

damages due, would first take the loss of wages which it was not disputed the pursuer had sustained. To that I think they were entitled to add something on account of the uncertainty of the doctor's opinion as to the date of his recovery being realised. They were also entitled to give him something additional for the suffering he had endured. On the whole, it appears to me that there is no excess in the award made, or at least that if there is any, it is of so microscopic a character as not to entitle us to interfere.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court refused a rule.

Counsel for the Pursuer—Comrie Thomson—Orr. Agent—W. A. Hyslop, W.S.

Counsel for the Defenders—Jameson—Fleming. Agents—Drummond & Reid, W.S.

Tuesday, November 8.

FIRST DIVISION.

[Lord Low, Ordinary.]

DALGLEISH v. THE FIFE COAL COMPANY, LIMITED.

Contract—Construction of Agreement—Output of Coal.

In an agreement between the owner and the lessees of a coalfield it was stipulated that when "the annual output of coal and dross from the said mineral field" exceeded so many tons a certain proportion of the selling price should be paid as a royalty on "the total quantity of coal and dross put out and removed from the said lands." Held that, no limitations being expressed, "annual output" must be taken, for the purpose of fixing the rate of royalty, as the whole mineral brought to the surface, although the royalty was payable only on the portion thereof removed from the lands.

Laurence Dalgleish of Dalbeath, Fife, leased certain coalfields to the Fife Coal Company, Limited, under a tack dated December 1876, and in December 1889 an agreement was entered into between the same parties which provided, *inter alia*— "Third. In lieu of the royalties for coal fixed and stipulated by said tack, the royalties payable and exigible (in the option of the said first party) for coals and dross put out by the second parties from said mineral field, and removed from the lands in each year, from said term of Whitsunday 1889 to the end of said tack, as now extended, shall be as follows, *videlicet*— . . . (3) When the annual output exceeds 70,000 tons, but does not exceed 100,000 tons, one-twelfth of the selling price, as aforesaid, on the total quantity of coals and dross put out and removed from said lands. (4) When the annual output exceeds 100,000, but does

not exceed 130,000 tons, one-thirteenth of the selling price, as aforesaid, on the total quantity of coals and dross put out and removed from said lands." The conditions of the original lease were declared to be binding upon the parties so far as not altered by the agreement.

In 1892 Mr Dalgleish brought an action against the Fife Coal Company, Limited, for payment of his royalty, on the footing that the annual output from Whitsunday 1890 to Whitsunday 1891 had not exceeded 100,000 tons, the defenders contending that it had. The question turned upon the meaning to be attached to the word "output" as used in the agreement.

The Lord Ordinary (Low), upon 2nd August 1862, pronounced the following interlocutor:—"Finds that the total output of coal and dross from the collieries let by the pursuer to the defenders for the year from Whitsunday 1890 to Whitsunday 1891 exceeded 100,000 tons, but did not exceed 130,000 tons, and that therefore upon a sound construction of the minute of agreement of 9th, 10th, and 11th December 1889, the royalties payable to the pursuer amount to one-thirteenth of the selling price of the coals and dross sold in the said year: With that finding appoints the cause to be enrolled for further procedure.

"*Opinion.*—The main question in this case depends upon the construction of the third article of the minute of agreement of December 1889.

"The article makes provision for the royalties which are to be payable for coals and dross 'put out' of the mineral field let to the defenders 'and removed from the lands in each year,' in lieu of the royalties stipulated in the lease of 1876.

"The principle upon which the royalties are fixed is that according as the 'annual output' is under or over a certain amount, the royalty shall be a larger or smaller percentage upon the selling price of the total quantity of coal and dross 'put out and removed from the lands.'

"I do not think that it can be disputed that, according to the ordinary and natural meaning of the words 'annual output,' something different is meant from coal 'put out and removed from the lands.'

"The defenders say that the 'annual output' means the whole coal and dross taken out of the pit, whether it is disposed of or not, and that the coal and dross 'put out and removed from the lands' means the coal and dross sold. I am of opinion that *prima facie* the defenders are right.

"The pursuer, on the other hand, contends that the agreement must be interpreted in view of the lease, which, except in so far as superseded, remained in force, and that so interpreted, the phrase 'annual output' and the phrase 'put out and removed from the lands' refer to the same thing, viz., the coal and dross sold. . . .

