NO. 1271—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION)—
7TH, 8TH AND 13TH OCTOBER, 1941

COURT OF APPEAL—17TH APRIL, 1942

HOUSE OF LORDS—6TH, 8TH AND 9TH JULY AND 4TH AUGUST, 1943

EARL FITZWILLIAM'S COLLIERIES CO. *v.* PHILLIPS (H.M. INSPECTOR OF TAXES) [1]

Income Tax, Schedule D—Deduction from profits—Mining lease—Payments as liquidated damages in respect of subsidence—"Rent . . . in respect of any "easement"—Income Tax Act, 1918 (8 & 9 *Geo.* V, *c.* 40), *Schedule D, Cases* I *and* II, *Rule* 3; *Finance Act,* 1934 (24 & 25 *Geo.* V, *c.* 32), *Section* 21.

By two mining leases dated 1*st May,* 1933, *and* 31*st January,* 1935, *certain coal mines, surface lands and brick works were demised to the Appellant Company with liberty to work the coal and in so doing to withdraw support from the surface overlying the areas demised. Under the terms of the leases there were payable,* inter alia, *certain fixed sums per acre of the seams worked each half-year "as liquidated damages in respect of the overlying surface". On appeal by the Company against assessments to Income Tax for the years* 1934–35 *and* 1935–36, *the Special Commissioners found that in respect of the liberty to withdraw support from the surface, the leases granted easements within the meaning of Section* 21 (4) (*b*), *Finance Act,* 1934, *and that the compensation payments therefor, although expressed to be liquidated damages, were so related to the exercise of the rights granted that they must be regarded as periodical payments in the nature of rent. They held therefore that the payments were not allowable as deductions in computing the Company's profits for Income Tax purposes.*

Held,

(i) *that the sums paid were "rent" within the definition of Sub-section* (4) (*c*) *of Section* 21, *Finance Act,* 1934;

(ii) (*Lord Romer dissenting*) *that the liberty conferred under the leases to withdraw support from the surface was an "easement" within the definition of Sub-section* (4) (*b*) *of the Section* (Commissioners of Inland Revenue *v.* New Sharlston Collieries Co., Ltd., 21 T.C. 69, *approved*); *and accordingly,*

(iii) *that the deductions claimed were inadmissible for Income Tax purposes.*

CASE

Stated under the Income Tax Act, 1918, Section 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 27th February, 1940, Earl Fitzwilliam's Collieries Company (hereinafter called "the Appellant Company") appealed against assessments to Income Tax made upon it for each of the years 1934–35 and 1935–36.

2. The sole question in dispute was whether in computing the profits of the Appellant Company for the purposes of assessment to Income Tax the deduction of certain sums hereinafter referred to was prohibited by the provisions of Section 21 of the Finance Act, 1934.

[1] Reported (K.B.) 166 L.T. 303; (C.A.) [1942] 2 K.B. 92; (H.L.) [1943] A.C. 570.

3. The following facts were admitted or proved.

Under a lease dated 31st January, 1935, Earl Fitzwilliam demised to the Appellant Company for a term of 99 years from 1st January, 1933, certain mines, surface lands and brick works in consideration of rents and payments thereby reserved. A copy of the lease is annexed hereto, marked "A", and forms part of this Case(1).

4. So far as is material to this case, clause 2 of the lease reads as follows :—

"2. So far as the Lessor can grant the same there are included in the "demise and for the purposes thereof and for all other purposes "connected with the due and proper working of the said mines "seams beds measures and strata of coal and other minerals and "the said brick earth fireclay and clay respectively demised by "the last preceding clause (hereinafter collectively referred to as "'the demised minerals') and the disposing of the same the "liberties following that is to say :—

"(1) To work the demised minerals and in so doing and in "working minerals under adjoining and neighbouring "lands to withdraw support from the surface overlying "the area of the demise and from any buildings or "erections now or hereafter to be erected or built thereon "or for any mines seams beds measures and strata of coal "or other minerals (other than and except such support "(if any) as shall be required to be left in pursuance of "any covenant or provision hereinafter contained or may "be required to be left in accordance with any contract "or lease now existing or heretofore made or granted) "without making any compensation for damage except as "hereinafter provided."

5. The rents and payments to be made are set out in clause 5 of the lease and comprise :—

(1) A surface rent of £360 yearly in respect of specified land and a further yearly rent of £4 per acre for any additional land which might be occupied by the lessees.

(2) A certain yearly rent of £5,000 in respect of the Parkgate seam of coal.

(3) Acreage or footage rents as follows :—

(*a*) £150 per acre for the Parkgate seam.
(*b*) £30 per foot per acre for the Silkstone seam.
(*c*) £30 ,, ,, ,, ,, ,, Lidgett seam.
(*d*) £20 ,, ,, ,, ,, all other seams.
(*e*) A rent or royalty of 1*s.* 6*d.* for every 1,000 bricks made from brick, earth or fireclay worked or gotten out of the lands and sold during the half-year preceding the date of payment.
(*f*) The sum of £10 per acre of so much of the Parkgate seam and £5 per acre of so much of each of the other seams of coal demised as shall have been worked and gotten during the preceding half-year as liquidated damages in respect of the overlying surface, and also the sum of £10 per acre of so much of the Parkgate seam [as shall have been worked as aforesaid under specified land].

