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*Mar. 21,

*Dec. 14.

PHILIP R. PALMER (DEFENDANT).....APPELLANT;

AND

JANE ALEXANDER WALLBRIDGE (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mining lease—Covenants—Liability to pay rent—Quantity and quality of ore found—Right of lessee to terminate lease.

In a lease of mining lands the reddendum was as follows: "Yielding and paying therefor unto the party of the first part one dollar per gross ton of twenty-two hundred and forty pounds of the said iron stone or ore for every ton mined and raised from the said lands and mine payable quarterly on the first days of March, June, September and December in each year."

The lease contained, also, the following covenants by the lessee:—

"The parties of the second part for themselves, their executors, &c., covenant and agree to and with the party of the first part, her heirs, &c., that they will dig up and mine and carry away in each and every year during the said term a quantity of not less than two thousand tons of such stone or iron ore for the first year, and a quantity of not less than five thousand tons a year in every subsequent year of the said term, and that they will pay quarterly the sum of one dollar per ton as aforesaid for the quantity agreed to be taken during each year for the term aforesaid."

"And the said parties of the second part covenant and agree to and with the party of the first part that they will pay the said quarterly rent or royalty in each year, and if the same shall then exceed the quantity actually taken, such excess shall be applied towards payment of the first quarter thereafter, in which more than the said quantity shall be taken, and that they will protect such openings as they shall make so as to insure the same against accident, and will indemnify the party of the first part in the event of the same happening and against all costs of prosecution and defence thereof."

There was a provision that the lessor should be at liberty to terminate the lease in case of non-payment of rent for a certain period,

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*PRESENT—Sir W. J. Ritchie C.J., and Strong, Fournier, Taschereau and Gwynne JJ.

(Mr. Justice Henry heard the argument in this case but died before judgment was delivered.)

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and if the iron ore or iron stone should be exhausted, and not to be found or obtained by proper and reasonable effort in paying quantities, then the lessee should be at liberty to determine the lease.

Held, affirming the judgment of the court below, Ritchie C.J. and Fournier J. dissenting, that this lease contained an absolute covenant by the lessee to pay the rent in any event, and not having terminated the lease under the above proviso he was not relieved from such payment in consequence of ore not being found in paying quantities.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment for the defendants on the trial and ordering judgment to be entered for the plaintiff.

This was an action for royalty or rent under a mining lease in which the plaintiff Jane A. Wallbridge was lessor and the defendant Philip Palmer and others were lessees. The habendum of the lease and covenants affecting this case are as follows:—

"To have and to hold the said close piece or parcel of land and also the said mines unto the said lessees, their executors, administrators and assigns, from the first day of December instant, for and during and unto the full end and term of 10 years thence next ensuing and fully to be complete and ended, yielding and paying therefor unto the party of the first part $1 per gross ton of 2,240 pounds of the said iron stone or ore for every ton mined and raised from the said land and mine, payable quarterly on the first day of March, June, September and December in each year.

"The parties of the second part, for themselves, their heirs, executors, administrators, or assigns, covenant and agree to and with the party of the first part, her heirs, executors, administrators and assigns, that they will dig up and mine and carry away in each and every year during the said term a quantity not less than 2,000 tons of such stone or iron ore for the first year, and a

(1) 14 Ont. App. R. 460 sub nomine *Wallbridge* v. *Gaugot*.

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quantity not less than 5,000 tons a year in every subsequent year of the said term, and that they will pay quarterly the sum of $1 per ton as aforesaid for the quantity agreed to be taken during each year for the term aforesaid.

"And the said parties of the second part covenant and agree to and with the party of the first part that they will pay the said quarter's rent or royalty upon the said quantity quarterly in each year, and if the same shall then exceed the quantity actually taken, such excess shall be applied towards payment of the first quarter thereafter in which more than the said quantity shall be taken."

The lease also contained the following provisoes:—

"Provided, that if the rent or royalty hereby reserved shall be behind in arrear or unpaid for two quarters, then the lessor may at her election then or at any time before actual payment declare the lease void and the term hereby created at an end, and the term shall cease and be determined.

"Provided also, that if the iron ore or ironstone shall be exhausted and not to be found or obtained there by proper and reasonable effort in paying quantities, then the parties of the second part shall be at liberty to determine this lease in the manner provided therefor."