"In my judgment the contention of the pursuer is not well founded. I am of opinion that by the third article of the agreement the royalty clause in the lease is entirely superseded and cancelled, and that the clause at the end of the third

article . . . refers to the provisions in the lease as to the time when payment is to be made, as to the power of the tenant to make up for a shortcoming in the output of one year by putting out a certain amount free of royalty in succeeding years, as to the books which are to be kept by the tenant, and the statements which are to be furnished to the landlord, and as to the right of the landlord to appoint a check-grieve to take a daily account of produce and sales.

"It is not disputed that the daily output from the colliery for the year 1890-91 (the year in regard to which the present question has arisen) is over 100,000 tons and under 130,000 tons, and that being the case I am of opinion that the royalty under the agreement is one-thirteenth of the price of the total quantity of coal and dross sold."

The pursuer reclaimed, and argued—(1) The natural meaning of "annual output" was nett output. A coalmaster if asked to state his output would not give the gross amount. (2) The "annual output" was really defined by the words which followed, viz., "total quantity of coals and dross put out and removed from the lands." (3) The Lord Ordinary's interpretation was inequitable. It would be a temptation to the coal company to bring as much coal as possible to the surface, but to be reckless as to the amount consumed on the lands. The coalfield might thus be unduly exhausted to the prejudice of the owner. (4) The pursuer's construction of the word "output" was the correct one upon an examination of the terms of the lease, which, so far as not altered, still subsisted.

Argued for the respondents—The Lord Ordinary was right. There was no reason for not giving "output" its natural sense, which was gross output. The fact that the royalty was only to be paid upon the coal put out and removed did not affect the question.

At advising—

LORD PRESIDENT—I agree with the Lord Ordinary in considering that the dispute in this case must be determined by the terms of the 3rd article of the minute of agreement of 1889.

Now, the first question is, what is the ordinary meaning of the words "annual output of coal and dross from the mineral field?" and I suppose there is no doubt that in their ordinary sense they mean all the coal and dross that is brought to the surface within the field. Well, then, is there any necessity arising in the context in this particular passage for attaching to those words a different and secondary sense, or, in other words, is there anything to compel us to the conclusion that saying "the annual output" they meant only some of the annual output? I find no repugnancy in adopting the primary sense of the words. It is quite possible to fix the rate of royalty according to the amount of the annual output, and to make the royalty payable only on a part of the output—to wit, that which has been sold. This is what the clause in question purports to do according to the natural sense of the words,

and therefore I hold this to be its legal effect. The argument for the reclaimer, so far as it was confined to the agreement, does not seem to me to come to more than that a part of the annual output would be a fairer criterion than the whole. I am not satisfied that it would; but at all events, by the language which I have been discussing, the parties have settled that question for themselves.

Even assuming that we are entitled to go back to the lease in order to find the meaning of "annual output," I do not think that it supports the reclaimer. On the contrary, it seems to me that where the word "output" is used alone, it means the whole mineral brought to the surface, and when it has a more limited sense, the limitations are expressed.

I am for adhering to the Lord Ordinary's interlocutor.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court refused the reclaiming-note.

Counsel for the Pursuer and Reclaimer—H. Johnston—C. N. Johnston. Agents—Dalgleish & Bell, W.S.

Counsel for the Defenders and Respondents—Dickson—A. S. D. Thomson. Agents—Davidson & Syme, W.S.

Saturday, November 12.

SECOND DIVISION.

SMITH v. SMITH.

Process—Petition—Appointment of Judicial Factor—Sequestration of Partnership Estate—Competency of Presenting Petition to Inner House—20 and 21 Vict. cap. 56, sec. 4.

Held that under section 4 of the Distribution of Business (Court of Session) Act 1857, a petition by a joint-tenant for the appointment of a judicial factor on the partnership estate, and praying the Court incidentally to sequester the estate and interdict the other joint-tenant from selling any part thereof, must be brought before the Junior Lord Ordinary, and cannot be taken in the first instance before the Inner House.

The Distribution of Business (Court of Session) Act 1857 (20 and 21 Vict. cap. 56), sec. 4, enacts—"All summary petitions and applications to the Lords of Council and Session which are not incident to matters or causes actually depending at the time of presenting the same, shall be brought before the Junior Lord Ordinary officiating in the Outer House, who shall deal therewith and dispose thereof as to him shall seem just; and in particular, all petitions and applications falling under any of the descriptions following shall be so enrolled before and dealt with and disposed of by