[HIGH COURT OF AUSTRALIA.]

GRAIN ELEVATORS BOARD (VICTORIA) . APPELLANT;
DEFENDANT,

AND

PRESIDENT, COUNCILLORS AND RATEPAYERS OF THE SHIRE OF DUNMUNKLE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1946.

MELBOURNE, *May* 14, 31.

Latham C.J., Rich, Starke, Dixon, McTiernan and Williams JJ.

Local Government (*Vict.*)—*Rating*—*Exemption*—"*Land the property of His Majesty which is . . . used for public purposes*"—*Land owned and occupied by statutory corporation*—*Functions of corporation*—*Grain Elevators Acts* 1934-1943 (*No.* 4270—*No.* 4946) (*Vict.*)—*Local Government Act* 1928 (*No.* 3720) (*Vict.*), *s.* 249 (1).

Under the *Grain Elevators Act* 1934 (Vict.) a Board was constituted as a body corporate, capable of suing and being sued and of taking and disposing of real and personal property, for the purpose of "the handling of grain in bulk by means of the elevator system." It was subject in some respects to executive control, but it also had independent discretionary powers. The members of the Board were appointed, and could be removed from office, by the Governor in Council. The Board had power to appoint and dismiss its own officers, none of whom (nor the members of the Board) were to be subject to the *Public Service Act* 1928 (Vict.). It had its own separate fund into which it was to pay all moneys received by it; its accounts were audited in accordance with the statutes relating to the audit of public accounts. It had power to borrow on overdraft up to a specified limit, and a further power, with the consent of the Governor in Council, to borrow moneys on the security of its revenues by the issue of debentures. It had power, with the approval of the Minister of Agriculture, to acquire existing grain elevators and appurtenances, to construct elevators and appurtenances, and to operate, maintain and control the same. It was empowered to acquire land, by agreement or compulsorily, for the purposes of the Act and to store in elevators under its control all grain of prescribed quality offered for that purpose; it was required to

afford all reasonable, proper and equal facilities for the storage of grain in elevators under its control and for the receiving, forwarding and delivery of grain so stored, and was empowered to sell surplus grain, to buy grain and to do such other acts as were incidental to the exercise of any of its powers. It also had power to make by-laws (subject to confirmation by the Governor in Council) for the purposes of the Act generally and, in particular, for the operation, management, control and maintenance of its elevators, and for scales of charges for the handling and storage of grain in its elevators.

Held, by *Latham* C.J., *Starke*, *Dixon*, *McTiernan* and *Williams* JJ. (*Rich* J. dissenting), that land acquired by the Board for the purposes of the Act was not "land the property of His Majesty" so as to come within the exemption from rating provided by s. 249 (1) of the *Local Government Act* 1928 (Vict.).

Decision of the Supreme Court of Victoria (*Herring* C.J.): *Dunmunkle* v. *Grain Elevators Board*, (1946) V.L.R. 190, affirmed.

APPEAL from the Supreme Court of Victoria.

The Grain Elevators Board was a body corporate constituted under the *Grain Elevators Act* 1934 (Vict.). It was the registered proprietor and the occupier of land in the Shire of Dunmunkle. Upon the land were erected buildings with elevators and other machinery necessary for the bulk handling of grain, and the land was used exclusively for that purpose.

The municipality of the shire rated the Board in respect of the land for the year ending 30th September 1943 and in an action in the Supreme Court of Victoria sought to recover from the Board the amount of the rate. The Board contended that the land was exempt from rating by reason of s. 249 (1) of the *Local Government Act* 1928 (Vict.) as being "land the property of His Majesty which is . . . used for public purposes."

Herring C.J. gave judgment for the plaintiff.

From this decision the Board, by special leave, appealed to the High Court.

H. Walker, for the appellant. Land to which the Board has the legal title is held by it for the purposes defined in the Acts from which it derives its authority, the principal Act being the *Grain Elevators Act* 1934 (Vict.). It may be that the functions of the Board are such as could be carried out by private enterprise, but the Parliament of Victoria has seen fit to confer those functions on the Board for the service of the public. The primary question here is not quite the same as that considered in some of the English cases—whether the body in question was or was not exercising functions of a "governmental" character—but is rather this: Whether the Board is acting on behalf of, and under the control of, the Crown, carrying out what

H. C. OF A. 1946. GRAIN ELEVATORS BOARD (VICT.) v. DUNMUNKLE CORPORATION.

is in fact a Crown enterprise. If this question is answered in the affirmative, it follows that the land held by it is held on behalf of the Crown; the Board is a trustee of the land for the Crown, and, as the Crown is the beneficial owner, the land is properly described as land "belonging to" the Crown: Cf. *Heritable Reversionary Co. Ltd.* v. *Millar* (1). The answer to the question depends on the degree of control over the activities of the Board which the Act reserves to the Crown. Taking the *Grain Elevators Act* 1934 as a whole (see, particularly, ss. 18, 37, 39, 41, 42, 44, 45, 50), it is apparent that, although the Board has extensive powers of management, it is, in respect of all major matters, under the control of the Minister of Agriculture and the Governor in Council, and is really no more than a committee of management of the undertakings entrusted to it. The powers of the Board in relation to finance, although they seem extensive, are limited in important respects and are subject to governmental control. Its debentures are part of the Government Stock of Victoria. Its accounts are audited by the Auditor-General of Victoria under the *Audit Act* 1928 (Vict.), which is confined to public accounts. It does not detract from this view that the Board is a body corporate and that the legal title to the land is given to it. The provisions of the Act in that regard are merely machinery. When land which has been alienated from the Crown is resumed, it is the practice to take title in the name of a nominee because it is not practicable to have dealings in the name of His Majesty under the Acts relating to the transfer of land, owing to the requirements of the personal signature of the necessary documents. It is, therefore, a convenient piece of machinery which enables the Board to take title, and no inference adverse to the appellant can be drawn from the conferring of this power. In *Repatriation Commission* v. *Kirkland* (2) it was held that the Commission was a Crown agency; the *indicia* of identification with the Crown in the Act there in question were not nearly so strong as those in the present Act. Accordingly, the proper conclusion is that the land in question was held by the Board as trustee for the Crown and was, therefore, "the property of His Majesty" within the meaning of s. 249 (1) of the *Local Government Act* 1928, which is not confined to unalienated Crown land; it clearly fulfilled the other requirement of the section in that it was used for public purposes.

