Judgement of the Lords of the Judicial Committee of the Appeal of The Attorney General of the Straits Settlements v. *Wemyss, from the Court of Appeal of The Straits Settlements (Settlement of Penang); delivered 4th February* 1888.

Present:

LORD WATSON.
LORD FITZGERALD.
LORD HOBHOUSE.
LORD MACNAGHTEN.
SIR BARNES PEACOCK.

[*Delivered by Lord Hobhouse.*]

This litigation was commenced by a petition of right presented by Mr. Wemyss, in which he claimed 40,000 dollars from the Government on account of damage done to his tenement by the execution of works upon the foreshore in front of it. His case is that free communication between his plot of land and the sea is of great importance to his business, and that whereas he was previously in enjoyment of such communication, the works of the Government cut it off.

The Chief Justice of the Supreme Court held that the petitioner could recover damages, which were afterwards assessed at 35,000 dollars. The Attorney General appealed, but the Court of Appeal agreed with the Chief Justice. He now appeals further from their decree.

Wemyss is the lessee of the plot of land in question, which was acquired by grants from the Crown. At the date of the latest grant it was bounded by the sea, and is so described in the

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deed of grant. But the land gains upon the sea at this point, and in course of time a considerable deposit was formed in front of the plot, pushing back the sea and leaving an extent of open uncovered ground.

There have been several changes of proprietorship in the land as regards both the freehold and the leasehold interests. But they do not affect the present question, and it will be sufficient to speak of the successive owners of the freehold as the lessor, and the successive owners of the leasehold, including Wemyss, as the lessee.

On the 2nd July 1877 the lessor granted to the lessee a lease of the plot, with some specified exceptions, for the term of six years, at the rent of 130 dollars per month. And it was agreed that if the lessee should be desirous of taking a renewed lease for the further term of six years, and should give six months' notice in writing of his desire, the lessor would execute a renewed lease for the term of six years, at such rent as might be either agreed upon by mutual consent, or fixed by four arbitrators, two to be chosen by the lessee and two by the lessor.

At some subsequent time, it does not appear precisely when, the excepted portions were thrown into the lease at an additional rent of 15 dollars per month.

On the 29th November 1882 an agreement for reclamation of land from the sea was made between the Government and a number of persons, of whom the lessor was one, described as "owners of lots of land on the east side of Beach "Street." The effect of the agreement was that the Government would reclaim and fill up the mud bank lying between the land owned by the owners and a certain line drawn to the eastward, which was the seaward side, of it, and would construct a quay at the seaward end; that each

owner would pay 65 cents a square foot for the reclaimed land lying between his lot and the quay; and should receive a grant of such land in fee simple with a quit-rent reserved.

On the 16th December 1882 the lessee gave to the lessor written notice of his desire to take a renewed lease of his plot at the former rent and on the former conditions.

On the 22nd June 1883 the lessor and lessee agreed to vary the terms of the lease by leaving in the hands of the lessor some godowns, said to be in disrepair and useless, in consideration of his paying assessments and rates upon them. But the lessee's rent was not to be diminished on that account. With this variation, the lease was renewed at the former rent, by deed dated the 15th November 1883, according to the covenant for renewal.

The reclamation works came opposite to the lessee's plot in February 1884, when he presented his petition of right. The Government denied his right to recover damages on several grounds.

First, it was contended that his right to use the foreshore as an access to the sea was no greater than the right of any other of the Public, and that it gave him no ground of action. To this it was answered that, with respect to riparian owners on tidal rivers, the contrary rule was laid down in Lyon *v.* The Fishmongers' Company, and that for this purpose no distinction can be taken between a tidal river and the sea. Both the Courts below were of this opinion, and their Lordships concur in it. Indeed, it was not seriously combated at this bar on the part of the Government.

