Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Her Majesty's Attorney General for the Isle of Man v. *Mylchreest and others from the Court of Exchequer of the Isle of Man; delivered 8th of May* 1879.

Present:

Sir James W. Colville.
Sir Barnes Peacock.
Sir Montague E. Smith.
Sir Robert P. Collier.

THE questions raised in this appeal are, whether the Crown is entitled to the clay and sand in the customary estates of inheritance in the Isle of Man, and to an injunction to restrain the customary tenants from taking, winning, and working these substances.

The information filed by Her Majesty's Attorney General for the Isle alleges that Her Majesty, in right of Her Crown, is seized in Her demesne as of fee of the Island, Castle Peel, Lordship, and territory of Man, and that Her Majesty and all former Lords of the Isle have been seized of the Manor of Man (commonly called the Lord's Lands), and of "all mines and "minerals of what nature and kind soever, and "quarries and delfs of flagg slate or stone within "the said Manor," with the right, according to the laws and customs of the Isle and Manor, to enter upon the lands, and to search for, work, and win the same, making compensation to the customary owners of the lands for surface

damage. It then alleges that the first Defendant Mylchreest, the owner of a customary estate called Ballaharra, had (by his guardian) granted a lease or license to the Defendants, Moore and others, to dig clay and sand in this estate for the manufacture of bricks, tiles, and pottery. The information prays that it may be declared that Her Majesty is seized of or entitled to all mines and minerals of what nature or kind soever within the lands called Ballaharra, including clay and sand, and all other substances which can be gotten from underneath the surface of the earth for the purpose of profit, whether the same be gotten by open cutting or by underground working, with the right to enter and work them. It also prays that the lease to Moore and others be set aside, and for an injunction to restrain the Defendants from winning and working clay and sand.

The answer admits the right of the Crown to certain mines and minerals, and to win and work them, but alleges, with regard to clay and sand, that by the laws and customs of the Isle the owners of customary estates of inheritance in customary tenements of Lords' lands have from time immemorial without the license of Her Majesty or Her predecessors, Lords of the Isle, as of right dug, raised, and got the clay and sand therein, and have removed and used the clay for manuring their own and other lands and for other purposes, and have converted it into bricks and tiles for sale. The custom is set out at great length, and in divers forms in the answer.

The circumstances which immediately preceded the filing of the information are worthy of remark.

On the 20th February 1867 the Crown granted a lease of the mines and minerals (except slate and stone) under the estate of Ballaharra to the

Defendants Moore and others, who, by virtue of it, proceeded to get and work the clay and sand in that tenement.

The Defendant Mylchreest thereupon (on the 25th June 1867) filed a bill in the Chancery Court of the Isle to restrain these workings, and for an account. An injunction was granted, and subsequently a decree was made against the Crown lessees for payment to Mylchreest of the amount of profit made by the workings.

In consequence of this decree the lessees surrendered their lease to the Crown. The Crown did not think fit at that time to contest the claim of the customary tenant, and accepted the surrender. The same persons who had been the Crown lessees then took a lease from the customary tenant, Mylchreest, of the clay and sand in his tenement, and were working under it, when the present information was filed, to which they were made Defendants.

A considerable body of evidence has been produced by the Defendants to prove the custom they have set up. It appears that a bed of clay exists under the whole, or nearly the whole, of the northern part of the Isle, and also under the district in which Ballaharra is situate. Numerous witnesses, many of them of great age, proved that clay and sand had been largely dug up, used, and sold by the owners of the customary tenements. One witness said, "All over the "north district there are hundreds of clay or "marl pits, some in actual use, and others "disused." Numerous brick and tile works exist, some of them ancient, which have been supplied with clay from the customary tenements. A witness proved that for upwards of 40 years clay had been dug and sold from Ballaharra itself. Bricks have been used in buildings in the Isle long before living memory. In the town of Douglas they have been largely used. The

existence of old pits and works in the customary tenements establishes the fact of ancient workings. The proof of taking and using sand by tenants is equally strong. Their Lordships do not think it necessary to go at length into the details of the evidence, for it is all one way, the Crown having given no evidence upon the fact of the usage. It will be sufficient to add to what has been already stated, that it was shewn that the Crown by its lessees and licensees, in ancient times and recently, worked metalliferous mines and quarries of stone within the customary tenements, but it was not shewn to have ever granted a lease of clay or sand, or a license to dig for them. There is no trace that the agents of the Crown ever interfered with the customary tenants in taking, using, and selling these substances. Moreover, it was proved that clay had been constantly sold by the customary tenants of Ballaharra to the managers of the Crown mines for use in those mines from the time when the Defendant Mylchreest's grandfather was owner of the estate down to the present time. Their Lordships can come to no other conclusion upon this evidence than that the custom has in fact existed during and beyond the period of living memory; and, consequently, that its antiquity, and continued existence from a time when it might have had a valid commencement, ought, unless the contrary appears, to be presumed.