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(1) Not included in the present print.

On behalf of the Appellant Company it was submitted that as a matter of construction the payments provided by the above sub-paragraphs (*e*) and (*f*) were not within the generic description " acreage and/or footage rents " in the opening sentence of clause 5 (3) of the lease.

6. For both the years 1934–35 and 1935–36 the question for our decision was whether the payments to be made under clause 5 (3) (*f*) are rents or periodical payments in the nature of rent either in respect of lands or in respect of an easement within the meaning of Section 21 of the Finance Act, 1934, or are admissible deductions from the profits of the Appellant Company.

7. The assessment for the year 1934–35 was based on the accounts of the Appellant Company for the calendar year 1933. The amounts paid under clause 5 (3) (*f*) of the lease in the year 1933 were paid in full without deduction of Income Tax. The further question for our decision with regard to the year 1934–35 was whether the provisions of Section 21 of the Finance Act, 1934, had any operation in respect of payments made prior to the passing of that Act.

8. For the Appellant Company it was contended :—

(1) that the payments under clause 5 (3) (*f*) of the lease were what the lease itself expressed them to be, namely, " liquidated damages in " respect of the overlying surface " ;

(2) that the said payments, having none of the characteristics of a rent such as periodicity and the incident right of distress, were neither rents nor annual nor periodical payments in the nature of rent within the meaning of Section 21 (4) (*c*) of the Finance Act, 1934 ;

(3) that the said payments were not made in respect of any land or in respect of the Appellant's right to withdraw support or otherwise in respect of any " easement " within the meaning of the said Section, and

(4) that so far as regards the payments made in the calendar year 1933, which had been made gross, Section 21 of the Act of 1934 could not in any event operate retrospectively.

9. For the Crown it was contended :—

(1) that the payments under clause 5 (3) (*f*) of the lease were true rents, or alternatively

(2) that those payments were annual and periodical payments in the nature of rent and were therefore " rent " as defined by Section 21 (4) (*c*) of the Finance Act, 1934 ;

(3) that this rent was payable in respect of a right, privilege or benefit in, over or derived from land, and therefore in respect of an " easement " as defined by Section 21 (4) (*b*) of the Finance Act, 1934 ;

(4) with regard to the year 1934–35 the provisions of Section 21 of the Finance Act, 1934, operated to forbid the deduction of this rent notwithstanding that the payments had been made in full prior to the passing of the Act.

10. A similar question to that in paragraph 6 giving rise to similar contentions arose with regard to a payment made under clause 8 of an underlease dated 1st May, 1933, granted by the Cortonwood Collieries Co., Ltd. to the Appellant Company. A copy of this instrument is annexed hereto, marked " B ", and forms part of this Case(1).

(1) Not included in the present print.

11. We were referred to the following cases :—

O'Grady v. *Bullcroft Main Collieries, Ltd.*, 17 T.C. 93.

Elliott v. *Burn*, [1934] 1 K.B. 109 ; 18 T.C. 595.

Commissioners of Inland Revenue v. *New Sharlston Collieries Co., Ltd.*, [1937] 1 K.B. 583 ; 21 T.C. 69.

Commissioners of Inland Revenue v. *Hope*, 1937 S.C. 585 ; 21 T.C. 116, and—on the question as to the applicability of the provisions of Section 21 of the Finance Act, 1934, to the assessment for the year 1934–35 referred to in paragraph 7 of this Case—

Lanston Monotype Corporation, Ltd. v. *Anderson*, [1911] 2 K.B.15 and 1019 ; 5 T.C. 675.

12. We, the Commissioners who heard the appeal, gave our decision in the following terms :—

" We hold that (*a*) the lease of 31st January, 1935, and (*b*) the underlease " of 1st May, 1933, are grants of easements within the meaning of " Section 21 (4) (*b*) of the Finance Act, 1934, and that the payments " exigible and made under clause 5 (3) (*f*) of the first-mentioned " instrument and under clause 8 of the second-mentioned instrument, " although expressed to be liquidated damages in respect of overlying " surface, are so related to the exercise of the rights granted that they " must be regarded as periodical payments in the nature of rent in " respect of the easement.

" We are of opinion that the contention that the provisions of Section 21 of " the Finance Act, 1934, were not applicable to the year 1934–35 " is not well founded.

" We hold, therefore, that the appeal fails in principle and we remit the " case to the parties for agreement of figures."

13. The Appellant Company immediately after the determination of the appeal declared to us its dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

C. C. GALLAGHER, } Commissioners for the
R. COKE, } Special Purposes of the Income Tax Acts.

Turnstile House,
94/99 High Holborn,
London, W.C.1.
2nd July, 1941.

The case came before Lawrence, J., in the King's Bench Division on 7th and 8th October, 1941, when judgment was reserved. On 13th October, 1941, judgment was given in favour of the Crown, with costs.

