consideration for the purchase of the French property. It seems to me, though I still speak with great diffidence, that the learned Lord Justice who gave the leading judgment in favour of the respondents has not paid sufficient attention to two points which appear to me to be clear enough. In the first place, it must always be borne in mind that as regards conveyances on sale the charge is on instruments, not on persons. In the next place, I think it clear that there is nothing criminal in a purchaser omitting to stamp his conveyance. By such an omission he commits no breach of duty. He does nothing wrong. The instrument, if not duly stamped, cannot be put in evidence or made available for any purpose. That is all. . . . I agree with the judgment of Collins, M.R. I think that judgment should be entered in favour of the Commissioners, with costs here and below.

The LORD CHANCELLOR (LOREBURN) and LORDS ASHBOURNE, JAMES OF HEREFORD, and ATKINSON concurred.

Appeal sustained.

Counsel for the Appellants—Sir R. Finlay, K.C.—W. Finlay—(the Attorney-General Sir J. Lawson Walton, K.C., with them). Agents—Rawle, Johnstone, & Company, Solicitors.

Counsel for the Respondents—Danckwerts, K.C.—Beddall. Agents—Parker, Garrett, Holman, & Howden, Solicitors.

HOUSE OF LORDS.

Monday, December 2, 1907.

(Before the Lord Chancellor (Loreburn), Lords Ashbourne, Macnaghten, James of Hereford, and Atkinson.)

WEST LEIGH COLLIERY COMPANY *v.* TUNNICLIFFE AND HAMPSON.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Mine—Minerals—Subsidence—Damages—Risk of Future Subsidence.

In actions brought by surface owners against the owners of minerals to recover damages for injuries sustained by their property owing to the subsidence caused by the removal of minerals, no award of damages can be given in respect of depreciation caused by the apprehension of future subsidences; nothing can be taken into consideration except the actual damage already sustained.

Appeal from a judgment of the Court of Appeal (COLLINS, M.R., and COZENS-HARDY, L.J., ROMER, L.J., dissenting), reported (1906) 2 Ch. 22, reversing a judgment of SWINFEN EADY, J., reported (1905) 2 Ch. 390, in an action brought by the respondents against the appellants.

The action was brought by the respondents, who were owners of cotton mills, against the appellants, who were a colliery company, to recover damages for subsidence caused by the appellants' mining operations. The question of damages was sent to an official referee, who estimated that the respondents were entitled to £1300 in respect of damage already sustained, and he assessed the damages for depreciation of the selling value of the property in consequence of apprehension of the risk of future damage by further subsidence at £13,200. The appellants contended that they were not liable for this sum. No question was raised as to the £1300. SWINFEN EADY, J., decided in favour of the appellants' contention, but his judgment was reversed by the majority of the Court of Appeal.

LORD MACNAGHTEN—I agree with Swinfen Eady, J., and Romer, L.J. I think that this case is concluded by authority. In my opinion it is impossible to reconcile the judgment under appeal with the principles laid down in this House in *Backhouse* v. *Bonomi*, 9 H.L. Cas. 503, and *Darley Main Colliery Company* v. *Mitchell*, 11 App. Cas. 127. It is undoubted law that a surface owner has no cause of action against the owner of a subjacent stratum who removes every atom of the mineral contained in that stratum, unless and until actual damage results from the removal. If damage is caused, then the surface owner "may recover for that damage," as Lord Halsbury, L.C., says in the *Darley Main* case, "as and when it occurs." The damage, not the withdrawal of support, is the cause of action. And so the Statute of Limitations is no bar, however long it may be since the removal was completed; nor is it any answer to the surface owner's claim to say that he has already brought one or more actions and obtained compensation once and again for other damage resulting from the same excavation. If this be so, it seems to follow that depreciation in the value of the surface owner's property brought about by the apprehension of future damage gives no cause of action by itself. That was the conclusion reached by Cockburn, C.J., in his dissentient judgment in *Lamb* v. *Walker*, 3 Q.B.Div. 389, which was approved in this House in the *Darley Main* case. I think, as the Chief-Justice thought, that this conclusion necessarily follows from the principles asserted by the noble and learned Lords who took part in *Backhouse* v. *Bonomi*, and particularly by Lord Cranworth and Lord Wensleydale. But if depreciation caused by apprehension of future mischief does not furnish a cause of action by itself because there is no legal wrong, though the damage may be very great, it is difficult to see how the missing element can be supplied by presenting the claim in respect of depreciation tacked on to a claim in respect of a wrong admittedly actionable. If one examines this claim in respect of depreciation, and tries to investigate its origin, it will be found, I think, that it really depends upon a notion which is now exploded, that the right of

