Byrne, did there seem to me to be a full analysis of the term "specially qualified" occurring in section 3 of the Act, and as that term is illustrated by the subsequent sections of the Act, in which there is particular reference to the word "qualified," that qualification appears to be, as Lord O'Brien, C.J., says, something in its nature external to the person and not affecting his own personal competence. I assent to the motion which the Lord Chancellor has proposed, and I desire specially to record my assent to the analysis given by Lord O'Brien, C.J., in the case cited.

LORD MERSEY—I had some doubt as to whether I should take part in the hearing of this appeal, inasmuch as it involved the consideration of a judgment to which I was a party in *Barnes* v. *Brown* (*cit.*), but having heard the arguments, and having been convinced that the judgment in which I took part was wrong, I see no reason why I should not say so, and I think that it was wrong for the reasons given in the Irish case to which reference has been made.

Appeal dismissed.

Counsel for Appellant—W. F. Hamilton, K.C.—Boome. Agents—Dixon & Hunt, Solicitors.

Counsel for Respondents—Sir R. B. Finlay, K.C.—A. Grant, K.C.—Grimwood Mears. Agents—Percy Robinson & Company, Solicitors.

HOUSE OF LORDS.

Monday, April 18, 1910.

(Before the Earl of Halsbury, Lords Macnaghten, Atkinson, and Collins.)

BUTTERLEY COLLIERY COMPANY *v.* NEW HUCKNALL COLLIERY COMPANY.

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

Mines and Minerals—Right of Support—Upper and Lower Strata—Lease of Upper Stratum—Reserved Right of Working Lower Strata — Subsidence Necessary Result.

A stratum of coal was leased to the appellants under two leases which reserved expressly the right of working the strata below. One of the leases, which covered the greatest portion of the area, provided for the indemnification of the lessees for any "physical damage" thus caused; the other lease provided that there should be no liability for any damage caused. It was admitted that the proper way of working the seams in question was the long wall system; it was proved that the working of coal in a seam is inevitably followed by a sinking of the whole of the above strata. Subsidence of the upper stratum was actually brought about by the working of the lower stratum, and the appellants' company, whose operations were impeded, sued for an injunction against the colliery company of the lower strata to have them restrained from causing subsidence.

Held that by the necessary implication of the leases of the upper stratum the respondents were entitled to work the lower seams even to the extent of causing subsidence.

Under the circumstances stated *supra* in rubric the appellants obtained an injunction before NEVILLE, J., whose judgment was reversed by the Court of Appeal (COZENS-HARDY, M.R., MOULTON and FARWELL, L.JJ.).

Their Lordships gave considered judgment as follows:—

EARL OF HALSBURY—Although my judgment is contrary to that given originally by Neville, J., I cannot think that that learned Judge and I differ upon the question of law involved in the litigation. I believe that he would agree with me but for the construction which he placed upon Lord Macnaghten's words in the case of *Butterknowle Colliery Company* v. *Bishop Auckland Co-operative Society* ([1906] A.C. 305). I will deal presently with those words, and I think that I can see in what way the learned Judge has misconstrued them, but in the meantime I think what was said by Lord Blackburn in *River Wear Commissioners* v. *Adamson* (2 App. Ca. 743) and quoted by Farwell, L.J., in this case, is very relevant here, since I think that a great deal of the difficulty of the construction is solved by considering what are the facts to which the language is applied. Lord Blackburn said—"In construing a document in all cases the object is to see what is the intention expressed by the words used. But from the imperfection of language it is impossible to know what that intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object appearing from these circumstances which the persons using them had in view, for the meaning of words varies according to the circumstances with respect to which they are used." Now it is most important here to note that we are dealing with two coalfields, one under the other, and that if the construction adopted by Neville, J., prevailed 75 per cent. of valuable minerals would remain unworked, but it is possible to work them both though it will cause additional expense in doing so, but without destruction to either. Now Cozens-Hardy, M.R., points out that in every one of the leases granted to the plaintiffs are to be found provisions which show that the working of the lower seam during the currency of the lease was contemplated by both parties, and in some of them obligations are imposed upon the plaintiffs to assist or not to obstruct the necessary

