[ORIGINAL CIVIL JURISDICTION.]

THE SECRETARY OF STATE FOR INDIA (PLAINTIFF) *v.* SIR ALBERT SASSOON AND OTHERS (DEFENDANTS).*

1877. February 20.

Land reclaimed from the sea.

The plaintiff demised to the defendants for a term of 999 years certain lands, a portion of which, A, was liable to an annual rent of Rs. 500 per acre. For the other portion, B, which was described in the lease as "being at times covered by the sea," a nominal rent of Re. 1 per acre per annum was reserved. The lease contained a power to the lessees "to reclaim from the sea" the whole or any portion of B, and provided that upon such reclamation the lessees should pay for any portion of B which they might "reclaim from the sea" an enhanced rent at the rate of Rs. 500 per acre per annum. The lessees also had power under their lease to dig or excavate any portion of the demised lands, and to remove the soil therefrom. The lessees thereupon excavated a portion of B, and thus turned it into a dock, at the entrance of which they constructed gates, by means of which they could in a measure, but not entirely, control the flow of sea water into the dock. The defendants charged nothing for the use of the dock, but for the use of the wharves round it they charged a fee.

Held that the expression "to reclaim from the sea" signifying, in its primary and ordinary sense, the conversion of the reclaimed land into dry land, by rendering it secure from the ingress of the sea, with the view to its being used as such, the construction of the dock was not such a reclamation as was contemplated in the lease, and, therefore, the enhanced rent of Rs. 500 per acre could not be charged for the water area of the dock.

THIS was a special case stated for the opinion of the Court under the provisions of Section 328 of Act VIII. of 1859, and the parties consenting that it should be heard by two Judges in the first instance, it was considered by SARGENT and GREEN, JJ.

The following was the case stated :—

1. By an indenture of lease bearing date 7th November 1870, and expressed to be made between the Secretary of State for India in Council (hereinafter called the lessor) of the one part and the Honourable Sir Albert Abdulla David Sassoon, Knight, C.S.I., Reuben David Sassoon, Arthur Sassoon, and Aaron Moses Gubbay (hereinafter called the lessees) of the other part, the lessor granted and demised to the lessees and their assigns all that piece of land situate at Colaba, in the Island of Bombay, containing by admeasurement 76,090 square yards, bounded on the north by the public road leading from the Fort to the Light-

* Suit No. 627 of 1876.

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house, on the south by the sea, on the east in part by a road, in other part by the Victoria Basin, and on the west in part by ground belonging to Government and in other part by the sea, which piece of land was shown on the plan drawn in the margin of the said indenture, and was therein coloured pink, and was marked A and B, the part marked B being then at times covered by the sea, together with (among other things) the right to reclaim from the sea all and so much of the said premises as was then at times covered by the sea, to have and to hold the said premises thereby granted and demised unto the lessees and their assigns for the term of 999 years, from 27th June 1870, yielding and paying therefor yearly during the said term for the portion of the said piece of ground, marked A, Rs. 3,750, being at the rate of Rs. 500 per acre, and for the remaining portion of the said ground, marked B, until some portion thereof should have been reclaimed from the sea, a yearly rent calculated at the rate of Re. 1 per acre, and from and after any portion of the said ground, marked B, should have been reclaimed from the sea until the whole thereof should have been so reclaimed a yearly rent calculated at the rate of Rs. 500 per acre for so much of the said ground marked B as should for the time being be reclaimed from the sea, and Re. 1 per acre for the unreclaimed portion thereof, and from and after the whole of the said ground marked B should have been so reclaimed, the yearly rent of Rs. 7,857, being at the aforesaid rate of Rs. 500 per acre.

2. Since the date of the said indenture of lease, the lessees have excavated a portion of the ground marked B, and have converted the portion so excavated into a dock, known as the Sassoon Dock, and they have raised the remaining portion of the said ground, and have converted the portion so raised into wharves and bunders. The said dock was completed on 8th April 1875. At the time the said indenture was executed it was not in the contemplation of the parties to this case, that upon the premises thereby demised a dock should be constructed, and in fact such dock was not designed or commenced until the year 1872.

3. The area of the said dock is 3 acres and 3,927 square yards.

4. During the construction of the said dock the sea was as far as possible excluded from the site thereof by a retaining wall,

and 6 steam pumps were continually employed for the purpose of keeping such site free from water. But it was not found possible entirely to exclude the sea from the said site during the construction of the said dock.

5. Since the completion of the said dock it has been filled with water entering from the sea. The present floor of the said dock has been excavated by the lessees to a depth of from 9 feet to 10 feet or thereabouts lower than the depth of the Victoria Basin, and is from 8 feet to 9 feet or thereabouts below the level of low water at spring tides, and from 11 feet to 12 feet or thereabouts below the level of low water at neap tides.

