Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Stockton Coal Company, Limited, v. *Fletcher and others, from the Supreme Court of New South Wales; delivered 25th July* 1891.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD FIELD.
LORD HANNEN.
MR. SHAND (LORD SHAND).

[*Delivered by Lord Macnaghten.*]

The action in this case was brought by the Appellants as Plaintiffs to recover possession of the coal under a plot of land containing ten acres, situate at Stockton, in the county of Gloucester, which was granted by the Crown in 1843 to one Macqueen.

The Appellants alleged that the coal under that plot, together with the coal under other lands at Stockton, was demised to their predecessors in title by lease dated the 10th of June 1882, the lessors being the trustees of a Mrs. Quigley's settlement.

On referring to the Crown Grant of 1843 it appears that the Crown reserved "all mines " . . . . of coal with full and free liberty " and power to search for, dig, and take away

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"the same." There is nothing before their Lordships to show at what time or by what means the mineral rights of the Crown passed, if indeed they did pass, to the grantee of the surface or his successors in title. In the arguments at the Bar the title of the Crown was simply ignored. The reservation in Macqueen's grant is not noticed in the judgment of the Court of Appeal, nor does it seem to have been referred to at the trial before the Primary Judge in Equity. And their Lordships have been given to understand that no explanation on the point can be obtained in this country. Under these circumstances, having come to the conclusion that the Appellants' case must fail in any event, their Lordships do not think it necessary to pursue the matter further. They assume that for some good reason the learned Judges in New South Wales, who are familiar with the title to lands in that Colony, considered that the reservation had ceased to be operative. Otherwise all the proceedings would have been idle. Their Lordships therefore, for the purpose of this judgment, propose to treat the Crown grant as if it contained no reservation. But at the same time they desire to guard themselves against being supposed to intimate any opinion as to the rights of the Crown. Those rights, if they exist, whatever they may be, are unaffected by the result of this trial, and will not be prejudiced by any expressions in this judgment.

It was admitted that the Respondents were in possession at the time when the action was brought.

The defence, in substance, was that the Appellants had not proved their title.

The title of the Appellants' lessors was traced through one Mitchell, who was said to have

acquired Macqueen's grant by virtue of the Statute of Limitations.

In the Courts below two objections were urged on behalf of the Respondents. It was contended that there was no evidence of such possession by Mitchell as would satisfy the Statute. Assuming, however, that Mitchell did acquire a title to Macqueen's grant, and that it passed under Mitchell's will to his trustees, who took upon trust for his three children (of whom Mrs. Quigley was one) in equal shares—it was argued that Macqueen's grant never became the property of Mrs. Quigley or her trustees either at law or in equity, and that the lease of the 10th of June 1882 did not comprise the coal in dispute.

The Primary Judge in Equity decided in favour of the Appellants. His decision was reversed by the Full Court. The judgment on Appeal was given by Faucett, J. All the learned Judges concurred in thinking that the coal in dispute was not comprised in the lease of the 10th of June 1882, assuming that Mitchell's title was made out. Sir George Innes, J., added that, in his opinion, that assumption was not well founded.

The lease of the 10th of June 1882 was made between the trustees of Mrs. Quigley's settlement of the one part, and the lessee of the other part. It recites Mitchell's will and Mrs. Quigley's settlement, by which her share was settled, and leasing powers were given to the trustees of the settlement. It then recites a deed of partition, whereby certain property which admittedly did not include Macqueen's grant was allotted in severalty as Mrs. Quigley's share in her father's real estate. This recital describes the property contained in the deed of partition as "comprising (*inter alia*) the "lands, hereditaments, and premises intended to

"be hereby demised." These words of recital would not of course control the operative words of the deed, if clear and unambiguous, but they certainly convey an intimation that the parcels of the lease are to be found in the parcels of the deed of partition. The lease proceeds to trace the devolution of the trust estate; and the witnessing part follows. The property demised is described as "all and singular the mines, beds, "veins, and seams of coal within or under the "pieces or parcels of land in the parish of "Stockton . . . particularly described in "the schedule hereunder written, and also "within or under all other the lands of the said "lessors in the parish of Stockton adjoining, or "near to the said pieces or parcels of land, "and which may not be included within the "boundaries of the said description."