On the trial before Mr. Justice Ferguson there was conflicting evidence as to the quantity and character of the ore mined from the land, and the learned judge found, as a fact, that it was not found, by reasonable and proper effort, in paying quantities; he therefore held that the defendant was relieved from his liability to pay rent under the lease and gave judgment in his favor. The Court of Appeal reversed this judgment, holding that there was a liability on the lessee to pay rent in any event. From the latter decision the defendant appealed to this court.

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S. H. Blake Q.C. and *W. Cassels* Q.C. for the appellants, argued that as the subject matter never existed the contract never took effect and cited Bainbridge on Mines (1); Rogers on Mines and Minerals (2); *Griffiths* v. *Rigby* (3); *Clifford* v. *Watts* (4); *Earl of Beauchamp* v. *Winn* (5); *Daniell* v. *Sinclair* (6).

Robinson Q.C. and *Dickson* Q.C. for the respondents. The lessees had a right to terminate the lease if ore was not found. They could only do so by notice in writing to the lessor which was not given until after this rent accrued.

The lessor was kept out of possession of the land and is entitled to the rent.

SIR W. J. RITCHIE C.J.—By the terms of the lease the lessee is to yield and pay $1 per gross ton of iron stone or ore for every ton mined and raised.

The covenant is that the lessee shall dig up and mine in each and every year a quantity not less than 2000 tons for the first year and not less than 5000 tons in every subsequent year, and will pay quarterly $1 per ton for the quantity agreed to be taken during each year.

And further, that they will pay said quarter's rent or royalty upon said quantity quarterly in each year, and if the same shall exceed the quantity actually taken such excess shall be applied towards the payment of the first quarter thereafter in which more than the said quantity shall be taken.

With this proviso, that if the rent or royalty shall be unpaid for two years the lessor may at her election then, or before actual payment, declare the lease void and the same shall cease and be determined.

And also provided, that if the iron ore, or iron stone, shall be exhausted, and not to be found or obtained by

(1) Pp. 492, 495.
(2) Pp. 394, 402, 405.
(3) 1 H. & N. 237.
(4) L. R. 5 C. P. 577.
(5) L. R. 6 H. L. 223.
(6) 6 App. Cas. 181.

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proper and reasonable efforts in paying quantities, then the lessee shall be at liberty to determine this lease.

I think that the right to recover the rent was dependent on the existence of ore on the premises which could be mined or raised by the defendant, and that the defendants did not agree to pay a dead or sleeping rent. The learned judge who tried this case says that "there is no doubt that at the time of the execution of the lease all parties to it believed that there was a valuable mine on the premises in question." This was not denied by any one. At page 351 the learned judge says :—

> All I desire to say is, that after having examined and considered it as well as all the evidence respecting the assays of the ore made by professional men, and as to the bearing of such assays as evidence of the practical fact from a mining point of view, I am as I was at the close of the evidence clearly of the opinion that the defendants (even assuming that the burden of proof was upon them throughout in respect of this subject) have succeeded in establishing as a fact that the iron or iron stone became exhausted and was not to be found or obtained by proper and reasonable efforts in paying quanties. The pocket south of the shaft was exhausted and I think that ore in paying quantities was not found in the shaft, that is, although there were pieces of fairly good ore in the shaft and drifts these were so intermixed with rock and lean and poor ore that the real fact for all practical or mining purposes is reasonably and accurately stated by saying that iron ore or iron stone was not to be found or obtained there by proper and reasonable efforts in paying quantities; and upon the evidence I have no hesitation in finding and I do find that the iron ore and iron became exhausted and not to be found or obtained by proper and reasonable efforts in paying quantities.

Here, then, both parties assumed, in good faith, the existence of a valuable mine on the premises and must, I think, be assumed to have contracted, in good faith, on the assumption of its existence; and it seems to me that when the act or thing contracted to be done by either party cannot be performed by reason of the non-existence of the subject matter assumed to be in question the contract in respect to it must be considered to be at an end and not enforceable.

