[HIGH COURT OF AUSTRALIA.]

THE MELBOURNE HARBOUR TRUST COMMISSIONERS . . . . . Defendants, } Appellants;

AND

THE COLONIAL SUGAR REFINING COMPANY LIMITED . . . . Plaintiff, } Respondent.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 13, 16-20, 23-25, 27, 30, 31; *June* 9.

Isaacs, Higgins and Rich JJ.

Melbourne Harbour Trust—Land vested in Commissioners—Bed, soil and shores of River Yarra—Wharf and embankments built in bed of river by riparian owner by permission granted for temporary purposes—Interest of riparian owner in wharf and embankment—Limitation of action—Adverse possession—Termination of permission—Right of riparian owner to exercise riparian rights over wharf and embankment—Melbourne Harbour Trust Act 1915 (*Vict.*) (*No.* 2697), *secs.* 2, 3, 9, 11, 12, 46, 52, 54, 81-85, 87—*Real Property Act* 1915 (*Vict.*) (*No.* 2719), *secs.* 16-19, 43—*Land Act* 1869 (*Vict.*) (*No.* 360), *secs.* 3, 4, 6, 12, 45, 50.

Held, by *Isaacs*, *Higgins* and *Rich* JJ., (1) that the word "lands" in sec. 4 of the *Land Act* 1869 (Vict.) included land comprising the bed and shore of a navigable river, and therefore that a permission or licence to build a pier or wharf or embankment in the bed of a navigable river, such permission or licence not complying with the provisions of Part III. of that Act, gave no estate or interest in the land upon which a pier or wharf or embankment was built pursuant to such permission or licence; (2) that sec. 46 of the *Melbourne Harbour Trust Act* 1915 (Vict.) has the effect of vesting in the Melbourne Harbour Trust Commissioners the bed and soil and shores of the River Yarra within the metes and bounds specified free from any estate or interest which any person might, since the passing of the *Melbourne Harbour Trust Act* 1876 (Vict.), have acquired by reason of the operation of secs. 18 and 43 of the *Real Property Act* 1915 (Vict.).

The respondent company—being the registered proprietor of land of which one boundary was a portion of the River Yarra where its bed, soil and shores were vested in the Melbourne Harbour Trust Commissioners—occupied and used, for the purpose of its business carried on upon its land, a wharf and an embankment constructed by it or its predecessors in the bed of the river pursuant to a permission obtained by them and granted for a temporary purpose. Buildings were erected by the respondent company partly on its own land and partly on the embankment.

Held, by *Isaacs* and *Rich* JJ. (*Higgins* J. dissenting), that, when the permission was terminated, although the wharf and embankment were vested in the Melbourne Harbour Trust Commissioners, the company was entitled to use the wharf and embankment, so long as they remained in position, for the purpose of exercising its riparian rights, subject however to whatever duties and authorities were vested in the Commissioners by the *Melbourne Harbour Trust Act* 1915.

Per Higgins J.: The riparian right of the respondent company was a right to get to and from the river from and to the company's land; the company never acquired any other riparian right; that right remains, though it is interfered with by the wharf and embankment which the company itself constructed; and the company has no new right to get to and from the river at a new frontage.

Attorney-General of Southern Nigeria v. *John Holt & Co. (Liverpool) Ltd.*, (1915) A.C. 599, applied.

Plimmer v. *Wellington Corporation*, (1884) 9 App. Cas. 699, distinguished.

Ramsden v. *Dyson*, (1865-66) L.R. 1 H.L. 129; *Marshall* v. *Ulleswater Steam Navigation Co.*, (1871) L.R. 7 Q.B. 166, and *Lyon* v. *Fishmongers' Co.*, (1876) 1 App. Cas. 662, considered.

Per Isaacs and *Rich* JJ. (*quære per Higgins* J.): The *Statute of Limitations* (Part II. of the *Real Property Act* 1915 (Vict.)) is applicable to a public corporation of the character of the Melbourne Harbour Trust.

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

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by the Colonial Sugar Refining Co. Ltd. against the Melbourne Harbour Trust Commissioners in which the statement of claim as amended was substantially as follows:—

The plaintiff says:—

1. It is a company duly incorporated.

2. It is seised of an estate in fee simple in possession in a piece of land. Such land is Crown allotment 4 of section 8 and is bounded

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on the east as appears in the original Crown survey of 7 allotments of portion No. VIII. in the parish of Cut Paw Paw county of Bourke and/or is the land more particularly described in certificate of title entered in the register book volume 2275 folio 454930 and includes the area mentioned in the defendants' notice hereinafter mentioned.

3. Such land was alienated from the Crown by Crown grant Number 24417 made to one George Ward Cole and dated 10th December 1850.

4. The land referred to in par. 2 hereof and alienated as alleged in par. 3 hereof was and is bounded on the east by the actual River Yarra from time to time existing formerly called Hobson's River.

5. The said river at all times material was for some distance above the said land a tidal navigable stream and by virtue of the matters hereinbefore alleged the plaintiff is and its predecessors in title were entitled to all natural riparian rights in relation thereto.

6. At the time of the said Crown grant and for some time thereafter the waters of the said river spread a short distance from the channel thereof in a shallow backwash which tended to erode the banks and impeded access to the channel.

7. The plaintiff and its predecessors in title have at all times material conducted upon the said land a large mercantile undertaking which required the continued exercise of riparian rights and necessitated regular access to such channel for the lading and unlading of ships and lighters.

8. By and with the licence and consent of the Crown and/or of the defendants or their predecessors the plaintiff and/or its predecessors in title made and built embankments and retaining walls and strengthened and consolidated the bank of the said river so that by such and by filling and reclamation and building the land above high-water mark for the time being has been extended and a wharf decking and approaches thereto erected towards the said channel which has been artificially widened and deepened.

9. The plaintiff and its predecessors in title have continuously occupied the said land so extended and the said wharf decking and approaches and conducted thereon the said undertaking and from time to time for that purpose have at great cost constructed and

erected valuable permanent improvements buildings and fixtures partly upon that part of the land which became available by such extension partly in the said river and partly upon the remaining land and they have continued to exercise such riparian rights.

10. The Crown and the defendants or their predecessors were or ought to have been aware of the acts matters and things alleged in the last two preceding paragraphs but made no objection thereto and claimed no right title or interest in any part of the said land prior to the grievances complained of in par. 13 hereof.

11. (a) The plaintiff and its predecessors in title have been in exclusive possession of the whole of the said lands including such extended part up to the existing water's edge and of the said wharf decking and approaches for a period of 30 years and upwards and any estate or interest therein to which the defendants might otherwise have been entitled has been extinguished.

(b) The plaintiff relies on Part II. of the *Real Property Act* 1915 and the corresponding previous enactments.

12. There was in force on 1st January 1877 a licence in relation to the land and/or the wharf in the next paragraph mentioned within the meaning of sec. 52 of the *Melbourne Harbour Trust Act* 1915 and such licence continues in force.

13. The defendants assuming to act under sec. 54 of the *Melbourne Harbour Trust Act* 1915 on or about 19th August 1919 gave a notice to the plaintiff purporting to cancel the licence or right (if any) held by or granted to the plaintiff or its predecessors in title to occupy hold or use the extended part of such land and the wharf or jetty thereon and requiring the plaintiff to give up possession of the said land and wharf or jetty to the defendants at or before the expiration of three calendar months from the service thereof.

14. The defendants threaten to and will unless restrained issue their warrant under the said section to the sheriff of Victoria requiring him to deliver possession of the said land to the defendants or some person named by the defendants and the defendants wrongfully claim that the plaintiff has no right or title therein.

14A. Alternatively, if the extended part of such land and/or the soil whereon the buildings wharf decking and approaches shown as being in the area mentioned in the defendants' said notice now

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stand or any part thereof is vested in the defendants (which it does not admit) the plaintiff is by virtue of its ownership of such land as is vested in it in fee simple entitled to exercise riparian rights over the said extended part of such land and/or the said wharf decking and approaches and/or the land wharf and buildings shown in the said area without interruption by the defendants and/or is entitled to restore or to have restored to its natural condition the said area and to exercise riparian rights thereover.

15. If the said section applies to the said land the Commissioners in giving such notice did not act in bona fide exercise of the powers thereby conferred nor for any of the purposes of the *Melbourne Harbour Trust Act* 1915.

And the plaintiff claims :—

(1) A declaration that it is entitled to an estate in fee simple in the whole of the said land bounded on the east by the actual stream of the said river.

(2) Alternatively, that it is entitled perpetually or indefinitely to the exclusive use and occupation of so much thereof as abuts upon such stream and lies between the same and the boundary of the plaintiff's land.

(3) A declaration that the plaintiff is entitled to exercise the rights of a riparian owner in respect of the said river over the land and wharf or jetty mentioned in such notice or to an easement for the like purposes appurtenant to the land to which the plaintiff is entitled in fee simple.

(4) An injunction restraining the defendants their agents and servants from issuing such warrant or dispossessing or taking any step to dispossess the plaintiff of any part of the said land or interfering with the possession or enjoyment by the plaintiff of the same.

(5) Such further or other relief as to the Court seems right and in particular an order that the defendants do comply with any conditions duties or obligations whether precedent or otherwise which the Court may hold to have been unfulfilled.

The amended defence and counterclaim were as follows :—

In their amended defence the defendants to the amended statement of claim said :—

1. They admit par. 1 of the amended statement of claim.

2. Subject to the production of the certificate of title referred to in par. 2 of the amended statement of claim they admit that the plaintiff is seised of an estate in fee simple in so much of the land referred to in the said certificate of title as is not land included within the First Schedule to Act No. 552, the First Schedule to Act No. 763, the Second Schedule to Act No. 1119 and Part I. of the Second Schedule to the *Melbourne Harbour Trust Act* 1915. The said Schedules include and the said certificate of title and the Crown grant hereinafter referred to and the plan of allotment 4 in the Crown survey referred to in the said paragraph and each of them exclude all the land on the western side of the River Yarra below the mean high-water mark as it existed in 1850. Save as aforesaid the defendants deny each and every allegation contained in par. 2 of the amended statement of claim.

2A. On the true construction of the said certificate of title the land included therein extends on the eastern boundary thereof only up to the mean high-water mark of the said River Yarra as it existed in 1850, the said river having at all times been at the said land a tidal navigable stream.

2B. Alternatively, if upon its true construction the said certificate of title includes any land to the east of the said mean high-water mark of the River Yarra as it existed in 1850, such land so included was so included by wrong description of parcels or boundaries.

Particulars.—The said certificate of title was issued to the plaintiff on 4th July 1890 in pursuance of an application made by the plaintiff to the Commissioner of Titles to amend certificate of title volume 774 folio 154622. The said certificate of title so issued upon the said application showed as the eastern boundary of the plaintiff's land the River Yarra. The true eastern boundary of the plaintiff's land was and is not the River Yarra as it existed in 1890, but was and is the said mean high-water mark of the River Yarra as it existed in 1850.

2C. Alternatively, if upon its true construction the said certificate of title includes any land to the east of a traverse appearing upon a plan of survey by one Cunningham lodged with the said application

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and thereon described as "retaining wall," such land so included was so included by wrong description of parcels or boundaries.

Particulars.—The said certificate of title was issued to the plaintiff on 4th July 1890 in pursuance of the said application. The said application showed as the eastern boundary of the plaintiff's land the line of the said traverse. The said certificate of title so issued upon the said application showed as the eastern boundary of the plaintiff's land the River Yarra. The true eastern boundary of the plaintiff's land was and is not the River Yarra as it existed in 1890, but was and is the line of the said traverse.

2D. If the said Crown grant or the said certificate of title on its true construction vested or vests in the plaintiff any land which at the time of the said Crown grant was part of the bed or banks of the River Yarra or was then daily covered by the water of the said river, such vesting was and is in derogation of the public right of navigation on the said river and was and is illegal and void.

3. The defendants admit that the land mentioned in Crown grant No. 24417 was alienated from the Crown as alleged in par. 3 of the amended statement of claim, but say that such alienation was subject to reservations and exceptions in such Crown grant expressed, and save as aforesaid deny each and every allegation contained in par. 3 of the amended statement of claim.

4. The defendants admit that the land mentioned in the said Crown grant was in 1850 bounded on the east by the River Yarra in 1850 known as Hobson's River. Save as aforesaid the defendants deny each and every allegation contained in par. 4 of the amended statement of claim.

5. The defendants admit that the said river was at all material times for some distance above the said land a tidal navigable stream. Save as aforesaid they deny each and every allegation contained in par. 5 of the amended statement of claim.

6. They deny each and every allegation contained in par. 6 of the amended statement of claim.

7. The plaintiff and its predecessors in title have at all times material conducted upon the land mentioned in the said Crown grant a large mercantile undertaking in the course of which it was convenient for the plaintiff and its said predecessors to have regular

access to the channel of the said river for the lading and unlading of ships and lighters. Save as aforesaid the defendants deny each and every allegation contained in par. 7 of the amended statement of claim.

8. They admit that works were done by the plaintiff or its predecessors in title and that thereby and by filling and reclamation a strip of dry land has been raised between the land which was above high-water mark at the time of the said Crown grant and the said river as it now flows and that the said strip of raised dry land extends beyond the high-water mark at the time of such grant and that the said river has been artificially deepened by the defendants. Save as aforesaid they deny each and every allegation contained in par. 8 of the amended statement of claim.

8A. Alternatively, as to any licence or consent alleged in par. 8 of the amended statement of claim they say that (a) the same was a licence or consent to erect a jetty only and was subject to the conditions that the said jetty should be temporary only, and should not extend further into the river than 40 feet beyond the end of the then existing jetty ; it is not alleged in the amended statement of claim that the said works consisted of a jetty only or that the said works extended not further into the river than 40 feet beyond the end of the then existing jetty ; in fact the said works consisted of more than a jetty, and did extend further into the river than 40 feet beyond the end of the then existing jetty : (b) the alleged licence or consent was not communicated to the plaintiff or to its predecessors in title : (c) they had no power to grant the same and the same is therefore devoid of legal effect : (d) the term of the same has expired or was determined by notice from the defendants to the plaintiff dated 19th August 1919 : (e) they served on the plaintiff on or about 19th August 1919 a notice that they required possession of the said strip of land and of the wharves or other erections thereon : (f) the piers or wharves mentioned in par. 8 of the amended statement of claim were not private property at the passing of the *Melbourne Harbour Trust Act* 1876 and never obtained the licence of the said Commissioners and the defendants required and require possession thereof in order to remove and/or alter and/or repair the same and to perform the duties imposed

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upon the defendants by the *Melbourne Harbour Trust Act* 1915: (g) the same was not in writing: (h) the secretary for the time being of the defendants did not at any time certify upon any licence alleged that the conditions thereof had been duly performed: (i) there was no consideration or alternatively no fair and reasonable consideration paid for the same: (j) the consideration for the same was not such as in the judgment of the defendants was deemed to be the true and fair worth and value thereof to the person obtaining the same: (k) no valuation was made prior to the granting of the same and no valuation was prior to such grant signed or certified by the person making such valuation to be true and accurate to the best of his judgment and belief: (l) no notices as required by sec. 86 of the *Melbourne Harbour Trust Act* 1915 and corresponding prior enactments were given or served prior to the grant of the same.

8B. The licence (if any) from the defendants' predecessors was not made or given in accordance with the *Land Act* 1869 and was *ultra vires* and invalid.

9. The defendants admit that the plaintiff and its predecessors in title have used the said strip of land and piers and wharves and have erected buildings and fixtures thereon. Save as aforesaid they do not admit any of the allegations contained in par. 9 of the amended statement of claim.

9A. The plaintiff and its predecessors in title have at all times or alternatively at all times until shortly prior to the issue of the writ herein used and/or occupied the same as under and subject to the jurisdiction and powers of the defendants and as part of the Port of Melbourne as defined in the *Melbourne Harbour Trust Act* 1915 and corresponding prior enactments and not otherwise.

10-11. They deny each and every allegation contained in pars. 10 and 11 of the amended statement of claim.

12. They deny each and every allegation contained in par. 12 of the amended statement of claim.

12A. Alternatively, if the allegations contained in par. 12 of the amended statement of claim are true the plaintiff by reason thereof ought not to be admitted to allege and is estopped from alleging that the title of the defendants to the land referred to in the said paragraph has been extinguished or that the plaintiff is entitled

to an estate in fee simple therein or that it is entitled perpetually or indefinitely to the exclusive use and occupation of any part thereof or that it is entitled to exercise any rights in the capacity of a riparian owner in respect of the said river over any of the said land.

13. The defendants admit that they gave the notice mentioned in par. 13 of the amended statement of claim on or about 19th August 1919. Save as aforesaid they do not admit any of the allegations contained in par. 13 of the amended statement of claim.

13A. The land referred to in the notice mentioned in par. 13 of the amended statement of claim was land vested in the defendants of which the defendants desired to take possession and the said notice was given under the authority and in execution of the *Melbourne Harbour Trust Act* 1915.

14. The defendants do not admit any of the allegations contained in par. 14 of the amended statement of claim.

15. They deny each and every allegation contained in par. 15 of the amended statement of claim.

16. They do not allege and never have alleged that the plaintiff is not entitled to an estate in fee simple in possession in so much of the said land as is not included in any of the Schedules mentioned in par. 2 hereof.

17. The remainder of the said land, being the strip of land mentioned in par. 8 hereof, and all wharves piers or erections thereon or abutting thereon on the east are and at all material times have been continuously vested in the defendants by virtue of sec. 47 of Act No. 552, sec. 12 of Act No. 763, sec. 46 of Act No. 1119 and sec. 46 of the *Melbourne Harbour Trust Act* 1915, and the plaintiff and its predecessors in title had no estate or interest in the said strip of land at the time of the passing of the *Melbourne Harbour Trust Act* 1876.

