

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, 32, 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,

J., reported (1896) 1 K.B. 318, upon a case stated by the Commissioners of Inland Revenue. The question was whether a certain instrument, one of a series numbered consecutively, was a "promissory note" or a "marketable security." The Commissioners held that it was the latter. WALTON, J., decided that it was only a "promissory note," but the Court of Appeal, restoring the order of the Commissioners, held that it was a "marketable security," and liable therefore to a higher rate of duty. The instrument was described on its face as a "Four and one-half per cent. Gold Coupon Treasury Note," was dated the 1st June 1903, and was issued by the Government of the United States of Mexico in pursuance of a Law of Congress of the 15th May 1903. The following are the more material parts of the instrument:—"United States of Mexico acknowledge themselves indebted and promise to pay to bearer on the 1st day of June 1905 one thousand dollars (1000 dollars) in gold coin of the United States of America, and also to pay interest on said principal sum in like gold coin at the rate of four and one-half per cent. per annum from the 1st day of June 1903, semi-annually on the 1st days of December and June in each year, upon surrender of the annexed coupons as they respectively mature. Both as to principal and interest this Treasury note shall be for ever exempt from any taxes or assessments which may at present exist or be hereafter imposed by the United States of Mexico. The principal and interest of this Treasury note are payable in the city of New York at the office of Speyer & Co., or, at the option of the holder, in London, England, at the office of Speyer Brothers, in sterling, at the fixed rate of 4.85 dollars to the pound sterling." The note was also stated to be redeemable at par and accrued interest at the option of the United States of Mexico at any time before maturity on sixty days' notice to be given in certain newspapers in New York and London. The coupons attached to the note provided that "on the 1st day 19 , unless the above-mentioned Treasury note shall be sooner redeemed, and on the surrender of this coupon, the United States of Mexico will pay to bearer in the city of New York, U.S.A., at the office of Speyer & Co., twenty-two dollars and fifty cents in gold coin of the United States of America, or in London, at the office of Speyer Brothers, £4, 12s. 9d. sterling, being six months' interest then due on said Treasury note."

The Stamp Act 1891 enacts—Section 33—" (1) For the purposes of this Act the expression 'promissory note' includes any document or writing (except a bank note) containing a promise to pay any sum of money. (2) A note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, is to be deemed a promissory note for that sum of money." Section 82—" (1) Marketable securities for the purpose of the charge of duty thereon include . . . (b) a

marketable security by or on behalf of any foreign State or Government, or foreign or colonial municipal body, corporation, or company (hereinafter called a foreign security) bearing date or signed after the 3rd of June 1862 . . . (2) which, though originally issued out of the United Kingdom, has been, after the 6th of August 1885, or is offered for subscription and given or delivered to a subscriber in the United Kingdom; (3) which, the interest thereon being payable in the United Kingdom, is assigned, transferred, or in any manner negotiated in the United Kingdom. . . ." Section 122—" . . . The expression 'marketable security' means a security of such a description as to be capable of being sold in any stock market in the United Kingdom."

LORD CHANCELLOR (LOREBURN)—I think that the appeal in this case fails. We are told, quite accurately I have no doubt, that the case is one of great importance, but I do not think that it is either a long or a difficult case. The question is under what description a particular document is to be stamped. Counsel for the appellants say that the document is a promissory note within the Act of 1891, and I think that it does fall within the definition of a promissory note in that Act. They also say that it is so in a commercial sense within the meaning of the Bills of Exchange Act. I do not desire to express either assent to or dissent from that proposition, because I do not think that it really signifies in the decision of this case. Then comes the question, Is this document also a "marketable security" within the meaning of the Act? That was so found by the Commissioners and by Walton, J., after hearing evidence which has not been laid before your Lordships. I think that it seems to have been admitted in the Court of Appeal that it was a marketable security, and in one sense it has not been disputed here. I think that it is a marketable security within the meaning of the Stamp Act 1891. Accordingly, if that be so, the document will fall within the description both of a promissory note and of a marketable security. Mr Danckwerts, however, says further, that according to authority a discrimination must be made between a marketable security and a promissory note, and that the test whether a document is within one class or the other is this—Is it something more than a promissory note? Now in my opinion this document is something more than a promissory note. There is a greater excess over a promissory note, so to speak, in this case than there was in the case of the *British India Steam Navigation Company v. Commissioners of Inland Revenue*, which has been cited by your Lordships. But I desire to say that in my view the document falls within both descriptions, and where a document is by its statutory description chargeable under the Stamp Act as a promissory note, and also as a marketable security, I think that it is accurate to say that the Crown has a choice whether it will charge it under the one or the other description. Perhaps

