

Lord Ellenborough, that no action like the present could be sustained in this country. May 26. 1824.

My Lords,—Upon the most careful consideration which I have been able to bestow upon this case, I am very clearly of opinion, that with regard to the two bills, the interlocutors complained of cannot be supported, and that they ought in so far to be reversed. But, my Lords, your Lordships cannot adjudge a general reversal; for, as to the promissory-note for L. 25, the appellants never denied their liability to that extent; but although Arnott's name does not appear upon that instrument, he (as well as they) has been found liable for payment of the contents in the Court below. It will therefore be necessary that a special remit be made to the Court of Session, to apply your Lordships' judgment to the particular situation of that article.

*Appellants' Authorities.*—3. Term Rep. 757.; 2. Campbell, 308.; 15. East, p. 17.; 10. Vesey, 206.; 12. Mod. Rep. 243.; 1. Esp. 4.; 10. Vesey, junior, 206.

*Respondent's Authority.*—Paley, p. 144.

TUSTIN—ROBINSON and BURROWS,—Solicitors.

(Ap. Ca. No. 44.)

ROBERT CUNNINGHAM, Appellant.—*Shadwell—Walker.*

No. 32.

PATRICK WARNER and R. BEAUMONT, Respondents.—*Murray—Abercromby.*

*Partnership—Clause.*—Two parties having entered into a contract of partnership for working coal, under which a permission, in general terms, was granted to work coals in the lands of one of them, by means of pits sunk in the lands of the other; and having thereafter entered into another contract, prorogating the whole terms of the first contract, but declaring that the coal in the lands of the first party should be worked only to the east of a certain point;—Held, (reversing the judgment of the Court of Session), That the company had no right to work beyond that point.

ROBERT REID, afterwards Cunningham, the father of the appellant, was proprietor of the lands of Saltcoats Campbell, (on which he had erected salt-pans), adjoining to those of Ardeer belonging to Patrick Warner, the father of the respondent, and both of which properties are situated in Ayrshire. Ardeer lies to the south-east of Saltcoats Campbell, and is divided from it, on the west, by a rivulet called the Stevenston-burn, and near to which, on Saltcoats Campbell, there is a stratum of whinstone, called the Capon Craig-gall. In 1770 Reid and Warner entered

May 26. 1824.

1ST DIVISION.  
Lord Alloway.

May 26. 1824.

into a verbal agreement, by which they became partners in the working of coal and making salt; and in 1774 they reduced it into the form of a regular contract of partnership-lease for seventeen years; by which Warner let to himself and Reid the coal situated within his lands of Ardeer, while Reid, on the other hand, let his salt-pans to himself and Warner. Accordingly the deed proceeded on the narrative, that ‘the said parties having some time ago entered into a verbal agreement, on their mutual charge, and for their mutual interest, to work the coal within the above-mentioned lands, belonging to the said Patrick Warner, under direction of the said Robert Reid, as well for exportation as for inland sale, also with the pan-coal thereof, or others, to make salt in the salt-pans, and garnel, which belonged to Auchendarvie’s heirs, to which the said Robert Reid has acquired, or is about to complete a title, &c. in the profits or loss on which coal and salt the said parties were and are to be equal sharers; in consequence of which verbal agreement, the said parties, on their joint and equal charge and expense, have set down pits, erected a machine, made a canal, with a coal-yard at the end thereof, have been working and selling coals, and making and selling salt for their joint behoof;’—therefore Warner let to himself and Reid, ‘All and Hail the whole seams or seam of coal within all or any part of the said lands, sometime called Dovecot-hall, now Ardeer, &c. lying in the parish of Stevenston, &c. which includes all his lands in that parish; also All and Hail whatever part of the said lands are, or shall necessarily be required for coal-hills, coal-bings, road, and canal, &c. with power to set down pits, make coal-hills, and others foresaid.’ On the other part, Reid let to Warner and himself, and to their respective heirs, ‘the foresaid salt-pans and materials thereof, with the salt-garnel, and such of the lands belonging to the heirs of Auchendarvie, or their assignees, as are used for the canal and coal-yard; and that for the like space above-mentioned.’ And, lastly, there was a clause introduced in these terms:—‘And albeit there is no liberty herein granted of setting down pits in the ground belonging formerly to Auchendarvie, now to his heirs and assignees, called Saltcoats Campbell, adjoining to the said lands of Patrick Warner, yet liberty is granted to work the coal beneath the same, from any pit in Mr Warner’s ground, so far as the levels will admit of.’