18. Alternatively, the said strip of land as it existed from time to time was, when the plaintiff and its predecessors began to occupy the same, Crown land, and no part of the said strip of land was at any time alienated by the Crown, and the defendants rely upon sec. 17 of the *Real Property Act* 1915 and the corresponding prior enactment or enactments.

19. Alternatively, the land alienated by the said Crown grant

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No. 24417 was so alienated before the passing of the *Water Act* 1905, and the bed and banks of the said river as existing at the date of the said Crown grant are to be deemed to have been and remained the property of the Crown. The strip of land mentioned in par. 8 hereof is part of the said bed and/or banks as then existing and is the property of the Crown subject only to the rights of the defendants conferred upon the defendants by the Acts mentioned in par. 2 hereof. And the defendants rely upon secs. 4 and 5 of the *Water Act* 1915 and the corresponding prior enactment or enactments.

20. The said strip of land was at the time of the passing of the *Melbourne Harbour Trust Act* 1876 and at all times since has been and is part of the Port of Melbourne and is subject to the exclusive control and management of the defendants.

21. It is and at all material times was *ultra vires* the defendants to alienate or part with the said strip of land or any part thereof or to confer upon the plaintiff or its predecessors in title expressly or by implication from conduct or otherwise howsoever any rights therein or thereover save in accordance with the provisions of the *Melbourne Harbour Trust Act* 1915 and the corresponding prior enactment or in any way or by any means to part with or fetter the exclusive control and management of the Port of Melbourne conferred upon them by the said Acts, or to bind themselves not to use or in any way to part with or fetter or prejudice the exercise of any of the powers conferred upon them by the said Acts or any of them.

21A. It was at all times *ultra vires* the defendants and their predecessors to grant expressly or by implication a perpetual or indefinite right to the exclusive use and occupation of any part of the Port of Melbourne.

22. The wharf or jetty mentioned in the notice referred to in par. 13 of the amended statement of claim is in part erected over the bed and/or banks of the said river as now existing and not upon the land alienated by the said Crown grant or any part thereof or upon the said extended land or any part thereof, and the plaintiff has no right title or interest in to or over any part of the said bed or banks as now existing.

In their amended counterclaim the defendants say :—

1. They repeat pars. 17 and 20 of the amended defence, and the defendants counterclaim

(1) For possession of the said strip of land and all wharves piers and erections thereon or abutting thereon on the east;

(2) For a declaration that the said land piers wharves and erections are part of the Port of Melbourne, and are vested in and subject to the exclusive control and management of the defendants.

The reply and defence to the counterclaim as amended were as follows :—

The plaintiff as to the amended defence says :—

1. Save as to admissions therein contained it joins issue thereon.

2. It will object that pars. 2A, 2B, 2C, 8A, 9A, 18, 19, 20 and 21 afford no defence to the plaintiff's statement of claim.

3. The plaintiff and/or its predecessors in title in building the piers wharves retaining walls and in strengthening extending and consolidating the bank of the river so that by such means and by filling and by reclamation their land was extended beyond the high-water mark at the time of the Crown grant and in constructing and erecting valuable permanent improvements buildings and fixtures partly upon that part of the land which became available by such extension as is alleged in pars. 8 and 9 of the statement of claim acted as the defendants and/or their predecessors well knew upon the belief that such piers wharves retaining walls bank and the land so extended would and did become its or their property and in reliance upon such belief as the defendants and/or their predecessors well knew expended large sums of money thereon but neither the defendants nor their predecessors made any objection to it so acting or claimed any right title or interest in any part of the said land prior to the grievance complained of in par. 13 of the statement of claim wherefore the defendants are precluded and estopped from setting up or relying upon the matters alleged in pars. 8A, 17, 18 and 19 of the defence.

4. As to pars. 17, 19 and 20 of the amended defence it says that if any of the said land therein mentioned was vested in the defendants (which it does not admit) it was so vested subject to the estate and interest of the plaintiff referred to in pars. 2 to 12 of the statement of claim.

4A. If any of the land mentioned in the defendants' said notice

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is vested in the defendant which is not admitted the plaintiff is by virtue of its ownership of such land as is vested in it in fee simple entitled to exercise riparian rights over the said area and/or the wharf and decking and approaches thereto shown therein without interruption by the plaintiff and/or is entitled to restore or to have restored to its natural condition the said area and to exercise riparian rights thereover.

In its defence to the amended counterclaim the plaintiff says :—

1. It denies each and every allegation in pars. 17 and 20 of the amended defence as repeated by par. 1 of the counterclaim.

2. It repeats pars. 3 and 4 of the reply.

3. It repeats pars. 2 to 12 of the amended statement of claim and will contend that the land mentioned in pars. 17 and 20 of the defence as repeated was subject to the estate and interest of the plaintiff described in the said pars. 2 to 12.

4. It will rely upon the provisions of sec. 52 of the *Melbourne Harbour Trust Act* mentioned in par. 12 of the statement of claim.

The material facts sufficiently appear in the judgments hereunder.

The action was heard by *Mann* J., who made an order declaring (1) that the plaintiff was entitled in fee simple to the whole of the land bounded on the east by the River Yarra and lying between that river and the eastern boundary of the land included in the plaintiff's certificate of title, volume 2275, folio 454930 ; (2) that the plaintiff was entitled to the perpetual use and occupation of the wharf the subject matter of the action subject to the powers of management and control conferred upon the defendants by the *Melbourne Harbour Trust Act* 1915 and subject to all public rights in or relating to the said river ; (3) that the plaintiff was entitled as owner of the adjoining land to a right of easement over that portion of the river bed lying under the said wharf to have and keep the said wharf erected upon piles in the said portion of the bed in such manner as to offer no further obstruction than then existed to the flow of the water beneath the wharf ; ordering that the defendants be perpetually restrained from issuing any warrant under sec. 54 of the *Melbourne Harbour Trust Act* 1915 requiring the sheriff to deliver to the defendants possession of the land bounded on the east by the River Yarra and lying between that river and the eastern

boundary of the land included in the said certificate of title or any part thereof and from interfering with the plaintiff's possession and enjoyment of any part of the said land; and ordering that the counterclaim be dismissed.

From that decision the defendants now appealed to the High Court.

Latham K.C. (with him *Fullagar*), for the appellants. The certificate of title issued to the respondent in 1890 could not go beyond the Crown grant of 1850, and on its proper construction gave a title only to the mean high-water mark in 1850 with any extension that afterwards occurred by natural accretion but not by artificial encroachment. Par. 14A of the statement of claim has no support in law, for riparian rights do not include a right to build a wharf in the bed of a river or to encroach upon the river. Under sec. 46 of the *Melbourne Harbour Trust Act* 1915 the bed and soil and shores of the river were absolutely vested in the appellants and the only rights and interests which are preserved are those in the pieces of land mentioned in that section. Secs. 4, 5 and 6 of the *Water Act* 1915 are an answer to any claim of the respondent to the bed of the river. The doctrine of estoppel cannot be used to give efficacy to acts which are *ultra vires* (*Ayr Harbour Trustees v. Oswald* (1); *E. A. Clark & Son Pty. Ltd. v. Melbourne Harbour Trust Commissioners* (2)). A riparian owner who builds a wharf in the bed of the river or who reclaims part of the river bed by an embankment against the will of the owner of the bed ceases to be a riparian owner, for he gains no right to the wharf or embankment and ceases to be an owner of land adjoining the water. At common law a riparian owner has no right to place an obstruction in a navigable river (*Attorney-General* v. *Terry* (3)), nor has the Crown or the owner of the foreshore (*Williams* v. *Wilcox* (4)). The Crown cannot make a grant of the foreshore so as to be detrimental to the *jus publicum* (*Attorney-General* v. *Parmeter* (5); *Bickett* v. *Morris* (6); *Attorney-General* v. *Earl of Lonsdale* (7); *Attorney-*

(1) (1883) 8 App. Cas. 623, at p. 634.
(2) (1903) 29 V.L.R. 467; 25 A.L.T. 131.
(3) (1874) L.R. 9 Ch. 423, at p. 432.
(4) (1838) 8 Ad. & E. 314, at p. 329.
(5) (1811) 10 Price 378.
(6) (1866) L.R. 1 Sc. App. 47, at p. 60.
(7) (1868) L.R. 7 Eq. 377, at p. 387.

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General v. *Tomline* (1)). If a riparian proprietor makes any encroachment upon the bed of the river, the owner of the bed becomes owner of the obstruction and may remove it; and if the Crown or the owner of the bed of a river makes an embankment in the bed of the river between the riparian proprietor and the water, the riparian owner may cross the embankment to exercise his riparian rights or may remove the embankment. (See *Marshall* v. *Ulleswater Steam Navigation Co.* (2); *Lyon* v. *Fishmongers' Co.* (3); *North Shore Railway Co.* v. *Pion* (4); *Attorney-General of Southern Nigeria* v. *John Holt & Co. (Liverpool) Ltd.* (5).) An alternative to the view that a riparian owner who reclaims land in the bed of the river is a trespasser is that he still has his riparian rights and may exercise them by going over the embankment but he cannot prevent the Crown from removing the embankment. If the respondent was in that alternative position, it was using the land in a lawful manner and no right of action accrued to the Crown under secs. 18 and 43 of the *Real Property Act* 1915, and the respondent therefore can gain nothing from those sections. There was no such possession by the respondent as would bring those sections into operation for its benefit.

[ISAACS J. referred to *Leigh* v. *Jack* (6).]

The wharf was not a private wharf at the time the *Melbourne Harbour Trust Act* 1876 was passed, and it never afterwards became one. Land can be disposed of by the Crown only in the way prescribed by statute, and no acquiescence in an illegal disposition by an officer of the Crown is of any effect (*Ontario Mining Co.* v. *Seybold* (7)). That principle applies not only to the Crown but to a public corporation such as the appellants are, and no acquiescence by them can make *intra vires* what was originally *ultra vires*. Prior to 1877 the Crown could upon any view of the law have removed the embankment and wharf, for there was no legal licence in force. The *Melbourne Harbour Trust Act* 1876 vested both the embankment and the wharf in the Commissioners. It is clear that in 1877 the respondent's predecessors were not the owners of the disputed land on the north, nor were they the owners of the disputed land on the

(1) (1880) 14 Ch. D. 58, at p. 69.
(2) (1871) L.R. 7 Q.B. 166, at p. 172.
(3) (1876) I App. Cas. 662, at p. 682.
(4) (1889) 14 App. Cas. 612, at pp. 618-619, 621.
(5) (1915) A.C. 599, at pp. 611-615.
(6) (1879) 5 Ex. D. 264.
(7) (1903) A.C. 73, at pp. 79, 83.

south, which was then under water. There was no licence in existence upon which sec. 52 of the *Melbourne Harbour Trust Act* 1915 could operate. Starting from the assumption that *Mann* J. was right in his finding that nothing that was done before 1877 between the appellants' predecessors and the Crown gave any legal rights to the respondent in respect of the embankment or wharf, what occurred afterwards did not give any such rights. As to the wharf, the special case upon which the decision of *dBeckett* J. was given in 1897 (*Melbourne Harbour Trust Commissioners* v. *Colonial Sugar Refining Co.* (1)) shows that it was within the Port of Melbourne. The northern part of the embankment having been made before 1877, no rights in respect of it can be claimed under sec. 82 of the *Melbourne Harbour Trust Act* 1915 or the corresponding sections of the Acts of 1876 and 1890. The Commissioners had no power to dispose of any land comprising embankments made by riparian owners under licence unless the conditions of sec. 82 were complied with, and in fact the conditions were not complied with. All the land in dispute and the wharf were vested in the Commissioners by the *Melbourne Harbour Trust Act* 1876. Sec. 46 of the *Melbourne Harbour Trust Act* 1915 does not apply to preserve any estate or interest of the respondent, first because it had none, and, secondly, because any estate it claims is in the bed or banks of the river and not in the " pieces or parcels of land " referred to in sec. 46. The effect of that section is to continue the vesting which was made by the Act of 1876 and to preclude the application of the Statute of Limitations (*Real Property Act* 1915, secs. 18, 43) in respect of any land which was vested in the Commissioners by the Act of 1876. Sec. 85 is mandatory in its terms, and any licence which the Commissioners might purport to grant in a manner inconsistent with its terms would be *ultra vires* and invalid. There is nothing in this case which can be said to be a licence within that section. There is nothing in the Act which either expressly or impliedly gives the Commissioners power to grant an irrevocable licence. A licence is in its essence revocable (*Wood* v. *Leadbitter* (2); *Hurst* v. *Picture Theatres Ltd.* (3)). The Commissioners have no power to deal with

(1) (1897) 3 A.L.R. 231.
(2) (1845) 13 M. & W. 838.
(3) (1915) 1 K.B. 1, at pp. 10, 13.

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land which is vested in them except in the way provided by the Act (*Ayr Harbour Trustees* v. *Oswald* (1); *Mulliner* v. *Midland Railway Co.* (2)).

[HIGGINS J. referred to *Stourcliffe Estates Co.* v. *Bournemouth Corporation* (3).]

If there cannot be a legal origin for a grant, the Court will not presume that there was such a grant (*Rochdale Canal Co.* v. *Radcliffe* (4); *York Corporation* v. *Henry Leetham & Sons Ltd.* (5); *South-Eastern Railway Co.* v. *Cooper* (6)). The maxim *omnia præsumuntur rite esse acta* cannot be applied to a transaction in respect of which all the facts are known (*Symons* v. *Schiffmann* (7); *Schiffmann* v. *Whitton* (8); *Anderson* v. *Morice* (9); *Ajum Goolam Hossen & Co.* v. *Union Marine Insurance Co.* (10); *Folkestone Corporation* v. *Brockman* (11)). *Ramsden* v. *Dyson* (12) and *Plimmer* v. *Wellington Corporation* (13) are distinguishable, for in both of those cases it was assumed that there was power to make the grant which was alleged to have been made. *Attorney-General of Southern Nigeria* v. *John Holt & Co. (Liverpool) Ltd.* (14) does not apply. That was a case of a subject exercising his right to protect his land from erosion by the sea, and there was a duty on the Crown to protect the foreshore from such erosion and a power in the Crown to grant a licence to the subject to protect the foreshore. That case did not purport to lay down the law as to the riparian owner who reclaimed the foreshore.

Sir Edward Mitchell K.C. and *Owen Dixon* K.C. (with them *Stanley Lewis*), for the respondent. If the acts done on behalf of the Crown before 1877 were null and void under sec. 4 of the *Land Act* 1869, the Crown had then a right to enter upon and resume possession of the wharf and so much of the reclaimed land as then existed, and as the Crown did not exercise that right within 15 years the respondent is, under sec. 43 of the *Real Property Act* 1915,

(1) (1883) 8 App. Cas., at p. 634.
(2) (1879) 11 Ch. D. 611.
(3) (1910) 2 Ch. 12.
(4) (1852) 18 Q.B. 287, at pp. 314, 315.
(5) (1924) 1 Ch. 557.
(6) (1924) 1 Ch. 211.
(7) (1915) 20 C.L.R. 277, at p. 281.
(8) (1916) 22 C.L.R. 142.
(9) (1874) L.R. 10 C.P. 58, at pp. 67, 68.
(10) (1901) A.C. 362, at p. 366.
(11) (1914) A.C. 338, at p. 375.
(12) (1865-66) L.R. 1 H.L. 129.
(13) (1884) 9 App. Cas. 699.
(14) (1915) A.C. 599.

entitled to the land and the wharf. If sec. 4 did not apply, the respondent has an irrevocable licence under which it may keep the land and the wharf. The provisions of secs. 18 and 43 of the *Real Property Act* 1915 apply to the appellants (*Magdalen College, Oxford*, v. *Attorney-General* (1); *Brighton Corporation* v. *Guardians of the Poor of Brighton* (2); *Midland Railway Co.* v. *Wright* (3); *Ayr Harbour Trustees* v. *Oswald* (4); *Iredale* v. *Loudon* (5)), and the respondent's long possession of the reclaimed land had the effect of extending its title to the present water's edge. Sec. 46 of the *Melbourne Harbour Trust Act* 1915 should not be interpreted so as to vest in the Commissioners land to which the respondent had already acquired title. That Act, like the Act of 1890, was a consolidation Act and was not intended to alter the law (*Melbourne Corporation* v. *Barry* (6)). Sec. 32 of the *Acts Interpretation Act* 1890 was properly applied by *Mann* J. to the interpretation of sec. 46. A licence under sec. 81 of the *Melbourne Harbour Trust Act* 1915 may be for a permanent wharf, and it is not necessary that such a licence shall be in writing (*Kearns* v. *Cordwainers' Co.* (7)). Sec. 4 of the *Land Act* 1869 did not apply to land which was part of the bed or banks of a port or navigable river. That Act dealt with the sale and occupation of land. The right of the Crown to grant licences to riparian owners and others to build piers and embankments for the purpose of access to their land was not affected by that Act, but was dealt with by other statutes. So far as that right was not dealt with by other statutes, it remained part of the prerogative of the Crown. If the Crown gave a licence to build a wharf or pier it could not afterwards treat the wharf or pier as an obstruction and remove it unless it was in the nature of a nuisance (*Hargrave's Law Tracts*, p. 85; *Angell on Tide Waters*, p. 196), and there is no allegation here of a nuisance.

[HIGGINS J. referred to *R.* v. *Lord Grosvenor* (8).]

The wharf in question was a private wharf, and the existence of private wharves is contemplated by the Melbourne Harbour Trust Acts. Having been built before 1877, this wharf must be taken to

(1) (1857) 6 H.L.C. 189.
(2) (1880) 5 C.P.D. 368.
(3) (1901) 1 Ch. 738.
(4) (1883) 8 App. Cas., at p. 634.
(5) (1908) 40 Can. S.C.R. 313.
(6) (1922) 31 C.L.R. 174, at p. 187.
(7) (1859) 6 C.B. (N.S.) 388, at p. 391.
(8) (1819) 2 Stark. 511.

