Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Ballacorkish Silver, Lead, &c., Company v. *Dumbell and others from the Isle of Man; delivered the* 19*th December,* 1873.

Present:

Lord Penzance.
Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague Smith.
Sir Robert P. Collier.

THE Appellants under a lease from the Crown have entered upon lands occupied by the Respondents, have sunk shafts or enlarged shafts already sunk, and worked the mines there.

The Respondents filed their Bill of Complaint in the Court below, complaining of two distinct species of damage: first, the damage done to the surface by depositing spoil from the mine upon it; and, second, the damage done to three several springs of water which existed in their land and which they used for farm purposes.

They also complained in their Bill of the entry by the Appellants into their land and breaking the surface for the purpose of mining; but this it was proved in the Court below that the Appellants had a right under their lease and by the custom of the Island to do, and the Court below have practically affirmed this right, nor is it in question now.

The Appellants by their answer denied the Respondent's claim both for damage to their springs of water and damage done to the surface by depositing the spoil upon it.

But this latter claim was clearly proved by the evidence to be in accordance with the custom of the

island and the Appellants do not now in appeal contend that they are not liable for it.

The question, therefore, is narrowed to the point whether, upon the general principles of law applicable to their respective positions, or upon the custom of the island, the Appellants are responsible for the damage done to the springs.

The Court below has by its decree decided this question in the affirmative, and has accordingly directed an inquiry by a jury as to the quantum of damage sustained under this head.

The present Appeal calls in question the principles on which that decree proceeded, and raises a controversy of very general interest and very wide range.

For the damage complained of is the withdrawal by percolation into the mine of the Appellants of water, which it is averred would otherwise have flowed into, or having flowed into would have been retained in the wells or springs on the Respondent's land; and such percolation of water is so common an incident of mining, that any legal liability attaching to it cannot fail to be fraught with serious consequences.

The facts that give rise to this legal question in this case are these. A new level was driven by the Appellants under the Respondent's land about two years ago, and from that time the wells and springs were dried up.

This level appears to have been worked at a considerable depth below the springs, being at the depth of 25 fathoms, or 150 feet below the surface at or near the part where the springs lay, but it was said by one of the witnesses to have struck a "porous vein," and the contemporaneous failure of water in all the wells was the apparent result.

In this state of things it is convenient to consider the legal rights of the parties in the first place, independently of any custom.

If the litigant parties had been the respective owners of two adjacent closes, and one of them, mining in his own land, had drawn off by natural percolation through the soil the water which fed a spring or well on the land of the other, there would have been no question to discuss. For the cases of Aston *v.* Blundell, and Chasemore *v.* Richards have affirmed conclusively this proposition—that the dis-

turbance or removal of the soil in a man's own land, though it is the means (by process of natural percolation) of drying up his neighbour's spring or well, does not constitute the invasion of a legal right, and will not sustain an action.

And further, that it makes no difference whether the damage arise by the water percolating away, so that it ceases to flow along channels through which it previously found its way to the spring or well, or whether having found its way to the spring or well it ceases to be retained there.

But here a distinction was drawn in argument. It was said that the relations of the two parties in this case are not similar to those of two strangers in title occupying adjacent closes.

For that the Appellants represent through the Crown the lord of the manor, and the Respondents are customary tenants of the manor, and that the lord having granted the surface to the customary tenants, could not lawfully derogate from his own grant by so working the mines as to inflict damage of this description on the tenants.

This reasoning, whatever weight attaches to it, appears to apply to the present case; but the Respondents' argument admits of a more cogent answer.

The Court, in both the cases cited, dwelt upon the extreme difficulty, if not impossibility, of pursuing the courses of this natural percolation of water, so as to bring together cause and result, with that reasonable degree of certainty which ought to attend the enforcement of a legal right, and relied upon this difficulty as a prominent reason for declaring damage of this description to be *damnum absque injuriâ*.

The mutual rights of the lord and the tenants of the manor, were finally settled and adjusted by the Act of Tynwald in 1703.

That Act recited that disputes had arisen as to these mutual rights, and that the Act was passed with the consent of both parties to put an end to all such disputes.

After assuring to the customary tenants their lands and rights the Act expressly excepts in favour of the Lord all "mines, minerals," &c.

The words are—

"Saving always unto the said James Earl of

Derby, his heirs and assigns, and unto all and every other person and persons that shall at any time hereafter become lords of the said isle, all such royaltys, regalia, prerogatives, homages, fealtys, escheats, forfeitures, seizures, mines, and mineralls of what kind and nature soever, quarrys and delfs of flagg, slate or stone, franchises, libertys, priviledges, and jurisdictions whatsoever, as now are, or at any time heretofore have been invested in the said James Earl of Derby, or in any of his ancestors, lords of the said isle."

The lord's right to the mines and minerals it is to be observed is affirmed by way of exception. It is affirmed to have been excepted out of the thing granted.

It is not, therefore, a mere liberty to work the mines which the lord has, but the Act affirms that he has excepted out of the grant not only the minerals, but that portion of the soil which contains the minerals, and which constitutes the "mine."

The legal effect of such an exception is undoubted; it was commented upon by Lord Hatherley in the case of Proud *v.* Bates (34 L. J. N. S. Eq., p. 411): "There is no doubt," he says, "but that the mines are altogether out of the demise and never having been demised or parted with at all, the Defendants are at liberty to use them as they think fit." The rights of the lord or grantor in such cases are further illustrated and explained in the Duke of Hamilton *v.* Graham.