The first answer on the part of the Crown, as their Lordships understood it to be, was that it is to be inferred from the state of the title to the lordship of the Isle and the nature of the customary tenures, the custom could not have had a legal origin. It was further contended that, under the Act of Settlement of the year 1705, for settling and confirming the customary

tenures, clay and sand were reserved to the Lords, and that the custom was either disproved or displaced by this reservation.

It is not necessary to enter at any length upon the early history of the Isle prior to the reign of Henry IV. It will be found in Parr's "Abstract of the Laws, Customs, and Ordinances "of the Isle of Man," edited by Sir James Gell, the present Attorney General for the Isle. From the authorities there collected it appears that the Kings or Lords of the Isle were in early times subject to the Kings of Norway. The Isle afterwards fell under the sovereignty, with many alternations, of the Kings of Scotland, and of England. In the reign of Edward III., the Earl of Salisbury conquered the Isle from the Scots, and received a grant of it from that king. From the time of this conquest the Isle remained subject to the crown of England, and although the Lords were styled Kings down to the reign of Edward IV., when Thomas, Lord Derby, enounced that title, the paramount sovereignty of the Isle resided in the English Crown. In the reign of Richard II. the Isle was sold by a son of the Earl of Salisbury to the famous William le Scroope, afterwards Earl of Wiltshire. After Scroope's unsuccessful rebellion and execution, Henry IV., claiming title to the Isle by conquest, granted it to the Earl of Northumberland. When the insurrection, in which that Earl's family took part, was subdued by the battle of Shrewsbury, Henry IV. seized into his own hands the Isle of Man, and before the attainder of the Earl granted it, in the year 1405, to Sir John Stanley. The Isle remained virtually in the Stanley family until the sale of it to the Crown in recent times.

The above grant from Henry IV., and the subsequent state of the title, are set out in the preamble of the Act 5 Geo. III., c. 26, which

was passed for carrying into execution a contract for the sale of the Isle of Man by the Duke and Duchess of Athol to the Crown. The devolution of title is not material to the questions in the appeal. It will only be necessary to refer specifically to some grants in which mention is made of mines, and to an Act of Parliament in the reign of James I., which prohibited the alienation of the lordship, as some arguments have been built upon these documents.

In the original grant from Henry IV. to Sir John Stanley, among the general words which are very numerous, are "mines of lead and "iron." There is no mention of other mines or minerals. In a grant of the seventh year of the reign of James I., the general words include "mines of lead and iron and quarries."

The Judge in the Court below considered that it might be inferred, from the special mention of mines of iron and lead, that other mines and minerals did not pass by these grants from the Crown. It appears to their Lordships that an inference of this kind could not, if there were no proof of custom, be drawn from this limited description. The rest of the language of the grants is quite large enough to carry the full title to the soil of the Isle, including minerals (except perhaps precious minerals) so far as the Crown could grant them. But, on the other hand, the lordship could only be granted subject to the rights which the customary tenants might then have acquired by custom or otherwise in their tenements, and this limited description of mines and minerals is so far material that it would be consistent with the custom set up by the Defendants, if it then existed.

It may be as well to mention, as part of the history of the Island, that James I. granted the Abbey lands, which are distinct from what are called Lord's lands, to one of the Earls of

Derby. Charles II. also granted to the then Earl of Derby, the royal mines of gold and silver. But neither of these grants affects the questions in this suit.

All the rights which belonged to the Stanley family under these various grants have been purchased by and are now vested in the Crown by virtue of the Act of 5 Geo. III., already referred to, and subsequent statutes. The treaty for sale, recited in the Act of 5 Geo. III., states that the Duke and Duchess of Athol had agreed to surrender to the Crown the Isle with all the rights in and over the soil as lords of the manor, "and all mines, minerals, and quarries according "to their present rights therein." This language, it is to be observed, is by no means descriptive of unqualified rights.