The next defence of the Government was that the Crown cannot be sued in tort, a point apparently not raised in the Colony, but insisted on here. It is disposed of by the Crown Suits Ordinance of 1876. The object of that Ordinance is to make better provision by law for

(among other things) giving redress to persons having claims against the Crown in the Colony. And by Section 18, Sub-section II., it is enacted as follows:—

"Any claim against the Crown founded on the use or occupation, or right to use or occupation, of Crown lands in the Colony, and any claim arising out of the revenue laws, or out of any contract entered into, or which should have or might have been entered into, on behalf of the Crown, by or by the authority of the Government of the Colony, which would, if such claim had arisen between subject and subject, be the ground of an action at law or suit in equity, and any claim against the Crown for damages or compensation arising in the Colony, shall be a claim cognizable under this Ordinance."

Their Lordships are of opinion that the expression "claim against the Crown for "damages or compensation" is an apt expression to include claims arising out of torts, and that as claims arising out of contracts and other classes of claims are expressly mentioned, the words ought to receive their full meaning.

In the case of Farnell *v.* Bowman, attention was directed by this Committee to the fact that in many colonies the Crown was in the habit of undertaking works which, in England, are usually performed by private persons, and to the consequent expediency of providing remedies for injuries committed in the course of these works. The present case is an illustration of that remark. And there is no improbability, but the reverse, that when the Legislature of a Colony in such circumstances allows claims against the Crown in words applicable to claims upon torts, it should mean exactly what it expresses.

Another contention, which appears to have been more pressed in the Court below than

here, was that the lease of 1883 was not in pursuance of the covenant of 1877, because the subject matter of it was not identical. If that were so, the lessor could not by his lease pass to the lessee any right which he could not himself have enforced; and the agreement of November 1882 effectually precluded the lessor from complaining of injury from the reclamation works.

Their Lordships however are clear, agreeing herein with both the Lower Courts, that the circumstance that the later lease did not embrace the whole property comprised in the earlier one is no reason for holding that it was not a fulfilment of the covenant for renewal. The lessee insisted on his covenant, and not the less so because for mutual convenience an arrangement was made which the parties might have made at any time, and which did not in any way affect the interests of the owners of the foreshore.

An ingenious argument was then presented, and very ably presented, on behalf of the Government, to the effect that its right to execute works which might injuriously affect the land of the owners was prior in time to the interest conferred by the renewed lease. It is said that the covenant for renewal was one that could not be enforced by way of specific performance; that it conferred no interest in the land upon the lessee; that no such interest was acquired by him till the 22nd June 1883, when the terms of renewal were agreed on; that in November 1882 the lessor had given to the Government a license to execute the works affecting the land; that he thereby bound himself not to grant any interest in the land which should derogate from that license; that his obligation affected the land; and that what the lessee took under the renewal he took subject to the license.

Whether the argument would be sound if the agreement of the 29th November 1882 purported to give such a license to the Government, is a point on which their Lordships do not pronounce any opinion. They think that the agreement is not to be so construed. The owners agree to nothing except to pay for the land. They give no warranty, covenant, or license. They do not purport to represent anybody but themselves. There is nothing to show that the Government was not taking the usual course, by making inquiry of the parties in actual possession, and dealing with them according to their interests. Undoubtedly the owners preclude themselves, and of course all who claim through them by title subsequently arising, from complaining if the works they have sanctioned injure their property. That is all. The interests of other parties, of all who claim under prior obligations, are left untouched. The view now put forward by the Government comes to this, that, without any express word to that effect, the lessor bound himself first to commit the injustice of refusing to perform his covenant with the lessee, and secondly to pay the very substantial sum which would be awarded as damages for breach of covenant. Such a construction puts an unjustifiable strain on the expressions, in order to reach a very improbable conclusion. Their Lordships hold that the agreement of 29th November 1882 does not in any way diminish the lessor's power or obligation to perform the covenant for renewal, or the lessee's rights under that covenant.

The result is that, in their Lordships' opinion, the appeal ought to be dismissed, with costs, and they will humbly advise Her Majesty accordingly.