The schedule to the lease is a copy of part of the third schedule to the deed of partition, which contained the lands allotted in severalty as Mrs. Quigley's share. It is to be observed that one of the lots specified in the schedule is described as bounded on the north-east and south by the boundary lines of Macqueen's grant, so that Macqueen's grant is not only not included in the schedule, but it appears to be excluded from it. It was said, however, that Macqueen's grant though admittedly not comprised in the schedule to the lease, or in the third schedule to the partition deed, was comprised in the description of Mrs. Quigley's share in an agreement dated the 28th March 1872, which preceded the deed of partition. It was contended that under these circumstances Macqueen's grant was in equity at the date of the lease the property of Mrs. Quigley's trustees, and therefore included in the words of the demise, as other lands of the lessors adjoining or near to the scheduled lands. Having regard to

the way in which the boundary lines of the several lots contained in the schedule are described, and considering that some of the lands are described as being bounded in part by "the waters of Port "Hunter at high water," and some in part "by "the waters of the Pacific Ocean," the words in question seem to be intended to provide for possible errors in the boundary lines, or for a possible variation in the line of high-water mark, and indeed to be required for that purpose. In fact, shortly after the date of the lease a mistake in one of the boundary lines was discovered and corrected by deed.

It will be convenient now to turn to the agreement of the 28th of March 1872. That agreement describes the properties intended to be allotted to Mrs. Quigley as "the properties at the North "Shore, Newcastle, known as Stockton and the "Stockton Farm, and also the Lake Macquarie "property, which three properties are to be "taken as at the value of 55,000*l*." There is no proof that Macqueen's grant ever was known as Stockton or as the Stockton Farm. It was suggested that if Mitchell did acquire Macqueen's grant it must, in his hands, have formed part of his Stockton property, and must have become known under that name. So much may be conceded. But it is to be remembered that there was property belonging to Mitchell which did, in fact, answer the description in the partition agreement. And it is almost conclusive against the argument of the Appellants that when the parties to the partition agreement within two months from its date proceeded to carry it into execution by a formal deed Macqueen's grant was not dealt with, nor is it mentioned in the third schedule except as forming in part the boundary of one of the lots conveyed to Mrs. Quigley's trustees, and therefore as outside the property allotted to her. To this is to

be added the fact that between the date of the partition deed and the date of the lease no claim was made by Mrs. Quigley or her trustees to Macqueen's grant, and further that in a Bill in Equity, filed on the 13th of September 1877, by Mrs. Quigley against her then trustee, in which she specified the property to which she claimed to be entitled under her father's will, and which she stated had then "been ascertained and divided," no mention is made of Macqueen's grant.

Under these circumstances their Lordships have no hesitation in coming to the conclusion that the Full Court was right in holding that the coal in dispute was not comprised in the lease of the 10th of June 1882.

The rest of the case may be disposed of very shortly. Their Lordships' attention has been called to the evidence given at the trial. Their Lordships are of opinion that the evidence is not sufficient to prove that Mitchell acquired a title to Macqueen's grant. In fact, nothing was proved beyond disconnected acts of trespass committed from time to time by people who seem, for the most part, to have been the employés or servants of certain persons who were the tenants of a tweed factory on Mitchell's adjoining land. It is unnecessary to go through the evidence. Some of these trespassers kept cattle. Some had little gardens, and so forth. But assuming that their acts would enure to the benefit of Mitchell, there is no evidence of such possession as is required to establish a title under the Statute of Limitations; and there were several gaps, one, for example, after the factory was burned down in 1851, of more than twelve months, during which it seems pretty clear that there was no one in occupation of any part of Macqueen's grant.

In the result their Lordships are of opinion

that the Appellants' case wholly fails, and that the appeal must be dismissed.

Their Lordships will therefore humbly advise Her Majesty accordingly.

The Appellants will pay the costs of the appeal.