

1773. ANDREW WAUCHOPE, Esq. - - - *Appellant* ;
 Sir ARCHIBALD HOPE, Capt. JOHN M'DOWALL, }
 WAUCHOPE } *Respondents.*
 v. }
 HOPE, &c.

House of Lords, 28th January 1773.

LEASE.—Terms of lease of coal, under which held that the tenant had right to communicate the level in the coal grounds to other adjacent colleries also let to him ; but reversed in the House of Lords, and held, that by the lease the tenant had no right to do so without the consent of the landlord or proprietor.

Seams of coal run in parallel lines from north to south, beginning upon the sea shore at Prestonpans Bay, on the lands of Duddingston, belonging to the Earl of Abercorn, and continuing southward through various proprietors' lands lying higher up the country, and, after passing through the lands of Duddingston, run through *Niddrie*, belonging to Andrew Wauchope, the appellant ; through *Edmonstone*, and through Woolmet, the property of Mr. Charteris.

In 1723 John Biggar took a lease of the coal on the estate of Woolmet ; and in 1746 he got from the Earl of Abercorn a lease also of the coal in the Duddingston estate. The lessee having then in view the obtaining leases of the adjacent coal further up, it was provided in this latter lease, " that if either of the said parties should thereafter find it " necessary to communicate the *level* of the *Duddingston* " coal to the heritors of any of the neighbouring grounds, " they should be at liberty so to do, but under this express " condition, that the consideration to be paid by the one " party to the other on that account, should be referred to " the determination of arbiters, to be by them mutually " named."

1748. Biggar thereafter acquired the lease also of the coal on the lands of *Niddrie* from Mr. Wauchope, the appellant. In giving this lease, doubts occurred to him, whether Biggar, by his lease of the coal of *Duddingston* estate, was entitled to communicate the *Duddingston level* to the *Niddrie coal* ; and accordingly, in his lease, he bound Biggar to procure Lord Abercorn's consent to the communication of that level to the *Niddrie coal*. He also bound Biggar, in case it should be found necessary and beneficial to communicate the *level* of the *Niddrie coal* to any neighbouring heritor's coal, that it should only be done with advice and consent of both par-

ties, and not otherwise. And that whenever the level should be brought up and communicated to the coal of *Woolmet*, Biggar was not to communicate the benefit thereof to any neighbouring heritor's ground, without obtaining the appellant's previous consent.

Biggar began working the *Niddrie* coal, and the *Duddingston level* was carried into the *Niddrie ground*. After his death his heir, Andrew Wallace, continued working the coal upwards through the *Niddrie* grounds towards *Edmonstone* grounds. And after his death the respondents, Sir Archibald Hope and Captain M'Dowall, the latter being Wallace's heir, wrought the same until they were within a few fathoms of the boundary between the *Niddrie* and *Edmonstone lands*.

The communication of the level in the *Duddingston* lands (which were lower) to the *Niddrie* lands, necessarily allowed Biggar's successors to work the *Niddrie* coal effectually, to the depth of the sea level, by carrying off the water from these lands. It consequently followed, from carrying the level through the *Niddrie* colliery into the *Woolmet* or *Edmonstone* grounds, which were still higher, the water coming from these grounds would run down and entirely destroy and drown the *Niddrie* colleries, *if Lord Abercorn* was entitled to *shut up the level*, where it enters the lands of *Duddingston*.

The respondents, therefore, were proceeding to communicate the level of the *Niddrie* coal to *Edmonstone* and *Woolmet* grounds, without the appellant's consent, when he presented a bill of suspension, and obtained an interim interdict for stopping the further progress of the works in that direction, until the question of right was raised and determined by an action of declarator. This action was brought accordingly; and insisted, 1st, That the respondents should be decreed to procure the Earl of *Abercorn's* consent to the communication of the *Duddingston level* to the *Niddrie* coal for carrying off the water from it, pursuant to Biggar's express covenant in his lease; 2dly, That they should pay the appellant the twentieth part of the coals raised by them out of the lands of *Edmonstone* and *Woolmet*, by means of the *Niddrie level* having been communicated to those lands, or in default thereof, that the appellant should be found entitled to shut up the communication between the lands of *Niddrie* and the lands of *Woolmet*, and to keep it shut in all time coming; 3dly, That they should be prohibited from

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communicating the level to the coal of any neighbouring landowner, without the appellant's consent. To the 1st point the respondent answered, that as by the appellant's lease of the Niddrie coal to Biggar, Lord Abercorn's lease to Biggar was stated to be his title to the Duddingston level, it must have been understood by the parties, that Biggar was bound to communicate such right as he himself had from Lord Abercorn; and as it was now settled by a judgment of the House of Lords, that Biggar, under that lease, had such right from Lord Abercorn, it was only to indulge a fear, groundless and imaginary, to say, that his lordship might or could shut up the Duddingston level against the Niddry colliery. It was replied by the appellant, that the judgment of the House of Lords only found that Biggar had right from Lord Abercorn to communicate the Duddingston level to the neighbouring collieries only, so long as he had any right or interest *under the lease*; but when the *lease expired*, there was nothing to prevent the Earl from shutting up his level, and thereby drowning the Niddrie coal, and rendering its working impracticable.