Mr. F. Heyworth Talbot appeared as Counsel for the Appellant Company, and the Attorney-General (Sir Donald Somervell, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Lawrence, J.—The question in this case is whether the Appellant Company, a colliery company, is entitled to deduct payments which it has contracted to make under two mining leases, of £10 and £5 per acre of so much of the

(Lawrence, J.)

coal demised as shall have been worked and gotten during the preceding half-year, as liquidated damages in respect of the overlying surface. This question depends upon whether these payments are rents or periodical payments in the nature of rent either in respect of lands or in respect of an easement, within the meaning of Section 21 of the Finance Act, 1934. The expressions " rent " and " easement " are defined in Section 21 as follows :— " the expression ' rent ' includes a rent service, rent charge, fee farm rent, " feu duty or other rent, toll, duty, royalty or annual or periodical payment " in the nature of rent, whether payable in money or money's worth or " otherwise, but does not include any of the payments enumerated in Rules 1 " to 6 of No. II of Schedule A" ; and " the expression ' easement ' includes " any right, privilege or benefit in, over or derived from land ".

In the case of *Commissioners of Inland Revenue* v. *New Sharlston Collieries Co., Ltd.*, 21 T.C. 69, it was held that a liberty granted by the owner of the surface to work coal thereunder, notwithstanding that such working might cause subsidence, in consideration of a minimum yearly rent and a further acreage rent, the surface owner's right to compensation for damage to buildings being unaffected, was an easement within Section 21 ; and it is contended for the Crown that this case is decisive of the present.

Mr. Talbot for the Appellant Company, however, contends that that case is distinguishable on the grounds that here the other rents are considerations for the liberty to withdraw support and that these payments are truly liquidated damages for the damage which may be caused by such withdrawal and, further, that the *ratio decidendi* of the *New Sharlston* case was that the colliery owner was there acquiring an immunity from action for damage due to subsidence, and he refers specially to Slesser, L.J.'s judgment at page 79 and Greene, L.J.'s at page 91 ; whereas in the present case the lease did not provide, so he argues, for an immunity from action, but merely that the damages should be agreed beforehand at the acreage payments stipulated for.

In my opinion, the present case cannot be distinguished from the *New Sharlston* case. The words of Greene, L.J. (as he then was), at page 91, show that such a fine distinction as that between a lease providing for immunity from action for damages for subsidence and a lease providing for payment of a liquidated sum for damage for subsidence ought to be disregarded. He said : " From this point of view it appears to me that by virtue of the " indenture of 1901 the Respondents obtained an ' easement ' in that they " obtained the right to act in such a way as to affect the physical condition " of the surface without exposing themselves to the operation of certain of the " legal remedies which would otherwise have been available to the surface " owners. It is perhaps worth noticing that, if the Respondents' contention " be right, the effect of the Section could in general be avoided, in a case " where a concern desired to obtain an easement, by the simple expedient of " so drafting the document as to make it in effect an undertaking not to sue, " for example, for damages for trespass in a case where a wayleave was desired. " It appears to me that the language of the definition clause, using as it does " words of general import and not technical expressions, is sufficiently wide " to prevent such a result." I see no distinction between a liberty to work coal, notwithstanding that such working may cause subsidence, in consideration of certain rents, and a liberty to work coal and in so doing to withdraw support from the surface, without making any compensation except to pay certain acreage payments as liquidated damages in respect of the overlying surface. I hold, therefore, that these leases did grant easements within the meaning of Section 21 of the Finance Act, 1934.

(Lawrence, J.)

As to the question whether the acreage payments in question are rent within that Section, it has been argued for the Appellant Company that the payments are not so described: that they are not periodical: that they are not from occupation of land or user: that they are payable once and for all for each acre: that they are truly liquidated damages: that they would be capital in the hands of the recipient, and therefore have none of the characteristics of rent. In my opinion, these arguments are unsound. It must be remembered that colliery leases differ from other leases in that they are leases of wasting assets. Payments under colliery leases may, therefore, be in the nature of capital in the hands of the recipient but still fall within such a definition of "rent" as is contained in Section 21. The fact that the payment is made once and for all for each acre worked does not distinguish it from any colliery rent which is calculated on the acreage worked. Moreover, the expression "royalty" is included in the definition, and a royalty is essentially a payment once and for all in respect of a particular subject. The payment is periodical in the sense that it is payable half-yearly and it is paid for the use and occupation of land in that it presupposes subsidence of the land, owing to the working of the coal beneath.

The appeal is therefore dismissed with costs.

An appeal having been entered against the decision in the King's Bench Division, the case came before the Court of Appeal (Lord Greene, M.R., du Parcq, L.J., and Singleton, J.) on 17th April, 1942, when judgment was given unanimously in favour of the Crown, with costs, confirming the decision of the Court below.

Mr. F. Heyworth Talbot appeared as Counsel for the Appellant Company, and the Attorney-General (Sir Donald Somervell, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Lord Greene, M.R.—We need not trouble you, Mr. Attorney.

In my opinion this is a clear case and the decision of Lawrence, J., was manifestly right.

There are two questions involved. The first is whether the particular right in question is an easement within the definition contained in Sub-section (4) (*b*) of Section 21 of the Finance Act, 1934, a Section which I need not read. The second question is whether the payments which are in question are annual or periodical payments in the nature of rent within the definition in Sub-section (4) (*c*). On the first question Lawrence, J., held that the case was covered by the decision of this Court in *Commissioners of Inland Revenue* v. *New Sharlston Collieries Co., Ltd.*, 21 T.C. 69, and I need not repeat what the learned Judge said with regard to that case.