operations which *ex hypothesi* it was well known (and I must add here for myself to both parties) must produce subsidence. Now in this case it was proved, and not disputed, that except in the case of shallow mines (and this was not one) the working of the coal in a seam is inevitably followed by a sinking of the whole of the above strata and consequently of the surface. The logical result is, I think, not unfairly stated by Fletcher Moulton, L.J., when he says—"There is no contest in the present case as to the truth of the above law, or as to its being well known at all times material to the present case. Not only is there the clearest direct evidence of this on the part of the plaintiffs' own witnesses, but their counsel have admitted it, and the case has been argued before us on that basis. It follows, therefore, that if the instruments make it clear that it was the intention of the parties that subjacent seams should be worked, it is a necessary implication that it was intended that there should be subsidence of the superjacent strata." In the judgment of Lord Loreburn, L.C., and that of Lord Macnaghten, by which, I think, that Neville, J., was misled, I see that they were construing the peculiar language of an inclosure Act, or perhaps, to speak more accurately, they were applying the known rule of law to the peculiar condition of things brought about by the Act which they were construing, and, as the Lord Chancellor said in that same case, the "construction placed upon particular words in one instance does not necessarily prejudice their construction when in a different setting." All through the Lord Chancellor's judgment it will be noticed how carefully he points out that the nature of the commoners' interest is changed by the Act, and Lord Macnaghten obviously considers that that change has led, perhaps I should say misled, this House, and that the provision for the lord of the manor to enjoy the property as freely as before becomes a dead letter. However that may be, how can it be possible to maintain that what has been said of the right of an owner in respect of surface can be applicable to such an arrangement as is absolutely proved here with respect to the respective rights of each separate owner of the two different seams? Business men familiar with the subject and knowing what they were talking about have used language which necessarily imports that both sets of seams were to be worked, and as this essentially business document is drawn up for business purposes and for valuable consideration it is intended that they should be worked. I think that the key to Lord Macnaghten's words, and indeed to the whole judgment in the case, is to be found in the Lord Chancellor's words, where he says that when the nature of the commoner's interest is changed by an enclosure Act such as this his right to support, unless otherwise provided, changes also, and the owner of minerals must work them in a way not to damage the extended interest which the commoner has acquired under the Act. If that principle, he says, was applicable in the case of *Love* v. *Bell* (9 App. Ca. 286), I cannot see how it is to be excluded in the present case. The then "present case" was an enclosure Act of 1757. I think that the arrangement between the parties here by necessary implication allows subsidence as a consequence of this working the coal as it was intended by both parties to be worked. I think that the judgment appealed from is right and should be affirmed.

LORD MACNAGHTEN—In this case Neville, J., granted an injunction to restrain the respondents, the New Hucknall Colliery Company, Limited, from further working their mines in such manner as to cause an overlying seam known as the "Top Hard Seam," in lease to the appellants, or the roads or working places therein, or the works connected therewith, to crack or subside, or otherwise sustain injury. The Court of Appeal dismissed the action with costs. I think that the Court of Appeal was right, and that their judgment is in accordance with the principles laid down in this House and the decision in *Butterknowle Colliery Coal Company* v. *Bishop Auckland Co-operative Society* (*cit.*). Neville, J., seems to have thought that there was something somewhere in that case which prevented him from giving effect to his own opinion in favour of the respondent company. Notwithstanding the explanation suggested by the Earl of Halsbury, I must say, with the utmost respect for Neville, J., that I am quite at a loss to conceive to what he was referring. I am quite sure that none of the learned Lords who took part in the judgment in the *Butterknowle* case intended to depart from the settled principle of law which has been so often laid down in this House. Speaking for myself, I have no desire to retract or qualify anything which I am reported as having said in that case. But I must take leave to observe that nothing could have been further from my intention than to unsettle the law laid down in previous cases in this House. Perhaps I should have done better to have given a silent vote in a case which seemed to me to be abundantly clear. But I erred, if I erred at all, out of respect to the very learned and elaborate argument which was addressed to the House, and in the hope that I might perhaps contribute something which would relieve counsel in a future case from the necessity or custom of going through all the cases on the subject which have ever been reported in this House and in the courts below. So far am I from thinking that the decision of Neville, J., was in accordance with the judgment in the *Butterknowle* case, that I venture to think that it was directly contrary to it. In order to displace the common law right of support there must be either express permission or clear implication. What is clear to one mind may not be clear to another. But it really seems to me that it would be difficult to imagine a case in which permission to withdraw support could be more clearly implied than it is