6. At the entrance of the said dock are single lock-gates opening inwards. When the said dock is not being used for vessels, the said lock-gates are left open. When the said dock is being used for vessels, the said lock-gates are usually kept closed, but they are necessarily opened when any vessel enters or leaves the said dock. The mechanical contrivances employed by the lessees in the construction of the said lock-gates enable them at will either to open the same or to keep the same closed, unless the water outside the said gates rises to a level higher than that of the water within the dock, when the said gates are obliged to be kept open, and this occurs during a period of 5 or 6 days twice during every month. During a portion of the S. W. monsoon the said lock-gates are left continually open, as sea-going vessels do not enter the said dock at that season of the year.

7. When the said lock-gates are closed, the said dock forms an enclosed basin of water wherein vessels can at all periods of the tide lay alongside the Sassoon Dock wharf and discharge their cargoes. If the said lock-gates were not so closed, sea-going vessels could not, save at high tide, lay alongside the said wharf and discharge their cargoes as aforesaid.

8. It is competent to the said lessees to make charges for the user of the dock by ships; but such charges have never yet been made, nor is it at all probable that such charges ever will be levied, as the said lessees have satisfied themselves that ships would refuse to enter or use the said dock if subjected to any payment for the use of the same.

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9. A tariff of import and export charges is levied by the lessees upon all goods landed and shipped at the said wharf.

10. It would not be possible to lay dry the said dock except by filling up the entrance thereto and employing powerful steam pumping machinery, and the said dock when so laid dry would be useless as a dock.

11. The lessees admit that they are now liable to pay rent for the whole of the premises demised by the said indenture of lease other than the 3 acres 3,927 square yards occupied by the said dock at the rate of Rs. 500 per acre.

12. The question for the opinion of this Honourable Court is, whether the lessees are liable to pay rent for the 3 acres 3,927 square yards, portion of the said demised premises occupied by the said dock, at the rate of Rs. 500 per acre, or at the rate of Re. 1 per acre.

13. It is agreed that if this Honourable Court shall decide that the lessees are liable to pay rent for the portion of the said demised premises occupied by the said dock at the rate of Rs. 500 per acre, the lessees shall pay such rent to the lessor, and that the first payment thereof shall be considered to have accrued due on the 8th April 1876.

14. It is further agreed that the costs of this case and application shall be in the discretion of this Honourable Court.

Marriott, Advocate-General (Acting) and *Macpherson* for the plaintiff:—At the time of the execution of the lease, no doubt, the parties did not contemplate the construction of this dock, but what they did contemplate was that the lessees should interfere with the unrestricted flow of sea water over B in such a way as to render B profitable to themselves, and that then they were to pay the higher rent. By means of the dock gates the lessees have complete control over the influx and reflux of sea water over B, except for a period of five days twice in the month, when owing to the high tides the water outside rises to a higher level than the water can be raised inside when the gates are shut; at such times, therefore, the gates must be opened, but this does not interfere with the use of the dock. If it did, other gates would be used. The use of the gates is only to retain inside the dock a sufficient

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quantity of water to enable vessels to float there. No doubt, it would not be possible to lay dry the dock, except by filling up the entrance and pumping out the water; but to do this would be to render it useless as a dock. It is true, the dock never is and never has been quite dry; but the sea water in it is a part of the reclamation, it is used by the defendants, and is under their control.

Latham and *Inverarity* for the defendants:—Reclaimed ground is throughout the lease contrasted with ground at times covered by the sea. To reclaim here must mean to convert permanently into dry land. If the lessees admitted the sea purely at their own will and for their own purposes, still the land could not be said to be reclaimed from the sea. The sea, so far as it was made to subserve the purposes of the lessees, might be said to be reclaimed, but this would not be a reclamation of the land, and it is in the case of reclamation of the land that the enhanced rent is to be paid. Moreover, the lessees have not gained complete dominion over the sea either within the dock or without it. The dock is, in fact, nothing more than an arm of the sea, with which the lessees have not interfered, except to deepen it by excavating its bed, and this they had power to do under the lease. It is only reasonable to suppose that it was intended that the enhanced rent should be paid only in respect of such portions of B as by being converted permanently into dry land were made directly profitable to the lessees. They derive, however, no direct profit from the dock, only from the wharves and bunders round it, for which they pay the enhanced rent.

[SARGENT, J.:—The wharves would not be profitable without the dock. You brought about the state of things by which alone your wharves are profitable. Ought you not to pay the higher rent for the dock?]

No. *The Newport Local Board of Health* v. *The Newport Dock* (1) shows that, though both parts of B may be used together as a commercial concern, they must be considered separately for purposes of rating, the wharves being considered dry land, and the dock land covered with water.