The only distinction that Mr. Talbot endeavoured to draw between that case and the present case was of the following nature. In the *New Sharlston* case the company concerned started off with the right to get the coal because they were the freehold owners of the coal, but their title did not confer upon them the right to let down the surface without compensating the owner for any damage. That provision, which I have not set out verbatim, was held by the House of Lords in the year 1900 as not operating as a surrender to the coalowners of the right of support incident to the surface lands(1).

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(1) *See* 21 T.C., at p. 71 and [1904] 2 Ch., at p. 443.

(Lord Greene, M.R.)

Accordingly, in the year 1901, after that decision, the company proceeded to obtain from the then tenant for life of the surface lands full liberty to work the coal notwithstanding that the working might cause subsidence; but the company did not by that document obtain the right to work the coal without any liability to pay damages which might ensue from any subsidence which took place. The question arose as to whether the right in respect of which the payments fell to be made in that case—which was the right as I have said to work without leaving support for the surface—was, within the meaning of the definition of easements in Section 24, an easement.

The distinction which it is attempted to draw between that case and the present case is that the right in respect of which the payments in controversy here are to be made is a right which goes further than what was acquired in the *New Sharlston* case (1), because it is the right to be exempt for any claim for damages caused by subsidence. It is said that here the Appellants acquired the right to let down the surface, which meant that they acquired the right to act in relation to the land and to let down the surface without the liability to be restrained by injunction; that, it is said, the lease conferred upon them, and if it had stopped there and it had been a payment in respect of that right, it is conceded that the *New Sharlston* case would have covered it.

It is contended, however, that the Appellants are given an additional right which exempts them, in their exercise of the right already conferred upon them, from liability for damages and is in effect nothing more or less than a composition paid for damages.

In my opinion that distinction is one which cannot stand in the light of the reasoning on which the decision in the *New Sharlston Collieries* case was based. I do not propose to read passages from that decision but, in my view, the distinction drawn is one which cannot possibly be made good. I agreed with the learned Judge that the *New Sharlston* case conclusively decides, so far as this Court is concerned, that the right acquired in respect of which these payments are made is an easement within the meaning of the definition clause.

The next question is whether or not the payments are annual or periodical payments, and the further question remains: If so, are they payments in the nature of rent? It seems to me quite beyond dispute that these payments are periodical payments because they are payable half-yearly during the continuance of the demise, or at any rate so long as any coal is being worked under the demise. But they must be periodical payments in the nature of rent before they are caught; and it is pertinent to point out that the phrase "payment in the nature of rent" must, of course, be construed in relation to the type of subject-matter in respect of which the payment in controversy falls to be made.

The type of subject-matter in the present case is this particular type of "easement" within the meaning of this artificial definition clause. We therefore start with a subject-matter which, looked at from the strict point of view of law apart from the wording of this particular Section, involves a payment which, if analysed, is a commutation of a claim for damages. So be it. But once the right is an easement within this highly artificial definition, I cannot myself see how an annual payment made in respect of that easement can fail to be a payment in the nature of rent within the meaning of those words used in this context. It is not a question of what the nature of rent is *in vacuo*; it is a question of what the words "payment in the nature of rent" mean in relation to this particular type of subject-matter. If Mr. Talbot had

(1) 21 T.C. 69.

(Lord Greene, M.R.)

not argued the point with great ability and conciseness it could not really be contended, I should have thought, that these payments are not in the nature of rent.

The result, therefore, is that the appeal must be dismissed, and dismissed with costs.

du Parcq, L.J.—I agree.

Singleton, J.—I agree.

Mr. Talbot.—My Lord, it is with some trepidation that I make the application which I am now instructed to make for leave to appeal. As your Lordships will appreciate it may be the desire of my clients to challenge the decision in the *New Sharlston* case(1) where there was some difference of judicial opinion; and on that ground, my Lord, upon instructions I venture to make the application.

(*The Court conferred.*)

Lord Greene, M.R.—Mr. Attorney, did we give leave to appeal in the *New Sharlston* case ?

The Attorney-General.—I am not sure, my Lord ; very often the report so states at the end. It may be that leave to appeal was not asked for.

du Parcq, L.J.—Yes, leave was asked for and it was given.

Lord Greene, M.R.—But it was not pursued ?

The Attorney-General.—That is so, my Lord, the appeal was not pursued.

Lord Greene, M.R.—Mr. Attorney, subject to anything you may have to say, an appeal from the decision of this Court in the present case would in effect be an appeal from the decision in the *New Sharlston* case.

The Attorney-General.—Yes, my Lord.

Lord Greene, M.R.—We thought it right to give leave to appeal in the *New Sharlston* case and, if I recollect rightly, because there was a difference of opinion. Therefore, in spite of the fact that the taxpayer did not choose to go on in that case, it seems to be the right and proper thing to repeat that leave on this occasion.

The Attorney-General.—With respect, my Lord, I quite agree.

Lord Greene, M.R.—So be it.

Mr. Talbot.—If your Lordship pleases.