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have been constructed under the authority of the prerogative. [Counsel referred to *Plimmer* v. *Wellington Corporation* (1); *Liggins* v. *Inge* (2); *Booth* v. *Ratté* (3).] It should be presumed as a matter of fact that a licence was granted by the Crown to erect the wharf. The presumption arises from the facts that took place with the knowledge of every one concerned. *Attorney-General of Southern Nigeria* v. *John Holt & Co. (Liverpool) Ltd.* (4) establishes the principle that if a wharf is constructed by a riparian owner which the Crown might license and the Court can infer that the Crown knew what was being done and stood by, so that the owner might assume that the Crown was permitting the construction of the wharf as a permanent structure, then a licence will be presumed (see *McLean Bros. & Rigg Ltd.* v. *Grice* (5)). The power in sec. 87 of the *Melbourne Harbour Trust Act* 1915 to grant a licence includes power to grant an irrevocable licence, and if when the licence was granted no time was mentioned the licence is perpetual. If the only condition of the licence which was not complied with was the payment of a reasonable rent, the principle of *Duke of Beaufort* v. *Patrick* (6) would prevent the respondent from being dispossessed. Sec. 46 was not intended to take away riparian rights or to affect a title acquired by adverse possession in the lands vested in the Commissioners by the Act of 1876. An intention to take away property should not be imputed to the Legislature unless it is expressed in clear terms (*Commissioner of Public Works (Cape Colony)* v. *Logan* (7)). The grant of land bounded by a river is a shifting freehold (see *Scratton* v. *Brown* (8); *Smart & Co.* v. *Suva Town Board* (9)), and in this case the eastern boundary of allotment 4 shifted as the mean high-water mark shifted, and, when the *Melbourne Harbour Trust Act* 1915 was passed, that boundary was where in fact and in law it now exists. There was, by what occurred prior to 1877, a *de facto* settlement of that eastern boundary, and the long-continued possession by the respondent justifies a presumption that there was such a settlement. That eastern boundary is the

(1) (1884) 9 App. Cas., at p. 710.
(2) (1831) 7 Bing. 682.
(3) (1890) 15 App. Cas. 188.
(4) (1915) A.C. 599.
(5) (1906) 4 C.L.R. 835.
(6) (1853) 17 Beav. 60.
(7) (1903) A.C. 355.
(8) (1825) 4 B. & C. 485.
(9) (1893) A.C. 301.

western boundary at that place of the land vested in the Commissioners. The *Land Act* 1869 did not prevent an acquiescence by the Crown in the settlement of a boundary in that way. The certificate of title issued in 1890 accurately described the state of things which then existed. At that time the boundary was fixed on the ground and the Crown acquiesced in that being done under circumstances which, as against the Crown, fixed the boundary. Sec. 46 of the *Melbourne Harbour Trust Act* 1915 is not the vesting section but sec. 11 is, and the latter section shows that it was not intended to make a new title in 1915. The words of sec. 46 are not apt to bring about an extinction of rights which had already been acquired. The licence to erect the wharf imported a licence to use it. The licence to erect, having been executed, was ended, and there remained the licence to use. The existence of the wharf, therefore, could never be a violation of the right of the Crown. The subsequent conduct of the Crown and the Commissioners might well have induced the belief that the wharf was to be allowed to remain in position for an indefinite time for the use of the respondent. The respondent thus obtained an equitable easement to continue to use the wharf. [Counsel also referred to *Portsmouth Corporation* v. *Smith* (1); *Somerset Coal Canal Co.* v. *Harcourt* (2); *De Bussche* v. *Alt* (3).]

Latham K.C., in reply. Secs. 18 and 43 of the *Real Property Act* 1915 do not apply to land vested in the Commissioners. Where Parliament has indicated that land shall be dedicated to a particular public purpose, the operation of those sections is excluded. Public rights cannot be defeated by acquiescence (*South Australia* v. *Victoria* (4)). The wharf in this case was not a private wharf. A private wharf must at a past date have been private property and must have been licensed in a formal manner. The question of the settlement of a doubtful boundary is not open on the pleadings. From acquiescence or quiescence no agreement to settle the boundary can be presumed.

Cur. adv. vult.

(1) (1885) 10 App. Cas. 364, at pp. 371, 375.
(2) (1857) 24 Beav. 571.
(3) (1878) 8 Ch. D. 286.
(4) (1911) 12 C.L.R. 667, at p. 725.

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June 9.

The following written judgments were delivered :—

ISAACS J. This litigation began by the respondent, the Colonial Sugar Refining Co. Ltd., suing the appellants, the Melbourne Harbour Trust Commissioners, in the Supreme Court of Victoria, to obtain declarations respecting the Company's proprietary rights in relation to land. The action was primarily brought to protect the Company from the anticipated consequences under sec. 54 of the Trust's statute (Act No. 2697 of 1915),—namely, ejection by the sheriff—of non-compliance with a notice from the Trust dated 19th August 1919. The subject matter of the notice and the action is a strip of land immediately fronting the River Yarra and also two wharves or jetties standing in the river in front of the strip of land. The method of protection adopted was by seeking declarations of right. But, first, it is necessary to distinguish between various portions of the property included in the notice. The main portion of the strip in dispute lies to the north and will be referred to, where necessary, as the northern portion; the rest, where necessary, will be called the southern portion of the strip. These two portions are claimed under entirely different circumstances. A third portion of the property included in the notice consists of the southern of the two wharves. It is said by the appellants that that wharf is as a matter of language included in the declaration of absolute title in favour of the respondent, and should be excised. The respondent does not admit its verbal inclusion but does not claim it, and admits that, if required, it may be clearly excluded. Nothing more will be said about that wharf, except so far as reference is involved in dealing with the reclaimed land in the southern portion of the strip.

The declarations sought were, in effect, (1) that the Company is entitled in fee simple to the strip of land, or, alternatively, to its exclusive use and occupation; (2) that the Company is entitled to exercise riparian rights over the strip of land and the wharf or jetty or else to an easement appurtenant to other land of the Company adjacent to the strip referred to. The Trust, besides contesting the claim by way of defence, added a counterclaim, claiming (1) possession of the strip and all wharves, piers and erections to the east of it; and (2) a declaration that the strip and wharves, piers and erections are vested in and subject to the exclusive control and

management of the Trust. It is needless to follow the technicalities of the pleadings, because the whole contest, as fought at the trial and at this bar, is as to the accuracy on the facts proved of the judgment of *Mann* J. His Honor determined (1) that the Company owns the strip in fee; (2) that the Company is entitled to the perpetual use and occupation of the wharf, subject to the Trust's statutory powers of control and management and subject to all public rights in or relating to the river, and (3) that the plaintiff as owner of the adjoining land is entitled to an easement over the river-bed under the wharf to have and keep the wharf perpetually where it stands. There were consequential orders, which need not be mentioned. The counterclaim was dismissed.

The reasons of the learned Judge were stated with great care and clearness, and may be summarized as follows:—He rejected the contention of the Company that its documentary title carried its ownership to the present stream of the River Yarra. He limited the effect of the documentary title to the former line of the river, which excluded the strip of land in question. He rejected the Company's contention that the Crown prior to 1877 had created any binding obligation or interest whereby the Company could have sustained as against the Crown its claim of ownership or easement in respect of the northern portion of the strip of land. His Honor's opinion as to that rested on sec. 4 of the *Land Act* of 1869. The learned Judge, however, was of opinion that by *longa possessio* of the Company the title of the Trust to the whole strip had been extinguished, and that therefore the Company must be regarded as owner of the strip in fee simple. As to the wharf, which throughout means the northern wharf, his Honor thought the Trust had never been out of possession of the bed of the river, and therefore still remained owner, but that an irrevocable licence had been given to have and use the wharf for ever, and that such licence was lawful and enured to the Company's benefit.

One observation may be advantageously made at the outset. Neither side raised, and therefore the learned Judge did not determine, any issue as to whether the wharf is or might become a nuisance, or, on the whole, an obstruction to the navigation of the River Yarra. The respective claims of the parties and the judgment

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proceed on the basis that, for the purpose of determining the creation or preservation of proprietary rights in respect of the wharf, its actual or possible effect on the navigation of the river always was and still is immaterial.

I proceed now to state in logical order the issues of fact and law which present themselves, without regard to the order in which the parties have approached them.

The Trust founds its position on the *Melbourne Harbour Trust Act* 1915. That is the extant charter of the Trust; and to that Act it must look for its existence, its property, its powers and its duties. The statute is part of the consolidation which the Victorian Parliament undertook in 1915, but it repealed by sec. 2 all prior legislation on the subject, and now stands as the only repository of the will of the Legislature as to the property and powers of the Trust. That is subject to one qualification only: that, if there be any legislative direction elsewhere controlling the construction of the Act—as, for instance, in the *Acts Interpretation Act* 1915—effect must be given to the direction. There is, however, nothing in the existing *Acts Interpretation Act* which would affect the relevant portions of the Harbour Trust Act, and I am unable to see any advantage in discussing the effect of the former and now repealed *Acts Interpretation Act* on the former and now repealed Harbour Trust Act.

The *Melbourne Harbour Trust Act,* speaking as at 6th September 1915, first enacted by sec. 2 a repeal of existing law with a saving proviso which is important. Part I. of the Act is devoted to the constitution of the Trust, declaring the then Commissioners to be deemed appointed under the Act, making them a body corporate. But it is a *new* corporation, just as much as if there never had been such a corporation. Sec. 9 makes a legislative appointment of the then present Commissioners as the first Commissioners under the Act. Sec. 11, which is an important provision in relation to the present case, effects a transfer to the present corporation of all property, real or personal, and all powers, authorities, immunities, rights, privileges, functions, obligations and duties and liabilities existing in the earliest corporation in 1912, immediately before the

existence of the immediate predecessors of the present corporation. I shall return to this section presently.

Under Part III., headed " Property and Powers of Commissioners, " we find sec. 46, which is in these terms :—" The bed and soil and shores of the waters and the pieces or parcels of land within the metes and bounds described in Parts I. and III. of the Second Schedule to this Act excluding therefrom the pieces or parcels of land within the metes and bounds described in Part II. of the said Schedule are hereby declared to have been vested in the Commissioners upon trust for the purposes of the said Act, and the same shall continue to be vested in the Commissioners upon trust for the purposes of this Act, but subject to the estate and interest of any person in such pieces or parcels of land existing at the time of the passing of the *Melbourne Harbour Trust Act* 1876 and to the right of His Majesty to resume possession at any time without payment of compensation of any land required for purposes of national defence or for giving ingress egress and regress to and from the shore or for the purpose of continuing the direct channel from Hobson's Bay at Port Melbourne in and upon the land reserved for that purpose through and into the River Yarra Yarra." It is contended on behalf of the Trust that sec. 46, speaking in the present—that is, as at 6th September 1915—vests in the new corporation by clear and unambiguous words all " the bed and soil and shores of the waters and the pieces or parcels of land within the metes and bounds " mentioned, and vests that property absolutely and unqualifiedly upon trust for the purposes of the Act subject only to three reservations, namely, (1) the estate and interest of any person in such pieces or parcels of land existing in 1876 ; (2) Crown power of resumption, and (3) rights saved by sec. 2. The contention is that, even though apart from the new legislation it could be held that by operation of the Statute of Limitations (*Real Property Act*, secs. 18 and 43) the Commissioners' title to land was extinguished prior to 1915, the clear and emphatic words of sec. 46 vest the land absolutely in the Trust. Before that is dealt with some attention must be given to sec. 11. That section is a reproduction of sec. 4 of the Act of 1912 (No. 2449). By that Act the then existing harbour corporation (which I shall call the first corporation) was

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abolished, and a new one (the second corporation) was brought into being. But the Act of 1912 took a short cut as to property and powers. Sec. 4, which was in practically the same terms *mutatis mutandis* as sec. 11 of the present Act, effected a statutory and complete transfer of all property and powers, rights and obligations, &c., from the first to the second corporation. The specific enactments as to property and powers, &c., were not repeated. They were found by reference to the Act of 1890 and its amendments, and to what had been done under and in pursuance of those Acts, and also, I may add, to whatever events the relevant law had operated upon to affect rights and obligations. The first corporation stepped out of its shoes and the new corporation stepped in; but the shoes were still the old shoes. In 1915, however, the same course was not adopted. The present Act independently constitutes a new corporation (the third), and does not content itself with the old shoes. It entirely repeals the old Act of 1890 and all other Acts, including both the Act of 1912 and all those which that Act left unrepealed. It frames for itself a code both as to property and powers. It even alters some of the sections—as, for instance, in sec. 48. It enacts in relation to the new (third) corporation a new independent vesting section as to the Port, namely, sec. 46 as part of the new Part III., headed "Property and Powers of Commissioners." It enacts its own saving section (sec. 2) so as to preserve all things done "under the said Acts," that is, the Acts now repealed. But it adds by sec. 11 the provisions of sec. 4 of the Act of 1912. Sec. 11 must be closely examined. It declares that (1) all property, real and personal, and all powers, authorities, immunities, rights, privileges, functions, obligations and duties and liabilities which (2) immediately before the appointment of Commissioners under the *Melbourne Harbour Trust Act* 1912 were vested in or imposed upon the Melbourne Harbour Trust Commissioners by the *Melbourne Harbour Trust Act* 1890 or by any other Acts or by any means whatever, shall (3) by virtue of this Act (4) be and become transferred to and vested in and imposed upon and executed by (5) the Commissioners appointed pursuant to this Act. In other words, the property and functions, &c., which by sec. 4 of the Act of 1912 were transferred from the first corporation to the second,

are now by sec. 11 transferred from the second to and vested in the third. I am not very sure what is the total effect of that section. Standing by itself, it would not do more or less than put the third corporation in 1915 in exactly the same position as that in which the second corporation was put in 1912. That is, it transfers the same property and the same functions, rights and obligations, &c., unaltered in any respect whatever by anything that had happened between 1912 and 1915. But, as to functions and powers, clearly the independent and specific enactments as to functions which follow must be regarded as the really operative and prevailing enactments. One could not go back by force of sec. 11 to functions existing under the repealed Acts, and say "these are the functions of the present corporation." That could have been and must have been said under the Act of 1912, because that Act depended solely on incorporation by reference. Verbally there is an overlapping of functions when sec. 11 and other sections are read together. But operatively the specific enactments must govern. Similarly with respect to property. Sec. 11 verbally includes all property, including the Port which in 1912 under the Act of 1890 the first corporation held immediately before the Commissioners under the Act of 1912 were appointed. It does not include other property acquired or even other contracts entered into by the second corporation, and as to that other property there appears to be a gap, which may or may not be worth attention, for sec. 2 does not *transfer*, it *preserves*. But when we come again to Part III. we find an overlapping not only of powers but also of property. Sec. 46 very specifically vests in the third corporation in terms to be presently considered the Port as scheduled. It was urged that sec. 46 is not a vesting section but a mere descriptive section, and that sec. 11 is the only vesting section. I have said sufficient to show that this cannot be so. Besides, it is not at all clear that the Port as described in the Schedule to the Act of 1915 is the same as the Port as described in the Schedules to the Act of 1890 and other Acts as adopted in 1912. The Schedule to the Act of 1915 was, on the face of it, specially framed anew at some considerable time after 1890. After examining the repealed Acts I believe it appears for the first time in 1915. Obviously, when that Schedule is compared with

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the Schedule of 1890, the later one represents a carefully surveyed plan, and I do not think it an unreasonable inference to conclude that it represents an effort on the part of Parliament to consolidate and bring up to date in one clear Schedule all that had been enacted by several statutes as constituting the Port and to make clear the boundaries of the Port in 1915. In any event, the 1915 Schedule is very distinct and, by reason of its trigmometrical lines and exact measurements, an exact delineation of the boundaries of the Port. It appears by Part II. of the Schedule that what the Legislature was consciously doing in Part I. was marking "the outside boundaries." When that is borne in mind it is manifest that sec. 46 cannot be read as a subordinate section.

Sec. 46, however, is not clear of some ambiguity, and needs help towards a complete construction. I do not think, however, that there is any ambiguity with respect to the questions directly involved in this case. But, as the argument for the Company has rested to a considerable extent on the vagueness of the section, it is well to consider it generally. It enacts, first, that the bed and soil and shores of the waters and the pieces or parcels of land within the metes and bounds described in Part I. of the Schedule, excluding Part II., "are hereby declared to have been vested in the Commissioners for the purposes of the said Act." Before going further, there is some ambiguity. What is meant by "the said Act." So far as concerns the section itself, the identity of "the said Act" cannot be discovered, because the only Act previously mentioned in the section is "this Act" and it is impossible that "this Act" can be intended by "the said Act." It is impossible because of the words "to have been vested," that is, vested before "this Act" existed. And, further, the contrast is immediately afterwards drawn by the use of the words "this Act." What, then, is meant by "the said Act"? Certain positions are definite. First, "Commissioners" by sec. 3 mean "The Melbourne Harbour Trust Commissioners," that is, the Commissioners for the time being according to the context. Secs. 10, 11 and 12 exemplify this. That is to say, "the Commissioners" is only a short form of the full title and must be applied in point of time in accordance with the collocation. Next, "the said Act" is prior legislation. The prior legislation, however,

that is mentioned previously is various. It includes even the *Marine Act* 1915 (see sec. 39). But that is transparently inappropriate to "the said Act" in sec. 46. Other prior legislation is mentioned in sec. 2, the repealing section, and there we find the expression "the said Acts." Among "the said Acts" is the Act of 1912 (see Schedule I. to the Act of 1915). And, as by force of sec. 4 of that Act, as mentioned, all the property vested by the others of "the said Acts" was vested in the second corporation for the purposes of the Act of 1912 (which incorporated all the purposes of the other Acts), I take it that "the said Act" in sec. 46 refers to the Act of 1912. We may then regard sec. 46 as declaring that the lands in Part I. of the Schedule of the Act of 1915 (excluding those in Part II.) "are hereby declared to have been vested in the Commissioners of 1912 upon trust for the purposes of the Act of 1912." So far, the scheme of sec. 46 of the Act of 1890 is followed. There can, therefore, be no question, notwithstanding the newer wording of the Schedule and notwithstanding anything that had occurred, that the Port as finally described in Schedule II. must, by force of parliamentary declaration, be taken as having been in law *vested* in the second corporation immediately prior to the 1915 Act, and for the purposes of the Act of 1912. Then says the section: "and the same shall continue to be vested in the Commissioners upon trust for the purposes of this Act." Words, as it seems to me, could not be plainer. The Port as described shall continue to be *vested* in the third corporation. The word "continue" does not, of course, mean continue for ever, no matter what may happen in the future. It means that the lands described, having been up to the present vested in trust for the purposes of the then current Harbour Trust Act in the second corporation, shall, without any break in the continuity of dedication, be in 1915 vested in trust for the purposes of the new Act in the new corporation.

