Report of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Queen v. *Dallimore, from Victoria; delivered December* 21, 1865.

Present:

LORD CHELMSFORD.
SIR JOHN TAYLOR COLERIDGE.
SIR JAMES W. COLVILE.
SIR EDWARD VAUGHAN WILLIAMS.

IN this case the principal question argued by Counsel before us, and considered in the Judgment of the Court below, was, what effect the Proclamation of January 28th, 1861, whereby a portion of the Lamplough Run was proclaimed a gold-field common under the Statute 24 Vic. No. 117, had on the then existing right to occupy the run. On the part of the Appellant it was contended that the effect of the Proclamation was to take away absolutely the space proclaimed a common from the run, and so to diminish its area to that extent, at the same time determining absolutely all title, legal or equitable, of the Respondents, and those under whom they claim thereto. On the part of the Respondents the contention was that the effect of the Proclamation was merely to subject the run to the servitude of the rights of common enumerated in the statute by which the Proclamation was authorized, and that, subject to such servitude, the rights of the occupier continued to exist undiminished over the whole run.

But in the view we take of the case, it is not necessary to decide this question.

It is plain that neither the Respondents Clough and Bogg, nor the Respondent Dallimore, who claims under them, had any rights, legal or equitable, as licensees at the time this suit was commenced; for the last license obtained by Clough and Bogg was dated on the 25th of March, 1862, and it mentions

expressly that it is to operate and be in force from the 1st of January, 1862, until the 31st of December, 1862, *and no longer*.

But the Respondents claim as tenants, and that claim is founded on two subsequent payments of rent, the one on September 28, 1863, for rent due 30th June, 1863, and the other on December 31, 1863, for rent due on that day, which payments were accepted as rent on behalf of the Appellant, and having been so accepted constituted, as it was contended, a tenancy from year to year.

It cannot be disputed that payment and acceptance of rent will furnish a sufficient evidence of a tenancy: But it is plain that such tenancy can only be thus implied with regard to the land in respect of which the rent is paid and accepted, and cannot be implied with regard to any land in respect of which the rent was not paid and accepted. It follows, therefore, that if it appears that the rent in question was not paid and accepted in respect of any part of the land which formed that portion of the run over which the common was proclaimed, no tenancy could be constituted by such payment of rent as to any part of that land.

If the rent paid after the license had ceased to operate had been paid without anything having occurred but the substitution of the payment of rent for the obtaining a new license, it would, perhaps, follow that the implied tenancy ought to be regarded as co-extensive with the whole area to which the license extended, and it would then have been necessary to construe the license. It was in these terms:—

"*License to occupy Waste Lands of the Crown.*

"By his Excellency the Governor of Victoria, &c.

"Whereas J. H. Clough and Co. have made application for a license to occupy waste lands of the Crown, situated in the district of Castlemaine, and known as Lamplough. Now, I, the Governor aforesaid, do hereby authorize the said J. H. Clough and Co., upon payment by them of the sum of 10*l.* sterling into the hands of the Receiver at Melbourne, on or before the 31st day of March next, and upon the due acknowledgment of such payment hereunder by the said Receiver, to occupy the said waste lands for the term hereinafter

mentioned. Upon the issue of this license by the said Receiver, the same is to operate and be in force from the 1st day of January. 1862, until the 31st day of December, 1862, and no longer.

"Given under my hand at Melbourne, Victoria, this 20th day of March, A.D. 1862.

"HENRY BARKLY.

"N.B.—Although the above-mentioned waste lands of the Crown are described as being known as Lamplough, yet it is to be understood that no right is hereby granted to occupy land merely because such land may have been at some time heretofore known or described as Lamplough, and this license will not authorize the said J. H. Clough and Co. to occupy any land which is now or which may formerly have been known as forming part of such run, but which shall be, or may have been, lawfully taken away from such run by or on behalf of the Crown, or the Board of Land and Works, by alienation or otherwise howsoever; and the said J. H. Clough and Co. shall not be entitled to any compensation, or to a return of any portion of the above-mentioned sum, if any portion of the above-mentioned waste lands of the Crown shall hereafter be alienated, or be otherwise lawfully dealt with by the Crown, or the Board of Land and Works; or if the said J. H. Clough and Co. shall be deprived of the enjoyment of any portion of such lands by reason of the same being proclaimed a common, or by reason of any other lawful act to be done on behalf of the Crown, or by the Board of Land and Works.