After the parties had acted upon this contract for several years, they made a new agreement in 1783, which proceeded on

May 26. 1824.

the narrative, ‘ That the endurance of the said tack or contract  
 ‘ is too short, and that it will tend to their mutual benefit, and to  
 ‘ the advantage of their heirs, that the same shall be prolonged  
 ‘ and continued for a much longer space of time.’ And there-  
 fore they ‘ not only prorogate the foresaid tack or contract on  
 ‘ both sides for the further space of 99 years; but also of new  
 ‘ the said Patrick Warner sets to himself and the said Robert  
 ‘ Reid Cunninghame, equally betwixt them, and their respective  
 ‘ heirs, the foresaid coal in the whole lands in Stevenston parish  
 ‘ belonging to him the said Patrick Warner, with whatever land  
 ‘ shall be necessary for coal-hills, bings, roads, and canal; and  
 ‘ that for the space of 124 years from and after the foresaid 20th  
 ‘ day of April 1770, for the foresaid yearly rent of L.100 ster-  
 ‘ ling; and the said Robert Reid Cunninghame sets to himself  
 ‘ and the said Patrick Warner, equally betwixt them, and their  
 ‘ respective heirs, the foresaid salt-pans, materials thereof, and  
 ‘ girnals, and such lands of his as are used for the canal, and  
 ‘ the coal in his said lands *lying east of the Capon Craig*; and  
 ‘ that for the like space of 124 years from the said 20th day of  
 ‘ April 1770, for the like yearly rent of L.100 sterling, includ-  
 ‘ ing in this set the coal in Little Dubs and Boag, and also  
 ‘ whatever coal he may succeed to in the Broom.’

Under this agreement the coal was worked in Warner’s ground, and pits were also sunk in that part of Cunningham’s property which was situated on the east side of the Capon Craig-gall.

After the deaths of the two partners, they were succeeded by their respective sons, the appellant and respondent, who having got involved in a dispute, the Sheriff of the county, under a clause in the lease authorizing him to name a manager, appointed Beaumont to that office. In 1827 the appellant began to sink a pit on the *west* side of the Capon Craig-gall, with the view of working the coal situated upon that side of it, for his own private behoof. Against this Warner presented a petition to the Sheriff, praying for an interdict, on the ground that, by the original contract, as prorogated by that in 1783, the whole coal situated in Saltcoats Campbell had been let to the Company. The Sheriff, after causing an inspection to be made, so as to ascertain whether it was practicable, by means of pits situated in Warner’s grounds, to work the coal, not only on the east, but also on the west side of the Capon Craig-gall, by cutting through it, found, ‘ that  
 ‘ the Company have a right to work coal under the Saltcoats  
 ‘ Campbell, from pits sunk in the Ardeer grounds, the same

May 26. 1824. ‘ having been declared by the reporter to be practicable and  
 ‘ expedient; and that Mr Cunningham has no right to work the  
 ‘ coal under Saltcoats Campbell, on his own private account,  
 ‘ during the subsistence of the present copartnery;’ and therefore  
 granted interdict. The appellant then presented a bill of ad-  
 vocation, which Lord Cringletie refused, ‘ in respect that by the  
 ‘ first contract, dated 20th June 1774, between the predecessors  
 ‘ of the parties to this cause, liberty is given to work for the be-  
 ‘ hooof of the copartnery the coal in the lands of Saltcoats Camp-  
 ‘ bell, from any pit in Mr Warner’s grounds, so far as the levels  
 ‘ will admit of; 2dly, That there is no limitation of this general  
 ‘ right of working said coal, by confining it to any particular part  
 ‘ of said lands, nor any reference to, or even mention of, the  
 ‘ Capon ‘Craig-gall as the boundary of said rights; 3dly, That  
 ‘ as by the second contract between the same parties, dated 12th  
 ‘ August 1783, there is a prorogation of the period embraced by  
 ‘ the first contract, and an extension of the rights therein con-  
 ‘ tained; but no diminution of them; and, lastly, That by the  
 ‘ report of Mr Dixon it is ascertained, and not denied by the  
 ‘ complainer, that it is practicable, and may, at some future  
 ‘ period of the contract, be expedient to work the coals in the  
 ‘ said lands of Saltcoats Campbell, by means of pits in Mr  
 ‘ Warner’s lands; refuses this bill.’

His Lordship also subjoined this Note.—‘ The Lord Ordinary  
 ‘ observes, that the complainer places some stress on the expres-  
 ‘ sion in the first contract, that the liberty to work coals in Salt-  
 ‘ coats Campbell, by pits in Mr Warner’s lands, is said to be in  
 ‘ those lands “ adjoining” to Mr Warner’s lands: the words are,  
 ‘ “ and albeit there is no liberty herein granted for setting down  
 ‘ “ any pit in the ground belonging formerly to Auchenharvie,  
 ‘ “ now to his heirs and their assignees, called Saltcoats Campbell,  
 ‘ “ adjoining to the said lands of Patrick Warner, yet liberty is  
 ‘ “ granted to work the coal beneath the same from any pit in Mr  
 ‘ “ Warner’s ground.”