Nothing can be implied as inconsistent with that vesting at that time, and to hold that at that time the strip was not vested in the trust and was vested in the Company would be an inconsistent implication. Whatever exceptions to or qualifications of that declaration are permissible must be found in the Act itself. In sec. 46 the Legislature has expressed some limitations, namely, (1)

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subject to the estate and interest of any person in such pieces or parcels of land existing at the time of the passing of the *Melbourne Harbour Trust Act* 1876 and (2) Crown resumption rights. In sec. 2 also we find legislative saving of agreements, leases and licences, &c., "under the said Acts." But, except the statutory qualifications, sec. 46 is a parliamentary grant (using the word "grant" in a non-conveyancing sense) in 1915 of the land of the Port to the new corporation constituted by the Act itself. The title of the corporation as owner must be taken as existing on 6th September 1915 and, therefore, not to have been destroyed by any operation of the *Statute of Limitations* or otherwise. Further, the source of title is a direct parliamentary enactment, and not the gift, transfer or conveyance of any predecessor. The corporation does not claim through anyone; it does not take such title as anyone else had with all weaknesses, if any: it claims simply by virtue of a statute, which took property from one person and vested that property afresh in another clear of encumbrances except those it chose to preserve. The right to make an entry accrued to the present corporation certainly not earlier than its own existence; and, as it does not claim through the previous corporation, its own right is its only right.

Sec. 46 seems to me a complete answer to all the contentions of the Company except as to statutory licence and as to riparian rights. But, in view of the magnitude of interests involved, the length of time consumed by the trial, and this appeal, and the learning and ability bestowed upon the arguments, it is, in my opinion, very desirable that the parties should know my views upon the contentions raised, assuming sec. 46 to be less potent than I believe it to be.

Proceeding, then, to examine the contentions of the Company, they are (1) that by virtue of its documentary title it is the owner of the reclaimed land, the freehold title shifting with the river; (2) that prior to 1st January 1877—that is, prior to the establishment of any Harbour Trust—the Crown's licence to occupy the northern portion of the strips and make and maintain the wharf had become irrevocable; (3) that, if the licence had not then become irrevocable, it became so under the first Trust early in 1877; (4) that by *longa possessio* ending not later than 1895 a statutory title by limitation had accrued to the Company both to the northern

portion of the strip and to the wharf; (5) that, alternatively, an easement as declared with regard to the wharf had been created; (6) that the southern portion of the strip had been irrevocably licensed by the Trust in 1895; (7) that by *longa possessio* since 1895 it had passed to the Company; (8) that the Company has riparian rights over both portions of the strip and over the wharves while standing. The contentions both of fact and of law will be better understood with a more precise statement as to the title, situation and dimensions of the relevant properties.

In 1850 a Crown grant in fee simple was made to George Ward Cole of a piece of land described as "all that piece or parcel of land in our said territory containing by admeasurement 12 acres and 2 roods be the same more or less situated in the county of Bourke parish of Cut Paw Paw allotment No. 4 of section No. 8 bounded on the north by allotment No. 3, containing 11 a. 1 r. 0 p. bearing west 24 chains 48 links on the west by a line bearing south 5 chains on the south by allotment No. 5 containing 13 a. 1 r. 0 p. bearing east 26 chains 20 links and on the east by Hobson's River being the land sold as lot 92 in pursuance of the proclamation of 26th March 1850 with all rights and appurtenances whatsoever thereto belonging." At that time the land was part of the territory of New South Wales, and, as will be seen, the grant indicated compliance with the relevant Act then in existence, 5 and 6 Vict. c. 36 (1842). The respondent Company is now through several mesne transfers the owner of the land, which had been brought under the *Transfer of Land Act* and the title to which is now evidenced by a registered certificate. That certificate, dated 4th July 1890, describes the land thus: "All that piece of land delineated and coloured red on the map in the margin, containing 13 acres 3 roods seven perches and seven-tenths of a perch or thereabouts being Crown allotment 4 section 8 parish of Cut Paw Paw county of Bourke." The map in the margin delineates a piece of land, the western boundary of which is much more definitely fixed than in the Crown grant. In the grant it is merely "a line bearing south 5 chains." No doubt, the reference in the grant to lot 92 and the proclamation and plans would afford material to fix the western line more or less accurately. But reference

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to the plans in evidence shows discrepancies in measurement and position, and any effort to reconcile them fails. Nothing but guesswork, or, at best, the most doubtful conclusion could now settle the exact position of the western boundary as stated in the grant. The present certificate of title, however, takes as the datum Whitehall Street, a settled public street, and carries the land 1,777 feet 10 inches (admitted to be an error for 1,177 feet 10 inches) eastward to the Yarra River. But there is also the statement that the land is, as in the grant, "Crown allotment 4 section 8 parish of Cut Paw Paw county Bourke." As for the acreage, there is not, when the proverbial inferiority of surveying instruments in the early days is remembered, any necessary discrepancy between "12 acres and 2 roods be the same more or less" and "13 acres 3 roods 7 7/10th perches or thereabouts."

Company's Documentary Title to Reclaimed Land.—So far as that is based upon the certificate of title, it depends on what I may term the surveyor's identification of the reclaimed land with land included in the certificate. It appears from the evidence, and *Mann* J. has worked out very clearly this important part of the case, that not only the wharf but also the disputed strip is not included in the certificate. That is to say, the line of the River Yarra indicated on the plan in the margin of the certificate is intended to be the old line of the river. This is strongly contested on the part of the Company. It is urged that in the certificate the dominant parts of the description are Whitehall Street as the western boundary and the River Yarra as the eastern boundary. It is said that the measurements are subordinate and, as they are inconsistent, should be disregarded. The argument then takes "River Yarra" on the certificate as being the River Yarra as it actually existed in July 1890 when the certificate issued. There are reasons which convince me that that contention should not prevail. Whitehall Street, a public street, is no doubt a fixed boundary. At any moment, in any year and in any circumstances its position is the same. The eastern line of that street is, no doubt, the western boundary of the allotment according to the certificate. Any surveyor wishing to identify the land by means of the certificate could be certain of the western boundary. The eastern boundary, a river, is in its nature and

inherently an unstable factor. The surveyor going to the land to-day—35 years after the certificate—could not, by mere inspection, be sure he was looking at the eastern boundary. He would have to inquire as to circumstances. If he measured and, as in the present instance, found that, starting from the well defined western boundary, the title measurements stopped short of the river, he would at once have to inquire further. A certificate is not the original source of title, it is evidence of title: and, in some respects, conclusive evidence. But once find a contradiction in the description itself, there arises an ambiguity that must be solved according to law, and that varies according to circumstances. What is admissible against one person may not be admissible against another. What is available for one purpose may not be available for another. In the present instance, the known facts are that in 1875 the Victoria Sugar Co. held a certificate of title which simply reproduced the Crown grant. That Company transferred the land to the present Company in 1888, and the present Company applied for a certificate of title in its own name, with certain amendments and upon a certain plan showing the land to be included by the Titles Office. The application was not acceded to in full. But, even in full, the plan lodged showed that the whole of the wharf and the strip now in dispute were part of the River Yarra, and that the Company's land for which the certificate was sought stopped short at the Yarra River by stopping short at the western edge of the strip in contest. The land certainly came to the present water's edge in the southern part; but that is conceded by the Trust. The plan (Cunningham's plan it is called and part of Ex. 6) upon the faith of which the certificate issued is the best indication and proof of what the Titles Office, at the invitation of the Company, meant by the otherwise ambiguous line and name "Yarra River." The figures which the Company invite the Court to reject fit absolutely the allotment when reckoned from the fixed western limit of Whitehall Street, and the eastern limit of the River Yarra as shown in the application map. But there is more. The dominant feature—if there be a dominant feature—in the certificate is contained in the words "being Crown allotment 4 section 8 parish of Cut Paw Paw county of Bourke." That is so, because the delineation in the

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map is not self-sufficient. True the western boundary is fixed, but at what precise spot on that western line could one start to measure? And similarly what precise spot on the river bank, wherever that is, could one take as the commencing point? Obviously one would be driven to look somewhere for the relative position of Crown allotment 4 of the section and parish named. One is then driven back to the Crown grant and the earlier documents in order to locate either the north or the south boundary of allotment 4. The difficulty, then, cannot be solved by boldly taking the river frontage as it existed in 1890 as the eastern boundary, disregarding the whole understanding upon which the title issued. That appears to me to be so opposed to the known intention of both the Titles Office and the Company that it is unthinkable. I entirely agree with what I understand to be the view taken of this by *Mann* J.

The Company, then, cannot rest its case on the suggested inclusion of the disputed territory in its documentary title. That, assuming the Act of 1915 is not conclusive, leaves the problem entirely open on general principles of law whether the strip, admittedly Crown property up to 1873 and, apart from riparian rights, free from servitude, has by process either of irrevocable licence or the *Statute of Limitations* become the private property of the Company's predecessors, and now of the Company, or subject to the servitudes declared. The Crown ceased in any case to be the owner of the strip on 1st January 1877, because whatever rights it then had passed by Act No. 552 to the first Melbourne Harbour Trust corporation.

Northern Strip and Wharf.—The Company, however, asserts that prior to that date (1st January 1877) the Crown had lost the property in the northern part of the strip and had created an easement in respect of the wharf by reason of irrevocable licence to Joshua Brothers, continued to the Victoria Sugar Co. That, at least, is the primary contention of learned counsel for the Company. Another alternative contention, put forward for another purpose, is that, whether there was a licence or not for the strip, the Company as of right, under its own title, reclaimed the strip and openly, either lawfully or as a trespasser, built upon it and exclusively occupied it. The learned primary Judge, but for sec. 4 of the

Land Act 1869, would have agreed with the first view. His opinion is opposed to the second view. His Honor inspected the land and saw its present condition. If his Honor did so simply to understand better what evidence had been already given, that was legitimate enough. This Court offered, if the parties consented, to inspect for that purpose; the corporation consented, the Company did not. But if the inspection by *Mann* J. were to strengthen the evidence by throwing light on the nature of the permission and the intention of the parties in 1873—a view which has been pressed on behalf of the Company—I would consider it inadmissible for several reasons. The present buildings and improvements could not identify the subject matter of the permission given before any erection took place. I accept for other purposes the view that any outside person looking at the land as it now appears, or as it has for some years past appeared, would probably be led, if ignorant of the actual circumstances and events that had taken place, to think the strip was privately owned. But, in construing the actual correspondence in 1872 and 1873, the present condition of the improvements on the land affords no assistance and, unless great caution be observed, may even be misleading.

I have carefully read and re-read the correspondence, and I am unable to arrive at the same conclusion as *Mann* J., that the permission given in May 1873 was one indefinite in time, in the sense that it was intended to be in perpetuity. Of course, the original statement that the first-mentioned jetty was to be "temporary" was indefinite in point of time—that is, no specific moment of termination was indicated. But, if "indefinite" in relation to the second jetty is more than that, it must mean perpetual—that is, as long as the *licensee* desired. The effective correspondence begins with a letter of 2nd October 1872 which superseded an earlier application. By this letter Joshua Brothers, the then owners of allotment 4, informed the Chairman of the Board of Land and Works (1) that they were the owners of the allotment; (2) that they intended on *that land* to erect a refinery; (3) that in order to have water communication to it, that is, to the refinery, they intended running a pier 40 feet out into Hobson's River at a point where a small pier was then situated on their land; (4) that they intended levelling their land

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and throwing the debris into the river; (5) that by rights conferred by their Crown grant they could reclaim up to the fairway of the river; (6) " but before making the proposed pier or throwing this debris into the river we take the liberty to apprise you of our intention, so that the conservators of the river may point out to us any objection should it exist to the course we propose taking." After careful investigation in two or three Departments, the Secretary of Lands replied, by letter dated 30th October 1872, in these terms:—" Referring to your letter of the 2nd inst. I am directed to inform you that the Board of Land and Works will be prepared to grant the application therein made for permission to erect a jetty on the River Yarra, if such jetty be temporary only, and subject to the following condition specified by the Inspector-General of Public Works: ' such jetty not to extend further into the river than say 40 or 50 feet beyond the end of the present jetty.' " There was thus a basic stipulation introduced by the Board of Land and Works itself that the jetty be " temporary " only, and there was also a condition suggested by the Inspector-General of Public Works. The first stipulation was clearly a matter of general caution by which the Board of Land and Works (a statutory corporation of extensive authority under the *Public Works Act* 1865, sec. 12) carefully made it clear that nothing in the nature of a perpetual right to occupy the fairway would be entertained. The word " temporary " is usually the opposite of " permanent," and here it certainly excludes permanency. But further, in the connection in which it was used it meant that the structure was to be regarded as for the time only. The character of the public body making the stipulation and the terms in which it was made leave no doubt that " temporary " meant simply *until public interests in the opinion of the Government should require its removal.* It was not even of the technical stability of a tenancy at will, which means at the mere personal will of the landlord, for the public body and the Crown, being bound to regard public rights, were not thinking of mere personal will, but meant that, when public interests required revocation of the permission, that would be intimated. It was, therefore, even less stable than a personal revocable licence, because any personal fetter upon immediate right to possession, should public

interests be considered to require it, would be unlawful. But the permission to occupy subject to vacating as soon as the Crown thought public interests required it and so intimated, was lawful enough. So much for the first and basic stipulation. The second provision was one marking the limit under then present conditions of permissible interference with the fairway.

On 25th November 1872 Joshua Brothers addressed to the Harbour-Master a letter of considerable importance. Analyzing this communication, the writers (1) referred to "*the pile pier* which we are about to erect for the convenience of our proposed sugar-works at Footscray *and for which we have received the permission of the Harbour Department*"; (2) inquired "whether the Government will allow us to push *the jetty* as far into the river as where the proposed stone wall to confine the fairway will eventually run"; (3) stated their intention to build a T jetty so as to discharge *their own* vessels inside the two angles without obstacle to free navigation; (4) stated that this necessitated greater length of jetty; (5) stated that the "pier or jetty," intended to be 330 feet long, will render "immediately" the very service which the contemplated retaining wall "is intended to give." There is not a single word in that letter asking for perpetuity. In view of the distinct stipulation of "temporary only" in the "permission" of 30th October, one would expect, if that were objected to, that something would have been said. But, though that "permission" is expressly mentioned, all that is asked is an alteration as to *distance*—not *time*. The argument in favour of the extended distance is that there will be an *immediate* providing of "the very service" which the supposed wall will eventually give. Observe it is not an additional service; nor is it a service which will continue after the wall is built. On the contrary, the argument assumes that *until* the wall is built the jetty will perform the service and then, being on the very line to be later occupied by the wall, the jetty must necessarily disappear. This letter is, in my opinion, wholly inconsistent with the argument of perpetuity.

I should stop here for a moment to notice a suggestion pressed very earnestly in order to get rid of the obvious considerations just mentioned, and particularly the effect of the word "temporary" in

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the letter of 30th October: it is that the letter of 25th November 1872, in using the phrase " for which we have received the permission of the Harbour Department," meant not the permission contained in the proved letter of 30th October, but permission contained in some imaginary letter which so far has escaped identification. The suggestion is based on a purely inter-departmental memorandum addressed by the Chief Harbour-Master on 14th October to some one, apparently his official head. In that, Captain Payne says that the late Commissioner of Customs had approved an application from Mr. Matthew Parker on the same subject for the same piece of land, provided that no harm was done to ordinary traffic on the river and that it did not interfere with the intended line of retaining wall or other works for the improvement of the Yarra. That is to say, Captain Payne reminds the then Commissioner of Customs that the late Commissioner had—so far as his Department was concerned—given his approval to Parker's application. But there is nothing in Captain Payne's letter to say that other branches of the Government had also approved; as, for instance, the Department of Lands or the Department of Public Works or the Board of Land and Works, the latter being specially charged with such matters. Nor is there the least shred of evidence that there had been any communication of approval to Joshua Brothers, on whose behalf, apparently, Parker had written. That the Commissioner's approval was an incomplete step is manifest from several circumstances. First, if it had been formal and communicated, there would have been no need for another application, and, next, there would have been some evidence of it. Further, Captain Payne goes on to say that he " therefore " suggests that the Inspector-General of Public Works should be consulted, obviously to see what other Departments had to say to the matter. The result was the letter of 30th October already mentioned.