By the Act of 7 James I. already referred to, the Isle was settled upon the sons of William, Earl of Derby, in tail male, and made inalienable by them. It has been contended at the bar, on the part of the Crown, that this prohibition bound not only the heirs in tail, but the heirs general of the Earl, and therefore that from the time of this Act no grant or concession of the clay and sand to the tenants could be valid. The question whether the clause against alienation bound the heirs general, to whom the lordship of the Isle ultimately came, was a good deal discussed in the Court of Chancery in the case of the Bishop of Sodor and Man *v.* Duke of Athol, 2 Ves. Senr. 337. Their Lordships, however, do not feel themselves called upon to consider this nice question; for, assuming that the prohibition be taken to bind the heirs general of the Earl, it would not interfere with the view they are disposed to take of the rights of the customary tenants.

That the estates of these tenants were originally of a low kind is abundantly clear.

Certain ordinances printed in Mills' Collection of the Ancient Ordinances and Statutes of the Isle of Man, and which are described as "ordinances, "statutes and customs presented, reputed, and "used for laws in the Isle of Man, that were "confirmed as well by Sir John Stanley, king and "lord of the same land, and his predecessors, as "by all barons, deemsters, tenants, inhabitants, "and commons of the same land," were referred to on this point.

From the first ordinance in this collection, which is without date, and from another dated in 1422, it may be inferred that the tenants then held from year to year, though probably even at that early period with some customary privilege of renewal. Yet, however precarious these tenures may have originally been, they had certainly come to be treated as permanent and alienable holdings before 1583, for in that year an ordinance was passed prohibiting any grant, sale, or exchange of their lands by the tenants without the license of the lord or his council upon pain of forfeiture—not of the lands—but of a pecuniary fine.

An ordinance of 1593 affords distinct evidence that at that time the customary tenures were deemed to be heritable estates. It is a law of limitation, and provides that "if any person shall "pretend title to any farm, house, or ground "within the Isle, and does not exhibit his bill in "writing for the same before the Earl, or his "lieutenant or principal officer, whereby it may "be entered of record within the space of "21 years next after he or his ancestors have "been dispossessed thereof, then he and his "successors to be utterly barred from making "any title thereunto."

But the antiquity and nature of these customary estates is placed beyond doubt by the Act of Settlement of 1703, by which they are

declared to be *ancient* customary estates of inheritance, descendible from ancestor to heir, according to the laws and customs of the Isle.

Having now adverted to the history of the title to the Lordship or Manor of Man, and of the customary tenures, the question arises whether there is anything in that history from which it is necessarily to be inferred that the custom in question could not have had a legal origin. Their Lordships are of opinion that there is not, and therefore that, unless such an origin is negatived by the Act of Settlement of 1703 to be hereafter adverted to, or other evidence, it ought from the existence of the usage during and beyond living memory to be presumed.

The customary tenures, even in the earliest times to which the evidence extends, were not so base as that of copyhold tenants at will, and there seems to be no reason why usages which in this country have been engrafted on holdings at will as legal customs should not equally be engrafted on the tenures in the Manor of Man.

In considering whether the custom is ancient and immemorial, the question is not encumbered by the arbitrary rule of the English law, which has fixed the reign of Richard I. as the period of legal memory. From the evidence that the custom has existed beyond living memory, it may, their Lordships think, be presumed to have had an origin, if that were necessary to be found, before the grant of Henry IV. to Sir James Stanley, and certainly before the prohibition against alienation in the Statute passed in the eighth year of the reign of James I. How much earlier it is unnecessary to inquire. It is sufficient to say that the evidence warrants the presumption that the custom grew up with the consent of former Lords of the Manor of Man at a time when they were free to give consent. The customary tenures themselves, which are

described and declared in the Act of Settlement to be ancient, must have so grown up, and it may be presumed from the existence of the custom, if nothing to the contrary appears, that it grew up with the tenures as one of their customary incidents.

Customs of a similar kind claimed by copyhold and customary tenants were established and held to be valid in Hanmer *v.* Chance, 4 De Gex Jones and Smith, 626, and Marquis of Salisbury *v.* Gladstone, 6 H. & N. 123, and 9 H. L. 692.

Their Lordships have now to consider the effect of the saving clause in the Act of Settlement of 1703. It was contended on the part of the Crown that, whatever might be the evidence of usage, this clause involved a negation of the custom or overrode it.

