Privy Council Appeal No. 48 *of* 1937

The Attorney-General for the Isle of Man - - - *Appellant*

v.

Emily Moore - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUSTICE OF THE ISLE OF MAN, STAFF OF GOVERNMENT DIVISION

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH MAY, 1938.

Present at the Hearing:

THE LORD CHANCELLOR (LORD MAUGHAM)
LORD WRIGHT
LORD ROCHE

[*Delivered by* LORD WRIGHT]

This is an appeal from the High Court of the Isle of Man by His Majesty's Attorney-General for the Island. It raises an important question on the construction of the Act of Tynwald, known as the Act of Settlement of 1703-04. The appellant claims on behalf of His Majesty, who is Lord of the Isle and Manor of Man under a title the history of which was expounded by this Board in *Attorney-General for the Isle of Man* v. *Mylchreest*, 4 App. Cas. 294. What was there said need not be repeated here. Nor is there any dispute as to the position of the respondent so far as relevant to these proceedings. She is the holder of the Raggatt estate, which is a Manx customary estate of inheritance held by her from the Lord of the Island. Such estates, the nature of which was also fully discussed by this Board in *Mylchreest's* case, had been originally estates of a low kind of tenure which by custom and judicial decision had grown into customary estates in fee simple, subject to the discharge of certain payments to the Lord of the Isle. But as doubts and difficulties had arisen between the Lord and the tenants as to the extent and quality of the tenants' estates, the Act of Settlement was passed at a Tynwald Court on the 4th February, 1703, by James, Earl of Derby (the then Lord), the Governor and other his Lordship's Officers and 24 Keys, the representatives of the Isle, to settle and confirm the estates and tenures of the tenants. The Act was duly proclaimed in 1704, along with an amending Act. The estate of the respondent is for purposes of this case regulated by the terms of these Acts. Section 14 provides that the tenants'

estates should be good and perfect customary estates of inheritance descendable from ancestor to heir according to the laws and customs of the Isle, and section 15 contained a clause for peaceable enjoyment by the tenants, subject to their due payment of rents and fines and performance of other services. Section 16 contains the words on which the decision of this dispute depends. It is a clause of reservation by the Lord of "all such Royalties, Regalia, Prerogatives, Homages, Fealtys, Escheats, Forfeitures, Seizures, Mines and Mineralls of what kind or nature soever, Quarrys and Delfs of Flagg, Slate or Stone, Franchises, Libertys, Priviledges, and Jurisdictions whatsoever, as are now and at any time heretofore have been invested in the said James, Earl of Derby, or in any of His Ancestors, Lords of the said Isle." The amending Act by section 7 provides that notwithstanding the general words of the previous Act, every tenant and farmer should have liberty to dig and use all sorts of slate and stone on his tenement for his own use and the improvement of his own and his neighbours' estates, but not to dispose of them as merchandise without licence. Section 8 provides for the case where a tenant having a quarry of limestone or other common stone on his grounds should refuse to allow another person to get the stone for the improvement of that person's lands. In that event the Governor of the Isle might give authority to that person to dig and carry away, on paying reasonable compensation, as much as should be necessary for his use. These amending sections do not, in their Lordships' judgment, throw any light on the meaning of the words of section 16 of the principal Act.

The dispute which is the subject of this appeal has reference to the extent of the rights reserved to the Lord by the Act. The appellant, on the 9th March, 1936, issued an information on behalf of the Crown against the respondent alleging that there existed under part of the Raggatt, the respondent's estate, a valuable bed of mineral suitable for the purpose of merchandise and for making into bricks and other articles, and that the bed of mineral, commonly known as shale, was met with a few feet below the surface of the ground and could most conveniently be won by open workings. He claimed a declaration that the shale was within the reservation of mines and minerals under the Act, and a declaration of the Crown's right to enter on the lands, break the surface and search for, win, work and take away all minerals, including the mineral commonly called shale. The respondent by her answer, while admitting that her estate of customary freehold was subject to the Crown's legal rights, contested the right claimed in the information, and in particular denied that the shale was a mineral within the meaning of the Act of Settlement. She further averred that it was the ordinary subsoil of the estate and district and her absolute property and was composed essentially of clay and sand.

At the trial the Deemster Farrant held that shale was not within the reservation of mines and minerals in the Act,

or of quarries or delfs of flaggs, slate or stone, and gave judgment in favour of the respondent. The appellant then appealed to the Staff of Government Division of the Isle of Man. At the hearing the Judges of that Court were equally divided. The Judge of Appeal agreed with the First Deemster that the shale did not come within the reservation of mines or minerals, or of flag or slate, but differed from him in holding that it came within the reservation of stone. He would have allowed the appeal. But as Deemster Cowley, the other Judge, agreed on all points with the First Deemster, the result was that the appeal was dismissed and the judgment appealed from stood. From this decision the appellant appeals to His Majesty in Council.

