[HIGH COURT OF AUSTRALIA.]

BOWTELL . . . . . APPELLANT;
DEFENDANT,

AND

GOLDSBROUGH, MORT & CO. LTD. . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 20, 21, 22.

Griffith C.J., Barton and O'Connor JJ.

Mesne profits, action of trespass for — Limitations — Construction of Statutes — Preamble — Ambiguity.

Sec. 2 of the *Limitation of Actions for Trespass Act* 1884 (N.S.W.) provides that in actions for trespass to land, in which the plaintiff's title is not disputed by the defence, the plaintiff shall not recover damages for any "act of trespass" committed more than twelve months before the action.

Held, that this section imposes no restriction on the right of a plaintiff, in an action of trespass for mesne profits of land of which he has recovered possession by an action of ejectment, to recover in respect of the whole period of the defendant's occupation.

The words "act of trespass," construed in their natural and ordinary sense, mean a distinct or isolated trespass, and are therefore altogether inapplicable to the subject matter of an action for the recovery of mesne profits, which, though technically and in form an action of trespass to land within the meaning of the section, is in reality brought, not to recover damages for an act or acts of trespass, but to obtain compensation for the use and profits of land of which the plaintiff had been deprived by the defendant.

In construing a Statute the preamble should not be resorted to in order to cut down or extend the meaning of the enactment unless there is an ambiguity in the enacting words themselves. It is not necessary, however, that the ambiguity should be patent on the face of the Statute; it is sufficient if it arises when the general words of the Statute come to be applied to the particular subject matter.

Per Barton J.: Where the words of a Statute are capable of an interpretation which would work manifest injustice, the Court, if there is a grammatical or reasonable construction which would avoid such a result, should act on the

assumption that the legislature did not intend to bring it about; and, if the words are fairly capable of a construction which will avoid the injustice, should adopt that construction.

Remarks of *Brett* M.R. in *Plumstead Board of Works* v. *Spackman*, 13 Q.B.D., 878, at p. 887, applied.

Decision of the Supreme Court, *Goldsbrough, Mort & Co. Ltd.* v. *Bowtell*, (1905) 5 S.R. (N.S.W.), 461, affirmed.

APPEAL from a decision of the Supreme Court of New South Wales on demurrer.

The plaintiffs, respondents, brought an action of ejectment against the appellant to recover possession of certain land of which the appellant had been in occupation for some considerable time. Having been successful in that action, they then brought an action of trespass for mesne profits against the appellant, in respect of the period during which he had been in possession. The declaration began in the ordinary form of trespass *quare clausum fregit*, and went on to allege that the defendant ejected the plaintiffs from the land and kept them ejected for a long time, and during that time received to his own use all the issues and profits and the beneficial use and occupation of the land, whereby the plaintiffs during that time were deprived of the issues and profits, &c., and were prevented from letting the land and incurred great expense in bringing an action to recover possession and in recovering possession, and claimed £3,000.

The defendant in his second plea, which was founded upon sec. 2 of the *Limitation of Actions for Trespass Act*, 47 Vict. No. 71, and is the only one material to this appeal, alleged that the cause of action sued upon did not accrue within one year of the action. To this plea the plaintiffs replied that an action of ejectment had been brought against the defendant in respect of the said land and that the defendant disputed the plaintiffs title, and judgment was recovered by the plaintiffs in the action, that the defendant gave up possession only by force of that judgment, and that this action was brought for mesne profits consequent to the recovery by the plaintiffs in ejectment and in respect of no other claim or damage.

The defendant demurred to this replication on the grounds: that it was no answer to the plea, that it confessed but did not avoid

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the plea, that the action being one of trespass to land the plea was a good answer, that the proceedings in ejectment were immaterial to this defence, and that the plaintiffs admitted that the defendant did not by his defence in this action dispute the plaintiffs' title to the land, and that the allegation that he disputed the title in the action of ejectment did not affect his right to set up the defence pleaded in this action.

