writing or several testamentary writings, it is the aggregate or the net result that constitutes his will, or, in other words, the expression of his testamentary wishes. The law on a man's death finds out what are the instruments which express his last will. If some extant writing be revoked, or is inconsistent with a later testamentary writing, it is discarded. But all that survive this scrutiny form parts of the ultimate will or effective expression of his wishes about his estate. In this sense it is inaccurate to speak of a man leaving two wills; he does leave and can leave but one will. And when the law of approbate and reprobate is applied, it is this, the net result of the testamentary writings, which the doctrine protects from invasion. Applying this principle to the present case, it is manifest that the two testamentary writings of Mr Douglas form a coherent scheme of intention, and that the respondent having defeated it in part cannot claim to take under it. An attack was made on the *locus standi* of the present appellant. He takes beneficially under the Scotch but not under the Australian disposition. It is, however, quite clear that if the principle of approbate and reprobate applies, then so does the correlative rule of equitable compensation, and the appellant is therefore interested to protect the Australian estate. In truth the question of *locus standi* is really the same question in another form. Their Lordships will humbly advise His Majesty to allow the appeal and to make an order in terms of the following minutes, which are framed in accordance with the order of the House of Lords in *Codrington* v. *Codrington* (L. Rep. 7 H.L. at p. 868):—

Discharge the order of the Supreme Court; declare that the respondent Sibella Susan Douglas was bound to elect between her rights under Scottish law as widow of the testator and the benefits given to her by the testator in the general disposition of his estate contained in the instruments described as the British will and the Australian will; declare that the said respondent having claimed her legal rights in the Court of Session in Scotland, and having established her claim by the decree of that Court, is to be considered as having elected to take against the general disposition made by the testator of his estate, and that consequently she is not entitled to the income of the £100,000 to be provided as mentioned in the Australian will or to any other interest under that will, but that all the interest to which, if she had not so elected, she would have been entitled under the Australian will ought to be applied in making compensation to the persons disappointed by her election, of the benefits of which they respectively have been or will be deprived by her election so far as the same shall extend and until such compensation shall be fully made; liberty for any of the parties and any persons interested under the last preceding declaration to apply to the Supreme Court for such inquiries and directions as may be necessary in order to give effect to the same, and generally as they may be advised. Costs of all parties of and incident to the appeal to be dealt with and disposed of by the Supreme Court.

Appeal allowed.

Counsel for the Appellant—Levett, K.C.—A. Adams. Agents—Crawford, Chester, & Slade, Solicitors.

Counsel for the various Respondents—Levett, K.C.—A. Adams—Younger, K.C.—Austen-Cartmell—Upjohn, K.C.—Le Riche—A. Denham. Agents—Nisbet, Dow, & Nisbet—Joseph Hyam—Bell, Brodrick, & Gray — Murray, Hutchins, Stirling, & Murray, Solicitors.

HOUSE OF LORDS.

Friday, February 28.

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

NEW MOSS COLLIERY COMPANY *v.* MANCHESTER CORPORATION.

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

Mines—Waterworks—Lands Purchased by Agreement—Minerals Purchased along with Lands—Right to Support from Adjacent Minerals—Waterworks Clauses Act 1847 (10 *and* 11 *Vict. c.* 17), *secs.* 18-27.

Where land is acquired by agreement for the purposes of constructing waterworks under a Special Act incorporating the Waterworks Clauses Act 1847, and where the undertakers purchase all the mines and minerals under the land so taken, they *ipso facto* step into the former owner's place as regards the common law right of support from the minerals under adjacent lands. The common law right of support from minerals under adjacent lands is not taken away by sections 18 to 27 of the Waterworks Clauses Act 1847, nor have the owners of adjacent minerals any greater rights of working as against the undertakers than they had against the former owners. The rights in the two cases are the same.

Appeal from a judgment of the Court of Appeal (VAUGHAN WILLIAMS, ROMER, and COZENS-HARDY, L.JJ.) reported (1906) 2 Ch. 564, reversing a decision of FARWELL, J., reported (1906) 1 Ch. 278.

