still have to exercise his powers under sec. 42. To say the least, it is not established that the appeal would be necessarily futile; if the office is filled, it is filled subject to the right of appeal. It was not even filled till after the appeal of Kenney was filed.

For these reasons, I am of opinion that the Commissioner ought to entertain this appeal, and that the order should be made absolute.

Order nisi discharged with costs.

Solicitors for the prosecutor, *Maddock, Jamieson & Lonie.*

Solicitor for the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

WARREN . . . . . APPELLANT;
INFORMANT,

AND

VAGG . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

MELBOURNE, *May* 18, 29.

Knox C.J., Higgins and Gavan Duffy JJ.

Forests—"Protected forest," meaning of—Water frontage—Licence—Forests Act 1915 (*Vict.*) (*No.* 2655), *secs.* 4, 30—*Local Government Act* 1915 (*Vict.*) (*No.* 2686), *secs.* 729, 732.

Sec. 4 of the *Forests Act* 1915 (Vict.) provides that, unless inconsistent with the context or subject matter, "'protected forest' includes all unoccupied Crown land proclaimed as a protected forest pursuant to this Act or any Act hereby repealed and every unused road and every water frontage as defined in Part XXXIX. of the *Local Government Act* 1915." Sec. 30 (1) provides that "No person shall fell girdle ring-bark injure destroy or remove any growing tree or

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any timber in any protected forest without a permit in writing from the Minister of Forests or from some forest officer duly authorized by the said Minister to give such permits." Sec. 729 of the *Local Government Act* 1915 (Vict.) provides that, unless inconsistent with the context or subject matter, "(*g*) 'water frontage' means any portion of Crown land not exceeding twenty chains in width which is not for the time being held under lease or licence or reserved as a water reserve along any public road under any Act relating to Crown lands or to mining and which has a frontage to the sea or any river creek lake or swamp." Sec. 732 provides that "Notwithstanding anything contained in any Act or in any proclamation or order of the Governor in Council or in any map or plan the Minister may grant licences for the occupation and use of any unused road or of any water frontage."

Held, that the expression "any Act relating to Crown lands" in the definition of "water frontage" in sec. 729 of the *Local Government Act* 1915 does not include the *Local Government Act* 1915 itself, and therefore that the prohibition in sec. 30 of the *Forests Act* 1915 applies to a water frontage in respect of which a licence has been granted under sec. 732 of the *Local Government Act* 1915.

Decision of the Supreme Court of Victoria (*Schutt* J.) reversed.

APPEAL from the Supreme Court of Victoria.

At the Court of Petty Sessions at Cobden an information was heard whereby William James Warren charged that James Henry Vagg did unlawfully cause to be felled certain timber in a protected forest, to wit, the water frontage to Lake Elingamite, without a permit in writing from the Forests Commission or from some forest officer duly authorized by the Forests Commission to give such a permit. The evidence showed that Vagg was the owner of land abutting on the water frontage to Lake Elingamite, and that a licence had been issued to him pursuant to sec. 732 of the *Local Government Act* 1915 in respect of so much of the water frontage as abutted on his land. By the licence there was granted to Vagg, for a term of three years, licence and liberty to occupy and use the land in question subject to certain conditions, among which were a condition that the licensee should not ring-bark, destroy, cut or injure any live timber on the land unless with the consent of the Minister, and conditions that the licensee should keep the land free from vermin within the meaning of the *Vermin Destruction Act* and free from thistles within the meaning of the *Thistles Act*. A contention was raised on behalf of the defendant that the land which was alleged to be a water frontage was not a "protected forest" within

the meaning of the *Forests Act* 1915 inasmuch as it was not within the definition of a " water frontage " in sec. 729 of the *Local Government Act* 1915 because it was held under a licence under the latter Act. The Court of Petty Sessions disagreed with that contention, and held that the land was a protected forest. The Court also found that the defendant had without any permit caused to be felled certain timber, some of which was green, and convicted the defendant and imposed a fine upon him. The defendant obtained an order *nisi* to review that decision; and on the return of the order *nisi* *Schutt* J. made it absolute, holding that the licensing of the land to the defendant took it out of the definition of a " water frontage " in sec. 729 of the *Local Government Act* 1915 and, therefore, the land was not within the definition of a " protected forest " in sec. 4 of the *Forests Act* 1915.