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A dead rent may be reserved in respect of a license to enter and search, and in such case is payable whether there is ore or not, because there is nothing to exempt the defendant from paying the dead rent; but in this case the parties have not chosen to agree on a dead rent payable at all events, but have made the rent dependent on the ore raised; they only undertook to pay so much on every ton raised; if no ore they could have nothing to pay, because there was no ore to raise. Therefore, in this case the defendants have not got what they contracted for, and for which they agreed to pay rent or royalty. It is the iron ore which is the subject of the grant, on the raising of which the rent was reserved. How, then, can there be any rent payable when it is ascertained there was no such ore there? The covenant to pay rent is, in my opinion, only applicable if the ore is there, and does not amount to a warranty on the part of the lessee that the ore was there, or to an engagement to pay the royalty if there was none, in which event there was nothing on which the rent could attach. The intention and meaning of the covenant, in my opinion, was that the plaintiff should receive the royalty on the ore if it was found on the premises, the covenant being then based on the assumption of both parties that the ore was there; if no ore then the covenant became inapplicable. There is, it is true, a provision that either party could put an end to the lease, the one if the rent reserved should be in arrear, the other, if the ore should be exhausted and not to be found or obtained, by proper and reasonable efforts, in paying quantities, but I cannot see that this interfered with the right of the lessees to resist payment on the ground that the rent agreed to be paid never accrued due, by reason of the rent being payable only for every ton mined and raised, and no tons could be raised because none existed to be mined and raised.

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It seems to me that the quarterly payments, at the rate of $1 per ton for every ton mined and raised for the minimum quantity agreed to be raised each year, and the provision that if the fixed quarterly payments should exceed the quantity actually taken out from the mine, the excess should be applied in payment of the next quarter in which more than the quantity is taken, is based on the assumption that the mine will, at any rate, produce the minimum quantity, that the ore is there and can be mined and raised but for the default of the lessees, and does not, in my opinion, justify the conclusion that it was thereby intended that there should be a fixed payment of the stipulated sum per quarter whether there was ore on the premises or not.

I think the payment made before it was established that the ore did not exist, must be held to have been made conditionally on the contingency that ore would be found, and no ore having been found they amounted to payments made under a mistake of fact, with the exception of the payment of $937.32, paid voluntarily after knowledge of the non-existence of the ore, and of the sum of $306, the amount of royalty on the ore actually taken by the defendant.

I may say that I find it difficult, and even impossible, to distinguish this case from the case of *Clifford* v. *Watts* (1), in which Willes J. says:—

> The indenture also contains a covenant that Watts shall dig and raise from the land an aggregate amount of not less than 1000 tons, or more than 2000 tons, of pipe or potter's clay, the defendant was to pay a royalty of 2s. 6d per ton. The breach assigned on that covenant is that with which we have to deal on this occasion; it is that the defendant has not dug an aggregate amount of not less than 1000 tons of pipe and potter's clay in each year of the demise. The plea, the validity of which is now in question is, that the defendant could not dig 1000 tons of clay each year according to his covenant, because there was not at the time of the demise nor since existing

(1) L. R. 5 C. P. 577.

under the lands 1000 tons of such clay, that the performance of the covenant had always been impossible, and that such impossibility was unknown to the defendant at the time, and he had no reasonable means of knowing or ascertaining the same.

* * *

The second, and with reference to this case the most important consideration, appears to me to arise from the question whether the defendant has by this covenant contracted to perform an impossibility, or whether the true meaning of the covenant construing it by the rest of the deed, is, not that the defendant undertakes to get the stipulated quantity of clay whether it be there or not, or to pay the stipluated tonnage as if the clay had been raised, but rather dealing with it as subsidiary to the main object of the demise, that he will raise such pipe or potter's clay as may be found under the land, at the rate and price specified. If the latter be the true construction of the covenant, it is not an independent covenant to do the thing contracted for, whether possible or not, but only a stipulation as to the rate at which that is to be done which both parties at the time contemplated. According to that construction of the covenant, the plea is a good defence to the second breach. And this is the view to which, after the best consideration I am able to bring to the case and after having heard the very learned arguments on both sides, my opinion inclines.

I think the appeal should be allowed and the judgment of Ferguson J. in the Chancery Division restored.

