RECENT ENGLISH DECISIONS.

Vice-Chancellor Wood's Court.

PROUD v. BATES AND OTHERS.

The lessor of a lease reserved to himself the right to work the mines and quarries which should be under the premises demised, with the usual wayleave and passage to, from, and along said premises. The lease contained a covenant on the part of the lessor that, in working such mines, he should do as little damage and spoil to the soil as possible.

Held, that lessor was entitled to an absolute right of way underground in working such mines.

Held, also, that in such working the lessor had no right to let down the surface soil, and that the right to support such surface soil was incident to the grant of the surface, and could not be taken away, unless by express agreement to that effect.

THIS was a bill filed by the plaintiff, holding under a lease a farm granted by the then lord of the manor of Branspeth, in Durham, against the defendants, who represented the original lessor, and prayed an injunction to restrain them from carrying underneath the demised premises coals or other minerals obtained from adjoining royalties, without the permission of the plaintiff, and that defendants might be charged with a proper wayleave-rent for the use which had been made by them of a way which they had cut near the demised premises.

The lease was dated the 1st July 1745, and made between William Belasyse of the one part and William Darnell of the other part, whereby, in consideration of Darnell having enclosed certain lands claimed by said Belasyse, and in consideration of his giving up all right of any other lands than those demised, Belasyse demised to Darnell, his executors, administrators, and assigns, certain surface land containing about ninety-two acres, as the same was then enclosed by Darnell. The exception was, the mines and quarries lying and being within and under the same, with full power and free liberty and power to sink for, win, and work the same, with pit room and heap room for the same, and with all liberties, privileges, and conveniences necessary and convenient for the winning, working, and management thereof; the said William Belasyse, his heirs or assigns, paying to said William Darnell, his executors, administrators, and assigns, the sum of 13*s.* 4*d.* for every coal-pit which he or they should sink within the

demised premises; and saving and reserving full and free liberty and authority for the said William Darnell, his executors, administrators, and assigns, to dig and take stones for and out of the quarries within the said demised premises, for the building or repairing of his or their houses, buildings, or works within the said manor to be built, repaired, or erected; with free wayleave and passage to, from, and along the same on foot or on horseback, with all manner of carriages, always excepted and reserved to the said William Belasyse, his heirs and assigns. To hold to said Darnell, his executors, administrators, and assigns, for the term of one thousand years at a nominal rent. The lease also contained a covenant by the lessee that the lessor might cut, dig, sink, win, work, take, lead, and carry away the said mines and quarries in and from the said demised premises, with all liberties and privileges thereunto belonging, at the will and pleasure of the said William Belasyse, his heirs or assigns, without the lawful let, suit, trouble, or interruption of the said lessee. There was also a covenant by said Belasyse that he, his executors and assigns, in the winning and working the collieries within the said demised premises, and in the leading away the coals from the same, and in using the other liberties and privileges before excepted and reserved to him, his heirs and assigns, would do as little damage and spoil to the soil and herbage of the premises demised as he or they could conveniently make or do.

The mines of coal under the demised premises had been worked, and a way cut for that purpose along the coal-seam, but not high enough for the passage of carriages and horses, and therefore a height of about eighteen inches was cut in the stone above the roof of the mine to cure this defect.

It appeared by the evidence that the first injury and damage to the surface took place in November 1862. In the year following the plaintiff brought an action against the defendants, which was, however, compromised by an order to stay proceedings on payment of the amount of damage then done, this amount to be assessed by an arbitrator. The arbitrator had made an award by which he ordered the defendants to pay the sum of 50*l*., which had been paid.

Afterwards the plaintiff, as he alleged, had become aware that the defendants intended to proceed with the working of the seam of coal under his land, without leaving sufficient support for the sur-

face soil. The bill, therefore, also prayed for an injunction to restrain the defendants from further working under his farm, or any land adjacent thereto, in such a manner as to occasion a subsidence of the surface of the land, and also for damages for the injury since the date of the award.

By their answer the defendants averred that they were entitled to continue the workings under the plaintiff's farm and the land adjacent, in the same manner as they had been doing, and they believed they were working these mines in the county of Durham, leaving the customary and usual support for the surface.

The effect of the other parts of the answer and evidence is stated in the judgment.

