dance with the charter-party. They failed in this respect, and by that failure the respondents were rendered liable for the loss occasioned by the negligence of the master. It is true that the master of the vessel accepted and signed these bills of lading, but he had no authority to sign bills of lading in the form presented to him. The charterers, the appellants, knew what the master's authority was, and I do not think that they can rely upon his unwitting acquiescence in their mistake so as to escape from liability. I therefore think that the appeal must be dismissed with costs.

LORD ATKINSON—I agree in the conclusion which has been arrived at, and in the reasons given for arriving at it. I wish to guard myself against being supposed to acquiesce in all the conclusions that have been arrived at by the Court of Appeal or the reasoning of the respective Lords Justices. Especially do I desire to guard myself against being supposed to concur in their observations to the effect that the act of the captain in signing the bill of lading is purely ministerial. I think that he is entitled to exercise his judgment, and if it appears to him that the bill of lading does not conform to the charter-party, to refuse to sign it, even at the peril of his employment.

Appeal dismissed.

Counsel for Appellants—Sir R. Finlay, K.C. — J. A. Hamilton, K.C. — M. Lush, K.C.—Chaytor. Agents—Hollams, Sons, Coward, & Hawksley, Solicitors.

Counsel for Respondents—Scrutton, K.C. —Bailhache. Agents—Holman, Birdwood & Company, Solicitors.

HOUSE OF LORDS.

Monday, July 9, 1907.

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

EDEN AND OTHERS *v.* NORTH-EASTERN RAILWAY COMPANY.

Mines—Compensation—Railway Company —Coal Required to be Left Unworked— Measure of Compensation — Railways Clauses Consolidation Act 1845 (8 *and* 9 *Vict. cap.* 20), *sec.* 78.

Under the Railways Clauses Consolidation Act 1845, section 78, a railway company is entitled to prevent the owner, lessee, or occupier of a mine or minerals, from working minerals under or near the railway, provided the company makes "compensation for such mine."

An owner of land let the minerals to a coal company for a term of twenty-one years. Under section 78, a railway company laid an embargo upon the working of a portion of the minerals. Even excluding the portion in question, the land contained more minerals than the company could exhaust during the lease. *Held* (*reversing* the Court of Appeal), that the compensation payable by the railway company was the profit which would have been made on the minerals which were by the requirement of the railway company left unworked, and not merely a sum representing the increased expenses and loss incurred by the lessors and lessees in having to work other coal.

Appeal from an Order of the Court of Appeal (VAUGHAN WILLIAMS, MOULTON, and BUCKLEY, L.JJ.), reported 1907, 1 K.B. 402, reversing a decision of Bigham, J., (1906) 1 K.B. 195, upon a special case stated by an arbitrator.

The facts appear from the considered judgments of their Lordships, *infra*.

LORD CHANCELLOR (LOREBURN) — The appellants, Mr Eden and others, are lessors and lessees respectively of coal mines, part of which lie under the line of the North-Eastern Railway. In 1892 the lessees were desirous of working the coal lying under part of the line, and, conformably with the Railways Clauses Consolidation Act 1845, gave notice to the railway company under the 78th sec. of that Act. Thereupon the railway company required the lessees to leave certain portions of the unworked coal under their line as pillars for its support, expressing their willingness to pay such compensation as the law required. In this way the railway company became bound to pay, in accordance with the Act of Parliament, "compensation for such mines or any part thereof," whatever that means. What it does mean is the real question here. Very few further facts need notice. The lessees in the ordinary way and regular course of working would have worked this coal immediately had they not been obliged under the statute to leave it in pillars as a support for the railway. Had they so worked it they would have made a clear profit out of it of £730, and the lessors would have received as rent in respect thereof the sum of £155. Accordingly, if the proper basis of compensation is the profit which lessor and lessee respectively would have made by working the coal as it would have been worked in the ordinary course, then the sums payable by the railway company are £730 and £155 respectively. And that is what they claim in this appeal. The arbitrator has further found that "there is left unworked in the Shield Row seam (that is, this seam) under the said lands a quantity of coal which the coal company will not in the ordinary course be able to exhaust within the term of the before-mentioned lease, which expires on the 1st January 1907." So, if the lessees, instead of working the reserved coal, chose to work some other part of the same mine, they would be able to make their profit on the substituted coal instead of on the coal which they would have worked if they had not been obliged to leave it in pillars as