Dean K.C. (with him *Mulvany*), for the respondent. The Board is not in any material respect subject to executive direction or control. It has a very wide discretion which is quite free of executive inter-

(1) (1892) A.C. 598, at pp. 620, 621.

(2) (1923) 32 C.L.R. 1.

ference. Even where its powers are expressed to be subject to the approval or consent of the Minister or the Governor in Council, the initiative remains with the Board although it is subject to a power of veto. In such matters the act is the act of the Board, not of the executive. That is the test applied by the Privy Council in *Metropolitan Meat Industry Board* v. *Sheedy* (1). That decision is very much in point here; the legislation now under consideration has the characteristics which led the Privy Council to the conclusion that the body there in question was not a Crown agency. On legislation of a similar general character *Lowe* J. held that the Country Roads Board of Victoria was not an agent of the Crown (*W. A. Purvis Stores Pty. Ltd.* v. *Richardson* (2)). The legislation in *Repatriation Commission* v. *Kirkland* (3) was very different; the Commission had no revenue of its own and it was subject to ministerial direction; moreover, its functions were held to be functions of the executive government: *Sanitary Commissioners of Gibraltar v. Orfila* (4) was a similar case. The functions of the Board here are more like those of an industrial enterprise than of a government. In addition to s. 4 of the 1934 Act, under which the Board is incorporated and declared to be capable of suing and being sued and of acquiring and disposing of real and personal property, ss. 10, 17, and 18 are the important provisions. Under s. 10 it is for the Board to take steps to acquire or construct grain elevators &c.; the Minister has merely a power of veto. Under ss. 17 and 18, the Board's powers to acquire land by agreement or compulsorily and to provide facilities for the storage &c. of grain are entirely free of executive control or veto. Sections 25, 26 and 48 contemplate legal proceedings by and against the Board which are quite distinct from proceedings against the Crown. Under ss. 29-33 the Board has wide contractual powers, subject only to veto in certain cases. The provisions relating to finance (ss. 35 *et seq.*: See also Act No. 4379, ss. 7, 8, and Act No. 4675) give the Board a fund of its own and a considerable measure of financial independence. If the appellant's argument is correct, s. 249 (3) of the *Local Government Act* which exempts land of such bodies as the Victorian Railways Commissioners from rating, seems unnecessary. [He also referred to the *Grain Elevators Act* 1942 (Vict.), s. 3.]

H. Walker, in reply, referred to *Ex parte Graham*; *Re Forestry Commission* (5).

Cur. adv. vult.

(1) (1927) A C. 899, at p. 905.
(2) (1941) V.L.R. 56.
(3) (1923) 32 C.L.R. 1.
(4) (1890) 15 App. Cas. 400.
(5) (1945) 45 S.R. (N.S.W.) 379; 63 W.N. 29.

H. C. OF A. 1946. GRAIN ELEVATORS BOARD (VICT.) v. DUNMUNKLE CORPORATION. May 31.

The following written judgments were delivered :—

LATHAM C.J. The question which arises upon this appeal is whether the Grain Elevators Board constituted under the *Grain Elevators Act* 1934 (Vict.) is entitled to exemption from municipal rating under the *Local Government Act* 1928 (Vict.) by reason of s. 249 (1) of that Act, which is as follows :—

" All land shall be ratable property within the meaning of this Act save as is next hereinafter excepted (that is to say) :—

(1) Land the property of His Majesty which is unoccupied or used for public purposes."

The Board was rated for the year ending 30th September 1943 by the Shire of Dunmunkle in respect of land owned and occupied by the Board upon which were grain elevators and other machinery necessary for the bulk handling of grain. *Herring* C.J. held that the Board was liable and ordered that judgment be entered for the amount claimed, £158 6s. 8d., with interest.

The Board is a body corporate (*Grain Elevators Act*, s. 4 (3)). It is the registered proprietor of the land in question. It is contended on behalf of the Board that it holds the land as trustee for either the Commonwealth Government or the State Government, or that the Board is simply an agency of the Commonwealth Government or is a part of the State Department of Agriculture.

An arrangement was made between the Commonwealth Government and the Government of Victoria whereby the Board undertook the duty of storing wheat on behalf of the Commonwealth during the war. This arrangement resulted only in the Board being employed by the Commonwealth for the purposes mentioned subject to the terms of the arrangement. The argument was not pressed that the Board was in any sense entitled to any immunity as representing the Government of the Commonwealth. The question which was argued upon the appeal was whether the land which the Board owned and occupied and in respect of which it was rated was land the property of His Majesty in right of the State of Victoria.

If the Board held the land merely as a trustee for the Government of the State the land would be the property of the State and the exemption contained in the *Local Government Act*, s. 249 (1), would apply : *Perry* v. *Eames* (1) ; *Hornsey Urban District Council* v. *Hennell* (2). But it would in my opinion be wrong to hold that the Board holds land upon any trust. There is no provision in the Act which makes the Board a trustee for the Crown of the land vested in it. It holds its land subject to the provisions of the statute by which

(1) (1891) 1 Ch. 658, at pp. 668, 669. (2) (1902) 2 K.B. 73.

the Board is constituted. It is by these provisions and not by any part of the law of trusts that the rights and duties of the Board are determined.

The substantial defence to the claim is that the Board is a Government department acting for and on behalf of the State of Victoria—that it is a servant of the Crown, its acts being part of "the use and service of the Crown."

Various tests have been proposed and applied from time to time for the purpose of determining whether a person or a body is entitled to the privileges and immunities of the Crown. The fact that an authority discharges public functions and makes no private profit is not sufficient to identify it with the Crown: *Mersey Docks* v. *Cameron* (1). In order to be entitled to the immunity of the Crown an authority must show that the functions which it discharges are governmental in character. There are cases in which it has been held that some functions are inalienable functions of government, so that any body which discharges them is necessarily entitled to the privileges and immunities of the Crown. *Coomber* v. *Justices of Berks* (2) has from time to time been referred to in this Court as establishing a fundamental distinction between certain governmental functions which are "inalienable" and other functions: See e.g. *Federated Municipal and Shire Council Employees' Union of Australia* v. *Melbourne Corporation* (3); *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* [No. 2] (4); *The Commonwealth* v. *Colonial Combing, Spinning and Weaving Co. Ltd.* (5). But it is not necessary to determine in this case whether there are governmental functions which are "inalienable." It is not suggested that the storage of grain is such a function. The argument for the appellant is that it has, in Victoria, been made a governmental function by statute.

