Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Plimmer and another v. *The Mayor, Councillors, and Citizens of the city of Wellington, from the Court of Appeal, New Zealand, delivered 25th June* 1884.

Present :

LORD WATSON.
SIR BARNES PEACOCK.
SIR ROBERT COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

The sole question for their Lordships in this appeal is one which is put by the Special Case stated for the decision of the Supreme Court, viz., "Had the claimants any estate or interest "in the land upon which the remains of the "jetty stood when such land became vested in "the Respondents under The Wellington Har- "bour Board and Corporation Land Act, 1880; "and, if so, what was the nature of such estate "or interest?" The Supreme Court have answered this question in the negative. Their Lordships will state briefly the material facts which explain the Question.

In the year 1848 one John Plimmer moored an old hulk, known as Noah's Ark, in the bed and on the foreshore of Wellington Harbour for the purpose of a wharf and store. This was done by permission of the Crown, represented by Sir George Grey.

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In January 1855 there came an earthquake which raised the ground and so reduced the depth of water; and in order to carry on his business of a wharfinger John Plimmer erected a jetty extending to a considerable distance from the shore. The extension so made is coloured yellow on the plan used for the purpose of this appeal, and the land used for a portion of it is the land mentioned in the Question. It was about 190 feet in length. It is not stated that any permission was obtained for this work.

On the 18th October 1855 the then Governor, acting under statutory powers, granted to the Superintendent of the Province of Wellington a portion of the harbour, including the land occupied by Plimmer. It is not necessary to follow minutely the legal title to the land. It is sufficient to say that, under whatever form, it has been continuously vested in Government for public purposes, that the use made of it by Plimmer was consistent with those purposes, and that Plimmer might by contract with the Government have acquired a perpetual interest in it for such purposes

Some time before the month of June 1856 John Plimmer, at the instance of the Provincial Government, extended his jetty about 112 feet further into the harbour. That extension is shown by the green colour on the plan. He also reclaimed some land, and, at the suggestion of the Provincial Authorities, built thereon a warehouse or shed for the accommodation of immigrants, who were being introduced into the colony by the Provincial Government.

From the year 1856 to the year 1863, when the Queen's wharf came into use, Plimmer's jetty and warehouse were largely used for the immigrants, and charges were paid to him by the Government and others for such use.

In the year 1857 the Government began to reclaim portions of the harbour included in the grant of 1855 and contiguous to the land in Plimmer's occupation, and they proceeded to make on the reclaimed land a quay nearly at right angles to and across the yellow part of Plimmer's jetty. For the purpose of that work, with the permission of Plimmer, they cut away the shore end of his jetty. But his business was not interrupted thereby, for during the work he used a temporary gangway to connect his severed jetty with the shore, and when the work was completed in the year 1861 he was permitted to connect the remaining portion of the jetty with the breastwork of the new quay.

Subject to the alterations above mentioned, Plimmer's jetty or wharf was continually used as a landing place for passengers and goods from the time of the first placing of Noah's Ark down to the assumption of possession by the Respondents. And in the year 1872 the Government, acting under statutory provisions, declared it to be a legal quay or landing place.

The Special Case sets out in detail certain proceedings taken with reference to the reclamation of ground by the Government, and to a claim of pre-emption by Plimmer, but, in the view their Lordships have taken of the case, those transactions have little bearing on the Question.

The title of the Appellants stands as follows. In 1872 they became yearly tenants of John Plimmer. In 1875 John Plimmer sold to Jacob Joseph his interest in the jetty, then described as a certain freehold wharf which has been duly legalized as a landing place, subject to the yearly tenancy of the Appellants. Mr. Joseph subsequently granted to the Appellants a lease for the term of 21 years, commencing from

the 1st of January 1879, at an annual rental of 75*l*. The date of this lease is not mentioned in the Case.

In the early part of the year 1878 the Appellants extended the jetty some seven or eight feet, and on the 15th March 1878 the Secretary of Customs wrote to them as follows:—

"It has been reported to the Government that the wharf known as Plimmer's Wharf has recently been extended. I have therefore been directed by the Honourable the Commissioners of Customs to inform you that this wharf has been erected without the sanction or authority of the Government."

That letter is the earliest intimation of objection on the part of the Government. It must be taken that the latest extension of the jetty was a trespass. But if the assertion as to want of sanction was meant to apply to the entire wharf, it is at variance with the whole preceding history of the case.