The Full Court over-ruled the demurrer, on the ground that the Act 47 Vict. No. 7, sec. 2, did not extend to an action of trespass for mesne profits: *Goldsbrough, Mort & Co. Ltd.* v. *Bowtell* (1).

From this decision the present appeal was brought.

Sec. 2 of the Act 47 Vict. No. 7 is set out in the judgment of *Griffith* C.J.

Hamilton and *Delohery*, for the appellant. This is an action of trespass *quare clausum fregit*, the damages claimed being the rents and profits of which the plaintiffs were deprived owing to the defendant's alleged wrongful act. Other damages might have been claimed as well in the same action without any alteration of form. In *Stephen's Commentaries*, 3rd ed., Bk. v., Ch. II., p. 685, under the head of "Civil injuries," this action is called trespass *quare clausum fregit* to recover mesne profits. *Buller, Nisi Prius*, 7th ed., pp. 87, 88, speaks of it as trespass after ejectment to which the *Statute of Limitations*, 21 Jac. I. c. 16, sec. 3, may be pleaded. [They referred also to *Darby and Bosanquet's Statutes of Limitations*, p. 4, and to *Roscoe's Nisi Prius Evidence*, 16th ed., pp. 931, 943.] Having recovered possession by the action in ejectment, the plaintiffs, by virtue of the doctrine of relation, are entitled to treat the defendant as a trespasser during the whole period of the defendant's possession, and to recover damages in this form of action. All the incidents of an ordinary action of trespass are present. The nature of the plaintiffs re-entry makes no difference, the recovery of possession is the essential; and, once possession is recovered, the owner can recover damages for past trespass in just the same way as if he had been in possession all along, and the defendant had trespassed on his possession: *Litchfield* v. *Ready* (2). The action is within the class of actions

(1) (1905) 5 S.R. (N.S.W.), 461. (2) 5 Exch., 939.

aimed at by the *Limitation of Actions for Trespass Act* 1884. No words could be more general than those of the title of the Act. The fact that the plaintiffs' title was disputed in the action of ejectment is immaterial. Sec. 2 provides that the Act shall apply to all actions of trespass to land in which the defendant by his defence, *i.e.*, in that action, shall not dispute title. The pleas in this case raised no question of title. The enacting words being clearly wide enough to cover this case, and being unambiguous, there is no necessity to look at the preamble: *Beal's Cardinal Rules of Interpretation*, p. 118. Even if the words of the Act go far beyond the preamble, their meaning cannot, if plain, be cut down by the less extensive words of the preamble: *Hughes* v. *Chester and Holyhead Railway Co.* (1); *Kearns* v. *The Cordwainer's Co.* (2).

[O'CONNOR J.—There may be cases where the words as they stand are plain enough, but, when you come to apply them to the subject matter with which they deal, difficulties and ambiguities appear.]

When the words plainly cover the subject matter in question the Court will not search for or imagine ambiguities: *Dean and Chapter of York* v. *Middleburgh* (3); *Powell* v. *Kempton Park Racecourse Co.* (4). The preamble shows only the motive of the legislature, but the enacting part may go much further than would have been expected from the preamble: *Maxwell on Interpretation of Statutes*, 2nd ed., p. 56. In *Emanuel* v. *Constable* (5), there was a difficulty requiring explanation on the face of the enactment. [They referred also to *Greig* v. *Bendeno* (6).]

[GRIFFITH C.J.—Is there not an ambiguity in the words "act of trespass" in sec. 2 ?]

No, every moment during which the defendant is wrongfully on the land is a trespass. The whole period of the continuing trespass may be regarded as a series of momentary acts. The words of the Act are general enough to include continuing as well as momentary trespasses. The only restriction is that there must be no dispute as to title. The meaning of the words "act

(1) 31 L.J., Ch., 97, at p. 100.
(2) 6 C.B. N.S., 388, at p. 408.
(3) 2 Y. & J., 196, at p. 214.
(4) (1899) A.C., 143, at pp. 157, 185.
(5) 3 Russ., 436.
(6) E. B. & E., 133.