It is necessary to consider all the circumstances of each case in which the question arises. The fact that a function has been a traditional function of government and that no intention of "alienating" it appears is sufficient to answer the question in many cases. No-one would doubt, for example, that ordinary State departments such as the Lands Department or the Chief Secretary's Department were departments of government in the fullest sense and that what was done by their officers in the course of their duties was done on behalf of the Government. An incorporated body may be a government department and entitled to Crown immunity: *Public Works*

(1) (1865) 11 H.L. Cas. 443.
(2) (1883) 9 A.C. 61.
(3) (1919) 26 C.L.R. 508, in particular at pp. 528, 530.
(4) (1920) 28 C.L.R. 436, at p. 454.
(5) (1922) 31 C.L.R. 421, at p. 446.

H. C. OF A. 1946.

GRAIN ELEVATORS BOARD (VICT.) v. DUNMUNKLE CORPORATION.

Latham C.J.

Commissioners v. *Pontypridd Masonic Hall Co. Ltd.* (1). The fact that financial control is in the Crown—that revenues of an authority go into consolidated revenue and that its expenditure is made out of consolidated revenue—is another element which helps to show the identity of an authority with the Crown: *Fox* v. *Government of Newfoundland* (2); *Metropolitan Meat Industry Board* v. *Sheedy* (3). Where persons or an incorporated authority are subject to direct ministerial control so that they act under the direction of a Minister, such persons or authorities act on behalf of the Crown and any provision, whether express or implied, for Crown exemption is applicable to them: *Marks* v. *Forests Commission* (4); *Repatriation Commission* v. *Kirkland* (5).

But if a board is a body independent of the Government with discretionary powers of its own, so that it is not a mere agent of the Government, then such a body does not represent the Crown. This was the criterion which was applied in *Fox* v. *Government of Newfoundland* (6) and by this Court in *Repatriation Commission* v. *Kirkland* (5). See also *Ex parte Graham*: *Re Forestry Commission* (7). The question was put in the following form in *Roper* v. *Public Works Commissioners* (8)—whether the persons in question were acting as servants of the Crown or merely as a statutory body invested with public rights, duties and liabilities like the trustees of a public dock or public park. Were they Government servants doing the work of the Government? In *Metropolitan Meat Industry Board* v. *Sheedy* (9), their Lordships of the Privy Council described the Board there under consideration as "a body with discretionary powers of their own. Even if a Minister of the Crown has power to interfere with them, there is nothing in the statute which makes the acts of administration his as distinguished from theirs." I proceed, therefore, to examine the terms of the relevant statutes independently of any preliminary presumption that the storage of grain is or is not itself a governmental function.

In the first place, the *Local Government Act*, s. 249 (3), contains a number of exemptions from rating of statutory bodies discharging public functions. These are the Victorian Railways Commissioners, the Minister of Public Instruction, the Board of Land and Works, the Commissioners of the Melbourne Harbour Trust, the Melbourne and Metropolitan Board of Works, the Commissioners of the Geelong Harbour Trust and the Geelong Waterworks and Sewerage Trust.

(1) (1920) 2 K.B. 233.
(2) (1898) A.C. 667, at pp. 671, 672.
(3) (1927) A.C. 899, at pp. 905, 906.
(4) (1936) V.L.R. 344.
(5) (1923) 32 C.L.R. 1.
(6) (1898) A.C. 667.
(7) (1945) 45 S.R. (N.S.W.) 379; 63 W.N. 29.
(8) (1915) 1 K.B. 45, at p. 52.
(9) (1927) A.C. 899, at p. 905.

When the *Grain Elevators Act* was passed no provision was made to add the Board to the class of exempted statutory authorities specifically mentioned in s. 249 (3).

In the next place, the *Grain Elevators Act*, s. 44, contains an express provision exempting the Board from liability for income tax. There is no corresponding provision exempting the Board from liability for municipal rates.

Further, the *Grain Elevators Act* 1942 (Vict.), which came into operation on 21st December 1942, provided in s. 3 that, "notwithstanding anything in any Act, land used exclusively for any grain elevator under the Principal Act shall not be deemed to be rateable property within the meaning of any Act." (This provision is not applicable to the rates claimed in these proceedings because the rate was levied before the Act came into operation.) This provision exempts land used for grain elevators for the future, but it has no reference to the past. Moreover, it is limited to land used for grain elevators, a term defined in s. 3 of the Principal Act, and does not apply to other land occupied or owned by the Board.

These three facts—the failure to include the Board within the express exemptions applying to similar bodies by virtue of s. 249 (3) of the *Local Government Act*, the express exemption of the Board from income tax with no reference to liability for municipal rates, and the limited character of the exemption from rates created by the *Grain Elevators Act* 1942—all tend to show that the Board was not, by reason of its constitution and functions, entitled to the immunity which it now seeks to establish.

If, however, the *Grain Elevators Act* showed that the Board was a Crown agency, the considerations mentioned would have to yield to the terms of the Act. I proceed, therefore, to examine that Act.

On the one hand there are many provisions which emphasize the public nature of the functions of the Board and which associate the Board with the Government of the State. I refer to s. 6 (6), copies of decisions of the Board to go to the Minister : s. 6 (7), a Government financial officer to attend meetings of the Board ; s. 10, acquisition of elevators, arrangements for use of existing elevators, construction of elevators and operation of elevators by the Board require the approval of the Minister, that is, the Minister of Agriculture (s. 3) ; s. 10 (2) introduces a control of delivery of wheat within proclaimed areas which can give to the Board a monopoly of storage of wheat within those areas and therefore excludes private enterprise ; s. 11 (1) and s. 45, the Board reports upon certain matters to the Minister ; s. 11 (4), the Board may, with the approval of the Minister and of the Minister for Railways, arrange for certain work to be done by the

H. C. OF A. 1946. GRAIN ELEVATORS BOARD (VICT.) v. DUNMUNKLE CORPORATION. Latham C.J.

Railway Construction Branch of the Board of Land and Works; s. 33, contracts involving over £1,000 require the approval of the Governor in Council; s. 35, consent of the Governor in Council required for the borrowing of money by the Board; the Principal Act and amending legislation provide for the Governor in Council raising money on the credit of the State for the purposes of the Board (see Act No. 4379); s. 45, the Board to report to the Minister as directed upon any matter relating to the handling of the grain. These provisions show a close association with the Government, but the question is whether they are sufficient, having regard to other provisions in the statute, to make it proper to hold that the acts of the Board are the acts of the Government of the State.