The land was vested in the Respondents by a statute which came into force on the 1st of September 1880. In April 1881 they brought ejectment, to which of course the Appellants had no defence, and in December 1882 the Respondents took possession.

The claim for compensation is made under a statute which came into force on the 13th September 1882, the terms of which may conveniently be quoted here. After reciting the statute of the 1st of September 1880, it is enacted by Sect. 4:—

"Every person who immediately before the date of the passing of the said Act had any estate or interest in to or out of the lands by the said Act vested in the Corporation, or any part of such lands, and every person who has suffered loss or damage by the vesting by the said Act of the said lands or any part thereof in the Corporation, may make a claim for and shall be entitled to receive full compensation from the Corporation: Provided always that, in ascertaining and determining the title of any claimant to compensation, the Compensation Court shall not be bound to regard strict legal rights only, but may award compensation in respect of any

claim which the Compensation Court may consider reasonable and just, having regard to all the circumstances."

By the terms of the Special Case, and the proceedings taken in the Supreme Court, there is not in issue before this Board any question of compensation to the Appellants, except such as depends on their having some estate or interest in to or out of the lands vested in the Corporation.

The Appellants desire to rest their claim on the ground that John Plimmer was a trespasser throughout, and that a good title has been gained by possession without payment or acknowledgment. Countenance is given to this contention by the Government letter of the 15th of March 1878; but, as before observed, the whole history of the case is against it. It is clear that, at least up to the year 1872, the Government and John Plimmer were acting in accord, and there is no trace of a trespass until the year 1878.

It is true that under the Statute of Limitations, 3 & 4 Wm. IV. cap. 27, which the Counsel agreed to be in force in New Zealand, it is not necessary to show trespass or adverse possession in order to gain a title by lapse of time. If the original permission is carried back far enough, the title may be gained by mere omission of acknowledgment. But their Lordships are of opinion, and so far they agree with the Supreme Court, that the transactions of 1857—61 amount to a new arrangement. The subject matter of the occupation was then changed, and changed by consent. And upon this question it makes no difference whether John Plimmer is regarded as a licensee or a tenant-at-will, for in either case the new agreement obliterates the effect of the previous lapse of time. And as these transactions did not end till some time in 1861, the requisite 20 years had not elapsed by the 1st September 1880, which is the point of

time at which the Respondents' interest is to be ascertained. For this reason it is unnecessary to examine whether any subsequent transactions affected John Plimmer's occupation in the same way.

The Respondents however seek to attribute to the transactions of 1857—61 a much stronger effect. They insist that those transactions not only gave a fresh starting point for the lapse of time, but that they entirely destroyed the previous relations between the parties, so that prior agreements or equities cannot be taken into consideration. Their Lordships are asked to hold that the Government entered upon John Plimmer's occupation by its paramount title as owner, and that whatever was left to him was left of pure bounty. It would seem that the Supreme Court accepted this contention. They say that Plimmer did not give his permission to the operations of the Government on the ground that he claimed to be entitled to the fee simpleof the land, or that he asserted a legal right to it, but that he came as a suppliant to the Government, appealing not to his legal rights but to the public faith of the Province. And they hold that in 1861 he took as a mere tenant-at-will, and that the occupation remained on that footing until it was lawfully determined by the act of the Respondents.

In these conclusions their Lordships are unable to agree. They cannot find anything in the Special Case to show that John Plimmer failed to assert any right he possessed, or that he surrendered anything except by agreement, or that he or the Government acted as if he were at their mercy. The Special Case is obviously framed with great care so as to express what acts were done by permission, and what were done otherwise. It may be that Plimmer did not claim a fee simple, seeing that he had no

ground for such a claim; but it does not at all follow that he did not claim a right of permanent occupation, or that the Government did not recognize such a right. At all events what we know is that there was mutual concession. Plimmer allowed the Government to take away the shore end of his jetty; and the Government allowed him to make a temporary gangway, and, when the works were completed, to have the support of their new quay for his jetty in its altered state. It is easy to imagine how both parties were calculated to benefit by the transaction; but we need not speculate on their motives. Their Lordships rest on the statements in the Case, and from those statements they cannot draw any inference except that the transaction was one of mutual agreement between the parties for their mutual benefit, and not one of paramount right on the one side and appeals to mercy or to honour on the other. And the effect of the agreement is to leave John Plimmer with precisely the same interest in the altered jetty as he previously had in the original jetty. What was that interest?