An appeal having been entered against the decision in the Court of Appeal, the case came before the House of Lords (Viscount Simon, L.C., and Lords Russell of Killowen, Macmillan, Wright and Romer) on 6th, 8th and 9th July, 1943, when judgment was reserved. On 4th August, 1943, judgment was given in favour of the Crown (Lord Romer dissenting), with costs, confirming the decision of the Court below.

Mr. H. Wynn Parry, K.C., and Mr. F. Heyworth Talbot appeared as Counsel for the Appellant Company, and the Attorney-General (Sir Donald Somervell, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills for the Crown.

(1) 21 T.C. 69.

JUDGMENT

Viscount Simon, L.C.—My Lords, I have had the advantage of studying the opinion which my noble and learned friend Lord Russell of Killowen is about to deliver in this appeal. That opinion completely expresses my own view of the matter, and I content myself with saying that I accept it in its entirety. I move that the appeal be dismissed with costs.

Lord Russell of Killowen.—My Lords, by a lease dated 31st January, 1935, and made between the Earl Fitzwilliam and the Appellant, the Appellant became the lessee of certain mines, seams, beds, measures and strata of coal and other minerals, and brick, earth, fireclay and clay (therein collectively referred to as " the demised minerals "), for a term of 99 years.

By clause 1 of the lease the demised minerals were demised in consideration of the rents and payment thereby reserved and the covenants therein contained. By clause 2 it was provided that so far as the lessor could grant the same there were included in the demise and for the purposes thereof and for all other purposes connected with the due and proper working of the demised minerals and the disposing of the same, certain liberties of which the first ran thus:—" (1) To work the demised minerals and in so doing and " in working minerals under adjoining and neighbouring lands to withdraw " support from the surface overlying the area of the demise and from any " buildings or erections now or hereafter to be erected or built thereon or for " any mines seams beds measures and strata of coal or other minerals (other " than and except such support (if any) as shall be required to be left in " pursuance of any covenant or provision hereinafter contained or may be " required to be left in accordance with any contract or lease now existing or " heretofore made or granted) without making any compensation for damage " except as hereinafter provided."

By paragraphs (1) and (2) of clause 5 of the lease it was provided that the Appellant should during the said term pay to the lessor by equal half-yearly payments on the 1st July and 1st January in every year a surface rent for lands and surface works, and a certain rent in respect of coal. Paragraph (3) of clause 5 ran thus:—" (3) The Company " (that is to say, the Appellant) " shall also pay on the half-yearly rent days aforesaid or as " soon thereafter as such rents can be computed the acreage and/or footage " rents in respect of the several seams of coal hereby demised as follows:—" There then follow under headings (*a*), (*b*), (*c*) and (*d*) different rents for the different seams of coal, and under the heading (*e*) a royalty for bricks. Then follows heading (*f*), the text of which is as follows:—

" The sum of Ten pounds for every acre of so much of the Parkgate seam of " coal and Five pounds for every acre of so much of each of the other seams of " coal hereby demised as shall have been worked and gotten during the " preceding half-year as liquidated damages in respect of the overlying surface " belonging to the Lessor or/and under which he has the power to work the " minerals and let down and shall also pay the sum of Ten pounds for every " acre of so much of the said Parkgate seam of coal hereby demised as shall " have been worked as aforesaid under the lands coloured yellow on the " said Plan No. 1 and referred to in Part IV of the First Schedule hereto. " Provided also and it is hereby agreed and declared that such sums shall be " payable in lieu of paying compensation for damage or injury which may " be occasioned by subsidence consequent on the winning working and getting " of the demised minerals or in the exercise of the liberties hereby granted " but not in lieu of or in satisfaction for any damage or injury by smoke or " noxious fumes arising from or caused by any works or spoil heaps of the " Company."

(Lord Russell of Killowen.)

The Appellant is also lessee of other coal under an underlease from the Cortonwood Collieries Co., Ltd. dated 1st May, 1933, which contains similar provisions as to liberty to work the coal and withdraw support from the surface lands, and for payment of a sum per acre of coal worked as liquidated damages, such sum being payable in lieu of and in substitution for compensation for any permanent damage or injury which might be caused by subsidence or otherwise consequent on the working of the coal thereby demised. It is unnecessary to refer in greater detail to the provisions of this document. It is common ground that for the purpose of deciding this appeal the Fitzwilliam lease and this underlease may be treated as identical, and only the former need be referred to.

The point which arises for decision may now be stated. In computing their profits for the purposes of Income Tax the Appellant claimed that the sums paid to the lessor under clause 5 (3) (*f*) of the lease were allowable deductions, being moneys payable as liquidated damages in respect of the overlying surface. The claim was resisted on behalf of the Crown on the ground that the payments were rent payable in respect of an easement within the meaning of Section 21 of the Finance Act, 1934, which must under the Section be treated as if it were a royalty paid in respect of the user of a patent, the result of such treatment being that it is not an allowable deduction in computing profits.

The point is a fine one, and depends, in my opinion, solely on the question of whether the effect of clause 2 (1) of the lease is that the lessee becomes, by virtue of the liberty thereby granted, the owner of an easement within the meaning of Section 21 of the Finance Act, 1934. The relevant words in that Section are these:—" 21.—(1) Where rent is payable . . . in respect of any " easement, and—(*a*) the . . . easement is used, occupied or enjoyed in con- " nection with any of the concerns specified in Rules 1, 2 and 3 of No. III " of Schedule A . . . the rent shall be charged with tax under Schedule D " and shall, subject to the provisions of this section, be treated for the purpose " of such of the provisions of the Income Tax Acts as refer to royalties paid in " respect of the user of a patent as if it were such a royalty . . .