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of trespass" must not be restricted because they are in the singular number. They mean all acts done in violation of the possessory rights of the owner. The original form of sec. 3 of the Act, now sec. 120 of the *Common Law Procedure Act* 1899, shows that all actions of trespass to land were intended. It used the words "every such action" and then proceeded to use words which have always been understood to apply to actions to recover mesne profits, as well as to actions in respect of isolated acts of trespass. That section, which was obviously intended to apply to the same kinds of action as sec. 2, included all kinds, and therefore the latter section cannot be restricted to one class.

[GRIFFITH C.J.—The precedents given by the authors of the best known text books on pleadings recognize a distinction between specific acts of trespass, and continuing trespasses. He referred to *Chitty on Pleading*, 5th ed., vol. II., p. 847, and 1 *Wms. Saund.*, 27.]

The distinction is only one of description. Otherwise the Act would not cover a trespass which continued for several days only and then ceased. After recovery of possession by the owner, a trespass which ousts him is on the same footing as one which does not, as regards the right to recover damages in respect of it. [They referred to *Campbell* v. *Loader* (1); *Comyn's Digest*, vol. III., p. 498; *Stanynought* v. *Cosins* (2); *Mayne on Damages*, 7th ed., p. 474; *Turner* v. *Cameron's Coalbrook Steam Coal &c. Co.* (3); *Pilgrim* v. *Southampton and Dorchester Railway Co.* (4); *Matthew* v. *Osborne* (5).]

[GRIFFITH C.J. referred to *Wilkes* v. *Hungerford Market Co.* (6).]

Even if the preamble may be looked at, it throws no light on the suggested ambiguity. The words "trifling actions between neighbours," would not lead one to expect a section like sec. 3, dealing with actions to recover up to £200. The enacting part involves a complete departure from the intention expressed in the preamble. There is nothing in the preamble to explain the words "act of trespass" in sec. 2, or to exclude actions of trespass for mesne profits from the operation of that section.

(1) 34 L.J., Ex., 50.
(2) Barnes, 456.
(3) 20 L.J., Ex., 71.
(4) 18 L.J.C.P., 330, at p. 332.
(5) 13 C.B., 919.
(6) 2 Bing. N.C., 281, at p. 294.

Dr. Cullen K.C. (with him *Pitt*), for the respondents. The purpose of the Act was to give defendants, who have not forced the owner to litigation in order to assert his title, protection against old claims. It should not be construed to extend to cases in which the owner has been driven to the Courts, unless the words clearly demand it. It could not have been intended to benefit trespassers who have enjoyed the profits of the lands for years. The reference is to trifling and long past trespasses.

[GRIFFITH C.J.—I think the Act applies to all actions of trespass. What it says about them is a very different matter.]

The words of the Act are totally inapplicable to actions for the recovery of mesne profits. "Act of trespass" can only refer to isolated acts, not conduct resulting in total deprivation of possession. The latter constitutes one continuous act, not a series of acts. The distinction between the two classes of actions is manifest. The continuing act only becomes a trespass by relation back from the date of recovery of possession. Till that time no action will lie for trespass. Trespass without expulsion of the owner is actionable immediately. [He referred to *Blackstone's Commentaries* (Kerr's ed., 1857), pp. 205, 210, 214; *Ocean Accident and Guarantee Corporation Ltd.* v. *Ilford Gas Co.* (1); *Holmes* v. *Wilson* (2).] The construction contended for by the appellant would encourage trespassers to hold on to the land until ejected by process of law. If the words "act of trespass" are open to either construction the preamble should be looked at; that makes it clear that substantial claims like that of the appellants were not aimed at by the legislature. Moreover, the plea ought to have alleged that title was not disputed, and should have been limited to the claim in respect of mesne profits. The replication is in effect a new assignment, alleging that the plaintiffs are not suing for damages for distinct acts of trespass to which the Statute applies, but for mesne profits after recovery in ejectment. [He referred to *Roscoe's Nisi Prius Evidence*, 16th ed., p. 945.] The plea compelled the plaintiffs to reply the recovery in ejectment, and so put the plaintiffs to the proof of their title. Without such proof the mesne profits are not recoverable. Sec. 2 contains general and indefinite words. These may be cleared up by

(1) (1905) 2 K.B., 493. (2) 10 Ad. & E., 503.