Rolt, Q. C., *Willcock*, Q. C., and *Faber*, for the plaintiff, contended that he was entitled to the relief as prayed. They cited: *Hunt* v. *Peate*, Johns. 705; *Elliott* v. *North-Eastern Railway Co.*, 10 H. L. Cases 333, 8 L. T. Rep. N. S. 337; *Bonomi* v. *Backhouse*, 9 H. L. Cases 503, 4 L. T. Rep. N. S. 754; *Dugdale* v. *Robertson*, 3 K. & J. 695; *Hilton* v. *Lord Granville*, 5 Q. B. Rep. 701; *Smart* v. *Morton*, 5 E. & B. 30; *Bowser* v. *McLean*, 2 De G. F. & J. 615, 3 L. T. Rep. N. S. 456; *Lewis* v. *Braithwaite*, 2 B. & Ad. 437; *Farrow* v. *Vansittart*, 1 Rail. Cases 603; *North-Eastern Railway Co.* v. *Crossland*, 2 J. & H. 565, 7 L. T. Rep. N. S. 765.

Sir H. Cairns, Q. C., and *Dickinson*, for the defendants, admitted that if injury was proved the plaintiff might be entitled to compensation. They cited: *Rowbotham* v. *Wilson*, 8 H. of L. Cases 348, 2 L. T. Rep. N. S. 642; *Isenberg* v. *East India House Estate Co.*, 9 L. T. Rep. N. S. 625; *Lloyd* v. *London, Chatham, and Dover Railway Co.*, 11 Jur. N. S. 380.

Willcock in reply.

VICE-CHANCELLOR WOOD said:—The question in this cause arises on the demise for the term of one thousand years of the surface land to the plaintiff [he here read the principal terms of the lease before set out]; and the question is as to what right the defendants have to the use of any portion of the underground property as a wayleave, and as to their right to work the mine in such a manner as may occasion damage to the lessee of the surface land. Now the exception in the lease is a peculiar

one; but he did not think there was really any substantial difficulty on the whole construction of the lease, looking at the attendant circumstances and collecting what it is that the lessor has reserved to himself. He was lord of the manor, making a lease of an enclosed part of the manor, and being owner of all the mines in the manor as such lord, he excepts out of the demise the whole of the mines. Now, whether the word "mines" be used as it often was in the sense of minerals, the thing dug out of the mine or that which contains the minerals, that which contains cannot be less than the thing contained—and therefore there is no doubt that the whole containing chamber which has the minerals is "the mine," and so far as the mines are concerned there can be no question that they are altogether out of the demise; and as to them the representatives of the lessor are of course entitled to use them for any purpose whatsoever, and at any period. Lord CAMPBELL'S decision in the cause of *Bowser* v. *McLean*, *ubi supra*, in this court completely explains what the right view is. He says: "With regard to copyholds the copyholder has the whole right in him, but subject to the right of the lord to work the mines, and the lord cannot use an underground way for the purpose of passing through any portion of the copyhold premises. But as regards that which is excepted out of a demise by contract, of course the owner can use whatever he excepts in any way he may think fit." As regards that part of the case he never had any doubt. The only question that can be raised is about that headway of eighteen inches for the use of carriages and horses: whether the lessors are entitled to demand a wayleave in respect of it. Perhaps no such intention could have existed, but we must collect the intention from the lease itself. A right issuing out of the property cannot be excepted, for you either demise the whole of the property or not. If you do demise the whole of the property, and except anything, then it is by way of regrant, as in the case of hawking and hunting, which was much discussed in two cases, in which all the learning on the subject was collected: viz., *Wickham* v. *Hawker*, 7 M. & W. 78, and *Doe* v. *Lock*, 2 A. & E. 705, which he conceived decided that this was not a reservation of the whole ownership in that sense, but a grant, as it were, to be taken out of the property demised, and the question is, what is the extent of that grant which the landlord has so insisted on? Is it a grant merely for the purpose of working

