Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Bulli Coal Mining Company v. *Patrick Hill Osborne and another, from the Supreme Court of New South Wales; delivered* 11*th March* 1899.

Present:

LORD MACNAGHTEN.
LORD MORRIS.
LORD JAMES OF HEREFORD.

[*Delivered by Lord James of Hereford.*]

In this case the Appellants seek to reverse a judgment or order of the Supreme Court of New South Wales dated 10th September 1897 dismissing an appeal against an order of the Honourable William Owen Chief Judge in Equity dated 27th July 1896 and allowing a cross appeal on the part of the Respondents against the said order and varying it in certain particulars.

The proceedings in the Courts below were commenced by a summons issued by the Respondents in the winding up of the Appellant Company for liberty to prove for a sum of money claimed as the value of coal alleged to have been wrongfully taken by the Appellants from land belonging to the Respondents. Such claim was by an order dated 20th December 1895 directed to be tried before the Honourable William Owen Chief Judge in Equity and it was accordingly heard before him in April May and June 1896. On 27th July 1896 the learned Judge delivered judgment in the case and afterwards ordered that it be referred to the

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Master in Equity to inquire and certify what was the market value at the pit's mouth of all the coal worked and gotten by the Appellant Company from the land of the Respondents being a portion of their land known as Watt's Grant and that the Respondents should be allowed to rank as creditors of the Appellant Company for such aggregate amount as should be certified by the Master in Equity.

During the hearings in the Courts below the principal defence made by the now Appellants to the claim of the now Respondents was based upon an alleged champertous agreement.

It was proved that the Respondents had on 25th March 1895 made an agreement with a certain Company called the Bellambi Coal Company whereby it was agreed that the Respondents should employ the solicitor of the Bellambi Coal Company to conduct proceedings for the purpose of recovering damages from the Appellants' Company and that in consideration of the Respondents paying to the Bellambi Coal Company 92½ per cent. of the amount recovered that Company would indemnify the Respondents from all costs and expenses incurred by the taking of the proceedings. It was also found that by an Indenture of 15th May 1893 the Respondents had leased to the Bellambi Coal Company the land and the coal under it which had been entered upon and taken by the Appellants, so that by their wrongful acts the Bellambi Company had been deprived of coal which was believed by them and the Respondents to be the subject of their lease.

The Chief Judge held that the agreement of 25th March 1895 was champertous in its character, but that its existence did not preclude the Respondents from enforcing their rights against the Appellants.

The Full Court overruled the judgment of the

Chief Judge so far as it determined the agreement to be champertous but agreed with him in holding that if champertous it would not preclude the Respondents from enforcing their rights against the Appellants.

In his argument before the Committee the leading Counsel for the Appellants intimated that he felt he could not rely upon this defence of champerty and virtually withdrew it. Their Lordships are therefore relieved from delivering any judgment upon the subject beyond saying that they see no ground for differing from the judgment delivered on this head by the Full Court.

Among the other grounds of defence put forward in the Courts below was the plea of the Statute of Limitations. This plea was dealt with fully by the Chief Judge after he had disposed of the question of champerty in a preliminary judgment. It was raised again before the Full Court but not much pressed there, and the Full Court simply adopted the judgment of the Chief Judge on this point. It formed however the principal subject of discussion at their Lordships' bar where it was presented by the learned Counsel for the Appellants in a most elaborate and ingenious argument.

The material facts bearing on the defence of the Statute appear in the findings of the Chief Judge which had the entire concurrence of the Full Court. They were arrived at after an exhaustive inquiry lasting for 18 days during which much oral and documentary evidence was given. The Counsel for the Appellants endeavoured to some extent to contest these findings, but their arguments not only failed to show that there was manifest error in the findings of facts by the Courts below, in which case alone would their Lordships differ from them, but being called upon by arguments of Counsel to consider the

correctness of these findings their Lordships are of opinion that they are in every respect correct.