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reference to the preamble, even if there is no ambiguity on the face of the Act. It is when the occasion arises for applying these general words to particular facts that ambiguities appear. The question, then, is whether they are to be construed universally or in a restricted sense; the motive of the legislature then becomes important, and the preamble may be looked at for the purpose of discovering what that was. The fact that the words of the Act are wide enough to include all cases is not conclusive: *Emanuel* v. *Constable* (1); *Salkeld* v. *Johnston* (2); *Lowe* v. *Dorling* (3).

[O'CONNOR J. referred to *Powell* v. *Kempton Park Racecourse Co.* (4).]

Hamilton, in reply. If the plea is informal the Court should allow an amendment.

Salkeld v. *Johnston* (5) was over-ruled (6): The words must be read in their ordinary and natural sense unless it appears on the face of the Act that they could not be applied in that sense. The argument for the respondents would necessitate reading in some such word as "isolated" or "distinct." The argument *ab inconvenienti* is not to be lightly adopted: *Birks* v. *Allison* (7). If it may be resorted to here it cuts both ways. There is great hardship in making a man, who is innocently in possession of land, and who goes out immediately on finding that the plaintiff is the owner, pay up long arrears of rents, which would perhaps never have been allowed to accumulate but for the owner's tardiness in taking action.

December 22.

GRIFFITH C.J. In this case the Court is called upon to construe sec. 2 of the Act 47 Vict. No. 7, which is entitled "An Act to alter the law respecting remedies for trespass to land." Sec. 2 is as follows: "In any action to be brought in respect of any trespass to land committed after the passing of this Act the plaintiff's title to or possession of which the defendant shall not by his defence have disputed the plaintiff shall not recover any damages for any act of trespass committed more than twelve months before the

(1) 3 Russ., 436.
(2) 1 Hare, 196.
(3) (1905) 2 K.B., 501.
(4) (1899) A.C., 143.
(5) 1 Hare, 196.
(6) 1 Mac. & G., 242, at p. 265.
(7) 13 C.B.N.S., 12, at p. 23.

action shall have been begun. Provided always that nothing hereinbefore contained shall apply to any plaintiff who at the time when such act of trespass was committed was beyond seas or under any legal disability." The present action is an action of trespass *quare clausum fregit* for mesne profits. The declaration is in the old form, alleging that the defendant broke and entered the land of the plaintiffs and ejected the plaintiffs from the possession thereof, and kept them so ejected for a long time, and during that time took and received to his own use all the issues and profits and the beneficial use and occupation of the land; whereby the plaintiffs during all that time lost and were deprived of the issues and profits and the beneficial use and occupation thereof, and so on. The defendant treats sec. 2 of the Act as a Statute of Limitations, and pleads that the cause of action did not accrue within twelve months before the suit, and the plaintiffs reply that during the year they had brought an action for ejectment against the defendant, and the defendant defended the action and disputed the plaintiffs' title, and the plaintiffs recovered judgment and are now claiming in respect of the mesne profits of which they were deprived in consequence.