described. The railway company fastens, legitimately enough, on this circumstance as the foundation of their argument. They say that the statute does not require them to purchase this coal, which literally is true, but merely to compensate the owners thereof. And they urge that the lessees, though wishful to work this particular coal, had plenty more which they might work, and in fact did work, instead of it. Thus, argues the railway company, the lessees will be indemnified if they receive the increased expenses and loss to which they have been put by having to work this substituted coal instead of the reserved coal. And they say compensation means indemnity and no more. Now, if this be the true view, the lessees are entitled only to £100, and that sum is payable on the ground that the prohibition against working the reserved coal tended in some degree to accelerate a diminution of output in these mines, and also to accelerate the time when the lessees would be obliged to work coal more expensive to get. The railway company, no doubt, would admit that, in addition to this payment, they would have been liable to compensate the lessees for the profit which they would have made in working the reserved coal itself ultimately, when they had exhausted the other coal in their mines. But that point is not raised, for there is so much other unworked coal that the lessees cannot in the ordinary course exhaust it before the expiration of their lease. Similarly, in regard to the lessors, the railway company contend that the measure of compensation payable to them is not the rent which the lessors would have received in respect of the reserved coal if it had been worked, but the diminution in the value of the reversion caused by service of the statutory notice, and estimated at the date of such notice. It is agreed that upon this footing the lessors are entitled to £310. And the railway company argue that this sum, and not £155, is what the lessors are entitled to receive, for, say they, compensation means indemnity and no less. In deciding between these rival contentions the first step is to weigh the language of the Act of Parliament itself. The words used in section 78 are "compensation for such mines or any part thereof." Looking at that section and at section 6, the railway company is to compensate owners for the value of that part of the mines which is "taken or used." In its primary sense the Act certainly appears to mean that the owners according to their several interests are to receive the value of the actual coal actually placed under embargo. If one and the same person owned the mine and worked it, the obvious course would be to say, "You are about to work this coal, and if you work it you would make a net profit of, say, £500. We prevent you from working it, and so we pay you £500." It would be very strange if in such a case a railway company could say "You have a very large coalfield of 100 acres in extent. We are preventing you from working only one acre. You must first work out your other ninety-nine acres, and that will take you twenty years. Accordingly we will not pay you £500, the present profit you would make on the one acre, but we will pay you the present value of the profit which you would have made twenty years hence out of this one acre had we not laid an embargo upon it. If you have suffered any other loss by diminution of output or increase of working expenses we will pay that too." I cannot think that such a principle could be defended. If it were applied, for example, to building land worth £200 an acre over all, the sum payable for a small part of it taken compulsorily might be much less than the selling value, on the plea that the whole of the land would not be sold for building at once, and that it was to be assumed that the plot compulsorily taken would be the last to be sold for building. Whether the land is "taken" or is "used" within the meaning of the Act seems to me a matter of indifference. The value must in either case be paid. That being the rule, where there is only one interest in the land or mine—namely, the fee-simple—is there any difference where there are, as in this case, a lessee's interest and a reversionary interest? According to the railway company's argument the rule which I have stated would not then apply. I cannot see why it should not apply. What is taken away from the owners, and what is given to the railway company, is the same whether the ownership is in one hand or in more. There must be a distribution among those entitled to compensation if they be more than one, but the sum to be distributed must still be the same—namely, the value of what has been taken from them, and that is the value of the reserved coal at the time at which it was laid under an embargo. That value is found to be in all £885, of which £730 is allotted to the lessee and £155 to the lessor. It is true that upon the figures stated in the special case apportioning to lessor and lessee their several shares the lessees will on this footing be able to make a profit out of the transaction beyond what they could have made if the coal had not been taken under the Act. It is also true that the lessors will only receive £155, while the damage done to the reversion by the railway company's exercise of statutory powers amounts to £310. But these figures were mostly agreed figures. The division of the money might have been different if it had been disputed. It is assumed that the lessees whose term is limited will work only at the usual rate of working. They are entitled to work more rapidly if they please, and in proportion to the rapidity of working the anomaly in the distribution will disappear. On the other hand, if the respondents are in the right, then the railway company will get for £410 that which is worth £885. This shows the danger of departing from the simple principle that a railway company under this Act is to pay to the value of what it takes or uses. How the proceeds are to be divided may be a complicated question. It is not in dispute here between the lessor and lessee. What

is in dispute is the sum payable by the railway company, and on that I agree with the decision of Bigham, J.

