it would be difficult indeed to rebut that inference.

Now, let us put ourselves for a moment back to the year 1846, when Captain Stirling was the owner of Glentyan, and when he had acquired the Wardhouse estate. He himself, we may take it, knowing a great deal of the local circumstances connected with the enjoyment of this road before that time, whatever enjoyment there was, proceeds to deal with this road for the purpose of enlarging and completing his policies, and he does it in a most expressive and decided manner, namely, by closing up this road, putting across it a gate which is constantly kept locked or secured, and absolutely excluding the public. Now, just let us place ourselves for a moment in this position of things. He was dealing with the community of Kilbarchan. The act which he was doing was one which was against the interest of every member of that community; it was one to which they would all be adverse, and he was dealing with a community that was quite capable of asserting and defending its own rights—I should come to the conclusion that they would have asserted the right if a public right-of-way had existed.

There is another view also to be taken. That was in 1846. At that time the majority of the community, or a large portion of them, could have spoken to the enjoyment for 40 years previously if enjoyment there had been. If there had been continuous and exclusive possession by the public, there were then a number of people who could have spoken to it in positive terms and in the most satisfactory manner, both upon the one side and upon the other, and it seems to me incredible that a community who saw its right, if the right existed, violently invaded would have long submitted to that invasion and have acquiesced in it for 37 years. The inference to be drawn from that is very strong that a public right did not exist, and that the people then living knew that it did not exist, and that it was because of that knowledge that the community acquiesced in the forcible act of Captain Stirling in excluding them. Well, if that is the true view to take of it, it only remains to consider whether in this case there is sufficient evidence of facts in proof to rebut that legitimate and, as I have called it, overwhelming inference.

My Lords, I do not intend to advert to any of the details. They have been so well criticised by my noble and learned friends who have preceded me that I should only be wasting time by entering upon them. I will only state what occurs to my own mind regarding them, and that is that at an early period, from 1805 to 1820, the evidence is of that character that it cannot be said to be such full, complete, and satisfactory evidence as would rebut the inference deducible from a 37 years' acquiescence, which can only be rebutted by proving that for 40 years anterior to 1846 the public had a clear and continuous possession as of right and with no interruption.

My Lords, I entirely agree with the judgment of the Lord Ordinary, and I think that the interlocutor under appeal should be reversed, and that the interlocutor of the Lord Ordinary should be restored.

Interlocutor under appeal reversed, and interlocutor of the Lord Ordinary restored. The appellant to receive the expenses in the Court below from the date of the Lord Ordinary's interlocutor, and the respondents to pay the costs of this appeal.

Counsel for Pursuers (Respondents)—R. B. Finlay, Q.C.—James Reid. Agents—J. Balfour Allan—John Macpherson, W.S.

Counsel for Defender (Appellant)—Lord Adv. Balfour, Q.C.—Dickson. Agents—Grahames, Currey, & Spens—Webster, Will, & Ritchie, S.S.C.

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## *Wednesday, May* 13.

(Before the Lord Chancellor, Lords Blackburn, Watson, and Fitzgerald.)

### DUKE OF HAMILTON *v.* DUNLOP AND ANOTHER.

(*Ante*, vol. xxi. p. 657, and 11 R. 963—20th June 1884.)

*Property—Personal Privilege—Conveyance—Reservation in Conveyance of "Liberty of Working" Minerals.*

When a proprietor dispones lands, reserving to himself the "liberty of working the coal and other minerals" therein, he is to be understood, not as reserving a mere personal privilege of working minerals, but as reserving the property of the coal and other minerals.

By an excambion a proprietor conveyed lands which contained minerals to a neighbouring proprietor in exchange for others, reserving to himself and his heirs and successors in the lands obtained in exchange, "if conveyed with that privilege," the "liberty of working" coal and other minerals in the lands he conveyed, under the declaration that these must not be worked from the surface but from other lands which might belong to him or them. Thereafter he sold the lands obtained in exchange without mention of the "privilege." In a question between his heir and the heir of the proprietor with whom he had made the excambion, *held* (*aff.* judgment of Second Division) that the reserved right of working minerals was a reservation of the property therein, and not of a mere privilege of the nature of a servitude which might be lost *non utendo*, or which had fallen by the conveyance of the lands without mention of the "privilege."

This case is reported in Court of Session, *ante*, vol. xxi. p. 657, and 11 R. 963—20th June 1884.

The defender, the Duke of Hamilton, appealed.

At the conclusion of the arguments on behalf of the appellant, their Lordships delivered judgment as follows:—

Lord Chancellor—My Lords, it appears to me that the unanimous decision of the Second Division of the Court of Session agreeing with that of the Lord Ordinary in this case is right.