The defendant contends that the case falls within the plain words of the section. It is said on the other hand that this plea is not a good plea to an action of trespass for mesne profits, at any rate where the action is consequent upon a recovery in ejectment. There is nothing in the section to exclude the case when an action for ejectment has been brought, any more than that of an action for mesne profits. It is said, however, that the intention of the legislature is to be discovered from the preamble. That is in these words: "Whereas it is desirable to discourage actions between neighbours for trifling and long past trespasses on land the title to which is not in dispute." I entirely accept the principle contended for by Mr. Hamilton that, where the words of a Statute are plain and clear, their meaning cannot be cut down by reference to the preamble. But, if the words are uncertain as applied to the subject matter, and may bear more than one meaning, then you may, in a proper case, refer to the preamble to ascertain what was the occasion for the alteration of the law. Let us then look at sec. 2 in order to see whether there is any ambiguity. The first

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thing to be remarked is that it is very doubtful whether the Statute is in the nature of a Statute of Limitations at all. One would think, on first reading it, that it was not an Act for the limiting of the time for the bringing of actions, but for laying down a rule as to the measure of damages to be applied at the trial where title is not in dispute. That is not discovered until the pleadings are completed. That would be a singular provision to appear in a Statute of Limitations. Again, the ordinary form of such Statutes, and there are many of them, is that no action shall be brought but within a certain time, specifying the time. That is the usual form with slight variations. In the 21 Jac. I. c. 16, s. 3, the form is "all actions . . . shall be commenced . . . within six years next after the cause of such actions or suits, and not after." In the 3 & 4 Will. IV. c. 27, s. 40, it is "no action . . . shall be brought . . . but within twenty years next after" the cause of action shall have accrued. Nearly always the words are that no action shall be brought "but within" a certain time. Here the provision is not in the ordinary form, but the plaintiff's right to recover depends not upon his rights at the time of the issue of the writ, but on the conduct of the defendant in his defence to the action. That would indeed be a singular kind of Statute of Limitations, and it becomes more singular still if applied to an action for compensation for deprivation of the use of land. According to the contention of the defendant the plaintiffs' right to recover compensation for a period of six years, or the question whether they should get compensation for six years or for one, depends upon the circumstance whether the defendant does or does not deny the plaintiffs' title. That is a singular provision for the legislature to have made.

These considerations are sufficient to suggest a difficulty, that is to say, a doubt whether the Statute is to be taken as a Statute of Limitations or a Statute laying down a measure of damages to be applied at the trial. From that point of view, again, the question arises what is the meaning of the words "act of trespass." In the Statute of James I., the words are "all actions shall be commenced within" such and such a time next after the "cause of such actions or suits, and not after." It appears then upon the mere construction of the words that there is some doubt as to

what the legislature was dealing with. The preamble, perhaps, throws some light on the subject, but very little. If there were no other light but what is to be gained from that, I should find it very difficult to come to any definite conclusion at all. But, having got so far, having found that the ordinary language of a Statute of Limitations is not used, we may infer that the legislature used the words, not in any technical sense, but in their ordinary and common acceptation. I think there can be no doubt that the section applies to all actions in respect of trespass to land; and there is no doubt that an action of trespass for mesne profits by a person who is wrongfully ousted from land and has recovered possession of it is an action technically of trespass to land. And I see no reason why the section should not apply, nor why it should depend upon whether the plaintiffs recovered possession by an action of ejectment or by a peaceable re-entry. In either case the action is technically one of trespass *quare clausum fregit* and the plaintiffs are entitled to recover the mesne profits.

Construing the section by the ordinary or common interpretation of the language and considering the history of the action of trespass *quare clausum fregit*, a good deal of light is thrown on the subject by the earlier authorities. One to which we have been referred is *Buller's Nisi Prius*. From that it appears that under the old form of pleading the practice was to allege a trespass to the land, and to go on and say that the defendant continued or kept and continued the same acts. In more modern times it was usual to leave out the word "continued," and to say "on divers days and times." A distinction was drawn in the old authorities between acts in their nature instantaneous, and acts which were in their nature continuous, such as wrongfully retaining possession of property. We find that in the one case damages could only be recovered for a particular act done once and for all, and in the other for a continuous wrongful action going on for a long time. Later on, in the work of a very learned writer, *Chitty on Pleading*, 5th ed., vol. II., p. 847, we find a distinction continually drawn between continuing trespasses and repeated acts of trespass. In the note on page 847 he says: "Formerly it was usual to declare with a *continuando*, . . . but now it is more usual in tres-