STRONG J.—For a statement of the facts of this case I refer to the very full and carefully prepared judgment of Mr. Justice Ferguson, before whom the action was tried in the Chancery Division. The learned judge found in the appellant's favor as to the principal questions of facts involved in the issues raised by the pleadings, that as to whether or not the premises comprised in the lease contained ore in paying quantities, the finding in question being thus distinctly stated in the judge's own words:—

I am, as I was at the close of the evidence, clearly of the opinion that the defendants (even assuming that the burden of proof was upon them throughout in respect of this subject) have succeeded in establishing as a fact that the iron or iron-stone became exhausted and was not to be found or obtained, by proper and reasonable efforts, in paying quantities.

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This question, therefore, being purely one of fact, and the learned judge having rightly held that the onus was on the appellant to establish the affirmative of it, we must, of course, regard this finding as conclusive, and confine ourselves to the question what effect the fact thus established ought to have on the rights of the parties, having regard to the proper legal construction of the lease. This question of the construction of the lease is, indeed, the principal difficulty in the case, and when that is solved a conclusion as to the proper determination of the appeal is easily reached.

Then, to consider the several clauses and provisions material to be considered, as bearing on the liability of the lessees to perform the covenants to pay the rent or royalty reserved in the event which has been established, that with the exception of some 306 tons of ore extracted the land demised was wholly barren and unproductive of ore in paying quantities, we find first in order the reddendum which is in the following words:—

Yielding and paying therefor unto the party of the first part, one dollar per gross ton of twenty-two hundred and forty pounds of the said iron stone or ore for every ton mined and raised from the said land and mine, payable quarterly on the first days of March, June, September and December in each year.

It is to be remarked of this reddendum that it is, by itself, only a reservation of a royalty and not of a dead or sleeping rent, *i.e.*, a rent payable absolutely. It is, however, followed by a covenant thus expressed:—

The parties of the second part * * * covenant and agree to and with the party of the first part, * * * that they will dig up and mine and carry away in each and every year during the said term a quantity not less than two thousand tons of such stone or iron ore for the first year and a quantity not less than five thousand tons a year in every subsequent year of the said term and that they will pay quarterly the sum of one dollar per ton as aforesaid for the quantity agreed to be taken during each year for the term aforesaid.

It appears to me that it is upon the construction of

this covenant, read in the light of that which immediately follows it, that the whole question depends. If the lessees had merely covenanted to dig up 2000 tons of ore during the first year, and 5000 in every subsequent year of the term, this case would have been undistinguishable from *Clifford* v. *Watts* (1); but it will be observed that the covenant is not so restricted, for after the agreement to dig the stipulated quantity we find, expressed in absolute terms, the following additional agreement:—

> And that they will pay quarterly the sum of one dollar per ton as aforesaid for the quantity agreed to be taken during each year for the term aforesaid,

thus making the lessees liable to pay a sum equivalent to the amount of the tonnage on the prescribed quantity of ore, at the stipulated rate, whether it should be taken or not. And then, as though it had been intended to remove any possible ambiguity which might be supposed to arise upon the words "agreed to be taken," we find the following covenant coming immediately after that just stated:—

> And the said parties of the second party covenant and agree to and with the party of the first part that they will pay the said quarterly rent or royalty in each year, and if the same shall then exceed the quantity actually taken, such excess shall be applied towards payment of the first quarter thereafter in which more than the said quantity shall be taken,

a covenant which, beyond all doubt or question, contains an absolute undertaking to pay the rent or royalty in each year without reference to the quantity of ore actually extracted. This provision conspicuously and decisively distinguishes this case from Lord *Clifford* v. *Watts* (1), where Willes J. (2) expressly remarks on there being no covenant "to pay the stipulated tonnage as if the clay had been raised," in such a way as clearly to imply that if there had been

(1) L. R. 5 C. P. 577. (2) At p. 583.

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such a covenant similar to that now before us, it would have amounted to a covenant to pay a dead rent.

I construe these covenants which have just been set forth as if they had been expressed in the form of absolute covenants to pay a dead rent, or in other words, to pay a gross rental of $2000 for the first year and $5000 for each subsequent year of the term.