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

LORD CHANCELLOR (LOREBURN) — The facts upon which this appeal depends are simple. The Corporation of Manchester desired to construct waterworks, and for that purpose purchased two pieces of land under their Special Act, which gave them power to purchase by agreement, but not

compulsorily. The first piece of land they bought from Lord Stamford. It is coloured yellow on the plan. In this conveyance only the surface was granted to the Corporation, and the vendor reserved the right to work the minerals without making compensation. The second piece of land was bought from Mr Taylor. It is coloured pink on the plan, and the conveyance included both the surface and all mines and minerals underneath. In time the waterworks were constructed, covering part of this pink land, and now the owner of minerals beneath the yellow land is excavating his minerals so as to damage the natural surface of the pink land. The excavations which do this damage are partly outside and partly inside a belt of forty yards in width round the works of the Manchester Corporation. Before excavating within the forty yards belt the mineowners under the yellow land gave to the Corporation a notice under section 22 of the Waterworks Clauses Act 1874. No counter notice was given. In these circumstances the question to be decided is, Whether the mineowners ought to be restrained from mining so as to damage the pink land—first, as to mines under the yellow land within the forty yards belt; secondly, as to mines under the yellow land outside the forty yards belt? In my opinion the Court of Appeal was right in granting an injunction under both these heads. It was urged in argument that the mineowners were entitled to do what they had been doing by virtue of the Waterworks Clauses Act 1847. That Act provides that in the case of a purchase under the compulsory powers of a Special Act all mines should be deemed to be excepted in the conveyance of such land unless they shall have been expressly referred to therein and conveyed thereby. The House of Lords have decided in *Great Western Railway Company* v. *Bennett* (L. Rep. 2 H.L. 27), upon similar railway clauses, that the statutory purchaser in such case cannot claim the benefit of the right of an ordinary purchaser of the surface to subjacent and adjacent support, the statute having created a specific law for such matters by which alone rights of the company and the mineowners are regulated. In that case the question was between undertakers who had purchased the surface compulsorily and the vendor who had retained the minerals. I cannot see what relevancy that decision has to the present case. Here the purchase of the pink land was voluntary, and the Manchester Corporation had no power to buy compulsorily. Further, in buying the pink land the Corporation bought not only the surface but also the minerals underneath, and bought therewith the right to lateral support from the yellow land which the pink land had always possessed. I do not understand how a decision as to the rights created between vendor and purchaser upon the separation of surface from underlying minerals can govern the rights between the owners of two plots of land between whom there is no privity of contract. The Waterworks Clauses Act 1847 also contains clauses 22 and 23, which, in the absence of agreement, require the owner of any mines or minerals beneath or within a prescribed distance of the undertakers' works, or, if no distance is prescribed, then within forty yards, to give notice to the undertakers before he works the same, and the undertakers may buy the necessary support on paying suitable compensation. If they do not give such notice then certain consequences follow, to which I will advert presently. No doubt the present appellants were bound to give notice under section 22. But what is the consequence of their having done so and no counter notice having been given? For that we must look to section 23. It seems to me that the effect of section 23 is as follows:—The mineowner is authorised to work into the belt as if the Act of 1847 and the Special Act had not been passed. That is to say, if he has, apart from the Acts, a right to let down the surface, he may do so. If he has no such right, then the Acts do not enable him to do so. In any case he must not wilfully damage the works, or work his mines in an unusual way. Now, if these Acts had not been passed, the owner of the pink land would have had indisputably a right of lateral support to his surface in its natural state against the owner of minerals beneath the yellow land, and I am quite unable to see how this right has been destroyed. It was strenuously argued by Mr Cripps that the Waterworks Clauses Act 1847 operates to obliterate all pre-existing right to support of the surface from minerals either subjacent or adjacent to the works whenever lands are purchased by virtue of the Act. I can see no ground for such a contention. It would involve a free gift to neighbouring mineral owners of a most valuable right, and a ruinous withdrawal from the undertakers of rights most essential to the safe maintenance of waterworks, without compensation, and, so far as I can see, without reason. The Legislature might do such a thing no doubt, but I find nothing in the Act that says this, even indirectly. Nor do I find any judicial authority for it antecedent to the decision of Farwell, J. The argument of Mr Cripps when analysed really amounted to this, that because a conveyance under the Act of surface, leaving minerals in the hands of the vendor, does not confer upon the surface a right to support, therefore whenever any land is bought by undertakers by virtue of the Act, every easement for support heretofore attaching to it, whether vertical or lateral, is destroyed. I shall not so hold unless directed by an Act of Parliament, or by authority which I am compelled to follow. Accordingly I am of opinion that the pink land still enjoys the right of support for the natural surface against the yellow land which it always possessed, and that the decision of the Court of Appeal was right.

LORDS MACNAGHTEN, JAMES OF HEREFORD, and ROBERTSON concurred.