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pass to land, to state, '*that the defendant, on* such a day, in such a year, *and on divers other days and times, between that day and the day of exhibiting of this bill,* . . . . . *with force and arms, &c., committed the trespasses,*' and the plaintiff may give in evidence any number of trespasses committed during the specified time. If only one day be mentioned, the plaintiff will not be permitted to give evidence of more than one act of trespass, and where the trespasses are stated . . . . . to have been committed on divers days and times, between such a day and such a day, if the plaintiff intend to give evidence of *repeated* acts of trespass, he must confine himself to the time in the declaration, and therefore it is in general advisable, in trespass to real property, to lay the first day so far back as to be certainly anterior to the first act of trespass; however, as the precise day is not material in trespass, either to the person, personal, or real property, the plaintiff may succeed upon the trial as to any one *single* act of trespass, though committed prior to the time mentioned in the declaration." It was important to lay the first day so far back as to be certainly anterior to the first act of trespass. So that learned writer, as well as persons dealing with the subject in later times, speaks of a distinction between actions of trespass and actions of trespass for mesne profits. Bearing that in mind, it must be admitted that there are, at any rate, two possible meanings of sec. 2. One construction would have the effect of providing that when an action is brought in respect of an act of trespass causing immediate loss and terminating there and then, if the plaintiff does not complain within twelve months, and the defendant does not dispute the plaintiff's title, the plaintiff cannot recover damages for the wrong. That is a sensible sort of provision, very much like the provision that proceedings for assault cannot be brought summarily except within six months of the assault. There are also short periods of limitation provided for some other forms of action, for instance, trover and defamation. The other construction would result in this:—The question whether a man should be practically deprived of compensation for the loss of his land would depend on the circumstance whether the defendant, when sued, chooses or does not choose to dispute the owner's title.

That ambiguity being there, and it being necessary to say what

the legislature intended, I think we can arrive at a solution without resorting to the preamble, and we may properly hold that the legislature meant to deal with the case of an isolated act of trespass, and did not intend to refer to an action, which though technically called trespass, is in reality an action to recover compensation for deprivation of the use of land. The preamble confirms that view, although it would not be in itself sufficient to decide the matter.

The section, therefore, has no application to an action which, though called trespass, is in reality an action to recover compensation for the use of land of which the plaintiff was wrongfully deprived by the defendant. Substantially, therefore, the plaintiffs are entitled to succeed so far as this defence is concerned, and I do not see what the replication has to do with it. It alleges that the re-entry arose as the result of a successful action of ejectment. I am of opinion that the plea is bad, not on the technical ground that it does not appear from it that the defendant does not dispute the plaintiffs' title, but on the ground that the declaration claims damages for the deprivation of the use of the land, and the Statute does not afford a defence to such a claim.

For these reasons I think that the plaintiffs are entitled to judgment on the demurrer.

BARTON J. I am of the same opinion, and think that the conclusion to which the Supreme Court came is supportable and supported by the subject matter of the enactment.

As His Honor the Chief Justice has pointed out, there is some degree of ambiguity in the section, partly caused by the use of the words "act of trespass." In the case of *Plumstead Board of Works* v. *Spackman* (1), *Brett* M.R. said: "When the words of an Act of Parliament, being read in their ordinary meaning, are capable of an interpretation which will work manifest injustice, yet if it is possible within the bounds of any grammatical or reasonable construction to read the Act so that it will not commit a manifest injustice, the Court ought to construe it upon the assumption that the legislature did not intend, by the

(1) 13 Q.B.D., 878, at p. 887.

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words that it has used, to enact that which will perpetrate a manifest injustice."