Such then being the *primâ facie* construction of the covenants for the payment of rent standing alone, the next question which arises is what effect, on that construction, is to be attributed to the clause that if the rent shall exceed the quantity actually taken the excess in payment shall be applied to any excess in quantity the first quarter thereafter in which more than the stipulated quantity should be taken. This provision merely enables the lessees to recoup themselves by setting off the excess of their payments over the tonnage of the ore excavated in any year against their liability for ore excavated in excess (if any) of the prescribed quantity in succeeding quarters. Why should such a provision have the effect of cutting down an absolute covenant to pay rent to one dependent on a condition that the land should contain ore in paying quantities, words of qualification not to be found in the covenant itself? Surely the clause in question should not be held to have such a violent operation unless it can be shown that it is so entirely inconsistent with the preceding covenants to pay a fixed dead rent that the two cannot subsist together; then, so far from this being the case, the two are quite consistent if we consider the proviso as having been intended for the very reasonable and just purpose of enabling the lessees, in the case of there being a sufficiency of ore, to take a ton of ore to recoup themselves for every dollar of royalty which they should happen to pay in advance; in other words, that although the lessees should be bound to

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pay absolutely, and whether they took out ore or not, they should not be compelled to pay twice over, but should be entitled to a quantity of ore in the aggregate equal in value to their aggregate payments, at the stipulated rate of $1 per ton, provided ore was to be found to enable them to do so. I can see no repugnancy nor inconsistency between such a provision and the absolute covenant to pay, nor anything but the most natural consistency and concordance. Then this still leaves the covenant to pay for the stipulated quantities an absolute covenant equivalent to one for the payment of a dead rent.

The only other provision of the lease which can have any bearing on this question is that which enables the lessees to avoid the lease if the iron ore should be exhausted, or it should prove that there was none to be found in paying quantities on the demised premises. It is as follows :—

Provided also, that if the iron ore or iron stone shall be exhausted and not to be found or obtained by proper and reasonable effort in paying quantities, then the party of the second part shall be at liberty to determine this lease.

Taking the covenants already considered to be, as I hold they are, absolute covenants for the payment of a dead rent during each and every year of the term of ten years this power given to the lessees to determine the lease at their option in the event of the failure of the iron ore, or in the case of the unproductiveness of the demised land being ascertained, so far from influencing the construction in such a way as to reduce the clear, absolute terms of the preceding covenants, has precisely the opposite tendency since it shows that the case which has actually happened was in the contemplation of the parties and was provided for by the introduction into the lease of this important proviso enabling the lessees to relieve themselves from liability by putting an end to the term. The inference from

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this is so strong as almost to be irresistible that if, for any cause, they did not think fit to avail themselves of the remedy thus afforded them their liability to pay the rent was intended to continue.

Supposing the lease had contained a covenant, in terms, to pay a rental of $2000 for the first year and $5000 for the subsequent years of the term without any reference to the quantity of ore taken out, it would have been impossible in that case to say that this proviso could, though no minerals were found, have constituted any answer to a claim for rent actually accrued due prior to a determination of the lease by the lessees for the cause mentioned. Then, as I interpret it, the covenant is, in legal effect, the exact equivalent of such an absolute covenant to pay the rental as an ordinary dead rent. The clause enabling the lessees to determine the lease is then, in truth, their only protection from liability to pay in case of failure of the ore, and until they exercised their election, and gave notice of it to the lessor, they are bound by the plain and unequivocal words of the covenants they have entered into.

As to the sufficiency of the notice given by the lessees of their intention to avoid the lease, I agree with the Court of Appeal that we must accept the conclusion of Mr. Justice Ferguson that the evidence establishes a determination of it sufficiently early to afford a defence to the claim for the quarter's rent which accrued due on the 1st of December, 1884, though not for that which was payable on the 1st of September preceding.

The appeal should be dismissed with costs.

FOURNIER J.—I am of opinion that the appeal should be allowed and the judgment of Mr. Justice Ferguson restored.

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Taschereau J.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed for the reasons given by my brother Gwynne.

GWYNNE J.—By an indenture made on the 30th December, 1882, in pursuance of the act respecting short forms of leases, between the plaintiff, therein called the lessor, of the first part, and the defendant and others therein named and called the lessees of the second part, the said party of the first part in consideration of the royalty, rents, and covenants thereinafter mentioned did grant, demise and lease unto the lessees, &c.