In my opinion consideration of other provisions shows that this is not the case. The business of the Board in the storage of wheat is carried on under authority conferred upon the Board principally by ss. 17 and 18. Section 17 authorizes the Board to acquire land. Section 18 provides that the Board may store grain in elevators, handle such grain, sell surplus grain and buy grain in cases specified. This section relates to the ordinary day to day work of the Board. In relation to this work there is no provision authorizing ministerial control, or even requiring ministerial approval. Other provisions to which reference has already been made show that certain things can be done by the Board only with the approval of the Minister, so that the Minister has a veto. But there is no provision in the Act which entitles the Minister to give directions to the Board in the performance of its statutory function of storing grain. In performing its ordinary functions the Board acts at its own discretion.

Several provisions of the Act emphasize the separation of the Board from ordinary governmental services controlled by Ministers. For example, under s. 22 (3) an officer of the Department of Agriculture, nominated by the Minister, may determine disputes as to dockages between the Board and owners of wheat or their agents. Under s. 22 (5) that officer may make a determination the result of which is that the Board shall pay moneys to the Department of Agriculture. Such a provision assumes that the Board is not a part of the Department of Agriculture.

The finances of the Board are kept separate from the finances of the Government. Section 35 provides that the Board may, with the consent of the Governor in Council, borrow money. Here it is the Board, and not the Government, which borrows. Under the *Grain Elevators (Financial) Act* 1936 the Government may make money borrowed by the Government available for expenditure by the Board. The distinction between the two forms of borrowing emphasizes the

fact that the Board is separate from the Government. Further, under s. 37 (9) of the Principal Act the Government of Victoria guarantees the due repayment of moneys secured by debentures issued by the Board. This provision shows that acts of the Board are not treated by the statute as acts of the Government. The same observation applies to the provision in s. 38 (2) which enables the Treasurer to guarantee overdrafts of the Board. The *Grain Elevators (Financial) Act*, s. 7, requires the Board to pay to the Treasurer of Victoria as they become due such sums as the Treasurer may require in order to provide for the payment of interest and contributions to the National Debt Sinking Fund in respect of loan moneys raised under the Act. If the moneys of the Board were the moneys of the Government, no such provision would be necessary. Here again the separation of the Board and the Government of the State is apparent.

Under s. 27 of the Principal Act it is the Board which may demand and receive charges in respect of services rendered by the Board. Under s. 29 the Board may enter into contracts for the purposes of the Act. Section 31 provides that contracts made according to the provisions of the Act shall be effectual in law and binding on the Board. It is plain that the Board would be the person to sue and be sued upon such contracts. Section 48 refers to writs or other processes against the Board. The Crown would have no right of suit upon contracts made by the Board and would not be liable to proceedings in respect of such contracts by petition of right.

I am therefore of opinion that the Board is a statutory body, the powers, rights and duties of which are defined by the *Grain Elevators Acts*; that it is a body which in doing its business exercises an independent discretion of its own; and that, though a Minister of the Crown may prevent the Board acting in certain cases, he does not control or direct the acts of the Board. The acts of the Board are therefore not the acts of the Crown, and land the property of the Board cannot be described as the property of His Majesty within the meaning of the *Local Government Act*, s. 249 (1). I am therefore of opinion that the decision of the Chief Justice was right and that the appeal should be dismissed.

RICH J. The question involved in the present appeal is whether land vested in the Grain Elevators Board of the State of Victoria for the purposes of its functions is exempt from liability to rates under the *Local Government Act* 1928 (Vict.) which, by s. 249 (1), excepts from ratability "land the property of His Majesty which is unoccupied or used for public purposes." Two questions are involved, (1) Is the land vested in the Board land the property of His Majesty ?, and (2) Is it used for public purposes ?

H. C. OF A 1946.

GRAIN ELEVATORS BOARD (VICT.) v. DUNMUNKLE CORPORATION.

Rich J.

I feel no doubt that land vested in the Board is land the property of His Majesty. The Board, by reason of s. 10 of the *Grain Elevators Act* 1934 (Vict.), is so much under the control of the Minister that it is, in my opinion, a branch or department of the Government (and therefore "the Crown") rather than a body independent of the Government having, as its primary function, the exercise of independent powers and discretions free of governmental control. In *Mersey Docks* v. *Cameron* (1), the criterion of taxability imposed by a statute was occupancy of land. Hence, since the Act did not bind the Crown, the criterion of exemption was whether it was the Crown which occupied the land, not whether the occupant was using it for a public purpose or for the general good of the realm: to be exempt, the land had to be occupied by the Crown or by a servant of the Crown for the purposes of the Crown, as distinguished from merely public purposes. In the case now before us, it is property in land which is one of the criteria of exemption. To be capable of being exempt, the land must be the property of the Crown. It is clear that the Board, which is an agency of the Crown, has no beneficial interest in any land which it may acquire for the purposes of its functions; for example, with the permission of the Minister under s. 10 (1) (*a*), or by agreement or compulsory purchase under s. 17 (1) (*a*), of the *Grain Elevators Act*, any title to land so acquired it holds as trustee for the Crown.

The next question is whether the land is used for public purposes. In my opinion, it is. It is used, not by a private concern, but by a Crown agency for the purpose of supplying the public at large with facilities for the storing and delivery of grain, and ancillary purposes. No doubt, charges are made for the services so supplied; but these do not enure, in whole or in part, for the benefit of private individuals, but wholly for the benefit of the Crown. There is nothing in the case of *Essendon Corporation* v. *Blackwood* (2) inconsistent with this: Cf. *Municipal Council of Mosman* v. *Spain* (3); and, as was pointed out by *Latham*, C.J., in *South Australia* v. *The Commonwealth* (4), "any activity may become a function of government if parliament so determines."

The appeal should be allowed.