That statement was made, it is true, in the course of a dissenting opinion; and in the House of Lords the judgment from which the Master of the Rolls dissented was affirmed, on the ground that a manifest injustice did not arise from the construction put upon the Act by the Court of Appeal, because the House was of opinion that a public benefit was conferred, before which any hardship upon individuals must give way. But the principle stated in the passage which I have read was untouched by the decision of the House of Lords, and this test is one proper to be applied to an Act of Parliament where on the face of the Act there is an ambiguity requiring to be solved. If there are two possible constructions, one working a manifest injustice and the other not, then I think the latter construction is the one which should be adopted. In *Palmer's Case* (1) the Court said:—"If any part of an Act of Parliament is penned obscurely, and other passages in the same Act will elucidate that obscurity, recourse ought to be had to such context for that purpose." Recourse to the context as to its wording does not help us much here, perhaps, but regard being had to the whole subject matter, it seems to me that a construction can be avoided which would work injustice. This case is not one of mere quarrels between neighbours, relating to actions for long past wrongs on the one hand and vexatious and wanton attempts to set up title on the other, but quite a different class of case, where mesne profits are sued for after recovery in ejectment, that is, after title has been established, and where on the doctrine of relation damages may be had for the adverse occupation over the entire period up to the recovery in ejectment. In such a case it could scarcely have been the intention of Parliament to work this injustice, that the defendant being a manifest wrongdoer and the action being no mere harassment of a neighbour, the construction should be adopted that a person in wrongful occupation should be protected from having to disgorge the profits which he should never have usurped.

O'CONNOR J. I am of the same opinion. It has been con-

(1) 1 Leach Cr. Ca., 352, at p. 355.

tended in this case that an ambiguity must appear on the face of a Statute before you can apply the rules of interpretation relating to ambiguities. In one sense that is correct, and in another sense it is not. You frequently find an Act of Parliament perfectly clear on the face of it, and it is only when you apply it to the subject matter that the ambiguity appears. That ambiguity arises frequently from the use of general words. And wherever general words are used in a Statute there is always a liability to find a difficulty in applying general words to the particular case. It is often doubtful whether the legislature used the words in the general unrestricted sense, or in a restricted sense with reference to some particular subject matter. In *Maxwell on Interpretation of Statutes*, 3rd ed., p. 28, reference is made to this. The author says: "General words admit of indefinite extension or restriction, according to the subject to which they relate, and the scope and object in contemplation. They may convey faithfully enough all that was intended, and yet comprise also much that was not; or be so restricted in meaning as not to reach all the cases which fall within the real intention. Even, therefore, where there is no indistinctness or conflict of thought, or carelessness of expression in a Statute, there is enough in the vagueness and elasticity inherent in language to account for the difficulty so frequently found in ascertaining the meaning of an enactment, with the degree of accuracy necessary for determining whether a particular case falls within it." The extent to which the Courts will go in ascertaining the real intention of the legislature where general words are used, and will, if the object and purpose of the Act necessitates restriction, restrict them accordingly, is referred to in *Hardcastle on Interpretation of Statutes*, 3rd ed., p. 193, where he cites from a very old case, *Stradling* v. *Morgan* (1), decided in 1660:—"The judges of the law, in all times past, have so far pursued the intent of the makers of Statutes, that they have expounded Acts which are general in words to be but particular where the intent was particular . . . The sages of the law heretofore have construed Statutes quite contrary to the letter in some appearance, and those Statutes which comprehend all things in the letter they have

(1) Plowd., 204.

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expounded to extend but to some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the legislature, which they have collected, sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances, so that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion."

Now, the words "any action brought in respect of any trespass to land" are words of the most general description, and the ambiguity arises at once when we seek to apply them to an action such as that now under consideration. Further on the words used are "any trespass to land *committed* after the passing of this Act." And the expression is used later on "any act of trespass *committed* more than twelve months before the action shall have been begun." According to the strict legal sense of the word, trespass includes, not only an act of trespass committed while the plaintiff is in possession, but also an act such as that involved in this case, where an act peaceable in itself and not at the time a disturbance of the plaintiff's possession becomes afterwards by fiction of law a trespass. In both cases there is in law a trespass, and the question is whether it is the latter kind of trespass that was intended to be included in the terms used by the Act.