Plimmer's original works were erected with the permission of the Government, and their Lordships think that he must be taken to have occupied the ground under a revocable license to use it for special purposes, viz., those of a wharfinger. Whether the yellow extension was so held when first made need not be discussed, because after the month of June 1856, when the green extension had been made, the whole was certainly held upon the same tenure. In their Lordships' opinion it was still held upon license to use for the original purposes, but by the transactions of 1856 the license had ceased to be revocable at the will of the Government.

The law relating to cases of this kind may be taken as stated by Lord Kingsdown in the

case of Ramsden *v.* Dyson, 1 L.R. Eng. and Ir. App. 129. The passage is at page 170 :—

"If a man, under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in Gregory *v.* Mighell 18 Ves. 328, and, as I conceive, is open to no doubt. If at the hearing of the cause there appears to be such uncertainty as to the particular terms of the contract as might prevent a Court of Equity from giving relief if the contract had been in writing but there had been no expenditure, a Court of Equity will nevertheless, in the case which is above stated, interfere in order to prevent fraud, though there has been a difference of opinion amongst great Judges as to the nature of the relief to be granted. Lord Thurlow seems to have thought that the Court would ascertain the terms by reference to the Master, and if they could not be ascertained would itself fix reasonable terms. Lord Alvanley and Lord Redesdale, and perhaps Lord Eldon, thought this was going too far; but I do not understand any doubt to have been entertained by any of them that, either in the form of a specific interest in the land, or in the shape of compensation for the expenditure, a Court of Equity would give relief, and protect in the meantime the possession of the tenant. If, on the other hand, a tenant being in possession of land, and knowing the nature and extent of his interest, lays out money upon it in the hope or expectation of an extended term or an allowance for expenditure, then, if such hope or expectation has not been created or encouraged by the landlord, the tenant has no claim which any Court of Law or Equity can enforce. This was the principle of the decision in Pilling *v.* Armitage, 12 Ves. 78, and, like the decision in Gregory v. Mighell, seems founded on plain rules of reason and justice."

This case of Ramsden *v.* Dyson was strongly pressed in argument against the conclusion to which their Lordships have come, and it was said that Lord Cranworth's judgment, which represented the opinion of the majority, lays it down that an equity of the sort now relied on cannot be raised unless the occupant who improves the land believes it to be his own, and the owner of the improved land knows of that mistaken

belief. But there was no disagreement among the Judges on the principles of law laid down in that case. Only Vice-Chancellor Stuart first, and after him Lord Kingsdown, drew from the evidence inferences of fact at variance with those drawn by the majority of the House, and so brought out a different legal conclusion.

The main conclusions of fact to which Lord Cranworth applied his principles of law were, to state them very briefly, as follows: that as to part of the improved land, the tenant, when taking it for building purposes, expressly contracted in writing to hold it at will; that as to all the land, he was a substantial gainer in point of rent by so holding; that he never believed he had any higher right; that the landlord never knew or suspected what kind of assurance his agent was holding out to the tenant; but that, even if the statements of the agent were to be ascribed to himself, he expressly refused to come under any legal obligation, and the tenant as expressly submitted to trust to the honour of the Ramsden family.

In the present case, the equity is not claimed because the landowner has stood by in silence while his tenant has spent money on his land. This is a case in which the landowner has, for his own purposes, requested the tenant to make the improvements. The Government were engaged in the important work of introducing immigrants into the Colony. For some reason, not now apparent, they were not prepared to make landing places of their own, and in fact they did not do so until the year 1863. So they applied to John Plimmer to make his landing place more commodious by a substantial extension of his jetty and the erection of a warehouse for baggage. Is it to be said that, when he had incurred the expense of doing the work asked for, the Government could turn round and revoke

his license at their will? Could they in July 1856 have deprived him summarily of the use of the jetty? It would be in a high degree unjust that they should do so, and that the parties should have intended such a result is, in the absence of evidence, incredible.