It appeared that on the 1st February 1854 the Crown granted to John Alexander Watt 51 acres of land near Bulli Illawarra. By several conveyances the said 51 acres of land, known as "Watt's Grant," became vested in Henry Osborne, whose personal representatives are the present Respondents. Henry Osborne died in 1858. Early in 1873 the Appellants who were working coal in land adjoining to Watt's Grant found that their workings were approaching the boundary between the two properties and so informed the then trustees of Henry Osborne's will, and entered into negotiations with them for the purpose of obtaining a lease of Watt's Grant. These negotiations fell through but the Appellants proceeding secretly with their workings entered upon Watt's claim and between the years 1878 and 1880 removed the coal from under some 14 acres of such land. The trespass was distinctly shown upon the Appellants' own working plan. It was committed under ground, and committed wilfully. Until the workings by the Bellambi Coal Company under their lease of May 1893 brought to light the fact that a trespass had been committed by the Appellants the Respondents and their predecessors were ignorant of the Appellants' wrongful working, and had no reason to suspect that any had occurred.

Upon these facts the Courts below have come to the conclusion that no laches can be attributed to the Respondents in not discovering the existence of the wrongful workings by the Appellants a conclusion with which their Lordships entirely concur.

Accepting however for the purposes of argument the findings of the Chief Judge the learned Counsel for the Appellants contended that the Statute of Limitations was an answer to the

Respondents' claim. Their argument was to this effect: — Granted, they said, that the trespass was intentional—as indeed most trespasses were—that circumstance of itself was no answer to the plea of the Statute. To use the language of Alderson B. there was "no "distinction between trespasses underground and "upon the surface." It constantly happened as one of the learned Judges observed in the case of the *Imperial Gas Light and Coke Company* v. *London Gas Light Company* that the owner of a coal mine takes coal from an adjoining mine and by fraud prevents its being found out for more than six years. "Yet that" adds the learned Judge "is no answer to the "Statute of Limitations." Clearly it was no defence at law. Why then should it be a defence when the claim is put forward in a Court of Equity. The foundation of the claim must be the same wherever the injured party may seek redress. At law he sues for damages in an action of trespass. If he comes into a Court of Equity still it is in respect of the trespass that he claims compensation. There being therefore a concurrent jurisdiction at law and in equity in respect of the very same wrong and the very same cause of action the Statute is as binding in equity as it is at law in accordance with the views expressed by the House of Lords in the well known case of *Knox* v. *Gye*. If indeed the Respondents had been able to make out a case of what Pallas C.B. terms "active or aggressive "concealment" that might have been a different matter. Possibly relief might then have been had in accordance with the principles to be deduced from the case of *Gibbs* v. *Guild* and similar cases. But nothing of the kind was suggested here. The Appellants have taken the Respondents' coal. Be it so. They have done nothing more. That is the beginning and the

Hunter v. *Gibbons*, 7 H. & N. 459, 465.

10 Exch. 39, 42.

L.R. 5 E. & I. 656, 674.

Barbur v. *Houston*, 14 L. R. I. 273.

9 Q. B. D. 59.

end of their offending. It cannot be said that they have done anything actively to prevent the Respondents or their predecessors in title finding out what they did.

Such was the contention of the Appellants' Counsel but their Lordships areunable to accede to it. It seems to ignore the nature and character of the act of which the Respondents complain and to disregard the principles on which Courts of Equity proceed in dealing with fraud.

It will not be out of place to cite a passage from the Judgment of Lord Hatherley in *Livingstone* v. *Rawyards Coal Co.* before the House of Lords. The House was there dealing only with the measure of damage in a case of underground trespass. But in pointing out the distinction between a case of fraud and a case of inadvertence Lord Hatherley uses very plain language, and his remarks may be useful in clearing the ground. "There is no doubt" said his Lordship "that if a man furtively and "in bad faith robs his neighbour of property "and because it is underground is probably not "for some time detected, the Court of Equity in "this country will struggle, or I should rather "say will assert its authority to punish fraud by "fixing the person with the value of the whole of "the property which he has so furtively taken "and making him no allowance in respect of "what he has so done as would have been justly "made to him if the parties had been working "by agreement, or if as in the present case they "had been the one working and the other per-"mitting the working through a mistake. The "Courts have already made a wide distinction "between that which is done by the common "error of both parties and that which is done "by fraud."