I myself do not get much light from the preamble. It seems to me, if one may speak disrespectfully of an Act of Parliament, a foolish sort of preamble, apparently founded on the supposition that it is only between neighbours that such actions for trivial and long past trespasses are likely to occur. I do not gather much from the preamble beyond this, that it is intended to deal with actions for trifling and long past trespasses, in cases where title is not in dispute. But when we come to inquire into the language of the Act itself, one question which arises is this:— Could it ever have been intended to make such a fundamental

alteration in the law affecting rights of property by an Act of this kind?

Before this Act was passed a person, whose land was occupied wrongfully, was entitled to recover mesne profits as damages for the occupation for a period of six years. If this section is to be read as amending the law of limitation of actions for trespass generally, then in all cases in which the defendant does not dispute the title, perhaps because he has not a shadow of a claim to the land, he escapes with only a year's damages instead of six. Whereas a person who does plead title, and possibly with a *bonâ fide* excuse for so doing, comes under the ordinary law of limitations. Now, the circumstance that the defendant does not set up a title in himself as a defence to the action seems to have no relation whatever to the merits or to the rights or obligations of the parties as they were before this Act. This case, though, of course, we know nothing of the facts, may be an illustration of the very difficulty. The defendant may have been wrongfully in possession of land five or six years, and may have put the owner to all kinds of trouble and expense, necessitating an action of ejectment, before possession was recovered, and may then come into Court, and, when he cannot do anything else, admit the plaintiff's title; if he does that, then, according to the appellant's interpretation of the Statute, only a year's compensation for the five or six years occupation can be recovered from him. That position involves so radical an alteration in the rights of the parties under the law previously in existence, that one is driven to inquire whether it could have been intended to use the words "act of trespass" in so general a sense as to include cases of this kind. The conclusion to which I am driven, then, is that the generality of the Act must be restricted so as to carry out the real intention of the legislature. The Act was intended to apply to trespasses to land or acts of trespass, *committed* while the owner of the land is in possession, and in such a way as to render the trespasser liable to an action for damages, and was not intended to apply to the class of cases in which an action is brought to recover, not damages for an act or acts of trespass committed in violation of the plaintiff's possession, but to recover compensation for con-

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tinued unlawful occupation of land which is a trespass only by fiction of law.

For these reasons I am of opinion that the judgment of the Supreme Court was right, and the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor, for the appellant, *J. W. Maund* for *J. A. Nathan.*

Solicitors, for the respondents, *Minter, Simpson & Co.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

FORSTER . . . . . APPELLANT;

AND

SHACKELL AND ANOTHER . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1906.

MELBOURNE, *March* 29, 31.

Griffith C.J., Barton and O'Connor JJ.

Married Women's Property Act 1890 (*Vict.*) (*No.* 1116), *secs.* 4 (5), 22—*Insolvency Act* 1897 (*Vict.*) (*No.* 1513), *sec.* 119—*Insolvency of married woman—Whether her property subject to restraint on anticipation vests in her trustee in insolvency.*

The effect of sec. 119 of the *Insolvency Act* 1897 (Vict.) is that, so far as her property is concerned, a married woman is in the same position as she was before the Act, but, so far as she is personally concerned, she is subject to all the provisions of that Act as if she were a *feme sole.*

Therefore, under sec. 22 of the *Married Women's Property Act* 1890, property of a married woman, which she is restrained from anticipating, does not, on her insolvency, form part of her estate divisible among her creditors, notwithstanding sec. 119 of the *Insolvency Act* 1897.

Decision of the Full Court (*In re Forster*, [1906] V.L.R., 182; 27 A.L.T., 129), reversed.

APPEAL from the Supreme Court of Victoria.