The Act was passed by James, Earl of Derby, Lord of the Isle, and his officers, and 24 Keyes, representatives of the Isle. After declaring and confirming to the tenants their ancient customary estates of inheritance in their tenements, as already stated, it contains the following clause :—
" Saving always unto James, Earl of Derby, and
" all other persons who shall hereafter become
" Lords of the Isle, all such royalties, regalia,
" prerogatives, homages, fealties, escheats, for-
" feitures, seizures, mines and minerals of what
" kind and nature soever, quarries and delfs of
" flagg, slate, or stone, franchises, liberties,
" privileges, and jurisdictions whatsoever as now
" are or at any time heretofore have been
" invested in James, Earl of Derby, or in any of
" his ancestors, Lords of the Isle."

It was contended for the Crown that the word "minerals" used in the clause comprehended clay and sand. Doubtless, the word in its scientific and widest sense may include substances of this nature, and, when unexplained by the context or by the nature and circumstances of the

transaction, or by usage (where evidence of usage is admissible), would, in most cases, do so. But the word has also a more limited and popular meaning, which would not embrace such substances, and it may be shewn by any of the above-mentioned modes of explanation that, in the particular instrument to be construed, it was employed in this narrower sense.

In the case of the Earl of Rosse *v.* Wainman (14 M. & W. 859), the Court of Exchequer held that in an Inclosure Act containing a clause reserving to the lord of the manor all mines and minerals, the latter word was used in its full sense. The Court said, "The word minerals, "though more frequently applied to substances "containing metal, in its proper sense includes "all fossil bodies or matters dug out of mines;" and it decided that beds of stone found in the allotments which might be dug by quarrying, belonged to the lord. In coming to this decision the Court looked at the whole Act to ascertain its object and intention, and referred to other parts of it in support of its construction of the word.

An elaborate inquiry into the various senses in which the word "mineral" might be used was made by Vice Chancellor Kindersley in Darrill *v.* Roper, 3 Drewry, 294. In certain deeds of partition there occurred an exception of "the "mines of lead and coal and other mines or "minerals." Scientific witnesses were examined who, according to the report, agreed in defining minerals to be any crystalline or earthy substance, whether metalliferous or otherwise, existing in or forming part of the earth, and which might be worked by means of a mine or quarry. The learned Vice Chancellor refused to interpret the word in this sense, and construed it, according to what he considered to be the intention of the parties to be collected from the deeds, to mean

such minerals only as are worked by means of mines. He consequently held that quarries of limestone were not within the exception. In this case the Vice Chancellor sought to discover from the general scope of the deeds the sense in which the parties had used the word.

Vice Chancellor Kindersley gave the same construction to the word "minerals" when used in an exception in a modern conveyance of land, and held that freestone did not come within it. His opinion on this point was overruled by the Lords Justices; but they at the same time agreed with him in his construction of the power to work the minerals, holding that the grantee could only get the freestone by underground working. The exception in this case contained the word "metals" before minerals, indicating that the latter word was intended to embrace substances other than metals. The deed also contained nothing from which it could be inferred that the word "minerals" was not to have its full meaning. Lord Justice Turner said, "freestone "is a mineral, and I can find nothing in the "nature or context of this deed to show that it "was not intended to be included in the excep-"tion." (Bell *v.* Wilson, L.R. 1 Ch. App. 303.)

The last decision to which reference need be made is Hext v. Gill, L.R. 7, Ch. App. 699. In that case the Duke of Cornwall as lord of a manor, had granted the freehold of a tenement to the copyholder, reserving "all mines and "minerals within and under the premises," with power to work them. It was held that a bed of china clay was within the exception. An injunction was, however, at the same time granted to restrain the Duke from getting the china clay in such a way as to destroy or seriously injure the surface, though, as the Court observed, this was the only way in which it could be got. Lord Justice Mellish stated the result of the authorities, in his

view, to be, "that a reservation of minerals in-"cludes every substance which can be got from "underneath the surface of the earth for the pur-"pose of profit, unless there is something in the "context, or nature of the transaction, to induce "the Court to give it a more limited meaning." In that case there was nothing in the context, or nature of the transaction, to explain or qualify the word, nor any usage to show in what way the parties had interpreted it. On the contrary, the nature of the transaction, in the view of the Lord Justice, supported the widest construction of the word. He went on to observe, that the lord of a manor is beyond all question entitled to the minerals in the most general sense of the word under a copyhold tenement, and that there is nothing the copyhold tenant is entitled to get out of the soil and sell for a profit, adding, however, the important qualification "in the absence of "special custom." It was not pretended in that case that any custom existed, and consequently the exception of minerals in its widest sense was consistent with the pre-existing position and rights of the parties.