LORD ATKINSON—I concur in thinking that this appeal should be dismissed. The facts have been already fully stated, and it is unnecessary to repeat them. The decision of the case turns mainly on the construction of sections of the Waterworks Clauses Act 1847, and the determination of the subject-matter to which those sections apply. Section 18 obviously deals with the owner of those mines which lie under land sold by him to the undertakers. Sections 22 and 23 are wider in their scope, and deal with three classes of mineowners—1. Those who own mines which lie under the works and buildings of the undertakers; 2. Those who own mines lying under the works and pipes described in certain plans, kept and deposited by the undertakers in manner provided by the three preceding sections; 3. Those who own mines lying within the prescribed distance, or, if not prescribed, forty yards "therefrom"—*i.e.*, I presume from the reservoirs, buildings, or underground pipes and works of the undertakers so described. In the first class of cases the undertakers would be the owners of the surface. And several authorities have been cited in argument, from *Great Western Railway Company* v. *Bennett* (*ubi sup.*) downwards, to establish that in purchases of land by undertakers under their compulsory powers, mines being reserved to the grantor, there is no grant by implication of the right to have the surface supported by the subjacent minerals, such as would be implied in the case of a grant to an ordinary purchaser, but that the mutual rights and obligations of the grantor and grantee, the mineowners and the surface-owners, are regulated entirely by the code contained in the Waterworks Clauses Act 1847. In class No. 2 the undertakers would most probably, but not necessarily, be the owners of the surface, since it is conceivable that they might only acquire wayleave for their underground pipes. And in class No. 3 the surface of the land between the limit and their reservoirs, buildings, underground pipes, or works, might or might not belong to them, the plain object of the statute being to give to the undertakers the opportunity of securing, by the purchase of mines, if they so desire, not only subjacent but also adjacent support for their reservoirs, buildings, underground pipes, and works. No reference, however, is made in the statute to lands belonging to the undertakers upon which reservoirs or buildings have not been constructed or erected, or in which pipes and works have not been laid or sunk. Their rights and obligations in reference to lands of this latter description are left untouched by the code, to be regulated and determined by the common law. Again, these three sections deal with mines which belong to persons other than the undertakers, and I am quite unable to discover anything in the statute, or in the authorities to which we have been referred, to deprive the undertakers, where they own both the surface and the subjacent minerals, of such a natural right of lateral support as any owner of lands and the minerals beneath them would be entitled to at common law. It is conceded that the north part of the reservoir is upon Taylor's land. It is further conceded that the workings in Lord Stamford's land, partly within and partly without the limit of forty yards, have caused a subsidence of that part of the reservoir situate on Taylor's land, and would by reason of the deprivation of the lateral support have caused a subsidence of those lands even if the reservoir had never been built upon them. The defendants, as owners of the mines under the land sold by Lord Stamford, gave the notice required by section 22, and no counter-notice was given by the plaintiffs. Under these circumstances it appears to me that the mineowner under Lord Stamford's land, provided he did no wilful damage and did not work his mines in an unusual manner, could work them so as to let down the surface of Lord Stamford's land if he so desired, because, though section 23 provides that the mines may be worked "as if this Act and the Special Act had not been passed," yet according to the several authorities cited the plaintiffs never acquired the right to have the surface supported, such as an ordinary grantee of the surface would by implication have acquired. They got the statutory right in lieu of that implied right, and the fact that they have not availed themselves of this statutory right to the full cannot operate to vest in them the right for which the statutory right was a substitute. But with regard to Taylor's lands none of that reasoning applies. There the plaintiffs had the right of lateral support vested in them by the purchase from Taylor, and as the words "as if this Act and the Special Act had not been passed" cannot operate to vest in the plaintiffs a right in reference to Lord Stamford's land which they never had, so neither can it operate to deprive them of the right they had acquired, and would if the parties were remitted to their original positions have been entitled to enjoy and enforce. I concur with Cozens-Hardy, L.J., in thinking that the result as to Taylor's land would be the same whether the workings which caused the subsidence were within or without the forty yards limit, and I approve of the results at which he arrived and of the reasoning by which he arrived at them. I therefore am of opinion that this appeal should be dismissed with costs.

LORD COLLINS—I concur. I agree with the judgment of Cozens-Hardy, L.J., and am prepared to adopt it.

Appeal dismissed.

Counsel for Appellants—Cripps, K.C.—Upjohn, K.C.—MacSwinney. Agents—Bower, Cotton, & Bower, Solicitors.

Counsel for Respondents—Sir R. Finlay, K.C.—C. E. Jenkins, K.C.—H. F. Moulton. Agents—Austin & Austin, Solicitors.