it might be put otherwise, and it would be sufficient to say that by virtue of the Act the Crown is entitled to charge the higher rate of stamp but that it cannot charge both rates upon the same document; and if the Crown does claim a right to have the document stamped at the higher rate within one part of the Act, it is no answer to such claim to say that there is another part of the Act under which the same document might be stamped at a lower rate. For that reason, in my opinion, this appeal fails and ought to be dismissed with costs.

LORD MACNAGHTEN—I entirely agree.

LORD ROBERTSON—If a plain man conversant with business were asked to describe this instrument I think that he would call it a “foreign government security.” It is found as a matter of fact that the thing is marketable, it is therefore a “marketable security.” Now, it is true that from the point of view of legal analysis it contains a promise to pay, and is therefore in legal phraseology a promissory note. The result is that the instrument falls within both of the categories in this taxing Act. There is nothing legally impossible in this; it often occurs; and the result is that it may be assessed under either class at the option of the Government.

LORD ATKINSON—I concur.

Appeal dismissed.

Counsel for the Appellants—Danckwerts, K.C.—Vaughan Hawkins. Agents—Bircham & Company, Solicitors.

Counsel for the Respondents—The Solicitor-General (Sir W. Robson, K.C.)—Sir R. Finlay, K.C.—W. Finlay. Agent—Sir F. C. Gore, Solicitor of Inland Revenue.

HOUSE OF LORDS.

Tuesday, February 4.

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

GREAT WESTERN RAILWAY COMPANY *v.* PHILLIPS & COMPANY, LIMITED.

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

Railway — Regulation — Demurrage of Trucks — Disputes as to Demurrage to be Settled by Arbitration — Hire of Trucks in Place of those Delayed — Arbitration or Action.

A Railway Act, after providing that when merchandise is conveyed in trucks not belonging to the company the trader shall be entitled to recover from the company a reasonable sum by

way of demurrage for any detention of his trucks beyond a reasonable time, enacted that “any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party.”

A claim by a trader for damages sustained by him in hiring a truck in the place of one delayed by the railway company held to be in respect of a “difference arising under this section,” and to be accordingly a question for an arbitrator and not for a court of law.

Appeal from a judgment of the Court of Appeal (VAUGHAN WILLIAMS and BUCKLEY, L.J.J., MOULTON, L.J., dissenting), reported (1907) 2 K.B. 664, affirming a judgment of the King’s Bench Division (LORD ALVERSTONE, C.J., DARLING and CHANNELL, J.J.), reported (1906) 2 K.B. 426, making absolute a rule nisi for a *mandamus* to the County Court Judge of the Marylebone County Court to hear and determine the matter of the action.

The facts of the case and the section of the statute under consideration sufficiently appear in their Lordships’ judgments, *infra*.

LORD CHANCELLOR (LOREBURN)—In this case there was a difference of opinion in the Court of Appeal. The Great Western Railway Act 1891 by its sixth section makes provision for the case of detention by the company of trucks belonging to traders as follows:—“Where merchandise is conveyed in trucks not belonging to the company the trader shall be entitled to recover from the company a reasonable sum by way of demurrage for any detention of his trucks beyond a reasonable period either by the company or any other company over whose railway the trucks have been conveyed under a through rate or contract. Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party”; and the question before your Lordships is whether a difference that has arisen between the company and Messrs Phillips & Company, Limited, comes within that section. If so, admittedly the jurisdiction of the County Court is ousted. If, on the other hand, the difference is not within the section, then this action, commenced in the County Court, may proceed. The action was brought in the Marylebone County Court to recover the sum of 8s. 8d. “for damages occasioned to plaintiffs (Messrs Phillips & Company, Limited) by undue detention of their waggon and cost of hire of other waggon in place thereof.” In fact, Messrs Phillips had sent on the company’s line a truck of their own which was delayed for a few days on its way to Wales, and say that they had to pay 8s. 8d. for the hire of another truck to take its place. This sum the Railway Company refused to pay, and offered 6d. a day instead, which represented the earning power of the truck per day less depreciation. Thus the question really narrows itself to this—Does the Act mean that an arbitrator shall