STARKE J. The appellant is the registered proprietor and the occupier of certain lands within the Shire of Dunmunkle. It is a body corporate constituted under the *Grain Elevators Act* 1934 (Vict.) and acquired the lands pursuant to the powers contained in

(1) (1865) 11 H.L. Cas. 443.
(2) (1877) 2 App. Cas. 574.
(3) (1929) 29 S.R. (N.S.W.) 492; 46 W.N. 174.
(4) (1942) 65 C.L.R. 373, at p. 423.

that Act, erected buildings, elevators and machinery thereon necessary for the bulk handling of grain and uses the land for that purpose.

The Shire, pursuant to the *Local Government Act* 1928 (Vict.), s. 249, levied a rate for the year ending in the month of September 1943 upon all land within its municipal district. The *Local Government Act*, s. 249, provides :—

" All land shall be ratable property within the meaning of this Act save as is next hereinafter excepted (that is to say) :—

(1) Land the property of His Majesty which is unoccupied or used for public purposes."

The appellant claims that the land registered in its name and occupied by it is not ratable property by reason of this exception.

In England the exemption of the Crown from ratability is based upon the doctrine that the Crown is not bound by statute unless specially named or clearly intended. But in Victoria there is the express statutory exception already mentioned.

The land must be the property of His Majesty, but the provision does not require that it be vested in His Majesty (cf. s. 249, sub-ss. (3) (*a*) and (*b*)). Land may be the property of His Majesty because it is vested in him or because the land is held in trust for him or for his use by some other person or body (*Essendon Corporation* v. *Blackwood* (1) ; *Commissioners of Government Savings Bank* v. *Temora Municipal Council* (2) ; *Public Trustee* v. *Waipawa Council* (3)).

Land, however, vested in or belonging to statutory bodies for purposes defined in the statutes constituting them and which confer upon them discretionary powers of their own in relation to the use of the land is not property vested in or belonging in any sense to His Majesty (cf. *Fox* v. *Government of Newfoundland* (4) ; *Metropolitan Meat Industry Board* v. *Sheedy* (5)).

The land must also, if not unoccupied, be used for public purposes. " It is not easy," said the Judicial Committee in *Essendon Corporation* v. *Blackwood* (6), " to define generally what is meant by the words of the exemption ' the property of the Crown used for public purposes,' though land used for the public service, or as a public park, may be mentioned as instances which would clearly fall within them." It was long ago held in Victoria that the land must be used " purely and solely " for public purposes (*Hanna* v. *Seymour Road Board* (7) ; *Essendon Corporation* v. *Blackwood* (8)). In *Hanna's Case* (9) a

(1) (1877) 2 App. Cas. 574.
(2) (1919) 19 S.R. (N.S.W.) 111.
(3) (1921) N.Z.L.R. 1104.
(4) (1898) A.C. 667.
(5) (1927) A.C. 899.
(6) (1877) 2 App. Cas., at p. 584.
(7) (1865) 2 W.W. & A'B. (L.) 93.
(8) (1877) 2 App. Cas., at pp. 584-585.
(9) (1865) 2 W.W. & A'B. (L.) 93.

H. C. OF A. 1946. GRAIN ELEVATORS BOARD (VICT.) v. DUNMUNKLE CORPORATION. Starke J.

bridge the property of His Majesty was occupied by the Board. The only question was whether it was used for public purposes. The public had a right of passage over the bridge but only on payment of a toll " so that it was not for public purposes only, it subserved a private purpose also, and was therefore ratable."

Lastly, though property may belong to His Majesty it may yet be used and occupied by persons or bodies, other than for public purposes, and be ratable in respect of that occupation or use (*Melbourne Tramway and Omnibus Co.* v. *Fitzroy Corporation* (1)).

In my judgment, the land of which the appellant is the registered proprietor and occupier is neither the property of His Majesty nor used for public purposes. It is vested, as already indicated, in the appellant for the purposes of carrying out the powers, authorities and obligations conferred upon it by the *Grain Elevators Act* 1934. The appellant acquired the land for those purposes and upon it erected buildings, elevators and machinery for the storage and bulk handling of grain. It was empowered to and did store in the elevators under its control all grain of the prescribed quality offered for that purpose and it was required to afford all reasonable, proper and equal facilities for the storage of grain in elevators under its control and for receiving, forwarding and delivering of grain so stored. It was empowered to make by-laws for the operation, control and maintenance of all elevators of the Board and appurtenances connected therewith and also for a scale of charges for the handling and storage of grain and all operations connected therewith in its elevators and for many other purposes.

It is true that the members of the Board were appointed by the Governor in Council, that many of its powers and functions were subject to the approval of the responsible Minister and that the Government of Victoria might within prescribed limits guarantee the Board's debentures or its overdraft with any bank. But the Board had wide discretionary powers for carrying on its operations and bulk handling and storing grain.

And it was empowered to and did make charges for its services in handling and storing grain on the rated land which is plainly not a use of the land for public purposes.

It is unnecessary, I think, to examine the Act in more detail for the *Grain Elevators Act* 1942 (Vict.), passed after the making of the rate, provided in s. 3 that " notwithstanding anything in any Act, land used exclusively for any grain elevator under the Principal Act shall not be deemed to be rateable property within the meaning of any Act."

(1) (1901) A.C. 153, at pp. 168, 169.

So, it is improbable that the matter involved in this appeal will again arise.

The appeal should be dismissed.

DIXON J. We are not here concerned with a question arising under the rule that the Crown is not bound by statute unless the intention to bind it is expressed or positively indicated. It is under that rule that the occupation of premises for the naval, military, judicial and administrative purposes of the central government of the country has been considered to lie outside the area of liability for rates under the Poor Law of England. It is an occupation of the land which, if not that of the Crown itself, is at least to be regarded as part of the use and service of the Crown. In England it was necessary to find a ratable occupier.

