

*Judgement of the Lords of the Judicial Committee  
of the Privy Council on the Appeal of  
Ince v. Thorburn from Her Britannic  
Majesty's Supreme Court for China and  
Japan; delivered February 24th, 1886.*

Present :

THE LORD CHANCELLOR.

LORD BLACKBURN.

LORD HOBHOUSE.

IN this case several questions have been argued with regard to which, with two exceptions, their Lordships do not feel any difficulty. It seems to be perfectly clear that the power which is conferred by the authority of the Orders in Council which have been mentioned enabled Sir John Bowring, then Superintendent of Trade in China, to agree to regulations such as were actually agreed to; and the first question is, whether he did really pass these regulations, and whether they are regulations for the peace, order, and good government of British subjects within this particular district of China. Upon that there has been a great deal of argument addressed to their Lordships to endeavour to show that these regulations were not passed by Sir John Bowring as superintendent, and no doubt there was a necessity apparently that these regulations when passed by him as superintendent should be printed and exhibited for a certain time, so that all people might know of them. As to that, their Lordships think there is no ground for disputing that in point of fact all that was necessary was done. It was said that it was not proved to have been done; but their Lordships think there is quite sufficient

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evidence to show that it was, and they think that after it had been decided as long ago as 1865, in the case of *Keswick v. Wills*, that these regulations were valid, and there having been no impeachment of that decision since, they ought to advise Her Majesty that these regulations were validly made.

Then there was an attempt to say that there was no evidence that this piece of land in question was within the locality affected by the regulations, and that there was no evidence to show that it was beach ground. As to that it seems perfectly plain, when the proceedings in 1872 about rating the land are looked at, that both parties, that is to say the Council whom the Plaintiff represents, and the Defendant, were asserting rights against each other upon the ground that the land in question was within the locality, and that it was beach ground. These are questions of fact, and the conduct of each of the parties is evidence against him. Their Lordships therefore think that the Chief Justice was quite justified in coming to the conclusion that these facts were proved.

Then there come two questions, and two questions only, on which there is really considerable difficulty. The first of those questions is, what does this 5th Article of the Regulations of 1854 mean? There is little doubt that it is not very artificially drawn, in any point of view. It begins with the words:—"It is clearly understood and agreed to," and an attempt was made to show that it was not an enactment, but an agreement with the foreign renters; but their Lordships think it clearly was intended to enact "That land heretofore surrendered by the  
 " various foreign renters to public use, such as  
 " roads and the beach grounds of the rivers  
 " within the aforesaid limits, shall remain hence-  
 " forth dedicated to the same uses; and as new

“ lots are acquired, such parts thereof as are  
 “ beach ground shall be held under and subject  
 “ to similar uses.” The first question that  
 arises upon that is, what are the public uses  
 to which the beach ground was subject? It is  
 certainly not to be found here; but their Lord-  
 ships think it must be taken, and they will so  
 advise Her Majesty, that these uses were those  
 to which beach ground, that is the sides of the  
 rivers, in this district is held subject, such  
 as probably to beach boats, to have access  
 to the river, and other things of that nature; and  
 that the land being subject to such public uses  
 as those, would not deprive the person in whom  
 the beach ground was vested, by having taken a  
 lease from the Emperor of China, of the property,  
 but it would oblige him to respect those public  
 uses, and consequently would prevent the exercise  
 of many of the rights of property. If it had  
 stopped there, there would not have been much  
 difficulty in putting that construction upon it.  
 Then comes what their Lordships take to be a  
 separate enactment altogether:—“ And due pro-  
 “ vision shall be made for the extension of the  
 “ lines of road at present laid down, as means of  
 “ communication in the settlement. To this end  
 “ the Committee of Roads and Jetties”—it is  
 now a different committee under the new regula-  
 tions—“ appointed by the residents within said  
 “ boundaries, will, at the beginning of each year,  
 “ together examine the map and determine what  
 “ new lines of road are necessary.” Then comes  
 what their Lordships construe as a fresh enact-  
 ment and regulation:—“ And land subsequently  
 “ required to be rented shall only be granted  
 “ with the proviso expressed or understood that  
 “ the renter shall surrender the beach ground  
 “ aforesaid, if any, and the land required for  
 “ such roads.” Now there is considerable diffi-  
 culty in construing those words, but the sensible

meaning to be put upon them, their Lordships think, is this: that every renter who in future takes land, shall take it with the condition expressed or implied that as soon as he acquires the land it shall be subject to these public uses. They do not think it can have been meant to require that the renter should subsequently execute some deed or some instrument to create these uses. He takes it subject to these uses *ab initio* from the time he gets it. Then it says: "And  
 " in no case shall land surrendered as aforesaid,  
 " either heretofore or hereafter, be resumed, or  
 " shall any act of ownership be exercised over  
 " the same by the renters thereof, notwithstanding  
 " they shall pay the Chinese Government ground  
 " rent reserved thereon." Their Lordships think that must be taken, construing it reasonably and sensibly, as meaning no Act of ownership inconsistent with the public use over the thing which has been granted to him.

Then comes a provision which is certainly very difficult indeed to construe:—"Provided always  
 " that no act of appropriation or dedication for  
 " public use of the said beach ground or ground  
 " for roads, other than those already defined,  
 " shall, contrary to the will or interests of such  
 " individual renters, in any case be sanctioned  
 " or held lawful under these regulations." If that proviso were construed to the full extent to which it is possible, the words might be said to go, that nothing without the consent of the renter shall pass the property at all, or affect the property already dedicated. The proviso would eat up the previous enactment; it would be a proviso enacting that the previous enactment should be null and void. Some construction and some sense must be given to it. Their Lordships do not say it is easy to define what that construction should be, but they think it must mean, subject to this, that the dedication to the

public use of the beach grounds, to the extent to which beach grounds go, is valid and effectual to give rights to the public as far as the public have those uses over the beach ground, and consequently that there is jurisdiction as far as that goes to prevent, at the suit of the Plaintiff acting for the Committee, anything being done which is inconsistent with or obstructive to those rights. The question of what those rights are and to what extent those uses go upon the beach ground has not been fully entered into before the Chief Justice, who was much more familiar with them than their Lordships are and much more competent to require such evidence as might be required, but it is assumed throughout that those rights over the beach ground which the public have were inconsistent with building upon it, and that is all that was prohibited by the injunction.

Now that being so, the only other remaining ground which their Lordships have to consider is whether or no the previous proceedings in 1880 operate so as to prevent the public Committee represented by the Respondent from setting up against Mr. Ince the right they now have, on the ground that at that time, when there was a suit in respect of a trespass committed, and which ended in a consent decree, this matter became *res judicata*, or that for some other reason the Respondent is precluded from setting up this claim. The fact that they did act in that way, and that an action was brought, is evidence against the parties; but it is not by any means evidence which is to outweigh the rest of the evidence showing that this is beach ground. The question whether or not it would estop the parties and bind them, seems to depend greatly upon this, whether, when we look at the proceedings and the way in which they arose, and the Judgement which went by consent, there is an adjudication between these parties on a right to the ownership

of the land subject to the regulations. There was no adjudication then as to the public uses. That was not a question raised in the case, and it does not seem to their Lordships that there was any adjudication such as would bind the parties on the question now under consideration, namely, as to whether there was beach ground, and whether the public had uses over the beach ground inconsistent with allowing the Appellant to build upon it.

That disposes of all the points which have been raised, and for these reasons their Lordships will humbly advise Her Majesty that the Judgement below should be affirmed, and the appeal dismissed with costs.