Manx shale first became a matter of commercial interest in or about 1883, when a company called the Glenfaba Brick and Tile Company obtained a lease or licence from the Crown subject to a fixed rent and royalties to win and work the shale from the Glenfaba estate, which was in proximity to the Raggatt estate, and proceeded to work the bed of shale at Glenfaba. The Company used the shale in order to make bricks. In or about 1936 the workable bed was becoming exhausted. They then applied to the Crown to grant them a similar lease or licence in respect of the Raggatt estate. The respondent objected and the information was laid in order to ascertain the Crown's rights. Apart from a suggestion that the Crown was entitled to rely on a custom, which both Courts have rightly negatived, the question, as both parties agree, is whether shale, which is not specifically mentioned in the section, is included in the reservation of "Mines and Mineralls of what kind or nature soever, Quarrys and Delfs of Flagg, Slate or Stone . . . as now are or at any time heretofore have been invested" in the Lord.

The first use of the word shale cited in the Oxford English Dictionary is in 1747. The word is there defined as an argillaceous fissile rock, the laminae of which are usually fragile and uneven and mostly parallel to the bedding. Expert evidence as to the nature of this shale given at the trial was conflicting in many respects. It appears, however, to be common ground that this shale forms the subsoil of the Raggatt and indeed of a large part of the island: that when wetted it breaks down into mud and that for this and other reasons it is incapable of being used for roofing or for any other purpose for which common slate is used. The shale is found at a depth of about $2\frac{1}{2}$ feet from the surface of the land and goes down for a considerable distance, 50 feet or more. Some portions, generally at the top, are soft and are described as dark blue clay and as plastic. It is this portion which is peculiarly suitable for brickmaking. The shale, including harder or more rocky portions which are found generally lower down, is crushed by 6-ton rollers, water being added where necessary. When thus crushed it can be used for making bricks which are called shale bricks. One witness described it as a sort of soft stone which by

crushing can be made into a plastic substance. But even the hardest portion is friable. In the evidence shale was also described as a laminated variety of clay, or as a hardened and compressed clay. It was also variously described as a very poor quality slate, a decomposed slate, or on its way to become slate. It was admittedly of no use for road making or for building. It was said to be chemically indistinguishable from slate or clay, but it is clear that chemical analysis does not assist on a question of this character. The conclusion broadly seems to be that it is a chalky or clayey substance, generally a soft dark blue mud in the upper strata, but becoming harder lower down. In the lower layers as the result of pressure it has assumed a rocky character, but even so it is still friable and without the hardness which characterises stone or slate.

In the Information it was alleged that this shale was a mineral within the words of reservation. A great part of the evidence at the trial was directed to establishing this claim as a matter of fact. But before this Board it was admitted by the Attorney-General that the contention that this shale was a mineral could not be maintained. This Board had held in *Mylchreest's* case (*supra*) that in section 16 of the Act " mines and minerals " had a connotation limited to subterranean workings, and did not include surface workings or the material got by surface workings, such as the shale in question. It is true that since *Mylchreest's* case the House of Lords in *Midland Railway Co.* v. *Robinson* 15 A.C. 19 held (Lord Macnaghten dissenting) that " mines and minerals " as used in the Railways Clauses Act and similar statutes were not limited to underground workings, but the language of these Acts, as well as their purpose and scope, is different. The contrast in the Act of Settlement between " mines " and " quarries " and " delfs " (that is open pits or diggings) obviously excludes any construction of " mines and minerals " except a construction limited to subterranean workings.

There remains the question whether this shale can be held to be covered by the specific words " flagg, slate or stone." The principles to be applied in determining such a question have now been established by decisions of the House of Lords dealing with words of reservation in the Railways Clauses Act and similar Acts. After some conflict of judicial opinion it has been finally established by *North British Railway Co.* v. *Budhill Coal and Sandstone Co.* [1910] A.C. 116, followed by *Caledonian Railway Co.* v. *Glenboig Union Fireclay Co.* [1911] A.C. 290, that this type of question is an issue of fact to be decided according to the particular circumstances of the case, the duty of the Court being to determine what the words meant in the vernacular of the mining world, the commercial world and landowners at the relevant time, which in this case is the date of the Act of Settlement of 1703. It was thus that *mutatis mutandis* Lord Loreburn stated the question in the *Budhill* case at p. 127. Such an issue is necessarily an issue

