Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Castle Mona Company v. *John Stanway Jackson, from the Court of Chancery in the Isle of Man; delivered 11th June* 1879.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.

THIS case comes before their Lordships in a very unsatisfactory state, a circumstance which, no doubt, has been felt by the learned Counsel who have argued the Appeal. The suit is in substance a mere action of detinue, though for a particular purpose, viz., that of compelling the appearance of the Defendant Company, the Appellants, which was not within the jurisdiction of the ordinary Courts, it was brought in the Equity Court of the Isle of Man. There is no pleading on the part of the Defendant; the defence, whatever it was, has to be picked out of the evidence, and there are no reasons assigned by the learned Judge for his judgment from which it can be inferred with certainty what points were taken in the Court below. Their Lordships, however, think that the case is reducible to a short and simple point which is sufficient to dispose of the present Appeal. They are clear that the effect of the execution sale by the Coroner in January 1866 was to give to the Defendant Company, in their character of assignees of the lease, simply the premises demised, without the benefit of the stipulation contained in the original lease to Gough as to the use of the furniture specified in the schedule

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thereto. Great part of that furniture had been sold, and purchased by the Plaintiff, before the lease itself was put up for sale; and the conditions of sale, and the coroner's bill of sale, both expressly exclude the right to use the furniture from the subjects sold and assigned. It follows therefore that the subsequent transaction by which the furniture came into the possession of the Company was a new and distinct contract, in the nature of a bailment between the Plaintiff and the Company, which would imply an obligation on the part of the latter to restore the furniture bailed on the determination of such bailment. It has been argued with great ingenuity that the terms of the bailment, as collected from the correspondence and other evidence in the cause, were such as enabled the Company to shift their liability to fulfil this obligation from themselves to Foster by means of their assignment to him of their lease in April 1869. Their Lordships, construing the evidence in the sense the most favourable to the Company, cannot think it establishes more than that, by virtue of the new contract of bailment, they were to have the use of the furniture during the currency of the lease, with perhaps the same right of purchasing it for a fixed sum at the expiration of the term as was secured to Gough by the original lease. They cannot infer from the evidence that the new contract contained the further and singular term that the furniture was to be treated as included in the assignment of the lease which expressly extended the right to use it, so as to become subject to all the incidents of leasehold property made the subject of repeated assignments. Their Lordships are by no means prepared to affirm that, if the assignment of the lease had included the right to use the furniture as originally granted, the covenant, express or implied, to restore these chattels at

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Kali Kishen Tagore v. *Jodoo Lal Mullick, from the High Court of Judicature at Fort William in Bengal; delivered June* 11*th*, 1879.

Present:
SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.

IN this case the Plaintiff and Defendant were proprietors of land and gardens on opposite sides of a khal in which the tide in the River Hooghly flowed and re-flowed, and by which the surface water of certain lands was carried in a direction from the east to the west into the Hooghly. The Plaintiff was the proprietor on the north side, the Defendant on the south side just at the mouth of the khal. It seems that it is a tidal creek which is daily subject to the flow of the river; that for the protection of the banks on each side of the khal, walls had been erected, one at each side of the khal, and that the Defendant, upon the wall on his side becoming somewhat dilapidated, constructed a fresh one, and employed a skilled person to do so, who to some degree altered the direction of the wall; a portion of it he built further in towards the Defendant's land than it had been before, and another small portion he built a little further out. We have the precise extent to which it was built further out, which was five feet, making what may be called in one sense an encroachment, consisting of a triangle whose altitude was five feet, and whose base was about double that length.

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The Plaintiff, it appears, first applied to Mr. Whitfield, the Government Engineer, desiring Mr. Whitfield to interfere, on the ground that the Defendant's wall was an obstruction to the public navigation in the khal which belonged to the Government. Mr. Whitfield declined, however, to interfere, on many grounds, one of which was that the khal was not navigable, and another that there was in his opinion no obstruction.

The Plaintiff thereupon brought this action. It is stated to be a suit "for possession of land by "demolishing a brick-built retaining wall." He goes on to aver:—"By the said act of the Defen- "dant, injury having accrued to the retaining wall "of my garden, and inconvenience having been "caused to the passage of boats to my screw- "house through the said khal, and apprehensions "being created as to the screw-house falling "down eventually, a cause of action has arisen. "Therefore my prayer is that a decree be given "directing the removal of everything built by "the Defendant that stands on the disputed land "mentioned below, and awarding me possession "of the land and khal in question." His case was that he was entitled to the *solum* on which the Defendant had built his wall; that his navigation was obstructed, and that there was a danger of his screw-house falling down. It is true that he subsequently presented a petition in which he prayed that if he was not entitled to possession of the disputed land, still, if it was found that the retaining wall ought to be removed, there should be a decree granting that remedy. The petition was however rejected.

The case came before two Subordinate Courts. The Court of the Moonsif found that the Plaintiff had no right to the bed of the khal or any part of it, but that the Defendant had a right *ad medium filum*. He further found that the khal was not navigable, and that no injury had

been caused to the Plaintiff, and that the flow of the water had not been in any way sensibly obstructed.

