

*Reasons for the Report of the Lords of the
Judicial Committee of the Privy Council on
the Appeal of Perry v. Clissold and others,
from the High Court of Australia; delivered
the 14th December 1906.*

Present at the Hearing :

THE LORD CHANCELLOR.
THE EARL OF HALSBURY.
LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
LORD ATKINSON.
SIR FORD NORTH.
SIR ARTHUR WILSON.

[*Delivered by Lord Macnaghten.*]

This was an Appeal from a Judgment of the High Court of Australia, dated the 20th of June 1904, reversing a Judgment of the Supreme Court of New South Wales. It raised a question under the Lands for Public Purposes Acquisition Act 1880 (44 Vict. No. 16), now superseded by the Public Works Act 1900, which consolidates the law on the subject.

The Act of 1880 in its preamble recites that it is expedient to make provision for the acquisition on behalf of the Crown of lands required for certain purposes, including among others, "sites for public schools," and "to provide compensation for lands so acquired."

The following are the material provisions of the Act.

When the Governor sanctions the acquisition of any land for a school site he may, by

notification in the Gazette, declare that such land, if private property, has been resumed for such purposes (Section 6).

Upon such publication the land is forthwith vested in the Minister of Public Instruction and his successors on behalf of the Crown, for the purposes of the Act, for an estate of inheritance in fee simple in possession freed and discharged from all other estates and interests (Section 8).

The owners of the land or the persons who, but for the provisions thereinbefore contained would have been such owners, are entitled to receive such sum of money by way of compensation for the land of which they have been deprived under the Act as may be agreed upon or otherwise ascertained under the provisions thereafter contained (Section 10).

The estate and interest of every person entitled to land so resumed, or any portion thereof, and whether to the legal or equitable estate therein, is by virtue of the Act deemed to have been as fully and effectually conveyed to the Minister as if the same had been conveyed by means of the most perfect assurances in the law. Every such estate and interest upon the publication of such notification as aforesaid is taken to have been converted into a claim for compensation in pursuance of the provisions thereafter contained, and every person upon asserting his claim as thereafter provided and making out his title in respect of any portion of the resumed land, is entitled to compensation on account of such resumption in manner thereafter provided (Section 11).

Every person claiming compensation in respect of any land so resumed is, within 90 days from the publication of such notification or at any time afterwards, within such time as a Judge of the Supreme Court appoints in that behalf, to serve a notice in writing upon the

Minister and a like notice upon the Crown Solicitor, "which notice," it is declared, "shall set forth the nature of the estate or interest of the claimant in such land together with an abstract of his title" (Section 12).

Section 13 is in the following terms:—

"Within 60 days after the receipt of every such notice of claim by the Crown Solicitor he shall forward the same, together with his report thereon, to the Minister, who shall thereupon (unless no *prima facie* case for compensation shall have been disclosed) cause a valuation of the land or of the estate or interest of the claimant therein to be made in accordance with the provisions of this Act, and shall inform the claimant, as soon as practicable, of the amount of such valuation by notice in the form of the second Schedule hereto."

By Notification published in the Gazette of the 17th of July 1891 a piece of land containing two acres and three perches at Canterbury in the County of Cumberland, was resumed for a public school site. The land was at the time in the possession of one Frederick Clissold. Notice of the resumption was given to Clissold on the 22nd of July 1891; but nothing further was done then. Clissold died shortly afterwards, and his will was proved on the 5th of May 1892.

In May 1902 under an order of the Supreme Court the Respondents, who are the present Trustees of Clissold's will and of whom three are his surviving executors, served notice of their claim to compensation in respect of the land resumed by the Notification of the 17th of July 1891, stating that the claimants were the executors of Frederick Clissold, "who, at the date of resumption was in possession of such land as the owner thereof, and in receipt of the rents of such lands, and had a title thereto by possession."

It appeared from the papers which were forwarded with the claim that in the year 1881 Frederick Clissold entered into possession of the land, which was then open and vacant, and

enclosed it by substantial fencing, and that ever since the enclosure, up to the time of resumption, Clissold held exclusive possession of the land without notice of any adverse claim, and let it to different tenants and received the rents for his own use and benefit, and duly paid all rates and taxes in respect of the land which stood in his name in the rate-books of the municipality of Canterbury.

The Minister refused to entertain the claim to compensation.

The Supreme Court upheld the view of the Minister. The High Court reversed this decision and granted a mandamus requiring the Minister to cause a valuation to be made.

The only question on this Appeal was, whether or not a *prima facie* case for compensation had been disclosed.

On the part of the Minister it was contended that, upon the Plaintiffs' own showing, Clissold was a mere trespasser, without any estate or interest in the land.

Their Lordships are unable to agree with this contention.

It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is for ever extinguished, and the possessory owner acquires an absolute title.

On behalf of the Minister reliance was placed on the case of *Doe v. Barnard*, which seems to lay down this proposition, that if a person having only a possessory title to land be supplanted in the possession by another who has

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himself no better title, and afterwards brings an action to recover the land, he must fail in case he shows in the course of the proceedings that the title on which he seeks to recover was merely possessory. It is however difficult, if not impossible, to reconcile this case with the later case of *Asher v. Whitlock*, in which *Doe v. Barnard* was cited. The Judgment of Cockburn, C.J., is clear on the point. The rest of the Court concurred, and it may be observed that one of the members of the Court in *Asher v. Whitlock* (Lush, J.) had been of Counsel for the successful party in *Doe v. Barnard*. The conclusion at which the Court arrived in *Doe v. Barnard* is hardly consistent with the views of such eminent authorities on real property law as Mr. Preston and Mr. Joshua Williams. It is opposed to the opinions of modern text writers of such weight and authority as Professor Maitland and Holmes, J., of the Supreme Court of the United States.

See three articles by Professor Maitland in the *Law Quarterly*, vols. i, ii, and iv; Holmes, *Common Law*, p. 244.

Their Lordships are of opinion that it is impossible to say that no *prima facie* case for compensation has been disclosed.

They do not think that a case for compensation is necessarily excluded by the circumstance that under the provisions of the Act of 1900 the Minister acquired not merely the title of the person in possession as owner, but also the title, whatever it may have been, of the rightful owner out of possession who never came forward to claim the land or the compensation payable in respect of it, and who is, as the Chief Justice says, "unknown to this day."

The Act throughout from the very preamble has it apparently in contemplation that compensation would be payable to every person deprived of the land resumed for public purposes. It could hardly have been intended or contemplated that the Act should have the

effect of shaking titles which but for the Act would have been secure, and would in process of time have become absolute and indisputable, or that the Governor, or responsible Ministers acting under his instructions, should take advantage of the infirmity of anybody's title in order to acquire his land for nothing. Even where the true owner after diligent enquiry cannot be found, the Act contemplates payment of the compensation into Court to be dealt with by a Court of Equity.

It only remains for their Lordships to express their opinion that the valuation to be made should be a valuation of the land as at the date of the notification of resumption.

When the valuation is made it will be for the Claimants to take such proceedings as they may be advised to recover the amount, unless the Minister thinks fit to pay them or to pay the money into Court.

For these reasons their Lordships humbly advised His Majesty that the Appeal should be dismissed, and ordered the Appellant to pay the costs of the Appeal.