The Court, upon the report of the Lord Ordinary, pronounced this interlocutor:—“ Upon report of Lord Kennet, “ and having advised the informations for both parties, the “ Lords find that John Biggar had a right, by the lease “ entered into betwixt him and the pursuer, to carry his “ level through the pursuer's lands, and to communicate “ the same to the coal of Woolmet. And therefore find “ that the said pursuer is not entitled to a recompense from “ the defenders on account of the communication of the “ said level to the coal of Woolmet, nor on account of its “ being carried through a part of Edmonstone ground and “ coal which lies interjected between Niddrie and Woolmet, “ in respect the carrying it through Edmonstone coal was “ essentially necessary for communicating the level with “ Woolmet, which was one great view of the parties at entering into the contract. And find that the pursuer cannot shut up the said level, but that the communication thereof to Woolmet coal must subsist for the use of the defenders, who derive right to Woolmet coal as heirs or assignees of the said deceased John Biggar, so long as they shall continue to have right and interest in the said coal of Woolmet, and therefore assoilzies the defenders from these conclusions of the pursuer's libel, and decern.”

Against this interlocutor the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The contract of lease is clear and express, that the level shall not be communicated from the appellant's level of Niddrie to the coal of *any other heritor*, but by the mutual consent of both parties to that contract of lease. This necessarily infers, that the one could not communicate that level without the consent of the other. In the present case, the tenant, without the consent of the landlord, proposes to carry the latter's level into the Woolmet coal, not only without his consent, but also without any consideration whatever, contrary to what was expressly stipulated in the lease with the appellant. The lease expressly prohibits the communication of the Niddrie level to *any neighbouring heritor without the appellant's consent*. The proprietor of the Woolmet coal is a neighbouring heritor, and therefore the tenant having communicated the Niddrie level to the Woolmet, without the appellant's consent, and without any consideration, the latter is entitled to shut it up.

Pleaded for the Respondents.—The words of the lease, as well as the spirit and intendment of the transaction, go to establish, that the agreement in the lease, was a partnership or joint property concern in the level in question, to be mutually communicated, without a demand from the one on the other, except what was expressly stipulated in the lease. On any other footing than this, the bargain would have been a most unequal one to Mr. Biggar, because he would have had all the expense of the undertaking, while the only benefit, was *that* which might arise from the communication of the level to Woolmet. Besides, if any consideration had been stipulated for the communication of the Niddrie level to the coal of Woolmet, it would have been expressly stipulated in the lease. In this lease, every obligation covenanted and prestable is set forth and specified. There is nothing stipulated about the sum to be paid, as consideration for the communication of the said level, while it is clear such a communication was obviously in the view of the parties, and it is therefore reasonable to presume that none such was agreed on, and none such demandable. At the time of the lease, the Woolmet coal was already in the possession of Biggar, as lessee, and had been worked for many years. It was therefore a part of the transaction with the appellant, and the clear understanding of parties, that the Niddrie level should

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come under the power of Mr. Biggar; and that the consent of the appellant was only requisite, when that level was carried into any neighbouring grounds, other than, or beyond Woolmet.

After hearing counsel, it was

Ordered and adjudged that the said interlocutor complained of in the said appeal be, and the same is hereby reversed. And it is hereby declared that John Biggar had no right, by the lease entered into between him and the appellant, to communicate the level carried through the appellant's lands, to the lands of Edmonstone or Woolmet, without the appellant's consent first had and obtained. And it is further ordered, that the cause be remitted to the Court of Session, to do thereupon what shall be agreeable to law and justice.

For the Appellant, *Ja. Montgomery, Al. Forrester,*
John Ord.

For the Respondents, *Al. Wedderburn, Henry Dundas.*

Not reported in Court of Session.

MARGARET and ELIZABETH DUNCAN,	-	<i>Appellants;</i>
FRANCIS FOWKE,	- - -	<i>Respondent.</i>

House of Lords, *5th February 1773.*

VESTING OF LEGACIES.—Circumstances in which legacies held to vest.

For full report of this case, see Morison, 8092.

The circumstances were these. A testator, by his will, bequeathed one half of his personal estate to his two nephews, declaring that his will was to take place at the death of his wife, and that until that event she was to have the liferent interest thereof. The nephews survived the testator, but died before the death of the liferenter. The Court of Session held that the legacies vested in the nephews. And, on appeal to the House of Lords, this judgment was "affirmed."

For Appellants, *J. Montgomery, Alex. Lockhart, J. Mac-*
laurin, Tho. Lockhart.

For respondent, *Al. Wedderburn, John Madocks.*