The reply to the letter of 25th November 1872 was sent on 5th May 1873, but, as neither the original nor any copy can now be found, we have to gather its purport from the materials put in evidence, on the Company's behalf (Ex. Q. and Ex. R.). Ex. Q is a letter with endorsements. Taking these in order of date, they thus appear:—The Chief Harbour-Master on 27th November submitted

to his official head in the Department of Trade and Customs—as he was bound to do—the application of Joshua Brothers of 25th November with an adverse report, and advising that the present jetty should not extend more than 70 feet into the river, and suggesting reference to the Inspector-General of Public Works as to the contemplated river improvements. The Department of Trade and Customs referred it to the Public Works Department on 29th November 1872, requesting a tracing of the intended river improvements. On 22nd December the Inspector-General returned the letter with the desired tracing, which was forwarded to the Chief Harbour-Master with a memo. from the Inspector-General to the Chief Harbour-Master as follows:—"In forwarding the annexed tracing to Captain Payne I beg to remark that it appears to have been assumed that a stone wall is intended to be placed in front of the allotment belonging to Messrs. Joshua Brothers—whereas this Department has no present intention to carry out such a work. The sketch herewith shows how it is proposed to dredge and widen the channel." On this the Chief Harbour-Master wrote a memorandum as follows:—"I find by the annexed tracing forwarded from Public Works Office that there is only 64 feet from shore abreast Messrs. Joshua Brothers' allotment to the edge of the 12 feet channel. I can therefore only recommend that the jetty be extended 40 feet *as applied for on 2nd October last* (and not 70 feet as stated in my letter of 27th November last)." That was on 10th January 1873. The Minister of Trade and Customs approved of that recommendation, and this was communicated to the Chief Harbour Master on 30th April 1873. Then appears this note:—"Messrs. Joshua Bros. informed.—Chas. B. Payne, Chief Harbour-Master." *Mann* J. thought, and learned counsel for the Company have stressed that view, that the letter of 25th November 1870 was "a substantially different work," that is, different from the work for which permission was given a few weeks before. There was a difference certainly. One was a straight jetty or pier, and the other was T shaped, the head of the T extending a considerable distance along the river. The original condition as to distance was sought for reasons of private advantage, and supported by arguments of public advantage. The latter were found to be

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non-existent. The old condition as to distance was not extended: it was reduced to 40 feet definitely. No alteration was made as to deviations. If the work was so substantially different as to be more extensive in the fairway, that would be a reason rather for insisting on a temporary permission only than for consenting by way of free gift to the private appropriation for all time of a portion of the main, and almost the sole, public water-way—none too wide at any time—of the City of Melbourne. Such an inference should not lightly be drawn in any event, and least of all in a conflict between private and public rights. In this case it seems to me, with great deference to the learned Judge from whom this appeal comes, that the contrary conclusion is irresistible. On the other hand, a consent temporary in nature, though indefinite, because no one could say when public interests might require the withdrawal of occupation, is quite understandable on both sides. Pending future requirements no then present objection was raised to helping private enterprise, and the private owners might well think the chances worth taking to stay where they were a considerable time without disturbance. But privileges are not infrequently clung to as if they were permanent rights. In my opinion, the permission of 5th May 1873 was that of a temporary privilege and not of a permanent right. As far as it was expressed, it was only in respect of the jetty or wharf. As to the strip the Company, by its express allegations in par. 8 of the statement of claim, alleges its inclusion in the Crown licence. The learned primary Judge took that view when he said: "The reclamation of the foreshore behind the wharf in the manner described was, in my opinion, a matter of course and essential to the proper use of the facilities afforded by the wharf." As a matter of common sense, when Joshua Brothers in their letter of 2nd October 1872 spoke of reclaiming up to the fairway and also making the pier, it was evident that consent to the pier would involve embankment of the shore (*not its appropriation* as owners) and also use of the embanked land in connection with the pier, so long as the pier itself was permitted to be there. Commercially speaking, that was natural and inevitable. The jetty, from a business point of view, connoted the usual adjacent buildings, and no doubt that would be well understood by both parties. The permission sought

and obtained in 1890 (20th and 24th March 1890 and 3rd April 1890) would be meaningless unless that were so. The truth, then, is that both as to the jetty or wharf, whichever it may be termed, as the principal object of the consent, and also as to the occupation and user of the northern portion of the strip as accessory to the main object, the licence was temporary in the sense that the licensees were liable to be turned off whenever the Crown should deem that right in the public interests. The permission, in effect, refuses to concede any measure of permanency which (apart from a reasonable time to remove when required and not inconsistent with public needs) the law would recognize. In my opinion also, it is wholly inconsistent with any intention to abandon possession by the Crown of the soil either of the fairway or the shore. But it is all-important to bear in mind that there were not two distinct permissions—one for the wharf and one for the northern strip. The permission as to the wharf carried with it permission as to the strip, and the occupation or possession of the strip is linked with that of the wharf and takes its character in fact and in law from the permission in respect of the wharf.

If correct, the learned primary Judge's view of the nature of the permission renders it unnecessary in any aspect to consider the power of the Crown prior to 1877 to create an irrevocable licence. It would, however, be very undesirable to leave that question untouched. *Mann* J. thought there was no such power, but solely because of sec. 4 of the *Land Act* of 1869. That section provided: "Under and subject to the provisions of this Act but not otherwise the Governor in the name and on behalf of Her Majesty shall grant convey or otherwise dispose of lands for the time being belonging to the Crown for such estate or interest as in each case is hereby authorized and for none other." I entirely agree with the view taken by the learned Judge of that section. It has, however, been very strenuously challenged before us, notwithstanding the primarily clear words of the section itself, and the argument is that, since the Crown's prerogative right and power in respect of ports and tidal navigable rivers had not then been made the subject of legislation, those lands of the Crown which were the shores of the sea or of tidal navigable rivers were not intended by Parliament to be included in

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the Act of 1869. A short retrospect of land legislation will, I think, make this clear beyond question. A reference has already been made to the Imperial Act 5 & 6 Vict. c. 36, that is, the Act of 1842, under which Cole's Crown grant was made. The origin and political purpose of that Act I have discussed in *Williams* v. *Attorney-General for New South Wales* (1). But whatever its purpose, its language is distinct. In its first provision it enacts "that within the Australian colonies the waste lands of the Crown shall be disposed of in the manner and according to the regulations hereinafter prescribed, and not otherwise." Sec. 2 made "sale" essential to the conveyance or alienation of any estate or interest whatever in Crown lands. Sec. 3 is distinct that reservations of Crown lands may be made for internal communication by land or water, or as "the *sites of public quays or landing-places on the sea-coast or shores of navigable streams*" or other public purposes. In order to maintain the position that sec. 4 of the *Land Act* of 1869 (No. 360) did not apply to the "shores" of the sea or navigable rivers, it was very strenuously contended that the words "quays" and "landing-places" have no significance in that connection. It was said they properly applied to such places on private property. But the Act 5 & 6 Vict. c. 36 dispels that idea. As used in the Imperial Act they were at the time of the commonest import in England as public places. See, for instance, *Pulling's Laws of the Port of London*, 2nd ed., 1854, at pp. 353 et seqq. As early as 1856 the Circular Quay of Sydney was judicially recognized as a public wharf, and, indeed, it was proclaimed as such under 8 Vict. No. 16 (see *Willis* v. *Campbell* (2)). In 1852, by Act 16 Vict. No. 12, relating to "Harbours," a number of Acts were repealed and regulations for the government and preservation of ports were enacted, and by secs. 5 and 25 navigable creeks and rivers were included. Sec. 25 also defined "quay" as meaning "any pier, jetty, quay, wharf, or landing-place." We find in sec. 4 of the *Land Act* 1869 more than the unrestricted prohibition of sec. 1 of the Act 5 & 6 Vict. c. 36 suitably adapted and applying to "lands for the time being belonging to the Crown"—the largest terms to denote all lands of the Crown.

(1) (1913) 16 C.L.R. 404, at p. 450 et seqq.
(2) (1856) 2 Legge 932.

Sec. 6 of the Act of 1869 *enables* the Governor (that is, it so far modifies the generality of the restriction of sec. 4) to reserve Crown lands for "quays" and "landing-places." Sec. 12 specifically mentions "harbour" and "river," showing that these were not outside the legislative contemplation. Sec. 45 (IV.) naturally involves the use of the shore. Sub-sec. VI. of sec. 45 relates to leases "for sites of quays and landing-places." That, if the ordinary effect be given to the language of the statute, *must* mean the shore, because there could be no Crown lease of private lands.

But there was still another argument advanced to the contrary. It was that the Crown had not been expressly fettered by legislation with respect to the creation or establishment of ports, wharves and piers, &c.; that until 1877 the Crown had always exercised its harbour powers by prerogative aided by appropriations, and therefore it could not be that the prohibition of sec. 4 of the *Land Act* 1869 was intended to prevent the future exercise of that power. The answer seems to me quite plain. It is one thing for the Crown to utilize as its own undiminished property, and for the benefit of the public, the lands of the Crown—whether upland or foreshore; it is a totally different thing to part with dominion in the land, be it for a great or a small estate or interest. The distinction is markedly shown by contrasting the two Acts 5 & 6 Vict. c. 36 and the *Land Act* of 1869. The earlier Act, while restricting the Crown by sec. 2 except as saved by the Act, went on by sec. 3 to save expressly the Crown's power as to "disposing of" lands for various purposes including "public quays or landing-places" &c. So that the right of the Crown so far to alienate its lands for the purposes of quays and landing-places remained untouched, except so far as the word "public" effected a limitation (see *Turner* v. *Walsh* (1)). But the *Land Act* of 1869 while adopting a restriction in sec. 4, analogous to sec. 2 of the earlier Act, did not save the power of the Crown as did sec. 3 of the Act of 1842. The power of the Crown in sec. 6 of the Act of 1869 does not include a power of "disposing of" land reserved for quays and landing-places. It may be temporarily or permanently reserved from sale. That is a further limitation on disposition, not a preservation of a common law power of parting

(1) (1881) 6 App. Cas. 636, at p. 643.

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with it. While a reservation stands the land cannot be sold. If the reservation be temporary, it may be revoked, and then, subject always to sec. 4, it may be disposed of in any way permitted by the Act. If the reservation be permanent, nothing but another Act of Parliament could permit alienation (sec. 7). In these circumstances I find it impossible to accede to the argument that the Crown lands, being shores of the sea or navigable rivers—perhaps the most important of all to be guarded from alienation to private individuals—were intentionally left by the Legislature free to administrative disposal, while no fragment of interest in the most insignificant spot inland could be affected except in accordance with parliamentary direction.

Licence.—Though sec. 4 of the *Land Act* 1869 is in itself, as *Mann* J. held, fatal to any claim of the Company based upon relations with the Crown prior to 1st January 1877, it is necessary, in view of the circumstances, to examine the legal position before that date irrespective of the statute. It is said that the Crown gave a licence to the Company's predecessors which by the end of 1876 became irrevocable, and therefore the Company is now entitled to a declaration of right to maintain the perpetual use of the strip and wharf as heretofore. I shall assume, in the first place, that, as claimed, the Crown did purport to give a perpetual licence, expressly as to the wharf and accessorially as to the strip. The two things thus are an entirety, and either stand or fall together.

In my opinion, even assuming a perpetual permission had been in fact given to erect and maintain this wharf and to occupy therewith its hinterland, the Company would on the present case and materials fail to establish the right it claims. This Court cannot do more than apply itself to the case as presented below. A wharf connotes contact with navigable waters. As it signifies a place for loading and unloading vessels, it is an essential part of its connotation that it reaches the point of navigability. The wharf itself may be erected on private land; and, if so, it is not purpresture. It may be manifestly clear of any interference with navigation or may even be manifestly an aid to navigation. But, if it partakes of the nature of a pier by extending out into the stream so as to stand in the bed and thus reach the navigable waters, it is, unless permitted, a

purpresture and an invasion of the proprietary rights of the Crown if the Crown be the legal owner of the soil. It is a violation of the Crown's *jus privatum*, which may be permitted by the Crown. But, even if so permitted, it may still be a violation of the *jus publicum* by being on the whole an obstruction or hindrance to the navigation—and thus a common nuisance. This the Crown at common law cannot permit in a navigable stream. Whether this be so in a given case is a question of fact which must be determined before the Court is in a position to pronounce upon the issue of the right to maintain the wharf. But, as the public right (unless lawfully extinguished, that is, by means not suggested here) is continuous, the permission by prerogative is always subject to that right, and an obstruction to navigation whensoever arising is a nuisance and illegal (*Gann* v. *Free Fishers of Whitstable* (1); *Attorney-General* v. *Johnson* (2); and *Attorney-General* v. *Tomline* (3)). Consequently, at the end of 1876 there would have been no right as against the Crown, even apart from the *Land Act* 1869, to a sweeping declaration of a right in perpetuity to the wharf irrespective of its effect on navigation. Moreover, if the present legality of the wharf be the one point to be determined, since the Company is seeking an affirmative declaration it must fail, in my opinion, because it has not alleged that what may be an interference with navigation is not an interference. In *Attorney-General* v. *Johnson* (4) Lord *Eldon* L.C. says: "I take it also to be clear, that prima facie the subject has a right to use that which may be called a water-highway, and which prima facie includes the water between high and low-water mark when it covers the soil; and that those who think proper to inclose that soil are prima facie bound to show that they can take it away without injury to His Majesty's subjects." In the present case the "inclosure" gives many feet out beyond the low-water mark, and so the matter is a fortiori. So that, even if verbally permitted by the Crown in permanency, the present claim of the Company in respect of the wharf and the appurtenant use of the strip would fail.

(1) (1864-65) 11 H.L.C. 192.
(2) (1819) 2 Wils. Ch. 87.
(3) (1880) 14 Ch. D., at p. 69.
(4) (1819) 2 Wils. Ch., at p. 103.

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The basic assumption in *Attorney-General of Southern Nigeria* v. *John Holt & Co. (Liverpool) Ltd.* (1) that what was done was in consonance with the Crown's public duty and with the Crown's right to license the subject to perform this duty, as well as the subject's pre-existing right to protection, is entirely wanting in the present case, when the public right of navigation is in question. But for the reasons I have already stated the assumption of permanency is not correct.

On 1st January 1877 the Crown ceased to be the legal owner of the Port, and a new corporation—The Melbourne Harbour Trust—became invested with the property scheduled to Act No. 552, subject to the qualifications mentioned in the statute. It is and has been part of the Company's case—and in my opinion, coinciding with that of *Mann* J., it is correct—that the position in fact, whatever it was at the end of 1876, continued implicitly as between the Company's predecessors and the Company on 1st January 1877 and thereafter.

The corporation, it is said on behalf of the Company, is equitably bound, on the doctrine of *Plimmer* v. *Wellington Corporation* (2), to submit to the easements declared in the second and third declarations of *Mann* J. But *Plimmer's Case*, like *Holt's Case* (3), had as its very foundation the legal power of the Crown to do directly what was indirectly permitted to the subject (4). When that foundation is sought for in this case, it is nowhere to be discovered. It would have been and it would still be wholly contrary to the statute if the Commissioners had attempted or were to attempt to create the rights claimed in this action. The vesting sections (see now sec. 46) in the successive Acts expressly create a public "trust for the purposes" of the Acts (see *Zacklynski* v. *Polushie* (5)). They could not estop themselves and thus effect the illegality by indirect means (*MacAllister* v. *Bishop of Rochester* (6); *Islington Vestry* v. *Hornsey Urban Council* (7)).

Southern Strip.—The material facts as to the southern portion of the strip begin at the end of 1894. Shortly, the Company desired

(1) (1915) A.C., at pp. 620, 621.
(2) (1884) 9 App. Cas. 699.
(3) (1915) A.C. 599.
(4) (1884) 9 App. Cas., at pp. 705, 706.
(5) (1908) A.C. 65, at p. 70.
(6) (1880) C.P.D. 194.
(7) (1900) 1 Ch. 695, at pp. 705, 706.

additional berthing accommodation. The result of negotiations, oral and written, was that the Commissioners agreed to provide the accommodation, consisting of a new wharf, on certain conditions including (1) that the Company would accept a lease of the wharf for 21 years at £105 a year; (2) that certain filling required behind some sheet-piling of the wharf should be done by the Company, the manner of doing it being subject to the Trust's approval. The work done included cutting off a part of the northern wharf which projected southward. This was all done, and the lease of the new wharf was given for 21 years, expiring in 1916. The decree, it is said, includes as the Company's property the new wharf, but, as already explained, the Company does not assert any right to it and is willing, if necessary, to make clear its exclusion. But the result of the agreement that the Company should do the filling behind the wharf, plus the performance of that condition, is, according to the Company's contention, to transfer title to the Company of the southern portion of the strip. If intention is to govern—and intention is vigorously pressed by the Company with respect to its own riparian rights, notwithstanding reclamation—then it is absurd to imagine that the Trust intended by that condition to present the Company with public property. Nor can I understand, from the Company's side, how any reasonable business man could imagine that the adverse conditions as to filling in meant a gift of public foreshore. The filling-in was palpably a necessary or desirable part, from a constructive point of view, of the wharf accommodation. That was, so far as the Company was concerned, to be not more than 21 years—the utmost limit of the Trust's authority. At the end of that time the wharf was to revert and to be at the complete disposal of the Trust. It might then be removed. Twenty-one years in a fast-developing commercial community might mean a radical change in navigable conveniences. How could it be reasonably thought that the Trust, by merely requiring the filling-in to be done at the Company's expense instead of at that of the Trust, was surrendering its property and its power to deal adequately with the future? Notwithstanding the earnest argument bestowed on the point, I cannot help regarding the condition as the merest legal gossamer thread, utterly insufficient for the weight it is asked to

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carry. The Company certainly did build partly on the strip. But, as on the northern strip, the Company was apparently content to run a risk. It measured the probabilities of interference and the great advantages of immediate accommodation for its great business, and it chose to use public property for its private benefit as long as it could. Judging by the overt facts we know, it trusted to the improbability of the site being needed by the Corporation for a very considerable time, and that trust was not misplaced. In one sense even the northern wharf itself was spoken of as "private property." Not that it was so in strictness, but because it had under permission been erected by the Company and used exclusively for its own business, that is, exclusive of other individuals. But in 1915, public necessities required, in the opinion of the Harbour Trust, some alteration of the sites in question, and the outcome of communications in evidence, extending until 1919, was the notice which gave rise to this action.