these parties' mines, or has he insisted on a grant giving him an absolute right to this use for any purpose whatsoever? As far as the words go, it is for any purpose whatsoever. There is no limitation, and furthermore it is to be considered, that the first exception of the mines would give him the restricted right of working them without any words whatsoever. That was determined in the case of *Lord Cardigan* v. *Armitage*, 2 B. & C. 197, where it was held, that when once you reserve mines you reserve everything that is necessary for working them. See *Goold* v. *Great Western Deep Coal Co.* (*Limited*), 12 L. T. Rep. N. S. 842. This of course includes the wayleave for carrying away the minerals, especially when you find, as he did here, the words "with power to win and work the same." That is one ground for supposing that when it is expressed as it is in the present case it is not intended to be restricted to the limited right. You have also the circumstances of the grant. You find the landlord, who has the property in the whole manor, excepting the right to the mines; and the intent of the parties that what is here expressed to be absolute is confirmed by the fact that he has reserved to himself the full, complete, and absolute right of going through this property with carriages and horses for any purpose which he may think fit. As to that part of the case, therefore, the plaintiff's bill must be dismissed with costs. As to the other part of the case, the right of the lessor so to work these mines which are reserved as not to let down the soil, this is clearly governed by the authorities and followed in *Dugdale* v. *Robertson*, *ubi supra*. The case comes to this: whenever a person demises the surface, he *primâ facie* intends to uphold the surface, in order that he may not derogate from his own grant. He cannot do any act which will let that surface down, and although he reserves to himself the mines, and all liberties and privileges of working them, he does not include the right of so working them as to destroy them. That is a right which the lessee of the surface has obtained for himself and will not be deprived of by mere implication arising on conjecture from the lease, but there must be a plain, clear, and distinct indication of such intent. The Vice-Chancellor then stated the circumstances of the case of *Rowbotham* v. *Wilson*, *ubi supra*. Here the words are only that Belasyse, his heirs and assigns, are to be at liberty to "cut, dig, sink, win, work, take, lead, and carry away the mines and quarries in and from the demised

premises, with all liberties and privileges thereunto belonging." These words standing alone cannot be held to have the effect of enabling him to carry away everything, whatever the consequences might be. The other clause, which had been much relied on, was that Belasyse in leading away the coal "would do as little damage and spoil to the soil as he could conveniently make or do." He did not, however, think that a clause restricting the right of the lessor could be raised into any implication enabling him to destroy that privilege which he had conferred, viz., the surface in its existing state, to be used in its existing state with all the benefits that every surface-owner has, unless he has distinctly contracted himself out of his right. As to the question whether there has been any letting down of the surface soil, there does not seem to be much dispute on the evidence; but that would not prevent the plaintiff having a decree. There is a distinct assertion of the right. What he should do would, under all the circumstances of the case, be, to dismiss the bill with costs as far as regards the relief sought by the two first paragraphs of the prayer, and then to restrain the defendants, according to the third paragraph, "from working in such a manner as to occasion any further subsidence or alteration of the surface of the land," with an inquiry whether the plaintiff had sustained any and what damage in respect of the working of the defendants other than that which has been compensated by the terms of the former award. Upon that part of the case the plaintiff must have his costs; the one set of costs to be set off against the other.

Decree accordingly.

Court of Admiralty.

THE HELEN.

In a suit upon an agreement contemplating a breach of blockade of the ports of the Confederate States of America, and upon a motion to strike out the fourth article of the defendant's answer which pleaded that such agreement was not binding by reason of a breach of blockade being illegal,

Held, that a breach of blockade by neutrals is not an offence against the municipal law of this country.

Ordinarily, decisions of the H. of L. and the P. C. and the Courts of Common Law are absolutely binding upon the Court of Admiralty.

Brett, Q. C., and *E. C. Clarkson*, for plaintiff.

Milward, Q. C., and *Pritchard*, for defendant.

The facts of this case sufficiently appear in the judgment. In the argument the following cases were referred to: *Santissima Trinidad*, 7 Wheat. Rep. 340; *Richardson* v. *The Marine Insurance Co.*, 6 Mass. Rep. 113; *Seaton, Maitland & Co.* v *Low*, 1 Johns. Rep.; Arnould 763, 764, 766, 773; 3 Kent's Com. 367; 2 Parsons 95; Phillips, c. 3, s. 2, 163; Marshall 37; Maud & Pollock 309; 2 Twiss 297.

DR. LUSHINGTON.—This is a motion by the plaintiff to reject the fourth article of the defendant's answer. The parties in this cause are John Andrews Wardell, formerly the master of the *Helen*, plaintiff; and the Albion Trading Company, the owners of the ship, defendants. The master sues for wages, with certain premiums added, alleged to have been earned between July 1864 and March 1865. The answer states that, according to the agreement as set forth by the defendants, the plaintiff has been paid all that was due to him. This part of the answer is not objected to. The fourth and last article is the one objected to. It alleges that the agreement was entered into for the purpose of breaking the blockade of the Southern States of America; that such an agreement is contrary to law, and cannot be enforced by this court. In the course of the argument, the judgment recently delivered by Lord WESTBURY whilst he was Lord Chancellor, in *Ex parte Chavasse*, 6 N. R. 26, was cited as governing the case. The law there laid down is briefly stated, that a contract of partnership in blockade running is not contrary to the municipal law of this country; and by the decree the partnership was declared valid, and the accounts ordered accordingly. It was admitted that this decision is directly applicable to the present case. A decision of the Lord Chancellor is to be treated by the court with the greatest respect; but is it absolutely binding? Decisions of the following tribunals are absolutely binding upon the Court of Admiralty, viz. the House of Lords, the Privy Council, and, when deciding upon the construction of a statute, the courts of common law. All, then, that this court has to do, is to inquire if such decision is applicable to the case before it. If so, then it is the duty of the court to obey whatever may be its own judgment. On the present occasion no decision has been cited from the House of Lords, the

