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Monday, May 22.

BLAIR *v.* RAMSAY AND THE ALLOA COAL COMPANY.

(*Ante*, p. 10.)

Property—Coal—Disposition—Reserved Right.

Held that a reservation in a disposition of lands of the coal, with power to work, win, and carry away the same, does not entitle the person in right of the reserved power to use a mine underneath the said lands for the purpose of working coal outwith the boundaries thereof, unless the said mine runs altogether in the coal strata or in the wastes caused by the working out of the coal.

Mr Blair of Tillicoultry, the pursuer in this action, was proprietor of certain lands which were entirely surrounded by the property of the defender Mr Wardlaw Ramsay. Mr Blair had acquired his property from the predecessors of Mr Ramsay by grants dated respectively 1825, 1827, and 1851. The first of those grants, in 1825, contained the following clause:—"Reserving always to me, my heirs and successors, the coals and coal heughs all of the said haill lands, to be won and disposed upon by me and my foresaids at our pleasure." In the grant of 1827 the clause of reservation was to the following effect:—"Reserving always to the said Robert Wardlaw Ramsay, and his heirs and successors, the whole coal, stone quarries, and all other metals and minerals within the said three acres of the lands of Westquarter hereby disponed, with power to search for, work, and carry away the same—they always paying the said James Blair and his foresaids all damages."

The grant of 1851 contained this reservation—"Excepting always the coal within the said several subjects above disponed to the said James Blair, which coal is hereby expressly reserved to the said Robert Balfour Wardlaw Ramsay, with full power to him to dig for, work, win, and carry away the same, on paying the surface damages which the ground may thereby sustain."

The defenders, the Alloa Coal Company, were lessees from Mrs Ramsay of the coal field under her lands and also under the lands of the pursuer. The said coal company had run a mine underneath the pursuer's lands, passing partly through the strata of coal, but principally through other strata, and they used the mine for the working of the coal in lands beyond the boundaries of the pursuer's land.

The present action was brought for declarator that the defenders had no right to use the said mine for the purpose of working coal and other minerals outwith the boundaries of the pursuer's lands, and for damages for injuries "sustained" through their having done so.

The Lord Ordinary (MACKENZIE) pronounced decree of declarator in favour of the pursuer, and the Second Division upon a reclaiming note adhered to his judgment.

The defenders appealed.

At giving judgment—

LORD CHELMSFORD—My Lords, it seems to me, as I believe it seems to your Lordships, that there is no difficulty whatever in this case, and that there is no necessity to hear the counsel for the respondent.

The simple question arises upon three grants, with reservations made by the appellant Mr Ramsay of Whitehill. These grants were made in 1825, 1827, and 1851. The first of the grants, which is dated the 13th of July 1825, contained this proviso,—"Reserving always to me, my heirs and successors, the coals and coal heughs all of the said haill lands, to be won and disposed upon by me and my foresaids at our pleasure." The grant of 1851 is said to be practically in the said terms; the reservation is—"Excepting always the coal within the said several subjects above disponed to the said James Blair, which coal is hereby expressly reserved to the said Robert Balfour Wardlaw Ramsay, with full power to him to dig for, work, win, and carry away the same on paying the surface damages which the ground may thereby sustain." With regard to those grants there can be no doubt at all that the only reservation is of the coal under the surface, and the granter would have no power whatever to carry under those lands any coals or minerals won and worked from any other lands.

The reservation in the grant of 1827 is more extensive. It is, "Reserving always to the said Robert Wardlaw Ramsay, and his heirs and successors, the whole coal, stone quarries, and all other metals and minerals within the said three acres of the lands of West Quarter hereby disponed, with power to search for, work, and carry away the same, they always paying to the said James Blair and his foresaids all damages." Undoubtedly under that grant the whole of the land under the surface, all the coals, and all the metals and minerals, were reserved to the granter, and it gave him a right of course, as upon his own property, to make any way for any coals or other minerals that he might have in any other part of his lands. But in this case he could not use that power because there were barriers on either side which prevented access to that underground.

My Lords, the Judges of the Court of Session have been unanimous on this subject, and are of opinion that Mr Ramsay had no power whatever to use the underground of the lands reserved for the purpose of carrying away coals or minerals from any other lands which were not granted. I cannot help observing that I think that Lord Ormidale in giving judgment in this case has stated that which is not perfectly correct, because he says that the reserved right to work and carry away the coal was not of the nature of a proprietary right, but rather of the nature of a "privilege, servitude, or easement." Now, it appears to me that being upon a grant or reservation of minerals *prima facie*, it must be presumed that the minerals are to be enjoyed, and therefore that a power to get them must also be granted or reserved as a necessary incident. As was said by Lord Wensleydale in the case of *Rowbotham* v. *Wilson*, in 8th House of Lords Reports—"It is one of the cases put by Shepherd Touchstone in illustration of the maxim, *Quando aliquid conceditur conceditur etiam et id sine quo res ipsa esse non potuit*—

that by a grant of mines is granted the power to dig them. This power to dig would of course be futile unless it involved the right of bringing to the surface. A necessary incident to a grant cannot therefore in my opinion be styled a "privilege, servitude, or easement."

