could not work it himself, and  
 that there were no people to whom he could dispose of it but the  
 Defenders themselves.

My Lords, that being so I do not know what better mode there  
 could have been for ascertaining what the value of the property  
 in this case was, than by doing what the Pursuer himself says he  
 should have been obliged to do in order to turn it into money, and  
 what his own agent, Mr. *Rankine*, said he always advised him to  
 do. Mr. *Rankine*, his agent, said: "It is not workable by your-  
 self in consequence of its small size, and of its so being surrounded  
 by other property—so make the best you can of it, only do not let  
 yourself be driven into a corner. You may perhaps find yourself  
 put to a disadvantage by having only one purchaser; nevertheless,  
 do not part with it for a less royalty than you could get from  
 anybody else, and whatever others are willing to pay I should  
 stand upon, and if you cannot get that I should insist upon re-  
 taining the property in its present shape." That being so, the  
 Pursuer says in his evidence, "I don't think that there was any  
 way in which I could have turned this coal into money. It was  
 about the middle of 1875, when the houses began to crack, that I  
 first knew the Defenders were in the course of working out coal  
 under my feu. I spoke about the matter to Mr. John *Motherwell*.  
 I did not ask that the working should be stopped. I suggested  
 that it should have been wrought stoop-and-room for 'the sake of

protecting the property as much as possible. I made no<sup>d</sup> objection to their going on with the working out of the coal below the feu; I was quite content that they should go on with the working." That was before he knew that the coal under the property was his own. Up to that time he could not of course know very well what rights he had to stop this working; but when you put the two sentences together,—one, that he could not have disposed of the property to any other persons, and the other, that he did not think of taking any steps to stop the working, I think he cannot complain that he has got from the gentlemen the very same terms that he would have got from the adjoining proprietors with whom he has to deal.

The learned Judges in the Court below seem to have proceeded upon that footing. The Lord President says, "In addition to the consideration above mentioned, it must be kept in view that the coal in question was surrounded on all sides by the coalfield of the superior, which is leased to the Defenders. As the Pursuer's estate is only one and a half acres in extent it is evident that the coal under it could not have been worked to profit by himself working independently. Nobody but the superior or his lessees could have worked the coal to any profit. Now, let us consider the position of the Pursuer before the Defenders commenced to work his coal. He was then in possession of a certain piece of coal, and his object must be assumed to be to make the most of it. It cannot be assumed that he could contemplate keeping the coal as a support for his cottages, instead of working it out. It was situated in a part of the country where every available bit of mineral is in use to be wrought. Now, at that point of time, had the parties come together the coal would in all probability have been disposed of to the Defenders on terms mutually advantageous. The Pursuer says indeed, that he could have made exceptionally good terms for himself, as his coal stood in the way of the Defenders' working. But I think when Mr. *Smith* spoke of the Defenders' necessity being the Pursuer's opportunity he went too far. I do not think that the purchase of the Pursuer's coal was a matter of necessity to the Defenders, but only a matter of convenience. There was nothing to prevent their working round his coal. But, on the other hand, if the Pursuer wished to

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make the most of his coal he must have taken what the Defenders would give him, or let it stand." In that state of things, and finding that the coal has so been worked out, the learned Judges say, "We find that the best mode, in this particular case, of ascertaining the proper measure of damages is to give the Pursuer what the books and cases tell us we are to give him, that is to say:—As far as possible, the value of his coal, and that we will do by saying that he shall be compensated to the same extent as others have been compensated in adjoining properties; besides that he shall be compensated, and he has been by the decree compensated, for any damage done to the buildings upon the surface." That has been estimated at £200, and acquiesced in by both parties. He is paid for the royalty £171; he is paid for the value of the coal which has been disposed of; and therefore it seems to me that all he can possibly ask for has been given.