Agreement as to Boundaries.—Before entering upon other matters a passing notice may be given to a contention that made its appearance for the first time during the argument in this Court. It was that on a well-known principle parties having doubtful boundaries might, and in this case did, agree to settle them. It is claimed for the Company that the parties here settled their boundaries definitely by adopting the river edge of the strip all through. I desire only to say that there is no such allegation or issue—no evidence was specially directed to such a case; that it is almost incredible the plan would be consciously adopted; and that, as the river frontage is not a stable frontage but a possibly shifting boundary (*Scratton* v. *Brown* (1)), it would be scarcely feasible. Unless, therefore, the Act permits it, there cannot be set up a licence by the Harbour Commissioners involving a hindrance to navigation any more than one by the Crown. It is argued then that the Act does permit a licence to embank, and that a licence to embank the strip has been given in accordance with statutory powers. Secs. 81 and 82 are relied on. These are the sections in the present Act, but they are identical in terms with the corresponding sections of the Act of 1876. The strip was reclaimed in 1876 before the original Harbour

(1) (1825) 4 B. & C. 485.

Trust was formed. But it is said that acts of occupation and building and other construction have taken place since with the knowledge and acquiescence of the current Trust, and that this amounts to a licence within sec. 81 and sec. 82. The argument needs special consideration.

Licence to Embank.—It is, I think, evident on a careful reading of secs. 81 to 86 inclusive that the Company's contention is untenable. Dealing with those sections only so far as they refer to "embankments," this seems to be their meaning:—Sec. 81 forbids the erection or building or making of any embankment upon *the bed or shore* of the Port without the "licence" of the Commissioners. Whatever common law right there might have been previously to embank is thereby made subject to the requirement of the "licence." But with respect to licensed embankments, sec. 82 makes a very special provision. If once a licence is given—and we shall presently see the possible terms of the licence—the embankment may be made; and "when and as soon as"—that is not before—two events occur, the "land reclaimed by any such embankment" is to pass to the frontagers for the same title as the land fronting the land reclaimed. Those two events are (1) the making of the embankment and (2) the performance of the conditions of the licence. That works a parliamentary conveyance on the happening of two fixed conditions. This provision is obviously for the purpose of advancing the trade of the Port by adding convenience to the adjoining premises. An alternative method of doing this is provided by sec. 83, which I pass by, except to say it also is effected by licence. Sec. 84 provides still further facilities of analogous nature. Then sec. 85, which is very important, is also very distinct. It is founded in its nature on the common law doctrine stated in *Gann's Case* (1), that for the grant to an individual involving interference with the ordinary public rights in respect of navigation there must be what Lord *Wensleydale* calls "a sufficient consideration." Some of the privileges made possible are, of course, only analogous to navigation, but they are closely related to it, and the Legislature has adopted the essential idea of the common law that in return for private advantage at public expense there must be a corresponding consideration.

(1) (1864-65) 11 H.L.C., at pp. 209, 211, 214, 215.

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Sec. 85 accordingly declares that "the consideration . . . shall be such as in the judgment of the Commissioners is deemed to be the true and fair worth or value thereof to the person obtaining such licence," and there must be a signed and certified valuation of the licence. It is difficult to conceive of any more distinct provision. Where it is a licence to embank so as to reclaim and afterwards own Crown lands, the consideration must therefore include whatever the reclaimed land itself will be worth to the frontager. That is not the whole worth of the licence to him, but it is a necessary item. The group of sections create a new statutory right, hedged by statutory conditions.

It is unnecessary to determine how far the valuation is vital to the legality of the licence, if the licensee has no reason to believe it was omitted. The licensee must surely know—or must be taken to know—that the licence cannot be valid without the Commissioners' own estimate of its value to the licensee. Payment of that value must be at least one condition of the licence, and the need for certifying performance on the licence indicates that it must be in writing, and in possession of the licensee. It seems self-evident that the "licence" contemplated by the statute in sec. 82 cannot possibly be satisfied by what has happened in this case.

Nor, with respect, can I think the correct view has been stated by the learned primary Judge, that, when the Legislature has so definitely stated the conditions on which the title to public land held in trust can be divested and transferred, a Court of equity may substitute a totally different set of circumstances. To put it shortly, the statutory result can only be reached by the statutory road; and without the statutory result there are only two suggested means of getting title—either irrevocable licence outside the statute, which is already shown to be impossible, or by the *Statute of Limitations*, which I now consider.

Statute of Limitations.—An independent and quite different ground is taken by the Company, upon secs. 18 and 43 of the *Real Property Act* 1915. That reproduced the English *Statute of Limitations*. The Company's case is that it has in fact been in possession of the strip, both northern and southern portions, and the wharf for over 15 years (ending not later than 1895 or 1897),

and that therefore it has a fee simple title to the land in dispute. It claims the whole strip and also the wharf, which it regards as realty, and also whatever soil the wharf is resting on. I am not sure, but I believe, the argument went so far as to assert exclusive possession for the necessary time of all the land under the wharf. The first question is: "Does the statute apply to the Melbourne Harbour Trust at all?" It was suggested that, as against a public body like the corporation holding its property only for the purposes and upon the trusts of its Act, the *Statute of Limitations* did not apply. That is in itself an extremely important question and stands at the threshold. In my opinion the suggestion cannot be accepted. There is nothing in the Harbour Trust Act which says either expressly or by necessary implication that the ordinary law of limitation of actions is not to apply. It depends, therefore, solely on the true nature and construction of the limitation provisions themselves, that is, secs. 18 and 43 of the *Real Property Act* 1915. The Act is quite general. It includes by sec. 16, under the expression "person," *a body politic* and "classes of persons." "Body politic" is found in the *Magdalen College Case* (1). It is not unworthy of notice that "person" includes "body politic" in the Act of William IV., but the definition of that word does not contain that expression in the Imperial *Interpretation Act* 1889, sec. 19. The expression "body politic," as distinguished from "body corporate," indicates to my mind a body created for some public purpose. For instance, the Hudson's Bay Company and the East India Company, invested with public functions, were bodies politic. The Sovereign is a body politic (see *Magdalen College Case*). In *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (2) Lord *Watson* used the expression "body politic" to denote the Dominion of Canada. But general words in an Act do not always (though by force of a principle of construction) bind the Crown, and this applies even to persons who are merely servants of or trustees for the Crown: see, for instance, *Perry* v. *Eames* (3). But I do not read the Act as placing the corporation in the position either of a servant or of a trustee for the Crown. Without detailing the provisions leading

(1) (1615) 11 Rep. 66b, at p. 70a. (2) (1896) A.C. 348, at p. 361.
(3) (1891) 1 Ch. 658.

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me to my opinion, I shall simply observe that the Act makes the corporation independent of the Crown, and regulates its duties, so far as Crown interests are concerned as distinguished from public interest. The corporation then cannot claim Crown privilege. If so, it answers the description of " person " in secs. 16 and 18 of the *Real Property Act*.

What then can exclude the operation of that section from affecting the corporation in an otherwise proper case ? Statutes of Limitations embody a great principle of public policy which Lord *St. Leonards* expounded in *Dundee Harbour Trustees* v. *Dougall* (1). That was a case relating to real property rights, namely, the right to load ships in a harbour called Ferry Port on Craig free from any tolls by the harbour authority. The defendant relied on a Statute of Limitations which fixed a 40 years limit. Lord *St. Leonards* L.C. said (2) :—" It was not to support good titles, but to fortify infirm ones, that the statute interposed. All Statutes of Limitation have for their object the prevention of the rearing up of claims at great distances of time when evidences are lost; and in all well-regulated countries the quieting of possession is held an important point of policy. . . . Our old English *Statute of Limitations* (21 Jac. I. c. 16) barred the remedy, but it did not bar the right; but our new enactments bar the right as well as the remedy; so that the effect now is not simply to exclude the recovery, but to transfer the estate." The Lord Chancellor made some observations very pertinent to the suggestion referred to. He said (3) :—" Then an attempt was made to distinguish this case by showing that the appellants, being trustees for a public purpose, could not, by non-user or dereliction, injure or prejudice the public right. Your Lordships have had no authority cited to establish any such proposition ; but the authorities which have been cited on the other side clearly establish that corporations—that is, public bodies—may be, as they ought to be, dealt with as if they were private persons, the same consequences arising." The Real Property Commissioners in their first report upon prescription and limitation, after observing upon the difficulty after a considerable lapse of time

(1) (1852) 1 Macq. H.L. 317. (2) (1852) 1 Macq. H.L., at p. 321.
(3) (1852) 1 Macq. H.L., at p. 322.

of ascertaining the truth, added :—" Independently of the question of right the disturbance of property after long enjoyment is mischievous. It is accordingly found both reasonable and just that enjoyment for a certain period of time against all claimants should be conclusive evidence of title" (quoted in *Herbert on Prescription* (1891), at p. 203). Dissonant judicial observations approving or disapproving of the policy of the Acts may be readily found. But after all the ultimate truth for a Court is that the Legislature for its own reasons has enacted a general law attaching itself to all titles whether of a public or a private nature held by and for subjects, and, unless that is found to be excluded in a particular case, it must be applied without expanding and without restricting its language. In accordance with this are the cases of *Brighton Corporation* v. *Guardians of the Poor of Brighton* (1), *Bobbett* v. *South-Eastern Railway Co.* (2) and *Midland Railway Co. v. Wright* (3).

I pass then to see whether the facts establish the necessary possession of the Company, and the correlative want of possession by the corporation and its predecessors, on the assumption that my construction of sec. 46 of the Act of 1915 is erroneous. The problem may be—and, indeed, must be—condensed into one question : " When did the right of entry first accrue to the harbour authority ? " As to the wharf, it is to my mind clear beyond doubt that it was always held upon licence, and that, as the licence could not at law, and did not in fact by reason of its terms, become irrevocable, it always remained revocable. What, then, is the date when a right of entry first accrues in the case of a revocable licence ? The answer is : It depends upon the circumstances of the case. The rule of law in ordinary private cases is that before the licensor can enter and eject his licensee he must give such a notice as allows what is in that particular case a reasonable time to remove. In *Mellor* v. *Watkins* (4) it was so held by *Cockburn* C.J., *Blackburn* and *Lush* JJ., following *Willes* J. in *Cornish* v. *Stubbs* (5) ; and accordingly a landlord for want of such reasonable notice was

(1) (1880) 5 C.P.D. 368.
(2) (1882) 9 Q.B.D. 424.
(3) (1901) 1 Ch. 738.
(4) (1874) L.R. 9 Q.B. 400.
(5) (1870) L.R. 5 C.P. 334.

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defeated and held liable to pay damages for premature entry. No such notice was given, no intimation, however short, was conveyed, that in the opinion of the harbour authorities public interests required the occupants to vacate the land, and therefore, assuming, as I find to be the case, that a revocable licence existed, the *Statute of Limitations* does not apply to the wharf. The case is quite different from *President and Governors of Magdalen Hospital* v. *Knotts* (1), where in law the occupant was always a trespasser or, as Lord *Cairns* put it (2), "without any title whatever." There the hospital authorities could have ejected the occupants at any moment without warning, because the only ground on which possession was given and taken was inconsistent with a licence; it was a right of lease excluding the owner for the whole term, or it was a nullity. As it was a nullity the occupant held as in his own right all through, but was in law a trespasser all through and the supposed landlord could and should have ejected him. Here it would be impossible to regard the Company as a trespasser at any moment, or as anything but a licensee, liable on reasonable notice, having regard to public interests, to be ejected, but until then continually acknowledging the title of the harbour authorities to the wharf. As to the strip it is not so obvious. As already stated, the licence only expressly referred to the wharf, and the strip (northern portion) was occupied as accessory to the wharf. The Company, however, urges that the correspondence shows that its predecessors claimed a right by virtue of their title to reclaim the Crown's land to the fairway. Inferentially it is suggested that that means a claim to occupy followed by an occupation of the strip as of right and not by way of licence. Of course that is an inconsistent claim. But what does it amount to? It was an invalid claim: no authority for it is found in English law. It is stated in an American work of considerable value (*Farnham on Waters and Water Rights* (1904), vol. I., p. 339), as to riparian rights, that reclamation where permitted should be accorded to the riparian owner, but the learned author adds: "He cannot, however, by filling out without permission, obtain title to the made land, where the title to soil upon which the filling was done was in the State." However, whatever is the law

(1) (1879) 4 App. Cas. 324.

(2) (1879) 4 App. Cas., at p. 334.

in America, I know of no instance where by merely reclaiming the land of another—particularly without his permission—the title is transferred.

The importance of that consideration is that the Crown would not have imagined, and I give credit to the writers of the letter that they did not imagine, that the assertion of a right to "reclaim" involved the assertion of a right to keep. Consequently there was no claim to do more than reclaim and fill up so as to give a better and more convenient means of access to the river side and to the wharf, if permitted. The net result of that would be that, unless some new event intervened changing the implied terms upon which the Company occupied and improved the strip, the strip itself would for this purpose stand in precisely the same position as the wharf.

It is true, as I have said, that a stranger unacquainted with the terms upon which the land was occupied would probably imagine the strip to be the property of the Company. But the material point is what, as between the Company and the corporation, was the understanding. That goes back to 1873 and it comes forward to 1880, when permission was asked and granted for the concrete foundation. That is inconsistent with an adverse holding and is more potent as an overt communicated act than any conjecture to the contrary. It must always be remembered that the nature of the land, the use to which it can be put by either the documentary owner or the occupant, are material circumstances in determining the nature of the possession relied on by the occupant and the dispossession of the true owner. I referred, during the argument, to *Leigh* v. *Jack* (1). I regard that as an important case in its bearing on the present question. *Cockburn* L.C.J. said (2):—"I do not think that any of the defendant's acts were done with the view of defeating the purpose of the parties to the conveyances; his acts were those of a man who did not intend to be a trespasser, or to infringe upon another's right. The defendant simply used the land until the time should come for carrying out the object originally contemplated." That is strictly analogous to the word

(1) (1879) 5 Ex. D. 264. (2) (1879) 5 Ex. D., at p. 271.

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"temporary" in this case. *Bramwell* L.J. (1) said as to discontinuance of possession: "After all, it is a question of fact, and the smallest act would be sufficient to show that there was no discontinuance." I may pause to observe that the request and consent in 1880 shows that. The plan called Cunningham's plan on which the present Company applied for its title in 1890 also proves that it did not consider it was in what is colloquially called "adverse possession," even of the portion of the strip occupied by the projections of the buildings. I consider that plan to be a clear recognition by the Company that down to 1890 there was no claim to occupy the strip, much less the wharf, as owner. The land had then been reclaimed, and therefore necessary reclamation was not considered equivalent to appropriation. Proceeding further with the judgment of *Bramwell* L.J., it is said (2): "In order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it: that is not the case here, where the intention of the plaintiff and her predecessors in title was not either to build upon or to cultivate the land, but to devote it at some future time to public purposes." That is very close to the present case; for the use of the land by the Company and its predecessors once stamped as temporary, indicating that it was to be occupied only until wanted for public purposes which were not yet properly exercisable, cannot, in my opinion, be taken as either a dispossession of the Crown or Harbour Board or as a discontinuance of possession by either. So per *Cotton* L.J. (3). I find that *Leigh* v. *Jack* (4) has been approved by the Privy Council. In *Kumar Basanta Roy* v. *Secretary of State for India* (5) Lord *Sumner* said: "Again, to apply the test suggested by *Bramwell* L.J. in *Leigh* v. *Jack* (6), 'to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it,' and therefore it is necessary to look at the position in which the former owner stands towards the land as well as to the acts done by the alleged dispossessor.

(1) (1879) 5 Ex. D., at p. 272.
(2) (1879) 5 Ex. D., at p. 273.
(3) (1879) 5 Ex. D., at p. 274.
(4) (1879) 5 Ex. D. 264.
(5) (1917) 44 Calc. 858, at p. 872; L.R. 44 Ind. App. 104, at p. 114.
(6) (1879) 5 Ex. D., at p. 273.

'It is impossible,' says Lord *Halsbury* in *Marshall* v. *Taylor* (1), 'to speak with exact precision about the degree of possession or dispossession that will do, unless you have regard, as Lord Justice *Cotton* said, in . . . *Leigh* v. *Jack* (2), to the nature of the property.' An exclusive adverse possession for a sufficient period may be made out, in spite of occasional acts done by the former owner on the ground for a specific purpose from time to time. Conversely acts which prima facie are acts of dispossession may, under particular circumstances, fall short of evidencing any kind of ouster. They may be susceptible of another explanation, bear some other character, or have some other object. In the present case beyond the temporary *utbandi* cultivation itself there is nothing down to 1892 to show an exclusion of the plaintiffs by the Revenue authorities."

I need add but one more authority, *Perry* v. *Clissold* (3), where Lord *Macnaghten* says:—"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." That indicates how essential it is that the possession relied on to bar the true owner shall be, in the modern sense, adverse. It herefore, with great deference to the learned Judge from whom this appeal comes, think the claim is not, in any event, as to any of the land claimed, barred by the *Real Property Act*, sec. 18.

There are some collateral objections by the Company in their main action, and these are now dealt with.