I think the matter is perfectly clear, and I move your Lordships that the interlocutor of the Court of Session be affirmed.

LORD HATHERLEY—My Lords, I am entirely of the same opinion.

In the case of *The Duke of Hamilton* v. *Graham* it was clearly pointed out what the exact right of a proprietor was in respect of a property excepted from a demise, and as to which therefore all the original rights of the demising proprietor remained, together with all the incidents to that property necessary to its working and enjoyment, that which the owner has reserved to himself being as much his as other parts of his land of which he had made no demise whatever. In the *Duke of Hamilton's* case it did not appear from the evidence that he was exceeding that right; it did not appear that he was using for any purpose whatsoever anything but that portion of the mineral property which he had actually reserved, and over which he had entire and complete *dominium*, and therefore it was held that he was not transgressing his own grant or departing in any way from it. But as respects the power of working, whether incidental to the reservation of the property, or expressly specified in the instrument, no right of property is attached to that; it is simply a right of availing yourself of that property which you have reserved to yourself in the lands in question.

Now, the right which has been reserved in the lands in question in this case is only a right to the coals under the lands which have been parted with and demised, that is to say, a right to the portion of the coal situated under the surface demised to the pursuer (the respondent), and although the right to that coal would exist fully if that alone was being dealt with, with regard to this mode of access to the minerals which he has reserved to himself nothing can be done beyond the purpose for which that right was reserved, namely beyond the purpose of working the coal under Mr Blair's lands, and no other coal. That really seems to me, my Lords, the simple principle upon which the Court has proceeded, and as to the question of interpretation I do not see how he can give to the words "coal and coal heughs" (whatever coal heughs may mean) any interpretation going such a length that it would amount to a reservation of all the wastes between the different seams of coal in the lands.

As regards the intervening piece of land demised by the grant of 1827, the reservation is more extensive. The reservation there is of "The whole coal, stone quarries and all other metals and minerals within the lands demised, with power to search for, work, and carry away the same." If those who, advising Mr Ramsay with regard to the granting of his leases had happily thought of drawing the other two leases (contracts of excambion) in the same form, it is possible that he might have found himself in a more favourable position, but as things stand I have no hesitation in coming to the conclusion that the pursuer is right and that the appeal ought to be dismissed.

LORD SELBORNE—My Lords, the question seems to me to be a very simple one, both in fact and in law.

The engineer Mr Simpson finds in the Report, which is the only evidence as to the facts that the level cross cut which he speaks of by the word "mine" runs under the pursuer's lands, partly in the cherry coal waste and splint coal waste, and partly in other strata, and that the strata through which the mine passes, other than the coal, consists chiefly of shale and sandstone. The interlocutors under appeal have recognised the right of the appellant to carry through the coal and the coal wastes whatever he is able to carry through them without any interference on the part of the pursuer, but have denied him that right as to the other strata, stated here to consist chiefly of shale and sandstone. The only possible question that I can see is, whether by the grants of the two feus of 1825 and 1851 those other strata of shale and sandstone passed in fee to the feuar, who was the pursuer in the action, or were reserved and excepted in favour of the appellant?

Looking at the terms of the grants, I can see no ground whatever for raising so much as a doubt that those other strata of shale and sandstone passed to the feuar, and were not reserved or excepted in favour of the appellant. In the first grant the only thing excepted is whatever is properly described by the words "coals and coal heughs." The expression "coal heughs" is interpreted to mean coal pits. As there were no open coal pits at that time under this land, I take that as equivalent to coal mines; but coals and coal mines mean, I apprehend, when unopened mines are spoken of, nothing more nor less than the veins or seams of coal underlying the surface. Whatever he can do within the limits of those veins or seams, whether before or after their exhaustion by working, is still permitted to him by these interlocutors, and the question arises solely as to the other strata, which are neither coals nor coal mines. With respect to the third grant, there is even less apparently upon which the argument can be founded than in the first, because the words "coal heughs" are not there, but only "the coal."

My Lords, I must take the liberty of saying that I think Lord Ormidale was not so far wrong in the language which he used at pages 54 and 55. No doubt the right to work coal which is reserved under land otherwise granted is a right connected with property in the person who makes the reservation in his own favour, and not like an easement; still, so far as it is a right to be exercised, not within the *solum* which is reserved, but over and through the *solum* which is granted. I cannot but think that Lord Ormidale was justified in describing it by the words "privilege, servitude, or easement."

Appeal dismissed.

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