LORD MACNAGHTEN—It seems to me that the judgment of Bigham, J. is perfectly right. It is, I think, in accordance with the provisions of the Railways Clauses Act as to mines and minerals, and consistent with views expressed in this House on more than one occasion. I do not propose to trouble your Lordships by going through the sections of the Act which bear upon the question in debate. They have often been cited here, and your Lordships are, I am sure, familiar with them. But I will take the liberty of quoting a passage from the judgment of Lord Watson in the case of *Lord Provost and Magistrates of Glasgow* v. *Farie* (13 App. Cas. 657). It contains, I think, a remarkably clear and accurate exposition of the scope and effect of the provisions of the Waterworks and Railways Clauses Acts concerning mines and minerals. "The relation," says Lord Watson, "which they establish between seller and purchaser in regard to all minerals which may be held to be excepted appears to me to be, as Lord Westbury said in *Great Western Railway Co.* v. *Bennett*, L. Rep. 2 (H.L.) 27), clearly defined, useful to the railway company or waterworks undertakers, and at the same time fair and just to the mine-owner. The latter, who is forced to part with the surface of his land and all uses for which it is available, is not compelled to sell his minerals, whilst he is not in a position to ascertain their marketable value or the impediments that might be occasioned to the convenient working of his mineral field by his parting with a strip that intersects it. On the other hand, those who deprive him of the right to a portion of the surface and its uses by compulsory purchase enjoy the benefit of subjacent and adjacent support to their works without payment so long as the minerals below or adjoining these works remain undisturbed; but it is upon the condition that if they desire such support to be continued they must make full compensation for value and intersectional damage, whenever the minerals required for that purpose are approached in working and would in due course be wrought out." So Lord Watson's opinion certainly was that if the undertakers require the use in perpetuity of part of the mine for the support of their works they must make compensation, and the compensation must be the value of the minerals left unworked. The same view was expressed in *Smith* v. *Great Western Railway Company*, 3 App. Cas. 165). That was a case where the notice to the railway company had been given by a lessee. "It is to be observed," said Lord Penzance, "that the directors are not only to arrange with the lessee, but if he is a person who is entitled to take all the coal, the compensation for preventing him from taking the coal must be the full value of the coal left. . . . The full value of the coal, and nothing less than the full value of the coal, deducting of course the cost of getting it, must be the measure of the compensation which would be due to the lessee." The same view is to found in several other cases. For intance, Lord Westbury in *Great Western Railway Company* v. *Bennett* (*ubi sup.*) and Lord Herschell in *Midland Railway Company* v. *Robinson*, 15 App. Cas. 19), both speak of the consequence of a counter-notice by the railway company as a "purchase" of the minerals comprised in the counter-notice. Having regard to the point which was raised and decided in *Bwllfa Colliery Company* v. *Pontypridd Waterworks Company* (1903) A. C. 426), the word "purchase" may not perhaps be the most accurate expression that could be applied to the transaction, but at least it shows beyond the possibility of doubt that the understanding of those two noble and learned Lords was that the coal required to be left unworked was to be bought and paid for in full. Now, when the language of the enactment is tolerably plain, and the views expressed in this House have been uniformly consistent with the ordinary meaning of the language used, I have some difficulty in understanding the judgment of the learned judges of the Court of Appeal. They seem to have ignored section 78 altogether, and to have treated the case as if it fell under section 81. Section 81 does provide for compensation for damage "by reason of the continuous working of the mines being interrupted." But the compensation which is provided there is given for what Lord Watson calls "intersectional damage." As the enactment says, it is meant to cover "additional" losses. It is to be in addition to, not in substitution for, the compensation to be provided by section 78. Of course, although some things are clear, there are difficulties in the construction of these sections. It is clear that the only person who can initiate proceedings by giving notice under section 78 is the person actually working the mine, whether he be owner, lessee, or occupier. And he can only give notice when he is approaching the protected area and is in a position to get the minerals within it. When the company gave their counter-notice defining the minerals which they require to be left unworked, and signify their willingness to make compensation, further working is prohibited, and the obligation on the part of the railway company to make compensation arises. But then the only person who can give the notice may have merely a temporary or precarious interest. What is to happen in that case? And how is the compensation to be dealt with? But these difficulties are, I think, more apparent than real, and would probably disappear in practice. There is no difficulty in the present case. All persons interested are before the Court. There is no controversy between lessor and lessee. The lessee says: "I am in a position to work out the whole of the coal within the protected area, and I am entitled to do so." The lessor says: "That is quite true, but I must have my royalty." There can be no