Ultra Vires Purpose.—It is argued that the notice of revocation of licence (August 1919) was *ultra vires* because really intended for some ulterior or *ultra vires* purpose. The notice really plays now a very small part in this case. It was only a peg on which to hang the action, and the matter has travelled altogether beyond

(1) (1895) 1 Ch. 641, at p. 645. (2) (1879) 5 Ex. D. 264.
(3) (1907) A.C. 73, at p. 79.

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it. Nevertheless, it is right to observe that the objection is groundless. There is nothing in the Act which prescribes the purpose for which a revocable licence can be revoked. Motives are immaterial. A case in point is *Narma* v. *Bombay Municipal Commissioner* (1), where Lord *Sumner* (for Lord *Loreburn*, Lord *Dunedin* and himself) acted on the principle I have mentioned, and observed (2) :—" Cases in which it has been held that powers conferred only for a statutory purpose cannot be validly exercised for a different purpose are not in point. Such an exercise of the powers is outside the Act which confers them."

It is unnecessary, having regard to what is already said, to discuss the question of the application of *Iredale* v. *Loudon* (3). For these reasons, in my opinion, the Company's case fails except as to riparian rights.

Riparian Rights.—To deprive the Company of riparian rights would materially alter the character of the property it holds by documentary title. It is claimed by the corporation that by the alterations on the strip effected by the Company it has converted the land from shore to inland territory. Thereby, so it is urged, there has been interposed land between the Company's land and the river, and the Company's land is no longer riparian. That is wholly contrary to the corporation's own case. That case involves the mere temporary occupation of the foreshore, improved for the sake of access, to the river and wharf. I entertain no doubt that the riparian rights remain, and there is little need to enlarge upon the reasons. The singularly lucid expositions of Lord *Blackburn* and *Lush* J. in *Marshall* v. *Ulleswater Steam Navigation Co.* (4), and of Lord *Shaw* for the Privy Council in *Attorney-General of Southern Nigeria* v. *John Holt & Co. (Liverpool) Ltd.* (5), completely cover this part of the case and leave nothing further to be said as to the relevant law. Applying the law there clearly and authoritatively laid down to the facts of the case as already ascertained, I am of opinion that the Company is entitled to a declaration as to riparian rights in the terms hereunder stated. It goes without saying that no new right is conferred : there is merely a careful conservation of

(1) (1918) L.R. 45 Ind. App. 125.
(2) (1918) L.R. 45 Ind. App., at p. 129.
(3) (1908) 40 Can. S.C.R. 313.
(4) (1871) L.R. 7 Q.B. 166.
(5) (1915) A.C., at p. 621.

the Company's original right as riparian owner to reach the navigable water of the Yarra. Once the arrangement as to the wharf is held to be temporary only, then, when it is ended, common justice demands that it is ended for both sides alike. There is no pretence that the Company or the harbour authorities ever intended an abandonment by the Company of its riparian rights. Restoration of the *status quo ante* means non-deprivation of former rights of either party. Consequently, so long as the Harbour Trust chooses to retain as its own property the wharf which it claims and which is an obstacle to the Company's right of reaching navigable water at that point, so long must the Company, until common law rights are superseded, be permitted to pass over the wharf to the water.

Finally that right is to be subject always to whatever statutory rights the Trust may have, and may at any time exercise, to alter existing common law rights.

One phase, hitherto unnoticed, occurs to me, and I may refer to it. What effect on the Company's riparian rights has the new Act vesting anew the intervening land? It has not, in my opinion, entirely obliterated the Company's riparian rights, or made negligible the effect of the temporary arrangement as to those rights. The nature and effect of that arrangement, and particularly as to the intention with which the acts were done, greatly affect the conclusion as to the character of the intervening tract, and as to whether it is to be considered in the circumstances as cutting off the Company's access to the river entirely. That is no necessary or just conclusion from the new Act. In my opinion the Company, even from the standpoint of the new Act, is a riparian owner with a right of access from every point of its land to the navigable water of the river, including a passage over the wharf subject as already stated.

Quacunque via, therefore, the declaration hereunder ought to be made.

The Counterclaim.—The burden of proving title to the strip and wharves rests, for the purposes of the counterclaim, on the corporation. It would have been very satisfactory had there been a plan drawn representing with precision the outer boundaries of the Port of Melbourne as scheduled to the Act of 1915. But sufficient appears to satisfy the requirements of this case. If the strip and wharf are

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within the statutory outer boundaries, they are, prima facie at all events, vested in the corporation. They are within those boundaries if they are contiguous to the eastern boundary of the Company's allotment 4, because by the schedule a southerly line by the eastern boundaries of allotments 1 to 7 is part of the western boundary of the Port. The Company's title already referred to establishes the fact that the eastern boundary of allotment 4 is immediately contiguous to the western side of the strip claimed. The prima facie statutory title of the Harbour Trust to the strip and wharf is therefore shown. For the rest the matter is already dealt with.

In the result, except as to riparian rights, the appeal should be allowed and the judgment appealed from set aside.

Costs.—I have been greatly exercised as to the proper order as to costs. Having regard to the nature of the notice of 19th August 1919, the date of the writ (11th November 1919), the importance of the Company's riparian rights as affecting the general character of its land and the necessity of much of the evidence and argument, even for the purposes mentioned, it would be necessary very carefully to apportion the costs, if any were awarded. That would be a matter of some difficulty. From those considerations and also from several others, which it would be profitless to particularize, I have come to the conclusion that on the whole the fairest way is to apply the broad axe and make no order as to costs.

HIGGINS J. The primary task in this case is to settle clearly the meaning and the effect of certain letters of 1872 and 1873.

In 1872 Messrs. Joshua Brothers were seised in fee simple of allotment 4 of section 8 parish of Cut Paw Paw on the shore of Hobson's River (now the Yarra Yarra), and were about to erect a sugar refinery. By a letter of 1st August 1872, addressed to Mr. Wardell of the Public Works Department of Victoria, this firm asserted that by rights conferred in the original Crown grant they could reclaim up to the fairway; and that they wished either to run a pier into the river or to reclaim and build a wharf, in either case going out as far into deep water as they could without obstructing the free navigation of the river; and as they wished to act entirely in consonance with the view of the conservators of

the river, they took the liberty to apprise him of their "intention," and to ask with what officer of the Department they could confer, so that any works executed might have the sanction of the Harbour Department. A similar letter was sent on 2nd October 1872 to Mr. Hodgkinson, of the Board of Land and Works, as Mr. Wardell had told the Joshuas that the matter was under the control of the Board of Land and Works and not of the Public Works Department. This second letter stated an intention to run a pier 40 feet out into the river "at the point where a small pier is at present situated on our land"; and it reasserted the alleged right to reclaim up to the fairway. Neither letter seems to ask for any licence or permission to do what was intended; it merely indicates a desire to ascertain whether there was any possible objection on the part of "the conservators of the river," and to work in harmony with them if possible. No attempt has been made before us to show that the alleged right existed under the Crown grant; but perhaps the writers relied vaguely on the rule as to the right of a riparian owner *ad medium filum aquæ*. In 1869 the Supreme Court of Victoria had held that the rule was applicable in Victoria (*Davis* v. *The Queen* (1)); but in 1884 they reversed this decision, and held that it was not (*Garibaldi Co.* v. *Craven's New Chum Co.* (2)). Several departmental minutes, &c., have been put in evidence without objection; but they seem to me to be immaterial in view of the more legitimate evidence of communications with the Joshuas. On 30th October 1872 there came to Joshua Brothers a reply from the Department of Lands and Survey, as follows: "Gentlemen,—Referring to your letter of the 2nd inst., I am directed to inform you that the Board of Land and Works *will be prepared* to *grant the application* therein made for *permission* to erect a jetty on the River Yarra, *if such jetty be temporary only*, and subject to the following condition specified by the Inspector-General of Public Works—'such jetty not to extend further into the river than say 40 or 50 feet beyond the end of the present jetty.'" It will be noticed that this letter merely says that the Board *will* be prepared to grant the application for permission to erect the jetty (as if a formal

(1) (1869) 6 W.W. & à B. (Eq.) 106.
(2) (1884) 10 V.L.R. (L.) 233; 6 A.L.T. 93.

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application for a formal licence were to be expected); that it says nothing as to the Joshuas' assertion of right to reclaim; that it makes a condition as to the length of the jetty; and that the permission "will" be given "*if such jetty be temporary only.*" The Messrs. Joshua followed up their success by a letter of 25th November 1872 to the Chief Harbour-Master, the precise words of which are important: "Dear Sir,—With reference to *the pile pier which we are about to erect* for the convenience of our proposed sugar-works at Footscray, and for which *we have received the permission* of the Harbour Department, we respectfully beg to inquire whether the Government will allow us to push the *jetty* as far into the river as where the proposed wall to confine the fairway will eventually run." It appears that no such wall was in fact contemplated. By letters of 5th May 1873 the Chief Harbour-Master informed the Joshuas that the jetty might be extended 40 feet as applied for in the letter of 2nd October last. The letter of 25th November clearly refers to the same identical pier or jetty as had been the subject of the previous letters, the pier or jetty which had been already permitted or was to be permitted; but Joshua Brothers wanted to extend the pier or jetty further into the river. There is no attempt in the letter to get rid of or to qualify the condition of the Board that this jetty to be constructed was to be "temporary only"; and in my opinion, the word "temporary" governs the whole actual or intended permission of the Board, whatever that permission may be worth. By "temporary" I cannot understand anything but that the jetty was not to be permanent, and (as a corollary) that the jetty must be removed when the Crown wanted it to be removed. To say that the letter of 25th November submitted a proposal for an "entirely different structure" seems to me not to be justified, except in a rhetorical sense. To say that the jetty was now to be permanent because it was to be more substantial than before would be idle. The Messrs. Joshua simply took the risk, probably knowing the ways of Government in such matters; just as in *Ramsden* v. *Dyson* (1) a man agreed with Ramsden for a tenancy at will and put on valuable buildings under a title so frail. The Joshuas erected the jetty for the purpose of their business, and for the benefit of those to

(1) (1865-66) L.R. 1 H.L. 129.

whom they shortly sold it. Their expenditure seems indeed to have been good business, for no demand was made for removal for nearly 50 years.

The business of refining began at these works in 1874, and in 1875 the allotment 4 was transferred by the Joshuas to the Victoria Sugar Co.; and in 1888 to the present plaintiff, the Colonial Sugar Refining Co. These transfers were duly registered under the *Transfer of Land Act*; but they contained nothing as to any right of the transferors other than the right to allotment 4. It would be important to know whether there was any contract accompanying these transfers, or any assignment or document other than the transfers of land; and whether any reference was made therein to the wharf and reclaimed land: but no such documents have been put in. It is hard to conceive of all the solicitors concerned permitting their clients to leave possession or to go into possession without some provision as to the wharf and reclaimed land if it was thought that there was any title, actual or inchoate. The defence here does not admit that the plaintiff Company is successor in title to any property other than the land comprised in the Crown grant (par. 7). But the point has not been taken that the sugar companies are not successors to these rights; and I shall assume, as both parties assume it, that any interest or right of Joshua Brothers to the wharf or reclaimed land has passed to the present plaintiff. The learned Judge has found that in 1876 or 1877 the Victoria Sugar Co. built stores partly on reclaimed land between allotment 4 and the wharf. The *Melbourne Harbour Trust Act* 1876 came into operation on 1st January 1877.

Up to this date, 1st January 1877, therefore, the Government had not either directly or through its Departments, promised anything to the Messrs. Joshua in fact other than a permission to erect a temporary jetty into the river. Nor, as *Mann* J. points out, could the Government, if it had wished, have given any title or interest either in the foreshore or in the body of the river. For, by the *Land Act* 1869 (sec. 4), it was provided: "Under and subject to the provisions of this Act *but not otherwise* the Governor in the name and on behalf of Her Majesty shall grant convey or otherwise dispose of lands for the time being belonging to the Crown *for such*

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estate or interest as in each case is hereby authorized and for none other." This section expressly applies to *all* lands belonging to the Crown, whether under water or not. The bed and soil and shores of all navigable rivers (as well as other land) become Crown land on acquisition of a country; and, although the *Land Act* deals mainly with land available for settlement, I cannot accept the argument that it deals with such lands only. Part II. deals with alienation of country lands by licence and lease; but Part III. deals with leases and licences for other than agricultural or pastoral purposes. Under this Part III. the Governor was enabled to grant leases of Crown land for a term not exceeding 21 years and at a rent, "for sites of quays and landing-places," &c. (sec. 45); and by sec. 47 the Governor or any person duly authorized by him may grant a licence to enter any Crown lands "for any of the purposes for which leases may be granted under this Part of this Act." But, according to sec. 50, every licence under this Part shall not be for more than one year, and shall be subject to such conditions and to the *payment of such reasonable fee* as regulations impose.

Up to this date, therefore, 1st January 1877, the plaintiff Company had no estate or interest in the land under the foreshore or under the wharf. When that land was vested in the Harbour Trust, the Crown had at most, merely intimated, in effect through the Board of Land and Works that it would not treat the works of the Company as to the jetty as a trespass; but that the jetty was to be temporary. What has happened since the Harbour Trust got the land to deprive the Harbour Trust of its right of action for possession? Even if we take into consideration what the Crown had done, and add to that what the Harbour Trust did (or failed to do), I can find nothing. The learned Judge below has been of the opinion that the principle of equitable estoppel applies, and, in particular, he is impressed by the case of *Plimmer* v. *Wellington Corporation* (1). As his Honor has decided that he cannot give effect to the doctrine of equitable estoppel in face of the distinct language of sec. 4 of the *Land Act* 1869, I do not propose in this judgment to write a treatise on the subject of such estoppel; but it might be misleading if I did not say, respectfully, that, in my opinion, the doctrine does not apply.

(1) (1884) 9 App. Cas. 699.

Plimmer's Case (1) was brought to determine the principle on which compensation should be assessed for a wharfinger who had put his wharf and store out in the harbour of Wellington by the permission of the Crown. But there was more than permission — there was a "mutual agreement for mutual benefit" as to the wharf; and the Government had for its own purposes *requested* Plimmer to make the improvements, to incur expense for the Government's benefit (2). It is surely one thing to persuade a man to erect a wharf or to reclaim land; and a different thing to *consent*, at his *request*, to his erecting a wharf or reclaiming land. As usual, we are driven back finally to Lord *Cranworth's* lucid exposition of the closely related principle as to building on another's land, in *Ramsden* v. *Dyson* (3), and in particular to the passage at page 141: "If a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it." Even Lord *Kingsdown*, who differed from the majority of the House on the main issue, put this point in the same way (4): "If . . . a tenant being in possession of land, and knowing the nature and extent of his interest, lays out money upon it in the hope or expectation of an extended term, . . . then, if such hope or expectation has not been created or encouraged by the landlord, the tenant has no claim which any Court of law or equity can enforce."

In the judgment before us, there are set out two letters of 1890. The Company wrote on 20th March to the Harbour Trust secretary: —"Sir,—It is our intention to erect a store (No. 6) at Yarraville which will require to be built on a concrete foundation. The locality of the proposed retaining wall, and the relation it bears to the jetty and river are marked on plan and sent herewith, and I shall be glad to know if there is any objection on the part of the Commissioners to its construction in accordance therewith." The reply was: "Sir, —Your letter of 20th ultimo was submitted to the Commissioners, and I am instructed to inform you in reply that they have no objection to the proposed wall, your Company, of course, accepting any responsibility in connection therewith." This amounts, at the most,

(1) (1884) 9 App. Cas. 699.
(2) (1884) 9 App. Cas., at p. 712.
(3) (1865-66) L.R. 1 H.L. 129.
(4) (1865-66) L.R. 1 H.L., at p. 171.

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to a consent given by the Harbour Trust to the Company, at the request of the Company, that the Company erect the retaining wall —not to a request of the Harbour Trust that it should be erected.

The case of *Marshall* v. *Ulleswater Steam Navigation Co.* (1), which is also cited, is a mere illustration of the principle that one who obstructs a highway by placing or maintaining a gate across it, cannot complain if another who has a right to use the highway climb over the gate. A was the owner of the soil of a lake, and owned and *maintained* a pier which obstructed B—a steamship owner who held adjoining land on lease—in embarking and disembarking his passengers from or to his land held on lease. No one denied that if A had actually *constructed* the pier himself the person obstructed by it would have a right to step on it in order to get to the boats. This principle does not apply to a case where B creates the obstruction himself.

Lyon v. *Fishmongers' Co.* (2) was a case under the *Thames Conservancy Act*, from which many of the sections of the *Melbourne Harbour Trust Act* are taken. There, the conservators had, under sec. 53, granted, for payment, a licence to the Fishmongers' Co. to make a jetty into the river; and it was held that the licence did not confer on the company any right to affect injuriously by its construction the rights of another riparian owner to embark, disembark, &c.