" (4) For the purpose of this section . . . (*b*) the expression ' easement ' " includes any right, privilege or benefit in, over or derived from land; " (*c*) the expression ' rent ' includes a rent service, rent charge, fee farm " rent, feu duty or other rent, toll, duty, royalty or annual or periodical " payment in the nature of rent, whether payable in money or money's worth " or otherwise ".

Counsel for the Appellant argued in the first place that the payments under clause 5 (3) (*f*) of the lease did not come within the Section's definition of rent. As to this I feel no doubt. In my opinion, while they might well be said to be periodical payments in the nature of rent, they certainly fall within the word " royalty ". The fact that in various parts of the lease distinctions are drawn such as " rent or payment " (clause 6), " rent or sum of money " (clause 8), and " rents and surface damage payments " (clause 11), seems irrelevant. If the payment is within the Section's definition, the fact that the document calls it something else, or even states that it is not rent, would seem to be immaterial.

Whether the lessee is the owner of an " easement " within the Section is to me a much more difficult question. However much we might wish to do so, it is not open to us to say that the liberty granted by clause 2 (1) of the lease confers upon the lessee an easement within the ordinary legal meaning of that word. No such hereditament has been carved out of the surface owner's land and vested in the coalowner. The judgments and decision in

(Lord Russell of Killowen.)

your Lordships' House in the case of *Elliott* v. *Burn,* [1935] A.C. 84; 18 T.C. 595, prevent us from saying that there exists here such an easement. While the Crown might well have succeeded without relying upon the special definition clause in Section 21 had there been no *Elliott* v. *Burn,* it was conceded by the Attorney-General that in view of that decision he was, in order to succeed, compelled to rely on the extended meaning given to the word " easement " by the definition clause in the Section.

Turning once more to the lease, the effect of clause 2 (1) thereof is I think this: that the lessor grants to the lessee liberty to work the coal and to withdraw support (except as mentioned) without making any compensation except the sums payable under clause 5 (3) (*f*). While I think that *Elliott* v. *Burn* is an obstacle in the way of my holding that the lessee has any right in, over or derived from the surface land, or any benefit or privilege in or derived from the surface land, it is, in my opinion (notwithstanding the powerful dissenting judgment of Romer, L.J., in the *New Sharlston* case, [1937] 1 K.B. 583; 21 T.C. 69) possible to say that clause 2 (1) of the lease confers on the lessee a privilege over the surface land, viz., the privilege that, by paying the sums mentioned in clause 5 (3) (*f*), the lessee obtains freedom to work the coal without any fear of being stopped by injunction from causing subsidence to the surface land, or having to pay damages by reason of any such subsidence.

I am accordingly prepared to hold that the sums paid under clause 5 (3) (*f*) of the lease are rent payable in respect of an easement within the meaning of Section 21 of the Finance Act, 1934, and I would dismiss the appeal.

My Lords, my noble and learned friend **Lord Macmillan** authorises me to say that he concurs in the opinion which I have read.

Lord Wright (read by Lord Russell of Killowen).—My Lords, this appeal involves the true construction of Section 21 of the Finance Act, 1934, as applied to the circumstances of the case. The trial Judge, Mr. Justice Lawrence, and the Court of Appeal, rightly held themselves bound to follow a previous decision of the Court of Appeal, *Commissioners of Inland Revenue* v. *New Sharlston Collieries Co., Ltd.,* [1937] 1 K.B. 583; 21 T.C. 69, which had not come before this House on appeal. Your Lordships have now to consider whether that case was rightly decided. This appeal has proceeded on the assumption that the circumstances of the present case are indistinguishable in principle from those of the *New Sharlston* case. It has also been assumed by both parties that the material facts in both these cases are indistinguishable in principle from the facts in *Elliott* v. *Burn,* [1935] A.C. 84; 18 T.C. 595.

The facts of the present appeal have been fully stated and I do not now repeat them. It is enough to say that the Appellant Company is the lessee of certain collieries and that the demise includes (*inter alia*) liberty to work the demised minerals and in so doing to withdraw support from the overlying surface without making any compensation for damage except as provided in the lease. The lease stipulated for certain half-yearly payments described as rents, namely—a surface rent; a certain yearly rent in respect of the coal gotten in the Parkgate seam; certain other rents described as acreage and/or footage rent in respect of other seams. Finally, by clause 5 (3) (*f*) the lease provided (without using the word " rent " in that context) for certain payments in respect of every acre of the coal demised as should have been worked or gotten during the preceding half-year " as liquidated damages in respect " of the overlying surface . . . let down ". It was provided also that such sums should be payable in lieu of paying compensation for damage or injury occasioned by subsidence consequent on winning the demised minerals or in consequence of the exercise of the liberties granted by the lease. Damage due to smoke or noxious fumes and damage to buildings caused by the working

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of the seams by the Appellants were excepted. There was also a further lease which raised the same questions.