With respect to the occupant's belief in his own title and the knowledge of that belief on the part of the Government, it may be worth while to remark that the land in question was not like ordinary private property. It was the bed of the sea, useless till somebody converts it to use, and not unfrequently used by unauthorized persons to get profit by accommodating the public. It is difficult to suppose that a person who is so using the sea bed, and the Government who are its owners, can go on dealing with one another in the way stated in this case for a series of years, except with a sense in the minds of both that the occupant has something more than a merely precarious tenure. Their Lordships will not be the first to hold, and no authority has been cited to them to show, that after a such a landowner has requested such a tenant to incur expense on his land for his benefit, he can without more and at his own will take away the property so improved. Their Lordships consider that this case falls within the principle stated by Lord Kingsdown as to expectations created or encouraged by the landlord, with the addition that in this case the landlord did more than encourage the expenditure, for he took the initiative in requesting it.

On this view it becomes quite intelligible why, before the Government interfered with Plimmer's jetty in executing their works of 1857—61, they should have obtained his permission, which on the other view was not necessary. And the subsequent transactions down to 1878, though they do not lend any strong support to

the same view, are consistent with it, and are rather more favourable to it than to the opposite one. The Government used, paid for, and gave a legal status to the property which it is now said they might have taken to themselves.

The question still remains as to the extent of interest which Plimmer acquired by his expenditure in 1856. Referring again to the passage quoted from Lord Kingsdown's judgement, there is good authority for saying what appears to their Lordships to be quite sound in principle, that the equity arising from expenditure on land need not fail merely on the ground that the interest to be secured has not been expressly indicated.

In such a case as Ramsden *v.* Dyson the evidence (according to Lord Kingsdown's view) showed that the tenant expected a particular kind of lease, which V. C. Stuart decreed to him, though it does not appear what form of relief Lord Kingsdown himself would have given. In such a case as the Duke of Beaufort *v.* Patrick (17 Bea. p. 60) nothing but perpetual retention of the land would satisfy the equity raised in favour of those who spent their money on it, and it was secured to them at a valuation. In such a case as Dillwyn *v.* Llewelyn (4 D. F. & J. p. 517) nothing but a grant of the fee simple would satisfy the equity which the Lord Chancellor held to have been raised by the son's expenditure on his father's land. In such a case as that of the Unity Bank *v.* King (25 Bea. p. 72) the Master of the Rolls, holding that the father did not intend to part with his land to his sons who built upon it, considered that their equity would be satisfied by recouping their expenditure to them. In fact, the Court must look at the circumstances in each case to decide in what way the equity can be satisfied.

In this case their Lordships feel no great difficulty. In their view, the license given by the Government to John Plimmer, which was indefinite in point of duration but was revocable at will, became irrevocable by the transactions of 1856, because those transactions were sufficient to create in his mind a reasonable expectation that his occupation would not be disturbed; and because they and the subsequent dealings of the parties cannot be reasonably explained on any other supposition. Nothing was done to limit the use of the jetty in point of duration. The consequence is that Plimmer acquired an indefinite, that is practically a perpetual, right to the jetty for the purposes of the original license, and if the ground was afterwards wanted for public purposes, it could only be taken from him by the Legislature.

An analogy to this process may be found in such cases as Winter *v.* Brockwell (8 East p. 308) and Liggins *v.* Inge (7 Bing. p. 6). These cases show that where a landowner permits his neighbour to execute works on his (the neighbour's) land, and the license is executed, it cannot be revoked at will by the licensor. If indefinite in duration, it becomes perpetual. Their Lordships think that the same consequence must follow where the license is to execute works on the land of the licensor, and owing to some supervening equity the license has become irrevocable.

There are perhaps purposes for which such a license would not be held to be an interest in land. But their Lordships are construing a statute which takes away private property for compensation, and in such statutes the expression "estate or interest in to or out of land" should receive a wide meaning. Indeed the statute itself directs that, in ascertaining the title of anybody to compensation, the Court shall not

be bound to regard strict legal rights only, but shall do what is reasonable and just. Their Lordships have no difficulty in deciding that the equitable right acquired by John Plimmer is an interest in land carrying compensation under the Acts of 1880 and 1882.

The proper answer to the Question will be as follows :—That John Plimmer acquired and transferred to Jacob Joseph a perpetual right to occupy and use the land in question for the purposes of a jetty or wharf, and that the interest which the Appellants had in the land on the 1st September 1880 was the term which then remained to them under the lease granted to them by Jacob Joseph. Their Lordships will humbly advise Her Majesty that an answer to the foregoing effect be substituted for the answer given by the Supreme Court, and the Respondents must pay the costs of the appeal.