Probably this action would never have been fought so tenaciously but for the decision of the Judicial Committee in *Attorney-General of Southern Nigeria* v. *John Holt & Co. (Liverpool) Ltd.* (3). Indeed, the statement of claim not only speaks of "natural riparian rights" as in that decision (par. 5), but it alleges also, as is alleged in *Holt's Case*, the tendency of the waters to "erode the banks" of the river. There is not the slightest ground for alleging erosion in the present case, although *Holt's Case* turns on erosion. *Holt's Case* is best understood if one considers what alternatives (if any) the Judicial Committee had. Briefly, the Crown had in 1861 granted five plots of land on the coast of Lagos Island. The sea there was very destructive, tearing away the foreshore; the grantees

(1) (1871) L.R. 7 Q.B. 166.
(2) (1876) 1 App. Cas. 662.
(3) (1915) A.C. 599.

reclaimed the foreshore by building a retaining wall, &c., and erected there stores, &c., for their business. In so reclaiming they conferred a great benefit on the public. This was done with the knowledge, and not against the wish of the Government—probably with the positive permission of the Governor. The grantees were entitled as riparian owners to access from their land to the sea; the Crown had a duty to protect the land from the incursions of the sea. After a grantee had thus used the foreshore from 30 to 50 years (not long enough for the British *Statute of Limitations* as to Crown land), the Government began to construct a road across the reclaimed land, a road which would cut off the grantees from the sea and from their stores; and the question was on what principle compensation should be assessed. It was held that the soil of the foreshore still belonged to the Crown, but that its title was subject to the grantees' rights as riparian owners to access to the sea, and as to the reclaimed land subject to the perpetual right of the grantees to place and store such things and to erect such buildings as hitherto. In short, the Crown was not allowed to get possession of the foreshore without compensating those who by their expenditure had done what it was the Crown's duty to do. In the present case there is not the slightest ground for saying that the Crown, or the Trust neglected any duty, or that the Joshuas and the Sugar Company were working for the public benefit; and the Trust has not the powers of dealing with the land which the Crown had in *Holt's Case* (1) (cf. sec. 51 of *Harbour Trust Act* 1915).

If I am right in my comment on these cases, I think they show also that the doctrine of riparian rights has in this case been applied to circumstances to which it is not properly applicable. The Company, having the right of access to the foreshore from its land, erected something between its land and the fairway which was, no doubt, much more useful to the Company's business, but which incidentally blocked the Company from using such right of access to the river as the common law gave. The Company is responsible for that blocking; not the Trust. The Company could not give itself a better riparian *right* by its own operations. Suppose a tenant, annoyed by boys coming to his orchard for fruit, get from

(1) (1915) A.C. 599.

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his landlord leave to put up a high wall with broken glass to keep them out; suppose that this wall prevent the surface water from running off the orchard land: the tenant does not thereby get a right to put a new water channel into the adjoining land; he gets no new right of drainage from the landlord. Suppose A owns a block of land, and has the usual right to cultivate it; he builds on it, so that cultivation becomes impossible: he has not thereby "abandoned" his right to cultivate; but it does not follow that he can use B's adjoining land for cultivation. The position, to my mind, seems obvious.

But a much more difficult question arises as to the *Statute of Limitations* (Part II. of the *Real Property Act* 1915). Assuming that the Sugar Company has had possession of the foreshore land, with buildings and jetty, since 1877, the right to bring an action for possession would, it is urged, cease in 1892—after 15 years (secs. 18, 19). I shall assume, in favour of the Company, that there has been no written acknowledgment of title in the meantime; no payment of rent; no disability. It is not contended that the Company is an express trustee of the land for the Trust, or in the position of a bailiff for the Trust. There is no need for the Company to show what used to be called "adverse possession" before the Act 3 & 4 Will. IV. c. 27; the question is merely how many years have elapsed since the right of the Trust accrued. As explained in *Halsbury's Laws of England*, vol. XIX., p. 105, par. 193, the Act of 1833-1834 "put an end to the doctrine of adverse possession" (*Nepean* v. *Doe d. Knight* (1)). The writ in this action was not issued till 14th November 1919; and the counterclaim of the Trust for possession is in this action. If we assume, in favour of the Company, that the Trust's right of entry, or right to bring an action for possession, accrued about 1874 (although the Trust gave no notice to quit), is not the title of the Trust extinguished (*Real Property Act* 1915, secs. 19, 43)? If so, and if A has a country house which he does not want to use at present, and out of kindness lets B have the use of it till it be wanted, A's title is, after 15 years, for ever extinguished. Accepting this position as the law, does the statute apply so as to bar the claim of the Trust—a body constituted by

(1) (1837) 2 M. & W. 894, at p. 911.

statute as trustee for the public benefit—under the circumstances ?

I confess that on this subject I should have liked to hear more argument. Under the Victorian Act (sec. 17), the statute does not affect the title of the Crown, even after 60 years. The Harbour Trust Act purports to *vest* this Crown land in the Trust ; but for what estate or interest ? The *Statute of Limitations* seems to extinguish estates or interests, things resting in tenure (sec. 16, " Land " ; sec. 43 ; secs. 18, 19, &c.) ; but here there is no tenure apparently. Perhaps what was meant was to put the Trust in the same position as the Crown as to the land vested ; and the Crown has not a tenure from itself. Does the *Statute of Limitations*, a general Act, applying as between subjects, apply also to a public body holding lands on trust by the direct force of a subsequent special Act, not by a conveyance ? The land was vested in the Trust " upon trust for the purposes of the Act "—the several Harbour Trust Acts. Does the *Statute of Limitations* operate so as to enable the Trust to convey to a person land which it has no power to convey directly—to convey it by the simple process of bringing no action for possession for a period of 15 years ? Then there are doubts as to the Sugar Companies having had possession, or exclusive possession, for the purpose of the *Statute of Limitations* of the land under the jetty, or even the land reclaimed. But as there has not been any argument on such lines I propose to assume that all these questions suggested should be answered in favour of the Company. This brings me to sec. 47 of the *Harbour Trust Act* 1876, sec. 46 of the consolidated *Harbour Trust Act* 1890, and sec. 46 of the *Harbour Trust Act* 1915.

Sec. 47 of the Act of 1876 says : " There shall be vested in the Commissioners upon trust for the purposes of this Act the bed and soil and shores of the waters and the pieces or parcels of land within the metes and bounds described in the First Schedule to this Act, but subject to the estate and interest of any person in such pieces or parcels of land existing at the time of the passing of this Act and to the right of Her Majesty to resume possession at any time without payment of compensation of any land required for purposes of national defence or for giving ingress egress and regress to and from the shore." By sec. 46 of the Act of 1890, a consolidating Act :

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"The bed and soil and shores of the waters and the pieces or parcels of land within the metes and bounds described in Part I. of the Third Schedule to this Act are hereby declared to have been vested in the Commissioners *at the time of the passing of the Melbourne Harbour Trust Act* 1876 *upon trust for the purposes of the said Act*, and the same shall continue to be vested in the Commissioners upon trust for the purposes of this Act, but subject to the estate and interest of any person in such pieces or parcels of land existing at the time of the passing of the *Melbourne Harbour Trust Act* 1876, and to the right of Her Majesty to resume possession at any time without payment of compensation of any land required for purposes of national defence or for giving ingress egress and regress to and from the shore." By sec. 46 of the present Act of 1915: "The bed and soil and shores of the waters and the pieces or parcels of land within the metes and bounds described in Parts I. and III. of the Second Schedule to this Act . . . are hereby declared to have been vested in the Commissioners *upon trust for the purposes of the said Act*, and the same shall continue to be vested in the Commissioners upon trust for the purposes of this Act, but subject to the estate and interest of any person in such pieces or parcels of land existing at the time of the passing of the *Melbourne Harbour Trust Act* 1876 and to the right of His Majesty to resume possession" &c. (as before, and for another purpose, which is immaterial).

The Schedule to each Act admittedly comprises the foreshore in question, as vested in the Trust. Looking now at the words of sec. 46 of the Act of 1890, we find that the bed and soil and shores, &c., are to be deemed to have been vested "at the time of the passing of the *Melbourne Harbour Trust Act* 1876"; whereas, in the corresponding sec. 46 of the Act of 1915, the words "*at the time of the passing of the Melbourne Harbour Trust Act* 1876" have been omitted, and the words "for the purpose of the *said Act*" become unintelligible. If we could act on conjecture, it might fairly be urged that the omission was a clerical error; and the Courts have frequently acted on the basis of omission, treating the section as if the words were there (*Maxwell on Statutes*, 3rd ed., p. 351; *Re Wainewright* (1)). But, unless the Court cannot do justice without

(1) (1843) 1 Ph. 258.

deciding such a delicate question as to the omission of words in an Act, I propose to assume that the words in the Act of 1915 are to be construed without the aid of the words in the Act of 1890, and to act on the theory that there is no such obviousness of error as to justify us in declaring an error. Without the aid of these words, sec. 46 of the Act of 1915 as it stands shows that the land in question *had been* vested in the Trust and was to *continue* to be so vested hereafter. That is to say, the *land* in question remained, and is to remain, vested in the Trust from the time that it was so vested; there is no break in the continuity of the Trust's title, the land still remains—notwithstanding the *Statute of Limitations*—land of the Trust; and if there be no lease or licence, no legitimate title that has passed from the Trust to the Company, there ought to be judgment that the defendant Trust do recover possession.

I might add, as strengthening the view that the land in question remains the property of the Trust, that I see no answer to Mr. *Latham's* contention (as to the words "subject to the estate and interest of any person in such pieces or parcels of land existing" &c.) that the only estate and interest protected from the Trust by this sec. 46 are any estate and interest in the Trust lands *other than* in the "bed and soil and shores" of the waters. The distinction between the two classes of land—the margin and the bed—has been preserved right through, from 1876 to 1915. It would appear that the Legislature believed that neither the Crown nor the Trust alienated or would alienate any of the bed or soil or foreshore of the river. These were, and were to be, sacrosanct (and see secs. 81, 87, &c.); and these contained the land in question.

In face of the Act of 1915, it is, to my mind, impossible to affirm that the title of the Harbour Trust to the land in question has been extinguished or even in any way affected by the *Statute of Limitations*. To say that any title has passed to the Company before or after the *Harbour Trust Act* 1915 would be to contradict that Act, when it declares that the land *had been vested* and should *continue* to be vested in the Commissioners. Nor has any title been given to the Company since the Act of 1915. None of the powers of leasing, licensing, &c., conferred by that Act (as well as by the previous Acts) has been exercised. There is no power conferred to sell any of the land

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vested in the Commissioners by the Acts. There is power to grant leases of the land (sec. 51); but the power cannot be exercised without the approval of the Governor in Council, and the lease must be upon such rent and other conditions as the Commissioners think fit, and must not exceed 21 years (sec. 51). The Commissioners may construct wharves, &c.; and may authorize the construction thereof on such waterside frontages or on such land as the Commissioners may let or (query, "on") lease or licence (sec. 60). There has been no such lease or licence granted. The word "licence" in the Act involves clearly a document in writing—if not a deed (cf. secs. 81, 82). There is power upon such terms, and upon the payment of a fair and reasonable consideration to license the erection of piers or landing-places, &c. (sec. 84); and the consideration must be fixed after a valuation (sec. 85). There is a similar power under sec. 87; but the licence must be upon *payment* of such consideration, and subject to such conditions as the Commissioners think fit. The provision vesting in the owner of the adjoining land any embankment made under licence is obviously inapplicable; for there has been no licence, and the provisions cannot be applied until the secretary of the Commissioners has certified upon the licence that the conditions have been performed (sec. 82). The power of the Commissioners to resume by notice the possession of the land the subject of a lease or licence (sec. 54) is inapplicable; for there has been no lease or licence. The Trust has, it is true, given a notice under this section; but this course was taken, no doubt, for greater caution, in the event of the Court treating the correspondence of 1872-1873, &c., as amounting to a licence.

Perhaps I should say that I have not failed to consider the point first dealt with by *Mann* J. in his judgment—the point urged that the grant of allotment 4 in 1850, and the certificate of title issued afterwards, actually include part of the foreshore, and that therefore the Trust had no title to the whole foreshore at the Company's allotment. The learned Judge has held that any measurements contained in the Crown grant must yield to the clear intention that the land granted should end at the river's margin. No sufficient reason has been shown for differing from this decision.

For these reasons I am of opinion that the judgment should be set aside, the action of the plaintiff dismissed, and the counterclaim granted for possession of the land in question.

I regret to find, however, that I am unable to concur with the declaration proposed by my learned brothers *Isaacs* and *Rich* in favour of the Company. We agree in the essential position—that the title of the Trust is not extinguished, and that the Trust is not estopped in any way from insisting on its legal right. But I cannot understand how we can consistently declare that the Company "is entitled but *subject to the powers duties and authorities vested in*" the Trust "to exercise the rights of a riparian owner in respect of the River Yarra over the land" in question and over the jetty "*so long as the same remains.*" This either means that the Company has in some way acquired a new riparian right—a new quasi-permanent right as riparian owner on the east side of the land in question and the jetty; or it means, because of the words which I have italicized, nothing. I can understand the Company being treated as still entitled to its "natural" riparian rights, along the east of the allotment of which it is proprietor, so far as those rights can be exercised despite the filling in of the foreshore by the Company; but the Trust has done nothing that entitles the Company to treat its riparian rights as transferred to a new place. The obstructions to the exercise of the original riparian rights were created by the Company itself of its own volition; not by the Trust. The cases referred to in support of the declaration rest ultimately on estoppel of others by their conduct (*Ulleswater Case* (1); *Attorney-General of Southern Nigeria* v. *John Holt & Co. (Liverpool) Ltd.* (2); *Attorney-General of Straits Settlement* v. *Wemyss* (3)); and there is here no conduct of the Trust that creates any estoppel (see *Mellor* v. *Walmesley* (4)). Admitting that the Company never for a moment abandoned its riparian rights, never intended to abandon them, it does not follow that it acquired riparian rights at a new frontage further out in the fairway of the river. If the reclamation soil were removed, I assume that the original riparian rights could be exercised. Accepting what Lord *Shaw* said, in *Attorney-General of Southern*

(1) (1871) L.R. 7 Q.B. 166.
(2) (1915) A.C. 599.
(3) (1888) 13 App. Cas. 192.
(4) (1905) 2 Ch. 164.

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Nigeria v. *John Holt & Co. (Liverpool) Ltd.* (1), that the reclamation of foreshore by *the Crown or a third party* would have no effect on the riparian rights of the frontagers, it does not follow that reclamation *by the Company itself* confers on the Company riparian rights elsewhere. The declaration proposed would restore not the *status quo ante*, but a new status, and without grant or estoppel to support it. If the declaration is to have no substantial effect, because of the italicized words added, it will cause misunderstanding and probably lead to more litigation and useless expense.

RICH J. I have very carefully considered all the phases of this intricate case. After examining the relevant statutes, the lengthy evidence written and oral, I am of opinion that the appeal should be allowed, preserving, however, the respondent's rights as riparian owner. As my interpretation of the law and the facts does not differ from the reasons set out in the judgment of my brother *Isaacs*, which I have had the opportunity of reading, an extended statement by me would be practically reiteration. I content myself, therefore, with one exception, with stating my agreement with that judgment. That exception arises out of the difference of opinion between my two learned brothers on the subject of riparian rights. With regard to them, as I agree with the declaration proposed by my brother *Isaacs*, I shall state my reasons in my own words.

It was argued by Mr. *Latham* for the Harbour Trust that the simple fact of the Company or its predecessors having altered the configuration of the shore and built the wharf put an end to its riparian rights. On the other hand, learned counsel for the Company claimed to retain those rights on grounds which were certainly larger than those on which I am prepared to support them, but, all the same, claimed their retention. The ground I think applicable is that the dominant fact is the temporary nature of the permission which from first to last was given in respect of the reclamation and the wharf. That is fully set out in the judgment of my brother *Isaacs*, and, as I agree with what is there said, I refer to the nature of the permission only for the purpose of its corollary as to riparian rights. It is, in my opinion, a corollary from that conclusion that,

(1) (1915) A.C. 599.

when the temporary permission is put an end to, all parties revert to their prior situation so far as possible. The Company never for a moment abandoned its riparian rights. In *Holt's Case* (1) Lord *Shaw* says that "the abandonment of rights annexed to land is a question of intention, and it is absurd to suppose that the frontagers in the present case intended to convert their holdings into what has been described as 'hinterland.' Further, it appears from the case of *Marshall* v. *Ulleswater Steam Navigation Co.* (2) that the reclamation of foreshore by the Crown or a third party would have no effect on the riparian rights of the frontagers, so that the frontagers' rights may exist even after the land has ceased to be subject to the flow and reflow of the tide." When the temporary permission is terminated here, its purpose has passed. Then, if the Harbour Trust continues to maintain the wharf as its own, it cannot, consistently with the law as stated in *Holt's Case* and *Marshall* v. *Ulleswater &c. Co.*, deny that it is obstructing *pro tanto* the Company's access to the river. That access never having been abandoned, the only way to maintain the prior existing rights is to permit access to the river unimpaired, even though the obstruction stands in the way. By erecting the wharf the Company cannot, even at common law, deny its lawful existence now, but that is no reason for denying —so far as consistent with the presence of the wharf—the Company's right of access to the water, subject always to the power, if any, which the Harbour Trust may be found to have under its statute to affect that right. As to what the power is I express no opinion.

I agree with the order proposed by my brother *Isaacs*.

As to the claim:—Discharge the judgment of Mann J. and in lieu thereof: (1) *Declare that the plaintiff (respondent) as registered proprietor of the land included in its certificate of title volume* 2275 *folio* 454930 *is entitled, but subject to whatever powers, duties and authorities are vested in the defendants (appellants) by the Melbourne Harbour Trust Act* 1915, *to exercise the rights of a riparian owner in respect of the River Yarra*

(1) (1915) A.C., at p. 621.

(2) (1871) L.R. 7 Q.B. 166.

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over the land mentioned in the notice of 19th August 1919, *and also over the wharf or jetty therein mentioned so long as the same remains*; (2) *otherwise the plaintiff's action be dismissed. As to the counterclaim*:—(1) *Declare that the land mentioned in the notice of 19th August* 1919 *and all wharves, piers and erections thereon or abutting thereon on the east of the said land are vested in the defendants (appellants) as part of the Port of Melbourne, and are subject to whatever powers, duties and authorities are vested in the defendants by the said Act in respect of the said Port*; (2) *Judgment for possession accordingly. No costs of action (including claim and counterclaim) or of appeal to either party.*

Solicitors for the appellants, *Malleson, Stewart, Stawell & Nankivell.*

Solicitors for the respondent, *Blake & Riggall.*

B. L.