From the decision of *Schutt* J. the informant now, by special leave, appealed to the High Court.

Owen Dixon K.C. and *Clayton Davis*, for the appellant.

Latham K.C. and *Gregory*, for the respondent.

Cur. adv. vult.

May 29.

The following written judgments were delivered :—

KNOX C.J. AND GAVAN DUFFY J. The respondent was convicted on an information charging that he did unlawfully cause to be felled certain timber in a prohibited forest, to wit, the water frontage to Lake Elingamite, without a permit in writing from the Forests Commission or some officer duly authorized. It appeared from the evidence that the land in respect of which the charge was laid had a frontage to Lake Elingamite, and that the respondent had obtained from the Minister of Public Works a licence under sec. 732 of the *Local Government Act* to use and occupy that land. On appeal to the Supreme Court *Schutt* J. set aside the conviction and dismissed the information; and the appellant, by special leave, appealed to this Court against this order.

The ground of the decision of the learned Judge was that the

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land on which the timber was felled was not a "protected forest" within the meaning of the *Forests Act* 1915, and the question for this Court is whether he was right in so deciding. The answer to this question depends on the meaning to be given to the definition of "protected forest" in sec. 4 of the *Forests Act*, and involves the construction of sec. 729 (*g*) of the *Local Government Act* 1915.

By sec. 4 of the *Forests Act* "protected forest" is described as including (*inter alia*) "every water frontage as defined in Part XXXIX. of the *Local Government Act* 1915." Sec. 729 (*g*) of the last-mentioned Act, which is included in Part XXXIX., is in the following words: "'Water frontage' means any portion of Crown land not exceeding twenty chains in width which is not for the time being held under lease or licence or reserved as a water reserve along any public road under any Act relating to Crown lands or to mining and which has a frontage to the sea or any river creek lake or swamp." The substantial question is whether the expression "any Act relating to Crown lands" is to be read as including Part XXXIX. of the *Local Government Act*. The respondent asserts and the appellant denies that it should be so read.

The argument for the respondent was that Part XXXIX. of the *Local Government Act* relates to Crown lands, that it provides by sec. 732 for the granting of a licence to use and occupy any water frontage, and that such licence when granted is therefore a licence under an Act relating to Crown lands. Consequently, it is said, land held under such a licence is not a water frontage within the meaning of the *Local Government Act*, Part XXXIX., or of the *Forests Act*.

The general intention of Part XXXIX. of the *Local Government Act* seems to be to give power to the Executive to deal with unused roads and with Crown land abutting on water where such land is not already dealt with under other legislative authority. There seems to be no reason to introduce into the definition in sec. 729 a further limitation for the purpose of preventing the Executive from issuing a second licence in respect of land already licensed under the Act without cancelling the first licence. Such a limitation needs no expression, and is therefore not expressed with respect to the cognate subject of "unused roads." The relation of licensor and licensee

in this respect is definitely fixed by sec. 737. If for this or any other reason Parliament desired that the word "licence" in sec. 729 should include a licence granted under the *Local Government Act*, we should have expected the words "under this Act or" to have been used in the section before the words "any Act relating" &c. This view is confirmed by the use of the expression "water frontage" in other sections of Part XXXIX. On the respondent's construction land comprised in a licence under this Act would not be a "water frontage" within the definition, and consequently one would expect that that expression would not be applied in the Act to such land. But in sec. 734 it is clear that the expression "water frontage" is used as denoting both land occupied under such a licence and land not so occupied; for it provides that no person shall occupy or use a water frontage unless he is the licensee thereof under this Part. In secs. 737 (1) (*a*), 737 (1) (*d*) and 739 the expressions "licensed water frontage" and "water frontage" are used as descriptive of land included in a licence granted under sec. 732. It seems to follow that the Legislature did not intend to exclude from the definition of water frontage land comprised in a licence granted under sec. 732.