The *Local Government Act* 1928 (Vict.) contains a general but emphatic formulation of the principle that all land shall be ratable subject to specified exceptions and it proceeds to name the Crown as the object of an exemption the conditions of which are distinctly defined. " In this country," said Sir *Montague Smith* for the Judicial Committee in *Essendon Corporation* v. *Blackwood* (1), " the exemption of Crown property rests on the omission in the Poor Law Acts of any words to bind the Crown. In Victoria the exemption is defined and limited by express enactment." The basis of the exemption is property not occupation, and, though the distinction would not perhaps matter much were we considering the ambit of the immunity arising from the failure of a rating statute to affect the Crown (see per Lord *Watson* in *Coomber* v. *Justices of Berks.* (2)), in the Victorian legislation it means that this particular condition of the exemption depends on conceptions of property rather than upon governmental relations. It is true that the governmental character of the person or body actually rated may be relevant to the question where the property resides. But, in the end, it must be found that the land is the property of the Crown before it can qualify for the particular exemption. It is only in that event that the question arises whether the land is unoccupied or is used for public purposes. If it is claimed that the land is used for public purposes, the governmental character of the occupier may then again become relevant, but, in my opinion, it is not upon that question that this case turns. It turns upon the fact that the Grain Elevators Board, a statutory corporation authorized, for the purposes of and subject to its statute, to purchase, take, hold, sell and dispose of real and personal property, is the owner in fee

(1) (1877) 2 App. Cas. 574, at p. 587. (2) (1883) 9 App. Cas. 61, at p. 75.

H. C. OF A. 1946. GRAIN ELEVATORS BOARD (VICT.) v. DUNMUNKLE CORPORATION. Dixon J.

simple of the land rated. That is not conclusive because the fact that the legal estate is vested in the corporation leaves it possible that the equitable or beneficial interest is in the Crown. There should not be left out of account the further possibility of the statute itself creating in the Crown a special right or interest, or congeries of rights or interests, in relation to the land which, either because of the degree of control they involve or of the beneficial enjoyment they confer, should be regarded as amounting to a form of property, not common law or equitable, but statutory.

But it appears to me to be clear that under the *Local Government Act* the expression " land the property of His Majesty " is not used in any loose or figurative sense to include property vested in public bodies simply because they are answerable to or controlled by the central government of the State. For, if it were so used, there would have been no need for the specific exemptions in sub-s. (3) of s. 249, in sub-s. (1) of which the exemption occurs of land the property of the Crown unoccupied or used for public purposes. Sub-section (3) exempts land vested in, among other bodies, the Victorian Railways Commissioners, the Minister for Public Instruction and the Board of Land and Works. These are corporations closely related to the government of the State.

The parties seemed inclined to argue the case as if the question was whether the Board was an agency of the Crown enjoying the Crown's privileges and immunities and as if the consequence of an affirmative answer to that question would be that the land rated, though vested in point of property in the Board, would enjoy the exemption conferred upon land the property of His Majesty. I cannot agree in the adoption of any such test. The exemption under s. 249 (1) does not attach unless, according to some legal sense of the word " property," it can correctly be said that the land is the property of the Crown. This, in my opinion, cannot be said of land vested in the Grain Elevators Board. The Board is clearly an independent corporation established by statute to perform the services and carry out the duties, indicated particularly by ss. 10 and 11 of the *Grain Elevators Act* 1934 (Vict.), in connection with what the long title describes as " the handling of grain in bulk by means of the elevator system." That in the fulfilment of its functions it is subject to ministerial control, at all events at many points, is undeniable. Moreover, the closeness of its relation to the government of the State is shown by the constitution and mode of appointment of the Board and by the financial provisions of the legislation, especially those contained in the *Grain Elevators (Financial) Act*

1934 (Vict.) and the *Grain Elevators (Financial) Act* 1939 (Vict.) considered together. It is probably correct to say, as counsel for the Board said, that it conducts what is just as much a governmental undertaking as the State railways and that it falls within the Department of the Minister of Agriculture of the State of Victoria.

But that appears insufficient to overcome the plain intention of the legislation that, like the Victorian Railways Commissioners, the State Savings Bank Commissioners, the State Electricity Commission and many other statutory governmental bodies, the Grain Elevators Board should be an independent corporation owning its own property legally and beneficially and acquiring its own rights and incurring its own obligations.

In a case *in pari materia*, viz. *Commissioner of the Government Savings Bank* v. *Temora Municipal Council* (1), an example will be seen of an express provision that the corporation should hold property vested in it for and on behalf of the government. This, it was held, created property in the Crown. No such provision is contained in the *Grain Elevators Acts*, nor do they imply any such consequence. On the contrary, they appear to intend to constitute a body for the conduct of what may be regarded as a public utility, as a separate responsible entity, owning its own undertaking both in law and in equity.

The draftsman of the legislation recognized that this was so when he considered it necessary by s. 44 to add the Board to the list of agencies protected from income tax by s. 21 of the *Income Tax Act* 1928 (Vict.). Whether, at that time, the legislature overlooked liability for municipal rates or decided against exempting the Board cannot, of course, be known. But in 1942 a specific exemption was conferred. The *Grain Elevators Act* 1942 (Vict.), which was enacted only three weeks after the striking of the rate now in question, provides by s. 3 that, notwithstanding anything in any Act, land used exclusively for any grain elevator under the *Grain Elevators Act* 1934 shall not be deemed ratable property within the meaning of any Act. " Elevator " is defined comprehensively by the *Grain Elevators Act* 1934, s. 3, to mean " any elevator warehouse building or depot under the control of the Board at which grain is received . . . for storage or forwarding and whether the same is provided with mechanical grain handling appliances or not." The exemption, therefore, covers the substantial part of the Board's undertaking. But, at the same time, it is carefully guarded by the word " exclusively " and it does not extend to mere offices or to land not yet put to use for receiving, storing or forwarding wheat.

(1) (1919) 19 S.R. (N.S.W.) 111.

H. C. OF A. 1946. GRAIN ELEVATORS BOARD (VICT.) v. DUNMUNKLE CORPORATION.

Although the provision was passed too late to apply to the present case, I think that it may be considered on the question of interpretation. It would be a strange result if we were to interpret the prior legislation as giving a wider exemption than that conferred by the provision so that the express exemption it makes would prove unnecessary and the qualifications it places upon that exemption would be futile.

In my opinion the appeal should be dismissed.

McTIERNAN J. I agree that the appeal should be dismissed.

The question in this case arises upon s. 249 (1) of the *Local Government Act* 1928 (Vict.). The provision says that all land shall be ratable property within the meaning of that Act except land the property of His Majesty which is unoccupied or used for public purposes.

The appellant is constituted by the *Grain Elevators Act* 1934 (Vict.). By this legislation it is made a corporation and is made capable in law of, *inter alia*, purchasing and holding real and personal property for the purposes of the Act. The question in the case is whether certain land which the appellant purchased and of which it has been at all material times the registered proprietor is land the property of His Majesty which is used for public purposes. If such land is within that description it is not ratable. The appellant claims that while the land in question is at law its property, the land is in equity the property of the Crown. The words " land the property of " the Crown in s. 249 (1) include land which is the equitable property of the Crown. Hence if the appellant's claim is substantiated, the land in question is not ratable.