I will first make some observations which occur to me, which shall be but few, upon what I re-

gard as the good sense and reasonable view of such a deed as the present, even if there were not authority apparent on the matter. You have words of reservation, and you have a prior title to the whole property in these coals and minerals in the person who is making this reservation in his favour. What is the thing reserved? If there be no limit of time—if it be to Dunlop and his heirs for ever—then it is a perpetual reservation. What is the subject of the reservation? The right to take away the whole of those coals and minerals. A perpetual right to the whole possible profits and the benefit of property is *prima facie* very much like the whole beneficial interest in that property; at least, when you find that the man who had it before leaves as a reservation something out of his grant, and that that is the *quantum* of the reservation in point of matter and in point of time, the most sensible and reasonable construction, if there be no technical difficulty, is that he means to reserve as to that subject the property which he had before, with such superadded privileges as to the means of getting at it and enjoying it as are found in the deed, and there are such.

But, my Lords, I quite admit that these words being capable of being understood apart from the subject and apart from the previous title and the words of reservation, as not granting property but granting a right to deal with property, if even in the case of a clause of reservation with such a previous title there had been a series of authorities determining that something more was necessary and that without more they would operate as a license only, I might have hesitated to overrule such authorities. But when I find that the authorities are all the other way, concurring with what strikes me as the common sense of the case and with the unanimous decision of all the Judges in the particular case, I cannot be persuaded to doubt that they ought to be followed. [See *Livingston*, 5 Brown's Sup.]

Now, those cases which are reported in the supplement to Morison, of the years 1776 and 1778, although shortly reported, were plainly cases upon similar words in a contract of the same nature under similar circumstances; and if the words which shortly describe the decision of the Judges are to be interpreted in their legal and natural sense, the decision was that such words under such circumstances reserve the antecedent property in the coal, and do not merely give a license as from the grantee of the coal to take a part of what would otherwise be his.

The same views prevailed in the case of *Davidson* v. *The Duke of Hamilton*, May 15, 1832, 1 Sh. 411 (N.E.) 385; and whether that decision was right or wrong as to the use of surface privileges, which is quite a distinct matter, it cannot possibly have been right except upon the supposition of these words reserving the original property of the grantor in the coal.

In the case of *Bain* v. *The Duke of Hamilton*, 3 Macph. 821, which arose upon the question of reducing words said to have been improperly inserted in the dispositive clause of a charter by progress, I think that in determining that question it was proper, if not absolutely necessary, to consider whether those words signified the property in the coal or only signified a licence or privilege to take coal belonging to somebody else. All the Judges except the Lord President appear to have thought that it was necessary, or at all events proper, to express an opinion upon that question, and they all did express an opinion agreeing with what was decided in *Livingston's* case, agreeing in the opinion expressed in *Davidson's* case, and agreeing with what seems to me to be the reason and common sense of the matter, namely, that those words used in such an instrument and under such circumstances as words of reservation did reserve the antecedent property in the minerals of the grantor.

My Lords, those cases have been followed by the learned Judges in the present instance, and for my part I think it quite impossible that your Lordships should reverse their decision. I therefore move your Lordships to affirm the interlocutors appealed from and to dismiss the appeal with costs.

Lord Blackburn—My Lords, I perfectly agree. I think that besides the common sense of the thing, a licence or a privilege to work and win the whole of the coals is very much in substance the same thing as a right of property in the coals. There is a technical reason in Scotland, that where the person reserving is himself infeft of the whole property, in the coals and all, and reserves that right by these words, he reserves the property in the coal—in that case he is infeft of that right at the time, and continues infeft and has the title; in the other case he would not be infeft—(I do not pretend to use the correct Scotch words)—he would have at best a difficulty in making out his interest afterwards.

Taking that to be so, as the common sense of the thing, we find also that there are several decisions pointing one way. It is said that it was not necessary for the decision in all of them that this question should be considered, but a good many of the cases point to this, that where there is a reservation of the right to win coals and minerals by the person already infeft, that reservation of the right to win coals and minerals is, at least *prima facie*, the same thing as if it were a reservation of the whole property in the coals and minerals.

Then comes the question—Is there enough to shew that, although the reservation must be taken *prima facie*, though certainly not necessarily to have that meaning, it has been cut down in this instrument to mean less? I must say that the rather singular terms which the conveyancer has used do not seem to me to have that effect. Therefore, I quite agree with the opinion which has been expressed by the Lord Chancellor that the interlocutors must be affirmed.