On appeal to the Subordinate Judge, he affirmed the findings, with an exception which constitutes the chief difference between the decrees, that neither the Plaintiff nor the Defendant had any right to the bed of the khal, which it would appear is vested in the Government in right of their zemindary of the Twenty-four Pergunnahs. The finding of the Subordinate Judge is in these terms: "The "conclusion, therefore, at which I arrive is that "the Defendant has in fact committed an "encroachment, though not upon the Plaintiff's "property; but that it is not established that "damage to the Plaintiff's property must neces-"sarily result from the encroachment. Plaintiff "therefore is not entitled to have the wall "removed."

The case came on special appeal before the High Court; and the High Court, having remanded the case for the purpose of ascertaining the precise extent of the encroachment, considered themselves bound to reverse the decisions of both the Courts, and to order the removal of a portion of the Defendant's wall, apparently on the authority of the case of *Bickett* v. *Morris et Ux.*, which is reported at page 47 in the 1st Law Reports, Scotch Appeals, House of Lords. The effect of that case may be stated thus: A riparian proprietor on one side of a stream complained of the riparian proprietor on the other side, who had built into the *solum* of the stream beyond a line which had been agreed upon between the parties, and had thereby obstructed and changed the flow of the water so that the Plaintiff's right to have the water flow in its accustomed manner was injured. It was held that such an obstruction was such an injury to the Plaintiff's rights as

enabled him to support the action without proof of actual damage immediate or even probable. The *ratio decidendi* is illustrated by the remark of the Lord Chancellor. "It was asked in argu- "ment whether a proprietor on the banks of a "river might not build a boat-house upon it? "Undoubtedly this would be a perfectly fair use "of his rights, provided he did not thereby "obstruct the river or divert its course; but if "the erection produced this effect, the answer "would be that, essential as it might be to his "full enjoyment of the use of the river, it could "not be permitted."

Their Lordships observe that in a subsequent case in the House of Lords of *Oer Erving* v. *Colquhoun*, reported in the 2nd Law Reports, Appeal Cases, page 839, not in itself having much bearing on the present, inasmuch as it related to the obstruction of a navigable stream, Lord Blackburn explains the previous case in this manner: "The Defender had without any "right built an encroachment on his side of the "river which necessarily caused more water to "flow on the Pursuer's side, and though that "encroachment was small it was such as in a "small stream to make a sensible alteration in "the flow. That was an injury to the pro- "prietary right of the Pursuer, but he was not "able to qualify present damage."

Their Lordships are of opinion that the case of *Bickett* v. *Morris* does not govern the present. In the first place, the Plaintiff does not state his cause of action in the manner in which it was stated in *Bickett* v. *Morris*. The Plaintiff does not state that he, as a riparian proprietor, was entitled to the flow of the water as it had been accustomed to flow, and that that flow was seriously and sensibly diverted so as to be an injury to his rights; but he puts his case on the ground that he is the owner of the soil on which the wall was built, an issue which is found

against him. It is true that he sought to enlarge his plaint, and avail himself of any ground he might have for obtaining the removal of this wall; but their Lordships do not find that he has either claimed or proved such an easement as that which has been described in the case of *Bickett* v. *Morris*, and which was there interfered with, or that any issue was raised as to such a right of easement. It appears that the Plaintiff, at all events, has not all the rights of a riparian proprietor, or he would have been entitled to the bed of the stream *ad medium filum*. It may be that this khal being in possession of the Government, the Government may be able to do what they like with it; and if the Plaintiff would have no right to complain, as against them, of any interference with the flow, it does not seem clear what right he could have against a riparian proprietor on the other side. But further it has not been found in this case,—indeed the evidence on the whole points in the other direction,—that the Defendant, by what he has done, has, to use the words of Lord Blackburn, sensibly altered the flow of the water. Without establishing this the Plaintiff has failed to show any such injury to his right as would support an action. All that has been found is that the Defendant encroached on the bed of the khal, which is the soil of the Government, without causing any sensible injury to the Plaintiff. There may be, where a right is interfered with, *injuria sine damno* sufficient to found an action; but no action can be maintained where there is neither *damnum* nor *injuria*.

Under these circumstances their Lordships are of opinion that the High Court was wrong in reversing the decision of the Lower Courts and ordering, as they did, the wall to be removed; and their Lordships are of opinion that the decision of the Subordinate Judge was right.

Their Lordships will therefore humbly advise Her Majesty that the judgment of the High Court be reversed; that the judgment of the Subordinate Judge be affirmed, and that the Appellant have the costs of the Appeal in the High Court and also the costs of this Appeal.

the end of the term would have run with the land; but they are clear that, as bailees under a new and independent contract, the Company could not get rid of any liability under that contract by means of the assignment to Foster.

The point that has now been disposed of seems to their Lordships to be the only defence to the action which is in any sense raised in this record. They cannot find any such defence in the equities supposed to result from the conduct of the Plaintiff in respect of the sale and purchase of the lease.

Their Lordships therefore see no ground why the judgment of the Court of the Isle of Man should not stand, and they must humbly advise Her Majesty to affirm that judgment and to dismiss the Appeal. There being no appearance on the other side, there will be no order as to costs.