In the Supreme Court *Schutt* J. considered that the contention of the present respondent was supported by sec. 731 of the Act, his view being that the return required by that section was not intended to include land occupied under a licence granted under sec. 732. He thought the object of sec. 731 was to enable the Minister to compel applications to be made for licences in respect of areas not already licensed under the Act. We can see nothing in the section which requires such a limitation, and it may well be that the information as to values was required in connection with the fixing or collection of licence fees on areas already licensed. Moreover, the Act contains no provision enabling a council to obtain the information necessary to distinguish licensed from unlicensed areas.

For these reasons we are of opinion that the decision of *Schutt* J. cannot be supported.

The other points raised by the respondent are clearly untenable.

The appellant having undertaken to pay the costs of this appeal

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in any event, the order should be:—Appeal allowed. Order of the Supreme Court dated 22nd November 1921 and order *nisi* to review dated 19th August 1921 discharged. Order and conviction of Court of Petty Sessions at Cobden restored. No order as to costs of proceedings in the Supreme Court. Costs of appeal to this Court to be paid by the appellant.

HIGGINS J. Appeal by special leave from an order of the Supreme Court of Victoria (*Schutt* J.) setting aside a conviction. The defendant Vagg was convicted in Petty Sessions, as under sec. 30 of the *Forests Act* 1915, of the offence of felling timber in a protected forest without a permit. The conviction was set aside on the ground that the place where the timber was felled was not a protected forest. The learned Judge was disposed to think that the other grounds on which the defendant relied had no substance in them; and I agree with him. There was evidence to support the findings; and, if the defendant did not incur a forfeiture of the licence by reason of any breach of the conditions, it does not follow that he has not incurred a penalty by disobeying sec. 30 of the Act.

The case turns on the construction of the *Forests Act* and of Part XXXIX. of the *Local Government Act*. By sec. 4 of the *Forests Act* it is declared that, in the construction of the Act, unless inconsistent with the context or subject matter, "'protected forest' includes all unoccupied Crown land proclaimed as a protected forest pursuant to this Act and every unused road and every water frontage as defined in Part XXXIX. of the *Local Government Act* 1915." Part XXXIX. of that Act has also an interpretation section, 729, declaring, "unless inconsistent" &c., that "'water frontage' means any portion of Crown land not exceeding twenty chains in width which *is not for the time being held under lease or licence* or reserved as a water reserve along any public road *under any Act relating to Crown lands* or to mining and which has a frontage to the sea or *any river creek lake or swamp.*"

The land in question fronts Lake Elingamite, and it is conceded that it satisfies the definition in all other respects, but it is said that the land is held under licence under an Act relating to Crown lands, because it is held under a licence granted under Part XXXIX.

itself; and it is therefore contended that the land is not a "protected forest" under the *Forests Act*.

It is to be noticed that under sec. 4 of the *Forests Act* the expression "protected forest" includes not only every water frontage as defined in Part XXXIX. of the *Local Government Act*, but also, in the first limb of the definition, all unoccupied Crown land proclaimed as a protected forest. There is reference throughout the case to some such proclamation, but, for some reason unexplained, it was not put in evidence, and the prosecutor relies solely on the second limb of the definition and Part XXXIX. What, then, is the meaning of the definition of "water frontage" in sec. 729? Does it exclude a frontage to water as to which a licence to occupy has been given under sec. 732? At first sight, the object of excluding land which is for the time being held under lease or licence under any Act relating to Crown lands is to prevent duplication or conflict of titles—there is to be no licence where there is a lease or licence under a Land Act already. Now, Part XXXIX. has been taken bodily, in consolidation of the Acts, from an Act of 1903, called the *Unused Roads and Water Frontages Act* 1903. We are entitled to examine the history of the legislation, to examine how the law stood when the Act of 1903 was passed, and to see whether the title of the Act aids us in interpretation (*Salkeld v. Johnson* (1); *Fenton* v. *J. Thorley & Co.* (2); *Craies on Statutes*, 1st ed., pp. 95, 121, 177-180). *Primâ facie*, at all events, the same words in the definition of 1903 have the same meaning in the Act of 1915; what they meant then, they mean now. That this line of reasoning is legitimate, especially where the later Act is, as here, a consolidating Act, is shown by *Esher* M.R. in *Mitchell* v. *Simpson* (3) (and see per *Chitty* J. in *In re Budgett*; *Cooper v. Adams* (4); *Davies* v. *Kennedy* (5)). In 1903, after many Land Acts and amendments thereof, there stood among the statutes one main Land Act, the *Land Act* 1901, intituled "An Act to consolidate the *laws relating to* the sale and occupation of Crown lands." This Act contained sections permitting the lease or licence of Crown lands for ordinary settlement of people