dispute about the lessor's claim, nor can there, I think, be any doubt that the lessee is entitled to be paid the whole value of his interest in the coal which the railway company require to be appropriated in perpetuity as and for a support for their works. Then it was said: "If there is be an embargo on working and the lessee is to be paid the value of the coal left unworked, he will be free to use his appliances and machinery in some other part of the mine comprised in his lease, and so he will get what Vaughan Williams, L.J., calls a 'windfall,' and the position of the reversioner or those who may be his successors will, or may be, altered too." Well, it may be so. But what have the railway company to do with that? They prevent the lessee from working. They are entitled to do so on signifying their willingness to make compensation. It cannot surely be any concern of theirs how their action, which is perfectly legitimate, affects the interests of others. If anybody is aggrieved he has or may have his remedy, but it will not be against the railway company. They are secure. Whatever comes of it they will be none the worse. The conclusion at which the Court of Appeal has arrived seems to me to lead to results both unjust and inconvenient. As Vaughan Williams, L.J. says, one result is that the railway company "get the user of the reserved pillar of coal for practically nothing." Surely that is unjust. And it must be highly inconvenient on a question of compensation to permit the company to embark on an inquiry as to how the lessee can best mitigate the loss sustained by the embargo on his operations. The railway company have no right to a general inspection of the plans of his workings. They have no right to manage his business for him or to direct his operations. Their simple duty is to pay compensation for the use of the support which they require. And in this case there is no dispute or question as to the parties to whom the compensation is payable. I am, therefore, of opinion that the appeal must be allowed, and the judgment of Bigham, J., restored, with costs both here and below.

LORD JAMES OF HEREFORD—As the Lord Chancellor has stated the formal matters out of which this case has risen I do not propose to repeat them. It is found as a fact in the special case upon which these proceedings are based that if this notice had not been given and obeyed the coal in question would have been worked by the coal company in due course from the 31st December 1903, and thereby a profit of £730 would have been made, and the lessor would have received as rent a sum of £155. In answer to the claim for these two sums the railway company rely upon the facts stated in the special case. In effect this answer is that the coal company had other coal the subject of their lease which they could have worked instead of the coal which they were forbidden by the notice to work, which workable coal would last until the end of their lease in 1907; that the entire expense of working such coal, beyond that of working the notice coal, was £100; and that this was the only compensation to which the appellants were entitled. The question for determination is therefore clearly defined. Are the lessors and lessees entitled under the terms of section 78 of the Railways Clauses Act to the profit on the coal which they were prevented from working, or are they only entitled to be compensated for the increased cost of working the more distant coal? The words of the section are: "If the company be willing to make compensation for such mines (the subject of the notice), the owner shall not work or get the same." The notice not to work was given under this 78th clause, and was intended as an offer to bear the liability created by it. Now it is said by Bigham, J.: What is the railway company to pay for it? It is to pay "for such mines"—that is to say, in this case for the coal which it required to be left unworked. The railway required the support of certain coal, and in justice there seems to be no reason why the actual value of such support should not be paid for. The mineowners are to be paid the net value of the coal which they are precluded from working, and I can find nothing in the statute to show that if substituted coal can be worked that coal upon which the railway company has laid an embargo, and so appropriated, shall not be paid for. Such, expressed in very plain and forcible language, is the judgment of Bigham, J. The Court of Appeal, however, throw upon the coalowners the duty of looking round in order to find some other workings which should compensate them for the loss sustained through obeying the notice of the railway company. I find nothing in the words of section 78 to justify this judgment, and, as I think that the view of Bigham, J., is correct, I submit that the decision of the Court of Appeal should be reversed.

LORD ATKINSON—No question was raised in this case as to the *bona fide* intention of the owner to work by his lessee the minerals for which compensation is claimed. Under the provisions of section 78 of the Railways Clauses Act 1845 in a case such as this, compensation is to be paid for the mines. It is quite true, as was insisted upon by counsel on behalf of the company, that there has not been here any sale or transfer of any property or of any right or interest in it; but the minerals of the owners have been dedicated, as it were, to the use of the company. The only purpose which they can subserve while the railway continues to exist is to support the superincumbent soil of the company. And the owner of the minerals, or of any interest in them, will be as effectually deprived of all use, benefit or enjoyment of them as if they had been destroyed or removed and disposed of. I do not think that any appreciable deduction can be made from the sum which the company are bound to pay as compensation by reason of the remote contingency that should the railway cease to