the surface owner is a right in the nature of an easement, or a right to have pillars of support left for his security, while in reality his right, as Lord Wensleydale observes, is merely the right of a landowner to the ordinary enjoyment of his land. Speaking for myself, I cannot help thinking that a surface owner who complains of depreciation in the value of his property caused by underground workings is not wholly free from blame himself. In a sense it is his own folly. He has erected buildings or acquired buildings erected upon ground which is or may be undermined. So long as there are no underground workings, or it is taken for granted that his buildings rest upon a foundation that is solid throughout, all is well. But when it becomes known from some accident in the neighbourhood, or from evidence given in Court, or in some other way, that his buildings have beneath them a cavity or hollow, then people begin to think that it is probable, or at least possible, that some day his land, with the buildings upon it, may be let down. The secret has come out, and the character of his property suffers in public estimation. In truth, surface ground, with a stratum beneath it belonging to a different owner from which the minerals have been or are liable to be removed, is not justly entitled to the credit of absolute stability. I am of opinion that the order appealed from should be reversed, and the judgment of Swinfen Eady, J., restored, with costs here and below.

LORD ASHBOURNE—This action is brought to recover damages for injuries by subsidence owing to a removal of minerals, and the official referee who considered the question of what damages the plaintiffs were entitled to awarded two separate sums. As to the cost of all the repairs necessary, he measured the damages at the sum of £1300, and he assessed the damages for the depreciation of the premises at £13,200. It is the latter sum which has been the subject of controversy before your Lordships. The broad objection urged against it by the appellants is that it is inconsistent with the former decisions of your Lordships' House in the well-known cases of *Backhouse* v. *Bonomi* and *Darley Main Colliery Company* v. *Mitchell*. It was urged by the appellants that this large sum was mainly composed of an allowance for the risk of future damage, and that as they must remain liable for any future subsidence if it should occur, they might thus have to pay twice over for the same loss. The excavations in themselves give no right of action. It is only the damage caused to the respondents' right of enjoyment of their property by a subsidence caused by the excavations that gives any right of action. Before any subsidence it might be that the known excavations and the fears resulting therefrom would cause a depreciation in the value of the property for which no action would lie. The fear of a subsidence although founded on the known fact of extensive excavations cannot give any cause of action, even although there may have been already a subsidence. This is clear from the two cases already referred to, and cannot now be questioned. If no action for interfering with the enjoyment of property can be brought before a subsidence, could it be urged that a comparatively small subsidence, the consequences of which would be repaired for far less than £1300, would give a right to an inquiry as to depreciation which might result in the large figure awarded by the official referee? There is no secret about these large excavations. They are, I should think, always known to the owners and occupiers in the neighhourhood. There may be a certain amount of uneasiness in the minds of those whose lands are near and adjoin, but each party has clear rights. The mine-owner can excavate all that he thinks worth taking, subject to the risk of an action on the part of those whose enjoyment of their property he may interfere with, and those who are so interfered with may bring actions as often as a fresh subsidence takes place and their enjoyment of their property is so interfered with. It has been strongly urged before your Lordships that if the depreciation in the present value of the property by the fear of future damage is not now compensated for injustice will be done to the owner, because a purchaser will now give much less for the property on which the subsidence has taken place. It is presssd that the loss that may so arise is part of the damage now recoverable by reason of the present subsidence. Collins, M.R., puts it—"The first subsidence has established that the plaintiffs' mill is within the area of danger created by the acts of the defendants. It has been changed from the position of buildings presumably stable into that of buildings presumably unstable." But the fact of the excavations was what constituted the area of danger and of fear, and that would not justify the owner on the occasion of the first subsidence in making such a claim. An owner can bring a fresh action for the damage caused by each fresh subsidence, but he cannot recover anything for the risk of future damage. To give damages for depreciation because a purchaser from fear of future damage would give less after the subsidence would be a method of doing that which the law as laid down in this House would not sanction. Cockburn, C.J., well puts the position in his judgment in *Lamb* v. *Walker*, which has been accepted as law—"Taking the view I do," he said, "of the leading case of *Backhouse* v. *Bonomi*, I am unable to concur in holding that in addition to the amount to which he may be entitled for actual damage sustained through the excavation of the adjacent soil by the defendants, the plaintiff is entitled to recover in respect of prospective damage—that is to say, anticipated damage expected to occur which has not actually occurred, and may never arise." I am glad, however, to note that Swinfen Eady, J., did not limit his judgment to the £1300 for repairs, but has sanctioned a reference back to the official

referee to "assess the damages in respect of depreciation of premises." As the learned Judge says—"A mill which has been much cracked and injured, and with walls bulging and out of plumb, although repaired, is manifestly not of the same selling value as before it was injured. The repairs are very far from entirely reinstating it, and the loss to the plaintiffs is the same whether the mill be sold and the loss realised or whether the mill be retained by the plaintiffs, its value being reduced." In my opinion the appeal should be allowed, and the judgment of Swinfen Eady, J., restored, with costs here and in the Courts below.