in the present case. It is plain that the parties contemplated that the underlying seam would be worked concurrently with the "Top Hard Seam." It is proved or admitted that the proper way of working both seams is by the "long wall" system. It is also proved or admitted that working by the "long wall" must of necessity produce subsidence in the upper strata. Then provision is made for any physical damage. It would be extravagant to suppose that the lessors would have consented to make themselves liable for any further damage when they gave the Butterley Company the option of taking a lease of the lower seam in preference to anybody else. I am inclined to think that an overlying seam has the same mutual right of support from below that the surface has, but certainly the effect of withdrawing support is very different in the two cases. In the one it may be ruin, in the other it probably means nothing more than increased expense in working. I may remind your Lordship that this is not the first occasion on which, upon a controversy arising between the several owners of different strata as to their respective rights, an appeal has been made to the science and practice of mining as understood and followed at the date when the title was severed. In the case of *Dixon* v. *White* (1883, 20 S.L.R. 541; 10 R. (H.L.) 45; 8 App. Ca. 833), which came before this House in 1883, the question was whether the appellant as owner of the minerals under the land of the respondent was entitled to work at the whole of the minerals subject to payment of compensation for the damage to the surface, or was bound to leave sufficient support. The Lord Ordinary decided in favour of the appellant, who was the defender in the action. The First Division of the Court of Session recalled the interlocutor of the Lord Ordinary finding that nothing contained in the title of the parties had the effect in law of taking away or derogating from the right of the pursuer to insist that the defender in working out the minerals under the pursuer's land should leave sufficient support to sustain the surface uninjured. Lord President Inglis, after dealing with the principal portion of the property, comprising 25 acres, proceeds as follows:—"There only remains for consideration the title which the pursuer has to the six and a half acres, which disposition was granted the year before the disposition of the minerals." That was in 1799. "Now undoubtedly there is a clause there which is much more difficult to construe than any of those with which I have dealt hitherto. . . . The words which cause the difficulty of construction are these—'upon paying any damage that may be occasioned to the said lands by working of the said metals and minerals.' This may mean any damage that may be occasioned to the surface of the lands by any operations which may be performed by the mineral owner without inquiring or specifying what these operations may be, or it may mean, as contended for by the defender, that it contemplates the bringing down of the surface upon condition only of paying damage. Now keeping in view that 'long wall' working was then a thing entirely unknown, that the bringing down of the surface in that way was therefore a thing entirely unknown, and that the surface never was injured or brought down at all except by unskilful or negligent working in the ordinary mode by 'stoop and room,' I think that it would be very difficult indeed to give that meaning to the words." And then, after some further observations which I need not quote, his Lordship expressed his opinion that "nothing but a clear implication or express words" could deprive the surface owner of his common law right of support, and he added that he was unable to find anything of the kind in the clause in question. The judgment of the Court of Session was affirmed in this House, and although the passage on which the Lord President laid stress in the passage which I have quoted was not repeated in terms, the reasoning of the Court below with reference to the 6½ acres was approved generally. Among judges of modern times there is no higher authority than Lord President Inglis, and I may add that the line of reasoning which he adopted in *Dixon* v. *White* seems to be in accordance with what was laid down by Lord Wensleydale in *Rowbotham* v. *Wilson* (8 H.L. Ca. 348). The instrument of severance in that case was a private Enclosure Act. "The private Act of Parliament," says Lord Wensleydale, "is really no more than an agreement between the parties to it sanctioned by the Legislature, and in order to construe that agreement we may look at the surrounding circumstances at the date of it." I therefore agree in thinking that this appeal must be dismissed.

LORD ATKINSON—This case appears to me to turn to a great degree upon the construction of the plaintiff's lease, or rather upon the construction of a clause in it reserving to the lessor the right of working or leasing the mines underlying the "Top Hard Seam." If the right so reserved includes a right to cause the subsidence complained of, the plaintiffs must, as I think, fail in this suit, though they may be entitled under the provisions of the lease to damages for the injury done to their property. Neville, J., decided in favour of the plaintiffs, feeling himself controlled as he supposed by a passage in the judgment of Lord Macnaghten in the case of *Butterknowle Colliery Company* v. *Bishop Auckland Co-operative Society* (*cit.*). But for his view of the decision in that case he would have decided in favour of the defendants. His view of the present case is put clearly in the following passage from his judgment:—"Having regard to the knowledge of the present day that the extraction of minerals underlying the upper strata does as a matter of practical business necessarily lead to their subsidence, I should, were I uncontrolled by authority feel a difficulty in resisting the argument of the defendants that upon the natural construction of the words used it was in