(1) (1848) 2 Ex., 256, at p. 273.
(2) (1903) A.C., 443.
(3) (1890) 25 Q.B.D., 183, at p. 189.
(4) (1894) 2 Ch., 557, at p. 561.
(5) (1869) Ir. Rep. 3 Eq., 668, at p. 691.

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Higgins J.

in the State; and it also contained provisions enabling the Governor in Council to reserve from being leased or licensed any Crown lands which in his opinion are required for any public purpose whatsoever; and access for the public to lands along rivers, lakes, &c., would be such a public purpose. Since that Act there had been one Act, at the least, which related to leases and licences under the Land Act, and it was to be read with that Act (the Act No. 1831), and there might be more such Acts. There had been several other Acts which referred to Crown lands (such as Acts Nos. 1735, 1759, 1763, 1764, 1765, 1772, 1830); but they were not amendments of or incorporated with the *Land Act* 1901, they did not deal with leases and licences; and it is not, in my opinion, every Act that refers to Crown lands that can be treated as an "Act *relating to* Crown lands" for the purpose of the definition. The Act of 1903, as to unused roads and water frontages, does not purport to be an Act "relating to Crown lands," or to amend or to be incorporated with the Land Acts; on the contrary, its title is "An Act to *derive revenue* from unused roads and water frontages." Moreover, in 1903, there existed the Mines Acts 1890 and 1897, allowing the holders of miners' rights or business licences to take mining lands for residence or business. The Act of 1903, recognizing no doubt that the live-stock of private owners whose land abutted on unused roads and water frontages would graze thereon without regard to the limits of their owners' property, was an attempt to derive some revenue, and it provided by sec. 732 that "notwithstanding anything contained in any Act or in any proclamation or order of the Governor in Council . . . the Minister may grant licences for the occupation and use of any unused road or of any water frontage"; and, by sec. 734, it imposed the duty on owners of private lands which abutted on a water frontage and were not fenced off from such frontage, to obtain such a licence. But in permitting, or compelling, such licences, the Act, by the definition, excepted such water frontages as were "for the time being held under lease or licence . . . under any Act relating to Crown lands or to mining." This was obviously to prevent duplication or conflict of titles. In short, the meaning of these words in the definition, in the Act of 1903, taken with sec. 732, was that licences might be granted of water frontages if there were no lease or licence existing

thereof under other Acts. The definition does not except land held under licence "under this Act," but only land held under other Acts; it does not mean to treat the Act itself as being an Act relating to Crown lands. In confirmation of this view, we find that in several sections of the Act of 1903 (and therefore of Part XXXIX. of the *Local Government Act*) the expression "water frontage" is used as to land fronting water, even where a licence has been granted under sec. 732 (see secs. 734, 737 (1) (*a*) and (*d*), 738, 739, 743, 744). Moreever, in the case of unused roads, there are several references, in the definition of "road" in the same section, 729 (*e*), to "any Act relating to Crown lands," and these cannot possibly apply to the Act of 1903, or to Part XXXIX. itself. I cannot regard sec. 731, on which the learned Judge lays stress, as supporting the defendant's argument. The information which the municipal councils are required to give under that section would be useful to the Department for the purpose of guiding or checking its action with regard to lands licensed under sec. 732, as well as for the purpose of compelling licences to be taken out if they have not been taken out already.

I concur in the opinion that the appeal should be allowed, and the conviction restored.

Appeal allowed. Order appealed from set aside. Order nisi discharged. Order and conviction of Court of Petty Sessions at Cobden restored. Appellant to pay costs of appeal to High Court.

Solicitor for the appellant, *E. J. D. Guinness*, Crown Solicitor for Victoria.

Solicitors for the respondent, *Glover & Ormond*, for *C. W. St. John Clarke*, Colac.

B. L.