LORD JAMES OF HEREFORD—It is after some hesitation and with considerable reluctance that I have come to the conclusion that the judgment delivered by Lord Macnaghten contains the correct application of the principles of law governing this case. I come to that conclusion on the ground that the authorities quoted by my noble and learned friend bind us, and must prevail. Although I much doubt if justice to either party to this suit is certain to be secured by further litigation, I think that it should be made clear that your Lordships' judgment proceeds upon the ground that if further surface damage should occur, a just claim for damages may from time to time be made, and the plaintiffs in this action may make further claim for damage caused at that time. I will only add that while I concur in the result of my noble and learned friend's judgment, I prefer, for the present, to withhold my full acquiescence in the views expressed by him towards the end of his judgment as to the rights of a surface owner to damages.

LORD ATKINSON—I concur. I admit that during the progress of the argument I entertained some doubt as to whether this case was covered by the authorities cited in your Lordships' House to which Lord Macnaghten has referred. On consideration, however, I agree with him. In my view, to give damages for depreciation in the market value due to the apprehension of future injury by subsidence is to give damages for a wrong which has never been committed, since it is the damage caused by subsidence, and not the removal of the minerals, which gives the right of action.

LORD CHANCELLOR (LOREBURN)—I have read the opinion just given by Lord Macnaghten, and I so entirely agree in his conclusion, and in the reasoning by which it is reached, that little is left for me to add. I see no middle course between saying one of two things—either a surface owner is to recover once for all for the diminution in the value of his property which may be caused by the fact that the mineral owner beneath him has excavated, or the surface owner can recover only for the actual physical damage so caused as and when it occurs. The former alternative would be inconvenient and capricious in its results, but it need not be discussed, because it is excluded by authority of the highest order. The latter is affirmed as law by equally high authority, and it draws with it the result that the compensation disputed in this case cannot be allowed. To say that the surface lands would sell for less because of the apprehension of future subsidence is, no doubt, true. To say that the depreciation in present value caused by that apprehension ought to be included as an element of compensation is, in my view, unsound, for that is asking compensation, not for physical damage which has in fact been caused, but for the present influence on the market of a fear that more such damage may occur in future. Etymological confusion lies at the root of many difficulties, and perhaps there has been in this subject something of the kind in regard to the use of the word "damage." Be that as it may, I am unable, with the utmost respect, to agree with the opinion of the majority of the Court of Appeal. I think that this appeal ought to be allowed.

Appeal sustained.

Counsel for the Appellants—C. A. Russell, K.C.—Jessel, K.C.—Leslie Scott. Agents—Fowler & Co., Solicitors.

Counsel for the Respondents—Cripps, K.C.—Langdon, K.C.—F. L. Wright. Agents—Patersons, Snow, Bloxam, & Kinder, Solicitors.

HOUSE OF LORDS.

Wednesday, January 22, 1908.

(Before the Lord Chancellor (Loreburn), Lords Macnaghten, Robertson, and Atkinson.)

SPEYER BROTHERS *v.* INLAND REVENUE.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Revenue — Stamp - Duty — "Promissory Note"—"Marketable Security"—Document Falling under Both Categories Chargeable with the Higher of the Two Stamps—Stamp Act 1891 (54 *and* 55 *Vict. c.* 39), *secs.* 33, 82, 122.

Where a document is by its statutory description chargeable under the Stamp Act as a "promissory note," and also as a "marketable security," the Crown has a choice whether it will charge it under the one or the other description. In other words, by virtue of the Act the Crown is entitled to charge the higher rate of stamp, but cannot charge both rates upon the same document.

Terms of a document *held* to be both a "promissory note" and a "marketable security."

Appeal from a judgment of the Court of Appeal (COLLINS, M.R., COZENS-HARDY and FARWELL, L.JJ.) reported (1907) 1 K.B. 246, reversing a judgment of WALTON,