The question of way-leave does not seem to have been argued in the Court below, but if it had been argued I should have been prepared to say that I acquiesce in this particular case, and under all the circumstances of this case—which I think are extremely different in many remarkable particulars from those of *Jegon v. Vivian* (1)—in the interlocutor pronounced by the Lord Ordinary. But, looking at the form in which this case has been brought before us, no question of this kind arises. Nothing could have been properly estimated and given as the value of the right exercised by the Defenders of taking their waggons and coals from time to time through the ground of the Pursuer, they assuming it to be their own ground. What profit can be said to have been derived from that? The profit is this: that you save distance; you save other payments which you might have had to make, and therefore, inasmuch as the Pursuer cannot make out that the slightest damage has accrued to him in respect of that user, what you have to pay to him is only the value of his coal plus the damages to the surface. It appears to me to be quite consistent, and that the Pursuer rightly has not pressed that case of the way-leave, because he would have done so with very little effect.

Therefore, under all these circumstances, I am prepared to acquiesce entirely in the judgment of the Court below.

(1) Law Rep. 6 Ch. 742.

LORD BLACKBURN:—

I also think that the judgment of the Court below should be affirmed, and that consequently the appeal should be dismissed with costs.

The point may be reduced to a small compass when you come to look at it. I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. That must be qualified by a great many things which may arise—such, for instance, as by the consideration whether the damage has been maliciously done, or whether it has been done with full knowledge that the person doing it was doing wrong. There could be no doubt that there you would say that everything would be taken into view that would go most against the wilful wrongdoer—many things which you would properly allow in favour of an innocent mistaken trespasser would be disallowed as against a wilful and intentional trespasser on the ground that he must not qualify his own wrong, and various things of that sort. But in such a case as the present, where it is agreed that the Defenders, without any fault whatever on their part, have innocently, and, being ignorant, with as little negligence or carelessness as possible, taken this coal, believing it to be their own, when in fact it belonged to the Pursuer, then comes the question,—how are we to get at the sum of money which will compensate them?

Now, my Lords, there was a technical rule in the English Courts in these matters. When something that was part of the realty (we are talking of coal in this particular case) is severed from the realty and converted into a chattel, then instantly on its becoming a chattel, it becomes the property of the person who had been the owner of the fee in the land whilst it remained a portion of the land; and then in estimating the damages against a person who had carried away that chattel, it was considered and decided that the owners of the fee was to be paid the value of the chattel at

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the time when it was converted, and it would in fact have been improper, as qualifying his own wrong, to allow the wrongdoer anything for that mischief which he had done, or for that expense which he had incurred in converting the piece of rock into a chattel, which he had no business to do.

Such was the rule of the Common Law. Whether or not that was a judicious rule at any time I do not take upon myself to say; but a long while ago (and when I say a long while I mean twenty-five years ago) Mr. Baron *Parke* put this qualification on it, as far as I am aware for the first time. He said, If however the wrongdoer has taken it perfectly innocently and ignorantly, without any negligence and so forth, and if the jury, in estimating the damages, are convinced of that, then you should consider the mischief that has been really done to the Plaintiff who lost it whilst it was part of the rock, and therefore you should not consider its value when it had been turned into a piece of coal after it had been severed from the rock, but you should treat it at what would have been a fair price if the wrongdoer had bought it whilst it was yet a portion of the land as you would buy a coal-field (1). That was the rule to be applied where it was an innocent person that did the wrong; that rule was followed in the case of *Jegon v. Vivian* (2), which has been so much mentioned; it was followed in the Court of Chancery, and, so far as I know, it has never been questioned since, that where there is an innocent wrongdoing the point that is to be made out for the damages is, as was expressed in the minutes of the decree:—"The Defendants to be charged with the fair value of such coal and other minerals at the same rate as if the mines had been purchased by the Defendants at the fair market value of the district;" that I understand to mean as if the mines had been purchased while the minerals were yet part of the soil. That, I apprehend, is what is to be done here, and that is what both the Lord Ordinary and the First Division of the Court of Session have endeavoured to do. They have come to different pecuniary results, and the question really comes to be which is correct.

Upon that the Lord Ordinary, as I understand, has gone upon this position. He said, "I have taken evidence, and the result of

(1) *Wood v. Morewood*, 3 Q. B. n. 440.