Privy Council, or the courts of common law. But, as an intimation has been given that this case will be carried to the Judicial Committee, that tribunal might be inclined to consider me remiss in my duty if I had omitted to form an independent judgment on the case, and to state my reasons for so doing. It is, I conceive, admitted on all hands that the court must enforce the agreement with the master unless it is satisfied that such agreement is illegal by the municipal law of Great Britain. In order to prove this proposition, the defendants say that the agreement to break the blockade by a neutral ship is on the part of all parties concerned illegal according to the law of nations, which is a part of the municipal law of this country; *ergo*, this contract is illegal by municipal law. Now, a good deal may depend on the sense in which the word "illegal" is used. I am strongly inclined to think that the defendants attach to it a more extensive meaning than it can properly bear, or was intended to bear by those who used it. The true meaning, I think, is that all such contracts are illegal so far, that if carried out they would lead to acts which might under certain circumstances expose the parties concerned to such penal consequences as are sanctioned by international law for breach of blockade or for the carrying of contraband. If so, the illegality is of a limited character. For instance, suppose a vessel, after breaking the blockade, completes her voyage home, and is afterwards seized on another voyage, the original taint of illegality, whatever it may have been, is purged, and the ship cannot be condemned; yet if the voyage was *ab initio* wholly and absolutely illegal both by the law of nations and the municipal law, why should the successful termination purge the offence? Let me consider the relative situation of the parties. A neutral country has a right to trade with other countries in time of peace. One of these countries becomes a belligerent and is blockaded. Why should the rights of the neutral be affected by the acts of the other belligerent? The answer of the blockading power is, "Mine is a just and necessary war;" a matter which in ordinary cases a neutral cannot question. The belligerent further says, "I must seize contraband. I must enforce blockade to carry on the war." In this state of things there has been a long and admitted usage on the part of all civilized states, a concession by both parties—the belligerent and neutral—an universal usage which constitutes the law of nations. It is only with reference to

this usage that the belligerent can interfere with the neutral. Suppose no question of blockade or contraband, no belligerent could claim a right of seizure on the high seas of a neutral vessel going to the port of another belligerent, however essential to his interest it might be so to do. What is the usage as to blockade? There are several conditions to be observed in order to justify the seizure of a ship. Amongst other things the blockade must be effective, and, save accidental interruption by weather, constantly enforced. The neutral vessel must be taken *in delicto*. The blockade must be enforced against all nations alike, including the belligerent one. When all the necessary conditions are satisfied, then by the law of nations the belligerent is allowed to capture and condemn neutral vessels without remonstrance from the neutral state. It never has been a part of admitted common usage that such voyages should be deemed illegal by the neutral state, still less that the neutral state should be bound to prevent them. The belligerent has not a shadow of right to require more than universal usage has given him, amongst which is not included the power to say to the neutral, "You shall help me to enforce my belligerent right by curtailing your own freedom of commerce, and making that illegal by your own law which was not so before." This doctrine is not inconsistent with the maxim that the law of nations is part of the law of this country. The fact is, the law of nations has never declared that a neutral state is bound to impede or diminish its own trade by municipal restriction; for our own Foreign Enlistment Act is itself a proof that, to constitute transactions between British subjects when neutrals and belligerents a municipal offence by the law of Great Britain a statute was necessary. If the acts mentioned in that statute were in themselves a violation of municipal law, why any statute at all? I am now speaking of fitting out ships of war; not of levying soldiers, which stands upon a different footing. I may here say, that in principle there is no essential difference whether the question of breach of municipal law is raised with regard to contraband or breach of blockade. Then how stands the case upon authority? Mr. Duer is the only text-writer who maintains an opinion contrary to what I have stated to be the law. He maintains it with much ability and acuteness, but he stands alone. He, however, admits that an insurance of a contraband cargo is no offence against the municipal law of a neutral country according to the practice of all