exist the owner's right to work and win these minerals will revive. This result has been brought about not by a tortious act, whether wilful or negligent, but by the legitimate exercise by the railway company of a right conferred upon them by statute. On what principle, then, is the compensation to be paid by the railway company? If the minerals had not been leased, and had been removed innocently—that is to say, removed without the commission of any tortious act—the owner would have been entitled to obtain as compensation the value of these minerals *in situ*. If, as in this case, there be no physical difficulty in the way which would render the working, winning, and raising of them not reasonably practicable, then a fair test of that value would be the price which the minerals would fetch as and when won and raised, less the cost of working the mine, winning and raising them. Now, the principle upon which an owner is to be compensated when his property is thus innocently destroyed is laid down by Lord Hatherley in *Livingstone* v. *Rawyards Coal Company* (5 App. Cas. 25) in the following words—"Those principles are that the owner shall be repossessed as far as possible of that which was his property, and that in respect of that which was destroyed, or removed, or sold, or disposed of, and cannot therefore be restored *in specie*, there shall be such compensation made to him as will in fairness 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 allowance for all these outlays which he would have been obliged to make if he had been entering into a contract for that being done which has by misfortune or inadvertence on both sides, though by no fault, been done." There has been no outlay here by the company such as is adverted to in this passage. There was no physical difficulty in working the mine such as existed in that case, and therefore it appears to me to be clear, on the authority of *Smith* v. *Great Western Railway Company* (3 App. Cas. 165), and *Bwllfa Colliery Company* v. *Pontypridd Waterworks Company* (1903), A.C. 426, that if no lease had been executed, the contingency of the railway ceasing to exist being negligible, the owner would have been entitled to receive as compensation the full value of the minerals *in situ*. This sum the railway company would in my opinion be bound to pay. I cannot follow the reasoning by which it is sought to establish that the company should pay a smaller or a different sum because the proprietor's rights had been split up as it were, and an estate or interest in the property created by him in another. Though no doubt it may in some cases be a matter of some difficulty to apportion between several persons interested the sum to be paid by the company as compensation for the property, of the benefit and enjoyment of which they have all been deprived, I think that in this case no such difficulty exists. If the lessee had continued to win and raise and sell this coal it is found that it would have made, after deducting its royalty and cost, £730. Taking the test which I have mentioned, the value of the coals *in situ* was therefore £730 plus the royalty—that is, £855 in all—and I think that the company must pay that value. It would seem to me that a fair way of dividing the value of the coal *in situ* between the lessor and the lessee is to give to the lessor the royalty to which he would have been entitled had this coal been won and raised and sold, and to the lessee, who was entitled to win and raise it, the balance of this sum of £855, namely, £730. The lessee has worked and won coal in another part of the mine included in his lease, coal which it is found that he could not have won had he continued to work the coal put under embargo. He has paid the royalty on the coal so won in the new area, and it is quite true that if at the termination of the lease the price of coals should be such that the lessor could get for the coal in the new area, which but for the notice from the railway company would have been then unworked, a higher royalty than that reserved by this lease, the lessor would have been damnified to the extent of the difference between the royalties. But if the price of coal should have then so fallen that the possible royalty would have been less than that actually received, he would in the remote result have gained by the action of the railway company in diverting the activities of the lessee from the old to the new area. It is difficult to see how that affects the railway company. They are bound to pay to the owners the value of the property which they take. The proportions in which the owners may be disposed to divide the sum so paid between themselves is a matter with which they have no concern. Again, it is urged that since it has been found that the lessee could not have worked the two areas, the old and the new, and as it only cost him £100 more to work the new area than it would have cost him to work the old one, he is to be paid nothing more than this £100. This contention assumes a right in the company to take away or render useless a man's property, which he may be engaged in working at a profit, and to pay him nothing for it because he may happen to have other property lying waste on which, if he expended the labour and capital employed on that taken, he would realise an equal profit if he should not be able to work or cultivate both at the same time. I think therefore that the true measure of compensation is that set forth in par. 17 of the special case, and that the question submitted by the arbitrator should be answered to this effect, and the appeal be allowed, and the judgment of Bigham, J., restored.

Appeal sustained.

Counsel for the Appellants—C. A. Russell, K.C. — MacSwinney. Solicitors — Rawle, Johnstone, Gregory, Rowcliffe and Rowcliffe.

Counsel for the Respondents — Cripps, K.C.—Upjohn, K.C.—W. C. Ryde. Solicitor—R. F. Dunnell.