

TOVEY AND LINDSAY.

June 9, 1813.

Lord Eldon (Chancellor). He had before stated some important features in this case, which rendered it proper to send it back for review—more particularly as it introduced, or might introduce, that extremely important question which had been lately under the consideration of the Judges here, relative to the effect of a Scotch divorce on an English contract of marriage; and as this question arose in both cases, he thought it right to remit both. The cases, in fact, embraced a variety of important questions, and it would be desirable to have the deliberate judgment of the Court below on all of them.

WHETHER A
SCOTCH
COURT HAS
JURISDIC-
TION TO DIS-
SOLVE AN
ENGLISH
MARRIAGE?

June 18, 1813.

Agent for Appellant, GREY, Gray's-Inn.

Agent for Respondent, CAMPBELL, Duke-street, Westminster.

 FROM SCOTLAND.
WIGHT—*Appellant*.DICKSONS—*Respondents*.

LEASE of lime-works, with stipulation on the one side to furnish, and on the other side to take, a certain quantity of coals from particular collieries. The full quantity not raised by the lessor from the collieries in question.—The lessee cannot, on account of this failure, resort to other collieries for the whole of what he requires, but only for the quantity he may want beyond the supply from the particular collieries.

SIR JOHN DALRYMPLE, of Cousland, desirous of making the minerals on his estate subservient to each other, granted a lease to the Respond-

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ents, with the exclusive privilege of burning lime in the barony of Cousland, provided they consumed a certain quantity of coal raised on the same estate.

The material words in this lease were these:—

“ Sir John Cousland is bound to furnish panwood from the coal works at Cousland, so long as they are worked, at the rate of 1s. a cart of three bolls; great chows and panwood mixed, as they stand in the mine, at the rate of 1s. 6d. per cart, of 12cwt.;” (thus making the one sort, as is customary, deliverable by measure, and the other by weight). *“ And to make the said John and George Dickson certain, that no injustice shall be done them in that mixture, it is agreed, that a number of colliers, sufficient for supplying the draw kilns with great chows and panwood mixed, shall be set apart for the sole supply of the lime works, and those colliers to keep a separate bing for them, of what they cut down, of which NO PART shall be sold or go to the use of any other person, except the two or three inches of parrot coal at the top, which shall be set aside for the use of the said Sir John and his heirs, in case they shall desire to have it; and the said John and George Dickson are not to be at liberty to purchase panwood, or coals of any kind, from any other coal work, as long as they can be supplied at the above rates,”* (i. e. with the one description of coal as well as the other,) *“ from the Cousland coal works, under the penalty of 5s. for every cart they shall get elsewhere; and if the Cousland coal stops, they are to build no more kilns.”*

“ And in order to prevent the panwood from

hanging a burden upon the coal works, *it is specially agreed, that if the said John and George Dickson do not consume 24,000 bolls of panwood in a year, the said leasers shall be at liberty to consume the surplus panwood in separate kilns by themselves or others.*"

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As the Respondents did not consume the quantity of panwood necessary to entitle them to their exclusive privilege of burning lime, Sir John Dalrymple granted a lease to the Appellant, with liberty to raise coal to supply the Respondents, and to burn lime for sale on his own account, with the difference between the quantity of coal consumed by the Respondents, and what they ought to consume. The Respondents insisted on their exclusive privilege, and stated as the reason for their not taking the stipulated quantity of coal, that the Cousland colliery was not worked in such a manner as to yield them a regular supply, so that they were entitled to resort to other collieries.

A question arose whether "great chows and panwood" mentioned in the lease, did not mean "great coal; chows (small pieces of coal,) and panwood (the refuse or smallest coal)."

After a long course of litigation, not necessary to be particularly stated, the Court of Session decided upon the whole, in favour of the Respondents, by an interlocutor, the material words of which are set forth in the observations of Lord Redesdale.

It was argued at the bar, that the Court by introducing the word 'coal,' had made a new agreement for the parties; and that it was dangerous to intro-

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duce a word on mere conjecture, when the words as they stood in the lease made sense without it.

Lord Redcsdale read the material words of the lease or leases to the Respondents (vide ante); and observed, that a variety of disputes had arisen respecting them, which it was not necessary to mention particularly. Sir John Dalrymple, thinking that the Dicksons had not used the coal on the estate as they ought to have done, granted another lease to Wight, the Appellant, empowering him to supply the Dicksons with the quantity of coal which they were bound to consume, to entitle them to the exclusive privilege of burning lime, for sale in the barony of Cousland; or if they did not consume the proper quantity, then empowering him (Wight) to burn as much lime for sale on his own account, as could be burnt with a quantity of coal amounting to the difference between what they ought to take and what they actually took.