Section 4 (3) of the *Grain Elevators Act* 1934 creates a capacity in the Board to purchase or hold land only " for the purposes of the Act and subject to the Act." Hence the appellant Board holds the land now in question for those purposes and subject to those provisions. Does this make the Board a trustee for the Crown ? I do not repeat the provisions of the Acts. The powers and duties given to the Board are directed to supplying the public with the service of handling grain in bulk by means of the elevator system. The Acts entrust the responsibility of carrying on this service to the Board. Under the Acts, the Board is subject to a measure of control by the Executive Government. This control is a check upon the Board in the exercise of its powers and duties. But the result of the control is not that the Board is the servant or agent of the Crown or that the service of bulk handling of grain is made a function of the Crown. It is not a tenable view that the purposes for which the Board holds the land in question

under the Acts are the purposes of the Crown, or that the effect of the Acts is to make the Board a trustee of the land for the Crown.

In my opinion the appellant's claim that the land in question is the property of His Majesty fails.

WILLIAMS J. The question is whether 24 acres of land situated in the shire of Dunmunkle on which are erected buildings with elevators and other machinery necessary for the bulk handling of grain by the appellant, the Grain Elevators Board, and which has at all material times been exclusively used for those purposes, is exempt from rates under s. 249 (1) of the *Local Government Act* 1928 (Vict.). This subsection exempts " land the property of His Majesty which is unoccupied or used for public purposes." To qualify for this exemption two requisites are necessary, (1) that the land shall be the property of the Crown, and (2) that it shall be unoccupied or used for public purposes. It is not disputed that the subject land is being used for public purposes, so that the crucial question is whether it is the property of His Majesty. The land is vested in the Board at law and in Equity and so can only be the property of His Majesty if the Board can claim to represent the Crown. In order to determine this question it is necessary to consider the legal effect of the Acts by which the Board is incorporated and from which it derives its functions, duties and powers.

The Principal Act is the *Grain Elevators Act* 1934. This Act has been amended by the *Grain Elevators Acts* 1935, 1942, and 1943. The only provision in these amending Acts that needs to be noticed is s. 3 of the Act of 1942, which provides that, " notwithstanding anything in any Act, land used exclusively for any grain elevator under the Principal Act shall not be deemed to be ratable property within the meaning of any Act." This Act is not applicable because it was not in force when the present rate was struck, and we were also informed that the same point will arise in the future because the Board owns other land which is not entitled to the benefit of this exemption.

There is also the *Grain Elevators (Financial) Act* 1936, which provides for the raising of money by sale of Victorian stock and debentures for the purposes of the *Grain Elevators Acts*. This Act provides that the Grain Elevators Board shall pay to the Treasurer of Victoria as they become due such sums as the Treasurer may require in order to provide for the payment of interest and contributions to the National Debt Sinking Fund in respect of the moneys so raised. The Act provides an alternative method of raising money for the purposes of the Board to that provided by the principal Act

H. C. OF A. 1946.

GRAIN ELEVATORS BOARD (VICT.) v. DUNMUNKLE CORPORATION.

Williams J.

but the total amount to be raised by either method is limited to £2,000,000.

The Principal Act provides that the Board shall consist of three members and be a body corporate under the name of the Grain Elevators Board and shall have perpetual succession and a common seal and be capable in law of suing and being sued and of purchasing, taking, holding, selling, leasing, taking on lease, exchanging and disposing of real and personal property for the purposes of and subject to the Act. The members of the Board are appointed and may be removed from office by the Governor in Council. They are appointed for a term but may be removed at any time. Section 7 empowers the Board, with the approval of the Governor in Council, to appoint a general manager and in the exercise of its discretion to appoint and remove such other officers and employees as it requires. This section and s. 8 provide that no officer or other employee of the Board shall be subject to the *Public Service Act* 1928 (Vict.), but that the general manager or other officer of the Board who at the date of his appointment is an officer of the Public Service shall, in the event of his office under the Board being discontinued or the Board dissolved, be eligible to be reappointed to the Public Service on the basis that his service under the Board has been service in the Public Service.

Section 10 authorizes the Board, with the approval of the Minister of Agriculture, to acquire existing elevators and appurtenances for handling wheat grown in bulk as well as the land upon which they are situated, to enter into arrangements for the use of existing elevators and appurtenances, to construct new elevators and appurtenances, and operate, maintain and control such elevators and appurtenances. Section 11 requires the Board to carry out a number of surveys and investigations with respect to the construction of new elevators, and the most effective design and method of construction, and to report to the Minister and cause to be prepared schemes for new country and terminal elevators and estimates of costs and, if the Governor in Council approves, to proceed to carry any such scheme into effect. Sections 17 and 18 confer upon the Board powers and duties which it is authorized to exercise in its discretion. Section 17 authorizes the Board to enter upon and use land subject to the payment of compensation. Section 18 authorizes the Board to store in the elevators under its control all grain of the prescribed quality offered for the purpose, and requires it to afford all reasonable proper and equal facilities for the storage of grain and to buy grain where necessary for the purpose of delivering grain to persons who present warrants. Sections 25 and 26 protect the Board and its officers from

actions for conversion and detinue of any grain and from responsibility for loss of or damage to grain due to certain causes. Section 27 authorizes the Board in respect of its services to demand and receive such reasonable charges as are prescribed. Sections 29-32 confer wide contractual powers on the Board, but s. 33 provides that no contract for a consideration in excess of £1,000 or extending over a period exceeding one year shall have effect unless sanctioned by the Governor in Council. Sections 35-40 confer power on the Board, with the consent of the Governor in Council, to borrow upon debentures at interest sums not exceeding £2,000,000 and on overdraft, a sum not exceeding £75,000. Section 37 (9) provides that the repayment of the principal and the payment of interest on the debentures shall be guaranteed by the Government of Victoria. Sections 41 and 42 provide for the audit of the accounts of the Board by the Auditor-General at the expense of the Board and for the Board presenting an annual report to Parliament.