tended that the future lessees of the underlying mines should have a right in working their mines to occasion subsidence." This judgment of Neville, J., was reversed by the Court of Appeal. Some question was raised apparently at the trial, though not much pressed before your Lordships, as to whether some of the evidence given at the trial in reference to the system upon which mines are worked in this district, namely, by the "long wall" system, and the consequences necessarily flowing from that system, was admissible or not. The judgment of Farwell, L.J., upon that point is unanswerable. The evidence was clearly admissible to show what the parties to the contract were really contracting about and in what sense they used the language employed in dealing with this matter of business. It was proved in the case that at the time when the lease to the plaintiffs was executed "long wall" mining was the system of mining generally adopted in the district in which the mines were situated, and that it was considered to be the most profitable and the best system. It was also proved that it was well known in this district as elsewhere that when this system was adopted subsidence of the strata lying above the mine so worked necessarily followed, that it was the necessary result of working by that method. The subsidence was described as equable and uniform as compared with the irregular subsidence which results from the "pillar and stall" method of mining, and by reason of this uniformity causes much less damage to the surface and the buildings upon it than the latter method. The result of the evidence as to the effect upon the "Top Hard Seam" of the subsidence caused or likely to be caused by working the underlying mine with proper care and skill on the "long wall" system is that it would not destroy the upper mine, would not make its working impossible, or the lease of it in consequence valueless, but that it would inflict injuries on the upper mines which could be adequately compensated by damages, or that it might make the mine more expensive to work. It must I think be assumed that all these facts as to the methods of working the mine and their inevitable results, including the nature and extent of the injury caused by subsidence, were known to all the parties to the lease at its date, and that they entered into the respective covenants contained in it with reference to these results. Accordingly, when the lessees in the first lease covenant, as they do, that they will during the term of the lease "use and work the said seams, veins, and mines of coal and substance hereby granted and demised fairly and regularly according to the best and most approved methods now being or to be hereafter in use and in a workman-like manner in all respects," it is scarcely possible in the face of the evidence to suppose that it was not intended to authorise, if not indeed to enjoin, the lessees to work this mine on the "long wall" system. No case was, I think, made that any other system of mining was customary or was contemplated. In the case of the lower mine Neville, J., asked one of the witnesses for the plaintiffs if it would be possible to work the "Deep Soft Mine" by "pillar and stall," to which the witness replied—"Yes; it would not be advantageous." The learned Judge appears then to have remarked interrogatively—"In which case there would not be subsidence at least for a number of years afterwards?" And the witness who had already said that the proper mode of working the "Deep Soft Mine" was the "long wall" system replied—"If they worked a proportion of the coal, assuming that they worked 25 per cent. of it, there would be subsidence," which means that 75 per cent. of the coals would be left *in situ*. The subject then seems to have been dropped. No further cross-examination was directed to it nor was substantive evidence given touching the "pillar and stall" system or its suitability to either mine. It appears to have been treated as an altogether irrelevant matter. On re-examination, however, this important statement was elicited from the witness. He was asked—"Questions were put to you as to whether any person with mining knowledge would not know that the working of a lower seam on the 'long wall' system must cause subsidence in the upper seam. If there was a question between the worker of an upper seam and the worker of a lower seam and the surface owner I suppose that any mining person would know that if the surface owner parted with the lower seam and it was worked 'long wall,' you must let down the surface?" And the witness replied—"Certainly." It must therefore I think be taken to be established that the lessor and the appellants intended that the latter should, by the express language of their covenant, be bound, or if not bound certainly authorised and entitled, to work the "Top Hard Seam" on the "long wall" system, and that if as a result of carrying out that system in a proper way the superjacent strata up to and including the surface subsided, the lessor, the owner of those strata and of the surface, would have to put up with the injury and could not restrain the appellants from working the mine in the way so authorised, or recover damages from them for any loss which he might thereby sustain. Now if the lessor thus conferred upon his lessees by this lease the right as against himself of causing with impunity the subsidence necessarily incidental to "long wall" mining, the next question is, what was the nature and extent of the right which he reserved by the same instrument to himself and his possible tenants in the future in respect of the mines underlying that demised? It certainly would be strange if the parties intended and contemplated that a system should be followed in the lower mines not only different from that authorised or enjoined in the case of the upper, but one from which there would follow, unless more than 75 per cent. of the minerals to be won were left *in situ*, results certainly injurious in their nature, possibly as in-