(His lordship here read the provisions of the lease.)

At the time of the execution of the lease all parties thereto believed, as the learned judge who tried the case has found, that there was abundance of ore in the demised piece; there was then an iron mine being profitably worked upon a piece of land which was separated by the distance of four perches only from the demised piece, and upon the demised piece there was already a shaft dug which gave indications of the presence of iron ore.

Upon the execution of the lease the lessees proceeded to sink shafts for the purpose of working the mine, and, in the year 1883, they took out about 300 tons of ore which, however, they allege turned out not to be good. They paid the quarterly rents which accrued due under their covenant in the lease up to and including that which fell due on the 1st June, 1884, but they refused to pay any more rent for the reason that, as they allege, and as is now admitted to be the fact, there never was any iron ore on the demised piece in excess of the 300 tons which they had taken out; and in the month of September, 1884, availing themselves of the clause in the lease enabling the lessees to deter-

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mine the lease, they abandoned the premises and gave notice to the lessor that they determined the lease. The plaintiff brought her action in the month of December, 1884, to recover the two quarters rent which she claimed to have accrued due on the first of September and December, 1884, contending that the lease could not be determined by the lessees otherwise than by a deed, and that it was not determined until some time in 1885, when the lessees executed (*ex majori cautelâ*, as they contend) a deed of surrender of the lease to the lessor, which deed the lessor did not produce, a circumstance which drew from the learned judge who tried the case the observation that he could not say what it may have contained; it may possibly have recited the fact that the lessees had determined the lease in September for the reason that the iron ore had been exhausted. The defendant Palmer, in whom the interest of his co-lessees had become vested, defended the plaintiff's action upon the ground and contention that there never was on the demised premises any iron ore whatever other than the 300 tons taken out, and that as the rent is reserved only in respect of iron ore mined and raised, and that as under the circumstances no more could by possibility be raised, the consideration of the lease had wholly failed, and there never accrued due to the plaintiff anything in excess of $1 per ton on the 300 tons, and the defendant therefore counterclaimed for the monies paid in excess of such sum as for monies paid without consideration and under a mistake of fact, namely, as to there being iron ore on the demised premises capable of being taken out. The learned judge who tried the case acceded to this contention, and he dismissed the plaintiff's claim and gave judgment in favor of the defendant on his counterclaim for the amount claimed by him, less the sum of $937.50 which was, as he

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found, voluntarily paid by him on the 3rd of July, 1884, at a time when, as he also found, the defendant was as much aware that the mine had been exhausted as he was when the notice of determination of the lease for that cause was given, which he found to have been some time, but when in particular is not stated, in September, 1884.

On appeal from this judgment the Court of Appeal for Ontario has allowed the rent which accrued due on the 1st September, 1884, viz., $1250 dollars, but has not allowed that claimed to have become due on 1st December for the reason that (in this respect affirming the view taken by the learned judge who tried the case) the lease was effectually determined by the notice to that effect given in September 1884, and that to determine it a deed of surrender was not necessary, but they wholly disallowed the defendant's counter-claim, holding that no part of the monies paid could be recovered back.

The question wholly turns upon the construction of the lease, and it is to be observed, first, that the moving consideration for the execution of the lease by the lessor consists of the royalty and rent thereby reserved and the covenants of the lessees therein contained; secondly, that the habendum is "to have and to hold the said close or parcel of land" (in the lease described) "and also the said mines" and the reddendum therefor is of a money rent issuing not out of the iron ore but out of the said piece of land and also the mines of iron ore therein, payable quarterly on the 1st days of March, June, September and December in each year, the maximum amount of which rent is determinable by the quantity of iron ore mined and raised, but the minimum amount payable in each quarter is expressed to be the fourth part of $2000.00 or $500.00 per quarter in the first year, and the fourth part of $5000.00 or $1250.00 per quarter in each succeeding year.