(1) 2 B. & S. 708; S. C. 31 L. J. Mag. Ca. 266.

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There is no legal decision as to the meaning of the expression "to reclaim land from the sea." Johnson, Richardson, and Webster, in their dictionaries seem to ascribe to the word "reclaim" a sense of recovering a thing to its former state. The word "reclaim" as applied to land seems to be of modern origin, for it does not occur in the Bedford Level Act (15 Car. II., c. 17), and the two great instances in Europe of reclamation of land from the sea, viz., the Bedford Level, and the reclamations in Holland, were undoubtedly instances of winning back from the sea the dry land on which it had encroached. This shows that if the word "reclaim" be applied to land which never was dry land, it ought, at any rate, to be understood as meaning the conversion of such land into permanently dry land.

Marriott, in reply :—The word "reclaim" cannot in the present instance have been used in the sense of restoring to a former state, nor does the word necessarily imply any such meaning, *e. g.*, in such an expression as "to reclaim a wild animal," or as Dryden uses the word, when he speaks of reclaiming in ranks the forest trees. The water area of the dock may be said to be reclaimed : *Peto* v. *West Ham Overseers.* (1) The word "reclaim" means merely to reduce a thing to the state desired. To make a salt-water basin or a swimming-bath would be to reclaim. It is not necessary that to reclaim from the sea there should be complete control over the sea. To subject land now under the complete dominion of the sea to such conditions as did not before exist to such an extent as to make it subservient to the use of man is to reclaim that land from the sea.

SARGENT, J., delivered the opinion of the Court. After reading the case stated, his Lordship continued—

It appears from this statement of facts that the demised premises consisted of two portions marked, in the plan annexed to the lease, A and B, on the first of which an annual rent of Rs. 500 per acre was reserved, whilst on the latter, described as "being at times covered by the sea," a purely nominal annual rent of one rupee per acre was reserved—power, however, being given to the lessees to reclaim the same or any part thereof from the sea—in

(1) 28 L. J. Mag. Ca. 240 ; S. C. 2 El. and El. 144.

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which case an enhanced annual rent of Rs. 500 per acre was reserved on the land so reclaimed. The question, therefore, whether the site of the dock, which is admittedly a portion of the demised premises marked "B," is liable to pay the enhanced rent of Rs. 500 or the originally reserved rent of one rupee per acre, must depend upon the answer to be given to the question, whether or no it has been reclaimed from the sea within the meaning of the lease? It was contended for the lessees that the ordinary meaning of the expression, "to reclaim land from the sea," is to convert land which is subject to be overflowed by the sea into dry land, by rendering it secure against the inroads of the sea; but that even if it were capable of receiving another meaning, the language of the lease, and more especially of the power given to the lessees to reclaim the lands marked "B," shows that such was the exclusive sense in which the parties intended to use it, and, therefore, that the sea never having been expelled from the land in question except temporarily and very imperfectly, and that, too, only for the purpose of excavating the land and removing the materials, for which express power is giving by the lease, and the land being still liable at times to be overflowed by the sea, it cannot be regarded as land "recovered from the sea." On the other hand, it was argued for the lessor that "to reclaim from the sea" does not necessarily mean to secure the land from the inroads of the sea, so that it shall be converted into dry land, but that it includes the creation of a state of things (such as it was said now exists with respect to the land in question) by which the ingress of the sea is so controlled and regulated, and takes place under such conditions, that the land, albeit still liable to be overflowed at times by the sea, can, nevertheless, be applied to a useful mercantile purpose. Regarded as a mere question of propriety of language, we cannot doubt that the expression might be used with perfect correctness in either of the senses contended for. The land in the latter case would be reclaimed from the sea in the figurative sense of being released from its absolute dominion and power, as a man is said to be reclaimed from the dominion of evil habits. Again, by the new condition of things, the land would be reduced to a "state desired," one of the senses ascribed to the verb "reclaim" in the dictionaries of Johnson and Webster, "the state desired" being, as was said in this case, one