of fact, because it must depend on evidence of the actual user of the words, that is, the way in which they were in practice used by the classes of persons enumerated. Another point may be noted. Lord Loreburn L.C. pointed out in *Glenboig's* case at p. 299 that " the evidence given [in that case] as to common meaning is evidence given of the common meaning at the present day." He adds, " I should assume that it was the same at the time of sale unless sufficient ground was given for coming to a contrary conclusion." But in the present case, the fact that no one thought of this shale as capable of any valuable use at all or as a commercial material in 1703 or indeed until about 1883 when it was first used for brickmaking, might well be a ground for holding that even if to-day the words had acquired the requisite vernacular meaning, the position must have been different in 1703. On this principle it was held in *Linlithgow* v. *North British Railway Co.* [1912] S.C. 1327, that a special species of shale, that is, oil shale, had become a commercial mineral by 1862 because the term was used by those concerned as equivalent to oil bearing shale, whereas no such vernacular use could have existed in 1812, when the material was not recognised as of any commercial value at all or as being anything but waste. But it is here unnecessary to labour that point because on a careful consideration of the record in this appeal, their Lordships have been unable to discover any substantial evidence of fact that the words flagg, slate or stone or any one of them are at the present time used or have ever been used, in the vernacular of commercial, mining or landowning circles to signify this shale. It is not clear from the record that that particular issue of fact was ever precisely envisaged in the course of the evidence. Some confusion was no doubt introduced because of the emphasis directed in the pleadings and the evidence to " mines and minerals," words which are now admitted to be irrelevant in this dispute. But in general it appears that, with perhaps one exception, no specific questions were put and no specific answers were elicited as to the vernacular use of the words of the reservation, either in 1703 or 1704 or the present time, and in particular of the vernacular use of the words slate or stone, these being the words to which before their Lordships the appellant's claim was limited. The fact that this shale was not capable of being used for the ordinary purposes to which slate or stone are respectively applied, such as roofing or building is *prima facie* inconsistent with a vernacular designation of shale as slate or stone. So also is the fact that before 1883 shale was not regarded as of any commercial value at all. A similar conclusion seems to follow from the difference in physical character which distinguishes shale from slate or stone. It is true that in three leases granted by the Crown since 1883 for the getting of shale for brickmaking, the material is described as " shale or stone," but in the special circumstances of the case that cannot, in their Lordships' opinion, be regarded as evidence of a vernacular use of the word stone as including this shale. The manager

of the Glenfaba Brick Works said that he would not call the material slate or stone, a piece of evidence which seems to be an exception to the general absence of specific question or answer on the vernacular use of the words. A director of the same works said, that "one can't call it a slate," and that he considered shale as a "sort of soft stone." It is questionable how far the language used by scientific geologists is helpful in determining an issue of this character, but for what it is worth it may be noted that Professor Lamplugh in his geological survey of the island, published in 1903, does not without qualification describe shale as either slate or stone, though he describes it as decomposed slate. Their Lordships on the whole case see no reason to differ from the finding of fact of Deemster Farrant based on a careful and exhaustive examination of the evidence which it is here unnecessary to repeat, that shale such as that now in question could not have been described as slate by mining experts, commercial men or landowners either in 1703-04 or to-day, or to differ from his similar finding that it would not have been included in a description of stone by any of the same classes of persons. These findings of fact, which their Lordships accept, are fatal to the appellant's case. Deemster Farrant's finding in respect of slate, is concurred in by both Judges of Appeal. There is thus on this point a concurrent finding of fact which is sufficient on the established rule of the Board to conclude the issue *quoad* slate before their Lordships. On the meaning of stone there is not a concurrent finding because the Judge of Appeal, differing from his colleague in the Court of Appeal, was of opinion that shale was stone. Their Lordships, with all deference, are unable, for reasons already given, to agree with him on this point.

This conclusion renders it unnecessary to decide two further contentions raised on behalf of the respondent. One was that the appellant's claim if successful would have the result that the reservation would nullify the estate granted. As the shale can only be worked by removing the surface soil and by open workings, the 25 acres which constitute the respondent's estate would be rendered worthless to her by the process of extracting the shale, and her enjoyment of it would be destroyed. On this ground it was contended on the authority of *Hext* v. *Gill*, L.R. 7, Ch. App. 699, that the Court would not permit the Crown or its licensees to exercise the rights they claim under the reservation even if the words of reservation on their true construction were held to include shale and even on terms of paying compensation. Against this it was pointed out that in *Great Western Railway Co.* v. *Carpalla United China Clay Co.* [1910] A.C. 83 at p. 85, Lord Macnaghten seems to have been of opinion that the china clay which was there held to be a mineral might be worked though such working might destroy or interfere with the use of the railway and destroy the surface. That, however, was under a different type of statute because the railway company could always prevent the working by paying the ascertained compensation. But as their Lord-

ships hold that the shale is not within the words of reservation, it is not necessary to express any final opinion on the matter. The second point raised by the respondent was that the words of reservation are expressly limited to mines and minerals and quarries and delfs of flag, slate or stone such "as now are or at any time heretofore have been vested" in the Lords of the Isle, and hence, as it was argued, only mines, quarries and delfs existing in 1703 are within the section, so that as it was said, the Crown as Lord had no right to enter upon land and form a new quarry or delf not already existing in 1703. If on the true construction such a limitation of mining or of quarrying operations of flag, stone or slate was imposed by the Act, the practical consequences might well be serious, but their Lordships, while not giving any express decision see no reason, as at present advised, to differ from the Judges of the Courts below, who have all rejected that construction.

Notwithstanding the able argument of the Attorney-General, which loses nothing in merit because it has not succeeded, their Lordships are of opinion on the whole case that the appeal fails and should be dismissed with costs.

They will humbly so advise His Majesty.

(B—61—3A) Wt. 8208—30 110 6/38 P.St. G. 338

In the Privy Council

THE ATTORNEY-GENERAL FOR
THE ISLE OF MAN

v.

EMILY MOORE

DELIVERED BY LORD WRIGHT

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
POCOCK STREET, S.E.1.

1938