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Upon the execution of the lease the lessees were entitled to enter upon and enjoy the exclusive possession of the piece of land demised, and to retain such possession during the whole period of ten years or until the lease should be determined by the lessor or by the lessees under the clause in the lease which authorises them respectively to determine the lease; they acquired the right of digging and prospecting for iron ore by sinking shafts to any depth they pleased (provided only it should be done in a proper and skilful manner) in as many parts of the demised piece of land as they pleased, and in such kind of work they might, if they pleased, have been engaged for nine, twelve or any other number of months without raising any ore. Having this privilege it was natural and reasonable that the quarterly rent of not less than $500 in each quarter of the first year and $1250 in each quarter of each subsequent year should be, as in point of fact it was, made payable by the lease. Accordingly the lessees for themselves and each for himself his heirs, &c., covenanted with the lessor to pay such minimum quarterly rents notwithstanding that in any such quarter in which such rent should become payable no ore should be raised, and the only indemnity which the lessees contracted for, and which is provided by the lease for such payments of rent in advance of any ore being raised, is that the amount so paid in excess of any ore raised within the quarter shall be allowed in any quarter in which ore should be raised in excess of the quantity represented by the minimum amount made payable in such quarter, and only as against such excess in quantity so raised. The rent was made payable quarterly, and the intention of the parties is, I think, plainly expressed upon the lease to be, that the quarterly rents of $500 in the first year and of $1250 in each quarter of each succeeding year,

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should be and are made payable whether or not there should be any iron ore raised in any of the quarters upon the determination of which such rents respectively were made payable. Those specific quarterly rents so made payable have all the character of minimum rents covenanted to be paid whether any iron ore should or not be raised in any such quarter. The case of *Bridges* v. *Potts* (1) is the nearest case to the present, and in my opinion the present comes within it. There the royalty agreed upon was a stated sum per ton and it was provided and agreed that:—

If in the 1st and 2nd years the royalties above provided for should not amount to the sum of £500 each year then the lessees shall advance and pay to the lessor for each of the years such sum of money as with the amount of the royalties for that particular year will make up the full sum of £500, if in the third and any subsequent year of the said term the said royalties do not amount to the sum of £1500 each year the lessees shall pay to the lessor such sum as with the royalties will make up the full sum of £1500, and if any sum of money be so advanced to make up the said respective minimum rents in any one year the amount of such advance may be deducted out of the excess of royalties above such minimum rent accruing during any succeeding year.

Now a minimum fixed rent payable either by the year or the quarter may be reserved and made payable absolutely without the use of the words "minimum rent" which were the words used in *Bridges* v. *Potts* (1). In the present case the language is that the lessees covenant

That they will in each and every year during the said term dig up and mine and carry away not less then 2000 tons of such iron ore for the first year and not less than 5000 tons in every subsequent year, and that they will pay quarterly the sum of $1.00 per ton for such quantities and will pay the said quarter's rent or royalty upon the said quantity so agreed to be taken out, quarterly in each year, and if the same shall then exceed the quantity actually taken, such excess shall be applied towards payment of the first quarter thereafter in which more than the said quantity shall be taken.

Now these provisions in the present lease, applying

(1) 17 C. B. N. S. 314.

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the judgment in *Bridges* v. *Potts* (1) to them, are in effect that rent is to be paid quarterly to the amounts mentioned but that the lessees were to have the benefit of rent paid in one quarter in excess of ore raised as or towards payment of any excess in a subsequent quarter of ore raised exceeding the quantity represented by the rent made payable in such quarter. Rent so reserved is clearly, in my opinion, a minimum fixed rent payable quarterly whether any ore may have been raised or not. The covenant to pay it is as much an absolute unqualified covenant as was the covenant in *Jervis* v. *Tomkinson* (2), and the quarterly payments are as much a determined rent absolutely payable so long as the term shall endure, which the lessees can themselves determine, as was the rent in the *Marquis of Bute* v. *Thompson* (3), or that reserved in *Bishop* v. *Goodwin* (4). The lease does not operate by way of warranty by the lessor that there is to be found iron ore in the demised premises which can be worked profitably or at all (5); and in *Gowan* v. *Christie* (6) Lord Cairns says that the instruments which are called mineral leases

when properly considered are sales out and out of a portion of the land. He says it is liberty given to a particular individual for a specific length of time to go into and under the land and to get certain things there if they can find them and to take them away just as if he had bought so much of the soil.