In the present case, a custom for the tenants to take clay and sand has been shown to exist. It was not therefore, *à priori*, to be expected that anything would be found in an Act passed for declaring and confirming the existing rights of the tenants which should destroy one of those rights.

The words "quarries and delfs of flagg, slate, "or stone" appear to be used to describe open workings, and the specified substances got by such workings, as distinguished from mines properly so called, and mineral substances usually got by underground works. The word "delfs" probably means open pits or diggings. If the word minerals were intended to be used in its widest signification, it was obviously un-

necessary to make specific mention of flagg, slate, and stone. The intention appears to have been to except two classes of things, first, mines, and all substances of whatever kind and nature got by mining, and, secondly, quarries and delfs, not of all substances which might be got by quarrying or open pits, but of those only which are specifically described. It is not disputed that clay and sand are got from open workings.

Again, the exception is by way of reference. The language is, "all such mines, minerals, &c., "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." In the absence of evidence, one way or the other, it might be presumed that Lord Derby and his ancestors, as lords of the manor, had full right to all minerals, and though in the original grant to Sir John Stanley mines of lead and iron only are mentioned, that alone, as already observed, would not, in the absence of evidence of custom, be sufficient to limit the right. But, however that may be, the exception is not absolute, but framed by way of reference to antecedent rights.

In their Lordships' view, therefore, the reserva- in the Act of Settlement cannot be relied on to disprove the existence of the custom, as it might have been if its language had been clear and unambiguous. They further think that the document is of a nature and date which allows of its uncertain language being interpreted by continuous subsequent usage; and if it be competent so to interpret the reservation, the usage in this case demonstrates that it could not have been the intention to employ the word "minerals" in a sense which would include clay and sand. It is scarcely conceivable, if the custom had not existed, or if the Act had really excepted clay and sand, that the customary

tenants should have been allowed to commit what, on the hypothesis, would have been innumerable acts of trespass on the property of the Crown without a single instance of hindrance or interruption on the part of its officers.

The Counsel for the Crown sought to draw an inference against the custom from the omission of any mention of it in the Act of Settlement. But the Act obviously did not describe, or profess to describe, all the rights and customs incident to the customary tenures. A striking instance to show that it did not contain a catalogue of customs, such as the customary of a manor might be expected to give, is found in the Information itself, which alleges that by the custom of the Isle the Crown may dig and work the minerals, and use the land for winning, dressing, and making them merchantable, and for all necessary mining purposes, including the erection of machinery, making compensation to the tenants, according to custom, for surface damage. No power to enter and work the minerals is found in the reservation, and these important customs, on which the right of the Crown to work the reserved minerals depends, are not in any way mentioned or referred to in the Act. In a case lately before this Board, the custom for the Crown and its lessees to pay the tenants for surface damage done in working mines, properly so called, was admitted to exist, although it is not mentioned in the Act of Settlement. (Ballacorkish Mining Co., *v.* Ridgway and other, L.R. 5, P.C. 49.)

Reference was made by the learned Counsel for the Crown to a Supplemental Act passed soon after the Act of Settlement, which, among other things, provided that, notwithstanding the reservation of quarries and delfs of flagg, stone, and slate, the tenants should have free liberty to dig, raise, and dispose of stone and slate on their

lands for their own use, and for the improvement of their own and their neighbours' tenements, as had been formerly accustomed. It was argued that if there had been a custom to take clay and sand, the tenants would have obtained a similar recognition of it But the tenants doubtless considered that this custom was not affected by the reservation. It would not have occurred to their minds that the common substances of clay and sand were included in the terms "mines and minerals," whilst stone and slate being specifically mentioned in the reservation, an express declaration was naturally thought to be necessary to restore or confer the right to take and use these substances.

For the above reasons their Lordships are of opinion that the custom set up by the Defendants has been established, and that the Act of Settlement is not opposed to it. The judgment appealed from ought therefore to be affirmed, and they will humbly advise Her Majesty accordingly.

The Respondents will have the costs of this appeal.

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