Section 43 provides that the Board shall establish a general fund into which all moneys, including loan moneys, shall be paid, and that the general fund shall be applied by the Board for the doing and performing of all acts, matters and things which the Board is under this or any other Act empowered or required to do. Section 50 confers on the Board a wide power to make by-laws, including prescribing the scales of charges for the handling and storage of grain. Sub-section (2) provides that in determining scales of charges the Board shall fix the charges at such amounts as in its opinion will enable the cost of the operation of its elevators and other works and undertakings and interest on loans and payments into sinking funds and into renewal and depreciation funds and the cost of the administration of the Act to be covered. Sub-sections (3) and (4) provide that every by-law shall be subject to confirmation by the Governor in Council and shall not have any force or effect until so confirmed.

It was contended for the appellant that the effect of the Acts is to make the Board a branch of the Department of Agriculture so that it is performing its functions, powers and duties as part of the Executive Government of Victoria. The decision of this Court in *Repatriation Commission* v. *Kirkland* (1) was strongly relied on, but that case is plainly distinguishable. The Commission was there held to represent the Crown because it was charged with the administration of an Act which was designed to carry out two objects which are peculiarly within the province of the Government. At page 8 it is stated in the joint judgment of *Knox* C.J. and *Starke* J. that :—

(1) (1923) 32 C.L.R. 1.

H. C. OF A. 1946. GRAIN ELEVATORS BOARD (VICT.) v. DUNMUNKLE CORPORATION. Williams J.

"The provisions of the Act taken generally, and especially those contained in ss. 7 (1), 11 (2), 50, 52, 57 (*b*) and 58, establish that the Commission is in the strictest sense a department of government, or at all events so practically identified with it as to be indistinguishable. It is a statutory corporation charged with the administration of an Act designed to carry out two objects which are peculiarly within the province of the Government, namely, the re-establishment in civil life of persons who have served in the defence forces, and the provision of pensions and benefits for persons incapacitated and the dependants of persons killed or incapacitated as a result of active service in those forces."

The Grain Elevators Board is not charged with the administration of a governmental function which a State must necessarily undertake but with an ordinary operation of trade and commerce, that is to say, the handling and storing of wheat in bulk. So long as s. 92 of the Constitution is not infringed, there is no constitutional difficulty to prevent the State of Victoria carrying on such a business. If the duties and powers of the Board were carried out by the Department of Agriculture the business would be done on behalf of His Majesty in right of the State of Victoria. The beneficial interest in the land would then be in the Crown, even if the legal estate was vested in a nominee.

But in my opinion the *Grain Elevators Acts* do not operate to make the Board a branch of the Department of Agriculture. The Minister may give express directions to the Board under s. 11 of the Principal Act to make the report already mentioned, and under s. 45 to report to him upon any matter relating to the handling of grain in bulk. Many important functions of the Board are made subject to the approval of the Governor in Council or of the Minister of Agriculture. But it is not uncommon to subject a statutory body exercising public duties to some degree of control by the executive. All moneys borrowed to enable the Board to acquire the requisite assets are raised as part of the public funds of the State or by the Board upon a State guarantee, so that it would be natural for the executive to control the manner in which these funds are to be applied. But the Board has important powers and duties in the performance of which it is not subject to any executive or ministerial control. Broadly speaking, capital expenditure is subject to the approval of the Minister, but the carrying on of the business of receiving, storing and delivering grain is left entirely under the control of the Board.

The Board exhibits all the outward characteristics of an independent entity: it is a separate corporation; it has extensive contractual powers; it has power to own land; it has power to engage

and dismiss its own servants; it has its own separate funds. To obtain these funds it has power to raise moneys by public subscription and by way of overdraft; and to make charges for services rendered. It has power to sue and be sued, and it is given immunity from legal proceedings in certain respects. If it is, as its counsel alleged, subservient to the Government, the subservience must mainly arise from the power of the executive to remove the members of the Board at any time. But the Board is a legal entity quite separate from that of its members, and the question falls to be determined from a consideration of the extent of the executive control over the corporate body. None of these *indicia* would of themselves necessarily prevent the Board from being a branch of the Department of Agriculture but their cumulative effect is considerable.

There are two minor provisions in the Act inconsistent with such an agency. Section 16 provides that the Governor in Council shall by order determine any difference arising under the Act between the Board and the bodies defined in s. 3 as public corporations. Section 22 (3) provides that an officer of the Department of Agriculture shall arbitrate between an owner of wheat and the Board as to the amount of dockage to be imposed in respect of such owner's wheat. Section 22 (5) (*b*) provides in effect that the Board, if it loses, shall pay the fees of the arbitrator. It is an elementary principle of natural justice that no person shall be a judge in his own cause, and this principle would be completely violated unless the executive in the first and the Department of Agriculture in the second instance should be treated as separate entities from the Board.

Similar problems to that under discussion have arisen before. Each case must be resolved by a consideration of the purpose and effect of the particular Act by which the statutory body is established.

The decision bearing the nearest analogy to the present case would appear to be *Metropolitan Meat Industry Board* v. *Sheedy* (1). The *Grain Elevators Acts* contain similar provisions to those relied upon by the Privy Council as indicating that the Metropolitan Meat Industry Board was not a servant of the Crown. It can also be said here that, although a Minister of the Crown has power to interfere with the Board, "there is nothing in the Statute which makes the acts of administration his as distinguished from theirs."

Counsel for the appellant relied on the provisions of the *Grain Elevators Acts* whereby the Board is directed to make an annual report to Parliament and whereby its charges are restricted to an amount required to meet the outgoings. But similar provisions will

(1) (1927) A.C. 899.

H. C. OF A. 1946. GRAIN ELEVATORS BOARD (VICT.) v. DUNMUNKLE CORPORATION. Williams J.

be found in the Acts discussed in the leading case of *Mersey Docks* v. *Cameron* (1) and in subsequent cases. Counsel also relied on the provision that the repayment of principal and payment of interest on the debentures shall be guaranteed by the Government of Victoria. But this tells against the appellant because, as the Privy Council pointed out in *International Railway Co.* v. *Niagara Parks Commission* (2): "This provision would be meaningless if the Commission" (here the Board) "was not to be under any liability in the first instance."

For these reasons I would dismiss the appeal.

Appeal dismissed with costs.

Solicitor for the appellant, *Bernard Nolan.*

Solicitors for the respondent, *McInerney, Williams & Curtain.*

E. F. H.

(1) (1865) 11 H.L. Cas. 443.

(2) (1941) A.C. 328, at p. 342.