The material question then was, what the Dicksons were obliged to take, and Wight, as standing in the place of Sir John Dalrymple, was obliged to furnish. A question had arisen whether "great chows" and panwood mixed meant the chows and panwood exclusive of the great coal, or the whole of the coal, as it stood in the mine, except the parrot coal at the top, as mentioned in the lease. The Court of Session had determined, and he thought properly determined, that the expression meant the whole coal except the parrot coal. An attempt had been made to distinguish great chows from great

coal, but from the whole of the lease taken together it was clear that great coal was meant to be included, since the Respondents were to have the whole together as cut down by the colliers. The interlocutors were numerous, and some of them not material to be considered. The only one which required particular attention was that of the 23d of January 1806, where it was found “that the Pursuers, Messrs. Dicksons, were obliged to take, and the defenders obliged to furnish them with, regular wrought panwood to the extent of 24 bolls annually, if raised at the Cousland colliery; and also the great coal, chows, and panwood mixed as they stood in the mine, to the extent of 30 carts in each month, and that upon failure to work such a quantity of panwood yearly in a regular manner, so as to afford the Pursuers a constant supply for their works, the Pursuers are entitled to have, and the defenders obliged to furnish, the great coal, chows, and panwood they raise, mixed, as they stand in the mine, in terms of the leases, to the extent required by the pursuers for the supply of their lime works, *or at their option* to be supplied from other collieries.” Now, whether the Court of Session understood this to the extent to which it went, or not, it certainly appeared on the face of it to go beyond the meaning of the lease. The great object had been the consumption of coal, and the Dicksons were not at liberty to purchase their coals any where else, as long as they could be supplied from the Cousland colliery properly worked. The supply ought to be a ready and a fair one it was true;

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but then it was equally clear that if the Cousland colliery should be properly worked, the Dicksons could only resort to other collieries for the deficiency, or the difference between the supply and their demand. This appeared to be the true construction of the lease; but it might be contended from this interlocutor, that if the Dicksons were not furnished from the Cousland colliery with *all* that they wanted, they might at their option take *the whole* from other collieries.

The best mode of proceeding would be to remit the interlocutors for review to the Court below, with findings to this effect:—That the construction put by the Court of Session upon the lease, so far as related to great coal being intended to be given to the Dicksons with the chows and panwood, was correct:—that the Dicksons were not at liberty to purchase coals for their limeworks from any other mines so long as they were regularly supplied from the Cousland colliery—and that in case the Cousland colliery should be regularly wrought, the Dicksons were bound to take all that should be raised, the supply being as regular as the nature of the colliery would permit—the mixed coal to be fairly wrought, and the panwood supplied to be of such quality as was fit to burn lime, and that the Dicksons were at liberty to supply themselves to the extent of the deficiency, and to that extent only, from other collieries. Then he should propose to affirm the interlocutors as far as they were consistent with these findings, with directions to the Court below to vary them, where it might be required, for the purpose of making them correspond.

Lord Eldon (Chancellor). These interlocutors had been repeatedly under his consideration, and he had found great difficulty in understanding some parts of them. He agreed, however, in the suggestion that had been made by his noble and learned friend. There were two principal points to be considered: First, whether the Dicksons were entitled to the great coal along with the chows and panwood, under the words "great chows and panwood" in the lease. It had been said that it was too strong to insert a word; but the answer was, that other words in the lease could not have their proper effect without it. The 2d point was, whether the Dicksons were confined by the contract to supply themselves from other collieries, only to the extent of the deficiency of the supply from the Cousland colliery. He was of opinion that they were so confined, if the Cousland colliery was properly worked. The Court below would settle the interlocutors, and perhaps they might see something in them inconsistent with the findings. It appeared to him however, that the whole of them might be affirmed except that of January 1806, which seemed to give an option to the Dicksons, which the true construction of the lease did not warrant.

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CONSTRUCTION OF A LEASE.

Where a material word appears to have been left out of a lease by mistake, and other words cannot have their proper effect unless it be introduced, the lease may be construed as if it had been inserted, though the particular passage where it ought to stand conveys a sufficiently distinct meaning without it.

The cause was accordingly remitted for review with the above findings.

Agent for Appellant, CHALMER.

Agent for Respondent, MUNDELL.