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of great utility to man. But although there may, etymologically, be no impropriety in the use of the expression in the sense contended for by the lessor, we entertain no doubt that in its primary and ordinary sense it signifies, as contended by the lessees, conversion of the land into dry land by rendering it secure from the ingress of the sea with the view to its being used as such. Now, it is possible, and indeed not improbable, that had it been contemplated at the time of the preparation of the lease that the land marked B might be dealt with as has actually taken place (which, however, by the agreement is admitted not to have been the case), that event would have been provided for; but as it is, we can only seek to discover the intention of the parties from all parts of the deed. In *Bland* v. *Crowley* (1) Parke, B., says under somewhat similar circumstances—"The question in this case is as to the true construction of a deed, which was prepared apparently in the confidence that, if the bill for making the direct Portsmouth railway passed into a law, the promoters would certainly carry the undertaking into effect. Had the parties contemplated the possibility that after the bill passed the railway would have been abandoned, it is probable that a distinct provision would have been made for that event, leaving no doubt whatever as to the true intention of the contracting parties. As the deed is framed, some doubt may be entertained as to what the parties would have stipulated if the present state of facts had been presented for their consideration. But all we have now to do is to ascertain the meaning of the words they have actually used; and in construing the deed we must adopt the established rule of construction, to read the words in their ordinary and grammatical sense, and to give them effect, unless such a construction would lead to some absurdity or inconvenience, or would be plainly repugnant to the intention of the parties, to be collected from other parts of the deed." Now it may be said that the circumstance of only a nominal rent of one rupee being reserved until the land should be reclaimed is of itself sufficient reason for giving the expression, "reclaim from the sea," a liberal interpretation. This, however, appears to us to be a consideration not entitled to much weight, for it is quite possible that the inducement to the lessees to pay the very high rent of Rs. 500 per acre for the lands marked A was their obtaining

(1) 6 Ex. 522. See p. 529; S. C. 6 Rail. Ca. 756.

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the lands marked B at only one rupee per acre and the possibility of their being able to utilize them, under the powers given by the lease, at a merely nominal rent, provided they did not actually reclaim them from the sea and add them to the neighbouring *terra firma* included in the portion A. On the other hand, the following considerations are important as showing that the parties intended to use the expression exclusively in its ordinary sense: —1. The lease demises, "all the piece of land shown in the plan drawn in the margin of the deed and marked A and B, the part thereof marked B being at present at times covered with the sea, together with wharfage and tonnage rights and dues on the usual conditions, and also the right to reclaim from the sea all and so much of the said premises as is now at times covered by the sea." These words taken in their plain and obvious sense appear to us, as was strongly contended for the lessees, to contrast throughout lands covered at times by the sea with those which are not so subject, and to anticipate the possibility of all or part of the lands so subject to be covered, being brought into the same state as the more highly favoured portion of the demised piece of land. It was said, indeed, that the words covered with the sea in the description of the portion B only state an existing fact, but that the same words in the power to reclaim must be taken to express not only the fact of the land being covered by the sea, but also the idea of its being so at its free will and pleasure, but this would be to give a figurative meaning to the plain language of a formal technical instrument. 2. This deduction from the language of the operative part of the lease derives corroboration from the plan annexed to the lease, and which, by the ruling in *Lyle* v. *Richards* (2) this Court is bound to look at as being part of the deed. In the margin the lands marked A are described as "reclaimed ground" and containing A 7—2,410 square yards, and the land marked B "unreclaimed ground" and containing A 8—1,080 square yards: total 15 acres 3,490 square yards. 3. The circumstance that the higher annual rent of Rs. 500 per acre is reserved from the time the land or any part is reclaimed until the end of the term of 999 years, and that no provision is made for the land ceasing to be used as reclaimed land, shows that the

(2) L. R. 1 Eng. and Ir. Ap. 222; S. C. 35 L. J. Q. B. 214; 12 Jur. N. S. 947; 15 L. T. N. S. 1.

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parties contemplated a reclamation of a permanent nature, such as can scarcely be ascribed to a wet dock which loses the reclaimed condition attributed to it by the lessors by the simple removal of the gates. 4. Lastly, if the ordinary sense of the language of the lease be once departed from, it becomes little more than a question of degree, and opens the door to a variety of modes of using the land for which it would be unreasonable to suppose that the parties could have contemplated the same enhanced rent being paid. Thus, if the test be the controlling the overflow of the sea and bringing it under such conditions that the land can be turned to a useful purpose, a wet dock such as has been constructed, a basin for country boats, a break-water with the adjacent lands deepened so as to admit of even larger vessels lying secure under the protection of the break-water and landing their cargoes, and, lastly, a public swimming-bath, would all more or less satisfy the necessary condition, and yet the expected profit to be derived from such different and temporary forms of reclamation would vary within very considerable limits. On the other hand, land permanently reclaimed from the sea and converted into dry land might fairly be charged with the payment of the same rent as the adjoining lands marked A. Upon the whole of the case submitted to us, we think that the lessees in dealing with the portion B of the demised premises as therein stated have not, as to so much thereof as forms the site of the dock, reclaimed it within the meaning of the lease, and must, therefore, declare that the land constituting the dock area coloured green in the plan annexed to the agreement, is only liable to pay a rent at the rate of one rupee per acre per annum, and not, as contended by the plaintiff, at the enhanced rate of Rs. 500 per acre per annum. As the question turns upon the interpretation of a document to which both were parties, and which might, at the instance of either party, have been worded so as to exclude all doubt, we think that each party should bear his own costs.