jurious as those inevitably connected with the former system, that some provision should not have been made regulating the mode in which the latter mines were to be worked. That, however, is not done. On the contrary, a reservation clause is introduced in general terms, not specifying any particular mode of user or imposing any limit on output, but contemplating injury of some kind to the mine demised, and providing for the payment of compensation to the lessees in respect of it. By the clause dealing with the underlying mines the option of taking a lease of them is given to the appellants, and it is then provided that it shall be lawful for the reversioner or his under-tenants to enter upon any part of the mining area demised and "to sink to, work, get, and carry away all or any of the said underlying mines, and for the purposes aforesaid or any of them to sink, make, erect, and use all such pits, buildings, engines, machinery, roads, works, and conveniences, upon, through, or under all or any of the same lands, and over, under, or across ways, levels, and workings of the lessees or their executors, administrators, or assigns as shall be necessary or expedient, so that such roads, ways, levels, and workings be not thereby unnecessarily injured." It then provides that the lessees shall leave such pillars or ribs of coal and other minerals as the lessor or his agent shall require on account of the shafts, buildings, and other works necessary or proper for working the underlying mines, no royalty being charged in respect of the pillars and ribs of mineral so left. There is no provision that pillars shall be left in the underlying mine to sustain the "Top Hard Seam," while the reservation of a power to work and carry away all the underlying mines is entirely inconsistent with the notion that a system was to be adopted which, if subsidence was to be prevented, would necessitate leaving over 75 per cent. of the minerals *in situ*. It is further provided that in such case the beneficial reversioner shall indemnify the lessees against any physical damage which may be caused by the operations of the tenants of the underlying mines to mines or mining operations of the lessees. This is followed by an arbitration clause. I think that the word "damage" is qualified by the adjective "physical" in order to exclude consequential damage, such as the loss of profit or the like. It would appear to me, therefore, that, having regard to the evidence, this clause must, in order to carry out the intention of the parties, be held impliedly to authorise the adoption by the reversioner or his future tenants of the "long wall" system of mining with its inevitable consequences in the "Deep Soft Mine," nor do I think that there is anything in the judgment of Lord Macnaghten in the case of *Butterknowle Colliery Company* v. *Bishop Auckland Co-operative Society* (*cit.*) which forbids such a construction. One of the things which differentiates that case from the present is, to use the language of Farwell, L.J., "the impossibility, to the knowledge of both parties, of getting the lower seam without letting down the upper seam, and the possibility of letting down the upper seam without totally destroying it." The construction of the lease of the lower strata which would mean derogating from the grantor's grant to such an extent as to make the thing granted comparatively valueless would be that which required that 75 per cent. of that seam should be left unworked. Past experience has shown that the mine can be worked on the "long wall" system without any loss comparable to this. The instrument of severance, in this case the first lease, has, it would appear to me, authorised by necessary implication the interference with and disturbance of the upper mine which is complained of, in that it has authorised the system of mining of which that disturbance is the inevitable consequence, and thus it comes within the exception mentioned by Lord Macnaghten. There is, therefore, no room for a presumption such as that which is taken to apply to cases between the owner of the surface and the owner of a subjacent mine —namely, that the parties to the document of severance could not have intended that the surface should be destroyed when effect can be given to the rights of both parties by restricting the mine owner to working his mine "so far as is possible without letting down the surface." I am therefore of opinion that the judgment of the Court of Appeal was right, and should be affirmed, and the appeal dismissed with costs.

LORD COLLINS—I agree.

Appeal dismissed.

Counsel for Appellants—C. A. Russell, K.C.—Upjohn, K.C.—MacSwinney. Agents —Thicknesse & Hull, Solicitors.

Counsel for Respondents—Sir R. B. Finlay, K.C.—Astbury, K.C.—Waddy. Agent—J. P. Garrett, Solicitor.

HOUSE OF LORDS.

Thursday, April 21, 1910.

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

GRANT *v.* OWNERS OF S.S. "EGYPTIAN."

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

Ship—Collision—Remoteness of Damage—Subsequent Negligence on Part of Injured Ship—Negligence of Common Servant of Both Parties.

The "Egyptian" was negligently navigated by her temporary master B., whereby the "Nelson" was damaged while at anchor in harbour. B. was also the watchman in charge of the "Nelson" but he negligently failed to discover her injuries and stop a leak, owing to which the "Nelson" sank.