"Received the above sum, 10*l*., per Receiver.

"A. P. THOMSON.

"Treasury, Melbourne, March 31, 1862."

On the part of the Crown the contention was that the terms of the notice excluded the land which had been proclaimed a common from the right granted by the license, because such land had been "lawfully taken away" from the run. On the part of the Defendants it was contended that the concluding part of the notice treats the deprivation of the right of enjoyment of any portion of the land, by reason of the same being proclaimed a common, as a distinct thing from the being "lawfully taken away" mentioned in the earlier part, and indicates

that such land is not to be considered as excluded from the right granted by the license, but only as deteriorated in value, so as to entitle the occupier to a compensation but for the provision contained in it.

It is not necessary, we think, to decide this point, because the extent of the implied tenancy is ascertainable, in our judgment, by reference to matters independent of the license, and which occurred subsequently to its expiration.

The subsequent matters arose out of the exercise by the Board of Works of the powers conferred under Sections 84, 85, 86, and 87 of the Land Act, 1862.

By those enactments rents are substituted for the former assessments of stock depastured on the runs, such rent to be paid according to the grazing capabilities of the run, to be determined by the Board, and when they have been so determined, the Board is directed to cause to be inserted in the Government Gazette a notice of the amount of rent to be paid, in the form mentioned in one of the schedules of the Act, and the amount there mentioned is to be binding and conclusive, unless the occupier shall within two months of the publication send a notice of appeal. The form given by the schedule consists of several columns, in one of which the area of the run is to be inserted, in another the grazing capabilities of the run, in another the annual rent, and in another the quantity of stock depastured on the run in 1861, and the last column is headed "general observations." Accordingly, on the 10th of December, 1862, the Board having determined the grazing capabilities of Lamplough Run, published in a supplement to the "Victoria Government Gazette," the amount of rent, in a schedule framed in accordance with the Act; and in that schedule, "Lamplough Run" was stated to have an area of 1,500 acres, with a grazing capability of 750 sheep. The rent was fixed at 25*l*. The quantity of stock depastured on the run in 1861 was stated at 5,972 and in the columns for "general observations," there was an entry, "area diminished by sale *and commonage*."

It is probable that this schedule was intended to be framed in conformity with the license of 1862, according to the Appellant's construction of it. At all events, we cannot doubt that the payments of rent, which

are relied on as establishing the tenancy, were made, and accepted on the footing of the statements contained in the schedule. The amounts paid corresponded with the rent fixed, for although the receipt for the payment made in December 1863 shows that 78*l.* 6*s.* 8*d.* was paid for the half year, yet it is satisfactorily shown by the evidence that this sum was composed of 12*l.* 10*s.*, the half-year's rent mentioned in the schedule, with an augmentation of 53*l.* 6*s.* 8*d.*, in respect of the southern part of the run which had not been considered in the first insatnce to belong to the Lamplough Run. And the amount paid for the earlier half-year's rent is 12*l.* 10*s.*

If this be so, it is plain that the payments of rent were made for the run exclusively of the land in question in this cause. And the result is, that no tenancy was established in respect of it; but that as soon as the Respondents assented to become tenants of the diminished area only, all title to the land in question ceased, both at law and in equity, and they became merely tenants at sufferance of it, supposing them to have had a right to hold it up to that time; and consequently no notice to quit or demand of possession was requisite.

The Judgment in the Court below assumes that the occupation, as licensees and tenants, of the run continued all along to be of the same dimensions, and does not advert to the facts which, in our opinion, show that the tenancy, if established, was of a diminished area, so as to exclude the land in question.

For these reasons, their Lordships think they ought to advise Her Majesty to reverse that Judgment, with costs, and that the verdict found for the Appellant ought to stand.