Lord Watson—My Lords, I am quite of the same opinion. It appears to me to be established by authority in the law of Scotland that where the owner of lands is disposing to a singular successor or other person, if he reserves the liberty of working the coal in these lands, he must be taken to have reserved the estate of coal with which he stands vested by infeftment. Now, my Lords, it appears to me that that is a very reasonable construction to put upon the words in the case of a right constituted by reservation. How far these words would be effectual to constitute a right over lands it is not necessary for your Lordships to consider—But the words may be in-

sufficient to give a reserved right to the whole estate of coal if they are in any way qualified by the context; the right may be cut down, because it may appear from other words used in the deed of conveyance that it was intended to give to the disponee the estate of coal and merely to reserve to the disponer the right to work that estate or part of that estate of coal. I cannot find any such words in this deed effectual to qualify the right of John Dunlop and his heirs. There seems to me to be a good reservation in favour of John Dunlop and in favour of his heirs, and that reserved right is not taken away by the addition of the somewhat unnecessary reservation of this privilege to any of the singular successors in the lands of East and Mid Coatts to whom Dunlop or his heirs might choose to convey the right.

Lord Fitzgerald—My Lords, I concur. The decisions all point to one end, and they agree with the common sense and justice of the case.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Counsel for Pursuer (Respondent) — Lord Adv. Balfour, Q.C.—Sol.-Gen. Herschell, Q.C. Agents—Martin & Leslie—John C. Brodie & Sons, W.S.

Counsel for Defender (Appellant) — Davey, Q.C. — Graham Murray. Agents — Grahames, Currey, & Spens — Tods, Murray & Jamieson, W.S.

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# COURT OF SESSION.

*Saturday, June* 13.

## FIRST DIVISION.

PETITION—HUTTON (LIQUIDATOR OF THE GLASGOW INVESTMENTS COMPANY, LIMITED).

*Public Company—Winding-up—Production of Companies' Books and Papers—Companies Act* 1862 (25 *and* 26 *Vict. c.* 89), *secs.* 115, 126.

Warrant *granted* in the winding-up of a public company, on the official liquidator's petition, to summon the secretary and the shareholders of the company to depone to their knowledge of the company's affairs, and to produce the company's books and papers.

The Glasgow Coal Exchange Company on 20th January 1885 presented a petition to the Court of Session for the winding-up of the Glasgow Investments Company (Limited), and an order for judicial winding-up was pronounced by the Court on 6th February 1885. James Hutton, chartered accountant, Glasgow, was appointed official liquidator.

This was a note by the liquidator under the 115th section of the Companies Act 1862

Section 115 provides—"The Court may, after it has made an order for winding up the company, summon before it any officer of the company or . . . any person whom the Court may deem capable of giving information concerning the trade dealings, estate, or effects of the company, and the Court may require any such . . . officer or person to produce any books . . . or other documents in his custody or power belonging to the company. . . . Nevertheless in cases where any person claims any lien on papers, deeds, writings, or documents produced by him, such production shall be without prejudice to such lien, and the Court shall have jurisdiction in the winding-up to determine all questions relating to such lien."

The liquidator averred that the only assets of the company consisted of 664 shares (£10 each, £5 paid up) in the Glasgow Coal Exchange Co. (Limited), and that these shares were transferred to the company by Messrs Borland & King, writers, Glasgow, in exchange for which they received fully paid-up shares of the company; that the capital of the company was £10,000 in 10,000 shares of £1 each; that up to July 10th 1884 3742 shares had been allotted and were paid up; that William Borland, writer, Glasgow, held 1868 shares, and John Young King, writer, Glasgow (his partner) held 1869 shares. The remaining allotted shares were held by the other parties named in the note, who held one share each.

The liquidator further averred that for the proper discharge of his duties it was necessary that he should obtain delivery of the books and other papers of the company, but that Messrs Borland, King, & Shaw, writers, claimed to have a lien over them in security of an account for law business incurred to them in connection with the promotion of the company; that he had been unable to obtain any information regarding the company or its affairs. It was in consequence of their refusal to give up these documents that the present application was made. A list of the documents specially called for, and being the prospectus, memorandum, articles, books, contracts of the company, &c., was appended to the note.

The liquidator prayed that the parties named being the whole shareholders might be cited for examination concerning the trade dealings of the company, and that they should be required to produce the books and documents in their custody, and further that under the 126th and 127th sections of the Companies Act of 1862 commission should be granted to the Sheriff of the county of Lanark, or any of his Substitutes at Glasgow, to examine the parties and documents, and to make report thereof to the Court.

Section 126 provides — "That . . . the Sheriffs of counties in Scotland shall be commissioners for the purpose of taking evidence under this Act in cases where any company is wound up." . . .

The Court at the calling in the Single Bills granted the prayer of the note.

Counsel for Liquidator — M'Nair. Agents —J. & J. Ross, W.S.

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