The issue in this appeal is whether, as between the Appellant and the Respondent, the Inspector of Taxes, the payments provided for by clause 5 (3) (*f*) were to be treated in the assessment of tax as payments of " rent " in respect of an " easement " within Section 21 of the Finance Act, 1934.

Before your Lordships it has been conceded and assumed that the decision of this House in *Elliott* v. *Burn*[1] decided that no easement was actually conferred by the indenture in question in that case. Both sides have further agreed before this House in the present case, as they did in the Court of Appeal in the *New Sharlston* case[2] in respect of the lease there in question, that the lease which is now being considered is in substance and in principle indistinguishable from the lease which the House had under consideration in *Elliott* v. *Burn*. On this assumption, it follows, on the authority of *Elliott* v. *Burn*, that a right of support as an easement or incorporeal hereditament in the strict sense was not conferred on the Appellant under the lease between the Appellant and the lessors. The Respondent's claim must therefore fail unless it is saved by Section 21 of the Finance Act, 1934. That Section embodies in Sub-section (4) (*b*) a new statutory definition of " easement " for purposes of the Section. That definition is made applicable to certain concerns, including the collieries leased by the lessors to the Appellant.

The material words of Sub-section (4) (*b*) must now be construed. They are as follows:—" the expression ' easement ' " (that is to say, for purposes of the Section) " includes any right, privilege or benefit in, over or derived " from land ". Do these words take the case outside the actual or assumed ruling in *Elliott* v. *Burn*, and do they cover the present case? In my opinion they do. That was so held (Romer, L.J., dissenting) by the Court of Appeal in the *New Sharlston* case, which I think was rightly decided.

The Section is clearly of an amending or remedial character. It is essential to approach the construction of such an enactment without undue bias in favour of the strict law which the enactment is setting out to change. It is wrong to construe it in a niggardly and technical spirit, with an eye fixed on the old law. If it is approached in that spirit, it may be easy to eviscerate the enactment and deprive it of any effect. At the same time its effect must be ascertained by considering the words actually used, interpreted in a fair and reasonable way in the light of the whole tenor of the Section read as forming part of the Income Tax legislation.

The actual words of Sub-section (4) (*b*) are not words of art or such as a conveyancer would use. They are popular in character; they do not suggest the idea of an easement in the strict legal sense of an incorporeal hereditament or of an estate or interest in land. The words, in my opinion, would be satisfied by a merely personal right, privilege or benefit, so long as it concerns or affects a piece of land. So far as the fair meaning of the words requires, such a right, benefit or privilege might be created by deed or by simple contract. The definition seems to me to be inconsistent with the idea of its being limited to what could properly be called an estate or interest in land. The word " any " preceding " right, privilege or benefit " points in the direction of a wide construction. I do not wish to attempt to exhaust what the definition would cover, because I can conceive some borderline cases, but I am satisfied that the new statutory definition of " easement " includes more than the rights which this House held in *Elliott* v. *Burn* not to be an easement in the strict legal sense, and that it includes whatever right or privilege over the lessor's land is given by the lease here in question. That

(1) 18 T.C. 595. (2) 21 T.C. 69.

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at least includes that the Appellant is granted an immunity from an action for an injunction or for any damages beyond the agreed periodical payments which are to frank whatever the Appellant does in the course of working the mine in the way of letting down the lessor's surface land. The Appellant gets at least this qualified right or privilege in regard to withdrawing support. He cannot be restrained from doing so, nor can he be held liable in damages (except for the special excepted items) beyond the stipulated periodical payments, which are described as liquidated damages. I agree with the present Master of the Rolls in the *New Sharlston* case(1), where he states his conclusion that the lessees had acquired an easement within the definition in the Sub-section in that they were granted " the right to act in such a way " as to affect the physical condition of the surface without exposing them- " selves to the operation of certain of the legal remedies which otherwise " would have been available to the surface owners ", and that that constitutes an " easement " within the language of the definition clause, having regard to the fact that it uses words of general import and not technical expressions. I agree with his further conclusion that the same meaning applies to the present case(2).

In my opinion the Appellant was granted at least a " privilege " " over " the lessor's overlying land, that is in respect of the land, and this, I think, satisfies the new statutory definition.

There remains the further question whether the payments under clause 5 (3) (*f*) are " rent " within the definition of the Act. That definition is very wide; it includes (*inter alia*) a " royalty or annual or periodical payment " in the nature of rent ". In my opinion the payments in question come within the definition as being periodical payments in consideration of the enjoyment by the Appellant Company of the " easement " which, in my opinion, was conferred by the lease. That is my opinion when I look at the substance of the matter and disregard the mere language of clause 5 (3) (*f*). The description of these payments as liquidated damages cannot, in my opinion, prevent the Respondent from insisting on their true character, if they come, as in my opinion they do, within the definition of rent given in the Sub-section. The Crown's right to tax cannot be affected by the mere words which the parties have chosen to use. The word " rent " is itself a word of very wide import, not always correctly employed in ordinary current user, particularly in taxing provisions. " Rent " at common law, in its strict sense, could not properly be applied to denote a rent reserved in a lease of incorporeal hereditaments because rent would not issue out of the premises (*Buszard* v. *Capel*, 8 B. & C. 141). But such payments would ordinarily be called rent. In *Coltness Iron Company* v. *Black*, 6 App. Cas. 315, at page 335; 1 T.C. 287, at page 321, Lord Blackburn observes on the use which he says is perhaps not quite accurate of the term " rent reserved " on a mineral lease ", to describe what in one sense is payment by instalments of the price of minerals forming the land. In Section 21 " rent " is defined as including the periodical payment to be made in respect of any easement within the meaning given in the Section. " Royalty " is also included as an alternative category. I think that the periodical payment in this case comes within the statutory definition. It follows that it cannot be deducted by the Appellant Company in computing its annual profits or gains because by Section 21 (1) of the Act of 1934 it is to be treated for the purpose of so much of the provisions of the Income Tax Acts as refer to royalties paid in respect of the user of a patent as if it were such a royalty. It is accordingly caught by Rule 3 of the Rules applicable to Schedule D, Cases I and II.