(2) *Law Rep.* 6 Ch. 742.

that is, that it is agreed on all hands that this coal, when it was brought to the surface, actually did sell for £1768 5s. 10d. I look at the evidence, and I take the evidence to be that the actual amount expended by the Defendants (there is contradictory evidence on such points as might have been expected, and it is not all very clear), was 4s. 3d. per ton"—and, deducting that from the £1768 5s. 10d., he makes it £515 12s. 1d., which is what he says is the sum that the Pursuer ought to recover taking off all the expenses that the Defenders have incurred. But then, as it would necessarily follow, when you took away the coals that were below the land, that the surface of the land would come down, you must not take the sum which would be given as compensation for the injury to the surface twice over. You must not take that sum as being a matter which you are to be paid for, and also take the coals as if they had been got out without damage. On the Lord Ordinary's figures, as it seems to me, the £515 12s. 1d. would be right, and if there was no other way of getting at the figures, if you could not get evidence of the value of the coal *in situ* in a more correct way, I suppose it would be right to take them in that way. It is always a difficult thing to ascertain the actual expenses, and you may go wrong, but you must come as near to it as you can.

But then the Lord Ordinary himself observes that, taking that way of getting it, and giving the Pursuer £515 12s. 1d., "The truth of the matter is, that the removal of the Pursuer's coal by the Defenders, in place of being a misfortune, has been to the Pursuer a singular stroke of luck. The size of his feu is less than an acre and a half, and the coal which it contained could not have been wrought to profit by itself. The expense of sinking a pit and providing machinery would many times over have exceeded the value of the minerals. Possibly, no doubt, the Pursuer might have endeavoured to make with the Defenders terms upon which his coal might have been raised along with the coal of which they were the tenants. But the return which would have been rendered to him under such an arrangement must have fallen far short of what has been awarded by the Lord Ordinary. The lordship, in the circumstances, could not be expected to be higher than that paid by the Defenders for the adjoining portions of the seam ;

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H. L. (Sc.) and this, upon the quantity taken out, even if increased by reasonable damages for injury through subsidence to the houses on the surface, would certainly have fallen considerably short of £500." Now, when you find that the Lord Ordinary himself, who is professing to ascertain what is the money value of the damage that the Pursuer has received, says: "I have got at it in this particular way, but that money value is very considerably above the damage that you have received: it has been a singular stroke of good luck to you that you should get it," it occurs to one at once, *prima facie*, that there must have been something wrong in the way in which that money value was got at, and I think that there was an error in it, and that error was that the Lord Ordinary thought he was bound by decisions (which I do not think he was) to take that mode, and that mode only, of getting at the value of the coal *in situ*, namely, the price which the coal fetched when it was sold, deducting from that the cost of hewing and drawing and so forth, and so to ignore totally the fact this was an isolated small patch of land from which the Pursuer, as he himself admits, could not possibly have got coal by any practical means whatever, except by bargaining with the Defenders. I think there the Lord Ordinary was under a mistake. The Lord President points out very clearly to my mind that the Pursuer could not have made any use of his coal at all as long as he did not let it to the Defenders, who were the only people who could take it. He cannot do more than ask for his damage to the surface. That he is of course entitled to, as the Defenders have taken his coal without his leave and against his will. If they had taken it with full knowledge *scienter* there would have been very much more damage given; but they have innocently and ignorantly taken away his coal. "And then" (says the Lord Ordinary), "we must see what was the value of the coal *in situ* as it stood there to the Pursuer at the time when the Defenders by mistake took it away, and for that we must give compensation." Then he takes the evidence of Mr. Rankine, and says, "That is the best evidence that we could have of the value of the coal," and that sum is what the Court of Session has given.

My Lords, I only wish to say one word to guard against any misapprehension on a point which I at first a little misappre-

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hended. I do not think that this decision of the Court of Session is that the royalty is the measure of the damages. It is only that it is evidence of the value which is the measure of the damages. As to the other matters, about the way-leave and so forth, I quite agree with what has been said by my noble and learned friend on the woolsack, that inasmuch as in the Court of Session on appeal from the Lord Ordinary those questions were not raised again they are not before this House at all. If they were, I should be inclined to agree with what has been said by my noble and learned friend opposite (1), and the Pursuer would gain very little benefit from that contention.

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*Interlocutor appealed against affirmed; and appeal dismissed with costs.*

*Lords' Journals, Feb. 13, 1880.*

Agent for Appellant: *Andrew Beveridge.*

Agents for Respondents: *Simson & Wakeford.*

(1) Lord *Hatherley*, see p. 38.