‘ The Lord Ordinary considers the word “ adjoining” as merely  
 ‘ descriptive of the situation of the lands of Saltcoats Campbell,  
 ‘ and cannot, with any propriety, be held to limit the right of  
 ‘ working the coal. For the right to work is, from any pit in  
 ‘ Mr Warner’s ground, west of the Capon Craig-gall; so that  
 ‘ the right to work in Saltcoats Campbell adjoining, from any pit  
 ‘ in Mr Warner’s property, would be annihilated, if that right  
 ‘ were confined to the coal to the east side of that Gall; and,  
 ‘ 2dly, If the parties had in view to limit the right of working

May 26. 1824.

‘ the coal in the complainer’s property, to the stripe lying between Stevenston-burn on the east and the Capon Craig-gall on the west, it is not credible, that where there are two such distinct known boundaries, they would not have been mentioned; but, on the contrary, the right should have been given broadly over the lands of Saltcoats Campbell, from any pit in Mr Warner’s ground, so far as the level will admit.’

Cunningham having reclaimed to the Second Division, their Lordships passed the bill; and he then brought an action of declarator to have it found, ‘ that according to a just, sound, and bona fide construction of the foresaid second contract, the said copartners only got right to, and were entitled to work the coal, in or under the pursuer’s lands of Saltcoats Campbell, adjoining to the said lands of Ardeer, to the line or boundary called the Capon Craig-gall, on the west side of Stevenston-burn, and no farther; and that no part of the coal, lying in or under the said lands of Saltcoats Campbell, to the west of the Capon Craig-gall, was at all included, or meant to be included, in the lease or rights conferred by the said contracts, or either of them;’ and, therefore, that the respondents should be prohibited from working ‘ the coal in or under any part of the said lands of Saltcoats Campbell, lying to the westward of the Capon Craig-gall, in all time coming.’

This action having been conjoined with the advocacy, and the case having come before Lord Alloway, his Lordship, ‘ for the reasons assigned by the Sheriff, and by the Lord Ordinary on the Bills, remitted the cause simpliciter, and assoilzied from the declarator, and found expenses due.’ To these judgments the Court adhered on the 6th January 1821.\*

The appellant then brought an appeal, and contended, that as this was a contract *uberrimæ fidei*, it ought to be construed according to what was the real meaning of the parties, and not according to a literal and judaical interpretation: that, by the original agreement, the appellant’s father was to contribute the salt-pans as his share of the Company stock, while, on the other, the respondent’s father was to convey the coal in his lands, which were to be worked at the expense of the Company; and the clause which was introduced into the original contract, permitting coal to be wrought out of the property of the appellant’s father, by means of pits sunk in that of Warner,

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\* Not reported.

May 26. 1824. was introduced merely to prevent disputes, in case the workings should be accidentally extended into the lands of the appellant, but which it was never contemplated could go beyond the Capon Craig-gall, which was then considered as an impenetrable barrier; and that, accordingly, in the contract of 1783, the only part of that property which was let, 'was that lying east of the Capon Craig-gall.' In support of this interpretation, the appellant referred to various judicial statements, which had been made by the respondent Warner in a former process, where he found it his interest to contend for this construction.

On the other hand, the respondents maintained, that by the original contract liberty was granted to work the whole coal in Saltcoats Campbell, so far as the levels would admit of this being done, which it was proved by the report of an inspector could be accomplished throughout the whole lands by means of pits in Warner's ground; and that, as this contract was, in the whole articles thereof, expressly prorogated by that of 1783, the original power remained in full force.

The House of Lords found, 'That the company or copartnership are only entitled to the coal in and under the appellant's lands of Saltcoats Campbell, to the east of the Capon Craig-gall, during the period of the endurance of the copartnership. And it is therefore ordered and adjudged, that those parts of the interlocutors complained of, which are inconsistent with the above finding, be reversed. And it is further ordered and adjudged, that such parts of the interlocutors complained of, by which expenses are given against the appellant, be also reversed. And it is further ordered, that the cause be remitted back to the Court of Session, to do in the conjoined processes as shall be consistent with this judgment, and as shall be just.'

SPOTTISWOODE and ROBERTSON—A. DOBIE,—Solicitors.

(*Ap. Ca. No. 54.*)

No. 33. GEORGE GEDDES, and J. G. GELLER and Others, his Assignees,  
Appellants.—*Hart—Shadwell.*

CÆSAR MOWAT and WILLIAM SPENCE, Respondents.—*Skene—Maidment.*

*Bankrupt—Sequestration—Commission of Bankruptcy—Stamp.*—A domiciled Scottish merchant having, after contracting debts in Scotland, gone to England, and there