5 A. C. 25, 34.

In the present case the coal was taken furtively. No one can deny that it is a fraud to rob your

neighbour furtively of his property or that a Court of Equity ought to give redress for such a wrong. "This Court" as Lord Hardwicke presiding in a Court of Equity observed "has an undoubted "jurisdiction to relieve against every species of "fraud." Where the remedy is given on the ground of fraud Lord Westbury pointed out that "it is governed by this important principle that "the right of the party defrauded is not affected "by lapse of time or generally speaking by "anything done or omitted to be done so long "as he remains without any fault of his own "in ignorance of the fraud which has been "committed."

Chesterfield v. *Jansen*, 2 Vesey 125.

Rolfe v. *Gregory*, 4 D. J. & S 576, 579.

The Statute of Limitations has really no application to a case such as this. Courts of Equity are not within the words of the Statute which only apply to certain legal remedies though they are as it has been said within its spirit and meaning. The way in which the Statute came to be applied in proceedings in Equity is explained by Lord Camden in his Judgment in *Smith* v. *Clay* which was published from his Lordship's own notes. A Court of Equity he says "which is never active in relief against "conscience or public convenience" always refused its aid to stale demands. As however it had no legislative authority it could not define exactly the time of bar. It was governed by circumstances. But as often as Parliament prescribed a limit to proceedings at Law the Court of Chancery adopted that rule and applied it to similar cases in Equity. "For" he adds "when the Legislature had fixed the time at "Law it would have been preposterous for "Equity which by its own proper authority "always maintained a limitation to countenance "laches beyond the period that Law had been "confined to by Parliament." Now it has always been a principle of Equity that no length

3 B. C. C. 638 *n*.

of time is a bar to relief in the case of fraud in the absence of laches on the part of the person defrauded. There is therefore no room for the application of the Statute in the case of concealed fraud so long as the party defrauded remains in ignorance without any fault of his own.

The contention on behalf of the Appellants that the Statute is a bar unless the wrongdoer is proved to have taken active measures in order to prevent detection is opposed to common sense as well as to the principles of Equity. Two men acting independently steal a neighbour's coal. One is so clumsy in his operations or so incautious that he has to do something more in order to conceal his fraud. The other chooses his opportunity so wisely and acts so warily that he can safely calculate on not being found out for many a long day. Why is the one to go scot free at the end of a limited period rather than the other? It would be something of a mockery for Courts of Equity to denounce fraud as "a secret thing" and to profess to punish it sooner or later and then to hold out a reward for the cunning that makes detection difficult or remote.

There is very little direct authority on the particular point which was urged with so much ingenuity at the Bar. Indeed the case of the *Ecclesiastical Commissioners for England* v. *The North-Eastern Railway Company* before Malins, V. C. was cited as the only reported case in which the account was carried back beyond the period prescribed as a bar by the Statute of Limitations. And their Lordships are compelled to say that they are unable to rely on the decision in that case. It is very difficult to follow the reasoning of the learned Vice-Chancellor. His Honour said distinctly "there was no improper intention." He held that what was done "was done "under a mistake." Yet the Defendants were

4 Ch. D. 845.

visited with all the pains and penalties of fraud. The account was carried back beyond the six years; the measure of damages was in accordance with the severest rule ever applied. The ground of the decision seems to have been that although there was no moral fraud—no fraud in fact—yet "for the purposes of the Statute the "breaking of bounds into a neighbour's colliery "must be considered a fraudulent act." There is no foundation for that proposition. Underground trespass may be committed in good faith without any sinister intention or it may be committed under circumstances which would render the wrongdoer liable to a prosecution for felony. Every case must depend upon its own circumstances. There is nothing in principle or in authority or in the exigencies of public policy to require that the same measure of justice or injustice should be meted out to all transgressors alike ignorant or wilful innocent or fraudulent.