If then the lord is thus possessed of the "mines" as of his own original title in the soil he has all the rights incidental to that ownership, and among others he has the right to the use of all waters found thereon, and percolating by natural processes into the mines when opened. He may apply such waters too in any way he pleases, or he may simply remove them and cast them away.

And the question is, whether in exercising a right thus incident to the ownership reserved to him he is derogating from anything which he has expressly or by necessary implication granted to the tenants of the manor.

Express grant of these springs for the use of the tenant of course there is none.

And as these particular springs are not shown to have been in existence at the time of the Act of

1703, it is not easy to see how it could be implied that they individually were then or at any previous time granted.

If such a grant could be implied at all therefore, it could only be so as part of the general ownership and dominion of the surface, which carries with it, no doubt, the right to the use of the water falling upon it, or rising there in the form of a spring, or at any time found upon it. But the same thing is true, as has been just pointed out, of the ownership of the mines.

How then are these respective rights to be reconciled? They cannot, in a legal point of view, be distinguishable from those of the owners of adjacent portions of the same close, the only difference being that the former are adjacent vertically instead of laterally.

The case may therefore be put of the owner of a piece of land who has parted by grant with a portion of it and retained the rest.

Now, it is obvious that the respective rights of the grantor and grantee in such a case can only be upheld so long as the distinction is maintained between a right to use and appropriate the water which the soil from time to time affords, and a right to have the flow of that water in the soil preserved without disturbance.

In what respect then, do their rights differ from those of the owners of adjoining closes, who are strangers in title, each of whom is entitled by law to the water found upon his land, but neither of whom is entitled to complain of the loss of that water by natural percolation set in action by his neighbour's excavations.

It appears to their Lordships that the two cases are substantially identical, and that the same law must govern both. The grant of the surface cannot carry with it more than the absolute ownership of the entire soil would include.

That absolute ownership is held not to include a right to be protected from loss of water by percolation into openings made in the soil of a neighbouring owner. How, then, can the grant of the surface only be held to include such a protection?

To hold otherwise might not improbably result in rendering the reservation of mines and minerals wholly useless. Percolation of water into mines to some extent is an almost necessary incident of mining.

And if the grant of the surface carries with it a right to be protected from any loss of surface water by this percolation, the owner of the surface would hold the owner of the mines at his mercy, for he would be entitled by injunction to inhibit the working of the mines at all.

It is not at variance with this view that the case of Whitehead *v.* Parks (2 H. and N., 870) was decided, because in that case there was a lease and a distinct grant of the injured springs *eo nomine*, and the injury was the act of one who claimed under the lessor, so that the question resolved itself into the meaning and construction of the words used in the lease, and did not depend on the rights to be assigned by the law to persons standing in certain relations of title to one another, the Court holding that by the terms of the lease the lessor had so far assured to the lessee the continuance of the springs in question that he could not lawfully, by any act of his own, diminish them.

There remains the question of custom. This is a question of fact.

It was argued that the custom proved was wide enough to include the damages done to the springs of water, and that damage to the springs was in fact damage done to the surface of the land at or near which the springs were found, or if not, then that the custom was really a custom to compensate for damage generally, and that proof of compensation made for damage to springs was only wanting because that particular form of damage had not previously arisen.

Their Lordships cannot concur with either contention. The Court below has found as the result of the evidence that a custom existed "to compensate for surface damage that may be done to the land," but that "no custom to compensate for damage by interference with rights of water has been proved."

No further definition is given of what is intended by "surface damage done to the land," but the words are plainly used in contradistinction to "damage by interference with rights of water" in respect of which it was said no custom was proved.

It is therefore impossible, their Lordships think, to hold that the Court below intended, when speaking of "surface damage," to include damage done to the springs.

Nor would the evidence justify such a conclusion.

For there is not a single witness who even alludes to a claim ever having been made in respect of such damages, still less acceded to—although it can hardly be the case that mining should have been carried on to any extent in the island without giving rise to damage of this description.

Be this as it may, their Lordships are of opinion that a custom to compensate for a species of damage which does not fall within the ordinary definition of legal damage, and which is not *ejusdem generis* with that of which proof was given, needs for its establishment at least some direct proof of its existence, and ought not to be inferred from the fact of ordinary damage to the surface of the land in the legal sense of the words having been always paid for.

In the result, therefore, their Lordships will humbly advise Her Majesty, that this Appeal should be allowed; that the Decree of the 8th July, 1872, should be varied by omitting so much of the same as declares that in the opinion of the Court the Defendants are also liable to make compensation to the complainants for the damage caused to the aforesaid lands by the Defendants sinking and working mines on the lands of complainants, and thereby interfering with the rights of water as complained of in this Bill, and as directs the Jury to estimate and assess the amount of damage (if any) done by interference with water; and by declaring that the Plaintiffs are not entitled to compensation for such last mentioned damage. And that the order of the Court for an injunction should be reversed as not being justified by any established practice of the Courts in the Isle of Man, and contrary to the practice of the Courts in England; but that the bond, which appears to have taken the place of the arrested goods, should remain in force, and that the Appellants are entitled to their costs.

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