Lord Clifford v. *Watts* (7) was a case very distinguishable from the present. There the rent reserved was a royalty of 2s 6d per ton of clay which might be found upon or under the lands described; habendum for 12 years reddendum the 2s 6d per ton; there was a covenant that the defendant would dig and remove from the land an aggregate amount of not less than 1000

(1) 17 C. B. N. S. 314.
(2) 1 H. & N. 195.
(3) 13 M. & W. 487.
(4) 14 M. & W. 260.
(5) *Jefferys* v. *Fairs*, 4 Ch. D. 448.
(6) 2 Sc. App. 284.
(7) L. R. 5 C.P. 577.

tons nor more than 2000 tons of pipe or potter's clay in each year of the term; but there was no covenant for the payment of any fixed sum either by the year or by the quarter as there is in the present case; the action therefore had to be brought upon the covenant to dig and take out not less than 1000 tons in each year and the breach laid was that the defendant had not dug an aggregate amount of not less than 1000 tons of pipe and potter's clay in each year of the demise that had elapsed; to this breach the defendant pleaded upon equitable grounds in substance that there was no pipe or potter's clay in the demised premises, and that it was impossible for the defendant to have dug and gotten out any. Under these circumstances judgment was rendered for the defendant. The covenant was held to be a bare stipulation for payment for the clay which should be raised, which the fact that there was no stipulation, as there in the present case, for payment of a fixed rent quarterly during the term, or a stipulation, as there is also in the present case, that the lessees might upon finding the ore to be exhausted instantly determine the lease and all liability thereunder, showed to be the intention of the parties. That case therefore seems to be an authority in support of the judgment of Court of Appeal for Ontario, rather than against it. The contention that the defendants are entitled to be relieved from their covenant to pay the quarterly rents as upon a total failure of consideration for their entering into the covenant, and that they are entitled to recover back the rent paid as paid without consideration and under a mistake of fact, is quite untenable. There is no room here for the application of the doctrine of total failure of consideration; it was in fact upon the faith of and in consideration of the lessees' covenant to pay the rent at the times and in the amounts in the covenants stated that the lessor granted to them the

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exclusive possession of the demised premises for the term of ten years, to prospect for and get out and take out all the iron ore which might be found thereon as to the existence of which in sufficient quantities to justify the lessees in entering into the covenant, it was their business to satisfy, and they appear to have satisfied themselves; moreover, they did in fact take out 300 tons of such iron ore and what has occurred is what the lessees took care to provide for as being possible to occur, namely, that the iron ore has become exhausted, in which case the lessees were given power to relieve themselves from all future liability under their covenant by determining the lease, a privilege of which they did not avail themselves until the month of September, 1884, until which time they retained to themselves that exclusive possession which in consideration of their covenants the lease granted to them. Then as to the rent which was paid having been paid under a mistake of fact, what is here called a mistake of fact was, in truth, an error of judgment, not a mistake of fact in the recognized sense of that term, but an erroneous conclusion drawn by the lessees from such facts as were known and apparent, but which experience has shown to have been insufficient to justify the conclusion which the lessees formed upon them as to the value of the speculation they were entering into. The Court of Appeal for Ontario was clearly right in not allowing any thing to the defendant on his counter claim for the rents which he had paid, which rents were paid in compliance with, and discharge of, the covenant he had entered into, and in consideration of which he and his co-lessees acquired for a term of ten years exclusive possession of the ten acres mentioned in the lease, for the purpose therein stated, and with the powers therein mentioned to be exercised thereon; there is no principle of law upon which money so paid

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can be recovered back. For the same reason, I am of opinion that the $1250 allowed by the Court of Appeal for Ontario, as for rent covenanted to be paid on the 1st September, 1884, was properly allowed to the plaintiff. The covenant sued upon is express that such sum should be paid in each and every quarter in the second and each succeeding year of the term until the expiration thereof by lapse of time or sooner determination thereof by the lessees themselves, who, in the event which has happened, were empowered to determine it. The covenant is absolute in its terms not qualified by any condition that iron ore should have been raised at the respective times when the sums which were covenanted to be paid quarterly became payable.

The appeal therefore, in my opinion, must be dismisséd with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Bell & Biggar.*

Solicitor for respondent: *Francis S. Wallbridge.*

Solicitor for third party: *S. B. Burdett.*