21 B. 622.
13 Ch. D. 574.

In all or almost all the other cases cited at the Bar the Court held that fraud was not established. But Sir John Romilly in *Dean* v. *Thwaite* and Fry J. in *Trotter* v. *Maclean* expressed their opinion that fraud would or might be an answer to the plea of the Statute. In *Dean* v. *Thwaite* where the learned M.R. held that the evidence of fraud was not conclusive his Honour made these observations "The case "of fraud alleged and the only fraud that I "think would justify the Court in coming to "a conclusion that the coal gotten before that "period"—that is before the period of limitation —"ought to be accounted for is that the Defendant "had intentionally taken the Plantiffs' coal and "had concealed the fact and during the process "had taken steps to prevent the Plaintiffs "discovering it." If those observations are to be construed to mean that in his Honour's

opinion something more was required beyond taking the coal furtively, their Lordships are unable to agree in them. But they think that is not the fair meaning of the passage cited which must be understood as applied to the alleged facts of the case on which his Honour was then commenting. In *Trotter* v. *Maclean* Fry J. remarks that the period of limitation imposed by the Statute of James ought to apply to proceedings in the Chancery Division in respect of a trespass unless there was some equitable ground for repelling the application of the Statute. "Such an equitable ground" he adds "has in "many cases been found in fraud. When fraud "or any other equitable circumstance exists "undoubtedly the Statute will not apply." It may be observed that in *Trotter* v. *Maclean* no fraud was suggested beyond the fraud that lies in the secrecy of wilful trespass underground and that the Plaintiffs failed to prove in that case that the trespass was wilful.

Their Lordships are therefore of opinion that the Statute of Limitations cannot be set up as a bar in the present case and they think that this conclusion is not opposed to any authority.

A comparatively minor question remains to be noticed. By the order of 27th July 1896 the Chief Judge directed the Master in Equity to inquire and certify what was the market value of the coal which had been wrongly worked and gotten by the Appellants under Watt's Grant, and then proceeded to order: "In making such inquiry the Master is to take "into consideration that the Court has decided "that there is not sufficient evidence to satisfy "the Court that the pillars were extracted or that "the bords were worked otherwise than in the "usual and proper mode of working."

By the order of the Full Court of the 10th September 1897 this direction was negatived the Court ordering "that the Master in Equity "should determine the quantum and value of "the coal extracted from the said land freed and "unembarrassed by any direction in the said "Order (of 27th July 1896) contained as to "extraction of pillars or proper working of "bords." But in the judgment delivered by the Full Court the following dictum occurs:—

"It appears that His Honour by his order "directed the Master in making the inquiry to "take into consideration that His Honour had "decided that there was not sufficient evidence "to satisfy His Honour that the pillars were "extracted or that the bords were worked "otherwise than in the usual and proper mode "of working. This objection is complained of "and objected to on the part of Messrs. Osborne. "It was pointed out that the usual mode of "working would be to remove the pillars as "soon as the bords were worked out and that "if they were not in fact removed it lay upon "the Bulli Company to satisfy the Court as to "the fact. We think that this must be so and "that once it has been proved that the coal has "been worked from under the 15 acres it should "be presumed until the contrary be shown that "the pillars were worked out and the roofs "allowed to fall in."

Their Lordships do not agree with the direction given by the Chief Judge or with the dictum of the Full Court on the subject. No presumption of any kind as to the pillars having been either left or worked or the reverse should be made. The Master in Equity in taking the account must be guided alone by the evidence before him. His task may be a difficult one—but still he must arrive at the quantum of coal taken as best he can.

The evidence given by the litigants appearing before him must be his guide, and no presumptions such as have been referred to should affect his decision. Their Lordships express no opinion as to the effect the Master should give to any evidence—or the inferences he should draw from it—they only determine that presumption should not exist without being founded on evidence.

Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed, and that the judgment of the Court below be affirmed. The Appellants will pay the costs.