

**AN EXCEPTION OF "MINES AND MINERALS."
(ENGLISH LAW.)**

As the question of the respective rights of the owners of the surface of land and of the minerals thereunder in regard to the effect of a grant, or exception of "mines and minerals" has led to much litigation, it is proposed to consider and summarize the law on this subject as concisely as possible.

"Mines and minerals" are not definite terms; they are "susceptible of limitation, or expansion, according to the "intention with which they are used."¹ The same earthly substance which the court may hold to have been intended to be severed from the ownership of the surface under the designation of "minerals" under the particular circumstances of the case may, under different circumstances, be held not to be a "mineral."

At one time the tendency was to regard the meaning of a grant, or exception of "mines and minerals" according to etymological definitions or the opinions of mineralogists or other scientists, but recently when a body of scientific evidence had been received by a judge of first instance as to whether china clay (a valuable product used for making porcelain) was a mineral the Court of Appeal expressed the view that such expert evidence ought not to have been admitted.² The present rule in ascertaining the meaning of an exception of minerals is to construe the deed, or Act of Parliament, according to the surrounding circumstances, just as the court construes any other document or Act, in order to understand what the parties or the legislature really intended.

That rule is to be found in the following *dictum* cited in the last mentioned case. A written instrument must be

"construed according to its sense and meaning as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary and popular sense, unless they

¹ Glasgow v. Farie, [1888], 13 App. Cas. 657, at p. 675.

² Great Western Railway v. Carpalla Clay Co., (1909) 1 Ch. Div., 218, 230, 237.

have generally in respect to the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must in the particular instance and in order to effectuate the immediate intention of the parties to that contract be understood in some other special and peculiar sense."³

In connection with the meaning of "mines and minerals," but of course independent of the question of construction itself, has to be considered the rule that unless a contrary intention appears the mineral owner has no right to cause injury to the surface owner by withdrawing the support of the substratum of the land, or destroying its surface, in order that the minerals may be gotten. It may happen that the court decides that substances lying in or under land are "minerals" but holds nevertheless that it would be inconsistent with the surface owner's rights to allow the mineral owner to work his minerals. In determining the respective rights of the surface and mineral owners, therefore, one has always to inquire:

(1) "Is the substance claimed as a matter of fact a 'mineral' within the meaning of the exception or grant?" (2) "If so, can it be gotten by the mineral owner under the particular circumstances?"

The decisions on this important topic, as may be supposed, are very numerous. They can be grouped roughly according as the severance of the minerals from the surface is (1) unaffected by statute, or (2) affected by statute law.

Cases concerning "mines and minerals" under an ordinary assurance, say by deed or will, are fewer in number than those relating to the construction of those words in Acts of Parliament. The latter class includes Inclosure Acts and the group of clauses forming a code in sections 77 to 85, of the Railway Clauses Act, 1845. The object of Inclosure Acts is to improve commons, or waste lands, in the interests of agriculture, parcelling the land according to the extent of the rights of the owner of the minerals and of the commoners having pasturage rights. Here the tend-

³ See also *dictum* of Lord Blackburn, quoted in *Butterley Co. v. Hucknall Co.*, (1909) 1 Ch. Div. 37, at p. 52.

ency in construing such Acts is to hold that the minerals owner shall not be allowed to injure the surface unless the Act creating the severance manifestly intended it.

The meaning of the Railway Clauses Act has led to considerable litigation, carried to the highest tribunal, and the law still is in some respects not clearly settled. The clue to the meaning of the Act is to remember that the owner of the land taken for the Railway postpones the sale of his minerals, so that if the railway company will not purchase when the time comes for working them, the minerals owner is then at liberty to work his minerals, even to the injury of the railway track, subject to a limitation of the minerals owner's rights as regards the soil supporting the railway works, which limitation will be referred to in paragraph III in the summary at the end of this article.

It is impossible to discuss in detail so wide a subject as the present. The foregoing remarks are supplemented by the following attempted summary, which, it is hoped, may prove of interest to readers of this review.

SUMMARY.

"Mines."

I. (a) "Mine" in its primary signification means underground excavations or underground workings. From that it came to mean things found in mines, or got by mining, *with the chamber in which they are contained*. When used of unopened mines in connection with a particular mineral, it means little more than veins, or seams, or strata of that mineral. Mine connotes underground working as opposed to quarrying or surface working.⁴

Illustration—"Mines are excepted" in a deed. The mine owner worked coal and made an underground road through the adjacent strata. Held that "mines" included not merely the coal bed but the cavity after the coal had been removed and therefore that the road was part of the mine and belonged to the mine owner.⁵

⁴ See Lord Macnaghten, *Glasgow v. Farie*, [1883] 13 App. Cas. 657, at p. 687.

⁵ *Batten-Poole v. Kennedy*, (1907) 1 Ch. 256.

"Mines and Minerals."

(b) In ascertaining the construction of a grant or exception of "mines and minerals" regard should be had to what these words mean in the vernacular of the mining world, the commercial world and the landowners.⁶

II. Except as hereafter mentioned in paragraph III, a surface owner is entitled of common right to support for his property in its actual position and in its natural condition without interference, or disturbance, by or in consequence of mining operations, unless such interference, or disturbance is authorized by the instrument of severance, either in express terms, or by necessary implication.⁷

Illustration—(1) Exception in a deed of the "mines and minerals." China clay lay under the surface which could only be won by surface workings. Held that it was a "mineral," but that the surface owner was entitled to an injunction to restrain the mineral owner from getting the mineral in such a way as to destroy or seriously injure the surface.⁸

(2) A deed excepts the "mines and minerals" with power to get the minerals as theretofore. At the date of the deed the practice of the district was to let down the surface, which consequently became dotted with saucer-like depressions. Held that the minerals owner in getting the minerals could let down the surface.⁹

III. (a) Under sections 77 to 85 of the Railway Clauses Act 1845 as regards minerals lying within the forty yards or other prescribed limit mentioned in section 78 all mines and minerals not expressly purchased by a railway company which purchases "land" within or under which minerals may be found, may in case

⁶ Hext v. Gill, L. R. 7 Ch. App. 699, at p. 719, approved in North British Ry. v. Budhill Co., [1910] App. Cas. 116, at pp. 134 and 140.

⁷ Lord Macnaghten in Butterknowle Co. v. Co-operative Co., [1906] App. Cas. 305, at p. 313.

⁸ Hext v. Gill, *supra*; Staples v. Young, [1908] 1 I. R. 135 (C. A.).

⁹ Beard & Moira Colliery, [1915] 1 Ch. Div. 257 (C. A.).

the company has not agreed to pay compensation be worked by the minerals owner on complying with the statutory provisions applicable to the case even though such working may interfere with the use of the railway and absolutely destroy the surface. The only condition to which the working is made subject is that it must "be done in a manner proper and necessary for the beneficial working" of the mines and according to the usual manner of working such mines in the district where they are situate.¹⁰

(b) But what may otherwise be held to be a "mineral" if it consists of the ordinary soil of the whole district in which the land is situate is not within the statutory exception but passes to the railway company as part of the "land" which was conveyed to such company.¹¹

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¹⁰ Lord Macnaghten in *Great Western Railway & Carpalla Clay Co*, [1910] App. Cas. 83, at p. 85.

¹¹ See explanation, in *Great Western Railway & Carpalla Clay Co*, [1909] 1 Ch. Div. 218, at p. 229, of *Glasgow v. Farie* (*supra*). See also *Great Western Railway v. Blades*, [1901] 2 Ch. Div. 624; *In re Todd v. North Eastern Railway*, [1903] 1 K. B. 603.