I would dismiss the appeal.

(1) [1937] 1 K.B. 583, at p. 612; 21 T.C. 69, at pp. 91/2. (2) *See* page 436 *ante*.

Lord Romer.—My Lords, in my opinion the Court of Appeal were unquestionably right in holding that the payments specified in sub-clause (3) (*f*) of clause 5 of the lease of 31st January, 1935, are rents within the meaning of Section 21 of the Finance Act, 1934. The fact that they are expressed to be payable " as liquidated damages " and " in lieu of paying compensation " for damage or injury which may be occasioned by subsidence " seems to me to be quite immaterial. It cannot alter the essential nature of the payments, which is plainly that of additional royalties. A horse may be accepted in discharge of a claim to damages. Nevertheless it remains a horse.

But I cannot agree with the Court of Appeal that the " rent " is payable in respect of an " easement " within the extended meaning given to that word by Sub-section (4) (*b*) of the Section.

In forming an opinion upon this question it is essential to rid one's mind of the feeling that the Appellants have acquired some sort of right to work the coal demised to them without leaving pillars or taking other means to support the overlying surface, even though they may not have acquired an easement in the strict sense of the word. The feeling is a very natural one, seeing that clause 2 (1) of the lease purports in express terms to confer upon the Appellants liberty to work the demised minerals and in so doing to withdraw support from the surface. But loyalty to the decision of your Lordships' House in the case of *Elliott* v. *Burn*, [1935] A.C. 84; 18 T.C. 595, demands that this feeling should be sternly repressed. Either the Appellants have obtained by the lease an easement in its strict sense or they have no right of any kind to let down the surface. There is no room for any other alternative. *Elliott* v. *Burn* compels us to hold that no such easement was granted, and it necessarily follows that, if the Appellants so work their coal as to cause a subsidence of the surface, they will be committing a wrongful act, and one that is neither permitted nor condoned by anything that is comprised in the lease.

Now, were it not for the provisions of clause 5 (3) (*f*) of the lease, any such method of working the coal could have been restrained by injunction and any damage caused to the lessor by such method of working could have been recovered by him in an action at law. In view of the sub-clause these remedies are not open to the lessor; but I am unable to understand how the sub-clause can be said, because of that, to confer any right or privilege upon the lessees. It certainly gives them no right or privilege of working the coal without leaving or providing means of support to the surface. Any such working will be, as I have already pointed out, a wrongful act that is in no way sanctioned by the provisions of the sub-clause. Those provisions indeed amount to no more than this: that in lieu of his remedies by injunction and action at law the lessor agrees to accept certain additional royalties as his remedy for the wrong done to him by the lessees in depriving his surface of support. Whether or not he has thereby conferred a benefit upon the lessees time alone can show. The damages that would but for the sub-clause have been payable to the lessor by the lessees in respect of subsidence might well have been less than the total additional royalties paid in lieu of such damages. It might well happen, too, that the loss to the lessees by leaving pillars of coal and the cost to them of any other steps taken to prevent subsidence of the surface, would together have amounted to less than the total amount of such royalties. But assuming that it turns out to have been a benefit to the Appellants to pay the royalties in lieu of being compelled so to work their coal as not to let down the surface, I fail altogether to understand how that benefit can be said to be a benefit in, over or derived from the land.

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It can certainly be regarded as a benefit derived from the lessor. But with all respect to those of your Lordships who think otherwise, it does not seem to me to have anything whatsoever to do with the land. I have only one other observation to make upon this topic. The Court does not grant an injunction to restrain the commission of a threatened wrongful act if it appears that damages will provide an adequate remedy for the act if committed. Were the Court for this reason to refuse an injunction to restrain a colliery lessee from causing subsidence to some part of the surface, it would, I think, be much surprised if it were told that it had conferred a benefit on the lessee in, over or derived from that surface.

My Lords, I have so far dealt only with the position that arises under the lease of 31st January, 1935. The position under the sub-lease of 1st May, 1933, is, we are told, the same in all material respects. I need not therefore consider it further.

For myself I would allow the appeal.

Questions put:

That the Order appealed from be reversed.

The Not Contents have it.

That the Order appealed from be affirmed and the appeal be dismissed with costs.

The Contents have it.

[Solicitors:—Andrew, Purves, Sutton & Creery, for Newman & Bond, Barnsley; Solicitor of Inland Revenue.]